

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1994 MTWCC 66

WCC No. 9212-6647

CHARLES RASMUSSEN

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

HEEBS FOOD CENTER

Employer.

Reversed by Supreme Court Opinion No. 94-423.

ORDER GRANTING NEW TRIAL

The matter presently before the Court is the State Compensation Insurance Fund's (State Fund) motion for a new trial. Having considered the motion, along with the briefs of both parties, I conclude that the motion should be granted.

This case was tried in Missoula, Montana, on September 20 and 21, 1993. On May 18, 1994, I issued my Findings of Fact, Conclusions of Law and Judgment, ⁽¹⁾ finding claimant permanently totally disabled on account of his low-back condition. The State Fund had argued that claimant's condition is due to numerous falls he suffered during various sports activities, especially ski jumping. In view of medical opinions causally relating claimant's condition to an industrial accident, I did not find the State Fund's arguments in this regard persuasive. However, the occurrence of the accident was an essential foundation for the medical opinions upon which the Court relied. If the accident did not occur, then the medical opinions were worthless.

At trial the State Fund presented evidence which, if believed, tended to show that an industrial accident in fact did not occur. The State Fund argued that this evidence undermined claimant's credibility and demonstrated that his low-back condition is unrelated to any industrial accident. While the State Fund couched its contentions in terms of credibility and relatedness, I concluded, and reaffirm here, that the essence of its defense was fraud. Since fraud was not listed as an issue or defense in the pretrial order, I

"disregarded all evidence offered to prove fraud" and accepted claimant's account of the industrial accident.

Motions for new trials are governed by ARM 24.5.344. That rule provides inter alia that any party "may petition for a new trial or request amendment to the court's findings of fact and conclusions of law within 20 days after the order or judgment is served."

As an initial matter the claimant argues that the State Fund's motion is untimely since it was mailed rather than filed on the 20th day. That argument, however, overlooks ARM 24.5.303 (5), which provides:

Unless the court specifically orders otherwise, filing with the court may be accomplished by mail addressed to the clerk, and such filing will be deemed complete on the date shown on the certificate of mailing.

Under this rule the date of mailing is also deemed the date of filing. The motion was timely filed. Therefore, the Court will consider the merits of the motion.

The grounds for granting a new trial are enumerated in section 25-11-102, MCA. In cases tried to a court without a jury there are three grounds for granting a new trial. Section 25-11-103, MCA. Those grounds, as set forth in section 25-11-102, MCA, are:

...

(1) irregularity in the proceedings of the court, jury, or adverse party or any order of the court or abuse of discretion by which either party was prevented from having a fair trial;

...

(3) accident or surprise which ordinary prudence could not have guarded against;

(4) newly discovered evidence material for the party making the application which he could not, with reasonable diligence, have discovered and produced at the trial;

In addition to demonstrating the existence of at least one of these grounds, the moving party must also show that his or her rights were materially affected. *Id.*

In the present case only the first two grounds are implicated by the State Fund's motion. In its motion the State Fund contends that the Court improperly ignored its evidence concerning the occurrence of the accident. It argues that claimant did not object to much of the evidence and that the Court's requirement that fraud be specifically pleaded was unprecedented and came as a total surprise.

Several witnesses were deposed concerning the occurrence of an accident. The State Fund's supporting brief recites numerous instances of deposition testimony which focused on the occurrence of an accident and questioned whether claimant's report of the accident

was credible. Their testimony, if believed, contradicted claimant's testimony that he told co-employees of the accident and had his hand bandaged. (Sue Haniuk Dep. at 6-9; Happel Dep. at 6-8; Weber Dep. at 7; Len Haniuk Dep. at 22.) There was also testimony that claimant continued to do his job in a normal manner for several weeks after the date on which he claims he was injured. (Len Haniuk Dep. at 20.) The State Fund also focused on inconsistent medical histories given by claimant to various medical practitioners. Claimant did not object to the testimony focusing on the occurrence of the accident at the time of these depositions⁽²⁾, and the depositions were thereafter submitted to the Court pursuant to ARM 24.5.322 (9) for it to consider in reaching its decision. The rules of this Court provide that all objections to deposition testimony must be made at the time of the depositions unless otherwise agreed by the parties. ARM 24.5.322 (5). Claimant therefore acquiesced to the State Fund's pursuit of evidence which, if believed, both undermined claimant's credibility and tended to prove that no accident ever occurred.

The claimant's response to the State Fund's motion for a new trial shows that **both** parties misapprehended the legal essence of the State Fund's defense and indicates that this Court's decision to categorically reject testimony concerning fraud surprised claimant, as well as the respondent. As noted in the previous paragraph, during depositions claimant did not object to testimony which undermined his claim that an accident occurred. In his brief responding to the present motion, the claimant specifically notes that the State Fund's evidence was offered "to prove that the Claimant was not a credible witness." Apparently, if not expressly, claimant had, and has, no objection to consideration of the evidence for credibility purposes even though the evidence may at the same time tend to prove that no accident ever occurred. In his response the claimant states that the Court "presumably considered the evidence as it related to the credibility of Mr. Rasmussen" and goes on to make the following request of the Court:

Claimant respectfully requests that this Court amend its Findings of Fact, Conclusions of Law and Order to specifically find that the Court considered the evidence [of fraud] for its stated purpose [credibility] and concluded that Mr. Rasmussen was a credible witness.

(Petitioner's Brief in Opposition of State Compensation Mutual Insurance Fund's Petition for New Trial at 7.) Later on in his brief the claimant discusses the Court's observation at page 20 of the Findings of Fact that the State Fund did not request an amendment of the pretrial order to add a fraud defense and that even if it had good cause was lacking. Findings of Fact at 20. Referring to that statement the claimant says:

It is clear from the Court's conclusion in this regard that the Court did consider the evidence offered to prove fraud and found good cause lacking to amend the Pre Trial [sic] Order. The Court **could not have concluded that good cause was not shown had it not considered the evidence offered by the State Fund tending to prove**

that the accident did not happen. Therefore the State Fund was in no manner prejudiced by the Court's ruling.

(Petitioner's Brief at 10-11, emphasis added.)

The dilemma presented by claimant's response is that it misapprehends my original determination and supports the State Fund's arguments for a new trial. Contrary to claimant's perception, I did not determine that claimant's testimony concerning the occurrence of an accident was credible and I did not consider the fraud evidence for purposes of determining claimant's credibility. As stated in my original decision:

Since the State Fund did not properly raised a fraud defense, the Court will not consider it and **has disregarded all evidence offered to prove fraud. The claimant's account of the accident is therefore accepted.**

(Findings of Fact at 20, emphasis added.)

It is apparent that in trying this case both parties believed that evidence tending to prove fraud was admissible with respect to claimant's credibility. That perception was not shared by the Court when it reached its decision. A witness may be credible as to some matters but not as to others. The only credibility issue I resolved in the original decision concerned claimant's reports of his symptoms, especially pain, which I did find credible. Claimant's credibility concerning the occurrence of an industrial accident was, and is, an entirely different matter. The thrust of the State Fund's case was not that claimant's particular version of the accident was incredible. Its defense did not turn on how the accident occurred but whether it occurred at all. A finding that claimant's testimony concerning the accident was not credible would necessarily result in a corollary finding that claimant's present condition is unrelated to any industrial accident because no accident ever occurred. Such finding would be tantamount to a determination that claimant lied about the accident, that he did not suffer a compensable injury in the first instance, and that his claim is fraudulent. Neither party recognized that the attack on claimant's credibility concerning the occurrence of the accident was inextricably intertwined with an issue of fraud.

In light of claimant's failure to object during depositions, and his agreement that evidence of fraud should have been considered in determining claimant's credibility, I am unable to say that the State Fund could have avoided my original ruling by ordinary prudence. It clearly believed that the matter was within the issues framed by the pretrial order; the claimant's conduct lent credence to its belief.

Moreover, the State Fund, as well as claimant, may reasonably have been surprised by the Court's application of a rule requiring that fraud be raised as an affirmative defense. The State Fund correctly notes that this Court has not adopted a specific pleading requirement for affirmative defenses. Compare Rule 8 (c), Mont.R.Civ.P. Rather, it has implied such a

requirement into its rules via the more general requirements that the response set forth the respondent's contentions and the pretrial order set out the issues to be decided. As I concluded in the original decision in this case and in ***Carmody v. Employers Insurance of Wausau***, WCC No. 9302-6686 (May 6, 1994), an allegation of fraud is not fairly implied by a general denial of liability or by an assertion that a medical condition is unrelated to an industrial accident. My original determination requiring that fraud be specifically set forth as a separate issue and contention broke new ground,⁽³⁾ and I must now conclude that the Court's rules are **not** sufficiently clear on their face that as a matter of ordinary prudence the State Fund should have affirmatively raised the issue in its response and in the Pretrial Order.

The State Fund also argues persuasively that it did not move to amend the pretrial order because it was not provided fair warning of the need to make such a motion. As noted earlier, my original decision stated that "good cause" was lacking for such amendment. The claimant interprets the statement as indicating that I sifted the fraud evidence and found it lacking. I did not do so. I applied the "good cause" requirement in the context of whether there was good cause to excuse the omission of the issue from the pretrial order and determined, without discussion, that there was not. I now determine the lack of a rule expressly requiring that fraud be affirmatively pled, along with the failure of claimant to object to deposition evidence tending to prove fraud and both parties' understanding that fraud evidence could be considered in determining claimant's credibility, provided good cause to amend the pretrial order to include a fraud defense. I also conclude that under these circumstances the State Fund was denied a fair opportunity to move to amend the Pretrial Order.

The State Fund also invokes Rule 15 (b), Mont.R.Civ.P., as authority for a new trial. That rule permits amendment of pleadings to conform to the evidence and issues presented at trial, providing:

Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure to so amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence. [Emphasis added.]

While Rule 15 (b) is not directly applicable to the Court, it sets forth matters which can be appropriately considered in determining whether there is good cause to amend the pretrial order to add fraud as an issue. Claimant's failure to object to deposition evidence tending to show that he lied about the accident, and his current position that such evidence can be considered in assessing his credibility, constitutes implied consent to the admission and consideration of such evidence. Moreover, admission of the evidence would subserve presentation of the merits of the action. Thus, the rule lends further support to the determination already made herein that there was good cause to amend the pretrial order.

Finally, I again take note of claimant's discussion of good cause. That discussion contains an implicit admission that the Court should have "considered the evidence offered by the State Fund tending to prove that the accident did not happen." (Petitioner's Brief at 11 and *supra* at 3.)

I conclude that the State Fund has established grounds for a new trial under both subsections (1) and (3) of section 25-11-102, MCA. Lacking prior precedent or a rule containing an express requirement for pleading affirmative defenses, and considering the claimant's acquiescence to the presentation of fraud evidence through deposition testimony and his agreement that such evidence should have been considered by the Court in assessing his credibility, I am compelled to conclude that I abused my discretion in proceeding with the trial and then retrospectively disregarding the State Fund's evidence of fraud. I also find that my original ruling constituted "surprise which ordinary prudence could not have guarded against." The ground rules should have been established prior to proceeding. Other alternatives, including a continuance, should have been considered.

In granting a new trial, the Court must determine how to proceed. ARM 24.5.344 (4) provides:

If a new trial is granted, the matter will be scheduled for trial pursuant to ARM 24.5.310. As determined by the court, the matter may be decided based on the testimony taken at the initial trial and at the new trial, or by a *de novo* trial. After the new trial, the court will issue an order or findings of fact and conclusions of law and judgment setting forth the court's determination of the disputed issues.

Thus, two alternative courses of action are available. First, the matter can be heard anew in its entirety. Alternatively, the Court can consider the testimony at the first trial and limit the new trial to new or supplemental matters. Since I have a good recollection of the first trial, as well as extensive notes and a transcript of the first trial, a *de novo* retrial is unnecessary. On the other hand, since claimant's trial strategy at the first trial could have been affected by his perception that fraud was not in and of itself an issue in the case, he should be permitted an opportunity to present additional evidence as to whether an accident in fact occurred. Therefore, a new trial will be scheduled to hear additional evidence concerning the occurrence or non-occurrence of an industrial accident.

My decision to order a new trial in this case should not be read as rescinding the determination in the original decision, and in **Carmody**, that fraud is an affirmative defense which must be set forth in the response to the petition and in the pretrial order. That requirement should no longer come as a surprise to the bar practicing before this Court. The purpose of requiring both the petitioner and the respondent to set forth their contentions in their pleadings and the pretrial order, and to set forth a list of issues in the pretrial order, is to assure that the parties, as well as the Court, are fully informed about the matters being litigated. Issues and contentions which cannot be fairly implied or understood from more general statements must be separately set forth.

Accordingly, IT IS HEREBY ORDERED as follows:

1. The State Fund's motion for a new trial is **granted**.
2. The new trial shall be limited to additional evidence concerning the occurrence or non-occurrence of the industrial accident which gave rise to this litigation. The Court will consider that evidence, along with depositions and other evidence presented at the first trial.
3. The Court's previous determination excluding consideration of all evidence tending to show that no industrial accident occurred is **rescinded**. Such evidence, whether presented by way of deposition or at the first or second trial, shall be considered by the Court in determining whether the State Fund is liable for permanent total disability benefits.
4. Within 20 days of this Order the parties shall file an amended pretrial order in which they shall set forth the dispute concerning the occurrence of the industrial accident as a separate issue.
5. Within 20 days of this Order the parties shall exchange lists of supplemental exhibits and witnesses.
6. Any additional discovery desired by the parties shall be completed by Friday, September 2, 1994.
7. A further trial in this matter is set for 9:00 a.m. on Wednesday, September 7, 1994, in the Missoula County Courthouse, Missoula, Montana.

DATED in Helena, Montana, this 28th day of July, 1994.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Ken H. Grenfell
Mr. Leo S. Ward

1. The Court's decision is abbreviated and cited hereinafter as "findings of fact."
2. If claimant believed that evidence challenging the occurrence of the accident was outside the issues framed by the petition and response, he could and should have objected to the evidence on relevancy grounds at the time of depositions. ARM 24.5.322 (5).
3. The requirement that fraud be affirmatively set forth was initially articulated in ***Carmody v. Employers Ins. of Wausau***, WCC No. 9302-6686 (May 6, 1994), but the parties in this case did not have the benefit of the ***Carmody*** decision since it was issued only a few days prior to the decision in this case.