IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2004 MTWCC 31

WCC No. 2004-0958

RAYMOND HIGGINS

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Respondent/Insurer.

ORDER REGARDING CONSTRUCTIVE FRAUD DEFENSE

Summary: The respondent objects to inclusion of a constructive fraud theory in a pretrial order. The case involves a claimant's request to reopen his settlement. The objection is based on the claimant's failure to specifically mediate the constructive fraud theory or plead it in his petition.

Held: The claimant must mediate the benefits issue in dispute but is not required to mediate every legal theory which could conceivably support his claim for those benefits. In the context of a request to reopen a settlement agreement, which was initially premised on a mutual mistake of fact theory, his failure to also mediate a constructive fraud theory does not preclude him from advancing that theory in the Workers' Compensation Court. However, fraud must be affirmatively pled in his petition. But where the facts giving rise to the allegation of fraud are based on discovery conducted in connection with his petition, he will be allowed to amend his petition to include the theory.

Topics:

> **Mediation.** The mediation requirements of the Montana Workers' Compensation Act do not require a claimant to present every conceivable legal theory in support of his claim for benefits. In the context of a request to reopen a settlement, the claimant was not required to specifically argue a constructive fraud theory in order to preserve the issue for consideration by the Workers' Compensation Court.
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> **Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-71-2408, MCA (1987-2003).** The mediation requirements of the Montana Workers' Compensation Act does not require a claimant to present every conceivable legal theory in support of his claim for benefits. In the context of a request to reopen a

settlement, the claimant was not required to specifically argue a constructive fraud theory in order to preserve the issue for consideration by the Workers' Compensation Court.

Pleading: Amendments. Leave to amend a petition ". . . shall be freely given when justice so requires." Rule 15(a), Mont.R.Civ.P. Where a petition requests the Court to set aside a settlement based on mutual mistake of fact but facts are ascertained during discovery which claimant believes support a reopening based on constructive fraud, leave to file an amended petition will be granted even though the constructive fraud theory was identified and proffered shortly before the pretrial conference.

Pleading: Fraud. Fraud must be affirmatively pled. However, where the facts constituting the alleged fraud are discovered during discovery following the filing of the petition, leave to file an amended petition will be granted even though the constructive fraud theory was identified and proffered shortly before the pretrial conference.

¶1 The Court conferred by telephone with counsel in the above matter during a pretrial conference. Counsel requested me to resolve a dispute over a new legal theory raised by the claimant in his proposed pretrial order.

¶2 The petition requests the Court to set aside a settlement agreement based on mutual mistake of fact. As explained by the claimant's counsel, the constructive fraud theory is the product of information obtained during a deposition of the claims adjuster. The claimant's counsel construes the adjuster's testimony as indicating that the adjuster had information concerning total disability which he or she concealed from the claimant during the negotiations leading up to the settlement. Counsel for the respondent urges that the claimant cannot include the issue because the constructive fraud theory was not mediated or pled in the petition to this Court.

¶3 With respect to mediation, I told counsel that as long as the issue mediated was the reopening of the settlement, the mediation was sufficient. I reaffirm that statement here. Mediation is required by section 39-71-2408, MCA, (1987-2003). Subsection (1) provides:

> (1) Except as otherwise provided, in a dispute arising under chapter 71 or 72 of this title, the insurer and claimant shall mediate **any issue concerning benefits** and the mediator shall issue a report following the mediation process recommending a solution to the dispute before either party may file a petition in the workers' compensation court.

The *issue concerning benefits* in this case is whether the claimant's settlement should be set aside. There may be all sorts of *legal theories* which support claimant's request to

reopen but the *issue* is claimant's entitlement to set aside the settlement, not his legal theories.

¶4 Mediation was not intended to be a technical exercise in legal pleading or knowledge. I remind respondent's counsel of section 39-71-105(3), MCA, (1993-2003), which provides:

> (3) Montana's workers' compensation and occupational disease insurance systems are intended to be primarily self-administering. Claimants should be able to speedily obtain benefits, and employers should be able to provide coverage at reasonably constant rates. To meet these objectives, the system must be designed to minimize reliance upon lawyers and the courts to obtain benefits and interpret liabilities.

I therefore decline to interpret the mediation provisions as requiring a claimant to list every imaginable legal theory he or she might have to support a request for benefits.

¶5 There is, however, a pleading problem at the Workers' Compensation Court level. While this Court has not adopted the formal pleading requirements of the Montana Rules of Civil Procedure, the Supreme Court has held that fraud must be affirmatively pled in a petition before the Workers' Compensation Court, *Haag v. Montana Schools Group Ins. Authority*, 274 Mont. 109, 115, 906 P.2d 693, 697 (1995), at least absent a contrary rule promulgated by this Court. Thus, the claimant was required to affirmatively allege all of the elements of the alleged fraud in his petition.

¶6 Although the constructive fraud defense is not set out in the claimant's initial petition, Rule 15(a), Mont.R.Civ.P., provides that leave to amend ". . . shall be freely given when justice so requires." The claimant's attorney indicated that the information on which the theory is based was gleaned during depositions. That is good enough reason to allow an amendment even at the late date of the pretrial conference. The proceedings in this Court are on an expedited basis. Generally, trials are scheduled approximately seventy-five days after the filing of the petition, and during that seventy-five day period all discovery and other pretrial matters must be completed. Accordingly, the fact that the issue was identified shortly before a pretrial conference is not fatal to a late amendment of the pleading.

¶7 I therefore told counsel that I will allow the claimant to amend his pleadings to set out the constructive fraud claim. He may do so in the form of a statement of the particulars of his claim rather than filing a comprehensive amended petition.

¶8 However, since the injection of a new legal theory may give rise to a need for further discovery, I indicated to counsel that I was amenable to vacating the current trial setting, allowing time for further discovery. Counsel agreed that the trial should be vacated, and I am informed they have agreed to May 24, 2004, as the new trial date. A new scheduling order, setting new deadlines for further discovery, will therefore issue.

¶9 Finally, counsel for the respondent indicated she may wish to file a motion for summary judgment regarding the constructive fraud issue. I requested that the issue be reserved for trial and briefed at that time since it would not alleviate the need for trial and much of the same evidence regarding the constructive fraud theory will go to the mutual mistake of fact theory.

ORDER

¶10 The claimant's failure during mediation before the Department of Labor and Industry to proffer a constructive fraud theory in support of his request to reopen his settlement does not preclude him from his litigating that theory in this Court.

¶11 The claimant may amend his petition to add a constructive fraud theory and shall do so by a statement of particulars addressing each of the elements of constructive fraud. He shall file his statement by March 26, 2004.

¶12 The trial of this matter is reset to May 24, 2004. A new scheduling order, fixing new deadlines for further discovery and other pretrial matters will be issued.

DATED in Helena, Montana, this 23rd day of March, 2004.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Richard J. Martin
Ms. Carrie L. Garber