

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2005 MTWCC 31

WCC No. 2004-1129

DAN FRAZER

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

FILED

JUN - 6 2005

OFFICE OF
WORKERS' COMPENSATION JUDGE
HELENA, MONTANA

ORDER REGARDING FURTHER PROCEEDINGS

¶1 The petition herein requests the Court to set aside a disputed liability settlement the petitioner entered into with respect to an alleged February 9, 2001 industrial injury. The specific ground cited by the petitioner for reopening the settlement is "mutual mistake of fact." (Second to last sentence of ¶ 3, Petition for Hearing.)

¶2 The facts giving rise to the request to reopen are set forth in a single paragraph of the petition. That paragraph alleges:

A dispute exists between the parties. When Mr. Frazer filed his claim in April of 2001 it was denied pursuant to Mont. Code Ann. § 39-71-603 (1999) because Mr. Frazer had allegedly failed to notify his employer within 30 days of his injury. Believing he had no alternative and without counsel, on May 31, 2001, Mr. Frazer settled his claim on a disputed liability basis for \$8,500.00. Subsequently, after developing serious medical complications and spending thousands of dollars on medical care, Mr. Frazer sought counsel. In October of 2003, he contacted an attorney to see if there was anything that could be done to revisit his workers' compensation claim. His attorney obtained two affidavits from Mr. Frazer's co-workers indicating that he had reported his injury in February of 2001 to his employer. Mr. Frazer made a request to reopen his claim and the State Fund denied his request. Mr. Frazer seeks to reopen his claim based upon the mutual mistake of the

parties to his settlement. Neither State Fund nor the claimant was aware that the employer had been properly notified of the injury.

(Petition for Hearing, ¶ 3.)

¶3 The respondent moved for summary judgment. (Motion for Summary Judgment and Supporting Brief.) In doing so, it relied on facts set forth in a "Combined Motion and Brief to Reopen Claim" which had been sent by the petitioner to the Court on September 9, 2004. That document, however, was returned to the petitioner since no petition had been filed as of that date.¹

¶4 In his response to the motion for summary judgment, the petitioner urged that he entered into the settlement as a result of the claims adjuster's "overreaching and undue influence" and misleading statements. His argument in opposition to the motion was set out in a single paragraph,² which states as follows:

As additional response to Respondent's Motion For Summary Judgment and reply thereto, Petitioner takes issue with Respondent's argument. Respondent basically takes the position that there is no mutual mistake of fact because Petitioner contends he had knowledge that he verbally notified the boss of his injury within 30 days. Mr. Frazer was led to believe that he had not verbally notified his boss of this injury within the 30 day period and that the boss had no knowledge of this matter and therefore the matter would not be accepted. There was, in fact, overreaching and undue influence by the adjuster for the workers' compensation insurer in suggesting the same to the Petitioner under the circumstances. Also the conflict and positions taken by the Respondent's adjuster led Petitioner to believe that he had no choice but to resolve his worker's compensation claim on a disputed basis. This was also stated in the Petition and in footnote 1 on page 2 of the Petitioner's Combined Motion And Brief To Reopen Claim.

(Petitioner's Brief in Opposition to Motion for Summary Judgment, ¶ 2.)

¹Petitioner filed his present petition on September 16, 2004.

²The Petitioner's Brief in Opposition to Motion for Summary Judgment has three paragraphs. The first paragraph is introductory and simply accepts the statement of facts set out in the motion for summary judgment. The third paragraph requests the Court to deny the motion.

¶5 Because the Court did not have the document on which the respondent relied in moving for summary judgment, and because the petitioner's brief in opposition to the motion raised a question as to whether the petitioner "intended to allege some sort of fraud or duress in connection with his settlement," on February 15, 2005, I held a telephone conference with counsel. (February 15, 2005 Minute Entry, ¶ 2.) After discussion, I entered an oral order. The order was as follows:

Mr. Pyfer [petitioner's attorney] will file an amended petition within one week. Mr. Martello [respondent's attorney] will have two weeks thereafter to file an amended response and an amended motion for summary judgment. The Combined Motion and Brief to Reopen Claim will have to be provided to the Court at that time if I am to rely upon it.

I asked counsel to address whether a disputed liability settlement can be reopened based on mutual mistake of fact.

(February 15, 2005 Minute Entry, ¶¶ 4, 5.)

¶6 The oral order was confirmed by written order filed February 15, 2005. That order was as follows:

¶2 IT IS HEREBY ORDERED that petitioner file an amended petition by February 22, 2005, if he wishes to add fraud or duress allegations, or some similar ground, to his request to reopen the settlement.

¶3 IT IS FURTHER ORDERED that respondent shall file an amended response and any amended motion for summary judgment, along with supporting affidavits and brief, by March 8, 2005. The time for filing answer and responsive briefs shall be as provided by the Rules of this Court.

(Order Regarding Amended Petition and Amended Motion for Summary Judgment.)

¶7 On February 23, 2005, the Court received and filed the petitioner's Amended Petition for Hearing. In the amended petition, he added the following allegations regarding fraud and duress:

Mr. Frazer was led to believe by the Montana State Fund that his claim was untimely. This representation was not accurate. At the time he was not represented by an attorney and duress arising from the process and discussions with the adjuster led him to believe that he would not be able to receive coverage. Furthermore, both sides were operating under a medical mistake of fact about this condition and the potential for extreme problems

that could develop. There was no diagnosis or suggestion by medical people at the time of the disputed settlement that he could potentially develop a vascular necrosis as a result of the medical condition and incur expenses in excess of \$60,000 for hip replacements due to this condition.

(Amended Petition for Hearing, ¶ 4.)

¶8 As can be seen from the above, the allegations regarding fraud and duress were sparse and vague. Not surprisingly, on March 3, 2005, the respondent filed a Motion for More Definite Statement. The petitioner failed to respond to the motion within the time provided and on March 28, 2005, I entered an Order Granting Motion for More Definite Statement and Vacating Trial. I ordered as follows:

¶6 The petitioner is **ordered** to file a More Definite Statement specifying the specific acts and circumstances which he alleges constitute duress or fraud. Such statement shall be filed by April 6, 2005. Failure to file adequate particulars by that date shall result in the Court striking and barring any claim based on fraud and/or duress.

¶7 **IT IS FURTHER ORDERED** that the respondent shall have until April 20, 2005, in which to file a response to the Amended Petition for Hearing and the More Definite Statement, as well as any amended motion for summary judgment, supporting affidavit, and brief.

¶8 **FINALLY, IT IS ORDERED** that the trial setting in this matter is **vacated** and the matter be set over to the next regular term of Court in Helena. A new scheduling order shall issue.

(Order Granting Motion for More Definite Statement and Vacating Trial at 2.)

¶9 The April 6, 2005 deadline for filing the more definite statement passed; nothing was filed on that date or for a full two weeks thereafter. Finally, on April 20, 2005, the petitioner filed a Response to Motion for More Definite Statement in which he set forth additional allegations.

¶10 The respondent then filed a Reply to Motion for More Definite Statement. In that reply, it noted that the more definite statement was two weeks late and asked the Court to deny any of the petitioner's "attempts to add or modify the original Petition for Hearing . . ." (Reply to Motion For More Definite Statement at 1.) In effect, it requested that I strike the fraud and duress allegations of the amended petition on account of the petitioner's failure to file a more definite statement in a timely manner. The respondent also attacked

the sufficiency of the allegations in the Response to Motion for More Definite Statement, in effect moving to dismiss the fraud and duress allegations for failure to state a claim.

¶11 Following the respondent's motion, the petitioner filed an affidavit stating that he misread the Court's Order and mistakenly believed that April 20, 2005, was the deadline for filing his more definite statement. He also stated that "he contacted counsel for the State Fund Tom Martello, and Mr. Martello agreed to waive his untimeliness argument under the circumstances."

¶12 That is the state of affairs as they exist at this moment.

Discussion

¶13 The parties do not dispute that the claim in this matter was denied based on the alleged failure of the petitioner to report his alleged industrial accident to his employer within thirty days, as required by section 39-71-603, MCA (1999), and that following the denial of liability the claim was settled for \$8,500 on a disputed liability basis. The gist of the more definite statement provided by the petitioner is that the employer falsely reported that he did not receive notice of the industrial accident within thirty days. The petitioner further states that he settled his claim because of financial pressures due to medical costs.

¶14 As already noted, implicit in the respondent's Reply to Motion for More Definite Statement is a motion to dismiss the fraud and duress claim as failing to state a claim. While the respondent has cited case law governing duress, it has not fully addressed the claimant's fraud allegation. That allegation raises several threshold issues. The first is whether a false report of the employer can be imputed to the insurer for purposes of reopening a settlement. Second, even if an employer's false report concerning lack of notice can be attributed to the insurer, can the claimant establish fraud as a basis for reopening when he had personal knowledge of whether and when he reported an injury in a timely fashion? Third, is a disputed liability settlement subject to reopening on grounds of either fraud or duress? These matters require further briefing.

¶15 In addition, the motion for summary judgment is still outstanding because the Court does not have the Combined Motion and Brief to Reopen Claim which was the basis of the respondent's original motion.

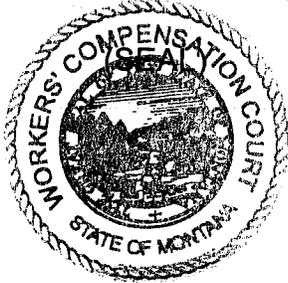
ORDER

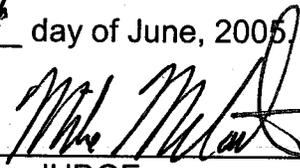
¶16 The petitioner shall provide the Court with the original Combined Motion and Brief to Reopen Claim if it is available; otherwise he shall provide the Court with a true and accurate copy of the document. He shall do so by **June 13, 2005**. If he has neither the

original nor a copy, he shall notify the respondent's counsel of such fact no later than **June 10, 2005**, so that respondent can provide a copy.

¶17 It is further ordered that both parties shall have until **June 14, 2005**, in which to file supplemental briefs respecting the respondent's motion for summary judgment and its implicit motion to dismiss the fraud and duress allegation for failure to state claims. Those matters will then be deemed submitted. No further briefing will be permitted.

DATED in Helena, Montana, this 6th day of June, 2005





JUDGE

c: Mr. Richard J. Pyfer (U.S. Mail and E-Mail)
Mr. Thomas E. Martello (U.S. Mail and E-Mail)
Attachment: Response to Motion for More Definite Statement

Richard J. Pyfer
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Attorney for Petitioner

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OFFICE OF
WORKERS' COMPENSATION JUDGE
HELENA, MONTANA

IN THE WORKERS' COMPENSATION COURT
OF THE STATE OF MONTANA

| | | |
|---------------------|---|-------------------------|
| DAN FRAZER, |) | WCC No. 2004-1129 |
| |) | |
| Petitioner, |) | |
| |) | RESPONSE TO MOTION FOR |
| vs. |) | MORE DEFINITE STATEMENT |
| |) | |
| MONTANA STATE FUND, |) | |
| |) | |
| Respondent. |) | |

Defendant requests a more definite statement in regard to the claim made in the Amended Complaint and Plaintiff's "More Definite Statement" of the allegations of Petitioner. Petitioner has no objection to further delineating his position with regard to the Amended Complaint herein. The Respondent has requested a more definite statement regarding representations and inaccuracies by the insurer.

Petitioner therefore alleges and states, as further clarification of his petition, that Respondent insured and represented Ted Williams, the employer. Ted Williams falsified his reporting by misrepresenting that Mr. Frazer had not notified him when he had in fact been taken off work and sent for medical care as a result of the injury that he sustained on-the-job. Mr. Williams, the employer, paid for the visit to the doctor. And, the secretary was not allowed to give Petitioner a work injury form.

Mr. Frazier specifies that representations by the State Fund to him regarding the requirement to settle this claim were made at a time when he needed immediate, expensive treatment leading to surgery. And petitioner did not have sufficient funds to take care of that surgery, and was told that this was all he would receive because he had not reported the claim.

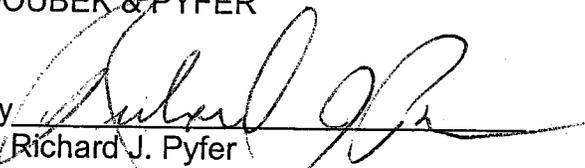
This all happened shortly after the claim was made and he was under tremendous duress and tension and anxiety over this situation and needed medical care. His own medical insurance had a \$2,000 deductible and he had a 50/50 co-pay thereafter. He did not have the means to take care of this imminent physical care and need without accepting the representations made by the State Fund. The representative, in particular Katie Herrera, was the person who told him words to the affect that she was doing him a favor by providing him any money towards this claim since his claim had not been timely filed.

The State Fund representative, Ms. Herrera, at the time was acting on behalf of the employer as the insurance company for the employer and the employer was misrepresenting to her the facts regarding the injury. She had the opportunity to investigate the claim and confirm or deny the authenticity of the employer's statements. The employer knew that this injury was sustained on-the-job and the insurance company did not talk adequately to or tell the Petitioner that they could investigate further the relatedness of this injury to the work place.

Ms. Herrera failed and refused to conduct further investigation and said the only amount that would be paid was this disputed \$8,500.00. This duress was based on false information which was not properly investigated and the pressing medical needs noted above.

DATED this 20th day of April, 2005.

DOUBEK & PYFER

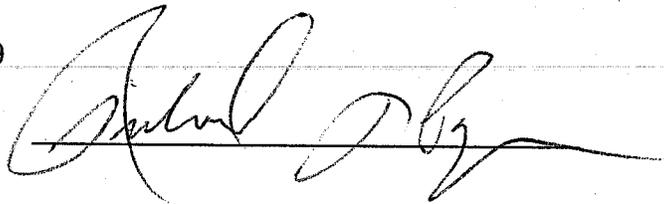
By 

Richard J. Pyfer
Attorney for Petitioner
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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of April, 2005, I served a true and correct copy of the foregoing upon opposing counsel by inserting a copy of the same in a stamped envelope and depositing it in the United States Post Office at Helena, Montana, addressed as follows:

Tom Martello
Montana State Fund
P.O. Box 4759
Helena, MT 59604-4759

A handwritten signature in black ink, appearing to read 'Tom Martello', is written over a horizontal line. The signature is cursive and extends to the right of the line.