IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1999 MTWCC 35

WCC No. 9810-8084

DONALD J. KRAITER,

Petitioner,

vs.

STATE COMPENSATION INSURANCE FUND,

Respondent/Insurer for

NORTHWEST FIXTURE COMPANY,

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Claimant seeks to reopen a full and final compromise settlement entered into with State Fund in 1989. The stated basis for the settlement was that claimant appeared to be totally disabled from a right knee condition for which State Fund accepted liability. Claimant was paid $40,242.02 in settlement, which represented approximately 500 weeks of total disability benefits, offset by social security benefits. If claimant had been paid that amount of biweekly benefits not in a lump sum, the payments would have continued until claimant reached age 65. Medical benefits were reserved to claimant and were in fact paid related to a left knee condition which developed in response to the right knee condition. Claimant argues both he and State Fund were mistaken in that they did not know the left knee condition would develop. State Fund concedes that mistake, but argues the mistake was not material to the settlement.

Held: Claimant not entitled to reopen where a mistake about a future left knee condition was not material to the settlement. Claimant settled on a permanent total disability benefit and received appropriate compensation for that claim. The presence of a left knee condition would not have increased the permanent total disability benefits to which claimant was entitled. Medical benefits have remained open and have been paid, leaving no issue regarding those benefits.

Topics:

Settlements: Reopening: Materiality of Mistake. Where claimant settled a claim for permanent total disability benefits relating to a right knee condition, he is not entitled to reopen his settlement on the claim that the parties were mistaken in not knowing that a left knee condition would develop. Any such mistake was not material to the settlement because permanent disability benefits are fixed and do not change based on change in medical condition, unless the medical condition changes for the better.

¶1 The trial in this matter was held on February 2, 1999, in Billings, Montana. Petitioner, Donald J. Kraiter (claimant), was present and represented by Mr. Lewis E. Brueggemann. Respondent, State Compensation Insurance Fund (State Fund), was represented by Mr. Greg E. Overturf.

¶2 Exhibits: Exhibits 1 through 19 were admitted without objection. Exhibits 20 and 21 were objected to by Mr. Overturf and refused.

¶3 Witnesses and Depositions: Claimant and Lori Clare were sworn and testified. The parties agreed that the Court may also consider the depositions of claimant and Dr. Douglas P. Morrison.

¶4 Issues Presented: As set forth in the pretrial order, the following issues were presented for decision:

1. Whether the full and final compromise settlement claimant entered into in 1991 should be set aside because the parties were operating under a mutual mistake of material fact.
2. Whether claimant is entitled to costs and attorney's fees.
3. Whether claimant is entitled to a penalty.

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

FINDINGS OF FACT

¶6 Claimant suffered a work-related injury to his right knee on June 24, 1980. At the time of his injury, he was employed by Northwest Fixture Company (Northwest) and was 45 years old.

¶7 Northwest was insured by the State Fund. The State Fund accepted liability for the injury and paid medical and wage-loss benefits.

¶8 In 1984, after having undergone two arthroscopic procedures and a lateral retinacular release, claimant was declared at maximum medical improvement and given a 5% impairment of the whole person by his treating physician, Dr. James E. Scott. (Ex. 1).

However, Dr. Scott thereafter performed major surgical procedures on the right knee in 1987 and 1988.

¶9 Between 1980 and 1988, claimant attempted at different times to return to work with only limited success. Each time pain and swelling in his knee caused him to discontinue employment.

¶10 In 1989 claimant and the State Fund entered into a full and final compromise settlement. The stated rationale for the settlement was that claimant could not return to work, had incurred substantial debt, and wanted a final resolution of his claim. The settlement agreement was executed on March 27, 1991, for the sum of $40,242.02. (Ex. 10.) The settlement amount represented approximately 500 weeks of total disability benefits at claimant's total disability rate after the rate had been offset by his Social Security Disability payments. The 500 weeks is equivalent to biweekly total disability benefits through 2000, when claimant will reach age 65. Medical expenses were reserved, thus the State Fund continued to be liable for medical expenses related to his injury.

¶11 Claimant thereafter moved to Oregon to escape the cold winters of Montana. Despite the move, his right knee continued to deteriorate. He had difficulty placing any weight on his right leg and compensated by placing more weight on his left leg. By 1996 claimant was suffering pain in his left knee.

¶12 Claimant was seen in May of 1997 by Dr. Karl C. Wenner, a board certified orthopedic surgeon, for his knee problems. (Ex. 14 at 57.) His chief complaint was, "bilateral knee pain, right worse than left." (*Id.*) Dr. Wenner recommended a total knee replacement on the right side. Claimant underwent the surgery on October 20, 1997. (*Id.* at 67.)

¶13 The knee replacement significantly improved claimant's right knee condition, however, he continued to suffer pain in his left knee. By May of 1998 he reported that he was unable to walk a half mile without extreme pain for days afterward. (Ex. 14 at 71.) Dr. Wenner treated him conservatively for a time with Synvisc injections but they did not provide relief. (*Id.*) On September 8, 1998, Dr. Wenner did a total knee replacement of the left knee. (Ex. 19 at 9.)

¶14 Following replacement of the left knee, Dr. Wenner rated claimant's impairment at 22% of the whole person. (Ex. 8.)

¶15 Dr. Wenner related claimant's left knee condition to his 1980 injury. (Ex. 14 at 56.) He opined that claimant compensated for his right knee problems by placing more weight on his left, resulting in deterioration of the left knee. (*Id.*)

¶16 At the State Fund's request, Dr. Douglas P. Morrison performed an independent medical examination in September of 1997. He agreed that it was possible that claimant's left knee problems were the result of his compensating "for his diseased right knee." (Ex. 15

at 77.) Based upon the results of the IME, the State Fund accepted liability for the left knee and has paid all associated medical costs.

¶17 Claimant now contends that the 1991 settlement to be set aside because both he and the State Fund were unaware that a left knee condition would develop as a result of the 1980 industrial injury.

¶18 At trial the State Fund conceded that the parties were operating under a mutual mistake of fact when the 1991 agreement was executed. It asserts, however, that the mistake was not material since the claim was settled on a permanent total disability basis. The Court agrees.

¶19 Claimant's injury entitled him to medical benefits. The settlement did not prejudice his medical benefits since they were left open, thus there is medical coverage for his left knee problems. The mistake is immaterial as to medical benefits.

¶20 The 1980 injury also entitled claimant to compensation benefits. The 1991 settlement was based on permanent total disability. The petition is entitled PETITION FOR FULL AND FINAL COMPROMISE SETTLEMENT OF TOTAL DISABILITY BENEFITS. (Ex. 17 at 95.) Moreover, the text of petition stated,

> The basis of the settlement is that the claimant appears to be totally disabled from finding regular employment of any kind in the normal labor market.

(*Id*.) Base on the petition alone claimant cannot now claim that he misunderstood the nature and degree of his disability or his entitlement to disability benefits. Moreover, claimant's own affidavit of necessity for commutation of payments indicates his awareness that he was permanently totally disabled and not rehabilitatable:

> Petitioner-claimant has not been rehabilitated, retrained or received any additional education with which he could seek any other kind of employment and therefore because of his advanced age it [**rehabilitation**] is no longer practical or plausible and he will soon be sustained by his old age social security payment alone.

(Id. at 97-98.) The above quoted statement demonstrates claimant's own belief in 1991 that he was permanently totally disabled with no prospect of rehabilitation.

¶21 Any mistake concerning claimant's left knee was immaterial to the settlement. The mistake did not affect either his medical benefits, which he continues to receive, or disability basis of the settlement. The left knee condition does not increase claimant's disability. Since the settlement agreement was premised on permanent total disability, the mistake does not affect the entitlement to benefits on which the settlement was premised.

CONCLUSIONS OF LAW

I. Governing Law

¶22 The 1979 version of the Workers' Compensation Act applies in this case since it was the law in effect at the time of the claimant's June 24, 1980 industrial injury. *Buckman v. Montana Deaconess Hospital,* 224 Mont. 318, 321, 730 P.2d, 380, 382 (1986).

II. Burden of Proof

¶23 Petitioner has the burden of persuasion. *See Ricks v. Teslow Consolidated,* 162 Mont. 469, 512 P.2d 1304 (1973); *Dumont v. Wicken Bros. Construction Co.,* 183 Mont. 190, 598 P.2d 1099 (1979).

III. Resolution

¶24 The full and final settlement entered into by the parties is a contract, thus contract law governs the agreement. *Kienas v. Peterson*, 191 Mont. 325, 329, 624 P.2d 1, 3 (1980). A contract may be rescinded when the parties were laboring under a mutual mistake regarding a **materia**l fact when the contract was made. *South v. Transportation Ins. Co.*, 275 Mont. 397, 401, 913 P.2d 233, 235 (1996). The contract may be rescinded only where "the parties share a common misconception **about a vital fact upon which they based their bargain**." *Mitchell v. Boyer*, 237 Mont. 434, 437, 774 P.2d 384, 386 (1989) (citations omitted; emphasis added).

¶25 The Supreme Court has addressed mistakes of fact concerning a worker's medical condition as affecting workers' compensation settlements. *E.g., Wolfe v. Webb*, 251 Mont. 217, 227-28, 824 P.2d 240, 246 (1992) and *South.* In *Webb* the Court characterized its prior precedents as follows:

> [W]e have previously held that a mistake about the nature or extent of the claimant's physical condition is a 'material' mistake of fact when applied to a workers' compensation settlement agreement.

251 Mont. at 227-28, 824 P.2d at 246. While that language arguably suggests that a mistake as to claimant's physical condition is **always** material, *South,* which is the more recent precedent, reiterates the requirement that any mistake of fact be material.

> . . . "A mutual mistake occurs when, at the time the contract is made, the parties share a common misconception about a vital fact upon which they based their bargain." *Mitchell v. Boyer* (1989), 237 Mont. 434, 437, 774 P.2d 384, 386 (citations omitted). In order to justify rescission, the mutual mistake must be regarding a fact that is vital to the completion of the contract. *Wray*, 879 P.2d at 725. Further, it must be "so substantial and fundamental as to defeat the object of the parties in making the contract." *Wyman v. DuBray Land Realty* (1988), 231 Mont. 294, 298, 752 P.2d 196, 199 (citing *Johnson v. Meiers* (1946), 118 Mont. 258, 164 P.2d 1012).

275 Mont. at 401. Thus, the fact that claimant and the State Fund may not have anticipated the development of claimant's left knee problem is not dispositive. Claimant must

demonstrate that an assumption that claimant's left knee was unaffected was vital to their agreement.

¶26 In *South* the Supreme Court held that the parties' mistake as to claimant being able to work as a massage therapist was material to the full and final settlement executed by the parties. Claimant was unable to perform that job and her attempt to do so resulted in a new injury. That case, however, involved permanent partial disability benefits under the 1985 version of the Workers' Compensation Act. The claimant's ability to perform specific jobs affected her entitlement to benefits under both an earning capacity analysis, § 39-71-703, MCA (1985), and an indemnity analysis, §§ 39-71-705 to -708, MCA (1985). *See Dunn v. Champion Int'l Corp*., 222 Mont. 142, 720 P.2d 1186 (1986) (earning capacity analysis) and *Holton v. F.H. Stoltze Land and Lumber Co.* 195 Mont. 263, 266, 637 P.2d 10, 12 (1981) (indemnity analysis).

¶27 In this case, the claimant's entitlement to benefits were not affected by the mistake. The case was settled on a permanent total disability basis. The basis of the agreement was express and claimant cannot now repudiate it. *Bunke, Inc. v. Johnson,* 205 Mont. 125, 137, 666 P.2d 1234, 1240 (1983) ("Where the contract is clear and unequivocal on its face, we will not consider parol evidence to modify its terms."). Permanent total disability benefits are fixed: A change in medical condition does not affect the rate or duration, unless the change is for the better. I therefore conclude that the mistake in this case was immaterial. Accordingly, claimant is not entitled to rescind or reopen the 1991 settlment.

Penalty, Attorney Fees and Costs

¶28 Claimant requests a penalty, attorney fees, and costs. Those awards, however, may be made only if claimant prevails on the merits of his claim. Since he has failed to do so, his requests must be denied.

JUDGMENT

¶29 1. Claimant is not entitled to rescind his 1991 settlement. His petition is therefore **dismissed with prejudice**.

¶30 2. Claimant is not entitled to a penalty, attorney fees, or costs.

¶31 3. This JUDGMENT is certified as final for purposes of appeal pursuant to ARM 24.5.348.

¶32 4. 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 11th day of May, 1999.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Lewis E. Brueggemann
Mr. Greg E. Overturf
Date Submitted: February 2, 1999