

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1997 MTWCC 25

WCC No. 9412-7192

DANIELA BLOWERS, individually and on behalf of

GALEN LEE BLOWERS, II, a minor

Petitioner

vs.

MONTANA INSURANCE GUARANTY ASSOCIATION

Respondent/Insurer for

POOL WELL SERVICING COMPANY

Employer.

ORDER AMENDING FINDINGS OF FACT

Summary: Following decision expressing Workers' Compensation Court's concern that testimony of claimant and her father did not disclose that claimant was joint tenant on land with her parents, claimant moved to amend decision, pointing out that the title was in evidence and Proposed Findings disclosed her joint tenancy.

Held: Court reiterated it's concern and, while praising claimant's counsel's competence and candor, admonished attorneys to take care not to present testimony leaving a false impression on significant matters.

Topics:

Witnesses: Credibility. Claimant's credibility was undermined where she did not state in deposition and trial testimony that she was joint tenant on property with her parents, which was material to Court's inquiry whether claimant was entitled to lump sum advance of death benefits.

Benefits: Lump Sums: Generally. Claimant's credibility was undermined where she did not state in deposition and trial testimony that she was joint tenant on property with her parents, which was material to Court's inquiry whether claimant was entitled to lump sum advance of death benefits.

On May 12, 1997, the Court received a letter from petitioner's counsel concerning Finding of Fact 12, which concerned ownership of the land for which the petitioner sought a lump

sum to enable her to purchase. In that finding, I noted deposition testimony by petitioner and her father, and initial trial testimony by petitioner, to the effect that petitioner's father and mother owned the land in question. In fact, petitioner is a joint owner of the land with a right of survivorship.

The finding of fact in question states, in full:

12. Petitioner resides in a mobile home which is located on a 6.3 acre lot. Petitioner owns the lot in joint tenancy with her father and mother, who also have a trailer on the land. (Ex. 14; Trial Test. of Petitioner and Max Hansonl.) The Court notes that neither the petitioner nor her father disclosed petitioner's interest in the land during their depositions. Both testified that the land is owned by petitioner's parents. (Petitioner's Dep. at 25-26; Hansonl Dep. at 12.) Petitioner's father responded "yes" when specifically asked to confirm "that [the] land is presently in your name and your wife's name." (Hansonl Dep. at 15.) When petitioner was first asked at trial about where she lived, she replied, "I live in a mobile home right now **on my mom and dad's land.**" (Trial Test.) It was at that point that I interrupted her and stated my understanding, which I believed at the time came from my reading of Hansonl's deposition, that her name was on the title of the land as a joint tenant. The petitioner confirmed my understanding. Upon reviewing the depositions and exhibits I have found that the information concerning the joint tenancy was contained in Exhibit 14, which is a copy of a portion of the title insurance policy for the land, and not in Hansonl's deposition.

I find the omission of this information by petitioner in both her deposition and her initial trial testimony, and by Hansonl in his deposition, very disturbing in light of the fact that part of petitioner's lump-sum request is for money to pay her parents for the land. While her parents may have given her the interest in the land, that does not change the fact that she has an ownership interest in the very land for which she asks the Court to advance her money to purchase. Petitioner's counsel surely knew of petitioner's interest in the property, if not at the time of the deposition, then at least by trial since it is disclosed in Exhibit 14. Counsel surely understood that the fact of her ownership interest in the land is a fact of consequence to her request. I am disturbed that he did not point out the fact and that he left me to ferret it out for myself.

(Finding of Facts, Conclusions of Law and Judgment at 4.)

The petitioner's counsel takes issue with the Court's last two sentences. He points out that not only was petitioner's ownership interest disclosed by the title policy but that a week prior to trial he also submitted proposed findings of fact which disclosed her ownership interest. That disclosure is contained in proposed Finding of Fact 14 of Claimant's Proposed Findings of Fact and Conclusions of Law, which reads:

14. Claimant and her son reside on approximately 6 acres of land in a 1988 16x80 mobile home. Also on this land is a mobile home owned and occupied by Claimant's parents; Max and Lyla Hansonl. There are two well, two septic systems, and two electrical services already on the property which has been developed for residential use. The 6 acres are titled in the names of Max Hansonl, Lyla Hansonl, and Daniela Blowers as Joint Tenants with the Right of Survivorship. Daniela Blowers did not pay any money for her name to be put on this property, which was done by her parents as a convenience and estate planning tool, rather than an outright gift. Max and Lyla Hansonl have agreed to sell 3 acres of this land outright to Claimant Daniela Blowers for the sum of \$26,500.00, which the Court finds to be a fair market value for this property.

The Court did not mention the proposed finding and did in fact overlook it. Petitioner's counsel also points out that at trial the Court interrogated petitioner regarding the ownership of the land before counsel had an opportunity to clear up the matter. He suggests that the Court should *sua sponte* amend its findings to clarify the record.

While the comments of petitioner's counsel are well taken, it was and continues to be my view that stronger action by counsel was warranted. The deposition testimony of petitioner and her father omitted essential, material information concerning a critical fact. As the Court's original finding states, "Counsel surely understood that the fact of her [petitioner's] ownership was a fact of consequence to her request." The deposition testimony of petitioner and her father stated not only that the land was owned by petitioner's parents but also that petitioner owed them rent on the land. That testimony was grossly misleading at best, a deliberate concealment of a material fact at worst.

The deposition testimony referred to the land ownership or rent at least six times. In her deposition, the petitioner gave the following testimony regarding ownership and rent:

Q As we go to the next page, under fixed assets, the home and property, that would be your trailer house. Is that correct?

A Yes.

Q I take it that the land that the trailer's currently on belongs to your folks?

A Yes.

(Blower's Dep. at 25-26.)

Q Are you paying rent to your parents?

A No. I was, but to help me out, my parents don't make me pay it now.

(*Id.* at 31.)

Q You've listed land to be purchased in Shepherd at 35,000. Is there a specific acreage you've looked at?

A Yes. I'd like to purchase the land where my trailer is on from my folks.

Q How much land is that?

A Well, I really couldn't tell you. He could tell you. I'm not real positive.

(*Id.* at 46.)

Q And your expenses added up to about 27 to \$2800 a month, and that includes the lot rent that you still don't even pay to your father.

A Right.

(*Id.* at 61.)

Petitioner's father testified in his deposition:

Q The proposal that Daniela has presented includes the purchase of some property. Apparently that's property you and your wife currently own?

A Yes.

(Hansonl Dep. at 12.)

Q The land on which Daniela's mobile home now sits, is that your land?

A Yes.

(*Id.* at 14.)

That testimony was plainly misleading. If counsel was aware of the petitioner's interest in the land at the time of the depositions, he should have, then and there, pointed out the omissions concerning petitioner's ownership interest in the land.

In opening statements and colloquy at the commencement of the trial, the deposition testimony remained uncorrected. No mention of petitioner's ownership interest in the land was made.

The fact of petitioner's ownership interest was also not disclosed in the Pretrial Order. In paragraph 1 of petitioner's contention she requests \$26,500 to pay for the land. In paragraph 2, she contends:

2. The real and personal property for which there is a certificate of title, which are purchased or paid with the lump sum advance above, should be placed in the names of Daniela Blowers and Galen Blowers, II, as joint tenants with right of survivorship.

(Pretrial Order Contention 2 at 3.) The contention implies that she is not presently a joint tenant in the property .

It is true, as petitioner's counsel states, that the petitioner's ownership interest is disclosed in his proposed findings and Exhibit 14. At the time I wrote the decision in this case, I did not believe, nor do I now believe, that he was deliberately concealing that fact. I could have "ferret[ed] out" petitioner's ownership interest from the documents presented to me, and in fact did so in my review of the exhibits.

On the other hand, petitioner's disclosure of her ownership interest in the land consisted of a sum total of two sentences among 18+ single-spaced pages of proposed findings and a single reference in a single sentence of an exhibit contained in a one-inch thick notebook with 21 exhibits. In light of the deposition testimony, it is my view that counsel should have caused petitioner to make a written correction to her deposition or at least alerted the Court at the onset of trial to the error in her and her father's testimony. As it unfolded, the petitioner further eroded her credibility by taking the stand and repeating her deposition testimony that the land is owned by her parents.

Finally, I will address the statement by petitioner's counsel, set forth in his letter, that my comment in Finding of Fact 12 "implies a lack of candor on my [counsel's] part with the Court" I have known and worked with Mr. Martin for many years now. I always found him to be extremely competent, skillful, candid and honest in his dealings with me when I was an attorney, and the same is true since I have been Judge. My criticism in this case does not undermine my judgment in that regard and should not be taken as an attack on his integrity. I simply believe that he should have taken more aggressive action to correct the misleading testimony given by petitioner and her father. What occurred in this case should instruct counsel in future cases of the importance of correcting false or misleading testimony immediately upon discovery of the error and doing so in a manner which emphatically brings it to the attention of the Court.

Finding of Fact 12 shall be **deemed amended** to reflect the discussion herein.

SO ORDERED.

DATED in Helena, Montana, this 19th day of May, 1997.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Richard J. Martin

Mr. Geoffrey R. Keller

Mr. Donald E. Sommerfeld

Mr. Barry G. O'Connell