IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2000 MTWCC 2

WCC No. 9909-8324

TONY MORRISSETTE

Petitioner

vs.

ZURICH AMERICAN INSURANCE COMPANY

Respondent/Insurer for

BLACK MAGIC

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

Summary: 31-year-old claimant injured back while shoveling snow and bark for employer. Insurer accepted liability and paid benefits. After diskectomy and fusion in claimant's lumbar spine, claimant's physician placed him at MMI and the parties reached an agreement to settle disability benefits. While the petition to settle was still at the DOL, claimant's counsel notified the DOL and opposing counsel he just learned the fusion had not been successful and claimant was not at MMI. The petition had already been approved, however, and the insurer refused to reopen settlement, arguing that it had contemplated a decline in claimant's condition and there was no mutual mistake of fact about claimant's medical condition at the time of settlement. Claimant asked the WCC to set aside the settlement.

Held: Where the factual record leaves no question that both the insurer and claimant were mistaken on the status of fusion of vertebrae in claimant's lumbar spine, and as to his having reached MMI, the parties were mutually mistaken as to claimant's medical condition at the time they entered settlement. The mistake was material where representatives of the insurer testified that MMI was a prerequisite to considering settlement and claimant testified he would not have settled if he had known his fusion had failed and there might be objective reason for his continued experience of pain. Claimant's attorney's attempt to halt settlement upon learning of the possible mistake regarding medical condition was also strong evidence that the mistake was material from claimant's perspective. Settlement set aside on the basis of mutual mistake of fact.

Topics:

Attorney Fees: Unreasonable Denial of Delay of Payment. Insurer's refusal to reopen settlement based on alleged material mistake of fact not unreasonable even though Court agreed material mistake existed. Insurer presented evidence that it expected claimant's condition to fail and that it had entered into settlement with the expectation claimant's condition would deteriorate. While this expectation of future problems was different from present knowledge claimant's lumbar vertebrae fusion had not worked and he was not at MMI, insurer's position was within the bounds of legitimate advocacy.

Penalties: Insurers. Insurer's refusal to reopen settlement based on alleged material mistake of fact not unreasonable even though Court agreed material mistake existed. Insurer presented evidence that it expected claimant's condition to fail and that it had entered into settlement with the expectation claimant's condition would deteriorate. While this expectation of future problems was different from present knowledge claimant's lumbar vertebrae fusion had not worked and he was not at MMI, insurer's position was within the bounds of legitimate advocacy.

Settlements: Reopening: Materiality of Mistake. Where the factual record leaves no question that both the insurer and claimant were mistaken on the status of a fusion of vertebrae in claimant's lumbar spine, and as to his having reached MMI, the parties were mutually mistaken as to claimant's medical condition at the time they entered settlement. The mistake was material where representatives of the insurer testified that MMI was a prerequisite to considering settlement and claimant testified he would not have settled if he had known his fusion had failed and there might be objective reason for his continued experience of pain. Claimant's attorney's attempt to halt settlement upon learning of the possible mistake regarding medical condition was also strong evidence that the mistake was material from claimant's perspective. Settlement set aside on the basis of mutual mistake of fact.

Settlements: Reopening: Mistake of Fact. Where the factual record leaves no question that both the insurer and claimant were mistaken on the status of a fusion of vertebrae in claimant's lumbar spine, and as to his having reached MMI, the parties were mutually mistaken as to claimant's medical condition at the time they entered settlement. The mistake was material where representatives of the insurer testified that MMI was a prerequisite to considering settlement and claimant testified he would not have settled if he had known his fusion had failed and there might be objective reason for his continued experience of pain. Claimant's attorney's attempt to halt settlement upon learning of the possible mistake regarding medical condition was also strong evidence that the mistake was material

from claimant's perspective. Settlement set aside on the basis of mutual mistake of fact.

¶1 The trial in this matter was held on December 16, 1999, in Helena, Montana. Petitioner Tony Morrissette (claimant), was present and represented by Ms. Laurie Wallace and Mr. David W. Lauridsen. Respondent, Zurich American Insurance Company (Zurich) was represented by Mr. Mark M. Kovacich and Mr. Joe C. Maynard. A trial transcript has not been prepared.

¶2 Exhibits: Exhibits 1 through 43, 45, and 47 were admitted without objection. Exhibit 44, documents relating to a social security claim made by claimant, were used in cross-examination but not admitted into evidence. Exhibit 46 was withdrawn.

¶3 Witnesses and Depositions: Through teleconference, the Court heard the deposition testimony of Connie Hoffman and Dr. Robert Hollis. Claimant and Mr. Joe C. Maynard were sworn and testified at trial. Depositions of claimant, Ms. Hoffman, and Dr. Hollis were also admitted into evidence.

¶4 Issues Presented: The issues as restated by the Court are as follows:

1. Should the settlement between the parties, which claimant sought to revoke prior to receiving the Order from the Department of Labor & Industry approving the settlement, be reopened based upon a mutual mistake of fact?

2. Is claimant entitled to costs, attorneys fees, or a penalty based upon unreasonable conduct on the part of the insurer?

¶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 is 31 years old.

¶7 On January 15, 1998, claimant injured his back while shoveling snow and bark for his employer, Black Magic.

¶8 Black Magic was insured by Zurich, which accepted liability for his injury and thereafter paid temporary total disability and medical benefits.

¶9 As a result of his industrial injury, on August 3, 1998, claimant underwent a diskectomy and fusion at the L5-S1 level of his spine. The surgery was performed through an anterior (abdominal) approach. The fusion procedure involved a bone graft with use of bone dowel cages to induce a boney fusion. (Ex. 22 at 2-3.)

¶10 Following a determination in early May 1999 that claimant's fusion was solid and he had reached maximum medical improvement (MMI), the parties negotiated a full and final compromise settlement of his claim. The final agreement was reached on approximately June 23, 1999, and called for Zurich to pay claimant fifty thousand dollars in a lump sum. (Ex. 12; Hoffman Dep. at 63.) Further hospital and medical benefits were reserved to claimant. (Ex. 12.)

¶11 The Petition for Settlement provided that settlement "is to resolve a dispute as to whether Claimant is permanently and totally disabled or permanently and partially disabled." (*Id*.) The petition also noted: "The claimant understands that by entering into a settlement, both the insurer and 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 may change in the future." (*Id.*)

¶12 The parties submitted the settlement petition to the Department of Labor and Industry for approval pursuant to section 39-71-741, MCA. By Order dated July 7, 1999, the Department approved the settlement. (*Id.*)

¶13 On July 8, 1999, Mr. Lauridsen, the attorney for claimant, attempted to halt processing of the petition. His letter of that date, faxed to Jim Miller of the Montana Claims Service in Billings, noted: "To follow-up our telephone conversation of this date, please do not process the Petition for Settlement pending further testing by Dr. Burns." (Ex. 39.)

¶14 On July 23, 1999, after having learned the Petition for Settlement had already been approved by the Department of Labor, Mr. Lauridsen notified counsel for the insurer, Mr. Maynard, that he believed a mutual mistake of fact had been made when entering into the settlement. (Ex. 40.) Mr. Lauridsen asserted the parties had been mistaken about claimant having reached MMI and about the success of the lumbar fusion. (*Id.;* Ex. 41.) The insurer disagreed. By letter dated July 28, 1999, Mr. Lauridsen returned the insurer's settlement check. (Ex. 42.)

Pre-Settlement Medical

¶15 Following his injury, claimant's symptoms included back pain, numbness in his legs, and tingling sensations. Dr. Ned A. Wilson, a specialist in orthopedics and sports medicine, prescribed medications, physical therapy, and epidural steroid injection, but claimant's symptoms continued. Dr. Wilson considered "a discectomy and fusion at L5-S1," but was concerned claimant had "insufficient insight to be considered for surgery and could potentially be a very risky operative candidate." (Ex. 1 at 1.) Dr. Wilson referred claimant to Dr. Steven M. Martini for a second opinion. (*Id.*) Dr. Martini agreed claimant was a poor surgical candidate, citing claimant's unrealistic expectations about the health care system and some "non organic findings on examination." (Ex. 3 at 2.)

¶16 Claimant was nevertheless referred to Dr. Peter M. Sorini, a neurosurgeon. Dr. Sorini requested a psychological evaluation of claimant by Dr. Edward H. Trontel prior to determining whether surgery was appropriate.

¶17 Dr. Trontel evaluated claimant and expressed concern that claimant believed surgery could "fix" his back problem and lacked reflection upon the possibility of residual pain. (Ex. 5 at 2.) He believed claimant "to be suffering from a Pain Disorder with psychological and medical factors combining." (*Id.* at 3.) He concluded claimant's "pain problem reflected a combination of identifiable medical pathology complicated by his approach to life problems, tension, dysphoria, anxiety, and probable medication and/or alcohol use." (*Id*.) Dr. Trontel opined that "[u]ncomplicated long-term recovery from surgery was questionable without attention given to psychosocial factors," however, he believed that psychological intervention was unlikely to be effective. (*Id*.) He considered claimant "at very high risk for a refractory chronic pain syndrome with vocational disability" and suggested that "[d]etermination of maximumal medical improvement should be accomplished as quickly as possible." (*Id*.)

¶18 Dr. Sorini nevertheless proceeded with the surgery. (¶9.) Following surgery some of claimant's symptoms improved, but he experienced back pain "worse" than before the operation. Dr. Sorini told claimant the status of the fusion "looked good" and that his pain should diminish as he recovered from the surgery.

¶19 Claimant's wound from the surgical incision also did not heal as expected. Medical records of Dr. David M. Fortenberry, who treated the surgical wound, indicated that the wound repeatedly would appear to have healed, then reopen. (Ex. 7.)

¶20 During January of 1999, Dr. Robert F. Hollis began treating claimant. He had the impression claimant's fusion was "mostly likely" solid. (Hollis Dep. at 11.) However, due to claimant's reports of worsening pain, Dr. Hollis ordered a bone scan to rule out the possibility of infection. (Hollis Dep. at 11-12; Ex. 8 at 2.) The bone scan did not suggest any problems. (Hollis Dep. at 12.)

¶21 On February 25, 1999, Dr. Hollis noted claimant continued his "pain pattern." (Ex. 8 at 4.) He reported:

> Assessment is status-post fusion with failed back syndrome. Mechanically, there is no reason why this patient should be limited. He has no neurologic stigmata, only pain syndrome.

(*Id*.) At deposition Dr. Hollis explained the diagnosis of "failed back syndrome" is "a somewhat loose term in order to refer to a patient who has not achieved a satisfactory result from a fusion that is anticipated to return a person to a competitive employment." (Hollis Dep. at 14.)

¶22 In late February Dr. Hollis determined that claimant could return to light-duty work. His February 25, 1999 report records:

> In addition I have notified Tony that I feel that he is ready for light duty at desk work. Tony scoffed at all of this and walked out of the office. When he is ready to continue his contract, as we agreed upon last visit, then I will be willing to take care of him. Otherwise, his management will be between him and his case worker.

(Ex. 8 at 4.)

¶23 During late March and early April of 1999, claimant underwent a second psychological evaluation. Dr. Lou Stone, Ph.D., summarized as follows:

> Based on available information, Mr. Morrissette does continue to experience significant back and hip pain. His style of coping and emotional problems contribute to his level of pain and physical dysfunction. Instead of working to cope more constructively, he has become furious at others for failing to "fix" him. His recent reaction to this has been to threaten others and disengage from the medical system. He wants to be left alone and would rather be left alone. He did however indicate he was interested in learning pain management.

(Ex. 9 at 2.) Dr. Stone recommended a brief pain management course for claimant, and safety precautions for those working with claimant. (*Id.* at 3.)

¶24 On April 6, 1999, Dr. Hollis examined claimant and found him to be near MMI. His office note records:

> Tony's case worker, Vim Tessar, accompanies him today. Tony is quite angry today, refusing to speak to the physician or to Vim, though he occasionally has outbursts of profanities. He is reminded that he is in a professional office.
>
> His abdominal wound is well healed and there is no acute problem noted.
>
> **At this point, Tony appears to be at or near MMI, therefore per Vim's suggestion and I am in total agreement, the patient will be sent over for a functional capacity test. Upon seeing the results, an MMI/impairment rating will be provided**. The patient has decided unilaterally to not take any more medications. Therefore, our office will not refill any medications. [Emphasis added.]

(Ex. 8 at 5.)

¶25 Claimant thereafter underwent a functional capacity examination (FCE). On May 4, 1999, Dr. Hollis noted the FCE "has inconsistent results, but it was clear that he demonstrated substantial pain behaviors through all aspects of the testing per the therapist that did the evaluation." (*Id.* at 6.) Dr. Hollis concluded:

> **At this point, based on his neurologic condition and following his case, I feel that he is at maximum medical improvement with an impairment of 10% for a 1-level surgically treated disc lesion with residual medical documented pain.** [Emphasis added.]

(*Id*.) Dr. Hollis testified that his decision to place claimant at MMI involved "the clinical evidence we had, in conjunction with the functional capacity examination." (Hollis Dep. at 19.) Claimant's problems with wound closure did not impact his determination, as that problem did not involve the structural stability of the spine. (*Id*. at 19.)

¶26 According to medical records, Dr. Lisa Fleischer began treating claimant on June 3, 1999. (Ex. 45 at 2.) Dr. Fleischer noted claimant reported "his pain is actually worse since he had his surgery done." (*Id*.) Like earlier physicians, Dr. Fleischer noted extremely exaggerated pain behaviors, very limited range of motion of the spine, and "a huge amount of psychosocial overlay in this situation." (*Id*.)

¶27 On June 8, 1999, Dr. Hollis reported speaking with Dr. Fortenberry about the repeated re-opening of claimant's wound. Dr. Hollis wrote: "In [Dr. Fortenberry's] opinion, he is not clear that this is an intentional reopening; I am a little more suspect with regards to this wound. However, it is hard for me to not give appropriate accord to Dr. Fortenberry's opinion." (Hollis Dep. Ex. 8 at 53.)

¶28 On June 17, 1999, Dr. Hollis approved three job analyses (production assembler, parking lot attendant, and keno caller) as jobs claimant could perform. (Hollis Dep. Ex. 8 at 182, 184, and 192.) The doctor testified his approval was based upon the belief claimant had a solid fusion and had reached MMI. (*Id*. at 24.)

¶29 That then is the medical status of the case at the time the parties entered into the full and final settlement agreement.

Settlement from the Insurer's Perspective

¶30 Connie Hoffman (Hoffman), who adjusted the claim for Zurich, testified about the considerations which led the insurer to settle.

¶31 Hoffman testified that from the beginning of her involvement with the case she had concerns about the claim. She questioned the circumstances of the injury and took note of the long period of time it took claimant to recover from a prior work-related injury. (Hoffman Dep. at 8.) She noted references in medical reports to "magnified pain behaviors" and considered the possibility of fraud or that claimant might be "working the claim, possibly." (*Id*. at 10.) She also noted references in various reports to psychological issues impacting claimant's recovery. She testified that "from a claims standpoint, [a claim involving]

someone like this, in my experience, could go on for years and years and years." (*Id*. at 16-17.)

¶32 Hoffman testified that during June of 1998, claimant telephoned her frequently and "was very belligerent at this time, angry." (*Id*. at 23.) After he stated he was "tired of this," she asked whether he was talking about settlement. (*Id*. at 24.) Claimant demanded $500,000, stating he would probably need more than one surgery, had no intention of returning to work, and "would apply for Social Security disability and 'go away.'" (*Id*. at 24.) Hoffman told claimant $500,000 was out of the question. He called back later and said he wanted "at least a hundred thousand dollars," but did not want to settle "until after I have my first surgery, because I'm probably going to need more surgeries." (*Id*. at 25-26.)

¶33 At trial the claimant denied he made these demands and also contradicted other portions of Hoffman's testimony. However, I do not believe his testimony. The medical and other records in this case are replete with claimant's demands, accusations, threats, and misbehavior. The record is far too extensive to dismiss and is incompatible with much of claimant's testimony.

¶34 After claimant's August 3, 1998 surgery, Hoffman understood claimant had some relief from his symptoms but soon learned about his difficulty healing from the surgical incision. (*Id*. at 28.) Based upon reports by home health workers and the insurer's case manager, Hoffman began to believe claimant "was never going to return to work at his pre-injury job, probably that he felt that he was a perm total." (*Id*. at 35.)

¶35 Based upon Dr. Hollis's records and an MRI done in November 1998, Hoffman believed there was a solid fusion. (*Id*. at 47.) She became suspicious claimant was avoiding return to work. (*Id*. at 44-45.)

¶36 Hoffman testified that following a recommendation for a second psychological evaluation, claimant was angry and "was screaming and yelling, threatening the doctors, threatening the case managers." (*Id*. at 49). Claimant was also angry at Dr. Hollis's suggestion, during February of 1999, that he return to light-duty work. (*Id*. at 50). In April 1999, after reviewing the second psychological report, Hoffman believed that everything predicted by the first psychological report "about the poor healing process, et cetera, was exactly what had happened." (*Id*. at 55). She described her state of mind at that point:

> We were now approximately, what, 10 months, 11 months down the road from the surgery. Tony was still doing the same thing. He had become abusive. He had become hostile. He continued to say that he didn't want to return to work. There were issues of possibly maybe a perm total, maybe further surgery. There was a lot of psych issues in there that really concerned us.

(*Id*.)

¶37 Following Dr. Hollis's April 6, 1999 report that claimant "appears to be at or near MMI," Hoffman began considering settlement. Dr. Hollis's April 6 note was significant to her "[b]ecause we were getting close to MMI, and we could possibly come to a settlement agreement at that time. We were also at the point where return to work could be discussed again." (*Id*. at 56-57.)

¶38 On April 7, 1999, Hoffman spoke with Mr. Lauridsen, claimant's attorney. He told her claimant may be permanently totally disabled. (*Id*. at 58-59.)

¶39 Later in April, when claimant's surgical wound again reopened, Hoffman believed claimant "was doing something to it because he was aware of the fact that we were discussing return-to-work issues." (*Id*. at 59.)

¶40 When Hoffman received Dr. Hollis's May 4, 1999 note placing claimant at MMI and providing an impairment rating, she concluded that serious settlement negotiations could commence. (*Id*. at 60.)

¶41 Hoffman conceded that "obviously, MMI is a big issue" that she looks to prior to settling a claim. (*Id*. at 110.) She explained:

> When we were getting ready to settle this claim, obviously the MMI issue was the big thing. I **mean, we couldn't settle a claim without the MMI issue and the impairment rating,** if there is one, if that's what you're referring to. [Emphasis added.]

(*Id*. at 111.)

¶42 In assessing the insurer's potential exposure for the claim, Hoffman calculated claimant's permanent partial disability entitlement at a little over $24,000. (*Id*. at 63.) She ultimately concluded that a $50,000 settlement was appropriate. She based her determination on several factors. "First of all, the psych issues. We knew that Tony was never going to go back to work. He had stated that numerous times. The chronic pain issues." (*Id*. at 63-64.) Second, she considered that there was some risk of an award for permanent total disability: "Tony thought he was a perm total. He had stated that to us, and I believe that was in a conversation between Dave and I, also, that he felt he was a perm total." (*Id*. at 64.)

¶43 Hoffman believed claimant would not return to work and would continue with medical treatment. (*Id*. at 60-61.) She further believed claimant's condition would deteriorate over time. Her belief was based on "the psych issues . . . the chronic pain issues . . . the type of surgery that he had, the age that he is." (*Id*. at 75-76.)

¶44 While believing that claimant would need further medical treatment in the future, Hoffman nonetheless understood claimant's fusion to be solid:

> We didn't have any diagnostic testing to say that it wasn't. It was my understanding there wasn't any other diagnostic testing to show that it was, if it is in fact, failing, so we were basing it on what we had at that point, which said that fusion was solid.

(*Id*. at 103.)

¶45 Mr. Maynard was also involved on behalf of the insurer in settling the case, acting as its attorney. Mr. Maynard has handled hundreds of workers' compensation cases, including many involving back injuries. When evaluating settlement in this case, Mr. Maynard considered the psychological issues impacting claimant's recovery, the risk of additional surgeries, claimant's ongoing reports of pain, and the history of the case. He believed Dr. Hollis's post-surgery diagnosis of "failed back syndrome" indicated the operation was not a success and that claimant would continue to have medical problems. He believed settlement for $50,000 was appropriate in light of those factors, including the fact that permanent total disability had been raised as a possibility in the case.

¶46 On May 3, 1999, Mr. Lauridsen wrote to Mr. Maynard. Among other things, the letter said: "Once we get the impairment rating on Mr. Morrissette from Dr. Hollis, I will be back in touch with you regarding settlement of the claim." (Ex. 35.) By letter dated May 10, 1999, Mr. Maynard responded, "I agree with you regarding resolution." (Ex. 36.)

¶47 Mr. Maynard was concerned claimant would later allege a mutual mistake of fact and seek to set aside the settlement. On June 29, 1999, Mr. Maynard wrote to Mr. Lauridsen, enclosing a copy of the settlement petition, and advising as follows:

> [A] consideration in settlement is the assumption that Mr. Morrissette's condition will worsen, the nature and severity of the impairment will worsen, his functional capacity will deteriorate and he is or will become permanently totally disabled. We did not settle based on the assumption he could do any particular job. In fact, we settled based on the assumption he could not do any job. Finally, we believe there are serious psychological issues which will adversely impact his ability to work and will deteriorate in the future.

(Ex. 13.)

¶48 On the other hand, Mr. Maynard testified that at the time of settlement his file reflected that the fusion was solid and that he did not consider the possibility that the fusion might have failed. He acknowledged that he did not consider that claimant might be entitled to ongoing temporary total disability as the parties were entering into the settlement. Finally, he agreed that in an accepted liability case, such as this one, the claimant's reaching MMI is prerequisite to any settlement.

Settlement from Claimant's Perspective

¶49 Claimant testified that he agreed to settle his case after Dr. Hollis placed him at MMI. He authorized settlement for $50,000 because he "just was told that was the best it was going to be, so that was it." (Morrissette Dep. at 78.) He was also tired of what he called "being hassled" and "not listened to" about his claim and medical treatment. (*Id*.)

¶50 Claimant testified he believed Dr. Hollis's determination that he had reached MMI because "he's the doctor." (Trial Test.) His testimony is refuted by that of Dr. Hollis, who testified that claimant "did not agree with the opinion that he was at MMI." (*Id*.) The Court believes Dr. Hollis, however, at the time of settlement the claimant was represented by counsel who was surely aware that in any proceeding for benefits the doctor's opinion would prevail over claimant's unfounded belief, and the Court so infers.

¶51 More importantly, claimant was unaware that his fusion had failed. He testified he would not have agreed to settle if he had known his fusion was not solid, and his testimony is corroborated by his attorney's attempt to stop the processing of the settlement upon receiving information indicating possible mistake of fact. On this point, the Court believes the claimant.

Claimant's Post-Settlement Medical Evaluation

¶52 During her second examination of claimant on July 1, 1999, Dr. Fleischer noted claimant was essentially the same. (Ex. 45, at 1). She discussed claimant's condition with Dr. Hollis, suggesting the possibility of a steroid injection. (*Id*).

¶53 After learning claimant continued to experience severe back pain, Dr. Hollis directed additional testing to rule out possible structural reasons for claimant's continued pain. On July 22, 1999, Dr. Hollis reviewed "plain films" of claimant's spine. (Hollis Dep. at 27.) Those films demonstrated "loosening along the graph site, suggesting failure of fusion or degeneration of fusion." (*Id*.) On a CT scan conducted in early August 1999, the doctor also noted pseudoarthrosis, which he explained as "the forming of nonweightbearing structural[ly] inadequate scar tissue with partial calcification between an intended fusion site." (Hollis Dep. at 27, 30; Ex. 8, at 94.)

¶54 Dr. Hollis testified he could not determine conclusively whether the fusion deteriorated or had never formed. However, he noted that "[m]ore than likely, he did not, in fact, have a solid fusion." (Hollis Dep. at 28.) Looking at the question "retrospectively," Dr. Hollis testified claimant had never reached MMI. (*Id*. at 29.)

¶55 Dr. Hollis prescribed further treatment with a bone electro-stimulator to encourage fusion. At deposition in early December 1999, he expected this treatment to continue for three to six months. If that fails, claimant may need to undergo further surgery, specifically a posterior fusion. Dr. Hollis anticipates claimant will be under active medical treatment for another six to twelve months. He could not estimate when claimant might reach MMI but said it is unlikely claimant will be able to work for the next six to twelve months.

56 Following a December 2, 1999 examination of claimant, Dr. Hollis reported that recent imaging shows "perhaps a slight increase in the density of the bone dowels as well as the anterior osteophyte. However, he still has not achieved fusion." (Ex. 47 at 2.)

Factual Resolution - Mutual Mistake of Fact

¶57 The Court is persuaded that the parties were mutually mistaken as to claimant's medical condition at the time of the settlement. Specifically, they were mistaken as to the status of claimant's fusion, believing it to be solid, and his MMI status. The evidence is unequivocal that the mistake was material. Mr. Maynard and Ms. Hoffman, for the insurer, testified that MMI was a prerequisite to consideration of settlement. From that testimony the Court can only infer that had they known that the fusion had failed and claimant had not reached MMI they would not have approved the settlement. On his part, the claimant was being told that he had no objective physical reasons for his severe pain and testified that he would not have settled had he known his fusion had failed. His attorney's attempt to stop the settlement upon learning of a possible mistake as to his medical condition is also strong evidence that the mistake was material from claimant's perspective.

¶58 The Court is unpersuaded that the reopening of the surgical incision was material. There is no evidence indicating that the wound reopening was other than superficial or that it affected claimant's overall physical abilities.

¶59 The fact that the parties factored in the risk that claimant might be permanently totally disabled, would continue to complain about his condition, would continue to need medical care, and could possibly need future surgery, does not render the mistake immaterial. The stability of claimant's fusion and his MMI status at minimum affected his entitlement to further, immediate temporary total disability benefits. The ultimate outcome of the fusion healing process, and any additional surgery necessitated by the failure of the fusion to solidify, may affect his ability to work and the parties' evaluations of the worth of the case. Had this case been settled on the basis that claimant was permanently totally disabled and the full amount of estimated lifetime benefits paid out, the result might be different.

Reasonableness of Insurer's Refusal to Agree to Reopening

¶60 I find that the insurer did not act unreasonably in refusing to agree to reopening of the settlement. It presented evidence showing that it expected claimant would not return to work, would continue to complain, would continue to seek medical care, and might need further surgery. It justifiably saw the case as a problem one and sought to finally settle it to fix its liability and avoid future controversy. While it did not specifically envision a mistake of fact regarding the fusion, Mr. Maynard's June 29, 1999 letter, indicated that from the insurer's perspective the settlement did not depend on what happened to claimant's condition or employment. Mr. Maynard testified that he intended to exclude any possible

reason to reopen. While I do not read the language of the letter as referring to or excluding mistake of facts as to claimant's current condition - the letter refers to worsening of claimant's condition - I also do not doubt Mr. Maynard's intent to close the door firmly and finally. Although I find that he failed to do so, the arguments presented in support of the insurer's opposition to reopening were within the bounds of legitimate advocacy.

CONCLUSIONS OF LAW

I. Reopening of Settlement Petition

¶61 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).

¶62 The Supreme Court has addressed the effect of mistakes of fact concerning a worker's medical condition. *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 the mistake of fact must also be material:

> 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, 913 P.2d at 235.

¶63 The record leaves no question that the parties were **both** mistaken on both the status of claimant's fusion and MMI. Claims adjuster Connie Hoffman testified she believed the fusion was solid. (Hoffman Dep. at 47, 103.) She attributed claimant's continued reports of pain to psychological factors or lack of motivation to work. Mr. Maynard, while testifying he did not think about the solidity of the fusion when evaluating settlement, acknowledged his file at the time of settlement reflected the fusion was solid. While claimant may not have

liked or trusted Dr. Hollis, he likewise had no medical basis to question the solidity of the fusion.

¶64 Similarly, the record shows without question that both parties relied upon the report of a solid fusion and the mistaken MMI determination. Mr. Maynard's and Ms. Hoffman's testimony shows that the insurer would not have settled the case if it had known claimant had not reached MMI. Claimant testified that he would not have settled, and his testimony was corroborated by his attorney's attempt to stop the Department from approving the settlement. Moreover, the mistake affected both parties' evaluation of the settlement value of the case. The settlement failed to take into consideration the claimant's continued, **present** entitlement to temporary total disability benefit or what his ultimate condition upon actual achievement of MMI will be and how it will affect any possible claim for or risk of permanent total disability.

¶65 The insurer has cited several cases in support of its opposition to setting the settlement aside. The Court finds these cases distinguishable.

¶66 In *Sanford v. Brandon Owens, Inc.*, 268 Mont. 8, 885 P.2d 444 (1994), the claimant settled his claim for work-related knee injury but later argued the parties were unaware of a ligament tear, miscalculated the extent of his knee's instability, and erred concerning his ability to return to work. This Court's decision turned upon resolution of disputed evidence surrounding these contentions. In *Sanford* the Supreme Court affirmed, noting that the claimant's knee condition at the time of the settlement had been accurately diagnosed. It held that "[s]etting aside a settlement based on mutual mistake of fact requires a change in diagnosis" and agreed there was no such change to warrant setting aside the settlement. *Id.*, 268 Mont. at 18, 885 P.2d at 450.

¶67 Similarly, in *Sollie v. Peavey Co.,* 212 Mont. 197, 686 P.2d 920 (1984), there was evidence the claimant's medical condition, which involved widespread degenerative intervertebral disk disease, was consistent both before and after settlement. Determinations of whole body impairment were also consistent.

¶68 The present matter, in contrast to *Sanford* and *Sollie*, *does* involve significant mistake regarding the assessment of claimant's medical condition at the time of the settlement. The facts of the case are more similar to cases in which settlements have been set aside. *E.g., Wolfe v. Webb*, 251 Mont. 217, 222, 824 P.2d 240, 243 (1992) (neither the parties nor the treating physician were aware "of the additional damage to claimant's right shoulder which resulted in [subsequent] surgery, additional physical impairment, and further restrictions on claimant's physical activities"); *Kimes v. Charlie's Family Dining & Donut Shop*, 233 Mont. 175, 759 P.2d 986 (1988) (after settlement, it was discovered claimant had suffered a torn meniscus which created the conditions for probable degenerative changes in the knee joint); *Weldele v. Medley Dev.,* 227 Mont. 257, 738 P.2d 1281 (1987) (treating physician's initial assessment was a misdiagnosis of the nature and extent of his shoulder

injury); *Kienas v. Peterson,* 191 Mont. 325, 624 P.2d 1 (1980) (medical assessment of back injury did not take into account an aggravation of preexisting cerebral palsy).

¶69 Finally, the insurer argues that the settlement petition, with its disclaimer language, bars reopening. The language provides that the claimant assumes the risk that "the condition of the claimant, as indicated by reasonable investigation to date, may be other than it appears or may change in the future." (Ex. 12.) *Wolfe v. Webb* addressed this very language, which is standard in workers' compensation settlement petitions. The Supreme Court held that if the language precludes reopening for mutual mistake of fact then the provision conflicts with statutory and decisional law regarding formation of contracts and is contrary to public policy. The Court specifically held that "the language of the settlement agreement . . . did not preclude the Workers' Compensation Court from setting aside that agreement." *Id.*, 251 Mont. at 228, 824 P.2d at 246.

II. Attorney Fees, Penalty, and Costs

¶70 Attorney's fees and a penalty may be awarded only if the insurer's conduct was unreasonable. §§ 39-71-611, -612 and -2907, MCA (1997). I do not find the insurer to have acted unreasonably in opposing reopening. Claimant is, however, entitled to his costs since he has prevailed in this action.

JUDGMENT

¶71 1. The settlement agreement between the parties is hereby **set aside** and his claim is **reopened.**

¶72 2. Claimant is entitled to costs pursuant to section 39-71-611, MCA. The parties shall follow the procedures set forth in ARM 24.5.342.

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

¶74 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 12th day of January, 2000.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Ms. Laurie Wallace
Mr. Joe C. Maynard
Mr. Mark M. Kovacich
Date Submitted: December 16, 1999