

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2009 MTWCC 16

WCC No. 2008-2076

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ALAN DISTAD

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

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ORDER DENYING RECONSIDERATION

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

**Summary:** Petitioner moves for reconsideration of this Court's March 20, 2009, Findings of Fact, Conclusions of Law and Judgment in which this Court concluded that Petitioner is not entitled to reopen his settlement based upon a mutual mistake of fact and that Petitioner is not entitled to a penalty. Respondent Montana State Fund objects to Petitioner's motion.

**Held:** Although Petitioner sets forth three allegations which he argues entitle him to reconsideration, none of these allegations affect my conclusion that Petitioner did not meet his burden of proof regarding the cause of his back condition. Petitioner's motion for reconsideration is therefore denied.

¶ 1 Pursuant to ARM 24.5.337, Petitioner Alan Distad moves this Court for reconsideration of its March 20, 2009, Findings of Fact, Conclusions of Law and Judgment<sup>1</sup> in which this Court concluded that Petitioner is not entitled to reopen his settlement based

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<sup>1</sup> *Distad v. Montana State Fund*, 2009 MTWCC 11.

upon a mutual mistake of fact and that Petitioner is not entitled to a penalty.<sup>2</sup> Respondent Montana State Fund objects to Petitioner's motion.<sup>3</sup>

¶ 2 Petitioner sets forth three allegations which he argues entitle him to reconsideration: (1) that he submitted into evidence a September 30, 2004, journal entry in which he noted that Respondent paid for x-rays of his right low back taken by PA-C David Johnson and the Billings Clinic; (2) that Johnson noted in his medical records that he contacted Petitioner's employer to review the examination findings; and (3) that Petitioner should not have to be responsible for processing his own workers' compensation claim.

¶ 3 Respondent responds that Petitioner's allegations, even if taken as true, do not support reconsideration of this Court's decision. Respondent points out that the Court found Petitioner did not meet his burden of proof in establishing that his back condition was caused by his September 2004 industrial accident, and that the allegations Petitioner raises in his motion for reconsideration do not cause Petitioner to meet that burden. Respondent argues that, without proving the underlying causation issue, Petitioner has no basis for alleging a mutual mistake of material fact which would be necessary to reopen his settlement.

¶ 4 As to Petitioner's allegations regarding PA-C Johnson, in the findings of the underlying decision,<sup>4</sup> I noted, "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 some pain in his right low back.<sup>5</sup> After a physical examination, Johnson diagnosed him with a mild thoracic back strain."<sup>6</sup> In those findings, I noted other medical records which also referenced Petitioner's right low-back pain.<sup>7</sup> However, I ultimately concluded that, while Petitioner may have suffered from low-back pain, he had failed to prove that his right low-back condition was caused by his September 2004 industrial accident.<sup>8</sup>

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<sup>2</sup> Reason for Reconsideration, Docket Item No. 15.

<sup>3</sup> Montana State Fund's Response to Petitioner's Request for Reconsideration, Docket Item No. 16.

<sup>4</sup> *Distad*, ¶ 13.

<sup>5</sup> Ex. 8.

<sup>6</sup> Ex. 9.

<sup>7</sup> See, e.g., *Distad*, ¶¶ 14-17.

<sup>8</sup> *Distad*, ¶ 28.

¶ 5 The allegations raised by Petitioner in his motion for reconsideration do not change the fact that I concluded he did not meet his burden of proof regarding the cause of his back condition. Petitioner's motion for reconsideration is therefore denied.

ORDER

¶ 6 Petitioner's motion for reconsideration is **DENIED**.

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

DATED in Helena, Montana, this 30<sup>th</sup> day of April, 2009.

(SEAL)

/s/ JAMES JEREMIAH SHEA  
JUDGE

c: Alan Distad  
Thomas E. Martello  
Submitted: March 31, 2009