IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2009 MTWCC 39

WCC No. 2009-2282

BRAD STOKES

Petitioner

vs.

LIBERTY MUTUAL

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Petitioner settled his indemnity benefits on an accepted-liability low-back claim in August 2008. Petitioner subsequently required an additional back surgery for which the insurer paid medical benefits. Petitioner argues that his settlement should be reopened because he did not foresee the need for an additional surgery at the time he settled his claim and because he has been unable to obtain employment. Petitioner asserts that he has applied for the positions approved by job analyses submitted to his treating physician, but the actual positions exceed his physical restrictions and he has therefore been ineligible for them.

Held: The Court found no mutual mistake of fact and therefore no grounds exist to support reopening Petitioner's settlement.

Topics:

Settlements: Reopening: Mistake of Fact. The Court found no mistake of fact where Petitioner's back condition was properly diagnosed and treated prior to settling his claim. The fact that Petitioner required additional treatment after he settled the indemnity portion of his claim was not unanticipated by the parties, as evidenced by the fact that Petitioner's medical benefits were reserved.

Settlements: Reopening: Mistake of Fact. Although Petitioner contended that he was mistaken in relying on the job analyses which were approved by

his treating physician because he believed he could obtain one of the approved positions after he settled his claim and his job search has so far been fruitless, the Court concluded that Petitioner had not proven that similar jobs within his restrictions do not exist, nor had he proven that both he and the insurer were mistaken as to the existence of those jobs.

Settlements: Reopening: Mutuality of Mistake. Although Petitioner contended that he was mistaken in relying on the job analyses which were approved by his treating physician because he believed he could obtain one of the approved positions after he settled his claim and his job search has so far been fruitless, the Court concluded that Petitioner had not proven that similar jobs within his restrictions do not exist, nor had he proven that both he and the insurer were mistaken as to the existence of those jobs.

¶ 1 The trial in this matter was held on August 17, 2009, at the Workers' Compensation Court in Helena, Montana. Petitioner Brad Stokes (Stokes) was present and represented himself. Respondent was represented by Leo S. Ward.

¶ 2 Exhibits: Exhibits 1 through 4 were admitted into evidence.

¶ 3 Witnesses and Depositions: No depositions were filed with the Court. Stokes and Christine Stobb (Stobb) were sworn and testified at trial.

¶ 4 Issues Presented: The Pretrial Order states the following contested issue:

¶ 4a Whether Petitioner's Petition for Settlement should be reopened.[1]

FINDINGS OF FACT

¶ 5 On August 3, 2007, Stokes suffered a low-back injury. Respondent Liberty Mutual (Liberty) accepted liability and paid indemnity and medical benefits. On October 10, 2007, Stokes had back surgery. On March 20, 2008, Stokes' treating physician approved job analyses. On August 7, 2008, Stokes and Liberty settled Stokes' claim, leaving medical benefits open. On March 10, 2009, Stokes had another low-back surgery. Liberty paid medical benefits for that surgery.[2]

[1] Pretrial Order at 2.

[2] Pretrial Order, Statement of Uncontested Facts, at 2.

¶ 6 On May 14, 2009, Stokes petitioned this Court to reopen his settlement. Stokes alleged that his settlement should be reopened due to ongoing medical problems.[3]

¶ 7 Stokes testified at trial. I found Stokes to be a credible witness. Stokes testified that at the time he settled his claim, he was still recovering from his first back surgery and the parties did not know what the outcome of his recovery would be, and therefore his settlement should not have been approved. Stokes testified that while he has been very satisfied with the medical care Liberty has paid for, he is dissatisfied with the settlement because he has been unable to find employment since settling his claim.[4]

¶ 8 Stokes further testified that although he has been approved for specific jobs, he has discovered that the jobs do not actually exist. He has applied for jobs within the approved job categories and he has been unable to find employment because his lifting limitations are more restrictive than what the actual jobs require. For example, one of the job analyses approved by his treating physician was to be a service writer for a car dealership. He sought out and applied for this position, but the job required him to be able to lift 70 pounds and his lifting restrictions permit him to lift only 8 pounds. He also applied for a parts person job for which he had an approved job analysis, but the position required an ability to lift more than 8 pounds and Stokes therefore did not obtain the job. Stokes stated that he was interviewed for the position, but when his prospective employer learned of his lifting restriction, he declined to hire him.[5]

¶ 9 Stokes testified that although he had reservations about settling the claim when he did, he agreed to do so because he needed the money for living expenses. He knew at the time that he could hire an attorney and take his claim to court, but he had difficulty finding an attorney willing to take his case and he decided to settle the claim. Stokes testified that he never believed he was at maximum medical improvement (MMI), but it was not until January 2009 – several months after he settled his claim – that he learned from his treating physician that he would need a second back surgery.[6]

¶ 10 Stobb, workers' compensation case manager currently working for ESIS, testified at trial. I found Stobb to be a credible witness. Stobb testified that she worked as a claims

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[3] Petition for Hearing (Injury).

[4] Trial Test.

[5] Trial Test.

[6] Trial Test.

examiner for approximately ten and a half years and that she worked for Liberty Northwest for ten years. While she worked for Liberty, Stobb was the adjuster for Stokes' claim.[7]

¶ 11 Stobb testified that she was assigned Stokes' claim approximately four or five days after his injury. Liberty accepted liability and authorized medical treatment. After Stokes' first surgery, Stobb arranged for him to participate in a functional capacity evaluation (FCE) and obtain an impairment rating. She hired Travis Stortz (Stortz) to provide vocational rehabilitation services.[8] Stortz prepared an Initial Employability Assessment on February 26, 2008.[9] He prepared a Labor Market Clarification on April 16, 2008,[10] an Employability and Wage Loss Assessment on April 18, 2008,[11] and a Labor Market Addendum on May 27, 2008. In the addendum, Stortz concluded that Stokes could return to work immediately in the light-duty positions of auto service writer, dump truck driver, and service manager, or in the medium-duty positions of purchasing agent and parts person.[12] On May 27, 2008, Stobb sent a letter to Stokes which stated that his doctor had placed him at MMI and had approved several job analyses. She advised Stokes that his temporary total disability (TTD) benefits would be terminated and that he would begin to receive checks for payout of his 12% impairment rating.[13]

¶ 12 Stobb testified that she discussed Stokes' claim with him and explained the circumstances that caused her to convert his benefits from TTD to permanent partial disability (PPD). Stobb stated that Stokes' impairment was paid on a biweekly basis and that he was never without biweekly benefits. She gave Stokes information about the Employment Relations Division at the Department of Labor and Industry (ERD) and informed him that he had the right to talk to an attorney about his claim.[14] On June 3, 2008, Stobb sent Stokes a letter in which she outlined a settlement proposal for Stokes' claim.[15] In June 2008, she and Stokes discussed the possibility of settling his claim. Stobb did not

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[7] Trial Test.

[8] Trial Test.

[9] Ex. 4 at 12-15.

[10] Ex. 4 at 7-11.

[11] Ex. 4 at 3-6.

[12] Ex. 4 at 1-2.

[13] Ex. 2 at 3.

[14] Trial Test.

[15] Ex. 2 at 1-2.

recall the particular circumstances as to why Stokes was interested in settling his claim, but she recalled that he expressed interest in doing so. However, after Stobb prepared settlement documents and sent them to Stokes, he contacted her and stated that he had changed his mind and did not want to settle his claim. On July 8, 2008, Stokes spoke with Stobb and stated that he had reconsidered and wanted to settle his claim. Stokes then sent Stobb the signed paperwork and she forwarded it to ERD for approval.[16]

¶ 13 Stobb testified that ERD processed the paperwork on an expedited basis at Stokes' request. Stokes' medical benefits were reserved in the settlement and he continued to receive conservative care at the time he settled his claim. Stobb stated that it is not unusual for claimants to receive ongoing medical care at the time they settle their indemnity benefits and nothing about Stokes' claim struck her as unusual. Stobb further testified that she does not know of any physician who has opined that Stokes was not at MMI at the time of the settlement.[17]

Summary of Medical Records

¶ 14 PA-C Dave Johnson (Johnson), examined Stokes on August 10, 2007, one week after his industrial injury. Johnson noted that Stokes' symptoms appeared to be quite severe after his accident and that he was diagnosed with an acute, severe low-back sprain at the Billings Clinic on August 4, 2007. After examining Stokes, Johnson concluded that Stokes had a left sacroiliac sprain.[18]

¶ 15 An August 31, 2007, radiology report noted that Stokes had a round 11 mm isointense mass within the left foramen at L4-5 with a differential diagnosis of herniated disk material and nerve sheath tumor. Mild diffuse degenerative disk disease with a small right disk protrusion at L2-3 and mild central canal stenosis at L2-3 and L4-5 was also noted.[19]

¶ 16 On October 12, 2007, Alan K. Dacre, M.D., performed a diskectomy on Stokes at L4-5.[20] On February 1, 2008, Dr. Dacre saw Stokes for a follow-up appointment. Dr. Dacre noted that Stokes was improving but was still having persistent back and leg pain with occasional numbness and tingling. Dr. Dacre recommended a continued home exercise

[16] Trial Test.

[17] Trial Test.

[18] Ex. 3 at 13-15.

[19] Ex. 3 at 6.

[20] Ex. 3 at 66-67.

program and recommended an FCE. Dr. Dacre stated that he would assign Stokes a 12% whole person impairment rating.[21]

¶ 17 Stokes participated in a FCE on March 4, 2008.[22] On that date, Lisa B. Sasich, MS, PT, wrote to Dr. Dacre and informed him that from the FCE it appeared that Stokes was able to work an 8-hour day at a light-medium physical demand level.[23] On March 20, 2008, Dr. Dacre approved job analyses for auto service writer, dump truck driver, parts person, purchasing agent, service manager, and courtesy van driver/porter, and disapproved a job analysis for transport driver, noting that Stokes did not receive a high enough strength rating for this job during his FCE.[24]

¶ 18 On March 26, 2008, Lawrence Splitter, D.O., examined Stokes. Dr. Splitter noted that Dr. Dacre had given Stokes a 12% impairment rating on February 1, 2008. After examination, Dr. Splitter opined that Stokes was at MMI and that he was able to work 8 hours per day in a light- to medium-duty job.[25] On May 9, 2008, Dr. Splitter amended his report to incorporate findings from electrodiagnostic studies which were conducted after the previous appointment. Dr. Splitter opined that Stokes was entitled to a 12% whole person impairment rating.[26]

¶ 19 On March 10, 2009, Dr. Dacre performed a fusion and laminectomy at L4-5 on Stokes.[27] On June 3, 2009, Dr. Dacre wrote a letter "To Whom It May Concern" in which he noted that Stokes had undergone a lumbar microdiskectomy on October 12, 2007:

> However, it was felt at the time that his symptoms could improve with a minimally invasive procedure. Unfortunately, that did not happen. He has subsequently gone on to require a lumbar fusion in an attempt to decompress the nerve and address the underlying disc pathology.

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[21] Ex. 3 at 16.

[22] Ex. 3 at 17-33.

[23] Ex. 3 at 56-57.

[24] Ex. 3 at 35-55.

[25] Ex. 3 at 1-2.

[26] Ex. 3 at 3.

[27] Ex. 3 at 68-70.

It should be noted that often minimally invasive procedures do significantly benefit patients. However, there are a certain number that do not and these do require subsequent further surgeries.[28]

CONCLUSIONS OF LAW

¶ 20 This case is governed by the 2007 version of the Montana Workers' Compensation Act since that was the law in effect at the time of Stokes' industrial accident.[29]

¶ 21 Stokes bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks.[30] In the present case, Stokes argues that he is entitled to reopen his settlement because his ongoing medical problems have exceeded the level anticipated at the time of settlement, and because he cannot find a job that fits within his post-injury restrictions. Stokes further argues that he was not at MMI at the time he settled his claim.

¶ 22 Liberty responds that no physician has opined that Stokes was not at MMI at the time he settled his claim, and further responds that Stokes has no legal grounds for reopening his settlement as the fact that he required a second corrective surgery was not a mutual mistake of fact.

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

¶ 24 In *South v. Transportation Insurance Co.*, 275 Mont. 397, 913 P.2d 233 (1996), the Montana Supreme Court explained that a material mistake of fact concerning a worker's

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[28] Ex. 3 at 58.

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

[30] *Ricks v. Teslow Consol.,* 162 Mont. 469, 512 P.2d 1304 (1973); *Dumont v. Wickens Bros. Constr. Co.*, 183 Mont. 190, 598 P.2d 1099 (1979).

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

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

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

medical condition may justify rescission of the contract if the mistake is so fundamental as to defeat the object of the parties in making the contract.[34]

¶ 25 Mutual mistake of fact concerning a worker's medical condition has been more recently explored by this Court in *Gamble v. Sears*[35] and *Kruzich v. Old Republic Ins. Co.*[36] In *Gamble*, this Court determined that a mutual mistake of fact justifying rescission of a settlement agreement had occurred where it was later discovered that the injured worker (Gamble) had an odontoid fracture which originated with her industrial accident but remained undetected until after she had settled her claim.[37] In *Kruzich*, the Montana Supreme Court reversed this Court's decision that a mutual mistake of fact had occurred when the injured worker developed a movement disorder which was more probable than not a result of his industrial accident, but which was not present at the time the parties settled the claim.[38]

¶ 26 In the present case, Stokes' back condition was properly diagnosed and treated prior to settling his claim. Unlike Gamble, Stokes did not have a hidden condition which was undiscovered until after his settlement occurred. In Stokes' case, the parties were aware of his back condition. The fact that he required additional treatment after he settled the indemnity portion of his claim was not unanticipated by the parties, as evidenced by the fact that Stokes chose to reserve his medical benefits. Although Stokes did not foresee that he would require additional surgery, Dr. Dacre explained in his letter that while many patients are sufficiently helped by less invasive procedures, it was foreseeable that some patients with conditions similar to Stokes would require the surgery Stokes ultimately obtained.

¶ 27 As to Stokes' contention that he was not at MMI at the time he settled his claim, he has not presented this Court with any medical opinion to support this assertion. Finally, Stokes contends that he was mistaken in relying on the job analyses which were approved by his treating physician because he believed he could obtain one of those positions after he settled his claim. While I believe Stokes' testimony that he applied for a service writer position and a parts person position and was turned down for both due to his lifting restrictions, I cannot conclude that Stokes has proven that similar jobs within his lifting restrictions do not exist, nor has he proven that both he and Liberty were mistaken as to

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[34] *South* v. *Transportation Ins. Co.*, 275 Mont. 397, 401, 913 P.2d 233, 235 (1996)(citing *Wyman v. DuBray Land Realty,* 231 Mont. 294, 298, 752 P.2d 196, 199 (1988); citing *Johnson v. Meiers,* 118 Mont. 258, 164 P.2d 1012 (1946)).

[35] *Gamble v. Sears,* 2006 MTWCC 5 (*aff'd* 2007 MT 131, 337 Mont. 354, 160 P.3d 537).

[36] *Kruzich v. Old Republic Ins. Co.,* 2006 MTWCC 23 (*rev'd* 2008 MT 205, 344 Mont. 126, 188 P.3d 983).

[37] *Gamble*, ¶¶ 33-34.

[38] *Kruzich*, 2008 MT 205, ¶ 22.

the existence of these jobs. With no mutual mistake of fact evident from the record before the Court, I must conclude that no grounds exist to order reopening of Stokes' August 2008 settlement agreement.

JUDGMENT

¶ 28 Stokes is not entitled to reopening of his settlement.

¶ 29 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.

¶ 30 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 17th day of December, 2009.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Brad Stokes
Leo S. Ward
Submitted: August 17, 2009