IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2013 MTWCC 11

WCC No. 2011-2736

TOM GRIFFIN

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORP.

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Petitioner contends that he is entitled to reopen a settlement he entered into with Respondent. He further argues that Respondent is liable for the payment of certain medical bills. Respondent responds that the parties entered into a valid settlement agreement which closed Petitioner's medical benefits and that Petitioner has no grounds for reopening the settlement agreement.

Held: Petitioner has not proven that he is entitled to reopen his settlement nor that he was coerced into entering into the settlement. Since the parties agreed to close Petitioner's entitlement to medical benefits as part of the settlement terms, Respondent is not liable for the payment of medical bills which were incurred from treatment which occurred after the date of settlement.

Topics:

> **Credibility.** The Court found the claimant not to be a credible witness where he failed to answer questions in a straightforward manner, misrepresented a crucial date until it became clear that indisputable records would demonstrate otherwise, and claimed that he had personally paid for a medical procedure which had in fact been paid for by another insurer. In finding the claimant non-credible, the Court further noted that his testimony regarding a previous settlement agreement was "contradictory and wholly incredible" in that his alleged lack of understanding as to the consequences of settling his claim was incredible in light of his later actions regarding two other settlements.

Settlements: Reopening: Mistake of Fact. Where Petitioner did not prove by a preponderance of the evidence that he had not reached MMI for his industrial injury, the Court concluded that it could not find the "fact" that Petitioner was not at MMI to be a mutual mistake of fact invalidating Petitioner's settlement.

Settlements: Generally. Although Petitioner testified, unconvincingly, that he did not understand that he was settling his entitlement to medical benefits when he entered into the settlement agreement at issue, Petitioner admitted that he "took [Respondent's] money" while represented by counsel. Petitioner cannot agree to settle, accept consideration for closing his medical benefits, and then demand that Respondent continue to pay for additional medical benefits. Respondent is not liable for medical treatment which occurred after the parties closed Petitioner's entitlement to medical benefits via settlement agreement.

Settlements: Medical Benefits. Although Petitioner testified, unconvincingly, that he did not understand that he was settling his entitlement to medical benefits when he entered into the settlement agreement at issue, Petitioner admitted that he "took [Respondent's] money" while represented by counsel. Petitioner cannot agree to settle, accept consideration for closing his medical benefits, and then demand that Respondent continue to pay for additional medical benefits. Respondent is not liable for medical treatment which occurred after the parties closed Petitioner's entitlement to medical benefits via settlement agreement.

¶ 1 The trial in this matter began on September 26, 2012, at Charles Fisher Court Reporting in Billings. Petitioner Tom Griffin attended and represented himself. Michael P. Heringer represented Respondent Liberty Northwest Insurance Corp. (Liberty).

¶ 2 Trial continued on January 18, 2013, at Charles Fisher Court Reporting in Billings. Griffin attended and represented himself. Heringer represented Liberty.

¶ 3 Exhibits: I admitted Exhibit 82 on December 13, 2012, when Liberty offered it during Richard Martin's deposition.[1] On January 18, 2013, I admitted Exhibit 88 without

[1] At trial, I noted that the exhibits attached to Martin's deposition would also be subject to my ruling regarding the parties' post-trial opportunity to review Martin's deposition. Neither party objected to the exhibits and they are therefore admitted with Martin's deposition on February 1, 2013.

objection. I admitted Exhibits 1, 3, 11, 12, 16, 19, 20, 25 through 43, 48, 50, 56 through 59, 62, 63, 65, 68, 71, 73, and pages 1, 2, and 4 of Exhibit 87 over Griffin's objections. I admitted Exhibits 14, 15, 17, 18, 24, 47, 49, 55, 60, 61, 64, 66, 67, 69, and 80 after Griffin withdrew his objections to those exhibits. The parties did not move to admit Exhibits 2, 4 through 10, 13, 21 through 23, 44 through 46, 51 through 54, 70, 72, 74 through 79, 81, 83 through 86, and page 3 of Exhibit 87. Although the Court has retained these exhibits in the exhibit binder, they will not be considered by the Court in issuing this decision.

¶ 4 Witnesses and Depositions: The parties submitted two depositions of Griffin, taken December 20 and December 30, 2011, respectively, and the depositions of Richard Martin and Travis Stortz, which are considered part of the record. Since neither party had received a copy of Martin's deposition at the time of trial, I held the record open until February 1, 2013, to give the parties an opportunity to review Martin's deposition and make objections. On September 26, 2012, William David Lundin was sworn and testified.[2] On January 18, 2013, Griffin, Stortz, and Sandy Scholl were sworn and testified. Receiving no objections to Martin's deposition, I deemed this matter submitted on February 1, 2013.

¶ 5 Issues Presented: The pretrial order sets forth the following issues for determination:

> Issue One: Is Griffin entitled to reopening of his workers' compensation Settlement Order?
>
> Issue Two: Is Liberty liable for the payment of medical bills claimed by Griffin?
>
> Issue Three: Was Griffin coerced into entering into his settlement?

Motion to Dismiss Documents

¶ 6 On December 31, 2012, Griffin filed a Motion for Dismissal of Documents. In his motion, Griffin moved the Court to dismiss "all document[s] from Vocational Management Services." Griffin alleged that Vocational Management Services interfered

[2] Lundin's appearance on September 26, 2012, was initially set as a deposition. However, when Lundin appeared for his deposition, he did not bring proper identification and the court reporter was unable to swear him in. A deputy clerk of court for this Court was in attendance and subsequently swore Lundin in. Since he was sworn in by a deputy clerk of this Court, I ruled that his testimony was therefore technically trial testimony. The parties stipulated that neither waived the right to recall Lundin to testify at the future trial date, but that his testimony on this date was conducted as trial testimony to cure the procedural complication.

with his medical care and that the documents from Vocational Management Services should be dismissed "for lack of following the proper procedures for making and having involvement" in Griffin's workers' compensation claim.[3]

¶ 7 Liberty did not respond to Griffin's motion. However, it does not appear that Liberty received Griffin's motion as Griffin filed no certificate of service indicating that he had served his motion upon Liberty.

¶ 8 Under § 39-71-105(3), MCA, this state's workers' compensation system is intended to be primarily self-administrating and the system must be designed to minimize reliance upon lawyers and the courts to obtain benefits and interpret liabilities. However, a claimant's *pro se* status does not relieve him from compliance with Court rules.[4] Under ARM 24.5.303(2), all pleadings subsequent to the original petition must be accompanied by proof of service as provided in M. R. Civ. P. 5 when submitted to the Court. In Griffin's case, he was reminded by the Court on multiple occasions that his compliance with this Court's proof of service rule was required.[5] In fact, he was reminded to do so when he initially contacted the Court via e-mail about the substance of this motion.[6]

¶ 9 Since Griffin did not serve his motion upon Liberty in accordance with this Court's rules, his motion is denied.

FINDINGS OF FACT

¶ 10 On May 5 or 6, 2005, Griffin suffered an industrial injury while working for Montana Railroad Services, Inc. Liberty accepted liability for Griffin's claim.[7]

¶ 11 On May 9, 2005, Lawrence Splitter, D.O., saw Griffin regarding his injuries. Dr. Splitter diagnosed Griffin with a right shoulder strain, left knee pain, and right heel

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[3] Docket Item No. 127.

[4] *American Interstate Ins. Co. v. Kurth*, 2003 MTWCC 71, ¶ 3.

[5] *See, e.g.,* Letter from Collins to Griffin (06/17/11), Docket Item No. 6; Letter from Collins to Griffin (08/15/11), Docket Item No. 24.

[6] *See* E-Mail Correspondence From Mr. Griffin Regarding Subpoenas to St. Vincent and Ortho Montana, Docket Item No. 125; E-Mail Communication from Griffin to Court with Regard to Making a Motion to Disallow Information from Vocational Management and any Medical Personnel with a Reply by Wilson, Docket Item No. 126.

[7] Pretrial Order, Statement of Uncontested Facts. Although the Pretrial Order states that Griffin's industrial accident occurred on May 6, 2005, Griffin testified – and contemporary medical records indicate – that the industrial accident occurred on May 5, 2005.

pain. Dr. Splitter opined that Griffin could return to work, but recommended that he avoid overhead work or pushing/pulling that could aggravate his shoulder pain.[8]

¶ 12 On June 20, 2005, Dr. Splitter reported that while Griffin's knee pain had improved, his shoulder pain had worsened.[9] On July 27, 2005, Dr. Splitter diagnosed Griffin with right shoulder impingement syndrome.[10]

¶ 13 On August 9, 2006, Griffin underwent a subacromial decompression on his right shoulder.[11] However, he continued to have pain and stiffness in his shoulder.[12] On March 26, 2007, Michael R. Yorgason, M.D., noted that Griffin's condition was not improving as expected.[13]

¶ 14 On May 1, 2007, Steven J. Klepps, M.D., evaluated Griffin. He noted that home exercise, cortisone injections, surgery, and physical therapy had not achieved adequate relief of Griffin's pain. Dr. Klepps further noted that a recent MRI revealed a partial or possibly full rotator cuff tear. He opined that Griffin could either live with the pain or undergo additional surgery.[14] On May 31, 2007, Griffin informed Dr. Klepps that he would like to proceed with surgery.[15]

¶ 15 On June 18, 2007, Griffin fell, injuring his left leg and knee.[16] Although the record is not entirely clear, it appears this was an industrial injury and Liberty accepted liability.

¶ 16 Griffin underwent surgery on his right shoulder on July 25, 2007.[17] At around this time, Lundin became involved with Griffin's case as a nurse case manager. Griffin testified that he was unhappy with Lundin's involvement and refused to allow Lundin to attend a medical appointment. However, Lundin entered the appointment over Griffin's protest. Griffin testified that he got into a heated argument with Lundin afterwards and Griffin decided that he did not want Lundin involved in his care.[18]

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[8] Ex. 73a at 5-6.

[9] Ex. 73a at 9.

[10] Ex. 73a at 16.

[11] Ex. 73b at 10; Ex. 73e at 1-2.

[12] Ex. 73b at 36-37.

[13] Ex. 73c at 37-38.

[14] Ex. 73c at 41-43.

[15] Ex. 73c at 44-45.

[16] Griffin 12/20/11 Dep. 17:1-7.

[17] Ex. 73c at 51.

[18] Trial Test.

¶ 17 Lundin testified in this matter on September 26, 2012. Lundin stated that he did not retain any of his notes or files regarding Griffin's case.[19] Lundin further testified that he does not recall his employment history and does not know when he worked for Vocational Management Services.[20] Lundin testified that he does not recall anyone contacting him in 2011 to discuss Griffin's file or to request a copy of the file.[21]

¶ 18 Lundin was evasive in his testimony and I did not find his testimony credible. Based on his demeanor and conduct at trial, I have no doubt that he was antagonistic in his dealings with Griffin and that his involvement in Griffin's case as a nurse case manager likely caused more problems than it solved. However, Lundin's hostile manner and lack of credibility does not affect the outcome of this case.

¶ 19 On December 17, 2007, Travis Stortz became involved with Griffin's case.[22] Stortz is the owner of Vocational Management Services.[23] He is a certified vocational rehabilitation counselor.[24] Stortz testified via deposition and again at trial. I found Stortz to be a credible witness.

¶ 20 In January 2008, Stortz met with Griffin and subsequently compiled an initial employability assessment. At the time of that assessment, Griffin was treating with Dr. Klepps but had not yet reached maximum medical improvement (MMI).[25] Stortz testified that Liberty initially asked him to develop a job analysis of Griffin's time-of-injury job position and to determine Griffin's "vocational factors," including age, education, work history, transferable skills, interests, and abilities.[26] Stortz testified that Griffin had a commercial driver's license and significant truck driving experience. Stortz anticipated that if Griffin's permanent restrictions allowed him to obtain a truck-driving job, Griffin could return to work without a wage loss.[27]

¶ 21 On January 15, 2008, Dr. Klepps examined Griffin and noted that at six months post-surgery, Griffin continued to have right shoulder pain at night and with lifting

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[19] Lundin at 13:8-13.

[20] Lundin at 35:10-22.

[21] Lundin at 52:16-25.

[22] Stortz Dep. 5:3-25.

[23] Stortz Dep. 84:19-22.

[24] Trial Test.

[25] Trial Test.

[26] Stortz Dep. 12:6-17.

[27] Trial Test.

activities. Dr. Klepps opined that Griffin was at MMI. He recommended that Griffin undergo a functional capacity evaluation (FCE) to determine work restrictions.[28]

¶ 22 On January 23, 2008, Griffin underwent the FCE. The evaluator, John Repac, OTR/L, indicated in his report that Griffin was uncooperative with the FCE. Repac found "[n]umerous inconsistencies" during the testing and opined that Griffin was exerting only "low levels of effort."[29] Repac noted:

> Pain reporting did not match objective findings and appeared arbitrary. Numerous inconsistencies were observed and test performance should be considered invalid. Mr. Griffin was less than enthusiastic during testing and expressed widespread discontent with his medical care since the injury.[30]

¶ 23 On January 31, 2008, Dr. Klepps saw Griffin for follow-up. He noted that Griffin's FCE results were unreliable and that Griffin had apparently not provided maximal effort during the FCE. Dr. Klepps stated:

> At this point, I am not sure what to make of this functional capacity evaluation. Basically, I feel the patient is unable to return do [sic] his job as it would only cause increasing pain within his shoulder. In terms of permanent work restrictions I would likely state he should be 40 pounds lifting with 20 pounds overhead. I also feel he should only occasionally perform overhead activity. However, in light of this confusing clinical picture, I would recommend that he return to Dr. Splitter for final work restriction determination as well as an impairment rating.[31]

¶ 24 After Griffin was found at MMI, Stortz sent several job analyses to Dr. Klepps and Dr. Splitter for review.[32] Stortz testified that Dr. Klepps refused to review the job analyses.[33] On March 10, 2008, Dr. Splitter approved job analyses for dump truck driver, trucking dispatcher, roller operator, truck driver, pilot car driver, and rate auditor.[34] Stortz testified that Griffin's physical restrictions precluded him from returning to his

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[28] Ex. 73c at 55-56.

[29] Ex. 73f.

[30] Ex. 73f at 2.

[31] Ex. 73c at 58.

[32] Trial Test.

[33] Trial Test.

[34] Ex. 88.

time-of-injury job.[35] Stortz opined, however, that based on Griffin's employability assessment and approved job analyses, he would not suffer a wage loss if he returned to work in a truck-driving position.[36]

¶ 25 On March 10, 2008, Sandy Scholl, senior claims adjuster for Liberty, wrote a letter to Griffin in which she stated that Liberty would terminate his temporary total disability benefits in 14 days.[37] Scholl testified at trial and I found her to be a credible witness. Scholl testified that she wrote this letter because Griffin had been placed at MMI, Dr. Splitter had given Griffin an impairment rating, and Liberty had received several approved job analyses which indicated that Griffin was employable. Scholl testified that Liberty therefore provided Griffin notice that it intended to terminate his temporary total disability benefits and that, since the vocational rehabilitation assessment indicated that Griffin would not have a wage loss, he was additionally entitled only to his six percent impairment award.[38]

¶ 26 On September 2, 2008, Dr. Klepps saw Griffin and noted that Griffin continued to have significant right shoulder pain. He further stated:

> At this point, I feel the patient has had a full course of orthopaedic treatment for this shoulder including physical therapy, surgeries, cortisone injections. I do not believe I can help him further with any type of surgical intervention. As I stated in the past he is maximally medically improved.
>
> Given all of this, I feel it would make the most sense to refer him to a pain specialist. The patient will contact his work representative to have this arranged. I would be glad to write a letter of referral once this pain specialist appointment has been arranged.[39]

¶ 27 Scholl testified that although Dr. Klepps' September 2, 2008, medical record indicates referral to a pain clinic, Scholl does not recall receiving a request for approval from Michael H. Schabacker, M.D.[40]

¶ 28 Richard Martin is an attorney who practices in Great Falls.[41] He specializes in representing workers' compensation claimants.[42] Martin testified that he and Griffin

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[35] Trial Test.

[36] Trial Test.

[37] Ex. 3.

[38] Trial Test.

[39] Ex. 73c at 62-63.

[40] Trial Test.

entered into an attorney retainer agreement to represent Griffin on his May 5, 2005, industrial injury claim.[43] Martin also represented Griffin on his June 18, 2007, industrial injury claim.[44] I participated in Martin's deposition on December 13, 2012, and found Martin to be a credible witness.

¶ 29 Griffin settled the May 5, 2005, and June 18, 2007, industrial injury claims while represented by attorney Richard Martin.[45] On November 10, 2008, Griffin signed a settlement agreement which stated:

> The claimant suffered a work-related injury occurring on June 18, 2007, and May 6, 2005. The insurer accepted liability for the claim. A dispute has arisen regarding the compensability for future medical treatment and claimant's eligibility for further indemnity benefits. The claimant and insurer have agreed to settle to resolve all past, present, and future claims . . . . The insurer shall pay to the claimant the sum of . . . $45,000 . . . .
>
> The claimant and insurer petition the Department of Labor & Industry for approval of this settlement allowing the claim to be fully and finally closed. **Further medical and hospital benefits are hereby closed forever on these claims.**[46]

Griffin further signed an Employment Relations Division Settlement Recap Sheet which set forth substantially the same terms.[47]

¶ 30 Martin testified that he negotiated the terms of the November 2008 settlement in consultation with Griffin.[48] Although did not have a clear recollection of the negotiations, he recalled that Scholl wanted medical benefits closed as part of the settlement.[49] Martin testified that he believes that his office likely drafted the settlement agreement.[50]

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[41] Martin Dep. 5:15-22.

[42] Martin Dep. 5:23-25.

[43] Martin Dep. 7:6-16. *See* Ex. 19.

[44] Martin Dep. 49:9-12.

[45] Martin Dep. 18:19 – 19:7.

[46] Ex. 16. (Emphasis in original.)

[47] Ex. 17.

[48] Martin Dep. 19:1-7.

[49] Martin Dep. 20:4-12.

[50] Martin Dep. 20:20-24.

Martin testified that his office would have drafted the settlement recap sheet along with the petition for settlement.[51]

¶ 31 Griffin's testimony regarding the November 2008 settlement agreement is contradictory at best. He testified that he understood that by settling his claim, he would "get money to fix my knee, because Liberty Northwest wouldn't do that."[52] Griffin further testified that he never agreed to combine his two claims into one settlement agreement and that he believes the $45,000 was only to get a knee replacement because that was the cost of the surgery.[53] At his deposition, he initially testified that he used the settlement funds to pay for a knee replacement.[54] However, upon further questioning he admitted that the surgery was paid for by private healthcare insurance.[55] At trial, however, Griffin again maintained that he used the $45,000 to get his knee fixed.[56]

¶ 32 At his deposition, Griffin testified that he understood, "This [settlement] money was so that Liberty Northwest no longer had to pay any medical bills."[57] However, at trial, Griffin testified that he read the settlement agreement before he signed it but did not understand that Liberty would no longer have to pay his medical bills.[58]

¶ 33 Griffin further claimed at trial that although he signed the settlement agreement, he did not agree to the settlement.[59] Griffin testified that he signed the agreement not because he was agreeing to it but because the document said he was disputing it.[60] Griffin further testified that in November 2008, he "took [Liberty's] money" for two claims, but he denied that he agreed to settle the claims although he acknowledged that he signed a document which states that the claims are settled.[61]

¶ 34 On August 6, 2009, Griffin signed a First Report of Injury claiming that on May 21, 2009, he injured his shoulders while putting a winch bar on a trailer. At the

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[51] Martin Dep. 23:15-19.

[52] Griffin 12/20/11 Dep. 17:22 – 18:1.

[53] Trial Test.

[54] Griffin 12/20/11 Dep. 18:3-10.

[55] Griffin 12/20/11 Dep. 18:14-16, 19:3-10.

[56] Trial Test.

[57] Griffin 12/20/11 Dep. 21:11 – 22:1.

[58] Trial Test.

[59] Trial Test.

[60] Trial Test.

[61] Trial Test.

time, Griffin worked for Gene Klamert, who was insured by Victory Insurance Company, Inc. (Victory).[62] Martin testified that he also represented Griffin for this claim.[63]

¶ 35 Griffin testified that he filed the petition in this matter because he believes Liberty is liable for a bill incurred for his initial consultation with Dr. Schabacker.[64] Griffin initially testified that he believed this appointment occurred prior to his signing the November 10, 2008, settlement agreement.[65] However, Griffin ultimately agreed that consultation occurred on November 19, 2009.[66] Griffin then explained that prior to entering into the settlement agreement, Dr. Klepps referred him to Dr. Schabacker. At that time, Liberty had closed his case and was refusing to pay any medical bills. Dr. Schabacker would not see Griffin because he did not have insurance coverage. Approximately a year and a half later, Griffin had fulfilled his deductible on his private healthcare insurance and when his private insurance agreed to pay for an appointment with Dr. Schabacker, Griffin went to see him.[67]

¶ 36 Griffin testified that he continued to treat with Dr. Schabacker, and he believes Liberty is also liable for the subsequent bills, but he decided to petition the Court for a single bill because he wants to "take them one at a time."[68]

¶ 37 Scholl testified that she does not recall Griffin ever asking Liberty to pay the bill for his November 19, 2009, consultation, but Scholl opined that Liberty would not have agreed to pay the bill because the consultation occurred after the parties had settled Griffin's claims and closed his medical benefits.[69]

¶ 38 On December 22, 2009, Joseph M. Erpelding, M.D., performed an independent medical examination (IME) of Griffin. Dr. Erpelding reviewed Griffin's medical history, specifically the history of his shoulder problems since his May 5, 2005, industrial injury. Dr. Erpelding diagnosed Griffin as having persistent right rotator cuff dysfunction with rotator cuff tear and biceps tendon dysfunction with tear/tenotomy and retraction. Dr. Erpelding recommended that Griffin consider a third surgery to attempt to improve his shoulder problems. Dr. Erpelding opined that Griffin's current complaints were the natural progression of his 2005 industrial injury and subsequent surgeries. He further

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[62] Ex. 71.

[63] Martin Dep. 49:3-22.

[64] Griffin 12/20/11 Dep. 49:12-24.

[65] Griffin 12/20/11 Dep. 51:2-25.

[66] Griffin 12/30/11 Dep. 18:20 – 19:10. *See* Ex. 73j at 1-5.

[67] Griffin 12/20/11 Dep. 52:25 – 53:24.

[68] Griffin 12/30/11 Dep. 19:11-19.

[69] Trial Test.

opined that it was unlikely that his May 2009 job duties aggravated or contributed to his shoulder condition. Finally, he opined, "I do not believe Mr. Griffin has achieved MMI nor do I think he suffered an impairment as a consequence of his May 2009 injury or claim."[70] Dr. Erpelding later clarified that when he stated that he did not believe Griffin had achieved MMI, he meant that it was more likely than not that Griffin was not at MMI from his 2005 industrial injury.[71]

¶ 39 Griffin admitted that after he signed the November 2008 settlement agreement, he ultimately signed two other workers' compensation settlement agreements, both with Martin representing him.[72] On December 12, 2010, he signed a Petition for Settlement, Disputed Initial Compensability regarding his June 25, 2008, claim. Anna Waller, representing Liberty, signed the petition on December 16, 2010, and an authorized representative of the Department of Labor and Industry approved the settlement on December 22, 2010. The Petition states:

> The claimant reported an injury arising from a work-related accident or occupational disease occurring on June 25th, 2008. The insurer has disputed liability for the claim.
>
> The controversy concerning the insurer's disputed liability and denial of the claim has been resolved by an agreement between the claimant and the insurer, whereby the claimant agrees to accept the lump sum of: FIFTEEN THOUSAND AND 00/100'S DOLLARS **($15,000.00)** paid by the insurer. . . . This settlement shall close indemnity and medical benefits on both the left and right knee . . . .
>
> The **claimant understands**, that by entering into a settlement and signing and submitting this Petition to the Department of Labor & Industry, that if this Petition is approved, the insurer is forever released from payment of compensation, medical, and/or vocational rehabilitation benefits under the Workers' Compensation and Occupational Disease Acts for injuries or diseases claimed to have been suffered as indicated above.
>
> The claimant and insurer petition the Department of Labor & Industry for approval of this settlement. If this settlement is approved, the claim will be forever closed and may not be reopened by the Department. **Further**

[70] Ex. 73k at 1-8.

[71] Ex. 73k at 9.

[72] Trial Test.

medical, hospital, vocational rehabilitation and all indemnity benefits are expressly closed.

***Special Provisions: None**[73]

¶ 40 On December 22, 2010, the Employment Relations Division of the Department of Labor and Industry reviewed and approved the settlement agreement. The Employment Relations Division Settlement Recap Sheet is signed by an ERD examiner, Anna Waller as a representative of Liberty, and Griffin. The recap sheet contains similar provisions to the Petition for Settlement, including language indicating the closure of medical benefits.[74]

¶ 41 On July 15, 2011, Griffin, while represented by Martin, signed a Petition for Full and Final Compromise Settlement and Release for the May 21, 2009, claim against Victory. The agreement settled Griffin's claims against Victory for $25,000 and the terms included, "Past, present, and future medical benefits are closed."[75]

¶ 42 Griffin further testified that he believes he was coerced into settling his claim with Liberty.[76] However, Martin testified that Liberty did not coerce Martin into entering into a settlement agreement between Liberty and Griffin.[77]

¶ 43 From his testimony at trial, I have not found Griffin to be a credible witness. Griffin repeatedly failed to answer questions in a straightforward manner. Until indisputable medical records demonstrated otherwise, he alleged that his first visit with Dr. Schabacker took place prior to the settlement of his claim when in fact it occurred more than a year after he signed the settlement agreement. Griffin also initially testified that he used the proceeds from his November 2008 settlement to fund his knee replacement surgery, only admitting that the surgery was in fact paid for by another insurer after it became apparent that Liberty either had proof or was going to obtain proof that Griffin's private healthcare insurance paid for his care. Griffin's testimony regarding his understanding of the November 2008 settlement agreement was contradictory and wholly incredible. Griffin was represented by counsel and he subsequently went on to settle at least two more workers' compensation claims with similar terms, also while represented by counsel. To believe Griffin's testimony, one would have to believe that after he was surprised to discover that closing his medical

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[73] Ex. 87 at 1. (Emphasis in original.)

[74] Ex. 87 at 2.

[75] Ex. 47.

[76] Trial Test.

[77] Martin Dep. 34:11-15.

benefits in November 2008 meant that Liberty did not have to pay for his November 2009 consultation with Dr. Schabacker, he nonetheless chose to sign other settlement agreements containing similar terms in December 2010 and July 2011. Having settled at least three workers' compensation claims with similar terms, I do not find it plausible that Griffin failed to appreciate the consequences of agreeing to close his medical benefits.

CONCLUSIONS OF LAW

¶ 44 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 Griffin's industrial accident.[78] Griffin bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks.[79]

Issue One: Is Griffin entitled to reopening of his workers' compensation Settlement Order?

¶ 45 The full and final settlement entered into by the parties is a contract; thus contract law governs the agreement.[80] A contract may be rescinded when the parties were laboring under a mutual mistake regarding a material fact when the contract was made.[81] The contract may be rescinded only where "the parties share a common misconception about a vital fact upon which they based their bargain."[82]

¶ 46 Griffin argues that the parties operated under a mutual mistake of fact in believing that he was at MMI when his treating physician believed he would benefit from a pain clinic.[83] Griffin testified that he settled his claim because he thought he was at MMI and that he could return to work because he had approved job analyses. However, he subsequently re-injured his shoulder while performing a simple task at

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

[79] *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).

[80] *Morrissette v. Zurich American Ins. Co.*, 2000 MTWCC 2, ¶ 61 (*citing Kienas v. Peterson*, 191 Mont. 325, 329, 624 P.2d 1, 3 (1980)).

[81] *Morrissette*, ¶ 61 (*citing South v. Transportation Ins. Co.*, 275 Mont. 397, 401, 913 P.2d 233, 235 (1996)).

[82] *Morrissette*, ¶ 61 (*quoting Mitchell v. Boyer*, 237 Mont. 434, 437, 774 P.2d 384, 386 (1989)). (Citations omitted; emphasis omitted.)

[83] Trial Test.

work.[84] Griffin testified that when he sought treatment for the re-injury, a doctor opined that he had never reached MMI for the May 5, 2005, right shoulder injury.[85]

¶ 47 Liberty argues that no mistake of fact occurred in this case. At the time the parties negotiated the settlement agreement, the parties knew that Dr. Klepps had placed Griffin at MMI, that Dr. Splitter had approved job analyses, and that subsequent to opining that Griffin had reached MMI, Dr. Klepps recommended that he seek referral to a pain clinic. Liberty argues that Griffin could have chosen to challenge Dr. Klepps' MMI determination at that time, but instead chose to settle his claim with assistance of counsel. Liberty argues that no mutual mistake of fact occurred since both parties were aware of these facts and Griffin has not demonstrated that any of these alleged facts were incorrect.

¶ 48 Based on the records from Dr. Erpelding, it appears that a difference of opinion exists as to whether Griffin reached MMI for his May 5, 2005, industrial injury. However, while Dr. Erpelding's records raise the possibility that Griffin may not have reached MMI, it is Griffin's burden to prove if this is the case. The evidence presented is that on January 31, 2008, Griffin's treating physician found him to be at MMI; on December 22, 2009, an IME physician opined that he was not. It is well-established under this Court's case law that as a general rule, the opinion of a treating physician is accorded greater weight than the opinions of other expert witnesses.[86] In determining whether the weight of conflicting medical opinions outweighs the opinion of a treating physician, this Court has considered such factors as the relative credentials of the physicians[87] and the quality of evidence upon which the physicians based their respective opinions.[88] In the present case, no evidence has been presented which gives me grounds to assign greater weight to Dr. Erpelding's opinion than to Dr. Klepps'. Given that Dr. Klepps' opinion carries greater weight under the treating physician rule, I therefore conclude that Griffin has not proven by a preponderance of the evidence that he has not reached MMI for his May 5, 2005, industrial injury.

¶ 49 Given that a lack of MMI was the "fact" in which Griffin argued the parties were mutually mistaken, Griffin therefore has not proven that a mutual mistake of fact occurred. He thus has not demonstrated that he is entitled to reopen his November 2008 settlement.

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[84] Trial Test.

[85] Trial Test. Although Griffin characterized Dr. Erpelding as his treating physician, as the findings above indicate, it appears that Dr. Erpelding was not a treating physician but rather performed an IME at Victory's behest.

[86] *EBI/Orion Group v. Blythe*, 1998 MT 90, ¶ 12, 288 Mont. 356, 957 P.2d 1134. (Citation omitted.)

[87] *See Barnea v. Ace Am. Ins. Co.*, 2007 MTWCC 58, ¶ 43.

[88] *See Durham v. State Compen. Ins. Fund*, 1998 MTWCC 87, ¶¶ 19, 44.

Issue Two: Is Liberty liable for the payment of medical bills claimed by Griffin?

¶ 50 At issue in this case is a medical bill which Griffin incurred when he attended a consultation with Dr. Schabacker on November 19, 2009. As the facts set forth above, Griffin settled his claim with Liberty on November 10, 2008, and agreed to the closure of his medical benefits. Although Griffin argues that Liberty should be liable for this consultation because Dr. Klepps recommended a referral to a pain management specialist on September 2, 2008, some months prior to the settlement of this claim, Griffin settled the claim, including the closure of his medical benefits notwithstanding this unfilled referral. Although Griffin testified, unconvincingly, that he did not understand that he was settling his entitlement to medical benefits, Griffin admitted that he "took [Liberty's] money." Griffin was also represented by legal counsel specializing in workers' compensation at the time he settled his claim. Griffin cannot agree to settle, accept valuable consideration for closing his medical benefits, and then demand that Liberty continue to pay for benefits which it closed as part of the settlement agreement. Liberty is not liable for medical treatment which occurred after the parties closed Griffin's entitlement to medical benefits pertinent to this claim.

Issue Three: Was Griffin coerced into entering into his settlement?

¶ 51 Griffin further contends that he was coerced into entering into the November 2008 settlement. However, he has presented no evidence in support of this contention. Lacking any evidence to support this contention, Griffin has failed to meet his burden of proof and I therefore conclude he was not coerced into entering into this settlement.

JUDGMENT

¶ 52 Griffin's motion to dismiss documents is **denied**.

¶ 53 Griffin is not entitled to reopening of his workers' compensation Settlement Order.

¶ 54 Liberty is not liable for the payment of medical bills claimed by Griffin.

¶ 55 Griffin was not coerced into entering into his settlement.

¶ 56 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.

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DATED in Helena, Montana, this 29th day of April, 2013.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Tom Griffin
Michael P. Heringer
Submitted: February 1, 2013