

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2011 MTWCC 30

WCC No. 2010-2507

KATHERINE McGLINCHEY

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: After Petitioner received a Social Security determination that she was disabled from the time of her industrial accident forward, she sought to reopen her settlement agreement, arguing that the parties entered into the agreement under a mutual mistake of fact since neither believed at the time of the settlement that she would never be able to work again.

Held: Notwithstanding the Social Security determination, the evidence presented demonstrates that Petitioner was able to, and in fact did, return to work following her industrial accident. Therefore no mutual mistake of fact occurred and Petitioner is not entitled to reopen her settlement.

Topics:

Settlements: Reopening: Mistake of Fact. Although Petitioner contended that a Social Security determination that she was disabled from the time of her industrial accident forward meant that the parties entered into a settlement agreement under a mutual mistake of fact because neither party believed at the time that Petitioner would be able to return to work, the evidence in this case indicates that Petitioner was capable of returning to work after her industrial accident and that she did so, albeit not in the same type of physically demanding labor which she had previously performed. No mistake of fact occurred as Petitioner's industrial accident did not leave Petitioner unable to return to work. Therefore, Petitioner is not entitled to reopen her indemnity settlement.

¶ 1 The trial in this matter came on November 15, 2011, at the Workers' Compensation Court in Helena, Montana, with Petitioner Katherine McGlinchey testifying via videoconferencing at Charles Fisher Court Reporting. McGlinchey waived her appearance at the rest of the trial and was represented by Charla K. Tadlock. Daniel B. McGregor represented Respondent Montana State Fund (State Fund).

¶ 2 Exhibits: I admitted Exhibits 1 through 8, 10 through 12, 14, and 16 through 32 without objection. Respondent withdrew Exhibit 9. I admitted Exhibit 13; however, I sustained Petitioner's hearsay objections to those portions of the report containing hearsay statements. I admitted Exhibit 15 for the limited purpose of Petitioner's claim regarding Respondent's reasonableness, with the caveat that I will not consider the allegations contained therein for the truth of the matters asserted. Mr. McGregor made a correction to Exhibit 15, noting that the final page 3 should be attached to the employer's First Report of Injury at Exhibit 2. Ms. Tadlock had no objection to the correction and the page was marked page 1A of Exhibit 2.

¶ 3 Witnesses and Depositions: Ms. McGlinchey was sworn and her testimony was taken via videoconferencing. Kevin J. Bartsch was sworn and testified.

¶ 4 Issues Presented: The Pretrial Order sets forth the following issues:¹

Issue One: Whether the Petitioner is entitled to reopen the indemnity settlement based on a mutual mistake of fact.

Issue Two: Whether the Petitioner is entitled to attorney fees, costs, and a penalty in this action.

FINDINGS OF FACT

¶ 5 On September 7, 1990, McGlinchey suffered an industrial injury arising out of and in the course of her employment with Camp 8 Ranch in Big Horn County, insured by State Fund.²

¶ 6 On December 9, 1992, McGlinchey sought treatment with Craig A. Zunka, DDS, FAGD, FASCD, for jaw injuries she suffered during her industrial accident.³ Although

¹ Pretrial Order at 2, Docket Item No. 36.

² Pretrial Order, Uncontested Facts, at 1.

³ Ex. 19 at 1-2.

there was a gap in time in which McGlinchey did not seek medical benefits from State Fund, McGlinchey continues to receive medical treatment for her industrial injury.⁴

¶ 7 In late 1993, Crawford Rehabilitation Services prepared job analyses for McGlinchey on behalf of State Fund which were approved by Dr. Zunka, including bank teller, hotel desk clerk, and optometric assistant.⁵

¶ 8 On June 27, 1994, McGlinchey settled her workers' compensation claim, closing indemnity, rehabilitation, and travel benefits while reserving medical and hospital benefits.⁶

¶ 9 McGlinchey testified at trial. I have reservations as to the credibility of McGlinchey's testimony. I believe she may have understated her physical abilities and the type of work she performed subsequent to her industrial injury. As set forth below, however, even taking her testimony at face value, McGlinchey admits to engaging in work activities after September 7, 1990.

¶ 10 McGlinchey resides in Fairmont, West Virginia. McGlinchey's doctor recommended that she not travel to Montana for this trial due to significant health problems.⁷ McGlinchey therefore testified via videoconference.

¶ 11 McGlinchey testified that when she began to treat with Dr. Zunka, she was disabled to the point where she was barely able to care for herself. McGlinchey testified that she did not believe she would ever obtain the same level of functioning which she had prior to her industrial injury, but she was determined to heal as much as possible. She testified that by 1994, her condition had improved to the point where she could care for herself and engage in activities of daily living.⁸

¶ 12 McGlinchey testified that she and Dr. Zunka believed she might be able to return to work if she could find a job which fell within her capabilities and did not put her in danger of re-injuring herself. She testified that Dr. Zunka approved specific jobs for her, including optician, hotel desk clerk, and accounting. She further testified that she heard of a training program for learning to value horses for insurance purposes. The

⁴ Ex. 1.

⁵ Ex. 18 at 9-20.

⁶ Pretrial Order, Uncontested Facts, at 2.

⁷ Docket Item No. 28.

⁸ Trial Test.

possibility of learning this trade appealed to her, but upon further investigation she learned that there was no demand for the service.⁹

¶ 13 McGlinchey testified that her educational background includes training as a licensed practical nurse and post-graduate classes in equine nutrition and reproduction at Ohio State University.¹⁰ McGlinchey completed the equine nutrition course in approximately 1995 and the equine reproduction course in 1998.¹¹

¶ 14 McGlinchey testified that at the time she settled her claim, she believed she could return to work.¹² McGlinchey testified that on several occasions, she attempted to engage in self-employment ventures. At the time McGlinchey traveled to Montana in 1990, she owned 28 horses that she intended to use for a trail riding company. McGlinchey testified that she had intended to earn money in Montana to start her trail riding business upon her return to West Virginia. When she returned to West Virginia after her industrial accident, McGlinchey hired three employees to run the business.¹³

¶ 15 McGlinchey testified that she personally did not perform any physical labor for her trail riding company. However, she planned the trail rides, instructed her customers, purchased supplies, and maintained the business accounting. McGlinchey testified that she occasionally rode a well-trained horse, but she no longer trained or broke horses after her industrial accident. McGlinchey estimated that she ran this business for eight or nine months after she began treating with Dr. Zunka.¹⁴ McGlinchey testified that after she ceased offering trail rides, she maintained ownership of the horses.¹⁵

¶ 16 McGlinchey testified that she never filed any tax returns for her trail riding business because she did not make any income. McGlinchey further testified that she has not filed any personal state or federal income taxes since 1990.¹⁶ McGlinchey testified that she did not have any wages for purposes of Social Security after September 7, 1990.¹⁷

⁹ Trial Test.

¹⁰ Trial Test.

¹¹ Trial Test.

¹² Trial Test.

¹³ Trial Test.

¹⁴ Trial Test.

¹⁵ Trial Test.

¹⁶ Trial Test.

¹⁷ Trial Test.

¶ 17 McGlinchey testified that she met John W. Frye, a dentist, in September 1993. She and Dr. Frye had a long-term relationship and shared an interest in horses. Dr. Frye owned a piece of real estate which they turned into a residence and horse facility. The property consisted of 30 acres and included an older residential dwelling. McGlinchey testified that she remodeled the existing dwelling and designed their new residence and the horse facility. McGlinchey testified that she and Dr. Frye turned the property into a facility for breeding and training Paso Fino horses.¹⁸

¶ 18 After McGlinchey and Dr. Frye developed the farm, McGlinchey ran the farm and managed the farm crew. McGlinchey testified that the farm offered training services for Paso Fino horses but she did not personally train the horses. The farm also offered horse boarding services. McGlinchey testified that she was involved in the breeding and sale of Paso Fino horses.¹⁹

¶ 19 McGlinchey testified that she taught equine nutrition and equine reproduction for the Fairmont State College veterinary technical program. For a few years, the program sent between 12 and 14 veterinary technician students to work on McGlinchey's farm during the foaling season. McGlinchey testified that she was not paid to teach the equine nutrition and equine reproduction classes; rather, she received foaling assistance from the students in exchange for the instruction. McGlinchey testified that she had very valuable mares which required 24-hour monitoring when they were due to foal. McGlinchey testified that the farm usually had one or two full-time employees and up to four part-time employees on the payroll and a two-man grounds crew.²⁰ McGlinchey testified that Dr. Frye was the sole proprietor of the farm and paid the taxes on it.²¹

¶ 20 In addition to the farm property, Dr. Frye purchased a residential structure which he intended to convert into a dental office. McGlinchey supervised that project. McGlinchey testified that she was not capable of performing the physical work involved in building her home and farm or in remodeling Dr. Frye's office. She designed the projects and scheduled the day-to-day work, but she depended on a crew to perform the physical labor. McGlinchey testified that at the start of each day, she would explain to the crew what work was to be performed and she drew plans for remodeling rooms.

¹⁸ Trial Test.

¹⁹ Trial Test.

²⁰ Trial Test.

²¹ Trial Test.

McGlinchey testified that she typically worked three to five days per week on these projects and that she was able to work at her own pace.²²

¶ 21 McGlinchey testified that Dr. Frye's new office was located near a senior living community, and while she was working on the renovation, she received several inquiries from senior citizens who needed minor repairs done on their homes. McGlinchey began instructing the construction crew who worked with her on Dr. Frye's office to perform minor repairs on local residences. McGlinchey testified that her crew members did the physical labor, but she would accompany them on the jobs and would instruct them in the repairs. McGlinchey testified that she enjoyed the work, and she and Dr. Frye discussed the possibility of her forming a limited liability company (LLC) to do home remodeling and home repairs. She, Dr. Frye, and another associate applied for an LLC to perform this work.²³ McGlinchey testified that her plans to run the LLC ended when she suffered a heart attack.²⁴

¶ 22 On August 28, 2008, a U.S. Administrative Law Judge determined that McGlinchey was disabled, as defined in the Social Security Act, and that she had been disabled since September 7, 1990.²⁵ McGlinchey testified that her main motivation in applying for Social Security disability benefits was because of her heart condition and kidney failure. However, she further testified that her life has been affected by her industrial accident. McGlinchey testified that she was "shocked" when the Social Security Administration declared her to be disabled since her industrial accident. She also was upset when she realized she would have to deal with State Fund because she did not want to deal with the insurer again.²⁶

¶ 23 McGlinchey testified that after she applied for Social Security disability benefits, the agency denied her claim twice. McGlinchey testified that at the time her claim was denied, she did not know that she had been disabled since September 1990. She testified that while she knew she could not do the same things she was able to do prior to her industrial injury, she felt like her life had been productive and that she had learned new skills which allowed her to contribute.²⁷

¶ 24 On January 8, 2010, an attorney for State Fund wrote to McGlinchey's counsel, apparently in response to a letter from McGlinchey's counsel requesting that the 1994

²² Trial Test.

²³ Trial Test.

²⁴ Trial Test.

²⁵ Ex. 11.

²⁶ Trial Test.

²⁷ Trial Test.

settlement agreement be reopened. State Fund's counsel asserted that no basis existed to reopen the settlement.²⁸

CONCLUSIONS OF LAW

¶ 25 This case is governed by the 1989 version of the Montana Workers' Compensation Act since that was the law in effect at the time of McGlinchey's industrial accident.²⁹

¶ 26 McGlinchey bears the burden of proving by a preponderance of the evidence that she is entitled to the benefits she seeks.³⁰ McGlinchey has not met this burden.

ISSUE ONE: Whether the Petitioner is entitled to reopen the indemnity settlement based on a mutual mistake of fact.

¶ 27 The full and final settlement entered into by the parties is a contract; thus contract law governs the agreement.³¹ A contract may be rescinded when the parties were laboring under a mutual mistake regarding a material fact when the contract was made.³² The contract may be rescinded only where "the parties share a common misconception about a vital fact upon which they based their bargain."³³

¶ 28 McGlinchey argues that the parties entered into the settlement agreement under a mutual mistake of fact because the parties believed that she would be able to return to work after her industrial injury. McGlinchey argues that she only discovered that she could not have returned to work after her industrial accident when she was awarded Social Security disability benefits dating back to the date of her industrial accident.

¶ 29 State Fund responds that no mutual mistake of fact occurred because McGlinchey was capable of returning to work after her industrial injury. Dr. Zunka approved several job analyses. State Fund argues that McGlinchey's activities regarding the design, building, and running of her and Dr. Frye's farm, her participation in breeding and selling Paso Fino horses, and her activities in renovating a building into

²⁸ Ex. 3 at 65-66.

²⁹ *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

³⁰ *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).

³¹ *Morrisette v. Zurich American Ins. Co.*, 2000 MTWCC 2, ¶ 61 (citing *Kienas v. Peterson*, 191 Mont. 325, 329, 624 P.2d 1, 3 (1980)).

³² *Morrisette*, ¶ 61 (citing *South v. Transportation Ins. Co.*, 275 Mont. 397, 401, 913 P.2d 233, 235 (1996)).

³³ *Morrisette*, ¶ 61 (quoting *Mitchell v. Boyer*, 237 Mont. 434, 437, 774 P.2d 384, 386 (1989)). (Citations omitted; emphasis omitted.)

Dr. Frye's dental office and supervising her crew as they performed repair work on neighboring residences rise above the level of hobbies. State Fund argues that simply because McGlinchey may not have directly received income for these activities does not mean that she did not meaningfully participate in activities which could be considered "work." State Fund further argues that no doctor has ever found McGlinchey to be permanently totally disabled as a result of her industrial injury. While State Fund concedes that, due to more recent health problems, McGlinchey may be disabled, State Fund argues that this Court is not obligated to agree with the Social Security Administration's determination that McGlinchey has been unable to work since her industrial accident.

¶ 30 As set forth in the findings above, McGlinchey admits that she operated her trail riding business for some time following her return to West Virginia after her industrial accident. McGlinchey later designed and ran the farm she shared with Dr. Frye, including overseeing a breeding and training operation for Paso Fino horses. McGlinchey also designed Dr. Frye's new dental office, supervising and directing the crew's work. McGlinchey further supervised and directed the crew as they performed home repair work for neighboring residences. Regardless of whether McGlinchey had actually formed an LLC – and accepting McGlinchey's representation that she personally performed no physical labor – her testimony is that she acted in a supervisory capacity with her crews on her farm, at Dr. Frye's new dental office, and on repair projects at nearby residences. McGlinchey further testified that she had to discontinue the home repair endeavor because she suffered a heart attack – not because her industrial accident had left her unable to work.

¶ 31 McGlinchey's September 7, 1990, industrial accident may indeed have left her unable to perform the same types of physically demanding labor that she performed prior to the industrial accident. However, McGlinchey clearly had other transferable skills which she put to use in subsequent years. McGlinchey ran businesses, supervised and directed employees, and put her skills to use both to build her Paso Fino breeding operation and to benefit Dr. Frye's dental practice. These activities were consistent with the job analyses which McGlinchey's treating doctor approved in 1993. Whether or not McGlinchey drew a wage or had income is not relevant to the issue of whether she was, in fact, capable of working in an income-producing capacity if she so chose. Although the Social Security Administration concluded that McGlinchey was disabled as of September 7, 1990, the evidence in the present case before this Court indicates otherwise.

¶ 32 I conclude that the parties were not operating under a mutual mistake of fact at the time they entered into the settlement agreement at issue. McGlinchey has not proven that a mistake of fact occurred as the evidence in this case indicates that her September 7, 1990, industrial accident did not leave her unable to return to work.

ISSUE TWO: Whether the Petitioner is entitled to attorney fees, costs, and a penalty in this action.

¶ 33 Since McGlinchey is not the prevailing party, she is not entitled to her costs, attorney fees, or a penalty.³⁴

JUDGMENT

¶ 34 Petitioner is not entitled to reopen the indemnity settlement based on a mutual mistake of fact.

¶ 35 Petitioner is not entitled to attorney fees, costs, or a penalty in this action.

¶ 36 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 30th day of December, 2011.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Charla K. Tadlock
Daniel B. McGregor
Submitted: November 15, 2011

³⁴ See §§ 39-71-611, -2907, MCA.