IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2021 MTWCC 2

WCC No. 2020-5105

KENNETH WALUND

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

ORDER DENYING PETITIONER'S MOTION FOR SUMMARY JUDGMENT AND GRANTING RESPONDENT'S CROSS-MOTION FOR SUMMARY JUDGMENT

Montana Supreme Court Appeal No. DA 21-0121 - 03/15/21
Affirmed 2021 MT 248N - 09/28/21

Summary: During his work shifts on September 26, 2019, and January 30, 2020, Petitioner experienced a sharp increase in pain in his lower extremities, which is a symptom of his preexisting neuropathy. Thereafter, Petitioner reported to his treating physician that he had a different feeling on touch. His symptoms have improved but have not returned to the level he had before his first work shift in which he experienced an increase in pain. He moved for summary judgment, asserting that Respondent has ongoing liability for his neuropathy because his work caused a permanent aggravation. Petitioner also argues that Respondent has admitted liability because its agreement to "treat" his increased symptoms while working as temporary aggravations is a judicial admission that he suffered compensable injuries. Respondent cross-moved for summary judgment, asserting that it is not liable for Petitioner's neuropathy because Petitioner's subjective reports of increased pain while working and his report of a different feeling on touch are not, by themselves, sufficient to prove compensable injuries under the 1995-present WCA, which requires that an injury be established with objective medical findings. Alternatively, Respondent argues that it is not liable for Petitioner's neuropathy because Petitioner does not have a medical causation opinion that his alleged injuries permanently aggravated his neuropathy.

Held: Respondent is entitled to summary judgment because Petitioner has the burden of proof but does not have sufficient evidence to prove his case. Under the 1995-present WCA, a claimant must prove that he suffered an injury with objective medical evidence and prove causation with medical expertise or opinion. Petitioner has not introduced objective medical findings in support of his claim that he suffered injuries; he introduced only subjective complaints of increased and different symptoms. Moreover, Petitioner does not have a medical causation opinion supporting his position that his alleged injuries permanently aggravated his neuropathy. Petitioner's treating physician testified that the increase of Petitioner's symptoms while working did not cause any progression of his neuropathy. Finally, even if Respondent's agreement was deemed a judicial admission that Petitioner suffered injuries that aggravated his neuropathy, Respondent does not have ongoing liability because, at most, Respondent admitted liability only for temporary aggravations.

¶ 1 Petitioner Kenneth Walund moves for summary judgment, asserting that Respondent Montana State Fund (State Fund) is liable for his preexisting neuropathy because he suffered injuries during his shifts on September 26, 2019, and on January 30, 2020, which caused a permanent aggravation.

¶ 2 State Fund cross-moves for summary judgment, asserting that it is not liable for Walund's neuropathy. State Fund argues that under the 1995-present Workers' Compensation Act (WCA), Walund did not establish that he suffered injuries with objective medical findings. Alternatively, State Fund argues that if Walund suffered injuries while working, he has not carried his burden of proving with a medical causation opinion that his injuries permanently aggravated his neuropathy.

¶ 3 This Court held a hearing on October 28, 2020. The parties agreed that Walund could thereafter file the exhibits to the deposition of Richard E. Popwell, Jr., MD. Walund filed those exhibits on December 10, 2020.

¶ 4 For the following reasons, this Court denies Walund's Motion for Summary Judgment and grants State Fund's Cross-Motion for Summary Judgment.

FACTS

¶ 5 Walund worked as a criminal investigator for the Montana Department of Justice.

¶ 6 In the early 2010s, Walund saw Anthony Paul Williamson, MD, because he was experiencing numbness, tingling, and pain in his legs and feet. Dr. Williamson suspected that Walund had peripheral neuropathy. Dr. Williamson ordered a nerve conduction velocity test, the results of which were "consistent with a sensory polyneuropathy."

¶ 7 In the fall of 2017, Walund began treating with Dr. Popwell, who has been practicing as a board-certified neurologist since 2001. Dr. Popwell noted that Walund had "moderate-severe associated neuropathic pain, often disabling."

¶ 8 Dr. Popwell diagnosed Walund with "small fiber neuropathy," a disorder of his nerves with the smallest diameters. Dr. Popwell explained that these nerves "carry pain, which is why this type of neuropathy predominantly presents as a painful set of symptoms." Dr. Popwell also explained that neuropathy is incurable and has "a very slow and progressive course over many years."

¶ 9 Despite "extensive diagnostics," Dr. Popwell could not ascertain the cause of Walund's neuropathy. However, Dr. Popwell excluded Walund's work as a potential cause, explaining, "This is a medical condition that is unrelated to anyone's occupation."

¶ 10 From the fall of 2017 to the fall of 2019, Walund's symptoms continued to worsen.

¶ 11 On September 26, 2019, Walund sat in a truck for over nine hours while conducting surveillance on a suspect. During that time, Walund experienced a sharp increase in his leg and foot pain. Walund's foot pain became so severe that he had to take off his shoes. When Walund got out of the truck, he was unable to walk. In the following days, his severe foot pain subsided; however, he continued to suffer from a throbbing pain in his legs.

¶ 12 Dr. Popwell explained that such an "attack" is a common experience for those with neuropathy and part of the natural progression of the condition. Dr. Popwell also explained that it is "not uncommon for people who have sensory neuropathy to have the greatest degree of symptoms when they're at rest."

¶ 13 On December 10, 2019, Walund returned to Dr. Popwell. Dr. Popwell's examination revealed, "Altered sensory perception to touch [in] the lower extremities, but no actual hypoesthesia. Otherwise normal strength and [deep tendon reflexes]." At his deposition, Dr. Popwell explained:

> So at that time, the update on his clinical exam was notable for alteration of sensory perception to touch in the lower extremities, but there was no actual diminished perception. And so as this progresses, people will typically begin to lose or have differences in tactile perception or temperature perception or pinprick perception. And so during that visit, he did describe when we were undergoing a touch assessment that it just didn't feel the same but he wasn't able to describe an intensity.
>
> So if you were to score—I touch you and it's—you know, this feels like a 10. He didn't describe a diminished intensity, just a different perception, which I would consider a relative objective exam finding.

¶ 14 On January 30, 2020, Walund worked for a half day in the Butte area and then drove to Billings for a weapons training course scheduled for the next day. While driving, Walund had another "attack" and was suffering from severe foot pain when he reached his hotel. Walund still had severe foot pain the next day, which rendered him unable to run during the training course.

¶ 15 On February 25, 2020, Walund returned to Dr. Popwell because of his second "attack." Dr. Popwell noted that Walund still had "Altered tactile perception in [his lower extremities] in stocking distribution." However, Dr. Popwell testified that there was no change when compared to his prior examination:

> **Q. Was there any change in his clinical exam?**
>
> A. He still had the altered tactile perception in his lower extremities. His motor strength and his reflexes remained the same. So there was no change in his exam that was clinically relevant or significant compared to his visit in 12-10-19.
>
> **Q. Okay. So as far as neurologic findings or other objective findings, there was no change?**
>
> A. No. And again, just to reference, that's not uncommon for sensory polyneuropathy.

¶ 16 Walund's severe foot pain lasted until March 2, 2020. Although his foot pain diminished, he continues to have leg and foot pain, which has not returned to the level he experienced before his "attacks" on September 26, 2019, and January 30, 2020.

¶ 17 Walund filed two workers' compensation claims, asserting that the "attacks" he suffered on September 26, 2019, and January 30, 2020, are injuries under the WCA and that they permanently aggravated his neuropathy.

¶ 18 On April 21, 2020, Dr. Popwell filled out an Attending Physician's Statement in support of Walund's application for a disability retirement.[1] Dr. Popwell stated that the "objective examination findings" supporting his diagnosis of "idiopathic peripheral neuropathy" was the 2017 nerve conduction velocity test. Dr. Popwell stated that Walund's subjective symptoms were "severe neuropathic pain," "shocking sensations," and "leg weakness." Dr. Popwell stated, "Ken has continued to experience chronic moderate intensity neuropathic pain and occasional severe exacerbations that render him debilitated." Dr. Popwell explained, "[P]atient may be unable to perform physical tasks such as walking, running or lifting while his neuropathy flares. These flares are

[1] It is evident that Dr. Popwell had assistance in filling out this form, as there is another person's handwriting on it. Nevertheless, Dr. Popwell signed it and it is part of his records.

unpredictable." In response to a question asking whether Walund's neuropathy was "job related," Dr. Popwell marked the "no" box.

¶ 19 Dr. Popwell testified that Walund could not work as an investigator because of his neuropathy, explaining:

> Well, this is kind of a no-brainer, that if you're going to have these attacks from your medical condition and that they're going to be exacerbated in your work-related duties, you have to either have special accommodations—which really aren't practical in Mr. Walund's line of work—or you're probably going to have to seek a medical retirement.

¶ 20 On April 22, 2020, Dr. Popwell responded to a letter from State Fund with a series of questions about Walund's "attacks." In response to a question of whether there was any objective medical evidence supporting "a measurable exacerbation or aggravation to [Walund's] pre-existing peripheral neuropathy due primarily to workplace activities/duties," Dr. Popwell answered, "The reference we have is the telephone call Mr. Walund placed to our office, reporting the neuropathy flare. No objective evidence is applicable." Dr. Popwell noted that Walund had not returned to his pre-injury baseline and stated, "He is not expected to return to baseline."

¶ 21 On May 28, 2020, Dr. Popwell responded to a second letter from State Fund regarding the cause of Walund's "attacks." Dr. Popwell indicated that the cause was both the natural progression of his neuropathy and his work duties. In response to a question asking for objective medical evidence supporting his opinions, Dr. Popwell stated, "The only 'objective' evidence supporting his diagnosis are a [nerve conduction velocity test] from 2017 (per report) and his current physical exam, both of which are considered valid." Dr. Popwell stated that he thought that Walund suffered temporary exacerbations of his neuropathy, and stated, "He returned to baseline symptoms. This is per his report."

¶ 22 On July 9, 2020, Dr. Popwell sent a letter to Walund to clarify his statement that Walund had "returned to baseline symptoms." Dr. Popwell explained that he did not mean that Walund had returned to where he was before September 26, 2019, because Walund's condition is "chronically progressive." Dr. Popwell wrote:

> When I responded that you had returned to your pre-exacerbation baseline, such should not have been interpreted that baseline was static, especially not in the setting of a progressive painful polyneuropathy. Please accept this letter as confirmation that it is my medical opinion that your condition is chronically progressive and at some time shortly after your initial exacerbation on 9/26/2019, your related symptoms worsened to the extent that you were rendered incapable of performing your routine, work-related duties. As we have previously discussed, you[r] condition is considered permanent and unfortunately anticipated to continue it's [sic] progressive course in the future.

¶ 23 Dr. Popwell testified that Walund's symptoms increased, while conducting surveillance and while driving to Billings, due to a combination of the natural progression of his neuropathy and the periods of inactivity. However, Dr. Popwell explained that the "attacks" did not cause any additional injury to Walund's nerves nor any progression of his neuropathy:

> **Q. . . . [D]id either the surveillance or the travel that we've talked about cause any of this small fiber injury?**
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> A. No, it was the underlying medical problem that caused the actual disease state. It was . . . either extended lack of activity or certain specific extended activities that would lead to worsening symptoms from the underlying medical problem.
>
> **Q. And it would not change that underlying medical problem?**
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> A. No, it would not change the long-term course of that medical problem.

Dr. Popwell also testified, "So the cause of the illness and its course long term with regards to where it eventually lands has nothing to do with Mr. Walund's occupation, nor would it have anything to do with anyone else with a similar condition." Dr. Popwell explained his opinion as follows:

> So, no, the attacks wouldn't cause any progression of the illness. The illness is going to progress irrespective of what Mr. Walund is doing. The attacks and the degree of his discomfort are clearly related to some of the work-related duties that Mr. Walund had to do. It was timely. It was temporal association. And so he's sitting in a car, he's still for a long period of time, he experiences the exacerbation of the pain. He's undergoing a highly active physical drill, he experiences an exacerbation of his pain.
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> These are things that probably would not have occurred if he wouldn't have been in those particular scenarios at the time. So illness comes first. Associated discomfort and attacks are secondary to a combination of the preexisting illness in certain scenarios that might lead to such an exacerbation which were occurring while he was at work.

¶ 24 State Fund denied liability for Walund's claims on the grounds that he did not suffer injuries, as "injury" is defined in the 1995-present WCA, on either September 26, 2019, or January 30, 2020, and on the grounds that he did not have a sufficient medical causation opinion. However, in its summary judgment briefing, State Fund agreed to treat Walund's "attacks" as temporary aggravations of his neuropathy. State Fund stated:

> The State Fund has reviewed the matter. In order to eliminate one possible issue in this matter, it will agree to treat these matters as temporary aggravations and will pay the limited bills from Dr. Popwell associated with the initial visits after each of the incidents in question. It in no way acknowledges compensable injuries beyond the temporary aggravations that may be in play.

LAW AND ANALYSIS

¶ 25 This case is governed by the 2017 and 2019 versions of the Montana WCA because they were the laws in effect at the time of Walund's alleged injuries.[2]

¶ 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."[3] "[If] 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."[4]

¶ 27 Here, the parties agree that there are no issues of material fact. However, they have two disputes as to whether Walund has sufficient evidence under Montana law to prove his case.

¶ 28 The parties' first dispute is whether Walund has sufficient evidence to prove that he suffered injuries under the definition of "injury" in the WCA, on September 26, 2019, and January 30, 2020. Section 39-71-119, MCA, states, in relevant part:

> **Injury and accident defined.** (1) "Injury" or "injured" means:
> (a) internal or external physical harm to the body that is established by objective medical findings;
> . . .
> (2) An injury is caused by an accident. . . .

Section 39-71-116(22), MCA, defines "objective medical findings," as "medical evidence, including range of motion, atrophy, muscle strength, muscle spasm, or other diagnostic evidence, substantiated by clinical findings."

¶ 29 If Walund suffered injuries under these definitions, the parties' second dispute is whether he has sufficient evidence to prove that State Fund is liable for his neuropathy

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

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

[4] *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.

on the grounds that his injuries permanently aggravated his preexisting condition. Section 39-71-407, MCA, states, in relevant part:

> (3)(a) . . . an insurer is liable for an injury, as defined in 39-71-119, only if the injury is established by objective medical findings and if the claimant establishes that it is more probable than not that:
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> (i) a claimed injury has occurred; or
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> (ii) a claimed injury has occurred and aggravated a preexisting condition.
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> (b) Proof that it was medically possible that a claimed injury occurred or that the claimed injury aggravated a preexisting condition is not sufficient to establish liability.
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> . . . .
>
> (10) . . . an employee is not eligible for benefits payable under this chapter unless the entitlement to benefits is established by objective medical findings that contain sufficient factual and historical information concerning the relationship of the worker's condition to the original injury.

¶ 30 Walund argues that the "attacks" he suffered while working on September 26, 2019, and January 30, 2020, are injuries under § 39-71-119, MCA. He cites *Birnie v. U.S. Gypsum Co.*, in which the Montana Supreme Court reaffirmed that employers take their employees as they find them and explained that an employee's preexisting disease or disability is compensable under the WCA if it is "lit up, aggravated or accelerated by an industrial injury."[5] Walund also points to case law supporting his position that an increase in symptoms at work is sufficient, by itself, to prove an injury and the aggravation of a preexisting condition.[6] Because it is undisputed that he suffered an increase in symptoms while working, Walund asserts that he suffered injuries. Walund also points to Dr. Popwell's testimony that he considered Walund's "[a]ltered sensory perception to touch" to be "a relative objective exam finding" as the objective medical evidence establishing his injuries.

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[5] 134 Mont. 39, 45, 328 P.2d 133, 136 (1958) (citations omitted). *See also Robins v. Anaconda Aluminum Co.*, 175 Mont. 514, 518, 575 P.2d 67, 70 (1978) ("The well established rule in Montana is that an employer takes his employee subject to the employee's physical condition at the time of employment. The fact that an employee is suffering from or afflicted with pre-existing disease or disability does not preclude compensation if the disease or disability is aggravated or accelerated by an industrial accident.") (citations omitted).

[6] *See, e.g.*, *Stephenson v. Cigna Ins. Co.,* 2001 MTWCC 12, ¶ 42 (ruling, "Since the claimant's 1987 injury 'lit up' and made his preexisting back condition symptomatic, and since his back has remained symptomatic ever since, deteriorating even further, the insurer is liable for his present back condition and any medical expenses and disability resulting from it."); *Gubler v. Liberty Nw. Cos.*, 1997 MTWCC 1 (ruling that although claimant had preexisting shoulder impingement, the insurer was liable for his shoulder condition because industrial accident caused an increase in his symptoms); *Yarde v. Liberty Nw. Ins. Corp.*, 1995 MTWCC 69 (ruling that insurer was liable because the "industrial accident permanently aggravated claimant's preexisting conditions, by making them symptomatic."); *Rooney v. Credit Gen. Ins.*, 1995 MTWCC 53 (ruling that insurer was liable because the industrial accident caused an increase in claimant's low-back pain); *Carmody v. Emp'rs Ins. of Wausau*, 1994 MTWCC 45 (ruling that claimant with a preexisting knee condition suffered a compensable injury because industrial accident caused an increase in her knee pain which rendered her unable to work).

¶ 31 To the second dispute, Walund asserts that his injuries caused a permanent aggravation of his neuropathy, as evidenced by his uncontested reports that his symptoms have not returned to baseline—i.e., to the level of symptoms he had before September 26, 2019. Walund also points to Dr. Popwell's opinion that as of April 2020, he could not return to work as a law enforcement officer because his work exacerbated his symptoms as the medical opinion establishing causation. Thus, Walund argues that State Fund is liable for his neuropathy under § 39-71-407, MCA, and seeks medical and permanent total disability benefits.

¶ 32 State Fund argues that Walund does not have sufficient evidence to prove that he suffered injuries under the definition of "injury" in the 2017 and 2019 versions of the WCA. State Fund cites *Ford v. Sentry Casualty Co*.,[7] and argues that a claimant's report of increased symptoms at work, by itself, is not sufficient to prove injuries under § 39-71-119, MCA (1995-present), which requires a claimant to establish an injury with objective medical findings. State Fund asserts that Walund's reports of increased symptoms, including his report of a different feeling on touch during Dr. Popwell's examinations, are merely subjective reports of symptoms.

¶ 33 If Walund suffered injuries, State Fund argues that it does not have ongoing liability for Walund's neuropathy under § 39-71-407, MCA, because Walund did not present a medical causation opinion that the injuries permanently aggravated his neuropathy. State Fund again cites *Ford* and asserts that such an opinion is required. State Fund argues that this case falls under *Chapman v. Twin City Fire Ins. Co*.,[8] in which this Court ruled that while the claimant suffered an increase in her neck, shoulder, and arm pain while working, she did not carry her burden of proving a compensable occupational disease because none of her medical providers had opined that her work caused an aggravation of her preexisting cervical degenerative disc disease.[9]

¶ 34 As a matter of Montana law, State Fund is correct that a claimant's complaints of increased symptoms of a preexisting condition while working are insufficient, by themselves, to prove that he suffered injuries under the 1995-present WCA. In *Ford*, the Montana Supreme Court noted that the 1995 Legislature amended the definition of "injury" in § 39-71-119, MCA, by inserting the language stating that an injury had to be " 'established by objective medical findings.' "[10] Thus, a claimant's subjective reports of increased symptoms is insufficient to prove an injury under the definition in the 1995-present WCA,[11] and, to the extent that the cases on which Walund relies stand for the

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[7] 2012 MT 156, 365 Mont. 405, 282 P.3d 687.

[8] 2010 MTWCC 36.

[9] *Chapman*, ¶ 36.

[10] *Ford*, ¶ 47.

[11] *See, e.g.*, *TG v. Mont. Schs. Grp. Ins. Auth*., 2018 MTWCC 1, ¶ 32 (citing *Ford*, ¶ 49) (explaining, "Dr. Weinert's diagnosis is based entirely on TG's subjective complaints of increased pain in her neck and arm, which is insufficient by itself to establish a compensable injury under the Workers' Compensation Act.").

proposition that a subjective increase in symptoms at work is sufficient, by itself, to prove an injury or an aggravation of a preexisting condition, they are not controlling under the 1995-present WCA.

¶ 35 State Fund is also correct that in an aggravation claim under the 1995-present WCA, a claimant must present a medical causation opinion. In *Ford*, the court recognized that the 1995 Legislature amended the standard under which an insurer is liable in § 39-71-407, MCA, to provide that an insurer is not liable unless "the entitlement to benefits is established by objective medical findings that contain sufficient factual and historical information concerning the relationship of the worker's condition to the original injury."[12] The court held that under this language, a claimant is required to prove causation with medical expertise or opinion and that the case law interpreting the pre-1995 WCA, which held that a claimant did not necessarily need medical expertise or opinion, did not control for claims arising under the 1995-present WCA.[13]

¶ 36 To summarize Montana law, under §§ 39-71-119 and -407, MCA (1995-present), a claimant in an aggravation case has the burden of proving two elements: (1) that he suffered an injury, which must be established with objective medical findings; and, if he suffered an injury, (2) that the injury caused an aggravation of the preexisting condition, which must be proven with medical expertise or opinion.[14]

¶ 37 Here, Walund does not have the evidence to satisfy either element. *First*, Walund did not introduce any objective medical findings supporting his claim that he suffered injuries on September 26, 2019, or January 30, 2020. During Walund's appointments following the shifts in which he alleges that he was injured, Dr. Popwell did not make any objective medical finding of injuries. Dr. Popwell noted that Walund's motor strength and reflexes "remained the same" and were "normal." In Dr. Popwell's April 22, 2020, response to State Fund, he specifically wrote that there was "no objective evidence" to show an exacerbation or aggravation of Walund's neuropathy. Dr. Popwell testified that the "attacks" did not cause any injury to Walund's small fiber nerves. Although Dr. Popwell also testified that he considered Walund's "altered sensory perception to touch" to be "a relative objective exam finding," Dr. Popwell's 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

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[12] *Ford*, ¶ 47 (citation omitted). In the 2017 and 2019 WCA, this language is codified at § 39-71-407(10), MCA.

[13] *Ford*, ¶¶ 47-49 (ruling that the 1995 amendments "abrogated" *Boyd v. Zurich Am. Ins. Co*., 2010 MT 52, ¶ 22, 355 Mont. 336, 227 P.3d 1026 (holding that "claimants are not required to prove causation through medical expertise or opinion"); *Plainbull v. Transamerica Ins. Co*., 264 Mont. 120, 126, 870 P.2d 76, 80 (1994) (holding that, "Whether the claimant chooses to meet [his burden of proving causation] with medical evidence, non-medical evidence or a combination of both, is up to him and, obviously, depends on the facts and circumstances of his particular case, the nature of the claimed injury, and the evidence available."); and *Prillaman v. Cmty. Med. Ctr.,* 264 Mont. 134, 139-40, 870 P.2d 82, 85 (1994) (reversing this Court's decision because it relied solely on medical opinions and remanding with instructions to "consider and weigh all testimony, whether 'medical opinion evidence' or not.")).

[14] *Ford*, ¶¶ 47-49 (citing §§ 39-71-119 and -407, MCA (1995-2011).

diagnostic evidence." Rather, Dr. Popwell based his finding entirely on Walund's subjective report of a symptom. Because Walund introduced only subjective evidence of increased symptoms, he has not introduced sufficient evidence to prove that he suffered injuries under the 1995-present WCA.[15]

¶ 38 *Second*, assuming for the sake of argument that Walund suffered injuries, he did not meet his burden of proving causation because he did not introduce medical expertise or opinion that his injuries permanently aggravated his neuropathy. This Court has explained that an insurer has ongoing liability for a preexisting condition only when the claimant's industrial injury causes a permanent worsening:

> Whether or not an injury permanently or temporarily aggravated an underlying condition involves a question of causation. If the aggravation was only temporary, i.e., the claimant returned to her preinjury condition without residual effects from the injury, then the injury had no permanent effect and did not cause or contribute to the ultimate condition. If the injury did not wholly resolve and contributed to the ultimate condition, then the insurer providing coverage for the injury is liable for that condition.[16]

¶ 39 Here, Walund did not introduce an expert medical opinion that his "attacks" permanently aggravated his neuropathy; i.e., that the "attacks" have contributed to the worsening of his neuropathy. To the contrary, Dr. Popwell testified that Walund's "attacks wouldn't cause any progression of the illness. The illness is going to progress irrespective of what Mr. Walund is doing." Dr. Popwell also testified that the present state of Walund's neuropathy has "nothing to do with Mr. Walund's occupation." Dr. Popwell opined that Walund's symptoms have worsened to the point they are at because his neuropathy was progressively getting worse. Because Walund did not introduce sufficient evidence to prove that his alleged injuries caused a permanent worsening of his neuropathy, State Fund does not have ongoing liability for it under § 39-71-407(1), MCA.[17]

¶ 40 Walund characterizes Dr. Popwell's testimony on this point as "pure speculation," and argues that it is inadmissible. However, it is evident from Dr. Popwell's testimony that he has substantial experience as a neurologist and that he is knowledgeable about the typical course of a patient with neuropathy. And, Dr. Popwell has been Walund's treating physician since 2017 and is knowledgeable about the course of Walund's neuropathy. Thus, under M.R.Evid. 702 and 703, Dr. Popwell had an adequate

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[15] *See TG*, ¶ 32 (ruling that subjective complaints of increased pain are insufficient to prove an injury). *See also Haupt v. Mont. State Fund*, 2004 MTWCC 25, ¶ 33 (noting that pain "is ultimately a subjective, personal experience.").

[16] *Darling v. Kalispell Regional Hosp.*, 1995 MTWCC 101, Conclusions of Law, ¶ 4.

[17] *See Hash v. Mont. Silversmith*, 256 Mont. 252, 255, 846 P.2d 981, 982-83 (1993) (affirming this Court's conclusion that claimant was not entitled to permanent total disability benefits because her disability was not caused by the aggravations of her preexisting condition; rather, her disability was caused by the natural progression of her preexisting condition, which was not accelerated by her aggravations).

foundation to render expert medical opinion testimony on the course of Walund's neuropathy and whether his "attacks" caused a permanent worsening. Moreover, Walund has the burden of proof but does not have another medical causation opinion.[18] Therefore, even if this Court did not consider Dr. Popwell's causation opinion, State Fund would be entitled to summary judgment because Walund does not have the required evidence to prove an element of his case.[19]

¶ 41 Walund also argues that he carried his burden of proving medical causation by introducing Dr. Popwell's opinion that he cannot return to work as a law enforcement officer because his work duties cause an increase in his symptoms. However, as the Supreme Court held in *Ford*, and as this Court indicated in *Chapman*, a claimant must prove more than that his work caused an increase in his subjective symptoms of his preexisting condition.[20] As set forth above, Walund does not have sufficient evidence to carry his burden to prove that he suffered an injury that aggravated his preexisting neuropathy under §§ 39-71-119 and -407, MCA.

¶ 42 Finally, there is no merit to Walund's claim that State Fund has admitted ongoing liability for his neuropathy via a judicial admission in its summary judgment briefing. Walund asserts that State Fund's agreement to "treat" his "attacks" as temporary aggravations is a judicial admission that he suffered injuries that aggravated his neuropathy. He reasons that because he has not returned to the level of symptoms he had before September 26, 2019, State Fund has admitted liability for his claims. However, Walund takes more from State Fund's agreement than is there; State Fund merely agreed to "treat" his "attacks" as temporary aggravations; it did not admit that the "attacks" were temporary aggravations. Moreover, even if State Fund's agreement was deemed to be a judicial admission that Walund suffered injuries that aggravated his neuropathy,[21] State Fund would not have ongoing liability for his neuropathy. When State

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[18] *Ford*, ¶ 49.

[19] *See Chapman*, ¶¶ 36-37 (holding that claimant did not prove a compensable occupational disease because she did not present a medical causation opinion). *See also Blacktail Mountain Ranch, Co. v. State, Dep't of Nat. Res. & Conservation*, 2009 MT 345, ¶ 7, 353 Mont. 149, 220 P.3d 388 (citation omitted) (stating, "Summary judgment is proper when a non-moving party fails to make a showing sufficient to establish the existence of an essential element of its case on which it bears the burden of proof at trial.").

[20] *See Ford*, ¶ 57 (explaining, "The fact that Ford had an immediate onset of symptoms following the accident . . . does not necessarily establish that the accident more probably than not caused or aggravated his cervical disc condition."); *Chapman*, ¶¶ 11, 36-37 (ruling that although claimant had increased pain and other symptoms of degenerative cervical disc disease that worsened throughout her workday, she did not meet her burden of proof because she did not offer medical opinion evidence that her work duties aggravated or exacerbated her condition).

[21] *But see Stevens v. Novartis Pharms. Corp*., 2010 MT 282, ¶ 74, 358 Mont. 474, 247 P.3d 244 (stating, "A judicial admission is not binding, however, unless it is an unequivocal statement of *fact*, as opposed to a conclusion of law or the expression of an opinion."); *In re Raymond W. George Trust*, 1999 MT 223, ¶¶ 38-41, 296 Mont. 56, 986 P.2d 427 (holding that a trust beneficiary's statement that another person had "acquired an interest in the trust property" was not a judicial admission because it was a conclusion of law and not a statement of fact.); *DeMars v. Carlstrom*, 285 Mont. 334, 338, 948 P.2d 246, 249 (1997) (holding that defendant's testimony that automobile accident was all her fault was not a judicial admission because it was either a legal conclusion, or the expression of her personal opinion).

Fund's statement is taken as a whole[22] and considered in the context of this case,[23] it did not admit that Walund's "attacks" caused ***permanent*** aggravations of his neuropathy nor concede that it had ongoing liability for Walund's neuropathy. From the beginning, State Fund has denied ongoing liability for Walund's neuropathy[24] and, after agreeing to "treat" his "attacks" as ***temporary*** aggravations, stated, "[i]t in no way acknowledges compensable injuries beyond the temporary aggravations that may be in play." Thus, while State Fund arguably admitted liability for temporary aggravations, it continued to deny liability for permanent aggravations.

¶ 43 In conclusion, Walund does not have sufficient evidence to prove his case under §§ 39-71-119 or -407, MCA. Thus, as a matter of law, State Fund is not liable for Walund's neuropathy and is entitled to summary judgment. Accordingly, this Court enters the following:

ORDER

¶ 44 Walund's Motion for Summary Judgment is **denied**.

¶ 45 State Fund's Cross-Motion for Summary Judgment is **granted**.

¶ 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 22nd day of February, 2021.

(SEAL)

/s/ DAVID M. SANDLER
JUDGE

c: Bernard J. "Ben" Everett
Charles G. Adams

Submitted: December 10, 2020

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[22] *See Ganoung v. Stiles*, 2017 MT 176, ¶ 25, 388 Mont. 152, 398 P.3d 282 ("A judicial admission is not a smorgasbord—it must be taken as a whole.").

[23] *See Bilesky v. Shopko Stores Operating Co*., LLC, 2014 MT 300, ¶ 14, 377 Mont. 58, 338 P.3d 76 (stating, "the court must still look at the entire context in which the statements were made before determining whether a statement constitutes a judicial admission.").

[24] Response to Petition for Hearing, Docket Item No. 3.