IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2005 MTWCC 27

WCC No. 2004-1148

GARRY D. HANSEN

Petitioner

vs.

LIBERTY NORTHWEST

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: The claimant seeks to reopen a 2002 settlement based on mistake of fact.

Held: The claimant failed to demonstrate any mistake of material fact which would entitle him to rescind the 2002 settlement. He has not shown any material change in or misunderstanding about his medical condition. He alleges he is totally disabled but believed that to be the case when he entered into the settlement agreement.

Topics:

> **Settlements: Reopening: Mistake of Fact.** To reopen or rescind a workers' compensation settlement the claimant must prove the parties were mistaken as to facts material to the settlement.
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> **Settlements: Reopening: Mistake of Fact.** Where the claimant believed that he was unable to work and permanently totally disabled at the time he entered into a settlement, he is not entitled to reopen the settlement simply because he continues to believe he is permanently totally disabled.
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> **Settlements: Reopening: Mistake of Fact.** The fact that chronic back pain is later diagnosed as fibromyalgia is immaterial where the nature of the back pain has not materially changed and the new diagnosis does not result in any new, successful treatment of the pain. A change in diagnostic labels is not in itself sufficient to prove a mistake of fact for purposes of rescinding a settlement.

Benefits: Medical Benefits: Reasonableness of Services. The Court will not order an insurer to pay for an examination at the Mayo Clinic where the Mayo Clinic has indicated it cannot see the claimant at the time the examination was requested, no evidence was presented that the Mayo Clinic would ever be willing to see the claimant as a patient, and the physician referring the claimant to the Mayo Clinic did so only after the claimant requested the referral and without any medical justification other than the fact that the claimant's pain had not improved.

¶1 The trial in this matter was held in Helena, Montana, on February 15, 2005. The petitioner was present and represented himself. The respondent was represented by Mr. Larry W. Jones.

¶2 Subsequent to trial, the petitioner submitted additional exhibits and asked that they be admitted. On March 8, 2005, the respondent replied that it did not object to the additional exhibits except on grounds of relevancy. The exhibits are therefore made a part of the record and considered insofar as they are relevant.

¶3 Exhibits: Exhibits 1 through 6 and 9 through 30 were admitted at trial. Some exhibits were objected to on relevancy grounds. Those exhibits are considered only insofar as they are relevant. Exhibits 7 and 8 were refused since it was plain that they were irrelevant.[1]

¶4 Witnesses and Depositions: The petitioner and his wife, Patricia Hansen, testified. The depositions of the petitioner and Dr. Curt G. Kurtz were also submitted for the Court's consideration.

¶5 Issues Presented: The petitioner requests that his November 4, 2002 settlement be reopened and that he be awarded permanent total disability benefits.

¶6 Having considered the Pretrial Order, the testimony presented at trial, the demeanor and credibility of the witnesses, the depositions and exhibits, and the arguments of the parties, the Court makes the following:

FINDINGS OF FACT

¶7 On February 6, 2001, and again on February 7, 2002, the petitioner, Garry D. Hansen (claimant), was injured in industrial accidents while working for RDJ Brothers, Incorporated (RDJ Brothers).

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[1]The minute entry for the trial states that Exhibit 6 was admitted and later that it, along with Exhibit 7, was refused. Exhibit 6 was in fact admitted and it was Exhibits 7 and 8 that were refused.

¶8 At the time of the claimant's accidents, RDJ Brothers was insured by Liberty Northwest Insurance Corporation (Liberty). The claimant filed claims with respect to the two accidents and Liberty accepted liability for both claims.

¶9 On November 4, 2002, the claimant entered into a settlement agreement with respect to both claims. (Ex. 29.) The agreement provided for payment of $30,000. (*Id*.) All medical benefits were closed with respect to "bilateral carpal tunnel syndrome, psychological conditions and lumbar conditions." (*Id*.) Medical benefits respecting the "right arm (not including wrists) and upper back and neck conditions" were reserved. (*Id*.)

¶10 A settlement recap document accompanied the settlement agreement and sets out the rationale of the settlement. Of significance, it stated:

> There is . . . a dispute over a bilateral carpal tunnel condition, a low back condition and a psychological condition and whether they are related to the above noted [industrial] injuries &/or to employement [sic] with RDJ Brothers. Additional money is added to settle all disputes. . . .

(Ex. 30.) The claimant signed the recap document.

¶11 At the time of the settlement, the claimant was represented by counsel. (Exs. 19, 30.) His counsel also signed the recap document. (Ex. 30.)

¶12 The settlement agreement was approved by the Department of Labor and Industry on November 8, 2002.

¶13 The claimant now contends that the settlement agreement should be reopened because he cannot work and is permanently totally disabled. He testified that at the time of the settlement he had back and neck pain, could not sleep, was chronically fatigued, and could not work. (Trial Test. and Hansen Dep. at 31-32.) He told his attorney that he could not work. (Trial Test.) Nonetheless, both he and his attorney signed off on the settlement. (Exs. 29-30.) Thus, by the claimant's own admission there was no mistake of fact on his part as to his disability at the time he entered into the settlement.

¶14 The claimant also contends that his condition was misdiagnosed at the time of the settlement. He offers the deposition and medical records of Curt G. Kurtz, M.D., who has diagnosed him as suffering from fibromyalgia. (Kurtz Dep. at 10.)

¶15 The claimant is now seeing Dr. Kurtz because other physicians previously treating him have refused to continue doing so. (Kurtz Dep. at 7.) Dr. Kurtz does not have admitting privileges at any hospital (Kurtz Dep. at 6-8) and is therefore ineligible to be deemed the claimant's treating physician. § 39-71-116(36), MCA (1999-2001).

¶16 Dr. Kurtz's office notes state that the claimant reported pain in his shoulders which had not been previously documented by physicians. (Kurtz Dep. at 11.) His report that the claimant's shoulder pain had not previously been documented is inconsistent with the medical records. *(See, e.g.,* Ex. 17, which is a May 13, 2002 report of Dr. John A. Vallin stating that the claimant had neck pain, bilateral shoulder pain, and low-back pain, and had undergone trigger point injections.)

¶17 While Dr. Kurtz has put a different label on the claimant's overall pain complaints by diagnosing fibromyalgia, the diagnostic label is of little significance. Prior to his settlement, the claimant was diagnosed with "chronic back pain." There is no indication that relabeling his pain as "fibromyalgia" has resulted in more successful treatment of his pain or altered his prognosis or ability to work. Moreover, at the time of the settlement, the claimant was not operating under a material mistake regarding the nature of his condition (chronic pain) and his disability.

¶18 Dr. Kurtz referred the claimant to the Mayo Clinic for further evaluation but he did so only after the claimant requested the referral. (Kurtz Dep. at 12.) The Mayo Clinic has indicated "that their schedule was such that they didn't feel that they could get him in." *(Id.)* Despite his referral, Dr. Kurtz testified that he did not know of anything more that can be done for the claimant that he or prior physicians have not prescribed. Dr. Kurtz acceded to the claimant's request to make the Mayo Clinic referral because, in his words, "I'm not getting the progress that I would expect . . . ." (*Id.* at 14.)

CONCLUSIONS OF LAW

¶19 A settlement agreement may be reopened or set aside where both parties were operating under a mistake of material fact at the time the settlement was consummated. *South v. Transportation Ins. Co.*, 275 Mont. 397, 401, 913 P.2d 233, 235 (1996). But "the parties [must] share a common misconception about a vital fact upon which they based their bargain." *Mitchell v. Boyer*, 237 Mont. 434, 437, 774 P.2d 384, 386 (1989) (citations omitted).

¶20 In the present case, the claimant has failed to persuade me that he, let alone the insurer, was operating under a material mistake of fact at the time he executed the settlement agreement. He concedes that at the time he entered into the settlement he believed that he could not work and was permanently totally disabled. His current belief that he is totally disabled is no different than what he believed then. Thus, there is no mistake on his part as to his disability.

¶21 As to his medical condition, the only evidence of any possible mistake is with regard to the diagnostic label attached to his chronic pain condition. Any mistake in that regard is immaterial. There is no evidence that the claimant's chronic pain condition has changed or is different than what it was at the time of the settlement. There is no persuasive evidence that the attachment of a new label to his condition has or will change the course of his treatment or disability. Indeed, there is no persuasive evidence that further medical work-ups or evaluations will benefit the claimant.

¶22 I therefore conclude that the claimant has failed to establish a mutual mistake of material fact which would entitle him to reopen or rescind the 2002 settlement agreement.

¶23 Finally, the claimant has not provided persuasive evidence that he is entitled to further medical evaluation or treatment. There is no evidence that the Mayo Clinic will ever be willing to see the claimant. Moreover, in referring the claimant to the Mayo Clinic, Dr. Kurtz was simply accommodating the claimant's desire to go there and could provide no substantial medical justification for the referral.

JUDGMENT

¶24 The claimant is not entitled to reopen or rescind his November 2002 settlement of his workers' compensation claims and has provided no persuasive evidence for further medical evaluation or treatment at the Mayo Clinic or elsewhere. His petition is therefore dismissed with prejudice.

¶25 This JUDGMENT is certified as final for purposes of appeal.

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

DATED in Helena, Montana, this 9th day of May, 2005.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Garry D. Hansen, Pro Sé
Mr. Larry W. Jones
Submitted: March 9, 2005