

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2024 MTWCC 9

WCC No. 2023-00175

JEREMY SCHMIDT

Petitioner

vs.

MONTANA ASSOCIATION OF COUNTIES WORK COMP TRUST

Respondent/Insurer.

APPEALED TO MONTANA SUPREME COURT – DA 24-0527 09/04/24

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

Summary: Respondent moves for summary judgment, asserting that Petitioner's request for TTD benefits should be denied as his asserted inability to work is not supported by objective medical findings but rather his subjective belief that he cannot work. Petitioner opposes Respondent's motion, asserting that he has supported his contention that he has been incapable of working since January 1, 2021, with objective medical findings of his headaches, or, in the alternative, with objective medical findings of his injury.

Held: Respondent's Motion for Summary Judgment is granted. Petitioner has offered no objective medical findings of his chronic headaches. While Petitioner's subjective symptoms may fit standard diagnostic criteria, they were never observed during an examination or objectively measured by a medical provider. In the absence of clinical findings, Petitioner's complaints of pain do not constitute objective medical findings. Objective medical findings of Petitioner's left-temple contusion with swelling and right-thumb swelling at the time of injury do not support a determination of TTD because Petitioner does not claim that he cannot work due to a contusion and swelling, but, rather, because of chronic headaches.

¶ 1 Respondent Montana Association of Counties Work Comp Trust (MACo) moves for summary judgment, asserting that Petitioner Jeremy Schmidt's request for temporary

total disability (TTD) benefits should be denied as his asserted inability to work is not supported by objective medical findings, but rather his subjective belief that he cannot work.¹

¶ 2 Mr. Schmidt opposes MACo's motion for summary judgment, asserting that he has supported his contention that he has been incapable of working since January 1, 2021, with objective medical findings of his headaches, or, in the alternative, with objective medical findings of his injury.

¶ 3 This Court held a hearing on July 1, 2024.

¶ 4 Upon receipt of the parties' supplemental briefs on July 8, 2024, this Court deemed the matter submitted.

¶ 5 On July 9, 2024, this Court issued an order concluding that MACo's Motion for Summary Judgment was well taken; vacating trial; and notifying the parties an opinion granting summary judgment would be forthcoming promptly.

¶ 6 This Court granted MACo's Motion for Summary Judgment for the following reasons.

UNDISPUTED FACTS

¶ 7 Mr. Schmidt was injured on February 26, 2018, while performing his duties as a Detention and Transport Officer for the Hill County Sheriff's Department and Detention Center, in Havre. An inmate assaulted him, leaving him a left-temple contusion with swelling and right-thumb swelling.

¶ 8 At the time of Mr. Schmidt's injury, the Hill County Sheriff's Department and Detention Center was insured by MACo.

¶ 9 MACo accepted liability for Mr. Schmidt's industrial injury claim on February 27, 2018.

¶ 10 Following his initial treatment for head trauma, Mr. Schmidt was diagnosed with postconcussive syndrome with chronic headache or chronic migraine as a result. He primarily treated with two medical providers: Jessica M. Sheehy, PA-C, at Northern Montana Family Medical Center, from March 2018 until August 2019, and Deborah D. Dover, MD, at Atlas Neurology, from September 2019 forward.

¹ Mr. Schmidt's Petition originally requested approval for a titration study and ongoing c-pap treatment of his sleep apnea. MACo moved for Summary Judgment on that claim. However, in Mr. Schmidt's Opposition to MACo's Brief in Support of Summary Judgment, he vacated his request for relief regarding his sleep apnea condition.

¶ 11 PA-C Sheehy, and Britney R. Wever, PA-C, in her absence, kept Mr. Schmidt on light duty with restrictions like no lifting, bending, stretching, transporting, or working with inmates, and instructions to take frequent breaks or work short shifts depending on his symptoms, from March 2, 2018, until May 17, 2018.

¶ 12 On May 17, 2018, Mr. Schmidt told PA-C Wever that his headaches were improving, he was able to work a full eight-hour shift a couple days with minimal headaches after, and he wanted to try a full release to return to work. PA-C Wever released him to full duty the same day.

¶ 13 Mr. Schmidt continued to work full duty at his time-of-injury job from May 17, 2018, until he retired, allegedly due to his headaches, on December 31, 2020.

¶ 14 Over that two-and-a-half-plus years, Mr. Schmidt treated with five medical providers, including Dr. Dover, with no change in his restrictions.

¶ 15 Mr. Schmidt began treating with Dr. Dover for headaches on September 12, 2019. Among his complaints to her were that his memory had been poor since the incident and his mood and personality had changed.

¶ 16 Subsequent neuropsychological testing revealed attentional, memory, and language-based issues, but also that Mr. Schmidt's most recent head injury was likely not his first significant head injury and that his difficulties may be the result of multiple blows to the head.

¶ 17 At appointments dated January 20, July 22, October 20, November 24, 2021, and February 23, 2022, which were those Mr. Schmidt had with Dr. Dover during the period he argues he was totally disabled, he self-reported and she recorded the following information about his headaches in the medical notes:

¶ 17a Location: L temporal, spreads across forehead to other side.

¶ 17b Severity: moderate-severe, causes lost time from work and activities of daily living.

¶ 17c Nature: throbbing, stabbing.

¶ 17d Frequency: daily.

¶ 17e Duration: over 24 hours.

¶ 17f Aggravating factors: light, routine physical activity.

¶ 17g Alleviating factors: dark, quiet room, ice.

¶ 17h Associated factors: photophobia, neck pain.

¶ 17i Prior testing: CT scan of head 2/2018, MRI brain 8/23/19, both normal.

¶ 17j Other: history of head injury; chronic headache.

¶ 18 After performing neurological examinations on Mr. Schmidt during those same appointments – January 20, July 22, October 20, November 24, 2021, and February 23, 2022² – Dr. Dover recorded the following information in the medical notes:

¶ 18a Cortical functions: normal.

¶ 18b Cranial nerves: II-XII normal bilaterally, he does have photophobia.

¶ 18c Motor strength: no focal neurological weakness.

¶ 18d Tremors: absent.

¶ 18e Coordination: finger to nose normal bilaterally.

¶ 18f Gait and station: within normal limits, Romberg was negative.³

¶ 19 Dr. Dover recorded some combination of the following Assessments in the medical notes for Mr. Schmidt’s January 20, July 22, October 20, November 24, 2021, and February 23, 2022, appointments:

¶ 19a Chronic migraine⁴ (Primary).

¶ 19b Postconcussive syndrome.⁵

¶ 19c Memory loss.⁶

¶ 20 On May 17, 2022, MACo sent Dr. Dover a letter, asking a series of questions about her treatment of Mr. Schmidt, which was ongoing.

¶ 21 Dr. Dover responded on May 18, 2022. Based on Mr. Schmidt’s diagnosis and current symptoms, she opined that he was neither able to continue his employment as a Hill County Detention Officer nor participate in regular employment as of the date of his

² In her February 23, 2022, medical note, Dr. Dover recorded all of the information in ¶¶ 18a – 18f except the last third of ¶ 18b: “he does have photophobia.”

³ Although the Romberg test is a clinical test, it is used to diagnose problems with a person’s balance, which is not Mr. Schmidt’s concern.

⁴ Chronic migraine was listed in the Assessments for all five dates.

⁵ Postconcussive syndrome was listed in the Assessments for January 20 and October 20, 2021.

⁶ Memory loss was listed in the Assessments for January 20, 2021.

assault, February 26, 2018, because “[h]e never recovered from his head injury enough that he should have gone back to work.”

¶ 22 On June 7, 2022, Mr. Schmidt requested that MACo pay him TTD benefits from January 1, 2021, through June 7, 2022, due to his inability to engage in employment as a result of his work-related injury.

¶ 23 Based on Dr. Dover’s medical opinion that Mr. Schmidt is not capable of employment, MACo has paid TTD benefits, from May 18, 2022, forward, under a reservation of rights. MACo has not paid TTD benefits before May 18, 2022.

¶ 24 During her April 5, 2024, deposition, Dr. Dover opined the following:

¶ 24a Based on his diagnosis and current symptoms, Mr. Schmidt was still not capable of continuing his employment as a Hill County Detention Officer, because his symptoms were exacerbated by routine physical activity and exposure to light; when he experienced severe symptoms, he was not as cognitively sharp as would be desired in that position; and his symptoms affected his ability to do the driving aspect of the transport-officer work.

¶ 24b Based on his diagnosis and current symptoms, Mr. Schmidt was still not capable of participating in regular employment – it would have to be a very specialized environment.⁷

¶ 24c There are typically not objective findings of a headache and most of what can be assessed is subjective symptoms self-reported by the patient. She gave the example that if she asked a patient questions, the patient’s answers would be subjective.

¶ 24d During the 41-week period, from May 17, 2018, to February 27, 2019, where Mr. Schmidt was working and did not ask for any medical treatment, no one has any objective findings that suggest that he could not do his job.

¶ 24e She believes his reporting to be truthful.

¶ 24ei In the five years she has been treating Mr. Schmidt, she has never believed him to be misreporting his symptoms or his condition and he has been consistent in his complaints.

¶ 24eii She believes he is actually experiencing photophobia because he always wears a cap with a brim and dark glasses; when he removes the

⁷ Dr. Dover testified that this environment would have to have dim lighting, no fluorescent lights, no bright lights; Mr. Schmidt would have to have the ability to take breaks and rest; and the job would have to be reasonably sedentary and not include lifting or exerting himself physically very much.

cap and glasses in her office, he consistently squints and appears to be in distress.

¶ 24eiii She does not think anybody would go through Botox injections every three months if they did not have to because they are painful – ½ inch, 30-gauge needle, 31 injection points across the forehead, side of the head, back of the head, and shoulder area over five-to-ten minutes.

LAW AND ANALYSIS

¶ 25 This case is governed by the 2017 version of the Montana Workers' Compensation Act because that was the law in effect at the time of Mr. Schmidt's industrial injury.⁸

¶ 26 To prevail on a motion for summary judgment, the moving party must meet its initial burden of showing the "absence of a genuine issue of material fact and entitlement to judgment as a matter of law."⁹ "[I]f the moving party meets its initial burden to show the absence of a genuine issue of fact and entitlement to judgment, the burden shifts to the party opposing summary judgment either to show a triable issue of fact or to show why the undisputed facts do not entitle the moving party to judgment."¹⁰

¶ 27 MACo advances a simple argument. As required by *Ford v. Sentry Casualty Co.*,¹¹ and stated in §§ 39-71-701(2) and -702(2), MCA: "The determination of [temporary¹² or permanent¹³] total disability must be supported by a preponderance of objective medical findings." Mr. Schmidt requests TTD benefits between January 1, 2021, and May 17, 2022, based upon his headache condition but offers no objective medical findings in support of his request; rather, he supports his request with subjective symptoms, self-belief, and self-report. Thus, Mr. Schmidt cannot meet his burden of proof at this stage of the proceedings.

¶ 28 Mr. Schmidt cites to the statutory definition in § 39-71-116(22), MCA, that " 'Objective medical findings' means medical evidence, including range of motion,

⁸ *Ford v. Sentry Cas. Co.*, 2012 MT 156, ¶ 32, 365 Mont. 405, 282 P.3d 687 (citation omitted); § 1-2-201, MCA.

⁹ *Begger v. Mont. Health Network WC Ins. Trust*, 2019 MTWCC 7, ¶ 15 (citation omitted).

¹⁰ *Richardson v. Indem. Ins. Co. of N. Am.*, 2018 MTWCC 16, ¶ 24 (alteration added) (citation omitted), *aff'd*, 2019 MT 160, 396 Mont. 325, 444 P.3d 1019.

¹¹ *Ford*, ¶ 61.

¹² " 'Temporary total disability' means 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." § 39-71-116(39), MCA.

¹³ " 'Permanent total disability' means 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. Lack of immediate job openings is not a factor to be considered in determining if a worker is permanently totally disabled." § 39-71-116(28), MCA.

atrophy, muscle strength, muscle spasm, or other diagnostic evidence, substantiated by clinical findings.” He contends that his subjective symptoms, Dr. Dover’s evaluation of those symptoms, and her measurement of the symptoms against standard criteria to diagnose him with chronic migraine, constitutes “other diagnostic evidence” and “clinical findings,” which are types of objective medical evidence under the statute.

¶ 29 In the alternative, Mr. Schmidt argues that the objective medical evidence upon which MACo accepted liability for his industrial injury is the same objective medical evidence that supports a determination of total disability because his current diagnosis of postconcussive chronic headache is the product of his industrial injury.

¶ 30 This Court agrees with MACo. The Workers’ Compensation Act requires that total disability determinations be supported by objective medical findings. A careful reading of the definition of objective medical findings in § 39-71-116(22), MCA, and reference to ARM 24.29.1401(A), a Department of Labor & Industry regulation that implements it, indicate that “ ‘[o]bjective medical findings’ means medical evidence that is substantiated by clinical findings. Clinical findings include, but are not limited to, range of motion, atrophy, muscle strength, muscle spasm, and diagnostic evidence. Complaints of pain in the absence of clinical findings are not considered objective medical findings.”

¶ 31 Mr. Schmidt has offered no clinical findings, i.e., no range of motion or muscle strength deficits, no atrophy or muscle spasms, no abnormal diagnostic evidence, such as imaging or lab work, and nothing else of this ilk.¹⁴ What he has is subjective complaints of pain and Dr. Dover’s opinions based on his subjective complaints of pain. And, as guided by the statute and administrative rule, absent clinical findings, complaints of pain are not objective medical findings.

¶ 32 Moreover, under the canon of construction known as *ejusdem generis*, which means “of the same kind or class” in Latin, “when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same class as those listed.”¹⁵ Thus, even though the list of clinical findings is not limited to “range of motion, atrophy, muscle strength, muscle spasm, and diagnostic evidence,” this Court will not read subjective symptoms like “pain” into it because those would be items of a different class.

¶ 33 In *Walund v. Montana State Fund*,¹⁶ Walund alleged, in part, that he sustained industrial injuries. The evidence he relied on in support of this was twofold. First, he

¹⁴ Mr. Schmidt is incorrect that anything used to make a diagnosis is diagnostic evidence, and therefore a clinical finding, and therefore objective medical evidence. Diagnostic tests, such as imaging or lab work, produce diagnostic evidence. It is the fact that diagnostic evidence is the product of testing or measurement or quantification that makes it a clinical finding and, thus, an objective medical finding.

¹⁵ Black’s Law Dictionary (12th ed. 2024).

¹⁶ 2021 MTWCC 2 (applying 2017 and 2019 versions of the Workers’ Compensation Act, which are, for present purposes, the same), *aff’g*, 2021 MT 248N.

suffered an increase in symptoms of his pre-existing neuropathy while working.¹⁷ Second, his doctor testified that he considered Walund's report of an "[a]ltered sensory perception to touch" during his examinations "a relative objective exam finding."¹⁸ The insurer argued that both types of evidence were merely subjective reports of symptoms.¹⁹ The Workers' Compensation Court agreed with the insurer, ruling that Walund did not have sufficient evidence of objective medical findings where he introduced only subjective complaints of increased and different symptoms.²⁰ At the two appointments following the shifts in which Walund alleged he was injured, the doctor noted that the claimant's "motor strength and reflexes 'remained the same' and were 'normal.'"²¹ The doctor wrote the insurer that Walund's symptom "attacks" at work "did not cause any injury to [his] small fiber nerves."²² And, the doctor's "relative objective exam finding . . . that Walund had a different feeling on touch" was not an "objective medical finding" under the definition in § 39-71-116(22), MCA, because it was not based on " 'medical evidence . . . or other diagnostic evidence.' Rather, [the doctor] based his finding entirely on Walund's subject report of a symptom."²³

¶ 34 Again, all Mr. Schmidt has offered is subjective reports of symptoms. As in *Walund*,²⁴ his subjective reports of symptoms are not objective medical findings.

¶ 35 Mr. Schmidt fares no better under his alternative argument. The objective medical evidence of his injury was a left-temple contusion with swelling and right-thumb swelling. However, he is not claiming disability based on the contusion and swelling but rather on his headaches. Thus, it is the headaches for which he must have objective medical evidence. Furthermore, in the absence of any case law directly on point, this Court is persuaded by MACo's argument that where Mr. Schmidt's contusion and swelling improved to the point where they no longer existed, and he worked full duty for over two-and-a-half years, 41-weeks of which was without seeking medical treatment, his subsequent total disability claim could not rely on the initial objective medical evidence of his injury.

¶ 36 Mr. Schmidt raises several other arguments in support of his opposition to MACo's Brief in Support of Summary Judgment. However, none are persuasive.

¹⁷ *Walund*, ¶ 30.

¹⁸ *Id.* (alteration in original).

¹⁹ *Walund*, ¶ 32.

²⁰ *Walund*, ¶ 37.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ Although the context in the above-cited *Walund* excerpt (i.e., compensability) is different than in the present matter (i.e., disability), the same "objective medical findings," as defined in § 39-71-116(22), MCA, are required in both contexts. Thus, for present purposes, the distinction is without a difference.

¶ 37 Mr. Schmidt alleges that he has headaches that prevent him from working, and that none of his medical providers have stated a belief that he has been malingering. Indeed, Dr. Dover specifically testified at her deposition that she believed his reporting to be truthful. Maybe Mr. Schmidt has disabling headaches and maybe he does not. For purposes of summary judgment, this Court assumes he does. Nevertheless, §§ 39-71-701 and -702, MCA, require determinations of total disability to be supported by objective medical findings and Mr. Schmidt has offered none.

¶ 38 Mr. Schmidt contends that this Court has previously awarded wage loss benefits for headache conditions, at least in part, in *Sherwood v. Watkins & Shepard Trucking*,²⁵ and *Kellegher v. MACo Workers' Compensation Trust*.²⁶ However, as Mr. Schmidt acknowledges and MACo points out, headaches were not the sole bases for those wage-loss benefit determinations.

¶ 39 In *Sherwood v. Watkins & Shepard Trucking*, this Court relied heavily on the testimony of one doctor – Bill S. Rosen, MD – to determine that Sherwood, a commercial truck driver,²⁷ was entitled to TTD benefits.²⁸ In addition to Sherwood's headaches and other medical issues, that doctor testified that Sherwood needed further diagnostic workup,²⁹ that his current medications/medical dependency effectively precluded him from being employable,³⁰ that, because of a long history of concussions and opiate use, he may not be fully competent to make rational decisions,³¹ and that the doctor would not approve him to drive commercially.³²

¶ 40 In *Kellegher*, this Court ruled that Kellegher was entitled to permanent total disability benefits in part because it was “persuaded that [he] could not perform any of the approved jobs due to his vertigo, balance difficulties, headaches, memory problems, and hearing loss.”³³ Again, Kellegher's headaches were not the sole basis for the wage-loss determination.

¶ 41 Mr. Schmidt argues that his claim resembles a physical-mental claim, i.e., a psychological condition determined to be compensable as a direct consequence of a compensable physical injury. However, instead of the direct consequence of the compensable physical injury being a psychological condition – like depression – the direct

²⁵ 2010 MTWCC 19.

²⁶ 2015 MTWCC 16.

²⁷ *Sherwood*, ¶ 7.

²⁸ See *Sherwood*, ¶ 193.

²⁹ *Sherwood*, ¶¶ 178, 181.

³⁰ *Sherwood*, ¶ 176; *Sherwood v. Watkins & Shepard Trucking*, 2011 MTWCC 4, ¶¶ 20, 21.

³¹ *Sherwood*, ¶ 177.

³² *Sherwood*, ¶¶ 183, 193.

³³ *Kellegher*, ¶¶ 75, 80.

consequence of the compensable physical injury is alleged to be chronic headaches. Mr. Schmidt implies that if these psychological conditions are compensable notwithstanding that they can be difficult to objectively verify, his chronic headaches, standing in the same position, should be, as well. He cites *Yarborough v. Montana Municipal Ins. Authority*, Conclusion of Law, 3a., in support of his position.³⁴ There are several issues here. One is that the applicable version of the statute in *Yarborough* was 1987 and the statute started requiring objective medical findings to prove an injury in 1995. The other is that Mr. Schmidt did not lose wages at the time of his injury. Indeed, he was able to work full duty at his time-of-injury job for two-and-a-half years, even foregoing medical treatment for 41 weeks, between the time he was injured and the time he filed his disability claim. And by the time he filed his disability claim, he no longer had objective medical findings. This Court is bound by the statute, which requires that total disability determinations be supported by objective medical findings.

¶ 42 Mr. Schmidt also cites *Killoy v. Reliance National Indemnity*,³⁵ for the proposition that, “pain is . . . one factor to be considered when reaching a determination of disability,” and “[p]ain . . . may be so severe for some individuals that it renders them physically incapable of performing their job duties.”³⁶ In that case, Killoy testified that he had constant pain in his neck and shoulders, headaches, and muscle spasms; his pain increased when his activity did, but also if he was stationary for too long; and on “bad” days, he had to take hot showers and use a heating pad to relieve pain.³⁷ One doctor testified that he considered Killoy’s response to his injury as appropriate; the court also found that Killoy’s testimony regarding his pain was credible.³⁸ In considering this uncontradicted and credible evidence of Killoy’s pain, the Montana Supreme Court determined that the evidence did not support a finding that he was capable of working without pain or enduring his pain while working.³⁹ But *Killoy* is distinguishable from the present case because it applied a pre-1995 version of the Workers’ Compensation Act.⁴⁰ However, since 1995, whether pain or no pain, objective medical findings must support a determination of total disability.

¶ 43 Finally, Mr. Schmidt argues that his claim is like *O’Mahoney v. Liberty Ins. Corp.*,⁴¹ where this Court ruled that O’Mahoney was entitled to continuation of TTD benefits while

³⁴ 1996 MTWCC 48, *aff’d*, 282 Mont. 475, 938 P.2d 679.

³⁵ 278 Mont. 88, 923 P.2d 531 (1996).

³⁶ *Killoy*, 278 Mont. at 94, 923 P.2d at 534-35.

³⁷ *Killoy*, 278 Mont. at 95, 923 P.2d at 535.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Incidentally, although objective medical findings were not required under the statute applied, Killoy had muscle spasms. See *Killoy*, 278 Mont. at 95, 923 P.2d at 535.

⁴¹ 2013 MTWCC 6, *appeal dismissed, and judgment vacated and withdrawn per stipulation.*

she completed her pain treatment.⁴² However, that case is also distinguishable because there were objective medical findings of O'Mahoney's pain, including "noticeable swelling in her right arm after two days of [FCE] testing,"⁴³ and positive findings on a cervical MRI that the pain clinic was investigating as possibly being a cervical radiculopathy with a C-6 distribution, which could be a contributing factor to her right-arm pain.⁴⁴

¶ 44 For all of the foregoing reasons, this Court enters the following:

ORDER

¶ 45 MACo's Motion for Summary Judgment is **granted** on the grounds that Mr. Schmidt has offered no objective medical findings of his chronic headaches and objective medical findings of his left-temple contusion with swelling and right-thumb swelling at the time of injury do not support a determination of TTD.

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

DATED this 8th day of August, 2024.

(SEAL)

/s/ Lee Bruner
JUDGE LEE BRUNER

c: Megan L. Miller
William Dean Blackaby

Submitted: July 8, 2024

⁴² *O'Mahoney*, ¶ 54.

⁴³ *O'Mahoney*, ¶ 45.

⁴⁴ *O'Mahoney*, ¶¶ 47, 48.