

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1995 MTWCC 112

WCC No. 9505-7292

RALPH KRESS

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

JIM AND LOUIE BOUMA

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Truck driver injured during fall on ice settled workers' compensation claim, with medical benefits reserved. In this action, he seeks to reopen the settlement for mutual mistake of fact regarding relationship of groin pain to industrial injury. He also sought payment of medical bills relating to groin treatment and increase in compensation benefits.

Held: Under Supreme Court precedent (e.g., *Weldele v. Medley Development*, 227 Mont. 257 (1987)), mutual mistake regarding true nature of claimant's medical condition at time of settlement requires reopening of settlement. Recitation in settlement that both parties assume the risk that claimant's condition is otherwise than what they believe does not prevent reopening. Here, claimant's testimony and persuasive medical evidence convinces the Court that claimant's groin condition was caused by his injury and that the injury aggravated a pre-existing back condition. Where the parties were mistaken about this causal relationship, the settlement is deemed null and void. The fact that claimant insisted all along that groin condition was related to accident does not negate reopening where medical providers had rejected possible connection. Proof of causal connection entitles claimant to medical benefits for his groin and back conditions. Even with the settlement reopened, however, claimant has not proven his entitlement to additional compensation benefits, so none are ordered.

Topics:

Settlements: Reopening: Mistake of Fact. Recitation in settlement that both parties assume the risk that claimant's condition is otherwise than what they believe does not prevent reopening where claimant's testimony and persuasive medical evidence convinces the Court that claimant's groin condition was caused by his injury and that the injury aggravated a pre-existing back condition, facts previously rejected by medical providers.

Settlements: Reopening: Mistake of Fact. The fact that claimant insisted all along that groin condition was related to an accident does not negate reopening for mutual mistake of fact regarding groin condition where medical providers had rejected possible connection at the time of settlement.

The trial in the above-entitled matter came on Friday, October 13, 1995, in Great Falls, Montana. Petitioner, Ralph Kress (claimant), was present and represented by Mr. Cameron Ferguson. Respondent, State Compensation Insurance Fund (State Fund), was represented by Mr. Daniel J. Whyte. Exhibits 1 through 19 were admitted by stipulation. The claimant and Lance Zanto were sworn and testified. Additionally, the claimant's deposition was submitted for the Court's consideration.

Issues presented: The claimant requests that a compromise and release settlement executed by the parties on October 28, 1993, be set aside and that he be awarded further temporary total and permanent partial benefits, along with medical benefits for his groin condition.

Having considered the pretrial order, the testimony presented at trial, the demeanor and credibility of the witnesses, the deposition and exhibits, and the arguments of the parties, the Court makes the following:

FINDINGS OF FACT

1. The claimant is 47 years old. He is married with four children and is a high school graduate.
2. Over the years claimant has engaged in a variety of jobs. He has worked for a railroad, farmed, worked as a butcher, operated a grocery and driven trucks.
3. On December 16, 1991, claimant was working for J & L Trucking, which is operated by Jim and Louie Bouma. While unloading a truck, he slipped on ice and fell forward striking his thumb. He then fell backward, apparently striking his hip.
4. The employer was insured by the State Fund at the time of the accident and the State Fund accepted liability for the claim subsequently submitted by claimant.
5. The claimant was examined by Mr. Kelley Price, a physician's assistant, the day following his fall. An x-ray revealed a "fracture of the left thumb near the PIP⁽¹⁾ joint without joint

space involvement." The thumb was casted and claimant was instructed to return in four weeks. (Ex. 3 at 1.)

6. Claimant returned to Mr. Price on January 2, 1992, complaining of pain on the right side of his groin since the time of injury. Mr. Price conducted an examination. His office note reflects "right groin was without mass, there was no bulge in the inguinal canals, testicles appeared normal, they were not swollen or tender over the epididymis, there was no mass effect, urine analysis was normal, probable right groin strain." (*Id.*) At the time of the examination claimant believed his groin pain was caused by his December 16, 1991 industrial accident.

7. Claimant continued to experience pain in his right groin and was seen on January 16, 1992, by Dr. Stone, a urologist. (Ex. 17.) Claimant told Dr. Stone that his groin pain commenced at the time of his industrial accident. Dr. Stone opined that claimant had suffered an ilioinguinal genital nerve irritation and was possibly developing a hernia but recommended no medical intervention at that time.

8. Apparently unsatisfied with Dr. Stone's diagnosis and recommendation, the claimant sought an evaluation by Dr. Jake J. Allen on January 21, 1992. (Ex. 2.) At that time claimant again reported that he was suffering groin pain since the time of his industrial accident. Dr. Allen found no evidence of a hernia but reported claimant was tender at the pubic tubercle on the right. He felt claimant most likely had a chronic groin strain and recommended symptomatic treatment with Ibuprofen. Dr. Allen explained to claimant that the strain may be a chronic problem requiring treatment when symptoms arise.

9. On January 24, 1992, Mr. Price removed the cast from claimant's thumb and concluded that claimant had reached maximum medical improvement and could return to work as a truck driver. (Ex. 3.)

10. The claimant returned to Mr. Price on February 13, 1992, still complaining of groin pain. (Ex. 3.) Mr. Price felt that claimant had experienced a groin strain. There is no indication in his note for that date that he offered any further treatment.

11. Claimant then moved to Glasgow, Montana. He sought further treatment by physicians in that community.

12. He consulted Dr. Anne Williams, who is a general surgeon, on April 20, May 5, and October 5, 1992. (Ex. 7.) On the first visit claimant reported right groin pain and intermittent swelling of his right testicle. Of some significance to later developments, he reported that his groin pain sometimes extended down into the middle leg. Dr. Williams ultimately concluded that claimant's groin pain was "due to ilio-inguinal nerve irritation." (Ex. 7 at 1.) She offered two courses of treatment. One was "neurolysis⁽²⁾ of the ilioinguinal nerve." (*Id.*) The other was "surgical exploration to look for a neuroma or scar tissue entrapping the nerve to see if we could relieve some of this pain." (*Id.*) Claimant declined both options.

13. The claimant underwent a testicular ultrasound on May 7, 1992. The scan was within normal limits. (Ex. 4 at 2.)

14. At Dr. Williams' recommendation, the claimant also sought the advice of Dr. Richard Melzer; a urologist, on May 21, 1992. The copy of his office note provided to the Court is difficult to read; however, it is evident that no firm diagnosis resulted from this referral. (Ex. 5.)

15. Claimant, still casting about for a definitive resolution of his pain, consulted Dr. Gordon Bell on July 31 and September 16, 1992. (Ex. 6 at 3.) Dr. Bell first reported, "I certainly find nothing to be diagnosed but have to suspect chemical epididymis." He suggested claimant use Ibuprofen for his pain. At the time of the second examination, Dr. Bell did a local injection of claimant's groin with xylocaine and marcaine. The injection provided temporary relief and Dr. Bell concluded that surgery might provide claimant substantial relief. Dr. Bell also noted that while the etiology of the groin pain remained unclear, he suspected "mechanical local trauma" due to the industrial accident. (Ex. 6 at 1.)

16. Claimant was examined on December 15, 1992 by Dr. Charles Perkins, who is a neurologist. (Ex. 8.) Dr. Perkins felt the claimant "probably has possibly a high lumbar nerve root entrapment" or "could have pelvic plexus involvement" and ordered an MRI. (Ex. 8 at 1-2.) The MRI, taken February 20, 1993, showed "[m]inimal L4-5 bulging but not herniated disc . . . [causing] . . . no compromise on the neural foraminal openings or the spinal canal" and "minimal grade I reverse spondylolisthesis at L5-S1." (Ex. 9 at 1.)

17. On February 5, 1993, Dr. Michael Fay, an orthopedic surgeon, evaluated claimant's thumb. Dr. Fay did not feel further treatment of the thumb was warranted and suggested he return to work. (Ex. 11.)

18. Claimant returned to Dr. Perkins on March 16 and April 20, 1993, complaining of continued groin pain. He was unable to explain claimant's continuing symptoms. On May 26, 1993, Dr. Perkins provided Lance Zanto, claims examiner of the State Fund, with his view of the matter:

Dear Mr. Zanto:

The reason for the MRI of the thoracic spine is because groin pain originates from the T-12/L1-2 root areas. The routine lumbar films would not have covered this area. Therefore, a special film (MRI) involving the thoracic spine was indicated.

With regards to the second part of your letter, there are no objective medical findings at this time to substantiate his complaint however the complaint did arise from the injury of 12-16-91. As I said in my previous letter, I am unable to explain why the patient does have the pain in that area.

This does not indicate however that he is not having pain in that area. We have proven that it doesn't seem to be caused by a ruptured disc and there is no growth in the pelvic area compressing the nerves to the groin area that could be causing the problem. Whether it is some intrinsic problem in the testicle itself, I am unable to tell and possibly a urologist could evaluate him with this in mind.

At the present time, I feel the patient's condition is static in that it doesn't seem to be progressing, has reached a plateau. However, he still claims to be having the pain.

Sincerely,

Charles G. Perkins, M.D.

(Ex. 12 at 1.) Of significance to the decision in this case, Dr. Perkins rejected discogenic and spinal origins of claimant's groin pain.

19. Claimant was again examined by Dr. Bell on September 1, 1993. (Ex. 13.) Noting the lack of a diagnosis for the claimant's complaints, Dr. Bell suggested physical therapy to help alleviate pain. Lacking pain relief, Dr. Bell suggested claimant be evaluated at the Mayo clinic.

20. Until August 1993, the State Fund paid for medical treatment related to claimant's groin pain. However, on August 3, 1993, Zanto, wrote to claimant's attorney advising him that the State Fund would no longer pay for medical treatment of claimant's groin condition because the physicians who had seen claimant had been unable to make a diagnosis of his condition based on medical evidence. (Ex. 19 at 1.) Zanto noted, "I honestly believe that I have allowed Mr. Kress to be evaluated by enough physicians that if there were an objective medical diagnosis that it would have been diagnosed by now." (*Id.*)

21. Thereafter, on October 28, 1993, claimant and the State Fund executed a Petition for Compromise and Release Settlement. The petition was approved by the Department of Labor and Industry on November 10, 1993. The settlement agreement provided, *inter alia*:

The parties to this matter have agreed to fully and finally conclude all compensation payments due the claimant under the Workers' Compensation Act, wherein the insurer shall pay to the claimant the sum of Ten Thousand & no/100 (\$10,000).... Further medical and hospital benefits are expressly hereby reserved to the claimant.

. . . The claimant understands that by signing this compromise and release settlement petition, both the named insurer and the claimant agree to assume the risk that the condition of the claimant, as indicated by reasonable investigation to date may be other than it appears, or it may change in the future. The claimant understands that this petition represents a compromise and release settlement and, if approved, may not be reopened by the Department.

(Ex. 16 at 1, underlining in original.) The agreement also closed any further claim for rehabilitation benefits. (*Id.*)

22. In a telephone call, Zanto told claimant's attorney that the State Fund would not pay for any future treatment of claimant's groin complaints.

23. According to Zanto, \$5,292 of the settlement was attributable to claimant's thumb.

24. On August 17, 1994, claimant sought an evaluation by Dr. John Dorr, an orthopedic surgeon practicing in Billings, Montana. Claimant told Dr. Dorr that he was having ongoing pain in his back and right leg. Dr. Dorr's office notes for this day state:

In 1991 he was again working as a truck driver. He slipped on some ice and did the splits. He broke his thumb and hurt his back. He had pain that radiated into his testicle. The pain has now shifted more to the anterior and lateral aspects of his thigh. . . . x-rays taken here reveal significant narrowing of the L5-S1 interspace with anterior spur formation and an Air sign. . . . Certainly he has a basis for having significant back pain with his degenerative disc. It does currently seem to relate to his most recent accident.

(Ex. 14 at 2.)

25. Dr. Bell received a copy of Dr. Dorr's report and wrote the State Fund a letter setting forth his opinion that the claimant's groin pain originated in his back and was caused by the 1991 industrial accident. He wrote:

Throughout [claimant's] course, this [groin] pain seemed to be neuropathic. Its exact source was not clear on his examinations two years ago. Since then, he has developed a more clearly radicular pain but was not felt to have an operative problem during his recent orthopedic consultation. **It is now certain that his earlier groin pain and his current back and right thigh pain are related to spine pain. This began with the original injury a decade and one-half ago, with an exacerbation because of reinjury in 1991 when he slipped on some ice while employed as a truck driver.**

(Ex. 15 at 1; emphasis added.) Dr. Bell's opinion is the latest medical word. It is uncontradicted. His opinion, along with that of Dr. Dorr, is sufficient to persuade me that claimant's groin pain is caused by a low-back condition, which in turn is the result of his industrial accident of December 16, 1991.

26. In his December 5, 1994 letter, Dr. Bell opined that claimant "has reached maximum healing" with respect to his groin complaints and his back condition. Based on the claimant's continuous and persistent history of pain despite various treatments, the fact that a surgery is not contemplated, and the fact that his back condition progressively worsened rather than improved, I find that claimant reached maximum medical

improvement regarding his groin/back long before Dr. Bell reached his maximum healing opinion. There is no persuasive evidence that claimant's condition improved after the onset of his condition despite treatment, or that further treatment will result in any future significant improvement.

27. The parties did not present evidence concerning the duration of the temporary total disability benefits paid to claimant. Exhibit 18 suggests they had been terminated at least by June 2, 1992, but there was no testimony or other evidence indicating the specific date of cut-off or showing that they were not later reinstated.

28. Claimant did not present evidence addressing wage loss and the reduced labor activity factors used to determine permanent partial disability benefits under §39-71-703(3), MCA (1991). Claimant has demonstrated his entitlement to 4% of 350 weeks, 2% for his age and 2% for his education. Additionally, Lance Zanto conceded liability for a 5% impairment rating, resulting in a 9% entitlement. That entitlement is \$5,292, which is less than the amount already received by claimant.

CONCLUSIONS OF LAW

1. The claimant argues that the 1993 settlement agreement was based on a mutual mistake of fact. The Court agrees.

Prior decisions of the Supreme Court confirm the authority of the Workers' Compensation Court to set aside a full and final compromise settlement agreement where the parties entered into the agreement while laboring under a mutual mistake of fact. *E.g. Kienas v. Peterson*, 191 Mont. 325, 624 P.2d 1 (1981); *Weldele v. Medley Development*, 227 Mont. 257, 260, 738 P.2d 1281 (1987); *Kimes v. Charlie's Family Dining & Donut Shop*, 233 Mont. 175, 759 P.2d 986 (1988); *Wolfe v. Webb*, 251 Mont. 217, 824 P.2d 240 (1992).

Kienas involved a back injury. The settlement was set aside because it was based on a medical assessment which did not take into consideration the injury's effect on the petitioner's pre-existing cerebral palsy. Prior to settlement the petitioner's treating physician rendered an impairment rating based solely on the back injury; at the time of the settlement, neither party was aware that the injury aggravated or accelerated the cerebral palsy. Applying contract law, the Supreme Court held, "The parties were laboring under a material mistake as to the nature of and the extent of claimant's injuries." 191 Mont. at 330, 624 P.2d at 3.

In *Kimes* "a new and different medical problem was discovered after the settlement." The settlement in that case was based on the parties' belief that claimant's sole injury was to the anterior cruciate ligament of his knee, which was surgically repaired, but they later discovered that he also suffered a tear of the medial meniscus.

In *Weldele* the Supreme Court "allowed a reopening of the petition where the claimant's initial condition deteriorated substantially and the treating physician's initial assessment was a misdiagnosis of the actual extent of the injury." 227 Mont. at 256, 738 P.2d at 1281. At the time of the settlement, claimant had been diagnosed as suffering from carpal tunnel syndrome and a rotator cuff injury. Later it was learned that he suffered from thoracic outlet syndrome.

In *Pettit v. State Compensation Insurance Fund*, WCC No. 9305-6781 (December 29, 1993), claimant experienced a sharp pain in his hip and lower back while unloading equipment from a van. Treatment of the injury initially encompassed both the sacroiliac joint and the lower back, however, treatment then became focused entirely on the lower back and his condition improved. The parties eventually agreed to a compromise and release settlement. At the time of settlement, claimant's physicians did not consider sacroiliac dysfunction to be a viable diagnosis; their consensus was that claimant was suffering from lumbar strain. Approximately four months after the settlement, claimant was positively diagnosed as suffering from sacroiliac dysfunction. He petitioned the Court to reopen his settlement based on a mutual mistake of fact and the petition was granted. Central to this Court's holding in *Pettit* was a finding that **both parties** to the settlement were unaware that the claimant was suffering from sacroiliac dysfunction. (*Id.* at 7-8.)

The decisions of the Montana Supreme Court demonstrate that the mistake must be mutual. In *Kienas* the Court found that both parties were unaware that claimant's cerebral palsy was aggravated by the industrial injury. In *Weldele* neither party was aware that claimant had thoracic outlet syndrome. In *Kimes* it was only after settlement that an x-ray revealed a tear of the medial meniscus in claimant's knee.

At the time of the settlement in this case, neither the State Fund nor the claimant was aware of the possible relationship of claimant's groin pain to a back condition, or that claimant's fall aggravated a preexisting back condition. While such a relationship had been considered by Dr. Perkins, it had been ruled out at the time. Thus, both parties were unaware of the true nature of his condition and operating under a mutual mistake of fact.

While it could be argued that the mistake in this case was not mutual since claimant contended from the very beginning that his groin pain was the result of his industrial accident, the decisions of the Supreme Court, as I read them, require reopening where the parties are in fact mutually mistaken about the true nature of a claimant's condition even though they have expressly acknowledged in their agreement that the claimant's condition may be other than what they believe it is. See *Weldele*, 227 Mont. at 261-63, 738 P.2d at 1283-84 (Gulbranson, J., dissenting).

The claimant has persuaded the Court that he injured his back in his fall in December 1991, and that his injury is causing his groin pain. The most recent medical evidence supports this finding and that evidence is uncontradicted. Both parties were therefore mistaken

about his back condition at the time of the settlement and the agreement must be set aside.

3. Irrespective of the settlement agreement, the State Fund is liable for claimant's expenses for medical treatment of his back condition and groin complaints. The agreement expressly reserved medical benefits to claimant. While Lance Zanto told claimant's attorney that the State Fund would not pay for further treatment of the groin condition, his statements do not alter the plain terms of the agreement. All the agreement requires is that claimant demonstrate that the condition for which he is being treated was caused by the industrial accident. The essential element is a direct relationship between claimant's employment and the injury. *Brown v. Ament*, 231 Mont. 158, 162, 752 P.2d 171, 174 (1988). Claimant has proven that connection.

4. Claimant has failed to persuade me that he is presently entitled to additional temporary total disability benefits. He has not presented evidence concerning the amounts and duration of the temporary total benefits that were paid to him. The proposed findings of facts as well as the evidence he presented, fail to disclose either the amount or the period of time of his alleged entitlement.

5. Claimant has failed to establish what, if any, additional entitlement he has to permanent partial disability benefits. At the time of his injury, section 39-71-703, MCA (1991), provided:

39-71-703. Compensation for permanent partial disability. (1) If an injured worker suffers a permanent partial disability and is no longer entitled to temporary total or permanent total disability benefits, the worker is entitled to a permanent partial disability award.

(2) The permanent partial disability award must be arrived at by multiplying the percentage arrived at through the calculation provided in subsection (3) by 350 weeks.

(3) An award granted an injured worker may not exceed a permanent partial disability rating of 100%. The criteria for the rating of disability must be calculated using the medical impairment rating as determined by the latest edition of the American Medical Association Guides to the Evaluation of Permanent Impairment. The percentage to be used in subsection (2) must be determined by adding the following applicable percentages to the impairment rating:

(a) if the claimant is 30 years of age or younger at the time of injury, 0%; if the claimant is over 30 years of age but under 56 years of age at the time of injury, 2%; and if the claimant is 56 years of age or older at the time of injury, 3%;

(b) for a worker who has completed less than 9 years of education, 3%; for a worker who has completed 9 through 12 years of education or who has

received a graduate equivalency diploma, 2%; for a worker who has completed more than 12 years of education, 0%;

(c) if a worker has no wage loss as a result of the industrial injury, 0%; if a worker has an actual wage loss of \$2 or less an hour as a result of the industrial injury, 10%; if a worker has an actual wage loss of more than \$2 an hour as a result of the industrial injury, 20%; and

(d) if a worker, at the time of the injury, was performing heavy labor activity and after the injury the worker can perform only light or sedentary labor activity, 20%; if a worker, at the time of injury, was performing heavy labor activity and after the injury the worker can perform only medium labor activity, 15%; if a worker was performing medium labor activity at the time of the injury and after the injury the worker can perform only light or sedentary labor activity, 10%.

(4) The weekly benefit rate for permanent partial disability is 66% of the wages received at the time of injury, but the rate may not exceed one-half the state's average weekly wage. The weekly benefit amount established for an injured worker may not be changed by a subsequent adjustment in the state's average weekly wage for future fiscal years.

(5) If a worker suffers a subsequent compensable injury or injuries to the same part of the body, the award payable for the subsequent injury may not duplicate any amounts paid for the previous injury or injuries.

(6) As used in this section:

(a) "heavy labor activity" means the ability to lift over 50 pounds occasionally or up to 50 pounds frequently;

(b) "medium labor activity" means the ability to lift up to 50 pounds occasionally or up to 25 pounds frequently;

(c) "light labor activity" means the ability to lift up to 25 pounds occasionally or up to 10 pounds frequently; and

(d) "sedentary labor activity" means the ability to lift up to 10 pounds occasionally or up to 5 pounds frequently.

Claimant has not addressed the criteria for an award of benefits under the section, and has therefore, failed to prove any additional entitlement.

6. On the other hand, the State Fund has not argued that the amount of the settlement was excessive, nor has it sought repayment of any of the amount it paid in compensation

benefits. Therefore, despite setting aside the settlement, neither party is entitled to additional relief regarding compensation benefits.

JUDGMENT

1. The 1993 settlement agreement between claimant and the State Fund was premised on a mutual mistake of fact concerning the extent and nature of claimant's injuries. The agreement is therefore **rescinded and deemed void**.
2. The State Fund shall pay for treatment of claimant's back and groin conditions.
3. Claimant is not presently entitled to further temporary total disability benefits or to any further permanent partial disability benefits.
4. Claimant is entitled to costs in an amount to be determined by the Court. He shall have 10 days in which to submit an affidavit of costs. The State Fund shall thereafter have 10 days in which to file its objections, if any. Claimant shall then have 10 days to reply to those objections. The matter of costs will then be deemed submitted for decision.
5. Claimant has not requested and is not entitled to attorney fees or a penalty.
6. This JUDGMENT is certified as final for purposes of appeal pursuant to ARM 24.5.348.
7. Any party to this dispute may have 20 days in which to request a rehearing from these Findings of Fact, Conclusions of Law and Judgment.

DATED in Helena, Montana, this 27th day of December, 1995.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Cameron Ferguson

Mr. Daniel J. Whyte

Date Submitted: October 18, 1995

1. Proximal interphalangeal joint. The Merck Manual, 15TH ED. AT 1234.
2. A neurolysis involves surgery on a nerve. It can be (1) a surgical release of a nerve sheath by cutting it longitudinally; (2) the relief of tension upon a nerve obtained by stretching; or (3) destruction or dissolution of nerve tissue. Dorland's Illustrated Medical Dictionary, 25th Ed.