IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2006 MTWCC 23

WCC No. 2005-1247

HENRY KRUZICH

Petitioner

vs.

OLD REPUBLIC INSURANCE COMPANY

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Appealed to Supreme Court June 14, 2006
Reversed June 10, 2008 at 2008 MT 205

Summary: Petitioner, who suffered a traumatic brain injury as a result of an industrial accident, petitioned to have the compromise and settlement agreement set aside when he developed a movement disorder many years later as a result of the injury.

Held: The settlement is set aside because of a mutual mistake of a material fact.

Topics:

Medical Conditions (By Specific Conditions): Parkinsonism. Petitioner suffered a traumatic brain injury as a result of an industrial accident in 1988. In 2004, he began to exhibit symptoms of a movement disorder and was diagnosed as having Parkinson's or Parkinson's-plus or a similar movement disorder, which his treating physician opined, and this Court found, was a late sequela of his 1988 head injury.

Contracts: Generally. The full and final settlement entered into by the parties is a contract, thus contract law governs the agreement. *Morrissette v. Zurich American Ins. Co.*, 2000 MTWCC 2, ¶ 61, citing *Kienas v. Peterson*, 191 Mont. 325, 329, 624 P.2d 1, 3 (1980). A contract may be rescinded when the parties were laboring under a mutual mistake regarding a material

fact when the contract was made. *Morissette*, ¶ 61, citing *South v. Transportation Ins. Co.*, 275 Mont. 397, 401, 913 P.2d 233, 235 (1996). The contract may be rescinded only where "the parties share a common misconception about a vital fact upon which they based their bargain." *Morrissette*, ¶ 61, quoting *Mitchell v. Boyer*, 237 Mont. 434, 437, 774 P.2d 384, 386 (1989) (citations and emphasis omitted).

Settlements: Reopening: Mistake of Fact. At the time they entered into the settlement agreement, the parties were clearly unaware of the nature and extent of Petitioner's traumatic brain injury. Both Petitioner's wife and Petitioner's claims adjuster testified that they were unaware Petitioner would develop a movement disorder as a result of his injuries, and they believed Petitioner's injuries were cognitive.

Injury and Accident: Natural Progression. There is a clear distinction between the deterioration or worsening of a condition and the development of an entirely distinct disorder.

Settlements: Reopening: Mistake of Fact. Petitioner developed a distinct physical ailment as a direct result of his industrial accident, the possibility of which neither party was aware at the time the claim was settled. The settlement agreement is set aside and Petitioner's claim is reopened where a mutual mistake of fact regarding the nature of Petitioner's injuries occurred.

Settlements: Reopening: Mistake of Fact. Where both Petitioner's wife and Petitioner's claims adjuster testified that they believed Petitioner's injuries to be cognitive, and Petitioner later developed a movement disorder as a direct result of the traumatic brain injury he suffered in an industrial accident, the mistake of fact is mutual rather than unilateral.

¶ 1 The trial in this matter was held on January 23, 2006, in Butte, Silver Bow County, Montana. Petitioner Henry Kruzich and his wife Kathleen Kruzich were present and represented by William P. Joyce. Respondent Old Republic Insurance Company was represented by Joe C. Maynard. Judith Ann Hosford, Respondent's third-party adjuster, was also present.

¶ 2 Exhibits: Exhibits 1 through 31 and 33 through 48 were admitted without objection. Exhibit 32, which consisted of a mediation report, was stricken *sua sponte* by the Court pursuant to § 39-71-2410(4)(b), MCA (2005).

¶ 3 Witnesses and Depositions: The depositions of Kathleen Kruzich and Judith Ann Hosford were taken and submitted to the Court for consideration pursuant to stipulation. Kathleen Kruzich and Judith Ann Hosford were sworn and testified at trial.

¶ 4 Issues Presented: The Court restates the contested issues contained in the Pretrial Order as follows:

> ¶ 4a Should the settlement agreement be set aside based upon a mutual mistake?
>
> ¶ 4b Is Petitioner entitled to attorney fees and costs?
>
> ¶ 4c Is Petitioner entitled to a penalty?[1]

FINDINGS OF FACT

¶ 5 On August 16, 1988, Petitioner suffered an industrial injury arising from his employment with Blue Range Mining of Butte, Montana.[2] Petitioner was struck on the side of the face by an ore bucket.[3]

¶ 6 At the time of the accident, Petitioner was 37 years old and had been married to Kathleen Kruzich for approximately five years.[4]

¶ 7 Kathleen Kruzich testified both by deposition and at trial. The Court finds Ms. Kruzich to be a credible witness.

¶ 8 The blow to Petitioner's head caused a cave-in to the right orbital rim with the orbital floor and left lateral orbit being pushed up into the frontal lobe of the brain.[5] R.C. Dewey, M.D., performed a right frontal craniotomy, elevation, and debridement of depressed frontal skull fracture. In laymen's terms, he removed bone fragments from Petitioner's dura and brain.[6]

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[1] Pretrial Order at 5.

[2] Pretrial Order at 1, Uncontested Fact, ¶ 1.

[3] Ex. 1 at 1.

[4] K. Kruzich Dep. at 8-9.

[5] Ex. 1 at 1.

[6] *Id.*

¶ 9 At the time of Petitioner's injury, Blue Range Mining was enrolled under Compensation Plan No. 2 of the Workers' Compensation Act, and was insured by Respondent Old Republic Insurance Company.[7]

¶ 10 Respondent accepted liability for Petitioner's injury and has paid temporary total disability and medical benefits.[8]

¶ 11 Prior to Petitioner's injury, Ms. Kruzich had given notice to the bank where she was working that she intended to quit that job and start a home day-care business. Although she had planned to work for one more week, Ms. Kruzich left her job at the bank when Petitioner was injured and did not return. She began her day care soon afterward.[9]

¶ 12 Respondent retained the services of Industrial Injury Claims Services to adjust the claim. Industrial Injury Claims Services employed Judith Ann Hosford to handle the adjusting.[10] Ms. Hosford remains the adjuster on this claim.[11]

¶ 13 Ms. Hosford testified both by deposition and at trial. The Court finds Ms. Hosford to be a credible witness.

¶ 14 In the first months following Petitioner's industrial accident, the extent of his injuries was unclear and Ms. Kruzich did not know that Petitioner would be permanently totally disabled.[12]

¶ 15 In March 1990, Petitioner traveled to the Virginia Mason Clinic in Seattle for additional testing to determine the extent of his brain injury.[13] The clinic noted that Petitioner suffered from constant headaches.[14] The clinic's testing revealed that Petitioner had reductions in speed of thinking, reductions in flexibility of thinking, significant problems

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[7] Pretrial Order at 1, Uncontested Fact, ¶ 2.

[8] Pretrial Order at 1, Uncontested Fact, ¶ 3.

[9] K. Kruzich Dep. at 18.

[10] Pretrial Order at 2, Uncontested Fact, ¶ 6.

[11] Trial Test.

[12] K. Kruzich Dep. at 13.

[13] Ex. 5.

[14] *Id.* at 1.

with visual spatial memory, reductions in fine motor speed, reductions in grip strength in the right hand, problems with complex tactual spatial problem-solving, and a tendency to lose complex visual spacial information.[15]

¶ 16 In February 1991, Patricia L. Webber, Ph.D., who was treating Petitioner at the time, suggested that Petitioner might need domiciliary care if his condition did not stabilize.[16] Ms. Kruzich explained that Petitioner was engaging in unsafe behaviors when unsupervised, such as forgetting to turn off stove burners or leaving the door to the wood stove open.[17]

¶ 17 In October 1991, after closing her home day-care business, Ms. Kruzich took employment outside the home in order to obtain health insurance coverage.[18] Petitioner and she relied upon family and neighbors to check in on Petitioner during the day.[19]

¶ 18 Petitioner struggled to function on his own during the day, and Dr. Webber believed he required more structure.[20] Dr. Webber, in consultation with Petitioner's physiatrist, Dr. Jonathan D. Stone, determined that Petitioner needed a minimum of 8 to 10 hours of domiciliary care per day.[21] They informed Petitioner's attorney of this by way of letter on January 23, 1992.[22]

¶ 19 Shortly thereafter, Ms. Kruzich quit her job to stay home and care for Petitioner.[23] Months of negotiations ensued on behalf of Petitioner with Respondent in an attempt to reach an agreement which would enable Ms. Kruzich to provide domiciliary care for Petitioner. An offer of $5.30 per hour, 70 hours per week, was tendered and accepted on December 10, 1992.[24]

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[15] *Id.* at 8-9.

[16] Ex. 16 at 1.

[17] K. Kruzich Dep. at 26.

[18] *Id.*

[19] *Id.* at 26-27.

[20] *Id.* at 27; Ex. 18.

[21] Ex. 18.

[22] Ex. 19.

[23] K. Kruzich Dep. at 34.

[24] *Id.* at 42.

¶ 20 In February 1994, the parties began attempting to settle Petitioner's claim.[25] Ms. Kruzich believed Petitioner's condition had stabilized.[26] Ms. Hosford agreed that Petitioner's medical records indicated he was stable.[27] Dr. Stone had noted, "Things appear to be very stable."[28]

¶ 21 In June 1994, Petitioner and Respondent entered into a settlement agreement which was approved by the Department of Labor and Industry on July 26, 1994.[29] Under the terms of the agreement, Respondent settled the claim with Petitioner for $132,701.28, with continued medical and hospital benefits due to the industrial injury specifically reserved.[30]

¶ 22 Petitioner's medical records show that prior to 1994, he suffered from problems such as headaches and facial pain,[31] depression,[32] irritability,[33] and difficulties with concentration and memory.[34]

¶ 23 In January 1993, Petitioner was examined by a neurologist, Dr. Scott D. Callaghan, at the request of Respondent.[35] Dr. Callaghan noted, among other findings, "In regards to this patient motorically, this seems to be normal function in that he has normal strength, tone, and cerebellar function."[36]

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[25] *Id.* at 43.

[26] *Id*.

[27] Hosford Dep. at 16.

[28] Ex. 45 at 2.

[29] Pretrial Order, Uncontested Fact, ¶ 7.

[30] Ex. 40.

[31] Ex. 4 at 1; Ex. 7 at 1

[32] Ex. 5 at 2; Ex. 7 at 2

[33] *Id*.

[34] *Id*.

[35] Hosford Dep. at 22-23.

[36] Ex. 46 at 2.

¶ 24 Petitioner saw physiatrist Dr. Allen M. Weinert, Jr., on August 29, 2003, and again on September 22, 2003. On both visits, Dr. Weinert noted normal upper and lower extremity strength, normal coordination, and normal gait and balance.[37]

¶ 25 In 2004, Petitioner began to exhibit symptoms of a movement disorder.[38] Doctors have variously characterized Petitioner's condition as Parkinsonism, Parkinson's disease, Parkinson's-plus, or a movement disorder.[39]

¶ 26 On June 30, 2004, Petitioner visited Dr. Weinert and informed Dr. Weinert that he had been diagnosed with Parkinsonism earlier that year. Dr. Weinert's physical examination revealed a pill rolling tremor in his left hand, and diagnosed left-sided Parkinsonism, most likely as a late sequela of traumatic brain injury.[40] Future examinations by Dr. Weinert revealed a worsening of Petitioner's Parkinsonism symptoms.[41]

¶ 27 Ms. Hosford recalled that prior to 2004, Petitioner's main complaints dealt with cognitive problems and pain issues.[42] Ms. Hosford testified that she was aware of "deterioration" in people who suffered a brain injury but, she added, "I didn't expect Parkinson's." Ms. Hosford is a former CNA with a background in dealing with brain injured persons. She opined that in her experience, head injuries always get worse, never better.[43] Notably, Ms. Hosford also asserted that in 1994, she was unaware of any connection between head injuries and Parkinson's or Parkinson's-plus.[44]

¶ 28 Although Ms. Kruzich had done some research and reading concerning brain injuries, she did not learn anything about long-term deterioration following a brain injury and did not discuss long-term deterioration with any of Petitioner's doctors.[45] In November 1990, Community Medical Center in Missoula provided Ms. Kruzich with some articles on

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[37] Ex. 47 at 2, 5.

[38] Pretrial Order at 2, Uncontested Fact, ¶ 8.

[39] See Exhibits attached to Respondent's Motion to Compel Out of State Independent Medical Examination.

[40] Ex. 47 at 7.

[41] *Id.* at 12, 16.

[42] Hosford Dep. at 10.

[43] Trial Test.

[44] Hosford Dep. at 24-25.

[45] K. Kruzich Dep. at 10-11.

brain injury.[46] The articles made no mention of long-term deterioration.[47] Petitioner and Ms. Kruzich also belonged to a head injury support group for about a year. The support group occasionally had doctors as guest speakers. Ms. Kruzich did not recall receiving any information from the support group or guest speakers that indicated Petitioner's condition may worsen.[48]

¶ 29 The movement disorder diagnosed in 2004 is related to and caused by Petitioner's industrial injury.[49]

¶ 30 The mediation procedure set forth in the Workers' Compensation Act has been satisfied and the matter is ripe for review by this Court.[50]

CONCLUSIONS OF LAW

¶ 31 This case is governed by the 1987 version of the Montana Workers' Compensation Act since that was the law in effect at the time of Petitioner's industrial accident.[51]

¶ 32 Petitioner bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks.[52] Petitioner has satisfied his burden of proof, which justifies setting aside the full and final settlement agreement.

¶ 33 The full and final settlement entered into by the parties is a contract, thus contract law governs the agreement.[53] A contract may be rescinded when the parties were laboring under a mutual mistake regarding a material fact when the contract was made.[54] The

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[46] Ex. 12.

[47] K. Kruzich Dep. at 21.

[48] *Id.* at 24.

[49] Pretrial Order at 2, Uncontested Fact, ¶ 9.

[50] Pretrial Order at 2, Uncontested Fact, ¶ 5.

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

[52] *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).

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

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

contract may be rescinded only where "the parties share a common misconception about a vital fact upon which they based their bargain."[55]

¶ 34 In *South v. Transportation Ins. Co.*, the Montana Supreme Court explained that a material mistake of fact concerning a worker's medical condition may justify rescission of the contract if the mistake regards a fact that is vital to the completion of the contract and the mistake is so fundamental as to defeat the object of the parties in making the contract.[56]

¶ 35 In *Wolfe v. Webb*, the Montana Supreme Court held that "a mistake about the nature or extent of the claimant's physical condition is a 'material' mistake of fact when applied to a workers' compensation settlement agreement."[57] In the case at hand, the parties were clearly unaware of the nature and the extent of Petitioner's injuries at the time they entered into the settlement agreement. The testimony of both Ms. Kruzich and Ms. Hosford is that they were both unaware that Petitioner would develop a movement disorder as a result of his injuries. Petitioner, Ms. Kruzich, and Ms. Hosford all believed that Petitioner's injuries were cognitive, and none of them had reason to suspect that he could or would later develop Parkinsonism or a movement disorder as a result of his head injury.

¶ 36 Although Ms. Hosford testified that she was aware that people with brain injuries get "worse, never better," there is a clear distinction between the deterioration or worsening of a condition and the development of an entirely distinct disorder. While a deterioration or worsening of Petitioner's cognitive abilities would perhaps have been foreseeable, that is not the case before this Court. Rather, Petitioner developed a distinct physical ailment as a direct result of his industrial accident, the possibility of which neither party was aware at the time the claim was settled.

¶ 37 Respondent draws this Court's attention to various cases,[58] and argues that the case before this Court is more similar to cases in which this Court determined not to set aside settlement agreements when the mistake of fact was unilateral rather than mutual. The testimony from both Ms. Kruzich and Ms. Hosford, however, demonstrates that the mistake of fact in the present case was not unilateral. It was mutual. Therefore, the cases cited by Respondent are inapposite to the case at hand. Furthermore, in *Burgan v. Liberty Northwest Ins. Corp.*, the WCC determined that no mistake of fact, mutual or unilateral,

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[55] *Morrissette*, ¶ 61, quoting *Mitchell v. Boyer*, 237 Mont. 434, 437, 774 P.2d 384, 386 (1989) (citations and emphasis omitted).

[56] *South v. Transportation Ins. Co.*, 275 Mont. 397, 401, 913 P.2d 233, 235; *see also Morrissette*, ¶ 62.

[57] *Wolfe v. Webb*, 251 Mont. 217, 227-28, 824 P.2d 240, 246 (1992) (citation omitted).

[58] *Burgan v. Liberty Northwest Ins. Corp.*, 2002 MTWCC 41; *Brown v. Richard A. Murphy, Inc.*, 261 Mont. 275, 862 P.2d 406 (1993).

occurred because the parties in their settlement agreement expressly contemplated the fact Petitioner attempted to put at issue for reopening his settlement.[59] In *Brown v. Richard A. Murphy*, Inc., both the WCC and the Montana Supreme Court determined that the dispositive issue was not whether there existed a unilateral mistake of fact, but whether there existed a mutual mistake of law.[60]

¶ 38 Because a mutual mistake of fact regarding the nature of Petitioner's injuries occurred, the settlement agreement is set aside and Petitioner's claim is therefore reopened.

¶ 39 Attorney fees and a penalty may be awarded only if the insurer's conduct was unreasonable.[61] Taking into consideration the language of the 1994 settlement agreement, and the disagreement between Petitioner and Respondent concerning whether a mutual mistake of material fact occurred, this Court does not conclude Respondent acted unreasonably in opposing reopening the settlement. Therefore, the Court denies Petitioner's request for attorney fees and a penalty.

¶ 40 Petitioner is entitled to his costs because he prevailed on the substantive issues of this action.[62]

JUDGMENT

¶ 41 This Court has jurisdiction over this matter pursuant to § 39-71-2905, MCA.

¶ 42 The compromise and release settlement between the parties, approved by the Department of Labor and Industry, Employment Relations Division, on July 26, 1994, is hereby set aside because of a mutual mistake of fact and Petitioner's claim in this regard is reopened.

¶ 43 Petitioner's prayer for attorney fees and a penalty is **DENIED**.

¶ 44 Petitioner's prayer for his costs is **GRANTED**.

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

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[59] *Burgan*, ¶ 7.

[60] *Brown*, 261 Mont. at 280-81, 862 P.2d at 409-10.

[61] §§ 39-71-611, -612, and -2907, MCA.

[62] *Marcott v. Louisiana Pac. Corp.*, 1994 MTWCC 109 (*aff'd after remand at* 1996 MTWCC 33).

¶ 46 Any party to this dispute may have twenty days in which to request reconsideration from these FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT.

DATED in Helena, Montana, this 1st day of June, 2006.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: William P. Joyce
Joe C. Maynard
Submitted: January 23, 2006