

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2010 MTWCC 4

WCC No. 2009-2309

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KIMBERLY M. KELLER

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Respondent/Insurer.

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*Appealed to Montana Supreme Court - 03/16/10  
Reversed and Remanded - 12/28/10*

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

**Summary:** Petitioner petitioned the Court for reinstatement of her medical benefits. Petitioner argues that a mutual mistake of fact occurred in this case. Petitioner contends that the parties failed to account for the onset of nerve damage and/or chronic nerve inflammation and winging of her right scapula as the major injury and cause of Petitioner's pain at the time they entered into two settlement agreements.

**Held:** No mutual mistake of fact occurred in this case. Even if Petitioner was unaware that her condition at the time she entered into the settlement agreements included scapular winging and long thoracic nerve damage, she failed to establish that Respondent entered into the settlement agreements under the same mistaken belief. Therefore, the settlement agreements will not be set aside.

**Topics:**

**Settlements: Reopening: Mutuality of Mistake.** Although the claimant testified that prior to entering into her settlement agreements, she had no knowledge that her medical condition included either scapular winging or long thoracic nerve damage, her medical records predating the settlement agreements contain multiple references to these conditions. The claimant submitted no evidence that the insurer had no knowledge of these

conditions. To contend the insurer had no knowledge of these conditions is contrary to the evidence submitted to the Court. Therefore, no mutual mistake of fact occurred.

¶ 1 The trial in this matter was held on October 16, 2009, in Missoula, Montana. Petitioner Kimberly M. Keller (Keller) was present and represented by Howard Toole. Respondent Liberty Northwest Insurance Corporation (Liberty) was represented by Larry W. Jones.

¶ 2 Exhibits: Exhibits 1 through 24 were admitted without objection.

¶ 3 Witnesses and Depositions: The depositions of Keller, Carter Beck, M.D., and Dean Ross, M.D., were submitted to the Court. Keller was sworn and testified at trial.

¶ 4 Issues Presented: The Pretrial Order states the following contested issues:<sup>1</sup>

¶ 4a Whether Keller's two settlements in 2007 of indemnity benefits and medical benefits were entered into on the basis of a mutual mistake of fact and should be set aside; and

¶ 4b Whether Keller's request to reopen her settlement of indemnity benefits in January 2007 is barred by the two-year statute of limitations in § 27-2-203, MCA, and this Court's holding in *Miller v. State Fund*, 1999 MTWCC 21.

### FINDINGS OF FACT

¶ 5 I found the trial testimony of Keller to be credible.

¶ 6 Keller was hired by A Full Life Agency in 2003.<sup>2</sup> She was injured on January 3, 2005, while working for A Full Life Agency.<sup>3</sup> Keller was employed as the County Coordinator at the time of her injury.<sup>4</sup> A coworker of Keller's called in sick and Keller filled in as a home health aide for a client who was paralyzed on one side of her body.<sup>5</sup> Keller

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<sup>1</sup> Pretrial Order at 2.

<sup>2</sup> Keller Dep. 10:19-24.

<sup>3</sup> Ex. 5 at 9; Keller Dep 6:10-17.

<sup>4</sup> Keller Dep 7:15-18.

<sup>5</sup> Keller Dep. 7:15-20.

was injured while helping the client ambulate.<sup>6</sup> The client weighed approximately 200 pounds and her legs buckled, requiring Keller to support the client's full weight.<sup>7</sup> After holding the client up, Keller felt a searing pain in her thoracic region and in her lower cervical region.<sup>8</sup>

¶ 7 Jennifer Strine, PA-C, examined Keller on February 8, 2005. She assessed Keller with "[r]ight thoracic strain and right scapular dysfunction secondary to muscular weakness."<sup>9</sup> PA-C Strine removed Keller from her work duties due to her thoracic injury.<sup>10</sup>

¶ 8 Keller was seen by physical therapist Honani Polequaptewa on February 21, 2005. Polequaptewa assessed Keller with "[a]cute low back pain [and] right scapular winging."<sup>11</sup>

¶ 9 On February 23, 2005, Keller reported to PA-C Strine that she continued to have "exquisite right low back tenderness without radiation into the legs or upper back." Keller continued to experience headaches and some upper thoracic tenderness. PA-C Strine assessed Keller with low-back pain, upper thoracic pain, and headaches.<sup>12</sup>

¶ 10 On March 4, 2005, PA-C Strine was called into Keller's physical therapy appointment because Keller was experiencing spasm and pain in her right buttock and low-back region. PA-C Strine noted that Keller's scapula continued to wing and that the physical therapist was not able to eliminate the winging. PA-C Strine diagnosed Keller with lumbosacral and gluteal spasm secondary to physical therapy, headaches secondary to muscle fatigue, and scapular winging "most likely due to a long thoracic nerve inflammation or damage."<sup>13</sup>

¶ 11 PA-C Strine referred Keller to Maurice D. Brown, M.D., of Mission Valley Orthopaedic Surgery and Sports Medicine, on March 10, 2005. PA-C Strine's referral note

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<sup>6</sup> Keller Dep. 8:22 - 9:17

<sup>7</sup> Keller Dep. 8:22 - 9:17; 22:12-22.

<sup>8</sup> Keller Dep 9:18-22.

<sup>9</sup> Ex. 1 at 2.

<sup>10</sup> Ex. 1 at 1.

<sup>11</sup> Ex. 12 at 2.

<sup>12</sup> Ex. 1 at 4.

<sup>13</sup> Ex. 1 at 5.

included Keller's diagnosis of right scapular winging.<sup>14</sup> Cody Brown, PA-C, of Mission Valley Orthopaedic Surgery and Sports Medicine, examined Keller on April 6, 2005. PA-C Brown listed Keller's chief complaints as chronic headaches, right scapular winging, mid-back pain, lower back pain, sciatica, and right lower extremity paresthesias.<sup>15</sup> PA-C Brown's physical examination of Keller revealed "excessive winging of the scapula when asked to lean forward with hands outstretched against the wall."<sup>16</sup> PA-C Brown's objective findings were "consistent with nerve entrapment of the cervical spine/thoracic spine, resulting in scapular winging."<sup>17</sup>

¶ 12 On March 11, 2005, PA-C Strine examined Keller and assessed her with "[w]inging right scapula [and] [h]eadaches secondary to right sided upper extremity muscular weakness."<sup>18</sup> PA-C Strine referred Keller to physical therapy; PA-C Strine's physical therapy prescription listed the diagnosis of right scapular winging.<sup>19</sup>

¶ 13 Dr. Brown ordered an MRI of Keller that occurred on April 25, 2005. Keller's MRI revealed a moderate sized left paracentral disk protrusion at T8-9, a small to moderate right paracentral disk protrusion at T7-8, and smaller central disk protrusions at T9-10 and T10-11.<sup>20</sup> Dr. Brown examined Keller on April 27, 2005, and stated that "[t]he right scapula and shoulder are intermittently raised in a protective position causing the appearance of scapular winging; however, this was noted to be absent several times during today's evaluation."<sup>21</sup>

¶ 14 On May 24, 2005, John Hatheway, M.D., consulted on Keller's case. After reviewing her MRI results and performing a physical examination, Dr. Hatheway opined that Keller suffered from thoracic back pain related to a T8-9 right-sided disk protrusion and left hip pain.<sup>22</sup>

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<sup>14</sup> Ex. 1 at 6.

<sup>15</sup> Ex. 4 at 1.

<sup>16</sup> Ex. 4 at 3.

<sup>17</sup> *Id.*

<sup>18</sup> Ex. 1 at 8.

<sup>19</sup> Ex. 1 at 7.

<sup>20</sup> Ex. 2 at 2.

<sup>21</sup> Ex. 4 at 8.

<sup>22</sup> Ex. 17 at 3-5.

¶ 15 Carter E. Beck, M.D., evaluated Keller on September 20, 2005, and opined that Keller suffered from complex pain syndrome affecting multiple body parts, with the worst region in the mid-thoracic back which was likely discogenic in nature. Dr. Beck also opined that Keller suffered right-sided radicular syndrome likely coming from the T7-8 disk protrusion. Dr. Beck stated that Keller was not a surgical candidate, and recommended that she enroll in a comprehensive multidisciplinary pain clinic.<sup>23</sup>

¶ 16 Randale C. Sechrest, M.D., evaluated Keller on November 15, 2005. Dr. Sechrest's history of Keller's case stated, "[Keller] has seen several physicians including Dr. Maurice Brown, Dr. John Hatheway, and Dr. Carter Beck."<sup>24</sup> After reviewing Keller's pertinent medical records and performing a physical exam, Dr. Sechrest's impression was that Keller had a combination of chronic pain and possible disk pathology in her thoracic spine.<sup>25</sup>

¶ 17 Patrick Johnson, Ph.D., examined Keller on December 13, 2005.<sup>26</sup> Dr. Johnson opined that Keller suffered from a pain disorder associated with both psychological factors and a medical condition including chronic mid-back pain.<sup>27</sup>

¶ 18 Dr. Sechrest placed Keller at maximum medical improvement on June 19, 2006.<sup>28</sup>

¶ 19 John C. Schumpert, M.D., performed an independent medical evaluation (IME) of Keller on August 14, 2006.<sup>29</sup> Dr. Schumpert's IME report noted that PA-C Strine's physical exam of Keller found "right parathoracic muscle tenderness in the mid-scapular region. [Shoulder] range of motion was limited secondary to pain. There was winging of the right scapula noted."<sup>30</sup> Dr. Schumpert noted PA-C Strine's diagnosis of "right thoracic strain and

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<sup>23</sup> Ex. 13 at 10.

<sup>24</sup> Ex. 19 at 4.

<sup>25</sup> Ex. 19 at 6.

<sup>26</sup> Ex. 19 at 8.

<sup>27</sup> Ex. 19 at 10.

<sup>28</sup> Ex. 6 at 4.

<sup>29</sup> Ex. 6 at 2-9.

<sup>30</sup> Ex. 6 at 2.

right scapular dysfunction.”<sup>31</sup> Dr. Schumpert recalled that PA-C Brown observed right scapular winging when he examined Keller on April 6, 2005.<sup>32</sup>

¶ 20 Dr. Schumpert’s physical examination of Keller revealed a prominent right scapula, but he did not observe scapular winging.<sup>33</sup> Dr. Schumpert surmised that Keller’s prominent right scapula was due to dextroscoliosis. After performing a physical examination of Keller, Dr. Schumpert opined that Keller had chronic thoracic region myofascial pain, and chronic right thoracic nonverifiable radicular complaints.<sup>34</sup>

¶ 21 PA-C Strine examined Keller again on September 12, 2006. PA-C Strine noted retraction of Keller’s scapula and forward curvature of her scapula revealed significant right scapular winging.<sup>35</sup>

¶ 22 Keller testified in her deposition that she recalled that PA-C Strine informed her of the winging right scapula.<sup>36</sup>

¶ 23 On January 12, 2007, Keller settled indemnity benefits for \$27,582.64. Keller was represented by attorney David Sandler at the time of this settlement. Medical benefits were reserved.<sup>37</sup> Keller testified at her deposition that she was experiencing the same pain symptoms in the same locations at the time of this settlement as she was experiencing at the time of her injury.<sup>38</sup>

¶ 24 Ray Nelson, M.D., examined Keller on March 14, 2007. Dr. Nelson stated, “[Keller] has seen numerous physicians and had numerous studies done [for her chronic back pain] together with several cortisone injections in the area of the thoracic spine around T7-8 and

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<sup>31</sup> *Id.*

<sup>32</sup> Ex. 6 at 2-3.

<sup>33</sup> Ex. 6 at 6.

<sup>34</sup> *Id.*

<sup>35</sup> Ex. 1 at 9.

<sup>36</sup> Keller Dep. 67:23 - 68:1.

<sup>37</sup> Ex. 7 at 14-15.

<sup>38</sup> Keller Dep. 35:8 - 36:7.

T8-9 all without relief. She has seen a neurosurgeon and an orthopedic surgeon who both recommended breast reduction surgery.”<sup>39</sup>

¶ 25 Keller settled her medical benefits on August 23, 2007, for \$7,500. The settlement reflected that it was a disputed settlement of medical benefits because the parties disputed the medical necessity of Keller’s breast reduction surgery. The settlement was approved by the Department of Labor and Industry on September 4, 2007. Keller was not represented by an attorney at the time of this settlement.<sup>40</sup> Keller testified at her deposition that she was experiencing the same pain symptoms at the time of this settlement as she was experiencing at the time of her injury.<sup>41</sup>

¶ 26 Keller had breast reduction surgery in September 2007.<sup>42</sup> This surgery provided her with no pain relief.<sup>43</sup>

¶ 27 In August 2008, Keller was referred to Dean E. Ross, M.D., for electrodiagnostic investigation of her prominent scapular winging.<sup>44</sup> The electrodiagnostic testing found evidence of a chronic right long thoracic neuropathy that produced profound serratus anterior weakness and scapular winging. Dr. Ross’s physical findings included “very prominent winging of the right scapula seen at rest and certainly provoked most completely with shoulder abduction and protraction.”<sup>45</sup> Dr. Ross described Keller’s winging symptom as “striking cosmetically.”<sup>46</sup>

¶ 28 After reviewing PA-C Strine’s February 8, 2005, treatment note, Dr. Ross testified that the scapular winging noted by PA-C Strine was more probably than not related to a long thoracic nerve injury.<sup>47</sup> Dr. Ross opined that the lesion and symptoms associated with

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<sup>39</sup> Ex. 8 at 2.

<sup>40</sup> Keller Dep. Ex. 6 at 3; Keller Dep. 59:9 - 60:22.

<sup>41</sup> Keller Dep. 61:22 - 62:16.

<sup>42</sup> Keller Dep. 24:3-8.

<sup>43</sup> Trial Test.

<sup>44</sup> Ex. 20 at 9-10.

<sup>45</sup> Ex. 20 at 9.

<sup>46</sup> Ex. 20 at 10.

<sup>47</sup> Ross Dep. 21:24 - 23:11.

Keller's long thoracic nerve injury were present from the date of the initial injury to the date he first examined her in 2008.<sup>48</sup>

¶ 29 Dr. Beck examined Keller again on October 23, 2008, approximately three years after her previous visit. Dr. Beck's note states that Keller continued to have trouble with her neck and right shoulder after her breast reduction surgery. Dr. Beck noted that Dr. Ross's nerve conduction study verified Keller's long thoracic nerve palsy. Dr. Beck concluded the long thoracic nerve palsy was responsible for many of Keller's pain symptoms, although he had not seen a patient so symptomatic from this type of injury.<sup>49</sup>

¶ 30 Dr. Beck testified that scapular winging is one sign of long thoracic nerve palsy and considers, for the most part, scapular winging synonymous with long thoracic radiculopathy.<sup>50</sup> Dr. Beck testified that Keller's scapular winging was absent when he examined her in 2005, and was not part of the referring physician's impression.<sup>51</sup> Dr. Beck acknowledged, however, that Dr. Brown observed that Keller's right scapula appeared to be winging on April 27, 2005.<sup>52</sup> Dr. Beck opined that the scapular winging present in 2005 was more likely than not the result of the long thoracic neuropathy that Keller was diagnosed with in 2008.<sup>53</sup>

¶ 31 Keller testified at trial that prior to entering into the 2007 settlement agreements, she had no knowledge that her medical condition included either scapular winging or long thoracic nerve injury despite multiple references to these conditions in her medical records predating her settlements.<sup>54</sup>

### CONCLUSIONS OF LAW

¶ 32 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 Keller's industrial accident.<sup>55</sup>

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<sup>48</sup> Ross Dep. 30:21 - 31:3.

<sup>49</sup> Ex. 13 at 16-17.

<sup>50</sup> Beck Dep. 7:23 - 8:9.

<sup>51</sup> Beck Dep. 8:14-24.

<sup>52</sup> Beck Dep. 9:9 - 10:3; Beck Dep. Ex. 1 at 188.

<sup>53</sup> Beck Dep. 10:4-8.

<sup>54</sup> Trial Test.

<sup>55</sup> *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).



¶ 33 Keller bears the burden of proving by a preponderance of the evidence that she is entitled to the benefits she seeks.<sup>56</sup>

**Issue 1: Whether Keller’s two settlements in 2007 of indemnity benefits and medical benefits were entered into on the basis of a mutual mistake of fact and should be set aside.**

¶ 34 A settlement agreement is a contract, and contract law must be applied to determine whether an agreement is valid and enforceable.<sup>57</sup>

¶ 35 It is well established that a settlement agreement must be rescinded if, when the parties entered into it, they were mutually mistaken regarding a fact that was material to the agreement.<sup>58</sup> In this case, Keller argues that the parties were mutually mistaken concerning Keller’s medical diagnosis at the time of the settlement agreements. Specifically, Keller argues, “The mistake consisted in failing to account for the onset of nerve damage and/or chronic nerve inflammation and winging of the right scapula as the major injury and cause of claimant’s pain.”<sup>59</sup>

¶ 36 Keller testified at trial that prior to entering into her settlement agreements, she had no knowledge that her medical condition included either scapular winging or long thoracic nerve injury, despite multiple references to these conditions in her medical records predating her settlement agreements. Assuming for the sake of argument that Keller was unaware of these conditions, she still has failed to carry her burden of proof that there was a *mutual* mistake of fact. In order to find that the alleged material mistake was mutual to both Keller and Liberty, I must find that Liberty had no knowledge that Keller’s medical condition included either scapular winging or long thoracic nerve injury at the time the parties entered into the settlement agreements. Keller has submitted no evidence in support of such a finding and indeed such a finding would be contrary to the evidence submitted to the Court. Therefore, I must conclude that there was no mutual mistake of fact at the time Keller and Liberty entered into their settlement agreements.

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<sup>56</sup> *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).

<sup>57</sup> *Gamble v. Sears*, 2007 MT 131, ¶ 24, 337 Mont. 354, 160 P.3d 537.

<sup>58</sup> *Id.* at ¶ 26.

<sup>59</sup> Pretrial Order at 2.

**Issue 2: Whether Keller's request to reopen her settlement of indemnity benefits in January 2007 is barred by the two-year statute of limitations in § 27-2-203, MCA, and this Court's holding in *Miller v. State Fund*, 1999 MTWCC 21.**

¶ 37 Having determined that no mutual mistake of fact occurred, the Court need not reach the issue of whether Keller's request to reopen her January 2007 settlement is barred by the two-year statute of limitations.

JUDGMENT

¶ 38 Keller's two settlements in 2007 of indemnity benefits and medical benefits were not entered into on the basis of a mutual mistake of fact.

¶ 39 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 16th day of February, 2010.

(SEAL)

/s/ JAMES JEREMIAH SHEA  
JUDGE

c: Howard Toole  
Larry W. Jones  
Submitted: October 16, 2009