IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2002 MTWCC 7

WCC No. 2001-0381

STEVEN CRAWFORD

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Respondent/Insurer for

VALLEY MECHANICAL, a Montana Corporation

Employer.

ORDER DENYING CROSS-MOTIONS FOR SUMMARY JUDGMENT

APPEAL DISMISSED PURSUANT TO SETTLEMENT AGREEMENT 1/16/03

Summary: Claimant and the insurer entered into a settlement agreement under which the insurer paid claimant $60,000.00 in settlement of his claims for permanent disability and rehabilitation benefits. Later on both parties discovered that claimant suffered from a hip condition that neither party contemplated when reaching the settlement. They agreed to rescind the settlement. Upon rescission, the insurer restored claimant's temporary total disability benefits but credited $33,412.07 of the settlement against its obligation for retroactive TTD benefits. Claimant then brought the instant petition seeking a determination that the insurer is not entitled to offset his TTD benefits.

Held: As a general matter, the insurer is entitled to offset the settlement paid claimant against benefits due or to become due claimant, including TTD benefits. However, it may not offset the minimum amount plainly due claimant in future permanent disability benefits since those benefits will be due the claimant irrespective of the rescinded settlement agreement. In this case, the Settlement Recap Sheet and vocational reports of the insurer indicate that the claimant will be due a minimum of $28,595 in permanent disability benefits, or an amount close thereto. Since the insurer's offset against his TTD benefits left claimant with less than that he is entitled to the difference, however, there are potential factual issues concerning the minimum amount of his entitlement and the matter is set for trial to determine that minimum amount.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: Section 39-71-117(1), MCA (1997). Settlement agreements are contracts. *Kienas v. Peterson,* 191 Mont. 325, 328, 624 P.2d 1, 2 (1980). As a general proposition, upon rescission of a contract, each party is required to restore everything of value received from the other. § 28-2-1713, MCA.

Settlements: Contracts. Settlement agreements are contracts. *Kienas v. Peterson,* 191 Mont. 325, 328, 624 P.2d 1, 2 (1980). As a general proposition, upon rescission of a contract, each party is required to restore everything of value received from the other. § 28-2-1713, MCA.

Settlements: Reopening: Rescission. Settlement agreements are contracts. *Kienas v. Peterson,* 191 Mont. 325, 328, 624 P.2d 1, 2 (1980). As a general proposition, upon rescission of a contract, each party is required to restore everything of value received from the other. § 28-2-1713, MCA.

Settlements: Reopening: Rescission. Where a settlement is rescinded for mutual mistake of fact, the claimant is entitled to retain amounts that are due or will be due him irrespective of the settlement agreement. The insurer is entitled to a credit for or repayment of any remaining amount and may recoup its entitlement out of past-due or future benefits due claimant, including temporary total disability benefits.

¶1 Before the Court are cross-motions for summary judgment. The matter in dispute is whether the insurer is entitled to a credit for monies paid claimant under a rescinded settlement agreement.

Facts

¶2 The salient and material facts are not in dispute. Other, immaterial facts which the parties have set out, or which are unsubstantiated and inadmissible due to lack of personal knowledge or evidentiary support, (*see* Liberty's Second Motion to Strike and Supporting Brief), are disregarded.

¶3 The uncontroverted facts which are material to the motions are as follows:

¶3a On June 19, 1996, the claimant was injured in an automobile accident. The accident occurred in the course and scope of his employment with Valley Mechanical. (Petition for Hearing at 1, ¶ 1, as admitted by respondent.)

¶3b At the time of the claimant's auto accident, Valley Mechanical was insured by Liberty Northwest Insurance Corporation (Liberty). Liberty accepted liability for claimant's accident and injuries and began paying temporary total disability (TTD) benefits. (Petition for Hearing at 1, ¶¶ 2 and 3 (as admitted by respondent).)

¶3c A dispute arose between claimant and Liberty as to whether claimant, upon reaching maximum medical improvement, was permanently partially or permanently totally disabled (PTD). (Petition for Hearing at 1, ¶ 3, (as admitted by respondent).)

¶3d The parties resolved the dispute by entering into a settlement agreement, which was thereafter reduced to writing in a "Petition for Settlement" and submitted to the Department of Labor and Industry (Department) for its approval. The Department approved the settlement on May 17, 1999. (Ex. A to [First] Affidavit of Jamie Kern (hereinafter "Kern Affidavit I").)

¶3e Under the settlement agreement, Liberty paid claimant $60,000 less previous lump-sum advances of permanent partial disability (PPD) benefits. (*Id*.) The previous lump-sum advances amounted to $13,220 (Ex. B to Kern Affidavit I), claimant therefore netted $46,780.

¶3f The Settlement Recap Sheet provided the Department in conjunction with the Petition for Settlement, computed claimant's entitlement to PPD benefits at 43% (20% for wage loss, 18% for impairment, and 5% for physical restrictions). (Ex. B to Kern Affidavit I.) At a rate of $190 per week (*id.*), the total PPD entitlement was $28,595. § 39-71-703(3), MCA (1995). While Liberty took the position that the 18% impairment rating was a "compromise" (*id.*, Ex. C), its own IME physician assigned the 18% rating (Ex. E to Kern Affidavit II at 3.)

¶3g Following the settlement, claimant developed new symptoms in his hip. Liberty initially denied liability for the hip condition. (Kern Affidavit I, ¶ 4h.) However, after receiving a medical panel report relating the hip condition to claimant's injury, Liberty agreed to pay medical benefits. (*Id.,* ¶¶ 4k and 4l.)

¶3h Claimant then demanded that he also be paid TTD benefits. Liberty asserted that the settlement agreement closed future indemnity benefits. Claimant requested Liberty to reopen the settlement based on mutual mistake of fact. (*Id.*, ¶ 4m.) Ultimately, Liberty agreed to do so based upon a mutual mistake of fact. (*Id.*, ¶ 8.)

¶3i Liberty reinstated benefits and began claimant's TTD benefits on April 10, 2001, the date it agreed to reopen the settlement agreement, and has continued to pay TTD benefits to the present time, at least as of the date of filing of its motion for summary judgment. (Petition for Hearing at 2, ¶ 12 (as admitted by respondent); Kern Affidavit I, ¶ 11.)

¶3j Liberty did not pay claimant retroactive TTD benefits following reopening. Rather, it notified claimant that it was entitled to a credit for the $60,000.00 paid him under the settlement agreement. It calculated claimant's retroactive TTD benefits due to

reopening in the amount of $33,412.07, and credited that amount of the settlement against its obligation for those benefits. (Kern Affidavit I, Ex. D.) By letter dated April 25, 2001, Liberty advised claimant that "Liberty Northwest is reserving the right to take a credit for this amount at the time of future settlement, or alternatively, to recover this overpayment through suspension or reduction of future benefits . . . ." (*Id*.)

Discussion

¶4 In this case, the Court is asked to determine the right of an insurer to offset the amount paid a claimant pursuant to a settlement agreement when the settlement agreement is rescinded due to mutual mistake of fact. Claimant, who has been returned to TTD status, contends that none of the settlement payments can be deducted from his past due, present, or future TTD benefits. Liberty contends that it is entitled to take a credit for the full amount of the settlement against TTD and any other benefits it may owe claimant. As noted in ¶ 3j, it has already taken a credit of $33,412.07 with respect to TTD benefits accrued prior to the date of rescission.

¶5 Settlement agreements are contracts. *Kienas v. Peterson,* 191 Mont. 325, 328, 624 P.2d 1, 2 (1980). As a general proposition, upon rescission of a contract, each party is required to restore everything of value received from the other. § 28-2-1713, MCA. But, as noted in *Abell v. Ford Motor Company,* 39 St. Rep. 1347 (D.C. Mont. 1981), the requirement that a party return everything received under a settlement agreement is not an invariable one. In his decision, Judge Battin said, "[T]the Montana Supreme Court has recognized . . . that such a requirement [of full restitution] should not be taken too literally and that exceptions exist." *Id*. at 1351 (citing *O'Keefe v. Routledge,* 110 Mont. 138, 103 P.2d 307 (1964).) The two exceptions cited in *Abell* are (1) where fraud is alleged and (2) "where the party seeking rescission would be entitled to retain the contract consideration even without the release." *Id*. The second exception is in play in this case, however, neither party has properly applied it.

¶6 Initially, unless one of the exceptions applies, Liberty is entitled to set off the full amount of the settlement against amounts it owes claimant as a result of the rescission. There is nothing in section 28-2-1713, MCA, or in the cases cited by claimant that limits Liberty to recouping from permanent disability benefits. Recoupment from TTD benefits is not prohibited.

¶7 On the other hand, it is fairly clear from the uncontroverted facts that even after reaching maximum healing the claimant will be entitled, at minimum, to the full amount of PPD benefits calculated as due in the Settlement Recap Sheet which accompanied the Petition for Settlement. (*See* ¶ 3f.) The Settlement Recap Sheet, correspondence, and vocational rehabilitation reports attached to Jamie Kern's two affidavits indicate that the only potential dispute over claimant's minimum entitlement to PPD benefits was with

regard to the 18% impairment rating, and that rating came from Liberty's IME physician. The PPD calculation was done before the discovery of claimant's additional medical condition involving his hip. The likelihood that his PPD status will improve on account of the hip condition is nil; more likely it will increase or stay the same. It therefore appears that, at minimum, claimant is entitled to $28,595.00 in PPD benefits, or, even assuming there is a genuine dispute over the 18% impairment rating, an amount close to that figure. As a result of Liberty's taking a $33,412.07 credit against accrued TTD benefits, claimant is left with less than that, to wit: $26,587.93. Unless Liberty is able to show that there is a legitimate dispute over the 18% impairment rating **and** that the impairment rating is likely to be less than 18% even considering claimant's hip condition, it must advance claimant the additional amount of $2,007.07, which is the difference between claimant's minimum permanent disability entitlement and what he was left with after Liberty took a credit for accrued TTD benefits. If claimant can show that his minimum entitlement to PPD and rehabilitation benefits is greater than $28,595.00, then he may be entitled to the difference between that minimum amount and the $26,587.93 he has retained from the rescinded settlement.

ORDER

¶8 Since there may be factual issues as to claimant's minimum entitlement, neither party is entitled to summary judgment. Therefore, the cross-motions for summary judgment are **denied** and this matter is set for trial in accordance with the foregoing discussion.

DATED in Helena, Montana, this 6th day of February, 2002.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Geoffrey C. Angel
Mr. Larry W. Jones
Submitted: October 24, 2001