IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2000 MTWCC 72

WCC No. 2000-0059

MICHAEL L. MILLER,

Petitioner,

vs.

STATE COMPENSATION INSURANCE FUND,

Respondent/Insurer for

JACK GALT,

Employer.

ORDER GOVERNING FURTHER PROCEEDINGS

Summary of Facts: Claimant brought a prior action to reopen a 1988 full and final settlement. At trial he argued mistake of fact as to his back condition. The Court found his contention barred by the statute of limitations and the Supreme Court affirmed. Claimant then brought this second action seeking to reopen but on grounds not argued in the first case, specifically mistake of law and mistake as to wages from concurrent employment. He argues that his arguments are not barred by the doctrine of *res judicata* because the Clerk of Court told him in the first action he could not litigate claims other than the alleged mistake concerning his back condition.

Held: Claimant's attempt to reopen on account of mistake of fact as to his back condition is barred by the doctrine of *res judicata*. However, if claimant was in fact told by Court personnel he could not litigate his other theories for reopening, then he did not have an opportunity to litigate them and is not now barred from litigating them. Since it would be inappropriate for the Court to make a factual determination as to what Court personnel told him, a district judge will be called in to make that determination. Irrespective of the district judge's finding, claimant will be allowed to present his evidence in support of his other theories so that a complete record is made and all facts determined, thus avoiding the possibility of multiple appeals and further litigation.

Topics:

Judgments: *Res Judicata*. Claims and theories a party actually litigated in prior action are barred by the judgment in the prior action.

Judgments: *Res Judicata*. Claims and theories a party had an opportunity to litigate in a prior action are barred by the judgment in the prior action.

Judgments: *Res Judicata*. Claims and theories that a party did not have an opportunity to litigate in a prior action because of advice or actions of Court personnel which are not of record are not barred by the judgment in the prior action.

Pleading: Statement of a Claim. An allegation that a settlement was based on a mistake of law as to discounting may state a claim to reopen the settlement; at least it entitles the claimant to be heard as to whether or not it does.

Settlements: Reopening/Mistake of Law. Mutual mistake of law is a recognized ground for reopening a settlement.

Settlements: Reopening/Mistake of Law. Unilateral mistake of law is arguably a ground for reopening a settlement where the other party was aware fo the mistake and did not correct it.

Settlements: Reopening/Mistake of Fact. Allegation that insurer did not consider wages from concurrent employment in entering into a settlement may state a ground for reopening the settlement; at least it entitles the claimant to be heard as to whether or not it does.

Guardians and Conservators: Conservators. Claimant cannot seek to reopen a prior full and final compromise settlement based on his own incompetency where at the time of the settlement he had a court appointed conservator.

Guardians and Conservators: Conservators. Claimant cannot seek to reopen a prior full and final compromise settlement based on alleged incompetency of his conservator where that conservator was appointed by a district court.

Introduction and Background

¶1 The present action is the second one brought by petitioner, Michael L. Miller (Miller). Miller has represented himself in both actions.

¶2 In the first action, Miller sought to set aside and reopen a 1988 Full and Final Compromise Settlement with the State Compensation Insurance Fund. At trial he attempted to prove mutual mistake as to his back condition. I found that his claim was barred by the statute of limitations. The decision was affirmed on appeal. *Miller v. State Compensation Insurance Fund,* 2000 MT 19N.

¶3 Miller then brought the second, present petition, in requesting the following relief:

1) Settle my Medical Benefits.

2) Get a decision from the Court on the Reduction to Present value that was done on my Settlement in error.

3) Have the Court look at how State Fund has treated me.

(PETITION FOR HEARING at 2.) While the petition is not as clear as it could be, the Court construes it as asking that Miller's entitlement to future medical benefits be converted to a lump sum and that the 1988 settlement be set aside and reopened because the lump sum paid pursuant to that settlement was computed by discounting future benefits.

¶4 Following the filing of the second petition, Miller issued 42 written discovery requests. The State Fund moved for a protective order. On July 17, 2000, I issued an order limiting discovery. In that Order I held that the decision in the prior proceeding was *res judicata* as to all issues which were raised or which could have been raised. Thus, I determined that claimant could not again seek to reopen the 1988 settlement and that the only matters he may litigate are his request to settle his medical benefits and the reasonableness of the State Fund's refusal to lump sum his future medical benefits.[(1)]

¶5 On July 26, 2000, Miller wrote a letter to the Court responding to the Order. The letter was received and filed August 1, 2000. In it, Miller claimed that he had "been misled, misdirected, and just plain ignored by State Fund for years." In addition, he alleged that in the first proceeding he had been limited in his proof. He wrote, in relevant part:

> I would like [to] bring it to your attention that I was directed not to bring up anything in the court last time except my back problems (by Pat Kessner).

In an attached narrative to that letter, he wrote further,

> In July of 1998, I had a mediation with Work Comp to try to settle the Medical portion of my case. **It was suggested to me at that time that I should try to re-open my settlement.** I filed to re-open in August of 1998.
>
> I was told by Pat Kessner at work comp court not to bring up anything in the court except the material I needed to prove my back problems and some material that Tom Martello told me to bring about the financial status of a business that I wanted to buy. Then when we did get to court they would not even admit the paperwork on the business. [Emphasis in original.]

He made the statements to excuse his failure to bring up other issues, apparently the discount issue, in the prior proceeding.

¶6 Patricia J. Kessner is the Clerk of this Court and I therefore viewed Miller's accusations with concern. However, his accusations did not provide me with the specifics of any conversation.

¶7 On August 7, 2000, I requested the State Fund to reply to Miller's letter. (August 7, 2000 MINUTE ENTRY OF JAY DUFRECHOU, HEARING EXAMINER.) The State Fund replied on August 17, 2000. (STATE FUND'S RESPONSE TO JULY 26, 2000 LETTER OF MICHEAL [SIC] L. MILLER AND ITS JULY21, 2000 ATTACHMENT.) Thereafter, Miller replied to the reply. (PETITIONER'S RESPONSE TO RESPONDENT (received September 5, 2000).)

¶8 After reviewing Miller's last September 5th response, I ordered yet another response by him. Specifically, I directed him to file a "written statement setting forth in as much detail as possible" his conversations with Ms. Kessner. (ORDER REQUIRING FURTHER STATEMENTBY CLAIMANT (September 20, 2000) at 2.) I further ordered him to "provide the Court and the State Fund with a list of all reasons or grounds he now has or has ever had which he believes would warrant a reopening of his settlement." (*Id.*, underlining in original.) I now have his response, as well as a reply by the State Fund and a rejoinder by Miller.

Discussion

¶9 In my original order limiting discovery, I found that the doctrine of *res judicata* precluded Miller from again requesting the Court to reopen his 1988 settlement. I said:

> The prior decision of this Court is *res judicata* as to all issues and facts which were raised, or which could have been raised, in connection with Miller's request to reopen. "The doctrine bars a party from re-litigating a matter that the party has already litigated and from re-litigating a matter that the party had the opportunity to litigate in an prior case." *In re Raymond W. George Trust,* 296 Mont. 56, 67, 986 P.2d 427, 435 (1999). In this case, Miller requests the Court to determine whether the State Fund improperly discounted his settlement and directs a number of his interrogatories to the manner in which the settlement was calculated. This argument could have been raised as a ground for reopening when claimant petitioned the Court in 1998. It is not an issue which arose subsequent to the Court's prior decision, hence it is barred under the *res judicata* doctrine. *Nimmick v. Hart,* 248 Mont. 1, 16, 808 P.2d 481, 491 (1991) ("A judgment can bar claims in existence at the time the judgment was entered, but it cannot bar claims that arise after its entry."). All questions relating to the prior settlement are irrelevant and need not be answered.

(ORDER LIMITING DISCOVERY, ¶ 3.) As set forth in the quoted paragraph, the doctrine precludes a party from relitigating issues already litigated or which the party "had the opportunity to litigate in an prior case." (*Id.*)

¶10 This case presents a dilemma for the Court. Miller has made serious accusations against Court personnel, essentially accusing Ms. Kessner of preventing him from raising issues he should have been able to raise in the first proceeding. If Miller were an attorney,

the Court would dismiss his accusations out-of-hand. Attorneys are well aware that they are solely responsible for prosecuting their cases and that clerks of court cannot give legal advice or issue rulings. Since claimant is not an attorney, I do not dismiss his accusations out-of-hand.

¶11 As Judge of this Court, I am responsible for the actions of my staff, indeed I give them a great deal of responsibility and discretion in shepherding cases through the Court to trial. I expect them to assist pro sé claimants with procedural matters so that they understand what the Court's rules are and comply with them. On the other hand, the Clerk of Court and deputy clerks are not authorized to issue rulings on behalf of the Court except routine procedural rulings, such as extensions of time and scheduling orders.

¶12 If, while prosecuting his first case, Miller was told by Court personnel that he could only pursue reopening based on mistake of fact about his back condition and could not raise other challenges to the 1988 settlement, then he did not have an "opportunity" to litigate other grounds for reopening and he is not barred from now doing so. However, he is only entitled to litigate those other grounds if in fact he was misinformed by Court staff **and** the grounds he wishes to raise are grounds which, if proven, would entitle him to reopen the 1988 settlement or to some other relief.

¶13 The recognized grounds for reopening a full and final compromise settlement are (1) "a non-negligent mutual mistake of material fact," *Kimes v. Charlies Family Dining & Donut Shop,* 233 Mont. 175, 177, 759 P.2d 986, 988 (1988); (2) mutual mistake of law, *Brown v. Richard A. Murphy, Inc.*, 261 Mont. 275, 280-82, 862 P.2d 406, 409-411 (1993); and, (3) "duress, menace, fraud, or undue influence exercised by or with the connivance of the [other] party, § 28-2-1117(1), MCA. Therefore, I consider each of his contentions to determine if it states facts which, if true, constitute one of the legally recognized grounds. I consider his contentions in the order set out in his response to order requiring further statement, quoting his contention, followed by my analysis.

¶14 **1. State Fund has never treated me like a human being.** (*Id.* at 2, emphasis added.)

¶15 This ground does not set forth a basis to reopen the settlement or any other recognizable claim.

¶16 **2. I have had to beg for every medical treatment that was ever authorized for me.** (*Id.,* emphasis added.)

¶17 This allegation may be evidence supporting Miller's request to lump sum his future medical benefits, but that issue is properly before the Court and was not precluded by the prior Order limiting discovery.

¶18 **3 . State Fund has put me off, held me off, promised me things and then denied the same things for years, and is still doing it.** (*Id.*, emphasis added.)

¶19 This allegation is too vague to constitute a claim. It does not identify any legally enforceable promise, the breach of any agreement, or an entitlement to benefits.

¶20 **4. The statutes of limitations that State Fund is fond of telling me have run, ran because they put me off, and held me off until those statutes would be past. Otherwise for what reasons would they take *5* years to settle my case and 7 years to accept liability for my back? Why assign more than 17 Claims Adjusters in 17 years? I was doing everything I knew to do to get things done in the proper fashion.** (*Id.*, emphasis added.)

¶21 The statute of limitations issue was specifically resolved in the first proceeding. As found by this Court, and affirmed by the Supreme Court, Miller and his attorney were aware his back condition was related to his industrial injury for more than three years prior to the filing of his petition; the petition was therefore barred by the two-year statute of limitations applicable to reopening settlements. *Miller v. State Compensation Insurance Fund*, 2000 MT 19N, ¶¶ 21, 27. The alleged actions of the State Fund ("they put me off") occurred prior to the limitations period used by the Supreme Court and are thus irrelevant to the determination. Since the statute of limitations issue was fully litigated, Miller cannot relitigate it in this proceeding.

¶22 **5. The State Fund based my settlement illegally on the laws of 1988; it should have been done by the laws of 1983 when I was injured. (Mistake of Law) 39-71-741, MCA, Discount to present value cannot be applied to a workers' compensation injury that occurred prior to April 15, 1985. When I asked for $200,000 for a settlement, why did State Fund tell me there wasn't that kind of money in my case? Their own figures show my case at $357,357.32 before they reduced it to present value. (Exhibit 23, page 78 of 141) A document I never knew existed until I got my copies of exhibits for the 1998 Court date.** (RESPONSE TO ORDER REQUIRING FURTHER STATEMENT at 3, emphasis added.)

¶23 Documents furnished by the claimant in connection with his various filings indicate that the 1988 settlement may have been based on a 7% discount or the cost of an annuity to pay future benefits. (August 8, 1988 LETTER OF BRENDA LILLIE TO RICHARD J. PINSONEAULTAND PRESENT VALUE CALCULATION dated June 17, 1988, as attached to MILLER'SRESPONSE TO ORDER REQUIRING FURTHER STATEMENT.) Miller alleges he was not aware of the use of any discount until he "got my copies of exhibits for the 1998 Court date." (RESPONSE TO ORDER REQUIRING FURTHER STATEMENT at 3.) However, the letter to Mr. Pinsoneault, cited in the last sentence and which refers to the cost of an annuity, was in the hands of Miller's attorney in 1988.

¶24 Mutual mistake of law is a recognized ground for reopening a settlement agreement. In *Brown v. Richard A. Murphy, Inc.*, cited in paragraph 14, the Supreme Court held that a mutual mistake of law concerning the insurer's subrogation right entitled the claimant to

rescind a settlement agreement where the mistake was material to the settlement. In that case, however, the law regarding subrogation was unsettled at the time of the mistake. At the time of the settlement, both parties understood, based on the 1983 subrogation statute, that the insurer had a subrogation interest in a third-party settlement the claimant had received. The State Fund computed its maximum subrogation interest at $18,666.67, and that amount was deducted from the $52,329.17 which the parties agreed was claimant's entitlement under their settlement agreement. Subsequent to the agreement, the Supreme Court decided *Zacher v. American Ins. Co.,* 243 Mont. 226, 794 P.2d 335 (1990), holding that an insurer has no right to subrogation until the claimant has been made whole. The Supreme Court found that neither party had anticipated the ruling in *Zacher*. "Neither party understood that the State Fund's right to subrogation was limited as described by our decision in *Zacher." Brown,* 261 Mont. at 282, 862 P.2d at 410. The Court permitted reopening of the settlement based on the mistake.

¶25 *Brown* also suggests, but does not decide, that a unilateral mistake of law may be grounds for recission where the other party was aware of the mistake and did not correct it. 261 Mont. at 279-280, 862 P.2d at 409.

¶26 At the time of the claimant's injury, the law concerning discounting of lump-sum conversions was clear. In *Willis* v. *Long Construction Co.,* 213 Mont. 203, 690 P.2d 634 (1984), the Supreme Court held that the 1983 version of section 39-71-741, MCA, which regulates lump sums, does not permit discounting of a lump-sum conversion of future benefits for a permanently totally disabled claimant, at least where the Workers' Compensation Court found the conversion in the best interests of the claimant and ordered the conversion. Claimant in this case was injured on October 23, 1983, and the lump-sum statute in effect at that time is the same statute considered in *Willis*.

¶27 Section 39-71-741, MCA, was amended in 1985 to allow for a 7% discount, which is the rate used in the calculation sheet attached to Miller's response to order requiring further statement. It was amended again in 1987, prior to the settlement, to restrict the circumstances of lump summing and provide a different method of discounting.

¶28 As there has been no evidentiary hearing concerning the calculation of the settlement amount, it is unknown whether the parties were relying on the 1983 version of section 39-71-741, MCA, and using an annuity or discounted amount as a compromise, or whether they were relying on the 1985 or 1987 version of the Act. Moreover, lacking a factual record, it is unknown whether either or both parties were laboring under a mistake of law. In addition, the facts may raise legal issues of first impression, such as whether or not *Brown* should be read or extended to mistakes of law where both statutory and decisional law are clear and unequivocal, and the parties are simply unaware of the statutes or decisions. All of these questions can be resolved only after a full evidentiary hearing and/or briefing by the parties. Accordingly, without reaching the actual merits of the claim, I cannot presently

say, as a matter of law, that Miller has failed to state a claim for recission based on mistake of law. If he was denied the opportunity to present the claim in the prior action, then he should be allowed to prosecute it now.

¶29 **6. State Fund never considered my own self-employment income when settling with me. MCA, 39-71-703 at page 421, Aggregate Earnings: The Workers' compensation court can aggregate earnings from two separate and unrelated employments for the purpose of determining benefits payable**. (RESPONSE TO ORDER REQUIRING FURTHER STATEMENT at 3, emphasis added.)

¶30 The only alleged mistake of fact considered in the first action concerned Miller's back condition. A mistake of fact concerning earnings from concurrent employment was not raised or considered. Therefore, if Miller was denied the opportunity to present evidence of a mistake of fact concerning concurrent employment, he should be allowed to do so in this action.

¶31 **7 . State Fund never considered COLA in my settlement, but they based my settlement on 644 weeks of total permanent disability. (See attached exhibit 23, page 68 of 141) I was kept on temporary total disability for *5* years, when I was permanently totally disabled from the day I awoke from a coma.**(*Id*., emphasis added.)

¶32 This allegation does not present any cognizable claim. At the time of the claimant's injury, there was no cost-of-living adjustment for permanent disability benefits. *See* §§ 39-71-702, -703, MCA (1983). The fact that Miller may have been kept on temporary total disability benefits after he became permanently totally disabled would have no effect on his settlement since the rate for temporary total and permanent total disability are the same.

¶33 **8 . State Fund based my settlement on the purchase of a small ranch, and the fact that I would and could run it. They admit that they knew I would not be able to do the work to run it. I admit that I wanted to have the Ranch very badly and also that I wanted desperately to be able to run it. (I wanted my life back) I also admit that in 1988, I was in no condition mentally, to make those decisions. Things were done in a proper fashion up to a point. I had an attorney just for the settlement, even though he was not a Work Comp attorney. He jumped through all the hoops that State Fund put him through. We got all the proper paperwork to justify why I wanted a ranch. I discovered later I was in no shape physically and never would be, to do the work, any of the work necessary to run a ranch, so I started fighting to get State Fund to pay for medical on my back. If I had known that there was absolutely no way I could ever run a ranch, I would never have agreed to a settlement that was put together in a fashion that State Fund allocated my money for the purchase of said ranch, which they now say they knew I could not make work. (A mutual mistake of fact?) There are a few factors of this case that need to be looked at closely. In a case where the claimant is actively**

pursuing State Fund for seven years, to accept liability for back problems, when do the statutes run? My contention is that: A settlement made under Mutual Mistake of Fact is not a contract, thus there is no statute of limitations. If I had known that I could not perform even the smallest of chores needed to run a ranch, I would never have entered into a settlement with State Fund. If I had known of my legal right to re-open my case, Iwould have done so long before the statutes had run. Does it make sense to fight for seven years to get the back problems accepted by State Fund, if I had known I could just petition the court to re-open my case? Is it possible that State Fund saw that there were reasons back then to reopen my case and put me off for seven years so that the statutes would run? . . . . There are so many contradictions of State Fund's behavior in my case. They have the right to keep me from getting proper medical treatment for 7 years? Then tell me that my fighting them to accept liability is not enough? State Fund says I should have known that my back was a permanent condition. I should have known that I could or should have petitioned to reopen my case instead of trying to get them to accept liability for seven years. State Fund failed to disclose facts to me over and over again. The language of 27-2-205, MCA, indicates that simply the failure to disclose facts, as opposed to affirmative, fraudulent concealment, is sufficient to toll the statute. (*Id*. at 3-4, emphasis added.)

¶34 Mr. Miller has already litigated his contention that the parties were mistaken as to his physical condition and his ability to ranch. In paragraph 12 of my findings of fact, conclusions of law and judgement in the prior action, 1999 MTWCC 21, I summarized the claim being made in that action:

> Claimant now contends that at the time the parties entered into the full and final compromise settlement, they were operating under a mutual mistake of material fact. In his contentions claimant states, "However, within a year after the settlement, Petitioner began having back problems and was unable to physically work on the ranch." (Petitioner's Contention No. 1.)

(1999 MTWCC 21, ¶ 12.) The decision in the prior proceeding is *res judicata* as to this claim.

¶35 **9. State Fund advised me to try to reopen my case in a mediation meeting in July of 1998. Why did they let me go through all the stress and anxiety of trying to reopen a case that could not be reopened because of Statutes of Limitations? Do you know the mental anguish I have been through?** (RESPONSE TO ORDER REQUIRING FURTHER STATEMENT at 4, emphasis added.)

¶36 This statement reflects Miller's lack of understanding of mediation and the judicial system. If he had been told he could **not** mediate his claim and could **not** thereafter petition the Court, that advice would have been wrong. He cannot now claim that since he was afforded an opportunity to present his case and lost in Court that he has been wronged.

¶37 **10. State Fund keeps insisting that I had legal counsel through all of the fight for liability on my back. This is not true. (See letter from R. Pinsoneault, attached) They would like to blame someone else for all of the things that are wrong with my case.** (*Id*. at 4, emphasis added.)

¶38 Claimant had legal counsel at the time of the settlement. Lack of legal counsel, in any event, does not give rise to a claim.

¶39 Miller's July 26, 2000 letter to the Court and an attached statement make allegations in addition to those set out in his response to order requiring further statement. I will also address those contentions. In doing so, I summarize his contentions rather than repeat them verbatim.

¶40 **11. Deadlines relevant to litigation between Miller and State Fund should have been tolled because Miller was incompetent for a period of time after his injury. (Miller also acknowledges that he was under conservatorship for a period of time, but complains about that as well.)**

¶41 Documents filed with the Court in the preceding action, as well as this one, show that Miller's mother was his legally appointed conservator at the time of the settlement. During the prior proceeding before this Court, I requested evidence that the conservatorship had been terminated.[(2)] I was provided with a minute entry dated March 17, 1993, showing that Judge C.B. McNeil terminated the conservatorship on March 17, 1993. Thus, Miller's interests were protected through the conservatorship, which was under court supervision, during the time of his incompetency. He does not allege that he was incompetent subsequent to the termination of the conservatorship. His allegation does not present a ground for reopening his settlement.

¶42 **12. Miller's conservator (his mother) was in her seventies when she handled his interests and may not have been more competent than he was.**

¶43 Miller's mother was appointed conservator by a district court and she was accountable to a Court. Miller cannot collaterally attack that appointment in this Court.

¶44 **13. Miller was not satisfied with the representation he received from the lawyer who initially handled his case.**

¶45 Dissatisfaction with one's lawyer is not a ground to reopen a settlement.

¶46 **14. The computation of the running of the statute of limitations in *Miller v. State Compensation Insurance Fund*, 2000 MT 19N, should have been done differently**.

¶47 The statute of limitations was specifically addressed in the prior proceeding and the Supreme Court's decision is *res judicata*.

¶48 **15. On appeal to the Supreme Court in the prior case, Miller was not allowed to bring up matters not raised in the Workers' Compensation Court. "More lies and misleading information."**

¶49 The prior case is *res judicata*.

¶50 Since some of the grounds Miller alleges may state claims upon which relief may be granted, it is necessary to factually determine whether directions or statements made by Ms. Kessner deprived him of an opportunity to litigate those matters in the prior case. Since it is inappropriate for me to make that factual determination, a district judge will be called in to hold a hearing and make findings of fact as to what Mr. Miller was told and whether he was deprived of an opportunity to present the issues he now tenders. An order calling in a district judge for that limited purpose will issue separately.

¶51 Even if a district judge determines that Miller was not deprived of an opportunity to present his present claims, and is therefore barred from pursuing them, I nonetheless will allow him to proceed on the merits of all matters which I have found to state possible claims and will make specific findings of fact and conclusions of law as to each issue. I will do so to assure that the controversy over the settlement reaches a final and speedy conclusion with a single appeal.[(3)]

¶52 Therefore, the petition shall be deemed amended to encompass all of the following issues:

1. Whether the 1988 Full and Final Compromise Settlement between Miller and the State Fund was based on a mistake of law which entitles Miller to rescind the settlement.

2. Whether the 1988 Full and Final Compromise Settlement between Miller and the State Fund was based on a mistake of fact with respect to wages from concurrent employment which entitles Miller to rescind the settlement.

3. Whether claimant is entitled to a lump-sum conversion of his future medical benefits.

4. Whether claimant is entitled to attorney fees and a penalty with respect to the State Fund's refusal to lump sum future medical benefits.

¶53 I am unclear whether claimant also is seeking payment for medical bills he has incurred but which have been denied by the State Fund. If he is, then he should provide written notice to the Court and the State Fund stating that he is seeking payment for past medical bills and list all medical bills for which he is seeking payment. The petition will be deemed amended to include a claim for those medical bills.

¶54 Finally, in its answer, the State Fund raised a *res judicata* defense with respect to Miller's further request to reopen his settlement. In light of the current Order, which allows Mr. Miller to proceed to trial on his additional theories for reopening, I will allow the State Fund to file an amended response to the new theories and setting forth all defenses it may have in addition to *res judicata*.

ORDER

¶55 A district judge shall be called in to hold a hearing and make findings of fact and conclusions of law with respect to Mr. Miller's allegations that he was told by Patricia J. Kessner, Clerk of the Workers' Compensation Court, he could not raise certain issues in his prior case, *Miller v. State Compensation Ins. Fund,* WCC No. 9808-8030, and was thereby deprived of an opportunity to present other grounds for reopening his settlement. Such findings and conclusions shall constitute the findings and conclusions of this Court on that matter.

¶56 The petition in this matter is deemed amended to encompass the following issues:

1. Whether the 1988 Full and Final Compromise Settlement between Miller and the State Fund was based on a mistake of law which entitles Miller to rescind the settlement.

2. Whether the 1988 Full and Final Compromise Settlement between Miller and the State Fund was based on a mistake of fact with respect to wages from concurrent employment.

3. Whether claimant is entitled to a lump-sum conversion of his future medical benefits.

4. Whether claimant is entitled to attorney fees and a penalty.

5. Whether the State Fund is liable for unpaid medical bills identified by Miller.

¶57 Within 14 days of this Order, the State Fund may file an amended response to the petition, setting forth any defenses it has to the merits of the claims, as set forth in the preceding paragraph.

¶58 If Mr. Miller wishes to pursue payment of unpaid past medical bills, he shall within 14 days of this Order file a written statement with the Court stating that he wishes to do so and in that statement shall list each and every past bill for which he seeks payment. He shall simultaneously serve a copy of his statement on the State Fund. The petition in this matter will then be deemed to encompass a request for payment of the bills identified. No further response will be required by the State Fund; liability for the bills will be deemed denied for pleading purposes.

¶59 The parties shall proceed with discovery and to trial on all issues which are identified in paragraph 57.

DATED in Helena, Montana, this 17th day of November, 2000.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Michael L. Miller - Certified Mail
Mr. Thomas E. Martello
Submitted: October 25, 2000

1. In litigating the reasonableness of the State Fund's refusal to lump-sum medical benefits, he may seek attorney fees and a penalty with respect to that refusal.

2. I did so because Miller was prosecuting his action, as he does this one, *pro sé*.

3. If a district judge finds that claimant had an opportunity to litigate all issues involving the settlement, any findings on the merits of reopening the settlement will be superfluous, however, if the Supreme Court were to take a different view than the district judge, it would then have the benefit of, and could review, the determination on the merits of reopening.