IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1995 MTWCC 81

WCC No. 9506-7328

JOHN H. RATHMANN

Petitioner

vs.

THOMAS C. BULMAN
Attorney at Law

Respondent.

ORDER ON APPEAL

Summary: Pro se claimant appealed Department of Labor and Industry's Order denying his request to set aside dismissal of claims against his former attorney. Claimant's request was based on his allegation that the settlement agreement between him and his former attorney violated the Rules of Professional Conduct and unspecified provisions of Montana law. When matters raised for the first time on appeal are set aside, claimant's argument is that he should have been advised that Section 1.8(h) of the Rules of Professional Conduct disallow settlement of a claim against an attorney by a client without prior advice in writing that independent representation is adviseable.

Held: Appeal denied where evidence indicates claimant was conversant with Rule 1.8 and aware of his right to consult independent counsel.

Topics:

Pro Se. Where claimant has chosen to represent himself and has aggressively pursued his claim in the Department of Labor and the Workers' Compensation Court, he cannot use his pro se status as a shield and cannot claim error because his former counsel failed to inform him of something he already knew.

This is an appeal by John H. Rathmann (Rathmann) from the order of the Department of Labor and Industry (Department) which denied his request to set aside dismissal of his claims against his former attorney, Mr. Thomas C. Bulman (Bulman). The

original order of Dismissal with Prejudice was entered by a hearing examiner of the Department on May 19, 1995. The order denying Rathmann's request that the dismissal be set aside was entered on May 30, 1995. This appeal followed and is timely.

Factual Background

Rathmann was injured between April 4 and April 22, 1988, in the course and scope of his employment with Anthony Welzenbach, d/b/a/ Mountain Management. He injured his back while planting trees.

On June 3, 1992, Rathmann retained Bulman, an attorney, to represent him in his workers' compensation claim. An Attorney Retainer Agreement was signed and filed with the Department on June 4, 1992. Shortly thereafter, Bulman filed a petition with the Workers' Compensation Court for an emergency hearing on Rathmann's behalf. On February 16, 1993, Bulman filed Claimant's Motion for Partial Summary Judgment. Then, on March 8, 1993, Rathmann terminated Bulman's representation. Bulman confirmed the termination but notified Rathmann, the Department, and the insurers that he claimed an attorney fee lien of $2066.62 based on a $10,000.00 settlement offer made during his representation.

Rathmann, representing himself, eventually obtained a lump sum payment from the State Compensation Insurance Fund, which was one of the insurers involved in the case. The State Fund deducted an attorney fee of $2066.62 and sent a warrant in that amount to Bulman on July 14, 1994. Bulman signed the warrant over to Rathmann on July 15, 1994, and forwarded it to him along with a letter telling him to sign the "lien release/settlement before the time limit expires." (Ex. H to Brief in Support of Motion to Dismiss State Fund.) Rathmann negotiated the warrant, retained the funds, but apparently refused to sign the release. Thus, while he in fact obtained the disputed funds, Bulman's claim for attorney fees survived Rathmann's negotiation of the warrant.

Following mediation, on November 21, 1994, Rathmann requested a hearing before the Department. He requested that Bulman's lien be dissolved and that he be awarded damages for malpractice. The State Fund was initially named as a respondent but was subsequently dismissed from the action. Bulman remained a respondent and a hearing was scheduled for May 18, 1995.

On May 18, 1995, Rathman and Mr. Andrew F. Scott, representing Bulman, held a telephonic hearing with hearing examiner Stephen Wallace. At Wallace's urging, Rathman and Scott agreed to discuss settlement and commenced negotiations. (Tr. at 5.) They negotiated privately for approximately 30 minutes and reached a settlement agreement which was then memorialized in a document entitled Lien Release and Settlement of All Claims, . . . Attorney Fee Waiver, . . . [And] Complete Waiver of Claims. The agreement

was signed by both parties and filed with the hearing examiner, who then entered an order dismissing Rathmann's claims with prejudice.

Under the agreement, Bulman waived any claim for attorney fees. In return, Rathmann released Bulman and his law firm from "any and all claims of any nature whatsoever."

However, Rathmann changed his mind about the settlement and four days later requested the hearing examiner to set aside his order dismissing the petition with prejudice. Finding that Rathmann had failed to show good cause to set aside the dismissal, the hearing examiner denied the request.

Standard of Review

The Workers' Compensation Court's review of Department decisions is governed by section 2-4-704(2), MCA (1993), which provides in pertinent part:

> (2) The court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because:
>
> (a) the administrative findings, inferences, conclusions, or decisions are:
>
> (i) in violation of constitutional or statutory provisions;
>
> . . . .
>
> (v) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record;

The hearing examiner's findings of fact must be overturned on judicial review where they are "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." *State Compensation Mutual Insurance Fund v. Lee Rost Logging,* 252 Mont. 97, 102, 827 P.2d 85, 88 (1992) (quoting section 2-4-704(2)(a)(v), MCA). However, the Court will not reweigh the evidence; the findings and conclusions of the fact finder will be upheld if they are supported by substantial credible evidence in the record. *Nelson v. Semitool, Inc.,* 252 Mont. 286, 289, 829 P.2d 1, 2 (1992).

Discussion

In his appeal Rathmann asks this Court to determine the validity of Bulman's lien, enter judgment denying Bulman's entitlement to attorney fees, "rebuke and reprimand" Bulman, and award unspecified costs and expenses. (Notice of Appeal of Dept. Of Labor and Industry's "Dismissal with Prejudice" at 1.)

Rathmann seeks relief outside the jurisdiction of both the Department of Labor and Industry and the Workers' Compensation Court. The Department of Labor and Industry is charged with the regulation of attorney fees under the Workers' Compensation Act. § 39-71-613, MCA (1993), A.R.M. 24.29.3802(9), and A.R.M. 24.29.207(2)(a). Thus, the dispute over the validity of Bulman's lien and his claim for attorney fees were properly presented to the Department. However, the Department and this Court lack jurisdiction to award damages for malpractice or other personal injuries Rathmann claims to have suffered.

In his decision refusing to set aside the dismissal, the hearing examiner recognized that an order of the Department may be altered or amended for good cause. (Order Denying Motion to Rescind at 2.) Section 39-71-204, MCA, provides in relevant part:

> (1) The division has continuing jurisdiction over all its orders, decisions, and awards and may, at any time, upon notice, and after opportunity to be heard is given to the parties in interest, rescind, alter, or amend any such order, decision, or award made by it upon **good cause** appearing therefore. [Emphasis added.]

"Good cause" has generally been defined as a "substantial" or "legally sufficient" reason. *State v. Rozzell*, 157 Mont. 443, 450, 486 P.2d 877, 881 (1971). Traditional grounds which constitute good cause in the present context include mutual mistake, fraud, impossibility and coercion.

After receiving Rathmann's motion to rescind, the hearing examiner reviewed a tape of the May 18th hearing and concluded:

> The Claimant has failed to make any showing of coercion, fraud or mistake regarding his discussion with the Respondent of the proposed Lien Release, or in his review and signing of the same. The signed Lien Release at least confirmed the wishes of the parties at that time, and formed sufficient basis for the Dismissal to issue. The Claimant's present dissatisfaction with having signed the Release does not rise to a level warranting setting aside the resulting Dismissal. No good cause showing has been made to set aside or rescind the previously issued Dismissal.

(Order Denying Motion to Rescind Dismissal with Prejudice and Notice of Appeal Rights at 3.) The hearing examiner did not address Bulman's alleged violation concerning the Rules of Professional Conduct.

This Court's appellate jurisdiction is prescribed by subsection (3) of 39-71-204, MCA, providing:

(3) If a party is aggrieved by a division order, the party may appeal the dispute to the workers' compensation judge.

Since this Court's jurisdiction is predicated on the appeal from the Department's determination, it is limited to appellate review of the decision below. Thus, the sole issue before the Workers' Compensation Court is whether the Department erred when it refused to set aside its dismissal of Rathmann's claims.

Rathmann initially argues that the settlement agreement should be rescinded and the dismissal set aside because of "undue influence" and "grossly oppressive or unfair advantage." (Appeal of Dept. Of Labor & Industry's "Order Denying Motion to Rescind Dismissal with Prejudice and Appeal Rights"; Request for Determination on Validity of Attorney Fee Lien; Request for Costs from Respondents at 2.) He alleges that during the May 18, 1995 negotiations, Mr. Andrew F. Scott

> stated that the attorneys who were to be called as witnesses would intentionally testify on Bulman's behalf to the detriment of Rathmann; that Bulman Law Associates had knowledge that if Rathmann didn't settle the dispute by signing Bulmans [sic] "Release" that the Hearings officer would issue a decision in Bulman's favor; and that Rathmann could not win due to Bulman Law Asso.'s expertise in the courts.

(*Id.* at 3.) He characterizes the foregoing as "`undue influence' of lies and misrepresentations." (*Id.*)

Although the hearing examiner found no evidence of coercion, fraud or mistake, Rathmann's request that the dismissal be set aside did not in fact allege such grounds as the basis for his request. Rather, Rathmann urged that the settlement agreement was void or voidable because it violated the Rules of Professional Conduct and unspecified Montana State law. While his letter to the hearing examiner referred in passing to Bulman's and his law firm's "knowledge of the Rules of Professional Conduct regarding their activities and actions involving the lien releases, *surveillance, harassment, and threats"* (Rathmann letter of May 22, 1995; italics added), the letter did not allege that the settlement agreement was the product of either threats or harrassment. The reference to surveillance, harrassments and threats were in the past tense. In full, the letter said:

> John H. Rathmann
> 45 Donlan Flats Rd
> St. Regis MT 59866
>
> Mr. Stephen Wallace
> C/O Dept of Labor & Ind., Legal Scvs, Hearings Unit
> P.O. Box 1728

Helena MT 59624

Re: Your “Dismissal With Prejudice”.

Mr. Wallace,

I am going to ask you to rescind your decision that is based upon the “Lien Release and Settlement of all Claims” signed by myself and Tom Bulman.

To explain this, please reference the letter of 12/02/94 of mine to the Dept. of Labor and Ind.’s secretary C. Noland, (on your floor and offices) regarding releases and settlemtns [sic] between attorney’s and clients. This should be in the file, Bulman Law Asso.’s was sent a copy with proof of mailing by COM. (enclosed)

Tom Bulman and his Asso.’s have actual knowledge of the Rules of Professional Conduct regarding their activities and actions involving the lien releases, surveillance, harassment, and threats against me. So does your office. I do not believe that you could have okayed the settlement after you stated to me that you had read every document in the file. If you had read all of the documents, you would have been aware of the breach of the Rules of Professional Conduct and therefore unable to render the decision you did, based upon the instrument signed by myself and Tom Bulman. That instrument is at once voidable and invalid under State Law, look it up from my side, not his.

Also, your “Dismissal . . . .” states that it was the intentions of the parties by their “express wishes” that you “dismissed with prejudice”. I do not think that the law would allow you to accomplish this dismissal based on an illegal instrument such as the “Release. . .” provided by Bulman Law Asso.’s after being duly warned of the Rules of Professional Conduct regarding those types of settlements between an attorney and a former client.

Please Review your file, as, I would rather have only Bulman Law Asso.’s to deal with in a suit for Malpractice or under the Federal Tort Claims Act, and not every attorney in the state who was involved in helping Bulman get his way once again.

I hope to hear a satisfactory reply soon.

/s/ 5/22/95

John H. Rathmann

dc: Dept of Labor and Ind; File.

Courts will not consider issues raised for the first time on appeal. *Blair v. Blair*, 894 P.2d 958, 963 (Mont. 1995). I therefore decline to consider claimant's arguments concerning coercion and undue influence.

Rathmann also argues, as he did below, that the settlement agreement is void or voidable because it was executed in violation of the Rules of Professional Conduct. The specific rule applicable to the settlement is Section 1.8(h) of The Rules of Professional Conduct, which states:

> (**h**) A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a claim for such liability with an unrepresented client or former client **without first advising that person in writing that independent representation is appropriate in connection therewith.** [Emphasis added.]

The settlement agreement executed by Bulman and Rathmann is a global release which encompasses Rathmann's release of any and all malpractice claims against Bulman. Therefore, Bulman was required to comply with the rule. The record below, however, fails to disclose written advice from Bulman which complies with the requirement, and the hearing examiner failed to hold an evidentiary hearing which would have allowed Rathmann to present evidence showing that the requirement was not satisfied.

While a search of Montana cases reveals no application of this particular rule, several other jurisdictions confirm that the type of release executed in this case is in violation of the Rules of Professional Conduct if the client is not advised in writing to seek counsel. *Bambie v. State Bar*, 707 P.2d 862 (Cal. 1985); *In re Cissna*, 444 N.E.2d 851 (Ind. 1983); *In re Schmidt,* 402 N.W. 544 (Minn. 1987); *In re Wallace*, 518 A.2d 740 (N.J. 1986); *In re Ellsworth*, 486 A.2d. 1250 (N.J. 1985); *North Carolina State Bar v. Frazier*, 302 S.E.2d 648 (N.C. 1983); *In re Rubin,* 367 N.W.2d 219 (Wis. 1985). I find this authority persuasive.

Moreover, cases concerning other types of agreements between attorneys and their clients which are executed in violation of rules of professional responsiblity hold that such agreements are voidable by the client. For example, in *Miller v. Sears,* 36 P.2d 1183 (1981), the Alaska Supreme Court upheld the rescission of a real estate contract involving the sale of an attorney's property to one of his clients when the attorney failed to explain the legal consequences flowing from the transaction or advise the client to seek independent counsel. The court held such a transaction is voidable. Therefore, any failure by Bulman to give Rathmann the notice required by Rule 1.8(h) would ordinarily render the settlement agreement voidable.

However, documents filed by Rathmann in the proceeding below clearly and unequivocally show that he was familiar with Rule 1.8(h) at the time he entered into the

agreement. Attached to his letter requesting that the dismissal be set aside was a December 2, 1994 letter Rathmann wrote to Christine Noland, an administrative assistant in the Department's hearing unit. In that letter, Rathmann referred to a previous release proposed by Bulman, characterizing it as releasing all claims, including malpractice claims. Rathmann then specifically cited Rule 1.8(h) as governing any such agreement, and concluded that the release would violate the Rules of Professional Conduct. The letter states in full:

> Re: Bulman's Nov. 28, 1994 Release of Attorney's Lien Form.
>
> Ms. Noland,
>
> I received Mr. Bulman's correspondence, a form that would release my money to me and absolve him of any and all claims relating to his handling of my claim while it was in his care.
>
> Just to make it apparent to all parties involved, I considered Bulman's release form of Nov. 28, 1994 (and all past ones) as in violation of the Rules of Professional Conduct.
>
> Under his heading of "Complete Waiver of Claims", Bulman specifically attempts to diminish his liability to a former client, me, by withholding my benefits in lieu of releasing him from ". . . any and all claims of any nature. . . ." And, under his heading of "Lien Release and Settlement of all Claims", by the same method, namely, he wants ALL meritorious claims to be settled to diminish his liability to me a former client.
>
> Malpractice is a meritorious claim, and would be limited under the terms of Bulman's release of Nov. 28, 1994. Rule 1.8(H), it states that ". . . a lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice. . .or settle a claim for such liability with an unrepresented client or former client. . . ."
>
> And, Rule 8.4 (a); (c). where "It is professional misconduct for a lawyer to: (a) violate or attempt to violate the Rules of Professional Conduct, ..." or (c) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;".
>
> Bulman is an attorney and as such is held to these Rules.
>
> I will not sign this release and I consider this "release" a further detrimental act and coercion by Bulman's withholding of my benefits unless I sign his release which is in violation of the Rules of Professional Conduct.
>
> John H. Rathmann
>
> dc:C.Noland/Dept. Labor &Ind., Hearings Unit;T. Bulman via C.O.M.; file.

Rathmann was clearly conversant with Rule 1.8(h). He was thus aware of his right to consult independent counsel and that he should do so. "Acquiescence in error takes away the right of objecting to it." § 1-3-207, MCA. Thus, for example, acquiescence in a contract after learning that it does not represent the parties actual agreement destroys any right to reform the contract. *Krueger v. Morris*, 110 Mont. 559, 107 P.2d 142 (1940). Rathmann's actual knowledge of Rule 1.8(h) precludes him from using it to void the settlement agreement.

The fact that Rathmann has chosen to represent himself in these proceedings does not change the result. He has aggressively represented himself in proceedings before both this Court and the Department. He has demonstrated knowledge in legal research and writing. Rathmann has chosen to represent himself and this Court recognizes his right to do so, however, it will not allow him to use his *pro sé* status as a shield. *See Campanella v. Bouma,* 164 Mont. 214, 219, 520 P.2d 1075 (1974). He cannot claim error because Bulman failed to inform him of something he already knew. "The law neither does nor requires idle acts." § 1-3-223, MCA (1993).

Costs

Rathmann's request for costs is **denied**. He has not prevailed and has not shown that he has incurred recoverable costs in any event.

ORDER

The decision denying Rathmann's request that the settlement agreement be rescinded and that the dismissal of his claims be set aside is **affirmed.** Rathmann's request for costs is **denied**. Any party to this dispute may have 20 days in which to request an amendment to or reconsideration of this decision.

DATED in Helena, Montana, this 20th day of October, 1995.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. John H. Rathmann - Certified Mail
Mr. Andrew F. Scott
Ms. Christine L Noland
Mr. Brian McCullough - Zip Mail
Date Submitted: September 1, 1995