IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1995 MTWCC 64

WCC No. 9403-7019

SUZANNE SOUTH

Petitioner

vs.

TRANSPORTATION INSURANCE COMPANY

Respondent/Insurer for

COMBUSTION ENGINEERING, INCORPORATED

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

REVERSED IN *SOUTH v. TRANSPORTATION INS. CO.*, 275 Mont. 397 (1996)

Summary: Claimant and insurer settled claim for back injury based on medical approval of several new jobs, including that of a massage therapist. Claimant began massage therapy school but was unable to continue that training due to further back pain. She sought to reopen the settlement agreement.

Held: Workers' Compensation Court refused to reopen the settlement agreement where the parties were not operating under a mutual mistake of fact about claimant's back condition. Persuasive medical testimony indicated her present condition was the result of "something new" happening to her back. Note: this decision was reversed, in *South v. Transportation Insurance Co.*, 275 Mont. 397, 913 P.2d 233 (1996), with the Supreme Court concluding that the parties were mutually mistaken about claimant's ability to train and work as a masseuse and this understanding was material to the agreement.

The trial in this matter was held on August 15, 1995, in Billings, Montana. Petitioner, Suzanne South (claimant), was present and represented by Mr. Don E. Burris. Respondent, Transportation Insurance Co. (Transportation), was represented by Mr. Todd A. Hammer. Claimant and Dr. John Moseley were sworn and testified. Additionally, the depositions of claimant and Dr. Lashman W. Soriya were submitted for the Court's consideration. Exhibits 1-6 were admitted by stipulation with the exception of pages 607-8 of Exhibit 4, to which Mr. Burris objected. Having reviewed pages 607-8 of Exhibit 4, I find them inadmissible.

Issues Presented: Whether a full and final compromise settlement agreement executed and approved in 1990 should be set aside.

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

1. Claimant resides in Miles City, Montana.

2. On April 22, 1986, claimant injured her back during the course and scope of her employment while working as a laborer for Combustion Engineering.

3. At the time of the injury, Combustion Engineering was insured by Transportation. (Ex. 1.) Transportation accepted liability for the injury and thereafter paid medical and compensation benefits.

4. In October of 1986, claimant underwent a partial hemilaminectomy and removal of an extruded disc fragment at the Mayo Clinic in Rochester, Minnesota. (Ex. 4 at 463, 383.) The surgery was performed on the right side at the L5-S1 level.

5. Following the surgery the claimant continued to experience pain in the lumbosacral area and down the left leg. An MRI performed in July of 1988, showed a herniated nucleus pulposus at the L5-S1 interspace. (Ex. 4 at 130, 170.) In September of 1988, Dr. Soriya performed a second surgery on the left side at the L5-S1 level. (Ex. 4 at 172-75.)

6. Following the second surgery, Crawford Rehabilitation Services submitted several job descriptions to Dr. William S. Shaw for his consideration. At the time, Dr. Shaw was claimant's treating physician. He approved seven jobs as compatible with claimant's condition. Those jobs were hotel/motel clerk, cashier, sales clerk, case aide, teachers aide, convenience store clerk, and masseuse. (Ex. 4 at 241.)

7. In February 1990, claimant and Transportation entered into an agreement for a full and final compromise settlement of her claim. (Ex. 2.) The agreement was approved by the Department of Labor and Industry on March 12, 1990. (Ex. 3.)

8. In December of 1990, claimant moved to Seattle, Washington and began a training as a massage therapist. (Ex. 4 at 537-38.) While in training claimant experienced left hip and left lower back pain. She sought care from Dr. Charles B. Schuetz, D.O. After an initial examination on February 7, 1991. Dr. Schuetz noted that "[a]ggravation to this injury may be directly related to the physical exertion used in massage school." (Ex. 4 at 518.)

9. On February 13, 1991, claimant was seen again by Dr. Schuetz. Dr. Schuetz noted "moving household, lifting heavy boxes, low back better but still sore, also weak." (Ex. 4 at 527.)

10. On March 19, 1991, claimant again saw Dr. Schuetz complaining of back pain. Dr. Schuetz noted "[p]ainless then cough from bronchitis. Cough [equals left] hip pain then severe episode Fri[day] thru [sic] Sun[day] [with decreased] pain Mon[day] but today pain present [with] middle [two] toes [and] left foot tingly [and] numb." (Ex. 4 at 523.) The note reflects that claimant had become pain free, then experienced a renewed onset of pain when she began coughing.

11. Another MRI was then performed on April 16, 1991. It revealed a "mild to minimal" L4-5 central disc bulge, previous right L5-S1 laminectomy with evidence for perineural scar formation, and a mild left paracentral focal disc protrusion at L5-S1. (Ex. 4 at 549.)

12. Claimant was unable to continue her massage therapy training and returned to Montana.

13. Dr. James Johnson, a neurosurgeon, picked up her care in July 1991. (Ex. 4 at 436-38.) He ordered a myelogram and a CT scan, which were done July 31, 1991. They revealed a disc protrusion at the L5-S1 level that "questionably and very minimally compressing the nerve root on the left" and a central disc protrusion slightly to the right at the L4-5 level. (Ex. 4 at 443.) Dr. Johnson, however, recommended against surgery and in the fall of 1991, he prescribed an epidural steroid injection for symptomatic relief. (*Id*. at 440-41.) In 1992 he referred her back to Dr. Soriya. (*Id*. at 198.)

14. Claimant was referred to Dr. John Moseley on August 1, 1994. Dr. Moseley ordered yet another MRI, which was taken on August 8, 1994. The results showed a significant disc bulge posteriorly and to both sides at L4-5, and degenerative disc changes at L5-S1. (Ex. 4 at 602.) Dr. Moseley performed a disc removal at L4-5 in December of 1994.

15. Dr. Moseley testified at trial and I found his testimony persuasive. He said that the defect at the L4-5 could have been caused by a variety of events, traumatic or otherwise. He testified that "something new" must have happened in 1990 or 1991 to cause the L4-5 condition. Dr. Moseley was unable to say to a reasonable degree of medical certainty whether the L4-5 condition was related to the 1986 injury.

16. Prior to performing surgery in 1994, Dr. Moseley and a radiologist reviewed claimant's 1988 MRI and found nothing abnormal or unusual at the L4-5 level. Similarly, the x-rays and operative reports of Dr. Soriya obtained at the time of claimant's surgery in 1988 do not indicate any problems at the L4-5 level.

17. I find that at the time of the 1990 settlement agreement between claimant and Transportation, the parties were **not** operating under a mutual mistake of fact concerning claimant's low-back condition. As Dr. Moseley testified, "something new" occurred in 1990 or 1991 which caused claimant's additional low-back pain and ultimately led to the 1994 surgery at the L4-5 level.

18. Dr. Moseley testified that with the exception of the masseuse position the claimant is presently capable of performing all the jobs previously approved by Dr. Shaw.

19. The claimant testified that she would not have agreed to the 1990 settlement if she had known she would be unable to work as a masseuse. She did not, however, tell Transportation or its adjuster that her acceptance of the settlement was conditioned on the masseuse position. Moreover, I did not find her testimony in this regard credible.

20. Claimant has failed to persuade me that there was any mistake concerning her ability to perform the job of masseuse. As Dr. Moseley testified, "something new" occurred in 1990 or 1991 which affected the claimant's spine at L4-5 level and worsened her condition. The Court is not persuaded that claimant would have been unable to work as a masseuse absent the additional occurrence.

21. Claimant has also failed to persuade me that the masseuse position was material to the settlement agreement. Dr. Shaw approved several jobs and, with the exception of masseuse, she can still perform those jobs. Claimant's ability to perform **several** jobs was material to the agreement, and she can still do so.

CONCLUSIONS OF LAW

1. A full and final compromise settlement may be reopened and set aside when the parties to the agreement were operating under a mutual mistake of material fact. Cases in which agreements have been set aside include *Kienas v. Peterson,* 191 Mont. 325, 624 P.2d 1 (1981)*; Weldele v. Medley Development,* 227 Mont. 257, 738 P.2d 1281 (1987)*; Kimes v. Charlie's Family Dining ,* 233 Mont. 175, 759 P.2d 986 (1988*); Wolfe v. Webb,* 251 Mont. 217, 824 P.2d 240 (1992) and *Brown v. Richard Murphy, Inc.,* 261 Mont. 275, 862 P.2d 406 (1993). Cases in which reopening has been denied are *Sollie v. Peavey Corp.,* 212 Mont. 197, 686 P.2d 920 (1984)*; Whitcher v. Winter Hardware Co.,* 236 Mont. 289, 769 P.2d 1215 (1989); *Hartford v. City of Billings*, 246 Mont. 259, 805 P.2d 1293 (1990); *Giles v. Bozeman Public Schools,* 257 Mont. 289, 849 P.2d 180 (1992) and *Sanford v. Brandon Owens, Inc*., 268 Mont. 8, 865 P.2d 444 (1994). Reopening is based on contract law. *Wolfe* at 227. "General contract law gives court's the right to reopen a compromise settlement when there has been a non-negligent mutual mistake of material fact." *Kimes* at 177. The operative question is whether at the time of settlement "[t]he parties were laboring under a **material mistake as to the nature of and the extent of claimant's injuries.**" *Kienas* at 33 (*emphasis added).*

2. Reopening is warranted where the parties were ignorant of the existence of a medical condition caused by the initial injury. *Weldele*, 227 Mont at 261. The claimant argues that there was a mutual mistake of fact concerning her medical condition. However, the evidence does not establish that claimant was misdiagnosed or that she was suffering from an undiagnosed condition. The MRI taken of the claimant's spine in 1988 showed no

evidence of a disc bulge at L4-5, which was the object of Dr. Moseley's surgery in 1994. Neither Dr. Moseley nor a consulting radiologist could discern a problem at the L4-5 level in reviewing the 1988 MRI. Dr. Moseley further testified that "something new" occurred in 1990 or 1991 to cause the L4-5 condition. When given a history of the claimant's activities after settling her case, he could not relate the L4-L5 condition to the 1986 injury. I found Dr. Moseley's testimony credible and persuasive. There was no mutual mistake of fact concerning the claimant's medical condition.

3. The claimant also contends that a mutual mistake of material fact exists as to the parties' understanding of her residual labor market. The contention fails for two reasons. First, claimant has failed to persuade me that her inability to work as a masseuse is due to her original injury. Second, even if the parties were mistaken as to the appropriateness of the masseuse position, the settlement was not based on that particular position but rather on the approval of **several** positions, only one of which is now deemed inappropriate. With the exception of the masseuse position, the claimant has the same residual job market now as at the time of settlement. While she now asserts that she would not have entered into the settlement had she known that could not work as a masseuse, she never communicated that fact to Transportation. Moreover, the Court is not persuaded that she would have in fact refused the settlement had the position been disapproved by Dr. Shaw.

4. Since claimant has not prevailed in this case she is not entitled to attorney fees or costs.

JUDGMENT

1. Petitioner's request that the 1990 settlement of her April 22, 1986 workers' compensation claim be set aside is **denied**.

2. Petitioner is not entitled to attorney fees and costs.

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

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 25thday of August, 1995.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Don Edgar Burris
Mr. Todd A. Hammer
Submitted Date: August 23, 1995