

IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause No. DA 21-0121

KENNETH WALUND,

Petitioner and Appellant,

v.

MONTANA STATE FUND,

Respondent and Appellee.

APPELLEE MONTANA STATE FUND'S ANSWER BRIEF

On Appeal from the Montana Workers' Compensation Court,
Cause No. 2020-5105
Honorable David Sandler Presiding

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TABLE OF CONTENTS

TABLE OF CONTENTS..... II

TABLE OF AUTHORITIESIII

I. STATEMENT OF THE ISSUES1

II. STATEMENT OF THE CASE1

III. STATEMENT OF THE FACTS1

IV. STANDARD OF REVIEW.....4

V. SUMMARY OF ARGUMENT4

VI. ARGUMENT.....5

A. As a Matter of Law as to Causation and Aggravation, Walund Has Failed to Establish an Injury or Aggravation. Therefore, Walund’s Motion for Summary Judgment Was Properly Denied, and the Grant of Summary Judgement to the Appellee Should be Affirmed.5

B. Walund’s Reliance on His Own Pain Complaints is Misplaced as “Perception” Does Not Rise to the Level of Objective Medical Findings Supporting an Aggravation.....9

C. Walund Erroneously Relies Upon Dr. Popwell’s Testimony in an Attempt to Argue That the “Attacks” Were Permanently Worsened by His Job Duties.10

VII. CONCLUSION.....11

CERTIFICATE OF COMPLIANCE.....12

CERTIFICATE OF SERVICE13

TABLE OF AUTHORITIES

CASES

Albert v. City of Billings,
2012 MT 159, 365 Mont. 454, 282 P.3d 7044

Flynn v. Uninsured Employers’ Fund,
2005 MT 269, 329 Mont. 122, 122 P.3d 1216.4

Ford v. Sentry Cas. Co.,
2012 MT 56, 365 Mont. 405, 282 P.3d 687 *passim*

Houts v. Kare-Mor, Inc.,
247 Mont. 65, 847 P.2d 701(1993)6, 7

TG v. Montana Schools Group Insurance Authority,
2018 MTWCC 111

STATUTES

§ 39-71-116(22), MCA7, 9

§ 39-71-407, MCA 4, 7, 8

§ 39-71-119, MCA4, 7

I. STATEMENT OF THE ISSUES

Whether the Montana Workers' Compensation Court ("WCC") correctly granted summary judgment to Respondent Montana State Fund ("State Fund") on whether State Fund was liable for an aggravation to Petitioner Kenneth Walund's ("Walund") pre-existing, idiopathic, peripheral neuropathy, a condition which dates back to at least 2017.

II. STATEMENT OF THE CASE

This matter is on appeal from the WCC's Order denying Petitioner's Motion for Summary Judgment and granting Respondent's Cross-Motion for Summary Judgment. *Walund v. Montana State Fund*, 2021 MTWCC 2 (*Order Denying Petitioner's Motion for Summary Judgment and Granting Respondent's Cross-Motion for Summary Judgment*, hereinafter "*Order*" (Doc. 24)).

III. STATEMENT OF THE FACTS

On September 26, 2019 and on January 30, 2020 Walund allegedly suffered a permanent aggravation to his pre-existing, idiopathic, peripheral neuropathy, a condition which dates back to at least 2017, while in the course and scope of his employment with Montana Department of Justice. State Fund denied liability for both workers' compensation claims filed by Walund.

Walund has filed two separate claims for his underlying neuropathic condition. On September 26, 2019 Walund claims to have suffered an occupational injury while working for the Montana Department of Justice. He described sitting in a truck for long hours conducting surveillance and developing leg and foot pain. State Fund denied liability for that claim on December 13, 2019.

On January 30, 2020 Walund claims to have suffered a second occupational injury while working for the Montana Department of Justice. Walund claims he developed leg and foot pain while driving to Billings for training. State Fund denied liability for that claim on March 6, 2020.

Walund has a history or pre-existing, idiopathic, peripheral neuropathy which was not caused by his work. (*Deposition of Richard Popwell MD, ("Popwell Dep.")* 6:13 - 7:22). Dr. Popwell treated Walund's longstanding idiopathic neuropathy for over two years prior to the alleged September 20, 2019 and January 30, 2020 injuries and continues to treat Walund for said condition.

Dr. Popwell described idiopathic neuropathy in his deposition. He testified that the "cause of the illness and its course long term with regard 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." (*Popwell Dep.* 21:1-6).

Dr. Popwell further explained that this condition is "unrelated to anyone's occupation." (*Popwell Dep.* 20:24-21:1). While acknowledging symptoms occur

relating to activities, “[i]n no way can we say that Mr. Walund's illness was caused by his occupation.” (*Id.* at 21:17-19).

Idiopathic neuropathy has an underlying process in which “small fibers” have been injured. That small fiber injury process was not worsened by Walund’s work activities. (*Popwell Dep.* 27:14-28:23). Dr. Popwell described the symptoms that Walund experienced while working as “attacks.” In discussing their significance, the testimony was as follows:

Q. And as far where Mr. Walund sits today...is there anything in the progression of the illness that is due to those, quote, “attacks”?

A. 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.

(*Popwell Dep.* 21:23-22:9).

Dr. Popwell noted no change in clinical exam following Mr. Walund’s two alleged work events on September 26, 2019 and January 30, 2020. Dr. Popwell saw Walund on February 25, 2020 and indicated he still had “altered tactile perception in his lower extremities,” and that:

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.

(*Popwell Dep.* 18:9-20).

IV. STANDARD OF REVIEW

The Montana Supreme Court reviews summary judgment orders *de novo*. *Albert v. City of Billings*, 2012 MT 159, ¶15, 365 Mont. 454, 282 P.3d 704. The Court conducts a *de novo* review of the conclusions of law to determine whether they are correct. *Flynn v. Uninsured Employers' Fund*, 2005 MT 269, ¶11, 329 Mont. 122, 122 P.3d 1216.

V. SUMMARY OF ARGUMENT

The WCC correctly concluded that Walund does not have sufficient evidence to prove his case under §§ 39-71-119 or -407, MCA and therefore, State Fund is not liable for Walund's neuropathy.

Under the controlling law (post 1995) version of the Workers Compensation Act, Walund has not established an injury or occupational disease by objective medical findings. Unquestionably, Walund has a disease process, but that disease process long pre-existed his claimed injuries and is continuing without regard to any of his work activities as established by the testimony of his treating physician, Dr. Popwell.

The lower court engaged in an extensive analysis of the case law and statutes applicable to injuries and aggravations. It turned close attention to this Court's

holding in *Ford v. Sentry Cas. Co.*, 2012 MT 56, 365 Mont. 405, 282 P.3d 687, and noted several of its own decisions rendered in the wake of *Ford*. The Court's analysis is sound. Although this matter is on *de novo* review, the lower Court's decision should be considered and adopted. The Workers' Compensation Court should be affirmed.

VI. ARGUMENT

A. As a Matter of Law as to Causation and Aggravation, Walund Has Failed to Establish an Injury or Aggravation. Therefore, Walund's Motion for Summary Judgment Was Properly Denied, and the Grant of Summary Judgment to the Appellee Should be Affirmed.

As set forth above, Walund was treating for his idiopathic peripheral neuropathy for several years before he filed his claim with a date of injury of September 26, 2019 and his second claim with a date of injury of January 30, 2020.

When Walund first went to the Community Hospital of Anaconda ER on September 27, 2019 he reported he had a history of neuropathy and that his foot had been hurting for weeks, without an injury. Walund continued to work for the Department of Justice and didn't seek treatment again until he saw Dr. Popwell on December 10, 2019. During this office visit, Dr. Popwell noted that Walund continued to suffer from the combined consequences of both idiopathic small fiber sensory polyneuropathy and restless leg syndrome.

Walund alleges that on January 30, 2020 he worked half a day at the office and then traveled to Billings for training. Upon arrival to Billings he immediately felt pain in both feet. He then returned to Dr. Popwell on February 25, 2020. Dr. Popwell notes that idiopathic neuropathy with associated chronic, moderate intensity neuropathic pain and occasional severe exacerbations remains Walund's prominent challenge.

Walund argues that because Dr. Popwell has indicated that sitting for long hours while conducting surveillance on September 28, 2019 and sitting and driving on January 30, 2020 were "attacks" of his pre-existing peripheral neuropathy, that that is sufficient to establish an injury or aggravation. What Walund ignores is that at best Dr. Popwell's testimony may establish some kind of temporary aggravation.

Dr. Popwell unequivocally testified that, Walund's work "would not change the long-term course of that medical problem." (*Popwell Dep.* 28:22-23). As well, "attacks wouldn't cause any progression of the illness." (*Popwell Dep.* 22:6-9). Clearly, there was no change in the underlying process.

In order to prevail on a claim based on an aggravation of a pre-existing condition, Walund must meet the burden of proving that there was an aggravation or acceleration of the underlying process. *Houts v. Kare-Mor, Inc.*, 247 Mont. 65, 69, 847 P.2d 701(1993).

This case is governed by the 2017 and 2019 versions of the Montana Workers' Compensation Act because they were the law in effect at the time of Walund's alleged injuries. *Ford*, 2012 MT at ¶ 32. In pertinent part the law reflects the 1995 version of the Act addressed in *Ford*.

Since *Houts* was decided, the legislature has amended the Workers Compensation Act in three relevant places, the law as it applies to this case was amended in 1995—injury definition, objective medical findings definition added, and liability for injuries and aggravations. 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. . .

Id.

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.”

Section 39-71-407, MCA (2019) provides in pertinent 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:

(i) a claimed injury has occurred; or

(ii) a claimed injury has occurred and aggravated a preexisting condition.

(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.

. . .

(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.

Id. This Court in *Ford* discussed the changes to the injury definition and other relevant changes at some length. The 1995 changes required there be "objective medical findings." *Ford*, at ¶ 44. Here that has not been established in relation to the claimed events. There were no injuries that resulted in harm including objective medical findings. *Ford* also examined changes to Section 39-71-407 MCA, relating to the requirement that objective medical findings are required to establish an injury or aggravation. The lower court examined the significance of the *Ford* decision in its order at some length in relation to the present case (*Order* ¶¶ 34-39). It and its analysis are spot on and will not be repeated fully herein.

As this Court held in *Ford* a workers' compensation claimant's burden to establish an accident, an injury or aggravation of a preexisting condition, and a causal connection between the accident and the injury/aggravation is "more probable than not." In meeting this burden, the claimant must establish injury and causation

by objective medical findings. Here, the objective medical findings supporting the claimed aggravation have not been established. *Ford*, at ¶ 67.

The *Ford* standard has not been met. Walund's condition is the same now as it would have been without the work activities at issue, or the nature of his job. Indeed, Dr. Popwell confirmed that the "small fiber injury was caused by the underlying problem, and not any work activities." (*Popwell Dep.* 28:10-15). Work did not change the long-term course of the underlying problem. (*Id.* at 28:20-23).

B. Walund's Reliance on His Own Pain Complaints is Misplaced as "Perception" Does Not Rise to the Level of Objective Medical Findings Supporting an Aggravation.

Walund argues on appeal that the lower court erred in dismissing his perception of pain as failing to meet the definition of an objective medical finding. His argument is misplaced. This Court has held that under the post-1995 law that an injury or occupational disease must be supported by "objective medical findings." *Ford*, ¶ 47. The definition found in the Workers' Compensation Act requires such a finding to be based on "medical evidence . . . or other diagnostic evidence." § 39-71-116(22), MCA.

The WCC correctly ruled that in this case the doctor's "relative objective finding" concerning Walund's "perception" in the context of this case did not meet the definition. "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.” (*Order*, ¶ 37). Perception is by its nature subjective.

This holding is consistent with a body of law that has developed in the wake of this Court’s holding in *Ford*. Some of the WCC’s decisions are noted in its order in this case, including, *TG v. Montana Schools Group Insurance Authority*, 2018 MTWCC 1 (subjective complaints of pain insufficient to establish injury) and others referenced, citations omitted. (*Order*, ¶ 30, n 6).

Moreover, the WCC found no evidence to suggest that even if Walund suffered “injuries,” that there was nothing to support that they aggravated his neuropathy. (*Order*, ¶ 38). Dr. Popwell testified that the “attacks wouldn’t cause any progression of the illness. The illness is going to progress irrespective of what Mr. Walund is doing.” (*Popwell Dep.* 22:6-9).

C. Walund Erroneously Relies Upon Dr. Popwell’s Testimony in an Attempt to Argue That the “Attacks” Were Permanently Worsened by His Job Duties.

The testimony of Dr. Popwell is clear in that Walund’s disease process is going to progress regardless of activities. The suggestion in Walund’s opening brief that the “attacks” permanently aggravated the neuropathy are misplaced. A clear reading of Dr. Popwell's testimony proves otherwise. Walund’s reliance upon a July 9, 2020 letter is misplaced as well because it is not a supported proposition that the

attacks permanently aggravated the neuropathy. Finding it advisable to retire from one's job due to a disease process affecting one's ability to do that job is a far cry from the job causing the disease.

VII. CONCLUSION

For the reasons set forth herein, State Fund urges this Court to affirm the WCC's Orders denying Petitioner's Motion for Summary Judgment and granting Respondent's Cross-Motion for Summary Judgment.

RESPECTFULLY SUBMITTED this 16th day of July, 2021.

By: /s/ Charles G. Adams
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellant Procedure, I certify that the MONTANA STATE FUND'S RESPONSE BRIEF is printed with proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word is 2,287 excluding Table of Contents, Table of Authorities, Certificate of Compliance, Appendix and Certificate of Service.

DATED this 16th day of July, 2021.

By: /s/ Charles G. Adams
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CERTIFICATE OF SERVICE

I hereby certify that I have filed a true and accurate copy of the foregoing **APPELLEE MONTANA STATE FUND’S ANSWER BRIEF** with the Clerk of the Montana Supreme Court; and that I have also served true and accurate copies of the foregoing upon the following via U.S. Mail, postage pre-paid and addressed as follows:

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