IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1993 MTWCC 26

WCC No. 9305-6781

GERALD D. PETTIT

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

STEVE LINDSEY

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

The trial in this matter was held on October 15 and 22, 1993, in Kalispell, Montana. Petitioner, Gerald D. Pettit, was present and represented by David A. Hawkins. Respondent, State Compensation Insurance Fund, was represented by Todd A. Hammer. Petitioner and Dr. Albert Joern were sworn and testified. Exhibit Nos. 1 through 7 were attached to the PRETRIAL ORDER and admitted by stipulation. Exhibit Nos. 8 and 9 were admitted. The parties stipulated that the following depositions could be considered: Gerald D. Pettit, Steven R. Biggs and Marlene Catulli.

FINDINGS OF FACT

1. The petitioner is 31 years of age and resides in Kalispell, Montana.

2. On July 15, 1991, the petitioner was injured while working as a carpet cleaner for ServPro of Flathead County. Petitioner was attempting to load equipment into a van when he experienced sharp pain in his hip and lower back.

3. At the time of the injury the employer was insured by the respondent, State Compensation Insurance Fund (State Fund), under Plan III of the Workers' Compensation Act.

4. The petitioner filed a written claim for compensation. The State Fund accepted the claim as compensable and thereafter paid medical and disability benefits.

5. On or about December 11, 1992, the petitioner and respondent executed a PETITION FOR COMPROMISE AND RELEASE SETTLEMENT. The petition was approved January 4, 1993.

6. Petitioner was not represented by counsel at the time of the settlement agreement.

7. The petition stated that the "parties to this matter have agreed to fully and finally conclude all compensation payments due the claimant" in consideration of a $21,672.00 lump sum payment to the petitioner. Medical benefits were, however, reserved by the petitioner.

8. The petition contained a provision which states:

. . . **The claimant understands** that by signing this compromise and release settlement petition, both the named insurer and the 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 it may change in the future. **The claimant understands** that this petition represents a compromise and release settlement and, if approved, may not be reopened by the Department. [Emphasis in the original.]

9. Petitioner had the skills and education to understand the paragraph quoted in the previous finding. Although he did not graduate from high school, he has obtained a GED. He testified that he does not have difficulty understanding the English language generally, and that he had no difficulty reading the paragraph.

10. Petitioner's understanding of the paragraph quoted in finding No. 8 was as follows:

Q. When the Petition language states the condition of the Claimant may be other than it appears, what did you understand that to mean?

A. That it may have been something that wasn't related to what they had diagnosed.

(Pettit Dep. at 18.)

11. The petitioner is now seeking to reopen the settlement agreement based on mutual mistake of fact. He alleges that the settlement was based on a misdiagnosis of his injury.

12. Petitioner's claim for compensation stated that the injury involved both his hip and low back.

13. He was first treated for his injuries by chiropractor Steven R. Biggs, D.C. The doctor treated petitioner for the first time on July 18, 1991, and last saw him on November 11, 1991.

14. At the time of his first treatment by Dr. Biggs, petitioner had discomfort in the lumbosacral and sacroiliac areas. According to Dr. Biggs, sacroiliac refers to the sacroiliac joint, which is a joint between the sacrum and the ilium (a portion of the hip bone).

15. Throughout Dr. Biggs' treatment, the petitioner continued to have pain in the lumbosacral and sacroiliac areas, and his treatments extended to the sacroiliac area. According to the doctor, "Our treatment, a lot of it was geared toward sacroiliac dysfunction." (Biggs Dep. at 32.)

16. Dr. Biggs, however, never arrived at any final diagnosis. While some of petitioner's symptoms were consistent with sacroiliac dysfunction, others, such as bilateral leg pain, were not. The sacroiliac symptoms experienced by petitioner were also consistent with other lower back conditions. However, Dr. Biggs had not ruled out sacroiliac dysfunction as a possible diagnosis.

17. Petitioner recalled Dr. Biggs telling him that his sacroiliac joint, as well his back, was "out", and that the doctor put his sacroiliac joint back into place.

18. Dr. Albert Joern, a neurosurgeon, examined petitioner on August 30 and November 19, 1991.

19. In his report of the August 30 examination, Dr. Joern reached the following clinical impression:

1. Severe lumbar strain

a. Rule out posterior joint syndrome.

b. Rule out sacroiliac dysfunction.

2. Degenerative disc disease, L5-S1, unrelated to industrial injury; no evidence of nerve root compression or radicul-opathy.

(Ex. No. 2 at 7.) He noted that petitioner had "major discomfort in the sacroiliac region" but that "[i]t also is in the lower lumbosacral region, and, more importantly, radiates down the left leg." (*Id.* at 4.) Finally, he observed:

. . . His mechanism of injury, symptoms and findings are consistent with some form of lumbosacral strain injury. This could either be in the posterior or facet joints. Or, there **could be** some involvement of the left sacroiliac joint causing things like quadratus and/or piriformis syndrome.

(Id. at 7, emphasis added.)

20. On November 19, 1991, Dr. Joern noted similar symptoms as on the first visit. Regarding the August evaluation, he said, "It was felt that he had a severe strain problem of one of the structures in the lumbosacral/pelvic region." (*Id.* at 2.) There was no further diagnosis as the result of the November examination. Dr. Joern referred petitioner to physical therapy.

21. Dr. Joern testified at trial that his working diagnosis encompassed the sacroiliac joint and that sacroiliac dysfunction was never ruled out. A review of his office notes, however, puts a different cast on the matter. They indicate that while sacroiliac

dysfunction had not been ruled out it was not the prime suspect among possible causative conditions.

22. Dr. John Hilleboe, an orthopedic surgeon, treated petitioner between December 10, 1991 and February 7, 1992. His office notes do not mention any suspicion of a sacroiliac or hip problem, only of the back. He prescribed exercises. In a January 28, 1992 note, Dr. Hilleboe noted that petitioner "still has low back pain, can't seem to get through that." He discussed a need for further diagnostic testing and noted, "If that is all normal, then I am at a loss to explain his problem on a structural basis and would probably refer him to John Stephens for a second opinion." Dr. Hilleboe's final note on February 7, 1992, states that all tests were normal. "Therefore, I am unable to explain why this gentleman is having this problem. I think he needs another opinion and I will refer him to John Stephens."

23. Dr. John V. Stephens, who specializes in physical and rehabilitation medicine, examined petitioner in March, May and June 1992 upon referral from Dr. Hilleboe. In a March 5, 1992 report to Dr. Hilleboe, Dr. Stephens' assessment was:

1) Lumbar degenerative changes, apparently these are fairly mild by report. His exam is perhaps slightly suggestive of a radicular process. . . .

2) His pain on weight bearing is **perhaps somewhat suggestive of a hip degenerative problem though** with a negative bone scan **this seems a bit unlikely.**

(Ex. No. 5, emphasis added.) In his subsequent records Dr. Stephens did not mention any hip degenerative problem. His subsequent assessments were limited to "lumbar degenerative changes." He prescribed back school and on May 21, 1992, noted, "If he does not progress as expected then we will look for other factors contributing to his physical condition." Dr. Stephens' last office note on June 17, 1992, indicates that petitioner was not progressing, and that his pain had worsened. Dr. Stephens stated his plan to obtain a neurosurgical opinion and also noted the possibility of "psychological factors contributing to his [petitioner's] physical condition."

24. On July 14, 1992, Dr. Henry Gary, Jr., a neurosurgeon, examined petitioner upon referral by Dr. John Stephens. Dr. Gary's diagnosis was:

Chronic back strain. Some of his symptoms suggest nerve root irritation, however his MRI does not show any definite nerve root problems. . . .

Dr. Gary recommended gradual flexion exercises and a non-strenuous occupation.

25. On July 24, 1992, the insurer referred petitioner to a Missoula medical panel for evaluation. The final opinion of the panel was as follows:

It was the unanimous opinion of the Evaluation Panel that the patient has **recurrent or chronic lumbar strain. Degenerative disc disease at L5/S1** as an alternative diagnosis.

An impairment rating [of 5%] is set forth above.

The patient has reached maximum medical improvement. No further study or treatment is recommended. He may return to the labor market.

. . .

It can be said that **patient has no particular restrictions on work activity, other than that which relates to the lumbar spine.** Here, vigorous, repetitive, or heavy use of the lumbar spine seems poorly advised. Moderate use seems within his capabilities.

(Ex. No. 4, emphasis added.) There was no mention of a sacroiliac or hip problem.

26. The insurer's letter referring petitioner to the Missoula panel asked the panel "to determine the claimant's present condition as it relates to his July 15, 1991 industrial accident **to his low back.**" (Catulli Dep. Ex. No. 4, emphasis added.) There was no mention in the letter of any hip or sacroiliac involvement.

27. A fair reading of the medical records shows that throughout the course of petitioner's treatment his physicians adopted a primary working diagnosis of lower back or lumbar dysfunction. Early on they also considered the possibility of sacroiliac or hip involvement. However, commencing with Dr. Hilleboe's treatment in December 1991, none of the physicians examining or treating the petitioner seriously considered sacroiliac or hip involvement. Rather, they related his symptomatology solely to his lower back or to an unknown etiology. The Missoula panel's diagnosis was lumbar strain and possible degenerative disc disease. The panel made a specific finding that "**patient has no particular restrictions on work activity, other than that which relates to the lumbar spine."** (Ex. No. 4, emphasis added.) It gave petitioner a 5 percent impairment rating based on his lower back condition.

28. On October 26, 1992, the State Fund wrote to petitioner advising him that he was entitled to 129 weeks of permanent partial disability benefits at $168.00 per week based on a total impairment of 37 percent. The letter advised petitioner that he could elect to take the impairment award in a lump sum, but that his election "would constitute settlement of your claim for any future temporary total, permanent total, or permanent partial disability benefits."

29. The petitioner countersigned a copy of the State Fund's October 26, 1992 letter indicating he would like his benefits in a lump sum. The settlement agreement identified in paragraph 5 was thereafter executed.

30. On April 1, 1993, Dr. Ned Wilson began treating petitioner upon referral from Dr. Stephens. He administered a diagnostic injection of an anaesthetic at the sacroiliac joint. Based on petitioner's positive response to the injection, Dr. Wilson diagnosed petitioner as suffering from sacroiliac joint arthropathy. Dr. Wilson has prescribed three to six months of conservative therapy. His office note of April 8, 1993, states that sacroiliac fusion should be considered if the treatment is unsuccessful and petitioner responds positively to a second injection.

31. Dr. Wilson's diagnosis is the basis for the present petition. Respondent has not challenged the diagnosis.

Mutual Mistake

32. Petitioner testified that when he settled his case he was unaware that he was suffering from a sacroiliac dysfunction. His testimony is credible and consistent with his medical history.

33. Marlene Catulli was the claims examiner who negotiated the full and final compromise settlement. The State Fund contends that Ms. Catulli knew that petitioner's condition involved sacroiliac dysfunction, and thus there was no "mutual" mistake of fact. This contention is based on Catulli's review in December 1991, of Dr. Joern's office notes of August 30 and November 19, 1991. Ms. Catulli testified by deposition that when the claim was settled it was her "understanding that [the sacroiliac joint problem] could still possibly be a problem with respect to the Claimant."

34. However, in a letter to Dr. Wilson written on May 4, 1993, Ms. Catulli said:

I have enclosed a copy of previous medical records for the above captioned claim.

As you can see by the enclosed, Mr. Pettit was last evaluated by Dr. Stephens in October of 1992,[(1)] who indicated he had reached maximum medical improvement. You evaluated Mr. Pettit April 1, 1993 stating he was suffering a problem with the sacroilliac [sic] joint. **The State Fund would appreciate your review of the enclosed material and opinion of whether or not you feel the claimant's ongoing problems are related to the original injury he suffered July 13, 1991. Please give the medical reasoning supporting your opinion.**

(Ex. No. 7, emphasis added.)

35. Based on Ms. Catulli's inquiry to Dr. Wilson and the medical records, the Court finds that at the time of the settlement Ms. Catulli and the State Fund were not, in fact, aware that petitioner had injured his sacroiliac joint as a result of his industrial accident.

36. Petitioner's symptoms after the settlement agreement are about the same as before. They have not significantly worsened.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over this proceeding pursuant to section 39-71-2905, MCA.

2. The settlement of the parties was based on a mutual mistake of fact.

The Workers' Compensation Court may set aside a full and final compromise settlement agreement where the parties entered into an agreement while laboring under a mutual mistake of fact, ***Weldele v. Medley Development,*** *227 Mont. 257, 260, 738 P.2d 1281 (1987).* The Supreme Court has affirmed several decisions of the Workers' Compensation Court setting aside full and final compromise settlement agreements. ***E.g., Kienas v. Peterson,*** *191 Mont. 325, 624 P.2d 1 (1981);* ***Weldele v. Medley Development,*** *supra; and* **Kimes v. Charlie's Family Dining & Donut**

Shop,** 233 Mont. 175, 759 P.2d 986 (1988);* ***Wolfe v. Webb,** 251 Mont. 217, 824 P.2d 240 (1992).* ***Kienas involved a back injury. The settlement was set aside because it was based on a medical assessment which did not take into consideration the injury's effect on the petitioner's pre-existing cerebral palsy. Prior to settlement the petitioner's treating physician rendered an impairment rating based solely on the back injury, and neither party was aware at the time of settlement that the injury could have aggravated or accelerated the cerebral palsy. Applying contract law, the Supreme Court held: "The parties were laboring under a material mistake as to the nature of and the extent of claimant's injuries." *191 Mont. at 330.* In ***Kimes***, "a new and different medical problem was discovered after the settlement." ***Whitcher***, *236 Mont. at 294.* The injury was to petitioner's knee. In ***Weldele*** the Supreme Court "allowed a reopening of the petition where the claimant's initial condition deteriorated substantially and the treating physician's initial assessment was a misdiagnosis of the actual extent of the injury." ***Whitcher,*** *Id. at 294.*

After a careful review of the testimony of the witnesses, the medical records in this case, and especially Marlene Catulli's May 4, 1993 letter to Dr. Wilson, the Court concludes that at the time of settlement both parties were unaware that petitioner was suffering from a sacroiliac condition. Certainly, the possibility of such a problem had been mentioned in 1991 by both Dr. Biggs and Dr. Joern. However, the sacroiliac joint was not their primary diagnostic candidate, and subsequent treating physicians focused on the lower back/lumbar area as the origin of petitioner's complaints. By the time of the settlement, both Dr. Gary and the Missoula medical panel had concluded that petitioner was suffering from lumbar strain of some sort. Drs. Stephens and Hilleboe focused on the lower back as the source of petitioner's symptoms but were unsure of the etiology of the symptoms. In any event, by the time of the settlement, sacroiliac dysfunction or arthropathy was no longer under active consideration by petitioner's treating physicians. It is also significant that the impairment rating which formed the basis for the settlement was based on a diagnosis of lower back strain. *Compare **Kienas,** 191 Mont. at 327 (the pre-settlement impairment rating "did not take into account claimant's preexisting neurological condition").*

Marlene Catulli's May 4, 1993 letter to Dr. Wilson contradicts her assertion that she assumed that petitioner had suffered an injury to the sacroiliac joint. If she had made that assumption, it would have been unnecessary for her to write Dr. Wilson and ask him if the sacroiliac arthropathy was related to petitioner's industrial accident. It is therefore clear that neither she nor petitioner were aware of the sacroiliac condition at the time of the settlement. Thus, both petitioner and the State Fund "were laboring under a material mistake as to the nature of and the extent of claimant's injuries," ***Kienas***, *191 Mont. at 330.*

This case is factually similar to ***Kienas, Weldele, Kimes*** and ***Wolfe.*** In ***Kienas*** the settlement was reopened because the treating physicians and the parties failed to take into account the effect of petitioner's back injury on his preexisting cerebral palsy. In ***Weldele*** petitioner's physicians had diagnosed him as suffering from carpal tunnel syndrome and a rotator cuff problem, but after the settlement they discovered he was suffering from thoracic outlet syndrome. In ***Kimes*** the petitioner injured his knee. His physician diagnosed and surgically repaired a ruptured cruciate ligament. After entering into a full and final compromise settlement, petitioner discovered he had also suffered a

tear of the medial meniscus. In ***Wolfe*** the petitioner suffered an injury to his right clavicle. However, at the time of settlement the parties and petitioner's treating physician were unaware of additional damage caused by the accident to petitioner's right shoulder. Significantly, the agreement in ***Wolfe*** was set aside even though petitioner's initial treating physician had noted that petitioner complained of pain in the area of his right shoulder. The Court commented:

However, that was not his primary complaint and no treatment was rendered for that complaint at that time.

251 Mont. at 220. In each of the cases the Supreme Court affirmed decisions setting aside the settlement agreements. In this case, neither the parties nor petitioner's treating physicians were aware of the underlying sacroiliac condition at the time of the settlement.

In his dissenting opinion in ***Weldele****, 227 Mont. at 261-3,* Justice Gulbrandson vigorously urged that a mistake as to the nature and extent of a releasor's injuries does not constitute a mistake of fact since prognosis is a matter of opinion. The majority of the Supreme Court has not adopted that view. Moreover, the Court has applied the mutual mistake doctrine despite contract language nearly identical to that contained in the settlement petition in this case. The settlement petition at issue herein states in part:

. . . **<u>The claimant understands</u>** that by signing this compromise and release settlement petition, both the named insurer and the 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 it may change in the future.

The settlement petition in ***Wolfe*** contained almost identical language, providing in part:

. . . The claimant understands that by entering into a full and final compromise settlement, both the named insurer and the 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 it may change in the future.

251 Mont. at 221. The Court rejected a contention that the language precluded reopening the agreement.

Therefore, based on an application of case law to the particular facts of this case, this Court determines that the full and final compromise settlement agreement between petitioner and respondent should be set aside on account of mutual mistake of fact. The extent of petitioner's disability and entitlement to benefits remain to be determined in a future proceeding, or by agreement of the parties. The lump sum amount already paid petitioner shall be appropriately credited against the respondent's ultimate liability for permanent disability benefits.

3. Petitioner has not requested an award of attorney fees or a penalty.

4. Petitioner is entitled to his costs.

JUDGMENT

1. This Court has jurisdiction over this matter pursuant to section 39-71-2905, MCA.

2. The COMPROMISE AND RELEASE SETTLEMENT executed by the parties on or about December 11, 1992 and approved January 4, 1993, is hereby set aside.

3. The petitioner's entitlement to benefits shall be determined in a future proceeding or by agreement of the parties.

4. The lump sum paid petitioner pursuant to the COMPROMISE AND RELEASE SETTLEMENT shall be appropriately credited against the ultimate liability of the respondent for permanent disability benefits.

5. Petitioner is entitled to reasonable costs for this action in an amount to be determined by the Court.

6. The JUDGMENT herein is certified as final for purposes of appeal pursuant to ARM 24.5.348.

7. 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 29th day of December, 1993.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. David A. Hawkins
Mr. Todd A. Hamme

1. While Ms. Catulli referred to an October, 1992 examination by Dr. Stephens, the record of such an examination is not among the exhibits furnished to the Court. After trial the Court requested counsel to review their files to determine whether such a record had inadvertently been left out of the exhibits. Counsel have informed the Court that their search did not locate a record of an October 1992 examination.