IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2008 MTWCC 53

WCC No. 2008-2032

GAYLE PINNOW

Petitioner

vs.

HALVERSON, SHEEHY & PLATH, P.C.

Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Petitioner entered into a settlement agreement which settled two workers' compensation claims with Respondent acting as her attorney. Although Petitioner ultimately accepted the settlement amount, she contested Respondent's right to an attorney fee, arguing that Respondent did not adequately represent her interests.

Held: The evidence overwhelmingly demonstrates that Petitioner was well-represented by Respondent. Respondent is entitled to its attorney fee and costs as provided for in the Attorney Retainer Agreement signed by Petitioner and Respondent.

¶ 1 The trial in this matter was held on June 26, 2008, in Billings, Montana. Petitioner Gayle Pinnow was present and was represented by Roy W. Johnson. Respondent Halverson, Sheehy & Plath, P.C., was represented by J. David Slovak. R. Russell Plath, Patrick R. Sheehy, and Victor R. Halverson, Jr., were also present.

¶ 2 Exhibits: Exhibits 1 through 50, 52, and 53 were admitted without objection. Exhibit 51, the Department Mediation Report, was removed from the exhibit book by agreement of the parties and returned to Respondent.

¶ 3 Witnesses: Petitioner, Arnaldo Flores, Jr., R. Russell Plath, Jay P. Dufrechou, and Steven S. Carey were sworn and testified at trial.

¶ 4 Stipulations: Prior to commencement of trial, I determined that the mediation in which the parties participated with mediator Jay P. Dufrechou was not a "department

mediation" within the meaning of § 39-71-2401, MCA, and therefore was not subject to the confidentiality rules of the statutes applicable to a department mediation. However, pursuant to § 26-1-813, MCA, any stipulation waiving confidentiality to a mediation must be in writing. A written Stipulation and Agreement to Waive Confidentiality and Privilege Pursuant to § 26-1-813(3), MCA, was prepared, signed by Dufrechou and counsel for the parties, and filed as Docket Item No. 33.

¶ 5 Issues Presented: The Pretrial Order states the following contested issues:

> ¶ 5a Was there a mutual mistake of fact as to the existence of a work release at the time of the settlement conference?
>
> ¶ 5b What is the appropriate compensation (attorney fees and costs), if any, due Respondent?
>
> ¶ 5c Whether Petitioner can raise the issue of mutual mistake when Petitioner failed to assert this issue in the Petition for Hearing?[1]

¶ 6 Prior to trial, Montana State Fund[2] (MSF) filed a motion for summary judgment on the issue of whether Petitioner can raise the issue of mutual mistake of fact as to the existence of a work release when she did not assert this issue in her Petition for Hearing. On June 20, 2008, I granted MSF's motion, holding that the Stipulation for Settlement is a valid and enforceable contract, that Petitioner no longer has any claims against MSF, that judgment is satisfied as to both of Petitioner's claims against MSF, and dismissing MSF from the case and changing the caption accordingly.[3] Therefore, the only issue which remains contested in this case is listed above at ¶ 5b: What is the appropriate compensation (attorney fees and costs), if any, due Respondent?

¶ 7 After Petitioner presented her case-in-chief, R. Russell Plath testified for Respondent. At the close of Plath's testimony, I asked Petitioner's counsel if Petitioner would be presenting any rebuttal testimony on the evidence thus far presented. Petitioner's counsel responded that no rebuttal testimony would be presented. At that point, I advised the parties that I was convinced that Petitioner had not met her burden of proof. However, since this Court's rules do not provide for a directed verdict, I gave counsel the opportunity

---

[1] Pretrial Order at 6.

[2] At the time, Montana State Fund was an Intervenor in this case.

[3] Order Granting Intervenor's Motion for Summary Judgment, Dismissing Intervenor, and Changing Caption, Docket Item No. 30.

to consult with their respective clients and advise the Court as to whether Respondent would proceed with its presentation of witnesses.

¶ 8 Respondent presented two additional witnesses. At the close of arguments, I informed the parties that I would not issue a formal bench ruling pursuant to ARM 24.5.335 because I was not prepared to enunciate the *Wight* factors[4] orally. However, I advised the parties that I had concluded that Petitioner did not meet her burden of proof, and that I had reservations about the credibility of both Petitioner and Arnaldo Flores. I further determined that the evidence demonstrated that Plath had done an exceptional job on Petitioner's case and that I could not find any justification for Petitioner's claim that Plath was not owed the attorney fee provided for in the Attorney Retainer Agreement. The following Findings of Fact, Conclusions of Law, and Judgment are issued in accordance with my oral ruling at trial.

Procedural History

¶ 9 On November 5, 1998, Petitioner reported to her employer, Kathy & Karen's Card Room, that her hands were hurting. Kathy & Karen's Card Room was insured by MSF, which accepted liability for Petitioner's industrial injury on January 25, 1999, under Claim No. 03-99-03798-5.[5]

¶ 10 On April 5, 1999, Petitioner complained to her employer that her shoulder hurt. MSF assigned Claim No. 03-1999-09294-9 to Petitioner's left shoulder claim. MSF refused to accept liability for this claim as an industrial injury, but placed the claim under the Occupational Disease Act.[6]

¶ 11 On May 24, 2004, Petitioner retained R. Russell Plath of Respondent to represent her on the two workers' compensation claims described above. Petitioner and Plath used an Attorney Retainer Agreement ("Agreement") which is the standard Agreement form prepared by the Montana Department of Labor and Industry for use by attorneys representing workers' compensation claimants arising under the laws of the State of Montana. Petitioner and Plath entered into representation under Option A of the Agreement, which provides for a 20% contingent fee on settled claims and a 25% contingent fee on benefits awarded by court order.[7]

---

[4] *Wight v. Hughes Livestock Co., Inc.*, 204 Mont. 98, 664 P.2d 303 (1983).

[5] Pretrial Order, Uncontested Facts, ¶¶ 1-3.

[6] Pretrial Order, Uncontested Facts, ¶ 4.

[7] Pretrial Order, Uncontested Facts, ¶¶ 5-7; *see* Exs. 12-13.

¶ 12 On June 4, 2004, the Employment Relations Division of the Montana Department of Labor and Industry ("ERD" or "department") issued a letter stating that the Agreement entered into between Petitioner and Plath for Petitioner's claims numbered 03-1999-09294-9 and 03-1999-03798-5 had been approved for Option A pursuant to § 39-71-613, MCA, and the applicable Administrative Rules of Montana.[8]

¶ 13 A dispute arose between Petitioner and MSF, and Plath filed a Petition for Hearing dated November 12, 2004, on Petitioner's behalf in the Workers' Compensation Court.[9]

¶ 14 On December 14, 2004, Petitioner's treating physician Dr. Michael H. Schabacker opined that Petitioner had reached a point of maximum healing (MMI) and provided her with a 20% impairment rating. Dr. Schabacker stated that Petitioner could return to work and approved three job descriptions which he believed she was capable of performing.[10]

¶ 15 On February 17, 2005, a mediation/settlement conference regarding the issues raised in Petitioner's Petition for Hearing was held at Plath's office. Dufrechou, hearings examiner for this Court, was the mediator. Petitioner was represented by Plath. Also present was Arnaldo "Arnie" Flores, Jr., whom Petitioner described as a "lay advocate." MSF was represented by Michael P. Heringer. MSF's claims examiner Linda Collins participated by telephone.[11]

¶ 16 At the February 17, 2005, mediation/settlement conference, both of Petitioner's claims (03-1999-09294-9 and 03-1999-03798-5) were settled in full for a lump-sum payment of $125,000. Plath, Heringer, and Petitioner signed a Stipulation for Settlement ("Stipulation") to that effect. The Stipulation clearly set forth the terms of the agreement, and provided for Petitioner to receive $125,000 plus payment of outstanding medical expenses.[12]

¶ 17 On February 22, 2005, Workers' Compensation Court Judge Mike McCarter issued an order approving the Stipulation and entering judgment. After the Order and Judgment

---

[8] Pretrial Order, Uncontested Facts, ¶ 8.

[9] Pretrial Order, Uncontested Facts, ¶ 10.

[10] Pretrial Order, Uncontested Facts, ¶ 9.

[11] Pretrial Order, Uncontested Facts, ¶ 11.

[12] Pretrial Order, Uncontested Facts, ¶¶ 12-13; *see* Ex. 17.

was issued, Petitioner contacted the Court to repudiate the Stipulation and deny attorney fees to Plath.[13]

¶ 18 On March 31, 2005, Plath filed a notice with ERD placing an attorney fee lien in the amount of $25,000, plus costs advanced in the amount of $1,906.04, against the settlement proceeds. Sometime thereafter, Petitioner terminated her relationship with Plath and notified the Court that she no longer wanted to go forward with the settlement.[14]

¶ 19 On April 20, 2005, Judge McCarter entered a minute entry to commemorate a telephone conference held that day between Petitioner, the attorneys involved in the case, and the Court. Judge McCarter authorized Plath's withdrawal as attorney of record; gave Petitioner until April 25, 2005, to decide if she would repudiate the settlement; and ordered Heringer to hold the settlement checks. Judge McCarter also agreed to treat Petitioner's correspondence with the Court as a petition disputing attorney fees, and decided to open a new case file and issue a scheduling order with respect to the attorney fee dispute so that Plath could respond. Petitioner notified the Court that she was rejecting the settlement in a letter dated April 26, 2005.[15]

¶ 20 On May 2, 2005, Judge McCarter issued an order requesting that Judge Jeffrey Sherlock assume jurisdiction over the matter. Judge Sherlock issued an order accepting jurisdiction on May 3, 2005.[16]

¶ 21 On November 10, 2005, MSF moved for an order enforcing the Stipulation. On November 22, 2005, Petitioner signed and filed with this Court a notice withdrawing any objection to the terms of the Order and Judgment approving the Stipulation.[17]

¶ 22 On February 24, 2006, Judge Sherlock granted MSF's Motion for Summary Judgment. Judge Sherlock enforced the Stipulation and held that the 20% contingency fee was reasonable and that Plath's firm was entitled to attorney fees. On March 8, 2006, Petitioner appeared at the Brown Law Firm with Flores, signed a Satisfaction of Judgment, and accepted a settlement check in the amount of $98,093.96 – her full share of the settlement proceeds in accordance with the Agreement on file with ERD. In the

---

[13] Pretrial Order, Uncontested Facts, ¶¶ 14-15; *see* Exs. 18-19.

[14] Pretrial Order, Uncontested Facts, ¶¶ 20-21.

[15] Pretrial Order, Uncontested Facts, ¶¶ 15-17.

[16] Pretrial Order, Uncontested Facts, ¶¶ 18-19.

[17] Pretrial Order, Uncontested Facts, ¶¶ 23-24; *see* Ex. 22.

Satisfaction of Judgment, Petitioner agreed to release MSF "from any and all liability to this case on the pending appeal." She reserved her attorney fee issue.[18]

¶ 23 Petitioner then appealed Judge Sherlock's February 24, 2006, Order. The Montana Supreme Court remanded the case on appeal, holding that Judge Sherlock lacked jurisdiction over the matter. The Court specifically vacated Judge Sherlock's Order on Cross-Motions for Summary Judgment and remanded the case back to this Court, ordering it "to open a new case file related to Pinnow's dispute with Halverson regarding attorney's fees and for further proceedings not inconsistent with this Opinion."[19]

FINDINGS OF FACT

¶ 24 Petitioner testified at trial. I do not find her recollection of the events in her case to be credible in light of evidence to the contrary. I do find Petitioner to be credible in explaining to the Court her beliefs and what she wished to accomplish via this litigation. However, I do not find Petitioner's testimony credible where her recollections contradict other evidence in the record.

¶ 25 Petitioner does not want Plath to receive an attorney fee for representing her in her workers' compensation case. Petitioner asks the Court to give her the withheld funds because she alleges that Plath does not deserve to get paid for his representation. Petitioner understands that the present case deals only with Plath's attorney fees and that she received the settlement funds and had additional medical bills paid by MSF as agreed to in the Stipulation, and is not disputing the settlement amount.[20]

¶ 26 Prior to being represented by Plath, Petitioner was represented by Roy Johnson – her counsel in the present case. Petitioner testified she was unhappy with the way her case was proceeding when Johnson initially represented her and she confronted him about it. She then hired Plath, and signed an Agreement which was nearly identical to the one she had signed with Johnson.[21]

¶ 27 Petitioner understood from the Agreement that Plath's fee would be 20% of any amount recovered prior to trial on a contingent basis. After Plath's representation commenced, the parties participated in a department mediation and Petitioner rejected an

---

[18] Pretrial Order, Uncontested Facts, ¶¶ 25-28; *see* Ex. 25.

[19] Pretrial Order, Uncontested Facts, ¶¶ 29-31 (*citing Pinnow v. Montana State Fund*, 2007 MT 332, 340 Mont. 217, 172 P.3d 1273).

[20] Trial Test.

[21] Trial Test.

offer on Plath's recommendation. After the offer was rejected, Plath filed a petition on Petitioner's behalf in this Court, and it was after Plath filed the petition that the settlement conference which is pertinent to the present case occurred. Petitioner conceded that Plath obtained a settlement on her behalf of $131,000, whereas prior to his involvement, she did not receive any settlement offers.[22]

¶ 28 The settlement conference occurred on February 17, 2005, and was mediated by Dufrechou. Prior to the conference, Plath explained to Petitioner that no case is perfect, that every case has strengths and weaknesses, that there is a risk in proceeding to trial, that the judge could rule against her, and that the judge could rule in her favor but for a lesser amount than she believed her claim to be worth. Dufrechou reiterated these points at the beginning of the settlement conference.[23]

¶ 29 Petitioner invited Flores to attend the settlement conference as her friend and advisor because she alleges she has difficulty understanding things. Petitioner asserted that she has attention deficit disorder, and is dyslexic, and she therefore has difficulty with reading comprehension.[24]

¶ 30 Petitioner could not recall if she ever told Plath that she had problems with reading comprehension. The record is devoid of support for Petitioner's assertion that she is dyslexic and has difficulty reading. After she filed her workers' compensation claim, Petitioner met with vocational rehabilitation consultants, and while she denies any recollection of taking part in vocational testing, she apparently did so.[25] A Testing Report prepared by representatives of Work Rehabilitation Consultants, Inc., states that Petitioner scored within the average range of non-verbal intelligence and tested on a high school grade level in reading and spelling.[26] During this litigation, Petitioner has demonstrated an ability to read and comprehend documents. During the settlement conference, although she asserts that she did not notice that two claim numbers were listed in bold type in the first paragraph of the Stipulation, Petitioner indicated to the parties that her name had been misspelled within the document. In the week prior to this trial, Petitioner met with Respondent's counsel and, at that time, Petitioner read and discussed several documents

---

[22] Trial Test.

[23] Trial Test.

[24] Trial Test.

[25] Trial Test.

[26] Ex. 3.

with Respondent's counsel and even demonstrated that she was able to read one upside down.[27]

¶ 31 Petitioner's dissatisfaction with Plath's representation appears to include her claim that she was "rushed" into signing the Stipulation and that she did not fully appreciate its contents until a few days later when she reread the document and had Flores advise her. Petitioner was given ample opportunity to repudiate the settlement and upon further consideration she agreed to accept and abide by the settlement. She also testified that she is satisfied with the settlement amount. While I was not persuaded by Petitioner's testimony that she was pressured into signing the Stipulation without being given the opportunity to fully read and appreciate the document, I note that when Petitioner subsequently read and considered the document, she ultimately accepted and agreed to the proposed settlement.

¶ 32 Petitioner's dissatisfaction with Plath's representation primarily concerns a job approval which was signed by Dr. Schabacker on December 1, 2004.[28] At the top, the document says, "Job Analyses For Review - Please Indicate Your Approval/Disapproval:" and on separate lines it offers "Bank Teller," "Telephone Sales Rep," and "Cashier." Next to each job, Dr. Schabacker checked "Approve," although he further commented, "All JA's indicate frequent & repetative [sic] upper extremity use. These activities may increase discomfort."[29] Petitioner testified that during the settlement conference, she was told that Dr. Schabacker had given her a work release, and she felt that she had no choice but to settle her claim because Plath and Dufrechou both informed her that the work release made it unlikely that she would prevail at trial.[30]

¶ 33 Petitioner testified that at the settlement conference, Dufrechou opined that no judge would give her any compensation and she should take the settlement which was being offered. Petitioner stated that Dufrechou reminded her several times that her doctor had given her a work release, and Plath did not contradict Dufrechou's statements.[31]

¶ 34 Petitioner stated that she knew approximately two and one-half months before the settlement conference that Dr. Schabacker had approved several specific jobs for her, including bank teller, telephone sales representative, and cashier. Petitioner believes Plath

---

[27] Trial Test.

[28] Ex. 15.

[29] *Id*.

[30] Trial Test.

[31] Trial Test.

showed her the document in question a few days prior to the settlement conference. Petitioner described the document as "a piece of paper that had three jobs on it" which she was told was a work release. However, Petitioner believes this document is a "job approval" and not a work release because it does not say "work release" at the top. Petitioner stated that if the document said "work release," she would not have a dispute with Plath. However, Petitioner believes Plath lied to her about having a work release from Dr. Schabacker, because the document he referred to is a "job approval."[32]

¶ 35 Petitioner estimated that the settlement conference lasted approximately four and one-half hours. It culminated in an offer from MSF for $125,000. Petitioner balked, stating she would not accept the settlement unless MSF also paid some additional medical bills which totaled approximately $6,000. After MSF agreed to do so, Plath drafted the Stipulation. Petitioner stated that she started to read the document and noticed that her name was misspelled and requested that it be corrected.[33]

¶ 36 Petitioner testified that she relied upon Plath's representation that all the agreed-to terms were contained within the Stipulation. Petitioner testified that everyone else was rushing her and that she cannot read quickly. She asked Plath to explain the document and he responded that everything they had discussed was in the Stipulation and that he approved of it. Although Flores was present when Petitioner signed the Stipulation, he did not read it. A few days after she signed the Stipulation, she and Flores read it. She alleges that at that time, she discovered that both her claim numbers were listed on it.[34]

¶ 37 Petitioner maintains that at the time she signed the Stipulation, she was unaware that it would settle both her claims. A few days after the settlement conference, Petitioner and Flores called Plath and informed him that she was unhappy with the settlement and wanted to discuss the case. Petitioner asked Plath about the second claim when she and Flores went to Plath's office to pick up her settlement check. She and Flores met Plath in his office, where Flores wore a hidden microphone and taped the meeting without Plath's knowledge. Petitioner testified that the purpose of the meeting was to demand a copy of the work release. Petitioner testified that when she asked Plath for a copy of the work release, he informed her that it was "technically" not a work release and that if she wanted a work release, she needed to ask Dr. Schabacker for one.[35]

---

[32] Trial Test.

[33] Trial Test.

[34] Trial Test.

[35] Trial Test.

¶ 38 After Petitioner met with Plath, she contacted the Workers' Compensation Court to repudiate the settlement. However, she ultimately accepted the settlement as agreed to in the Stipulation.[36] Petitioner, appearing pro sé, filed a withdrawal of her objections in which she stated she would honor and comply with the Stipulation, but reserved her right to dispute Plath's attorney fees.[37] Petitioner explained that this document was prepared by Flores and that she read and understood it. She examined the Satisfaction of Judgment By Gayle Pinnow ("Satisfaction of Judgment") prepared by counsel for MSF[38] and, with Flores advising her, and after requesting the wording of the document be changed to allow her to contest Plath's attorney fee, Petitioner read and signed the document.[39]

¶ 39 Petitioner stated that she never wanted to accept the settlement and had informed Plath on several occasions that she wanted to go to trial. Petitioner testified that she had never wanted to settle her claim because she wanted her shoulder and neck surgeries performed. However, Petitioner stated that she spent the settlement funds and she has not gotten her shoulder and neck repaired.[40]

¶ 40 Petitioner testified that, although she is happy with the settlement and with the results that were obtained on her behalf, she is also angry with Dufrechou and believes he and Plath should both "pay" for her dissatisfaction.[41] The record indicates that Petitioner has been angry and dissatisfied with many of the parties involved in her workers' compensation claim. Plath was the second attorney to represent her in her claims after she became dissatisfied with Johnson. Subsequent to Plath's representation, Petitioner was represented by Paula Saye-Dooper, whose relationship with Petitioner also terminated. Petitioner also filed a claim against Plath with the Commission on Practice.[42]

¶ 41 At trial, Petitioner admitted that she is angry about the way her workers' compensation claim was handled, but denied being angry about the medical treatment she received. However, two weeks prior to the settlement conference, Petitioner wrote a letter to Dr. Schabacker in which she complained, "Why . . . did you throw me to the sharks when you said I was able to go back to work right away?" She further stated, "I believed you

---

[36] Trial Test.

[37] Ex. 22.

[38] Ex. 25 at 7-8.

[39] Trial Test.

[40] Trial Test.

[41] Trial Test.

[42] Trial Test.

were on my side to help me fight for what was best for me and also to fight for what is right. I also need a doctor who will discuss my well-being before making any decisions. I thought you were that doctor, but I was sadly mistaken."[43]

¶ 42 On March 21, 2005, Dr. Schabacker reported in his consultation notes:

> Ms. Pinnow is quite vocal about her dissatisfaction with . . . Montana State Fund. She does not feel like her interests were protected by her attorney . . . . Additionally, Ms. Pinnow repeatedly suggested that, in some way or another, my releasing her to return to work impacted her success in her claim of injury. Ms. Pinnow's report of the settlement amount is impressive. She most certainly could have the thoracic outlet syndrome taken of [sic] surgically bilaterally and have money left over from what she was provided.[44]

¶ 43 Petitioner admitted that she has a "hot temper" and that she had an "intense" discussion with Dr. Schabacker around the time of the settlement conference. She informed Dr. Schabacker about the amount of her settlement and opined that she could have settled for more money if Dr. Schabacker had not released her to return to work. Petitioner admitted that Dr. Schabacker informed her that the settlement amount would allow her to have bilateral thoracic outlet surgery on her shoulders and still have money left over. Petitioner later filed a medical complaint against Dr. Schabacker because she was upset with him.[45]

¶ 44 Petitioner also had a confrontation with Kellie Christianson, MS, CRC, a Rehabilitation Counselor and Consultant with Work Rehabilitation Consultants, Inc. Christianson issued a Final Closing Rehabilitation Plan Report on August 24, 2001. In the report, she documented Petitioner's lack of cooperation and her lack of effort in seeking employment. Christianson detailed multiple occasions where Petitioner missed or cancelled appointments. She further stated:

> On 8-15-01, the injured employee came in a half hour late. She was upset that she did not get an extension on her benefits. She kept telling me that "it's a dangerous thing to play with a person's emotions," after the third time I asked her if she was threatening me, she indicated no.

---

[43] Ex. 53 at 1.

[44] Ex. 20.

[45] Trial Test.

> She indicated that she felt I did not hold up my end of the contract. I indicated that I was here to assist her in finding employment not to do the work for her. She then indicated she would find a job "her ownself". She refused the job leads I had identified and left.

Christianson never heard from Petitioner after that meeting, and she closed Petitioner's file when Petitioner's eight weeks of placement services expired.[46]

¶ 45 Petitioner testified that she was very upset and frustrated about her case and she did not feel that she was being treated fairly by the vocational rehabilitation consultants. Petitioner explained that she asked Christianson to fill out a job application for her. Christianson examined the application, opined that Petitioner would be able to fill it out for herself and returned it. Christianson explained to Petitioner that she would assist her in finding employment and Petitioner refused to accept job leads which Christianson had identified, but stated that she would find a job on her own and left. Petitioner testified that the meetings with the vocational rehabilitation consultants occurred prior to the settlement conference, and that at the time of the conference, she was aware that the vocational rehabilitation consultants had identified several jobs which they believed Petitioner could perform.[47]

¶ 46 Petitioner's dissatisfaction with every aspect of the handling of her claim goes to the weight and credibility I give to her dissatisfaction with Plath's representation. Unfortunately, the record demonstrates that for whatever reason, Petitioner has been unable to achieve results for her claim which she found satisfactory. While I believe the evidence demonstrates that Plath's handling of Petitioner's claim was skillful and competent, I further believe that Petitioner was unlikely to be satisfied with Plath's representation regardless of the results obtained.

¶ 47 Flores testified at trial. For the reasons discussed below, I do not find his testimony to be credible.

¶ 48 Flores currently works as a lab technician making and adjusting eyeglasses and taking appointments at an eye care center in Billings. Prior to that, he worked for the State of Wyoming as a migrant outreach worker. Flores processed unemployment claims and performed adjudication and job service tasks for the state. The only time he was involved with workers' compensation claims was if he had a claimant who was receiving workers' compensation benefits who was also trying to seek unemployment benefits. Flores has no

---

[46] Ex. 48 at 1-2.

[47] Trial Test.

formal legal education and has never been licensed to practice law in Montana or Wyoming.[48]

¶ 49 Flores is Petitioner's friend. They met in 2001 when they were neighbors. Flores learned about Petitioner's workers' compensation claims. Petitioner occasionally asked Flores to explain things about her claims. Flores examined some of the paperwork and he offered to be an advocate for Petitioner and assist her in writing letters. At the time, she either did not have an attorney or was dissatisfied with her attorney's representation. Flores began to attend meetings with Petitioner and looked up statutes for her.[49]

¶ 50 Flores began to help Petitioner because he believed she needed help understanding the documents that she received regarding her claims. He thought she had difficulty reading. He read documents out loud to help her understand their content and what options she might have. Flores wrote several letters on Petitioner's behalf, read letters and court filings out loud for her, looked up phone numbers and made phone calls, and was often present when she made phone calls regarding her case. Flores attended the settlement conference at issue in the present case.[50]

¶ 51 Flores testified that at the settlement conference, Petitioner was presented with an offer and told that the offer was only good on that day. Flores stated that Plath only spoke once or twice on Petitioner's behalf. Flores further stated that Petitioner informed Dufrechou that she wanted surgery and Dufrechou stated that because Petitioner had been released to return to work, she was not likely to prevail at trial.[51]

¶ 52 Flores testified that during a break, he and Petitioner went outside. Plath found them and informed them that a settlement agreement was being drafted for Petitioner to read and decide whether or not to sign. Petitioner wanted to take the document home, and Plath replied that she needed to read it and decide whether to sign it during the conference. Flores did not read the Stipulation at the conference. A few days later, Petitioner received a copy of the Stipulation and she called Flores and informed him that the document contained two claim numbers. Flores read it for the first time. Flores did not know why the document listed two claim numbers, so Petitioner called Plath to inquire about it. Flores also asked Petitioner for a copy of her work release, and she gave him a document which she believed was a work release. Flores read the document and told Petitioner that it was

---

[48] Trial Test.

[49] Trial Test.

[50] Trial Test.

[51] Trial Test.

not a work release. Flores testified that he told Petitioner the document was a job analysis and that she could not take it to an employer and represent that it released her to work.[52]

¶ 53 Flores testified that prior to the settlement conference, he did not know that Dr. Schabacker had authorized a number of jobs for Petitioner. He knew that Petitioner was upset because Dr. Schabacker informed her that she was about to be released to return to work.[53]

¶ 54 Flores and Petitioner traveled to Plath's office. Flores asked Plath for a copy of the work release. Flores testified that Plath stated that "technically" they did not have a work release and that Petitioner would need to obtain one from Dr. Schabacker. Petitioner became angry because she had not known that no work release existed. Petitioner asked Plath how to proceed with her case and Plath informed them that the case was over because it had been settled.[54]

¶ 55 Flores testified that he was appearing in the present case to testify that Plath did not do his part in reaching a settlement. Flores knew Plath filed a petition for and participated in an earlier mediation conference with the department, that he consulted with physicians about Petitioner's case, and that he paid for a Life Care Plan to be created for Petitioner. Flores stated that the Life Care Plan and Petitioner's Functional Capacity Evaluation (FCE) were mentioned at the mediation, but he did not recall any particular discussion about them. Flores stated that he was not aware if the Life Care Plan was a factor in achieving Petitioner's settlement.[55]

¶ 56 Flores continued helping Petitioner with her claims. They scheduled a meeting with Dr. Schabacker, and wrote a letter to this Court stating that Petitioner was dissatisfied with her settlement. Ultimately, a teleconference between the Court and the parties occurred in April 2005. Flores listened in on the call although he did not actively participate. Flores continued to assist Petitioner when the case was transferred to Judge Sherlock's court. Eventually, Judge Sherlock issued an Order and Petitioner signed a Satisfaction of Judgment at the Brown Law Firm and received her settlement check while reserving the right to dispute Plath's attorney fees.[56]

---

[52] Trial Test.

[53] Trial Test.

[54] Trial Test.

[55] Trial Test.

[56] Trial Test.

¶ 57 Flores prepared Petitioner's petition to withdraw her objections to the settlement agreement and had Saye-Dooper review it. Flores then presented it to Petitioner, who read it and signed it. Flores explained that when he assisted Petitioner with her claims, he did not offer her advice or recommend how she should proceed, but simply explained things to her to help her understand documents and the proceedings in her case. Flores explained, for example, that when Petitioner met with Saye-Dooper, he accompanied Petitioner if she asked him to, but he would not participate in the meeting. Afterwards, he explained things to Petitioner if she had questions and reminded her of things she may have forgotten. Flores understood his role at the settlement conference was to provide moral support for Petitioner and to explain things to her if she asked him to.[57]

¶ 58 I did not find Flores's testimony to be credible. Specifically, Flores testified that he began to help Petitioner with her claims because he believed she needed help understanding the documents that she received regarding her claims and he believed she had difficulty reading. Flores further testified that he read documents out loud to Petitioner to assist her understanding of their content. Yet Flores would have this Court believe that when it came time for Petitioner to sign the most critical document – the settlement stipulation – Flores did not read the stipulation at the settlement conference before Petitioner signed it.

¶ 59 R. Russell Plath is an attorney licensed to practice in the State of Montana. Plath testified at trial and I find him to be a credible witness. Plath has been licensed and has been practicing law since 1980. His primary area of practice has been in workers' compensation law since 1986. Since that time, he has represented injured workers almost exclusively. Plath estimated that at any given time, he represents between 70 and 100 claimants. Plath asserted that his extensive experience helps him in representing injured workers because he is familiar with Montana physicians who treat workers' compensation injuries and he can predict how they are likely to testify in depositions and at trial. Plath further asserted that his knowledge and experience gives him the ability to read and understand medical reports and medical testimony.[58]

¶ 60 Plath estimated that he has been involved in over a hundred settlement conferences in workers' compensation claims since 1986. He estimated that he has also participated in more than a thousand court-ordered settlement conferences. Plath explained that he typically has his client come to his office prior to the conference and he explains the settlement conference process to the client. Plath advises each client to think about monetary issues and what they are willing to accept as a settlement amount. Plath explains that the settlement conference is based on monetary settlements, and he tries to

---

[57] Trial Test.

[58] Trial Test.

focus the client on that issue. He further advises the client that settlements are not mandatory and that the client will not be forced to sign a settlement agreement he or she disagrees with. Plath stated that he followed this procedure with Petitioner.[59]

¶ 61 Plath first met with Petitioner in May 2004. When Plath began to work on Petitioner's case, he requested her claims file from MSF. He discovered that Petitioner had two separate claims. Once Plath obtained these files, plus Petitioner's medical records and her records concerning vocational rehabilitation, Plath hired a specialist to organize the file for his review. After Plath reviewed Petitioner's file, he contacted the MSF claims adjuster who was involved with her shoulder claim and learned that MSF would not consider authorizing the thoracic outlet surgery Petitioner desired. Plath testified that he was focused on resolving the treatment issues regarding Petitioner's shoulder condition claim because she had already been placed at MMI with no impairment and had been released to return to work for her carpal tunnel injury. Plath reviewed Petitioner's medical records and determined that regarding her future medical treatment, her case would be difficult to litigate. Plath reached that conclusion because various medical providers disagreed as to whether Petitioner had thoracic outlet syndrome and further disagreed as to whether her shoulder condition was work-related. Plath opined that medical causation was very problematic in successfully litigating Petitioner's claim.[60]

¶ 62 Plath reviewed Petitioner's medical file and found that Dr. Schabacker, her treating physician, had opined that she was capable of working, although he believed she might have thoracic outlet syndrome. Plath also reviewed the records from Dr. Scott Rosen, who had performed an independent medical examination of Petitioner, and who concluded that Petitioner did not have thoracic outlet syndrome and was not a surgical candidate. Dr. Rosen further questioned whether Petitioner's complaints were work-related.[61]

¶ 63 Plath testified that it was fair to characterize Dr. Schabacker's approval of three job analyses as a work release, and that he had shown it to Petitioner on several occasions prior to the settlement conference. He stated whether the document said "work release" at the top or not would not change the fact that job analyses had been approved and Petitioner's doctor had released her to return to work.[62]

---

[59] Trial Test.

[60] Trial Test.

[61] Trial Test.

[62] Trial Test.

¶ 64 After further negotiation with MSF, Plath determined that negotiations were at a standstill and that it was appropriate to move forward with litigation. He then filed a petition for mediation with the department. When the mediation did not resolve the case, Plath filed a petition in this Court. Plath also hired Certified Rehabilitation Counselor Reg Gibbs to put together a Life Care Plan for Petitioner.[63] After the plan was prepared, Plath shared its contents with MSF. He testified that he believed the plan was an excellent document and that it gave MSF additional information to consider as the case proceeded to litigation.[64]

¶ 65 Plath testified that he reviewed the Life Care Plan, Petitioner's medical records, and other available evidence as he developed her case for trial. Plath obtained approved job analyses from Dr. Schabacker and met with vocational rehabilitation consultant Dennis Mc Luskie to discuss Petitioner's vocational rehabilitation.[65] Mc Luskie had prepared an eight-week rehabilitation plan for Petitioner's consideration.[66]

¶ 66 At the time Plath and Petitioner met with Mc Luskie, Petitioner's temporary total disability benefits had been terminated and MSF was refusing to pay for medical treatment. Plath informed Mc Luskie that Petitioner would not agree to the proposed vocational rehabilitation plan. After Mc Luskie left, Plath informed Petitioner that Dr. Schabacker had approved three jobs and that Dr. Schabacker was likely to approve additional job analyses. Plath informed Petitioner that he believed Dr. Schabacker would be unlikely to change his mind regarding whether Petitioner could return to work. Plath testified that he gave Dr. Schabacker's opinions a great deal of weight and further believed Dr. Schabacker would not change his mind if he were cross-examined about Petitioner's ability to return to work.[67]

¶ 67 Plath testified that if the case had gone to trial at that time, he believed Petitioner would have received the 20% impairment rating which Dr. Schabacker assessed. However, he thought the Court would determine that she did not have a wage loss based on the approved job analyses. He also believed the jobs which were approved were in the same medium- to light-duty range as her time-of-injury occupation. He therefore thought the case would result only in an impairment rating and ongoing medical benefits. Plath

---

[63] Ex. 45.

[64] Trial Test.

[65] Trial Test.

[66] Ex. 49.

[67] Trial Test.

estimated that if Petitioner's claim was settled as a permanent partial disability claim with a 20% impairment rating, it would be valued at approximately $15,000.[68]

¶ 68 However, Plath further testified that Dr. Schabacker believed Petitioner might be a candidate for thoracic outlet surgery with Dr. John I. Moseley. Plath testified that his own knowledge from previous cases indicated that the results from this surgery were generally poor and that he informed Petitioner that the outcome of thoracic outlet surgery was questionable. Plath stated that Petitioner often told him that she wanted to be "fixed," and that he explained to her on numerous occasions that not all problems could be fixed and that her condition might not improve.[69]

¶ 69 In January 2005, Plath received an offer to settle Petitioner's claims from one of MSF's adjusters. Plath was surprised to receive the offer as the case was heading toward trial. Plath shared the offer with Petitioner and the parties held the settlement conference pertinent to the present case.[70]

¶ 70 As he prepared for the settlement conference, Plath discussed the case with Petitioner. Prior to Flores' involvement, Petitioner had two other people who accompanied her as an advocate and friend, and one or the other of them were present during meetings Plath had with Petitioner. Plath stated that he thought that Petitioner understood her case and what Plath hoped to accomplish. Petitioner consistently informed Plath that she wanted to be "fixed," and while he told her that he did not think Petitioner should pursue thoracic outlet surgery, he also informed her that because of the Life Care Plan report, he believed he could settle her claim for enough money that she could afford the thoracic outlet surgery if she so chose.[71]

¶ 71 Plath indeed achieved a settlement in an amount sufficient to allow Petitioner to afford the thoracic outlet surgical procedure. Petitioner chose not to have the surgery. Although she testified that she is angry with Plath for settling her claim because she wanted to have her shoulder "fixed," Petitioner also admitted that Dr. Schabacker informed her that the settlement amount was more than adequate to pay for thoracic outlet surgery and that she ultimately spent the money elsewhere.[72]

---

[68] Trial Test.

[69] Trial Test.

[70] Trial Test.

[71] Trial Test.

[72] Trial Test.

¶ 72 Plath also informed Petitioner that she did not have to settle her claim and that he would represent her at trial if she chose not to settle. Ultimately, during the settlement conference he recommended to Petitioner that she accept the settlement because he believed it was a good offer.[73]

¶ 73 During the mediation, when Petitioner first indicated that she was ready to settle her claim, Plath informed Dufrechou that Petitioner had some unpaid medical bills which he wanted paid as part of the settlement. Dufrechou took the offer to MSF's representatives, and came back and reported that MSF would pay the unpaid bills, but that MSF wanted to settle the carpal tunnel claim in addition to the shoulder claim. At that point, Plath returned to his office and reviewed Petitioner's file. Since he had been focused on the shoulder claim, he wanted to ensure that nothing was unusual about the carpal tunnel claim before he agreed to settle it. Plath noted that after the carpal tunnel claim, Petitioner had been released to return to work with no restrictions and no impairment rating. He concluded that the carpal tunnel claim did not have any settlement value. He advised Petitioner that the Stipulation would settle both her shoulder and carpal tunnel claims and further advised her that the carpal tunnel claim did not have any settlement value.[74]

¶ 74 Plath typed the Stipulation on his office computer with Petitioner in attendance. He directed her attention to the Stipulation draft and pointed out that there were two claim numbers listed, both in bold type. After she spent some time going over the document, Petitioner asked Plath to explain the document to her. He informed her that it would settle both her workers' compensation claims. He pointed to each of the two claim numbers to emphasize that both claims would be settled via the Stipulation. He explained that in return for settling the two claims, Petitioner would receive $125,000 plus payment of the outstanding medical bills. Petitioner informed Plath that her name was misspelled in the document, and Plath returned to his computer and corrected her name. However, her name was misspelled in two locations and Plath only fixed one of the misspellings.[75]

¶ 75 Plath further testified that although Petitioner has subsequently asserted that she was extremely upset during the settlement conference, he saw no evidence of it at the time and her behavior was not unusual during the conference. He believed Petitioner was satisfied with the settlement at that time and wanted to proceed with it.[76]

---

[73] Trial Test.

[74] Trial Test.

[75] Trial Test.

[76] Trial Test.

¶ 76 Plath withdrew as Petitioner's counsel after Petitioner and Flores informed him that Petitioner wished to withdraw from the Stipulation and proceed to trial. Plath believed Petitioner needed to obtain different counsel because he had represented to the Court that the case had settled. When Plath withdrew as counsel, he sent a letter to the department informing the department that his law firm was withdrawing his representation and asserting a lien for an attorney fee against the settlement amount. Plath was later advised by MSF's counsel that Petitioner had withdrawn her objection to the settlement and at that time, his law firm intervened to enforce the attorney fee lien.[77]

¶ 77 Jay P. Dufrechou is an attorney who has been admitted to the Montana Bar since 1999 and the California Bar since 1984. Dufrechou testified at trial and I find him to be a credible witness. Dufrechou came to Montana to work as a hearing examiner for the Workers' Compensation Court under Judge McCarter. His job responsibilities included attending trials, assisting with writing decisions, conducting pretrial conferences, conducting discovery conferences, and facilitating mediations or settlement conferences at the request of the parties involved in workers' compensation litigation. Dufrechou's workload of mediation and settlement conferences increased throughout his tenure with the Court and he eventually spent most of his work hours conducting mediation and settlement conferences. At the time Dufrechou left his employment with the Court in December 2005, he was conducting two to four mediations or settlement conferences each week. Dufrechou estimates that he has conducted over 500 settlement conferences.[78]

¶ 78 Dufrechou explained that all his settlement conferences followed the same basic format. He first introduced himself to the parties and explained the conference process. Dufrechou always advised claimants that they could choose to proceed to trial instead of settling a claim. During his introductory words to the parties, Dufrechou would inform them that he worked closely with the Workers' Compensation Court Judge and had a good understanding of how the judge might rule in a given case, but that he was neither the judge nor the decision-maker if the case proceeded to trial. Dufrechou always emphasized that the mediation was a confidential process because he did not want laypeople to think that he would subsequently be involved in ruling on their case if the matter proceeded to trial.[79]

¶ 79 Dufrechou always asked that the settlement position statements from the parties be submitted by a certain date prior to the settlement conference. He recalled that in Petitioner's case, Plath submitted a position statement in a timely manner. Dufrechou

---

[77] Trial Test.

[78] Trial Test.

[79] Trial Test.

conducted settlement conferences with Plath representing one of the parties on many occasions, and his impression was that Plath was extremely thorough in his preparation. He opined that Plath ably represented Petitioner during the settlement conference.[80]

¶ 80 Dufrechou testified that he believed Petitioner's claims were problematic because the record contained very little evidence to support her medical complaints. He saw little, if any, objective medical evidence and, in Dufrechou's experience, Judge McCarter relied heavily on medical evidence in determining causation issues. Dufrechou opined that the settlement was extremely favorable to Petitioner as he believed she was unlikely to recover any amount had she taken the case to trial.[81]

¶ 81 Steven S. Carey testified at trial and I find him to be a credible witness. Carey is an attorney with extensive experience in handling workers' compensation claims for both claimants and insurers.[82] Carey reviewed Petitioner's claim at Respondent's request. Carey opined that the results that Plath achieved in obtaining this settlement for Petitioner were "outstanding" given the evidence in the record. In particular, Carey opined that Plath's decision to obtain a Life Care Plan substantially increased the value of the claim. Carey opined that he was convinced that Plath had satisfied the *Wight* criteria for justifying his attorney fee, and that his opinion was based upon a reasonable degree of probability within his specialized area.[83]

¶ 82 Petitioner's testimony and the evidence presented at trial demonstrates that what Petitioner hoped to achieve in settling her workers' compensation claims was to obtain the surgery recommended by Dr. Schabacker in the hopes of repairing her shoulder condition. What Petitioner received as a result of the settlement was an amount of money which was more than adequate to pay for the surgery. The facts clearly demonstrate that Plath achieved a favorable settlement because he used his expertise as an attorney to negotiate a settlement which would meet Petitioner's needs and compensate her for her industrial injury and occupational disease. However, the fact that Petitioner spent her settlement money without obtaining the medical treatment she claims to have wanted does not negate the fact that Plath achieved a fair settlement for Petitioner in the first place.

---

[80] Trial Test.

[81] Trial Test.

[82] Trial Test.

[83] Trial Test.

CONCLUSIONS OF LAW

¶ 83 There is no dispute that Petitioner entered into a valid Attorney Retainer Agreement with Plath. She signed the Agreement and it was approved by the department. Rather, the controversy is over whether Plath secured additional benefits on Petitioner's behalf.

¶ 84 The Agreement provided:

> Claimant and attorney agree to a fee schedule as follows:
>
> For cases that have been settled without an order of the workers' compensation judge or the Supreme Court, twenty percent (20%) of the amount of additional compensation payments the claimant receives due to the efforts of the attorney.[84]

¶ 85 Petitioner acknowledged that prior to Plath's involvement with her case, she had not received any settlement offers at all from MSF. Through Plath's efforts, a Life Care Plan was created which Carey opined substantially increased the potential settlement value of Petitioner's claim. The evidence presented demonstrates that Plath did a good job, and his handling of the claim was exemplary as is evidenced by the settlement amount he achieved.

¶ 86 In considering a claimant's contingent fee contract with her attorney, this Court accepts the approved contract as having a strong presumption in its favor.[85] The evidence overwhelmingly demonstrates that Petitioner did not meet her burden of proof in overcoming this presumption. Therefore, I conclude that the approved contract is acceptable and Respondent is entitled to its fee and costs as set forth in the Agreement.

JUDGMENT

¶ 87 Respondent is due $26,206.04 in compensation for attorney fees and costs.

¶ 88 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.

---

[84] Ex. 12.

[85] *Worts v. Hardy Constr. Co.*, 249 Mont. 477, 482, 817 P.2d 231, 235 (1991) (*citing Wight*, 204 Mont. at 115, 664 P.2d at 312).

DATED in Helena, Montana, this 19th day of December, 2008.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Roy W. Johnson
J. David Slovak
Paula Saye-Dooper (courtesy copy)

Submitted: June 26, 2008