IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2002 MTWCC 41

WCC No. 2002-0512

WILLIAM BURGAN

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Respondent/Insurer for

TODD CONSTRUCTION COMPANY

Employer.

ORDER DENYING PETITIONER'S MOTION FOR RELIEF FROM JUDGMENT

Summary: Petitioner entered into a settlement agreement accepting $20,000. The agreement expressly took into consideration the possibility that claimant might need shoulder surgery. The Court approved the settlement and entered judgment. Thereafter, claimant discovered he needs shoulder surgery and filed a motion to set aside the judgment.

Held: There is no mistake of fact or other grounds permitting the judgment to be set aside.

Topics:

Montana Rules of Civil Procedure: Rule 60(b). Even if Rule 60(b) of the Montana Rules of Civil Procedure applies to judgments of the Workers' Compensation Court, the claimant is not entitled to set aside a judgment where there is no mistake of fact or where the moving party moves to set aside the judgment more than 60 days after the alleged mistake.

Settlements: Reopening: Mistake of Fact. Where the parties enter into a settlement agreement which expressly provides for the possibility that the claimant may need shoulder surgery, and it is subsequently discovered that the claimant in fact needs shoulder surgery, there is no mistake of fact justifying reopening of the settlement.

¶1 On April 26, 2002, this Court received a Stipulation for Entry of Judgment signed by the attorneys for both parties, as well as the claimant individually. The stipulation provided for a payment to claimant of $20,000 and, as relevant to the current motion, went on to provide:

> 5. In the event a future left shoulder surgery is necessary as a result of claimant's injuries with Respondent, the amount paid set forth in paragraph one above [$20,000] discharges and fully satisfies Respondent's obligation for payment of TTD benefits after such surgery but not any increase in the impairment rating resulting from the surgery.

Judgment was entered April 26, 2002, adopting the parties' stipulation.

¶2 Petitioner now moves to set aside that portion of the agreement and judgment which pertains to the claimant's left shoulder. He alleges that subsequent medical evaluation shows he needs a shoulder replacement and that the parties were mistaken as to that fact. He invokes both Rule 60(b), Mont.R.Civ.P., and the rule permitting reopening of settlements where there has been a mutual mistake of fact.

¶3 No extended discussion of the motion is necessary. Under either theory the claimant is required to show a mistake of fact. He has failed to do so.

¶4 For purposes of the motion, I assume Rule 60(b) applies to actions in the Workers' Compensation Court, and also assume it applies to judgments entered by stipulation and agreement of the parties. The Rule provides in relevant part:

> **(b) Mistakes--Inadvertence--Excusable Neglect--Newly Discovered Evidence--Fraud, etc**. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. . . .

To satisfy the rule the claimant would have to show that the judgment was entered based upon some mistake, that there is new material evidence that could not have been discovered through due diligence, or that some other reason justifies relief.

¶5 The stipulation for judgment shows that both parties were aware of the possibility that claimant might need shoulder surgery. Their agreement made express provision for that possibility. Thus, there was no mistake as to claimant's future need for shoulder surgery and confirmation of that fact does not constitute newly discovered evidence which could not have been discovered by due diligence. Claimant has cited no other good reason to set the judgment aside.

¶6 Further, a motion asserting grounds (1) through (3) must be made within 60 days of entry of judgment since Rule 60(b) goes on to provide:

> The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) when a defendant has been personally served, whether in lieu of publication or not, not more than 60 days after the judgment, order or proceeding was entered or taken, or, in a case where notice of entry of judgment is required by Rule 77(d), not more than 60 days after service of notice of entry of judgment.

The judgment herein does not involve a defendant, thus it is questionable whether Rule 60 applies at all, especially since the claimant agreed to entry of judgment. In any event, there is no requirement that notice of entry of judgment be filed in this Court, thus the 60- day period for motions invoking reasons (1), (2), and (3) began on April 26, 2002. The present motion was filed July 9, 2002, more than 60 days later, hence the Court is barred from considering those grounds. As to ground (6), even if the 60-day time limit does not apply, that ground plainly only encompasses reasons other than those cited in (1), (2), and (3), otherwise the 60-day time limit applicable to those grounds could be circumvented in every case by invoking ground (6). The grounds asserted in support of the motion are mistake and newly discovered evidence, which are encompassed in grounds (1) and (2). No separate ground is set out under subsection (6), therefore it is inapplicable.

¶7 There is similarly no basis for setting aside the parties' agreement and the judgment based upon mistake of fact. There must "in fact" be a mistake of fact, and that mistake must be mutual. *See Kienas v. Peterson,* 191 Mont. 325, *624 P.2d 1 (1980).* The agreement of the parties shows that the parties expressly contemplated the possibility that claimant might need shoulder surgery. Thus, there was no mistake.

ORDER

¶8 The Petitioner's Motion for Relief from Judgment Pursuant to Rule 60(b), Mont.R.Civ.P. is **denied**.

¶9 This Order is certified as final for purposes of appeal.

¶10 Any party to this dispute may have 20 days in which to request a rehearing from this Order Denying Petitioner's Motion for Relief from Judgment.

DATED in Helena, Montana, 29th day of August, 2002.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. James G. Edmiston
Mr. Larry W. Jones
Submitted: July 24, 2002