IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2000 MTWCC 63

WCC No. 9801-7900

KRISTOPHER MILLER

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

SELF-EMPLOYED DOCTOR OF CHIROPRACTIC

Employer.

ORDER DENYING MOTION IN LIMINE

Summary of Case: Claimant was criminally charged with workers' compensation fraud. Following dismissal of the charges by the State, he filed a motion in limine to exclude any evidence of fraud at a trial on his petition for benefits. The motion was based on correspondence between his attorney and the Clerk of the WCC, and correspondence between the State Compensation Insurance Fund's attorney and the Clerk.

Held: The motion is denied. (1) The motion in limine is improper. (2) There is no binding stipulation or agreement. (3) The State Fund's agreement, if any, concerned an acquittal after trial, not a dismissal.

Topics:

Attorneys: Correspondence. Letter from insurer's counsel to Clerk of Workers' Compensation Court agreeing with statements in letter from claimant's counsel did not create binding agreement for dismissal of insurer's affirmative defense of fraud. Letter from claimant's counsel to Clerk had indicated case should settle if claimant was found not guilty of fraud in pending criminal case. When writing to the Clerk, insurer's counsel merely concurred with logic of earlier letter. Claimant, in any event, was not actually found "not guilty" when charges were dismissed.

Criminal Prosecution. Claimant's counsel wrote to Clerk of Workers' Compensation Court asserting that case should settle if claimant was found not guilty of fraud in pending criminal case. Insurance counsel's agreement in *his* letter to Clerk did not create binding agreement to dismiss affirmative defense of fraud.

Criminal case, in any event, was dismissed and claimant was never found "not guilty" of fraud.

Defenses: Fraud. Claimant's motion in limine to exclude evidence of fraud at trial was not proper where claimant, in essence, sought to strike an affirmative defense but had not moved for partial summary judgment or to strike. The motion to exclude was also denied because no agreement to drop fraud defense arose from communications to Clerk of Court by counsel.

Evidence: Generally. Claimant's motion in limine to exclude evidence of fraud at trial was not proper where claimant, in essence, sought to strike an affirmative defense but had not moved for partial summary judgment or to strike. The motion to exclude was also denied because no agreement to drop fraud defense arose from communications to Clerk of Court by counsel.

Fraud. Claimant's motion in limine to exclude evidence of fraud at trial was not proper where claimant, in essence, sought to strike an affirmative defense but had not moved for partial summary judgment or to strike. The motion to exclude was also denied because no agreement to drop fraud defense arose from communications to Clerk of Court by counsel.

Pleading: Affirmative Defenses. Claimant's motion in limine to exclude evidence of fraud at trial was not proper where claimant, in essence, sought to strike an affirmative defense but had not moved for partial summary judgment or to strike. The motion to exclude was also denied because no agreement to drop fraud defense arose from communications to Clerk of Court by counsel.

Procedure: Motion in Limine. Claimant's motion in limine to exclude evidence of fraud at trial was not proper where claimant, in essence, sought to strike an affirmative defense but had not moved for partial summary judgment or to strike. The motion to exclude was also denied because no agreement to drop fraud defense arose from communications to Clerk of Court by counsel.

Procedure: Motion to Strike. Claimant's motion in limine to exclude evidence of fraud at trial was not proper where claimant, in essence, sought to strike an affirmative defense but had not moved for partial summary judgment or to strike.

Settlement: Generally. Letter from insurer's counsel to Clerk of Workers' Compensation Court agreeing with statements in letter from claimant's counsel did not create binding agreement for dismissal of insurer's affirmative defense of fraud. Letter from claimant's counsel to Clerk had indicated case should settle if claimant was found not guilty of fraud in pending criminal case. When writing to the Clerk, insurer's counsel merely concurred with logic of earlier letter. Claimant, in any event, was not actually found "not guilty" when charges were dismissed.

Summary Judgment: Motion for Summary Judgment. Claimant's motion in limine to exclude evidence of fraud at trial was not proper where claimant, in essence, sought to strike an affirmative defense but had not moved for partial summary judgment or to strike. The motion to exclude was also denied because no agreement to drop fraud defense arose from communications to Clerk of Court by counsel.

¶1 The claimant in this matter is seeking 500 weeks of permanent partial disability benefits and payment for medical expenses. State Fund alleges his claim is fraudulent. Through a motion in limine, the claimant now seeks to strike the fraud defense based on a letter of State Fund's counsel which claimant construes as indicating an agreement by the State Fund to drop the defense in the event the criminal case was dropped. In fact, the criminal case against claimant was dropped and never went to trial.

¶2 Initially, the motion is improper. What claimant seeks to do is strike an affirmative defense. A motion for partial summary judgment or to strike should have been filed.

¶3 Moreover, the correspondence upon which the motion is based is insufficient to preclude the defense in any event. First, there is no stipulation or enforceable written agreement. At best, there is a letter from counsel for State Fund indicating he agreed with the logic of claimant's analysis. Second, the correspondence does not address the effect of the State dismissing the criminal prosecution, only an acquittal. In his letter, which was addressed to the Clerk of this Court, claimant's attorney wrote:

> In its Complaint, the State of Montana claims that my client did not suffer an on-the-job injury, and that he was working and receiving compensation at the same time he was receiving workers' compensation benefits. I would think that disposition of these issues in the criminal case would be dispositive of my client's right to compensation in the workers' compensation case. In other words, if he is found not guilty in the criminal case, this should be dispositive of issues currently pending before the Workers' Compensation Court.
>
> We are set for trial on December 13, 1999, and there appears to be no question, at this time, that the case will, in fact, go to trial as scheduled. **I would think that after the trial on the criminal charges, my client would be in a position to resolve his workers' compensation case without the necessity of a trial**. [Emphasis added.]

(Petitioner's Memorandum in Support of First Motion in Limine, Ex. A.)

Counsel for the State Fund, who received a copy of the letter, then wrote the Clerk of Court, as follows:

> I am in receipt of a copy of the letter to you dated September 22, 1999 from Robert G. Olson of Frisbee, Moore and Olson. I write to let you know that I concur with Mr. Olson on the issues addressed in that letter.

(*Id.*, Ex. B.)

Even if the correspondence gives rise to a binding agreement, the agreement was contingent upon claimant going to trial and being acquitted.

¶4 The motion is **denied**.

DATED in Helena, Montana, this 20th day of September, 2000.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Robert G. Olson
Mr. Charles G. Adams
Date Submitted: September 1, 2000