IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2009 MTWCC 11

WCC No. 2008-2076

ALAN DISTAD

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Appealed to the Montana Supreme Court May 8, 2009
Dismissed With Prejudice 06/26/09

Summary: Petitioner contends he has ongoing back problems from a September 2004 industrial accident, and that the settlement he entered into with Respondent should be set aside based on a mutual mistake of fact. Respondent contends that no causal connection exists between Petitioner's industrial accident and his current back pain.

Held: Petitioner has not proven that his back problems were caused or aggravated by his September 2004 industrial accident. Since he has not proven a causal connection between his back pain and his settled claim, he has not proven that the parties were mutually mistaken as to any material fact, and he is, therefore, not entitled to have the settlement reopened.

Topics:

> **Settlements: Reopening: Mistake of Fact.** In order to have a settlement agreement set aside on the basis of mutual mistake of fact, the claimant must first establish that a mutually mistaken fact exists. Therefore, where Petitioner alleged that his back condition was mistakenly left out of a settlement agreement, Petitioner must first prove that his back condition was caused or aggravated by the industrial accident at issue. Since Petitioner has not proven the underlying causation issue, he has not proven that a mutual mistake of fact exists.

Proof: Burden of Proof: Preponderance. Petitioner did not meet his burden of proving that his back condition was caused or aggravated by his industrial accident where the only evidence presented to the Court in support of his contention consists of a scant few mentions of back pain in post-accident medical records; incomplete medical records; and an IME report where the physician opined that the back condition was not caused or aggravated by the industrial accident.

¶ 1 The trial in this matter was held on October 20, 2008, in the Workers' Compensation Court, Helena, Montana. Petitioner Alan Distad was present and participated pro sé. Respondent was represented by Thomas E. Martello. Jeannie Davis, Respondent's claims examiner, was also present.

¶ 2 Exhibits: Exhibits 1 through 64 were admitted without objection.

¶ 3 Witnesses and Depositions: Petitioner was sworn and testified at trial. No depositions were submitted.

¶ 4 Issues Presented: The Pretrial Order states the following contested issues of law:[1]

¶ 4a Is Petitioner entitled to reopening his settlement based upon a mutual mistake of fact?

¶ 4b Is Petitioner entitled to $2,469,367.00?

¶ 4c Is Petitioner entitled to a penalty against Respondent?

At the opening of trial, Petitioner moved to strike paragraphs b, c, and d of his contentions and paragraph b – ¶ 4b, above – of the issues to be determined in the Pretrial Order. Respondent had no objection and I granted Petitioner's motion. The Pretrial Order was so modified, was signed, and controlled the course of the trial.[2]

[1] Pretrial Order at 2-3.

[2] Minute Book Hearing No. 3995.

FINDINGS OF FACT

¶ 5 On September 16, 2004, Petitioner suffered an industrial injury arising from his employment with Jones Construction in Yellowstone County, Montana. At the time of Petitioner's injury, Jones Construction was insured by Respondent.[3]

¶ 6 Petitioner signed the First Report of injury on September 23, 2004. It identifies the cause of his injury as a blow to the face, neck, and shoulder, affecting his left cheek, neck, and shoulder. The accident description states that Petitioner was struck on the left cheek and shoulder by a long piece of angle iron, which caused him to fall and lose consciousness for approximately two minutes.[4]

¶ 7 In May 2006 Petitioner settled his workers' compensation claim, closing indemnity and rehabilitation benefits and reserving medical and hospital benefits.[5]

Petitioner's Testimony

¶ 8 Petitioner testified at trial and I found him to be a credible witness. Petitioner stated that in the fall of 2007, he made an appointment at the Deaconess Billings Clinic to have a doctor examine his back. At the clinic, he was informed that his back was not covered by workers' compensation and that he would be liable for the cost of the medical treatment. Petitioner believes that a mistake was made regarding the settlement of his September 2004 workers' compensation claim because he has been prone to back sprains ever since his industrial accident. Petitioner testified that he has sprained his back on multiple occasions, and that these sprains have occurred from performing such activities as minor household chores. Petitioner believes that these back sprains would not occur were it not for the industrial injury he suffered in September 2004.[6]

¶ 9 Petitioner explained that, at the suggestion of a friend, he has maintained a journal of his physical ailments since the time of his industrial injury forward. Among other physical ailments he has suffered, Petitioner has noted back strains on multiple occasions since September 2004. Petitioner explained that he had injured his back in a work-related incident in March or April of 2001, and that the injury healed from his walking and exercise

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[3] Pretrial Order, Statement of Uncontested Facts at 1.

[4] Ex. 14.

[5] Pretrial Order, Statement of Uncontested Facts at 1.

[6] Trial Test.

program. Once his back healed, Petitioner returned to work and had no more back problems until after the September 2004 industrial injury.[7]

¶ 10 Petitioner believes his back was not included in the settlement agreement by mistake and that his back condition should be covered by his workers' compensation benefits. Petitioner stated that when he signed the settlement agreement, he understood that it would cover all the physical ailments he had which related to his industrial injury, and that this should have included his back problems.[8]

¶ 11 Petitioner acknowledged that his First Report of injury for his September 2004 industrial injury does not mention a back injury. Petitioner also admitted that he has at times attributed his back condition to other specific incidents, including lifting an air conditioner, overdoing weight-lifting, and getting hit in the back with an unidentified projectile which left a significant welt. Petitioner also conceded that he did not ever complain about any back problems to Steven R. Fischer, M.D., who treated Petitioner for his shoulder condition, until he scheduled the October 2007 appointment and was informed the appointment would not be covered by workers' compensation.[9]

Medical Evidence

¶ 12 Most of the medical records which were submitted as exhibits in this case deal only with Petitioner's post-industrial-accident shoulder condition and do not mention any back complaints. Accordingly, these are not detailed within these Findings. The medical records that reference Petitioner's complaints of back pain are set forth below.

¶ 13 Petitioner was first seen by Peter J. Light, M.D., in the emergency room at the Deaconess Billings Clinic on September 16, 2004. In his report, Dr. Light specifically noted that Petitioner denied any back pain at the time of his initial examination.[10] However, a September 30, 2004, follow-up report by PA-C David Johnson at the Deaconess Billings Clinic notes that, along with his more serious shoulder complaints, Petitioner also reported

[7] Trial Test.

[8] Trial Test.

[9] Trial Test.

[10] Ex. 45.

some pain in his right low back.[11] After a physical examination, Johnson diagnosed him with a mild thoracic back strain.[12]

¶ 14 Ronald K. Handlos, PA-C, treated Petitioner on November 3, 2004, at the Deaconess Billings Clinic. Handlos noted that Petitioner's chief complaint was, "Pain left shoulder, right low back and neck." Handlos noted Petitioner's September 2004 industrial accident in the history of the report and, along with shoulder injuries, diagnosed Petitioner with a mild thoracic back sprain.[13]

¶ 15 Petitioner was seen at the Deaconess Billings Clinic on December 7, 2004, complaining of "Left shoulder pain, right low back pain and neck pain; and multiple soft tissue injuries." Only the first page of this three-page report was provided to the Court as an exhibit, however, and I do not know whether a physical examination occurred, nor what diagnosis was made.[14]

¶ 16 Petitioner was again seen at the Deaconess Billings Clinic on January 4, 2005, complaining of "Left shoulder pain, right low back pain and neck pain, and multiple soft tissue injuries." Only the first page of this five-page report was provided to the Court as an exhibit, however, and I do not know whether a physical examination occurred, nor what diagnosis was made.[15]

¶ 17 An emergency room report from October 31, 2005, states that Petitioner came to the emergency room for treatment of back pain that came on suddenly as he was leaning over, reaching for a shirt. The report notes that he was off work recovering from his work-related shoulder injury. Petitioner's back pain was diagnosed as a musculoskeletal strain.[16]

¶ 18 On January 18, 2006, Patrick J. Cahill, M.D., saw Petitioner at the request of Dr. Fischer. Dr. Cahill noted that Petitioner complained of upper back pain, which seemed to be connected to Petitioner's then-ongoing recovery from shoulder surgery. No mid- or lower-back pain was noted.[17]

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[11] Ex. 8.

[12] Ex. 9.

[13] Ex. 5.

[14] Ex. 11

[15] Ex. 10.

[16] Ex. 7.

[17] Ex. 44 at 1-2.

¶ 19 On January 15, 2008, Lawrence Splitter, D.O., performed an independent medical examination (IME) to investigate Petitioner's back complaints at Respondent's request. In his IME report, Dr. Splitter reports that Petitioner complained of thoracic and lumbar pain that is present approximately 90% of the time, with occasional neck pain. Petitioner informed Dr. Splitter that he believes his back problems are work-related, and stated that he injured his back twice prior to the September 2004 industrial accident, and reinjured his back on that date. Petitioner added that sometimes his back becomes aggravated from simply twisting or turning, and that he has attempted to alleviate his back problems through exercise and staying in good physical condition. However, Petitioner continues to suffer from frequent back pain.[18]

¶ 20 Dr. Splitter reviewed Petitioner's medical records. He noted a lack of complaints of thoracic or low-back pain in the months immediately following Petitioner's industrial accident.[19] The first significant mention of back pain that Dr. Splitter notes is the October 31, 2005, emergency room report.[20] Dr. Splitter performed a physical examination of Petitioner and found that he had a full range of motion in his cervical spine without pain. Petitioner had a full range of motion in his thoracic spine with tenderness to palpation. Petitioner's lumbar spine had generalized tenderness without obvious somatic abnormalities. Dr. Splitter noted, "Range of motion was full. Straight leg raising was negative in the seated and supine position, FABERE was negative bilaterally. He did have pain with Waddell's testing with axial loading and simulated rotation."[21] Dr. Splitter assessed Petitioner as having chronic thoracic and low-back pain.[22]

¶ 21 Dr. Splitter ordered radiographs of Petitioner's thoracic and lumbar spine, which were taken on January 15, 2008. The radiology report states that Petitioner has mild S-shaped scoliosis with mild degenerative changes in his thoracic spine, and an unremarkable lumbar spine.[23]

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[18] Ex. 43 at 1 and 10.

[19] Ex. 43 at 4-10.

[20] Ex. 43 at 9.

[21] Ex. 43 at 2.

[22] Ex. 43 at 3.

[23] Ex. 62.

¶ 22 In response to questions from Respondent, Dr. Splitter opined that Petitioner's present back complaints were not related to his September 2004 industrial injury, and that his reported aggravations were not related to the industrial injury.[24]

¶ 23 On May 13, 2008, Petitioner was seen by Dr. Fischer, who diagnosed him as having a low-back strain and released him to return to work with a 30-pound lifting restriction and instructions to minimize twisting, bending neck and low back, and to limit repetitive lifting.[25] Dr. Fischer's report does not attribute a cause to Petitioner's back strain.

CONCLUSIONS OF LAW

¶ 24 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.[26]

¶ 25 Petitioner bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks.[27] In the present case, he seeks to set aside the settlement agreement he entered into with Respondent on the grounds that the parties were mistaken as to the condition of Petitioner's back. Petitioner argues that he suffered a back injury as a result of his September 2004 industrial accident, and that this back injury should be covered by his medical and hospital benefits that were specifically reserved when he settled his claim. Since Respondent has refused to pay for his back treatment, Petitioner seeks to rescind the settlement.

¶ 26 A settlement agreement must be set aside if, when the parties entered into it, they were mutually mistaken regarding a fact that was material to the agreement.[28] Petitioner argues that the parties were mutually mistaken as to the condition of his back when they settled his workers' compensation claim. However, Respondent argues that Petitioner has not proven that his back condition was caused by his industrial accident.

¶ 27 In order to have the settlement agreement set aside on the basis of mutual mistake of fact, Petitioner first must establish that there was, in fact, a material, mutually mistaken fact – specifically that Petitioner has a back condition which was caused by his September

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[24] Ex. 43 at 3.

[25] Ex. 12.

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

[27] *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).

[28] *Gamble v. Sears*, 2007 MT 131, ¶ 26, 337 Mont. 354, 160 P.3d 537 (citations omitted).

2004 industrial accident. Causation is an essential element to an entitlement to benefits and a claimant has the burden of proving a causal connection by a preponderance of the evidence.[29] Under § 39-71-407(2)(a), MCA, an insurer is liable for an injury if it is established by objective medical findings and if the claimant establishes that it is more probable than not that the claimed injury occurred, or that the claimed injury aggravated a preexisting condition.

¶ 28 I conclude that Petitioner has failed to meet his burden of proof in this case as he has not established that it is more probable than not that his back condition was caused by his September 2004 industrial accident. The medical evidence in support of Petitioner's contention are a scant few mentions of back pain after the industrial accident. Petitioner admitted that he had similar back pain which preexisted the September 2004 incident, and the most direct medical evidence is the IME report of Dr. Splitter, who opined that Petitioner's back pain was neither caused nor aggravated by his September 2004 industrial accident. Since Petitioner has failed to prove the underlying causation issue, Petitioner has not proven that a mutual mistake of fact exists regarding the settlement of his workers' compensation claim. His request to reopen the settlement is therefore denied.

¶ 29 Since Petitioner has not prevailed in his claim, he is not entitled to a penalty under § 39-71-2907, MCA.

JUDGMENT

¶ 30 Petitioner is not entitled to reopen his settlement based upon a mutual mistake of fact.

¶ 31 Petitioner is not entitled to a penalty.

¶ 32 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.

¶ 33 Any party to this dispute may have twenty days in which to request reconsideration from these Findings of Fact, Conclusions of Law and Judgment.

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[29] *Grenz v. Fire and Cas. of Connecticut*, 250 Mont. 373, 380, 820 P.2d 742, 746 (1991)(citations omitted).

DATED in Helena, Montana, this 20th day of March, 2009.

(SEAL)

JAMES JEREMIAH SHEA
JUDGE

c: Alan Distad
Thomas E. Martello
Submitted: October 20, 2008