

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2013 MTWCC 6

WCC No. 2011-2852

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SUZANNE O'MAHONEY

Petitioner

vs.

LIBERTY INSURANCE CORP.

Respondent/Insurer.

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FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

**APPEALED TO MONTANA SUPREME COURT – 04/03/13  
APPEAL DISMISSED PURSUANT TO STIPULATION – 06/12/13**

**JUDGMENT VACATED AND WITHDRAWN PURSUANT TO  
STIPULATION OF THE PARTES**

**Summary:** Petitioner alleges she is permanently and totally disabled due to right arm pain from her industrial injury. Respondent argues that Petitioner has had several jobs approved for her by her treating physician, and that her subjective pain complaints are insufficient to support a finding of permanent total disability.

**Held:** While Petitioner is undergoing evaluation and treatment at a pain clinic upon referral of her treating physician, she is not at MMI and her claim for permanent total disability is premature. She is entitled to continuation of temporary total disability benefits while she completes her pain treatment.

**Topics:**

**Witnesses: Credibility.** Petitioner disputes the FCE and her physician, testifying that she cannot even work part-time due to her debilitating pain. The Court found that Petitioner, her boyfriend, and her daughter all testified credibly as to Petitioner's difficulty in managing simple tasks such as grasping objects and driving a car due to her pain, and Petitioner's willingness to undergo surgery that had only a 50-60 percent chance of success was instructive of the degree of pain that she was experiencing,

particularly in light of the FCE therapist's observation that Petitioner had noticeable swelling in her right arm after two days of testing.

**Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: Montana: 39-71-702.** At the time of trial, Petitioner was still undergoing evaluation and treatment at a pain clinic where she was referred by her treating physician and for which the Respondent accepted liability. Despite the treating physician's determination of MMI, he found her pain complaints credible enough for the pain clinic referral, and while Petitioner undergoes evaluation and treatment for her pain, she is not at MMI. Therefore, her claim for permanent total disability benefits pursuant to § 39-71-702, MCA, is premature.

**Maximum Medical Improvement: When Reached.** At the time of trial, Petitioner was still undergoing evaluation and treatment at a pain clinic where she was referred by her treating physician and for which the Respondent accepted liability. Despite the treating physician's determination of MMI, he found her pain complaints credible enough for the pain clinic referral, and while Petitioner undergoes evaluation and treatment for her pain, she is not at MMI. Therefore, her claim for permanent total disability benefits is premature.

¶ 1 Trial in this matter was held May 23, 2012, in the Workers' Compensation Court in Helena, Montana. Petitioner Suzanne O'Mahoney was present and represented by Bernard J. Everett. Respondent Liberty Insurance Corp. (Liberty) was represented by Larry W. Jones.

¶ 2 **Exhibits:** I admitted Exhibits 1 through 10 without objection. During the course of trial, Exhibit 11 was identified and I admitted it without objection.

¶ 3 **Stipulations:** The parties stipulated that O'Mahoney's medical records could be admitted into evidence without objection.

¶ 4 **Witnesses and Depositions:** The parties agreed that O'Mahoney's deposition can be considered part of the record. O'Mahoney, Tom F. Earhart, Shannon Marie Guindon, and Megan Hrabe, CRC, were sworn and testified at trial.

¶ 5 **Issues Presented:** The Court restates the following issues set forth in the Pre-Trial Order:<sup>1</sup>

Issue One: Whether Petitioner is entitled to permanent total disability benefits for her industrial injury.

Issue Two: Whether Petitioner is entitled to her costs.

### **FINDINGS OF FACT**

¶ 6 On October 2, 2008, O'Mahoney injured her right arm in the course and scope of her employment with Bon Ton Stores, Inc. (a/k/a Herbergers) in Butte, Montana.<sup>2</sup>

¶ 7 Liberty accepted liability for the injury and has paid O'Mahoney certain wage-loss and medical benefits.<sup>3</sup>

¶ 8 O'Mahoney's wage rate at the time of her injury was \$15.88 per hour.<sup>4</sup>

¶ 9 Nick DiGiovine, M.D., medically approved the following job analyses submitted by Liberty's vocational consultant: motel desk clerk, Best Western, Butte; host/hostess, Perkins Family Restaurant & Bakery, Butte; parking lot cashier/attendant, Bert Mooney Airport Authority, Butte; para-educator, Hellgate Elementary School, Missoula; and night auditor, Best Western Butte Plaza Inn, Butte.<sup>5</sup>

¶ 10 O'Mahoney applied for and was awarded social security disability benefits, in part, for the injury she sustained in her industrial accident. She is also diabetic, has high blood pressure, and wears a hearing aid.<sup>6</sup>

¶ 11 O'Mahoney testified at trial. I found her to be a credible witness. O'Mahoney testified that, in addition to being a restaurant manager, secretary, daycare business owner, and sales manager for Herbergers, she also worked for about 6 months at a Subway making sandwiches and cleaning the restaurant, and 6 months as a substitute janitor for the Anaconda School District.<sup>7</sup>

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<sup>1</sup> Pre-Trial Order at 3, Docket Item No. 12.

<sup>2</sup> Pre-Trial Order, Uncontested Facts, at 2.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*; Ex. 10.

<sup>6</sup> Trial Test.; O'Mahoney Dep. 8:2-23.

<sup>7</sup> Trial Test.; Ex. 11 at 4.

¶ 12 O'Mahoney explained that on October 2, 2008, she was in the back receiving room at Herbergers, trying to access two pieces of shelving that were stacked vertically among other shelves. The shelving moved, trapping her right arm. She required assistance extricating her arm.<sup>8</sup>

¶ 13 O'Mahoney stated that she immediately felt pain in her arm, but because she believed the pain would resolve, she avoided going to a doctor until the following month.<sup>9</sup> On November 13, 2008, O'Mahoney began treating with Dr. DiGiovine, who diagnosed traumatic right lateral epicondylitis and right ulnar nerve neurapraxia and placed her on limited duty.<sup>10</sup> She continued to treat with Dr. DiGiovine on a conservative basis, with braces and occasional injections.<sup>11</sup>

¶ 14 On June 9, 2009, Dr. DiGiovine recommended an EMG of O'Mahoney's right arm to address her complaints of increasing elbow pain and aching from her shoulder down into her wrist and hand.<sup>12</sup> The EMG was performed on June 23, 2009, and showed decreased conduction velocity in O'Mahoney's right median and right ulnar sensory nerves, with the impression of: "[c]arpal tunnel syndrome and ulnar nerve impairment at Guyon's canal consistent with trauma history."<sup>13</sup>

¶ 15 Following the EMG, Dr. DiGiovine performed carpal tunnel release and ulnar tunnel release surgery on July 13, 2009.<sup>14</sup> Post-operatively, Dr. DiGiovine found that O'Mahoney had limited improvement, and noted that she seemed to be doing well, but that "subjectively she is not expressing that degree of expected improvement."<sup>15</sup>

¶ 16 Thereafter, O'Mahoney continued to treat with Dr. DiGiovine on a conservative basis, the doctor noting in his exam notes of January 6, 2010, that O'Mahoney continued to complain of persistent pain in her wrist/forearm, with "the possibility of a posterior interosseous nerve syndrome."<sup>16</sup>

¶ 17 On February 18, 2010, Dr. DiGiovine injected O'Mahoney's posterior interosseous nerve with cortisone and Polocaine to determine if she was suffering from

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<sup>8</sup> Trial Test.; O'Mahoney Dep. 10:10-23.

<sup>9</sup> Trial Test.

<sup>10</sup> Ex. 1 at 52.

<sup>11</sup> Trial Test.

<sup>12</sup> Ex. 1 at 37, 39.

<sup>13</sup> Ex. 4 at 1.

<sup>14</sup> Ex. 2 at 8.

<sup>15</sup> Ex. 1 at 30.

<sup>16</sup> Ex. 1 at 20.

interosseous nerve syndrome.<sup>17</sup> Based on O'Mahoney's reaction to the injection, on the following office visit Dr. DiGiovine diagnosed the possibility of either radial tunnel or interosseous nerve syndromes. He offered O'Mahoney surgery for decompression of the radial nerve.<sup>18</sup>

¶ 18 In a subsequent consultation on March 31, 2010,<sup>19</sup> Dr. DiGiovine advised O'Mahoney that her insurer had denied the request for operative intervention and was requesting an IME with P. Andrew Puckett, M.D. The consultation with Dr. Puckett occurred on May 19, 2010.<sup>20</sup> Dr. Puckett wrote that he believed Dr. DiGiovine was "right on track" in terms of diagnosis, but advised O'Mahoney to give her symptoms more time to heal, as "time is her most significant ally."<sup>21</sup> Dr. Puckett estimated it would take between 6 and 17 months for O'Mahoney to reach MMI,<sup>22</sup> and that the "chronic nature of crush injuries . . . are one of the hardest things for us to . . . provide adequate treatment for."<sup>23</sup> Dr. Puckett also advised O'Mahoney that radial tunnel decompression should be used only as a "last resort."<sup>24</sup>

¶ 19 O'Mahoney testified that Dr. Puckett gave the rate of success of radial tunnel release surgery at only 50-60 percent, but she wanted to return to work and was willing to try the surgery to relieve her pain.<sup>25</sup>

¶ 20 On August 16, 2010, Dr. DiGiovine performed anterior release surgery of what he believed to be O'Mahoney's radial tunnel syndrome in her right arm.<sup>26</sup> In an office visit on December 22, 2010, Dr. DiGiovine measured her grip strength at 5/5, but noted that O'Mahoney had no significant improvement post-surgery, and was back to her pre-surgery status. Dr. DiGiovine requested a functional capacity evaluation (FCE) to determine O'Mahoney's restrictions.<sup>27</sup>

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<sup>17</sup> Ex. 1 at 18.

<sup>18</sup> Ex. 1 at 16.

<sup>19</sup> Ex. 1 at 14.

<sup>20</sup> Ex. 3 at 1-3.

<sup>21</sup> Ex. 3 at 2.

<sup>22</sup> Ex. 3 at 3.

<sup>23</sup> Ex. 3 at 1.

<sup>24</sup> Ex. 3 at 3.

<sup>25</sup> Trial Test.

<sup>26</sup> Ex. 2 at 1-2.

<sup>27</sup> Ex. 1 at 7.

¶ 21 The FCE was performed February 8<sup>th</sup> and 9<sup>th</sup>, 2011, by therapist Tricia Williams.<sup>28</sup> Williams found that O'Mahoney gave maximal effort during her testing, that she complained of increased symptoms on her second test day with noticeable swelling of her right arm, and that O'Mahoney performed consistently on both days.<sup>29</sup>

¶ 22 The FCE findings included a determination that O'Mahoney could return to work in a "light to medium work category," with repetitive use of her right arm limited to an occasional basis, for 8 hours a day, 5 days a week.<sup>30</sup>

¶ 23 On March 7, 2011, Dr. DiGiovine signed a Work/Activity Status Report which listed O'Mahoney's physical restrictions as follows: in an 8-hour day, she could alternate sitting, standing, and walking up to 8 hours/day; drive up to 4 hours/day; lift, carry and push/pull 0-10 lbs. with her right arm, 11-20 lbs. with her left or both arms; simple grasping and fine manipulation limited to less than 3 percent per day with her right hand, unrestricted for her left hand; occasionally reach to and above shoulder height with her right arm; rarely climb ladders or stairs; and with the general restriction of occasional repetitive use of her right arm.<sup>31</sup>

¶ 24 On March 2, 2011, Dr. DiGiovine determined that O'Mahoney had "complete resolution" of her carpal tunnel and ulnar tunnel syndromes following surgery. He also noted "complete resolution" of the lateral epicondylitis without surgical intervention. Dr. DiGiovine opined that, with no response by O'Mahoney to her radial tunnel decompression surgery, "I feel that she did not probably have radial tunnel syndrome."<sup>32</sup> Dr. DiGiovine's subsequent treatment notes, however, continued to list "right radial neurapraxia and radial tunnel syndrome, unresolved" under O'Mahoney's diagnosis. Dr. DiGiovine determined O'Mahoney was at maximum medical improvement (MMI) and assigned her a 1 percent whole person impairment rating for "nonspecific" elbow pain.<sup>33</sup>

¶ 25 On her last office visit with Dr. DiGiovine on December 29, 2011, the doctor noted that O'Mahoney was continuing to complain of "forearm pain, unknown etiology, unresolved."<sup>34</sup> Dr. DiGiovine determined he could no longer manage O'Mahoney's pain issues and requested that Liberty approve a referral to a pain management doctor or

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<sup>28</sup> Ex. 8 at 1-13.

<sup>29</sup> Ex. 8 at 2.

<sup>30</sup> Ex. 8 at 3.

<sup>31</sup> Ex. 1 at 6.

<sup>32</sup> Ex. 1 at 5.

<sup>33</sup> *Id.*

<sup>34</sup> Ex. 1 at 2-3.

clinic.<sup>35</sup> Liberty accepted liability<sup>36</sup> for the referral, and O'Mahoney began treatment at the Advanced Pain & Spine Institute of Montana, P.C., in Missoula.

¶ 26 The records of the Missoula pain clinic show that O'Mahoney was seen on February 21, 2012, complaining of pain radiating from her biceps to her thumb "in a C6 distribution."<sup>37</sup> The impression of the clinic staff was of right arm pain, cervical radiculopathy, and status post multiple nerve surgeries with residual pain.<sup>38</sup> An MRI of O'Mahoney's cervical spine was ordered because of a "distinct possibility that cervical radiculopathy has been overlooked over the years."<sup>39</sup> An MRI on March 9, 2012, revealed mild to moderate annular bulging from C3-4 to C5-6, mild to moderate foraminal stenosis at C3-4 and C5-6, and multiple level disk desiccation.<sup>40</sup> On March 26, 2012, Steve Kemple, D.O., of the pain clinic requested authorization for a C6-7 ILESI (interlaminar epidural steroid injection) "directed on [the] Right."<sup>41</sup> No evidence was presented whether this was ever authorized or performed.

¶ 27 O'Mahoney testified that she had a follow-up visit with the pain clinic on May 7, 2012. During that visit, a discussion was had regarding her medications and her dissatisfaction with one of them. O'Mahoney stated she was not sure at the time of trial if she would be permitted to continue going to the pain clinic, as Liberty had her scheduled after trial for an independent medical evaluation (IME) with an occupational medicine specialist.<sup>42</sup>

¶ 28 O'Mahoney testified that Dr. DiGiovine did not approve of her return to work to her time-of-injury job as a sales manager at Herbergers.<sup>43</sup> O'Mahoney was laid off from that position at the end of January, 2009, due to a reduction in force.<sup>44</sup> O'Mahoney stated that even though Dr. DiGiovine approved of her return to work in a number of different positions (motel desk clerk, night auditor, restaurant hostess, parking lot cashier/attendant, and para-educator), she never discussed the positions with the doctor, nor did she discuss them with the vocational rehabilitation counselor Liberty

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<sup>35</sup> Ex. 1 at 1-3.

<sup>36</sup> Ex. 7 at 1.

<sup>37</sup> Ex. 7 at 6.

<sup>38</sup> Ex. 7 at 7.

<sup>39</sup> Ex. 7 at 8.

<sup>40</sup> Ex. 7 at 3.

<sup>41</sup> Ex. 7 at 2.

<sup>42</sup> Trial Test.

<sup>43</sup> Trial Test.; Ex. 10 at 1-9.

<sup>44</sup> O'Mahoney Dep. 12:6-16; 14:5-8.

assigned to her case, Megan Hrabe.<sup>45</sup> O'Mahoney disagreed with Dr. DiGiovine's opinion that the positions were compatible with her physical limitations, and she explained how each of the positions were too demanding and would cause her pain on use of her right arm and hand.<sup>46</sup>

¶ 29 Regarding the motel desk clerk position, O'Mahoney stated that the requirement of reaching and the use of a computer keyboard were beyond the ability of her right arm/hand on a sustained basis, even for a part-time position of 20 hours a week. Operating a copy machine, credit card machine, a calculator, even cleaning the desk area would all cause her pain.<sup>47</sup> O'Mahoney did testify to limited use of her home computer keyboard.

¶ 30 O'Mahoney testified that she was familiar with the position of hostess, since she had previously worked in restaurants. She stated that many of the requirements of the position – busing tables, moving tables, wiping tables, moving high chairs, stocking pastry shelves – would cause her pain and concern for dropping dishes.<sup>48</sup>

¶ 31 In terms of the night auditor position, O'Mahoney testified she believed the physical requirements of that position were very similar to that of the motel desk clerk. The activities of the job would cause her pain and, if she were busy, she believed she might be able to tolerate the work for up to an hour before she would need to rest her arm.<sup>49</sup>

¶ 32 According to O'Mahoney, the parking lot cashier/attendant position at the Butte airport was also beyond her physical abilities, particularly the constant reaching. The position also required snow removal and spreading sand in the winter time, activities which, O'Mahoney testified, were beyond her lifting ability.<sup>50</sup>

¶ 33 The final position was that of a para-educator for elementary school children. O'Mahoney testified that the position required climbing on ladders, something she believed Dr. DiGiovine prohibited her from doing.<sup>51</sup> The position also required a lot of

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<sup>45</sup> Trial Test.

<sup>46</sup> Trial Test.

<sup>47</sup> Trial Test.

<sup>48</sup> Trial Test.

<sup>49</sup> Trial Test.

<sup>50</sup> Trial Test.

<sup>51</sup> Trial Test.; Ex. 1 at 6.



lifting, grading of tests, and cleaning classrooms, all activities, O'Mahoney testified, that would cause her pain and therefore not something she believed she could do.<sup>52</sup>

¶ 34 O'Mahoney stated she could not imagine a position that she would be able to tolerate, even on a part-time basis.<sup>53</sup> She never sought to return to work in any capacity after she was laid off from her position at Herbergers, believing that her pain prohibited her from gainful employment.<sup>54</sup>

¶ 35 Tom F. Earhart testified at trial. I found Earhart to be a credible witness. Earhart is O'Mahoney's boyfriend and has resided with her for four years. He testified that he has observed O'Mahoney having difficulty with certain household chores. She can empty the dishwasher, but needs help placing dishes on higher shelves. She can vacuum, but sits down to rest after completing a room. She does not lift bags of groceries with her right hand. Earhart testified to two instances when O'Mahoney dropped a milk jug while trying to remove it from the refrigerator with her right hand. Earhart also testified that O'Mahoney does not sleep as well anymore because of her arm pain.<sup>55</sup>

¶ 36 Shannon Marie Guindon testified at trial. I found Guindon to be a credible witness. Guindon testified that she is the 24-year-old daughter of O'Mahoney who sees her mother almost every day. She assists her mother with grocery shopping. She has observed her mother having difficulty with cleaning floors, using a towel and moving it around with her feet rather than use a mop. Guindon testified to observing her mother have difficulty driving, using a keyboard, and playing with Guindon's 3½-year-old son.<sup>56</sup>

¶ 37 Megan Hrabe, CRC, testified at trial. I found Hrabe to be a credible witness. Hrabe testified that she has a master's degree in rehabilitation counseling and is a certified rehabilitation counselor. She had never met O'Mahoney prior to the day of trial. She conducted a phone interview with O'Mahoney while O'Mahoney was in California.

¶ 38 Hrabe stated that Liberty assigned her to work with O'Mahoney to develop a time-of-injury job analysis, alternative job analyses, and an employability assessment.<sup>57</sup> Hrabe stated she performed a transferable skills analysis in developing the alternative job descriptions for O'Mahoney, based on O'Mahoney's employment history, and did a

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<sup>52</sup> Trial Test.

<sup>53</sup> Trial Test.

<sup>54</sup> Trial Test.; O'Mahoney Dep. 15:13 - 16:21.

<sup>55</sup> Trial Test.

<sup>56</sup> Trial Test.

<sup>57</sup> Trial Test.; Ex.'s 10 and 11.

labor market analysis for those positions by contacting employers directly to determine job openings in each of the alternative positions. She had Dr. DiGiovine review the job descriptions and he signed off on those positions he medically approved for O'Mahoney. Dr. DiGiovine did not approve O'Mahoney to return to her time-of-injury position.<sup>58</sup>

### CONCLUSIONS OF LAW

¶ 39 This case is governed by the 2007 version of the WCA since that was the law in effect at the time of O'Mahoney's industrial accident.<sup>59</sup>

#### **ISSUE ONE: Whether Petitioner is entitled to permanent total disability benefits for her industrial injury.**

¶ 40 The injured worker bears the burden of proving by a preponderance of the evidence that she is entitled to the benefits she seeks.<sup>60</sup> However, under § 39-71-609(2), MCA, the insurer bears the initial burden to produce evidence showing that the injured worker is not permanently and totally disabled.<sup>61</sup>

¶ 41 "Permanent total disability" is defined by § 39-71-116(25), MCA, as:

[A] physical condition resulting from injury as defined in this chapter, after a worker reaches **maximum medical healing**, in which a worker does not have a reasonable prospect of physically performing regular employment. Regular employment means work on a recurring basis performed for remuneration in a trade, business, profession, or other occupation in this state. Lack of immediate job openings is not a factor to be considered in determining if a worker is permanently totally disabled. [Emphasis added.]

¶ 42 Maximum medical healing is defined in § 39-71-116(18), MCA:

"Medical stability", "maximum healing", or "maximum medical healing" means a point in the healing process when further material improvement would not be reasonably expected from primary medical treatment.

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<sup>58</sup> Trial Test.

<sup>59</sup> *Ford v. Sentry Cas. Co.*, 2012 MT 156, ¶ 32, 365 Mont. 405, 282 P.3d 687; § 1-2-201, MCA.

<sup>60</sup> *Ricks v. Teslow Consol.*, 162 Mont. 469, 512 P.2d 1304 (1973); *Dumont v. Wickens Bros. Constr. Co.*, 183 Mont. 190, 598 P.2d 1099 (1979).

<sup>61</sup> See, e.g., *Drivdahl v. Zurich Am. Ins. Co.*, 2012 MTWCC 43, ¶ 24.

¶ 43 Neither party disputes that Dr. DiGiovine, O'Mahoney's treating physician, found her to be at MMI and determined she could return to work. Dr. DiGiovine approved several positions that he believed O'Mahoney was physically capable of performing - positions which vocational rehabilitation counselor Hrabe developed based on O'Mahoney's transferable skills. Moreover, the FCE showed that O'Mahoney was capable of light to medium-duty work for up to 8 hours a day, 5 days a week.

¶ 44 O'Mahoney disputes both the FCE and her doctor's opinion, testifying she cannot even work part-time due to her debilitating pain. I found that O'Mahoney, Guindon, and Earhart all testified credibly as to O'Mahoney's difficulty in managing simple tasks such as grasping objects and driving a car due to her pain.

¶ 45 I find O'Mahoney's willingness to undergo surgery that apparently had only a 50-60 percent chance of success instructive of the degree of pain that she is experiencing. Her effort given on her FCE is also quite instructive, particularly in light of therapist Williams' observation that O'Mahoney had noticeable swelling in her right arm after two days of testing.<sup>62</sup>

¶ 46 This case was brought to trial while O'Mahoney was still being treated for her right arm pain at the Missoula pain clinic upon the referral of Dr. DiGiovine. It remains unknown whether such treatment will abate O'Mahoney's pain to the point where she may return to regular employment.

¶ 47 The possibility of cervical radiculopathy with a C-6 distribution was also being investigated by the pain clinic, with positive findings revealed in a cervical MRI. Authority was sought for an epidural steroid injection at the C6-C7 level by the clinic's Steve C. Kemple, D.O., but no evidence was presented whether this was approved or performed. It is likewise unknown whether cervical radiculopathy is a cause of – or a contributing factor to – O'Mahoney's right arm pain.

¶ 48 These unresolved questions lead me to conclude that while O'Mahoney is being evaluated and treated at the pain clinic upon referral of her treating physician, there remains a reasonable expectation of material improvement in her condition. Therefore, she is **not** at MMI.

¶ 49 This case is analogous to *Rockett v. Travelers Ins. Co.*,<sup>63</sup> where the claimant testified credibly to her neck and arm pain and headaches. Her pain resulted from a neck injury with C-7 radiculopathy. Rockett attempted to return to work but was limited

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<sup>62</sup> Ex. 8 at 2, **Limitations**: “. . . She demonstrated some increased swelling in right forearm after two days of repetitive tasks . . . .”

<sup>63</sup> 2003 MTWCC 21.

by her pain. She had trouble doing housework, similar to O'Mahoney, with limitations on pushing and pulling, lifting and carrying. Her physician placed her at MMI and released her to part-time work, yet testified that Rockett might materially benefit by a referral to a pain specialist. Rather than find Rockett permanently and totally disabled, this Court held:

Claimant has a good work history and work ethic. I am convinced that if she can control her headaches, neck, and arm pain she will want to return to work.

I therefore find that claimant will benefit from further evaluation and may benefit from further treatment, thus I find that she is not presently at MMI. In light of this finding, any determination of permanent disability is premature.<sup>64</sup>

¶ 50 Similarly, I find O'Mahoney to have a good work ethic and that her complaints of pain are credible. She may indeed benefit from her evaluation and treatment at the Missoula pain clinic which, at the time of trial, was on-going. As the Court held in *Thompson v. Liberty Northwest Ins. Corp.*,<sup>65</sup> a determination of MMI requires an accurate evaluation and diagnosis of the conditions caused by the industrial accident, followed by appropriate treatment. "Lacking evaluation and diagnosis, and at least an opportunity to pursue further treatment, how can it be said that 'further material improvement would not be reasonably expected . . .?'"<sup>66</sup>

¶ 51 O'Mahoney's pain complaints were found credible enough by her treating physician to refer her to the pain clinic. Liberty accepted liability for the referral and was paying for her pain treatments at the time of trial. While O'Mahoney undergoes evaluation and treatment for her pain, O'Mahoney is not at maximum healing for her work-related injury and her claim for permanent total disability is premature.

¶ 52 O'Mahoney is presently temporarily totally disabled. Temporary total disability is defined in § 39-71-116(35), MCA, as "a physical condition resulting from an injury, as defined in this chapter, that results in total loss of wages and exists until the injured worker reaches maximum medical healing." O'Mahoney has not been approved to return to work either to her time-of-injury job or to one with similar physical

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<sup>64</sup> *Id.*, ¶¶ 27, 28.

<sup>65</sup> 2002 MTWCC 34.

<sup>66</sup> *Id.*, ¶ 48.

requirements.<sup>67</sup> She is not at MMI and therefore is entitled to continuation of temporary total disability benefits until she is no longer eligible for those benefits under the WCA.

**ISSUE TWO: Whether Petitioner is entitled to costs.**

¶ 53 Because O'Mahoney has not prevailed on the issue of whether she is entitled to permanent total disability benefits, she is not entitled to her costs.

JUDGMENT

¶ 54 Petitioner is not presently entitled to permanent total disability benefits. She is entitled to continuation of her temporary total disability benefits until such time as she completes the pain treatment recommended by her physician and is no longer temporarily totally disabled.

¶ 55 Petitioner is not entitled to her costs.

¶ 56 Pursuant to ARM 24.5.348(2), this Judgment is certified as final and, for purposes of appeal, shall be considered as a notice of entry of judgment.

DATED in Helena, Montana, this 8<sup>th</sup> day of March, 2013.

(SEAL)

/s/ JAMES JEREMIAH SHEA  
JUDGE

c: Bernard J. Everett  
Larry W. Jones (courtesy copy)  
Jaimie Kern c/o Liberty Ins. Corp.  
Submitted: May 23, 2012

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<sup>67</sup> § 39-71-701(1), MCA.