

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2008 MTWCC 26

WCC No. 2006-1633

SHARON L. RAU

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

*Appealed to the Montana Supreme Court July 25, 2008;
Remanded to WCC for Consideration of Entry of Judgment from Settlement
October 15, 2008*

Summary: Petitioner fainted while waiting on a customer. Her head struck the floor, which caused severe injuries. Respondent denied liability, arguing that her faint was not caused by her work or work environment.

Held: Since the medical evidence demonstrated that the reason for Petitioner's faint was more probably than not her changing position from standing to sitting as required by her job duties, Petitioner's job duties, however seemingly benign, caused the faint which in turn caused her head injury. Therefore, Petitioner's injury occurred within the course and scope of her employment and is compensable.

Topics:

Evidence: Relevance. Where a "medical peer review" was offered into evidence without any information as to the qualifications of the author, whether the author examined the claimant, and what, if any records the author reviewed in reaching his conclusions, the exhibit provides no meaningful way for the Court to assess how much weight, if any, should be given to the author's opinion. The proposed exhibit is therefore irrelevant and not admitted into evidence.

Evidence: Admissibility. Petitioner objected to the admission of a letter to Respondent's counsel written by a medical expert witness on the grounds that the expert offered legal conclusions or opinions which he is not competent to give, and further argued that some of the terms were undefined and therefore vague, confusing, and misleading. Petitioner's counsel extensively cross-examined the expert on these issues. Therefore, Petitioner's objections go more to the weight, rather than the admissibility, of the opinions expressed in the letter.

Evidence: Relevance. During a deposition of a medical expert, Petitioner posed a series of questions in which the expert was asked to consider a set of hypothetical facts and then opine whether the injury described was work-related. The line of questions essentially asked the expert to "play judge" and decide whether each hypothetical situation, which were loosely based on previous cases, would be adjudged compensable. The hypothetical situations bear no relationship to the case at hand. The entire line of questions is irrelevant.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-119. Where Petitioner fell and sustained a severe head injury upon impact, she suffered an unexpected traumatic event which is an "accident" as defined in § 39-71-119, MCA.

Injury and Accident: Generally. Where Petitioner fell and sustained a severe head injury upon impact, she suffered an unexpected traumatic event which is an "accident" as defined in § 39-71-119, MCA.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-407. Petitioner experienced an orthostatic faint, which can occur some seconds after an individual has changed from a supine or sitting to standing position. Petitioner's job duties included leaving her desk to assist customers. Petitioner's performance of these duties precipitated the syncopal episode which in turn caused her head injury. The actions which caused her injury were within the course and scope of her employment and her injury is therefore compensable.

Employment: Course and Scope: Generally. Petitioner experienced an orthostatic faint, which can occur some seconds after an individual has changed from a supine or sitting to standing position. Petitioner's job duties included leaving her desk to assist customers. Petitioner's performance of these duties precipitated the syncopal episode which in turn caused her head

injury. The actions which caused her injury were within the course and scope of her employment and her injury is therefore compensable.

Benefits: Permanent Total Disability Benefits: Generally. To be eligible for PTD benefits, a claimant must reach MMI and have no reasonable prospect of physically performing regular employment. Where Petitioner has presented no evidence that she is at MMI, she is not eligible for PTD benefits until such healing has been reached and if, at that time, she also has no reasonable prospect of physically performing regular employment.

¶ 1 The trial in this matter was held on January 30, 2007, in Billings, Montana. Petitioner Sharon L. Rau was present and represented by Thomas J. Lynaugh and Michael G. Eiselein. Respondent Montana State Fund was represented by Michael P. Heringer.

¶ 2 Exhibits: Exhibits 1 through 12, 14 through 25, and 28 were admitted without objection. Exhibit 27 was withdrawn prior to trial. Petitioner's objections to Exhibit 13 were taken under consideration by this Court and, as set forth below Exhibit 13 is excluded on relevancy grounds. Petitioner's objections to Exhibit 26 were taken under consideration by this Court and, as set forth below, Exhibit 26 is admitted.

¶ 3 Witnesses and Depositions: The depositions of Petitioner and Dr. David G. Benditt were taken and submitted to the Court. During Dr. Benditt's deposition, the parties made objections which they asked the Court to rule upon. At trial, I ordered the parties' counsel to confer with each other and determine specifically which parts of Dr. Benditt's testimony each found objectionable and then e-mail the Court with a list of the specific portions of the deposition which are in contention. The Court's rulings on the deposition objections are set forth below. Petitioner was sworn and testified at trial.

¶ 4 Issues Presented: The Pretrial Order states the following contested issues of law:

¶ 4a Whether Petitioner's injury arose out of and in the course and scope of her employment and is compensable;

¶ 4b Whether Petitioner is entitled to biweekly temporary total disability or permanent total disability benefits; and

¶ 4c Whether Petitioner is entitled to have her medical and related expenses paid.¹

¹ Pretrial Order at 3.

FINDINGS OF FACT

¶ 5 Petitioner began working part-time for the Sidney Chamber of Commerce as Executive Vice President in 1991. Her job became a full-time position in 1995. Petitioner held the position for approximately 14 years.²

¶ 6 Petitioner's duties included recruiting members, attending committee meetings and taking minutes, organizing and attending events, and writing a newsletter. The position was salaried and the hours were officially 8 a.m. to 5 p.m., but some duties required extra hours and some events occurred on weekends.³

¶ 7 Petitioner had an administrative assistant, Alysha Bender, who helped her at the Chamber of Commerce. When Bender took her lunch break, Petitioner would fulfill Bender's receptionist duties and wait on anyone who came to the Chamber of Commerce. Petitioner also kept up with the financial records and wrote checks when Bender was on leave.⁴

¶ 8 On October 8, 2004, Petitioner was seated at the reception desk in the downstairs portion of the Chamber of Commerce because Bender was out of the office. A customer entered and requested information. Petitioner stood up from behind the reception desk and walked to a nearby brochure rack and selected a brochure which contained the information the customer sought. Petitioner walked over to and stood in front of the counter where the customer waited and opened the brochure.⁵ It took Petitioner about a minute from the time she stood up from behind the receptionist's desk until she stood at the counter with the brochure. Petitioner testified that she recalls feeling faint as she opened the brochure, but she does not clearly remember what happened after that point.⁶

¶ 9 Petitioner recalls waking up on the floor and seeing emergency medical personnel arrive.⁷ Petitioner testified that her next clear memory is from about three weeks later when she became aware that she was in a hospital.⁸

² Trial Test.

³ Trial Test.

⁴ Trial Test.

⁵ Trial Test.

⁶ Trial Test.

⁷ Petitioner Dep. 33:16-19.

⁸ Trial Test.

¶ 10 Petitioner has a history of fainting episodes. Petitioner testified that she first recalls fainting about 30 years ago while visiting relatives and she was taken to a hospital.⁹ Next, in approximately 1997 while attending a training session in Boulder, Colorado, she felt nauseous at breakfast and she asked someone to take her to the emergency room because she knew she was going to faint. Petitioner thinks she fainted in the emergency room, but she is not positive.¹⁰

¶ 11 On a subsequent occasion, Petitioner fainted while she was sweeping the sidewalk and recovered almost immediately. She did not seek medical attention for that incident.¹¹ Petitioner further recalled that she fainted once while she was home alone. She found herself laying on the floor of her husband's office. She did not seek medical treatment.¹²

¶ 12 On another occasion, Petitioner was speaking to someone on the telephone from her desk at the Chamber of Commerce. She dropped the phone and her head hit the desk. The secretary came in to check on her.¹³ The secretary drove her to the emergency room, where she was examined and released.¹⁴ After Petitioner left the emergency room, she went to her husband's place of employment to inform him about the incident. She drove to his job site and put her car in park. She was telling him about the incident when she fainted and "slumped on the steering wheel." Petitioner testified that neither she nor her husband could recall if she sought additional medical treatment after that.¹⁵ Petitioner's recollection of these episodes is generally consistent with her available medical records.

¶ 13 Regarding the present incident, after Petitioner was admitted to the Sydney Health Center on October 8, 2004, she became increasingly lethargic and confused. A CT scan revealed that intracranial bleeding had increased since her fall. On October 11, 2004, Petitioner was flown to Deaconess Billings Clinic to be evaluated for intracranial hemorrhage.¹⁶

⁹ Petitioner Dep. 45:17-22.

¹⁰ Petitioner Dep. 44:22 - 45:15.

¹¹ Petitioner Dep. 42:1-6.

¹² Petitioner Dep. 44:13-16.

¹³ Petitioner Dep. 42:10-16.

¹⁴ Petitioner Dep. 42:23 - 43:1.

¹⁵ Petitioner Dep. 43:10-19.

¹⁶ Ex. 15 at 1-3.

¶ 14 At Deaconess Billings Clinic, Eugen J. Dolan, M.D., surgically removed part of a subdural hematoma from Petitioner's head.¹⁷ On October 12, 2004, Petitioner had another surgical procedure performed by Michael Morone, M.D., Ph.D., to remove a large epidural hematoma.¹⁸ On October 13, 2004, Petitioner's condition again deteriorated and her surgical incision was reopened by Dr. Dolan, who removed a bone flap which was sent to the Bone Bank, and also removed a large left frontal subdural hematoma.¹⁹ Petitioner experienced further complications and underwent additional surgical procedures and other treatment.²⁰

¶ 15 Jeffrey M. Cory, Ph.D., a licensed clinical psychologist and clinical neuropsychologist examined Petitioner on November 28-29, 2005, and prepared an evaluation report on December 19, 2005. Dr. Cory opined that to a reasonable degree of neuropsychological certainty, the majority of Petitioner's neurocognitive impairments are the result or sequelae of her October 8, 2004, fall.²¹ Dr. Cory further concluded that Petitioner was not at maximum medical improvement (MMI).²² He further concluded that Petitioner's condition at the time of the examination was such that she would not be able to return to her time-of-injury job at that point.²³

¶ 16 Dr. Benditt is a cardiologist and cardiac electrophysiologist who investigates cardiac rhythm disturbances and associated symptoms, including fainting.²⁴ He is a professor of medicine in the cardiovascular division at the University of Minnesota. He is co-director of the Cardiac Arrhythmia Center, which evaluates and treats patients with heart rhythm disorders and associated symptoms.²⁵ He is board-certified in cardiology.²⁶ He also has

¹⁷ Ex. 15 at 6-7.

¹⁸ Ex. 15 at 15-16.

¹⁹ Ex. 15 at 25.

²⁰ See, e.g., Ex. 15 at 44, 75, 80-82, and 89.

²¹ Ex. 24 at 18.

²² Ex. 24 at 19.

²³ Ex. 24 at 20.

²⁴ Benditt Dep. 4:15-18.

²⁵ Benditt Dep. 5:3-14.

²⁶ Benditt Dep. 6:8-11.

a specialty certification in pacing and electrophysiology.²⁷ He has been on a variety of editorial boards for the American Journal of Cardiology and has been editor or co-editor of several books concerning heart rhythm disturbances, most of which discuss syncope.²⁸ Dr. Benditt explained that the vast majority of his published writings including books, peer-reviewed publications, and abstracts, are related to cardiology. Most of them more specifically deal with heart rhythm disturbances and a “substantial subset” are related to syncope and its evaluation.²⁹

¶ 17 Counsel for Respondent asked Dr. Benditt to review Petitioner’s medical records and determine what caused Petitioner’s fall and whether it was related to her work or work environment.³⁰ Dr. Benditt provided Respondent’s counsel with a written report of findings.³¹

¶ 18 Based on his review of Petitioner’s medical records and Petitioner’s deposition testimony, Dr. Benditt opined that she had suffered a syncopal episode.³² Dr. Benditt noted that a syncopal episode is not an injury in and of itself.³³ Dr. Benditt explained:

Syncope is a symptom. Basically, it’s technically a loss of consciousness which is transient, but which is due specifically to a drop in the blood flow to the brain. This most often results as a consequence of a drop in one’s blood pressure. It’s a temporary drop in blood pressure. It can be triggered by any number of things. The drop in blood pressure then creates a situation in which the brain is not getting enough blood flow and as a consequence doesn’t function. The patient usually will fall down or slump over, depending on where they were at the moment that the event happened. And gravity, fortunately, will then recompensate for the drop in pressure and they will awaken. The events, then, are self-limited due to a drop in blood pressure which results in a drop in perfusion to the brain.³⁴

²⁷ Benditt Dep. 7:13-16.

²⁸ Benditt Dep. 8:6-22.

²⁹ Benditt Dep. 9:3-12.

³⁰ Benditt Dep. 15:14-25.

³¹ Benditt Dep. 16:8-11.

³² Benditt Dep. 31:15-23.

³³ Benditt Dep. 103:22-25.

³⁴ Benditt Dep. 25:17 - 26:10.

¶ 19 Dr. Benditt further explained that the causes of syncope can be divided into four broad categories: vasovagal, orthostatic, cardiac arrhythmia, and organic diseases of the heart or vascular system.³⁵ Dr. Benditt opined that on October 8, 2004, Petitioner likely experienced an orthostatic faint with possibly some vasovagal contribution.³⁶ When asked to elaborate as to the vasovagal contribution, however, Dr. Benditt acknowledged that the vasovagal component of the incident was “a more distance [sic] inference” and that to a reasonable degree of medical certainty, “there was a strong orthostatic component.”³⁷ Orthostatic faints are caused by a change in posture and usually occur 30 or 40 seconds after an individual has gone from laying down or sitting to standing.³⁸ It is not always easy or possible to distinguish whether a faint was an orthostatic or vasovagal faint.³⁹ However, the circumstances surrounding Petitioner’s October 8, 2004, syncopal episode including standing from a sitting position within a minute of the syncope, caused Dr. Benditt to conclude the syncope was orthostatic.⁴⁰ Dr. Benditt elaborated that the history of the incident was “classic for a postural [orthostatic] faint.”⁴¹

¶ 20 Petitioner has not worked since October 8, 2004. She does not believe she can perform her former job duties at the Chamber of Commerce because she has limited writing skills, short-term memory loss, and mobility problems. She believes she could not hold any job because she has difficulty performing tasks.⁴²

¶ 21 As of the time of trial, Petitioner had not had any fainting episodes since October 8, 2004.⁴³ Prior to October 8, 2004, no one had ever informed her of a diagnosis of syncope.⁴⁴ Petitioner testified that she understands “syncope” to mean “fainting.”⁴⁵

³⁵ Benditt Dep. 27:7 - 29:20.

³⁶ Benditt Dep 33:1-3.

³⁷ Benditt Dep. 102:9-23.

³⁸ Benditt Dep. 33:6-24.

³⁹ Benditt Dep. 37:19 - 38:1.

⁴⁰ Benditt Dep: 33:25 - 34:6.

⁴¹ Benditt Dep. 55:25 - 56:1.

⁴² Trial Test.

⁴³ Trial Test.

⁴⁴ Petitioner Dep. 40:23-25.

⁴⁵ Petitioner Dep. 41:1-8.

EVIDENTIARY ISSUES

Exhibit 13

¶ 22 Exhibit 13 consists of a “Medical Peer Review” by Ken V. Carpenter, M.D., in which Dr. Carpenter offers his opinion as to whether Petitioner’s syncope and fall were work-related. Petitioner objected to Exhibit 13 on the grounds that it is irrelevant and expresses a legal opinion. Respondent argues that Petitioner’s objection is untimely as this Court’s scheduling order required that all objections to exhibits consisting of medical records be submitted to the opposing party in writing no later than December 25, 2006, pursuant to ARM 24.5.317(3). Petitioner responds that this rule does not apply to Exhibit 13 because it is not a “medical record.” In her objection to this exhibit, Petitioner asserts that Dr. Carpenter is an orthopedist and unqualified to render an opinion on syncope, which is not an orthopedic condition. Respondent has not provided Dr. Carpenter’s qualifications, whether Dr. Carpenter examined Petitioner, and what records, if any, Dr. Carpenter reviewed in reaching his conclusions. This exhibit provides the Court no meaningful way to assess how much weight, if any, should be given to Dr. Carpenter’s opinion. Therefore, I conclude that Exhibit 13 has no relevancy and it is not admitted into evidence.

Exhibit 26

¶ 23 Exhibit 26 consists of a letter to Respondent’s counsel from David G. Benditt, M.D., FACC, FRCPC, FHRS, in which Dr. Benditt discusses his medical opinion regarding Petitioner’s syncope and fall. Prior to trial, the parties briefed this evidentiary issue.

¶ 24 Petitioner objected to Exhibit 26 on the grounds that in the report, Dr. Benditt allegedly offered legal conclusions or opinions which he is not competent to give. Petitioner further objected on relevancy grounds, arguing that Dr. Benditt employed terms in the report which are not part of the statutory language which determines the compensability of a claim. Petitioner further argues that some of these terms are undefined and therefore vague, confusing, and misleading.⁴⁶

¶ 25 Dr. Benditt considered Petitioner’s account of her fall on October 8, 2004, as well as Petitioner’s medical records and formed opinions regarding what factors contributed to Petitioner’s loss of consciousness and whether anything in Petitioner’s job duties or work environment may have caused her loss of consciousness and/or to fall.⁴⁷ Dr. Benditt opined that Petitioner had experienced a syncope or faint: “a specific form of transient loss

⁴⁶ Benditt Dep. 19:23 - 21:5.

⁴⁷ Ex. 26 at 1.

of consciousness caused by temporary self-correcting insufficiency of blood flow to the brain.”⁴⁸ Dr. Benditt further opined that Petitioner’s syncope was likely an “orthostatic” or “postural” faint, which is triggered by standing from a seated or supine position and is usually accompanied by a light-headed feeling. Dr. Benditt explained that an orthostatic or postural faint does not occur immediately upon standing, but “some moments *AFTER*.”⁴⁹ However, Dr. Benditt further noted that Petitioner’s past medical history suggested that her syncope has a vasovagal component. Regardless, he opined that none of these causes would be triggered or aggravated by her work conditions or the nature of her work, and that her syncope was not related to or caused by her work activities.⁵⁰ Dr. Benditt pointed out that Petitioner’s past fainting episodes had occurred in a variety of situations and that a single recurrence at her place of employment did not indicate that anything in her work environment aggravated or triggered this condition. He further noted that nothing unusual had occurred at Petitioner’s employment that day which could be considered a triggering or aggravating event.⁵¹

¶ 26 Petitioner’s counsel had the opportunity to cross-examine Dr. Benditt on his report during Dr. Benditt’s deposition. With respect to Petitioner’s specific objections that Dr. Benditt’s report contained legal conclusions or opinions which Dr. Benditt was not competent to render, that the report employed terms which are not part of the statutory language which determines the compensability of a claim, and that some of these terms are undefined and therefore vague, confusing, and misleading, Petitioner cross-examined Dr. Benditt extensively on these issues. I, therefore, find that Petitioner’s objections go more to the weight, rather than the admissibility, of the opinions expressed in Dr. Benditt’s report. Petitioner’s objections are therefore overruled and Exhibit 26 is admitted.

Dr. Benditt’s Deposition Testimony

¶ 27 During the course of Dr. Benditt’s deposition, Respondent lodged several objections. Additionally, Respondent objected at trial to specific testimony of Dr. Benditt which is found at pages 84 and 85 of his deposition, and in which Dr. Benditt expresses his opinion about the expected testimony of Brian Olshansky, M.D. Respondent asserts that it anticipated that Dr. Olshansky’s deposition would be taken the following week. However, that deposition never occurred. Therefore, Respondent argues that Dr. Benditt’s opinion

⁴⁸ Ex. 26 at 4.

⁴⁹ Ex. 26 at 4. (Emphasis in original.)

⁵⁰ Ex. 26 at 4-5.

⁵¹ Ex. 26 at 5.

regarding Dr. Olshansky's findings lacks foundation and is not supported by evidence in the record.⁵²

¶ 28 On March 14, 2007, I informed the parties that I would deny in part Respondent's motion to strike. I noted that Respondent's contemporaneous objections had been preserved and would be considered in my ruling in this matter. However, I denied Respondent's motion to strike Dr. Benditt's testimony regarding Dr. Olshansky's opinions found on page 84 of Dr. Benditt's deposition. I further ruled that I would grant leave for Respondent to take a post-trial deposition of Dr. Olshansky to mitigate any prejudice Respondent believes may have occurred.⁵³ Respondent declined to conduct a post-trial deposition of Dr. Olshansky.⁵⁴

¶ 29 Regarding the specific objections made by Respondent contemporaneously with Dr. Benditt's deposition, at the time of trial, I ordered the parties to confer and to determine specifically which parts of Dr. Benditt's testimony each party finds objectionable, and to then e-mail the Court with a list of the specific portions of the deposition which are in contention at which time I would take action to resolve the issue, and possibly request point briefs.⁵⁵ Rather than doing so, both parties referred the Court to briefs already filed and filed additional briefs and arguments⁵⁶ thus defeating the purpose of the Court's request. While each party takes the opportunity to argue about evidentiary issues or respond to the other party's evidentiary issues, what neither party did was to present the Court with a list of the specific portions of the deposition in contention.

¶ 30 The first objection which I found on the record is Petitioner's objection to the admission of Dr. Benditt's report into evidence.⁵⁷ Since that evidentiary issue has already been dealt with above, I will not reiterate it here.

⁵² Respondent's Motion and Brief in Support of Motion to Strike, Docket Item No. 23.

⁵³ E-mail from Judge Shea to counsel of record, Docket Item No. 31.

⁵⁴ E-mail from Michael Heringer to Judge Shea and Judge Shea's responsive e-mail, Docket Item No. 32.

⁵⁵ Minute Book Hearing No. 3803, Docket Item No. 22.

⁵⁶ Respondent's Motion and Brief in Support of Motion to Strike, Docket Item No. 23; Respondent's Response to Court's Minute Entry of January 31, 2007, Docket Item No. 24; Petitioner's Response to Respondent's Motion to Strike Dr. Benditt's Deposition Admission that 39-71-119(5) Does Not Provide a Defense in this Case, Docket Item No. 25; Petitioner's Response to Court's Minute Entry of January 31, 2007, Docket Item No. 26; Reply to Petitioner's Response to Court's Minute Entry of January 31, 2007, Docket Item No. 28; and Reply to Petitioner's Response to Respondent's Motion to Strike, Docket Item No. 29.

⁵⁷ Benditt Dep. 19:20 - 21:5.

¶ 31 Aside from objections regarding the form of questions, the next objections are multiple objections raised by Petitioner to a question by Respondent's counsel which Respondent's counsel then rephrased as:

Doctor, based on your review of the documents that I provided to you, based on your experience and the education and all that you've done in this field, do you have an opinion as to whether the syncopal episode suffered by [Petitioner] on October 8, 2004, was caused by her work activities?⁵⁸

¶ 32 Petitioner objected that the question calls for a legal conclusion, that the "term" is vague and therefore confusing, and that the question is misleading, ambiguous, and lacks foundation.⁵⁹ After Dr. Benditt answered the question, Petitioner objected and moved to strike, arguing that Dr. Benditt did not answer the question that was asked but rather discussed whether Petitioner's syncopal episode was related to, rather than caused by, her work activities.⁶⁰

¶ 33 During his deposition, Dr. Benditt made it abundantly clear at several points during his deposition that he was not attempting to offer an opinion as to legal causation. Rather, he was offering his medical opinion as to the circumstances of Petitioner's incident and the relationship of those circumstances to the onset of her syncopal episode. He reviewed the history of the incident and he is clearly qualified in this area of medicine to render a medical opinion. To the extent that either the question or Dr. Benditt's answer may have been vague or confusing, that is for this Court to sort out. Petitioner's objection is overruled.

¶ 34 Respondent later asked Dr. Benditt if syncope was a cardiovascular condition and Petitioner objected on the grounds of relevancy.⁶¹ Petitioner's objection to this question is overruled. Whether Petitioner's syncopal episode could be attributed to a cardiovascular condition as opposed to some other condition – including possibly an external force – is relevant to the issues in this case.

¶ 35 Respondent also asked Dr. Benditt, "Doctor, do you have an opinion as to whether you believe the syncopal event, the primary cause of that, meaning a reasonable degree of medical certainty, work-related activities were responsible for more than 50 percent of

⁵⁸ Benditt Dep. 53:18-25.

⁵⁹ Benditt Dep. 54:1-7.

⁶⁰ Benditt Dep. 55:2-8.

⁶¹ Benditt Dep. 57:2-11.

the physical condition?"⁶² Petitioner objected on the grounds that the question was vague, confusing, ambiguous, and used undefined terminology such as work-related.⁶³ Dr. Benditt was asked whether he understood the question, and he responded in the affirmative and proceeded to answer.⁶⁴ Petitioner's objection regarding the vagueness and ambiguity of the question is well-taken. Therefore, Petitioner's objection is sustained.

¶ 36 Finally, during Petitioner's examination of Dr. Benditt, a series of questions were posed which asked Dr. Benditt to consider a set of hypothetical facts and then opine as to whether the injury described was work-related. Respondent objected on various grounds, including that the questions called for Dr. Benditt to make a legal conclusion and that the testimony was irrelevant.⁶⁵ I agree with Respondent that Petitioner's entire line of questions essentially asked Dr. Benditt to "play judge" and decide whether each of the hypotheticals posed, which were apparently loosely based on previous cases, would be adjudged compensable. Furthermore, these hypothetical situations bear no relationship to the case at hand. I therefore sustain Respondent's objection to this line of testimony on the grounds that Petitioner's questions in this portion of the deposition call for a legal conclusion which Dr. Benditt is not competent to give, and furthermore, this testimony is irrelevant.

CONCLUSIONS OF LAW

¶ 37 This case is governed by the 2003 version of the Montana Workers' Compensation Act since that was the law in effect at the time of Petitioner's industrial accident.⁶⁶

¶ 38 Petitioner bears the burden of proving by a preponderance of the evidence that she is entitled to the benefits she seeks.⁶⁷

¶ 39 Injury and accident are defined in § 39-71-119, MCA, which states in pertinent part:

(1) "Injury" or "injured" means:

⁶² Benditt Dep. 58:23 - 59:4.

⁶³ Benditt Dep. 59:9-16.

⁶⁴ Benditt Dep. 59:18-25.

⁶⁵ Benditt Dep. 113:24 - 126:23.

⁶⁶ *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

⁶⁷ *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).

- (a) internal or external physical harm to the body that is established by objective medical findings
- (2) An injury is caused by an accident. An accident is:
 - (a) an unexpected traumatic incident or unusual strain;
 - (b) identifiable by time and place of occurrence;
 - (c) identifiable by member or part of the body affected; and
 - (d) caused by a specific event on a single day or during a single work shift.
- (3) “Injury” or “injured” does not mean a physical or mental condition arising from:
 - (a) emotional or mental stress; or
 - (b) a nonphysical stimulus or activity.
- (4) “Injury” or “injured” does not include a disease that is not caused by an accident.
- (5) (a) A cardiovascular, pulmonary, respiratory, or other disease, cerebrovascular accident, or myocardial infarction suffered by a worker is an injury only if the accident is the primary cause of the physical condition in relation to other factors contributing to the physical condition.
- (b) “Primary cause”, as used in subsection (5)(a), means a cause that, with a reasonable degree of medical certainty, is responsible for more than 50% of the physical condition.

¶ 40 In the present case, Petitioner clearly suffered an “injury” – physical harm to her body that was established by objective medical findings. Furthermore, I conclude that this injury was caused by an “accident” as that term is defined in § 39-71-119, MCA. Petitioner’s October 8, 2004, fall and the severe head injury she sustained upon impact was an unexpected traumatic incident. However, to be compensable under the Workers’ Compensation Act, Petitioner must further satisfy § 39-71-407, MCA, which provides that each insurer is liable to an employee of each employer that it insures if the employee receives an injury arising out of and in the course of employment.

¶ 41 In the present case, the uncontroverted medical evidence is that to a reasonable degree of medical certainty, Petitioner experienced a form of syncope, also called an orthostatic faint, which can occur some seconds after an individual has changed from a supine or sitting to standing position. It is further undisputed that Petitioner’s job duties included filling in for the administrative assistant, and that the administrative assistant’s job included leaving her desk to assist customers. In short, the uncontroverted evidence is that it was Petitioner’s performance of these duties that precipitated the syncopal episode which, in turn, resulted in Petitioner’s head injury. This is not a situation in which Petitioner just happened to faint at work and struck her head for no known reason. Dr. Benditt has opined that Petitioner’s syncope was caused by her changing position from sitting to standing in order to get up and help a customer. Therefore, Petitioner’s actions which

caused her injury were within the course and scope of her employment and her injury is compensable under the Workers' Compensation Act.

¶ 42 Petitioner further asked this Court to determine whether she is entitled to permanent total disability (PTD) benefits. To be eligible for PTD benefits, a claimant must reach MMI and have no reasonable prospect of physically performing regular employment. In the case at hand, Petitioner has presented no evidence that she is at maximum medical healing, or MMI. She is therefore not eligible for PTD benefits until such healing has been reached and if, at that time, she also has no reasonable prospect of physically performing regular employment. Petitioner's request for PTD benefits is therefore denied.

JUDGMENT

¶ 43 Petitioner's injury arose out of and in the course and scope of her employment and is compensable.

¶ 44 Petitioner is entitled to temporary total disability benefits.

¶ 45 Petitioner is not entitled to permanent total disability benefits.

¶ 46 Petitioner is entitled to have her medical expenses, which she incurred as a result of her industrial accident, paid.

¶ 47 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 4th day of June, 2008.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Thomas J. Lynaugh
Michael G. Eiselein
Michael P. Heringer
Submitted: March 14, 2007