IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2004 MTWCC 30

WCC No. 2002-0683

RODNEY OENS

Petitioner

vs.

EMPLOYEE BENEFITS INSURANCE COMPANY

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: The claimant suffered a neck injury in 1983 and underwent a single-level cervical fusion in 1984. In 1985 he settled his claim on a full and final compromise basis but reserved medical benefits. Later in 1985 he experienced further neck pain and underwent a further fusion at the lower level. Shortly thereafter, he inquired about reopening his settlement but took no further action. In 1990 he suffered another injury and the insurer thereupon cut-off further medical benefits. He continued to have neck pain and returned to his 1984 treating physician who opined that his continuing problems were all attributable to the 1983 injury. In 2002 claimant underwent a further fusion at levels above his 1984 fusion. He now seeks to reopen his 1985 settlement, alleging mutual mistake of fact as to the nature and extent of his neck condition.

Held: The claim is time-barred. In 1985 the claimant was aware of facts which are the basis for the reopening and inquired about reopening at that time. Under section 27-2-203, MCA, he was required to seek reopening within two years of his discovery of the facts upon which his request is based. He failed to do so. Moreover, he has failed to establish that there was a mutual mistake of fact. In 1984 his treating physician told him of the possibility of future problems at other levels and the insurer was aware of that potential.

Topics:

> **Limitations Periods: Reopening of Settlements.** An action to reopen or set aside a full and final compromise settlement must be commenced within two years after discovery of the facts which constitute the mistake.
>
> **Settlements: Reopening: Mistake of Fact.** A mutual mistake of fact regarding the nature and extent of the claimant's medical condition is material to a settlement

and is grounds for setting the settlement aside. However, where the claimant suffered a neck injury, underwent a one-level cervical fusion, and was apprized of the possibility that his fusion could lead to problems at other levels, and in fact the claimant later experienced problems at other levels and underwent further fusions, there was no mistake of fact since he was aware of the potential for future problems.

¶1 The trial of this matter was held in Missoula, Montana, on October 31, 2003. Petitioner, Rodney Oens (claimant), was present and represented by Mr. Howard Toole. Respondent was represented by Mr. Robert E. Sheridan.

¶2 Exhibits: Exhibits 1 through 25 were admitted. There were no objections to any of the exhibits.

¶3 Witnesses and Depositions: Rodney Oens and Craig Daue testified at trial. The parties also submitted depositions of the claimant and Dr. James Burton.

¶4 Issues Presented: The Court restates the issues as follows:

¶4a Whether Petitioner's request to reopen a 1985 settlement is time-barred.

¶4b If his request is not time-barred, whether Petitioner is entitled to set aside the 1985 settlement based on mutual mistake of fact.

¶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 The petitioner in this case is Rodney Oens and shall be referred to as "claimant."

¶7 The claimant is presently fifty-one years old.

¶8 The claimant injured his upper back and neck on October 31, 1983, while working for Rocky Mountain Log Homes, Incorporated (Rocky Mountain). At the time of his injury, his employer was insured by Employee Benefits Insurance Company which accepted liability for his injury.

¶9 The claimant initially treated with a chiropractor but was then treated by Dr. James R. Burton, an orthopedic surgeon. Dr. Burton initially saw the claimant on January 26, 1984. (Ex. 2 at 1.) At that time he was complaining of mid-cervical pain with some radiation into the upper back. (*Id*.) Dr. Burton ordered cervical x-rays. Those x-rays showed preexisting degenerative disk disease at the C5-C6 level, which Dr. Burton opined was aggravated by the claimant's October 31, 1983 injury. (*Id*.) The x-rays also showed some lesser degree of degenerative disk disease at the C4-5 and C6-7 levels. (Burton Dep. at 10-11.)

¶10 The claimant continued to experience significant neck pain despite conservative treatment and on July 24, 1984, Dr. Burton performed an anterior fusion of the claimant's neck at the C5-6 level. (Ex. 2 at 2A, 4.)

¶11 The claimant's fusion at the C5-6 level placed him at a greater risk for developing future problems at other levels below and above the fusion because the fusion transfers additional stress to other levels. (Burton Dep. at 34.) Dr. Burton discussed the potential for future complications with the claimant. He testified:

> Q. You were aware in Rodney Oens' case that his degenerative disease in his spine was at more than just a C5-6 level?
>
> A. That is correct.
>
> Q. And I assume when you talked to him about doing the surgery, you told him that by fusing the C5-6 level you might be potentially developing or he might potentially develop problems at levels above or below?
>
> A. Right. In my 4/5/84 note, I note that he has been advised that this may or may not be successful and should not consider surgery unless all conservative modalities have been tried.
>
> Q. I didn't mean to, in any way, imply that you didn't do your job as a surgeon. What I wanted to establish is that you had a discussion with Mr. Oens about whether fusing this one level would help his problem or whether some other things might occur because of that?
>
> A. Yes, I would ordinarily do that. And I'm sure I have done that in every case of this particular procedure. And I'm sure I did that with Rodney.
>
> Q. You didn't tell Mr. Oens prior to his C5-6 fusion that that was going to be the last procedure or last intervention surgically that he would need with respect to his cervical spine?
>
> A. No, I'm sure I would not have told him that.
>
> Q. And in fact, isn't that what's evolved over the course of time in the - I guess we're on to 18 years now since you did your surgery and in 1984 - I guess '84, it's 19 years now, he eventually had another fusion at C6-7?
>
> A. Yes.
>
> Q. And more recently, after he returned to Montana, you referred him to Dr. Chapman out at Harborview who fused I think possibly two levels about the C5-6 level?
>
> A. That's correct.

Q. And this is something that you feel you would have discussed with Rodney at the time that you did his initial surgery back in 1984?

A. Yes, I feel I would have.

(Burton Dep. at 34-35.)

¶12 Following surgery, the claimant pursued a settlement of his case. On December 10, 1984, he told Dr. Burton that "he would like to get his case settled and be released to return to work." (Ex. 2 at 5.) On December 21, 1984, Dr. Burton released the claimant to return to work as of January 1, 1985, and rated his impairment at ten percent of the whole person. (*Id*.)

¶13 The claimant, with the help of an attorney, pursued a settlement of his claim. A settlement was reached and the claimant executed a Petition for Full and Final Compromise Settlement on January 22, 1985. The settlement provided for payment of $16,000 new money and reserved medical benefits. (Ex. 19.) The settlement was approved by the Division of Workers' Compensation of the Department of Labor and Industry (Department). (Ex. 20.)

¶14 The claimant asserts that at the time of the settlement the parties were mistaken concerning his condition since he continued to have neck problems and underwent two additional neck surgeries, one in 1985 to fuse his C6-7 vertebrae, and another surgery in 2002 to fuse the C3-4 and C4-5 vertebrae. (Exs. 9 at 5 and 23 at 3.) Dr. Burton, who saw the claimant again in 2001 opined that the additional fusions were the natural consequence of the claimant's 1983 industrial accident and his 1984 surgery.

¶15 While the claimant now claims that he believed the 1984 surgery would solve his neck problems and was unaware of the potential for future degeneration, he has failed to satisfy me that there was in fact a mistake of fact. Dr. Burton's testimony establishes that he was told at the time that his C5-6 fusion could lead to problems at other levels of his neck. Craig Daue, the attorney who negotiated the settlement on behalf of the insurer, testified that he was aware the claimant had degenerative disk disease at multiple levels and that the fusion at the C5-6 level might lead to additional problems and surgeries.

¶16 Moreover, his request to reopen is time-barred. Section 27-2-203, MCA, requires that any action based on mistake of fact be brought within two years after the mistake is discovered.[(1)] The claimant underwent his second surgery with a fusion at the C6-7 levels in 1985, the same year as his settlement. He was aware that the doctor doing the surgery related his need for surgery to his industrial accident and indeed the Employee Benefits Insurance Company paid for the surgery. At that point of time he was fully aware that Dr. Burton's surgery was not a cure and that his further problems at other levels were attributable to his 1983 industrial accident. That knowledge triggered the running of the statute of limitations.

¶17 Indeed, on October 7, 1985, the claimant sent a letter to the Department inquiring as to how he could rescind his settlement. (Ex. 24.) That letter shows beyond doubt that the claimant at that time believed there were grounds to reopen the settlement.

¶18 The claimant points out that in 1990 the insurer denied further treatment for his neck condition. That denial, however, was based on the insurer's belief that the claimant had suffered a material aggravation of his preexisting condition in a fishing accident. The claimant conceded that he had injured his neck in a fishing accident.

¶19 The termination of medical benefits in 1990 does not provide a basis for reopening the claimant's settlement. The settlement expressly provided for payment of future medical benefits. Any mistake that was made was as to the materiality of the subsequent accident and the claimant's entitlement *under the agreement* to further medical benefits. The insurer has recognized that mistake and has paid for the claimant's third surgery.

CONCLUSIONS OF LAW

¶20 This case is governed by the 1983 version of the Montana Workers' Compensation Act since that was the law in effect at the time of the claimant's industrial accident. *Buckman v. Montana Deaconess Hospital,* 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶21 The claimant seeks to set aside, rescind, and reopen a full and final compromise settlement he executed in 1985 with respect to a 1983 neck injury. His request is subject to the statute of limitations set out in section 27-2-203, MCA. *Whitcher v. Winter Hardware Co.*, 236 Mont. 289, 296, 769 P.2d 1215, 1219 (1989); *Hayes v. State Compensation Ins. Fund,* 1999 MTWCC 7, ¶ 8.

¶22 "Actual knowledge of mutual mistake is not required to start the running of the statute of limitations. Rather, the statute of limitations begins to run when the facts are such that the party bringing the action would have discovered the mistake had he or she exercised ordinary diligence." *Rath v. St. Labre Indian School*, 249 Mont. 433, 439-40, 816 P.2d 1061, 1065 (1991) (citations omitted.) In *Rath* the Court held that a claimant's awareness of the "possibility" of surgery was sufficient to trigger the statute of limitations even though he did not learn that back surgery was a certainty until more than two and a half years later.

¶23 In this case, the claimant not only was aware of the progression of his degenerative condition in 1985 but in fact he underwent surgery. Moreover, in 1985 he initiated an inquiry into how he might reopen his settlement. The statute began running in 1985 and has long since expired.

¶24 Moreover, in order to set aside or reopen a full and final compromise settlement, the claimant must show that in fact both parties to the agreement were mistaken as to material facts upon which the settlement was based. The applicable rules are set out in *South v. Transportation Ins. Co.*, 275 Mont. 397, 401, 913 P.2d 233, 235 (1996):

> Full and final settlement agreements are contracts and are subject to contract law. A contract may properly be rescinded if the parties were laboring under a mutual mistake regarding a material fact at its inception. "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." In order to justify rescission, the mutual mistake must be regarding a fact that is vital to the completion of the contract. Further, it must be "so substantial and fundamental as to defeat the object of the parties in making the contract." [Citations omitted.]

¶25 The nature and extent of the claimant's medical condition is material to a settlement. *Id*. However, in this case, the claimant has failed to prove that there was a mutual mistake of fact regarding the nature and extent of his neck condition. His treating physician advised him of the possibility of future problems at other levels of his neck. The attorney who negotiated the settlement on behalf of the insurer was also aware of that potential.

JUDGMENT

¶26 The claimant's request to set aside or reopen a 1985 Full and Final Compromise Settlement is time-barred. § 27-2-203, MCA. He has also failed to persuade the Court that there was in fact a mutual mistake of fact which would justify reopening. His petition is therefore **dismissed with prejudice**.

¶27 This JUDGMENT is certified as final for purposes of appeal.

¶28 Any party to this dispute may have twenty days in which to request a rehearing from these Findings of Fact, Conclusions of Law and Judgment.

DATED in Helena, Montana, this 19th day of March, 2004.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Howard Toole
Mr. Robert E. Sheridan
Submitted: November 17, 2003

1. The section provides:

27-2-203. Actions for relief on ground of fraud or mistake. The period prescribed for the commencement of an action for relief on the ground of fraud or mistake is within two years, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake.

The section is the same now as at the time of the claimant's 1983 injury.