

RICHARD BERG, Employee/Petitioner, v. HOWARD BOHANON ROOFING and FARMERS INS. GROUP, Employer-Insurer, and STATE TREASURER, CUSTODIAN OF THE SPECIAL COMPENSATION FUND.

WORKERS' COMPENSATION COURT OF APPEALS
SEPTEMBER 4, 1998

HEADNOTES

VACATION OF AWARD - SUBSTANTIAL CHANGE IN CONDITION. Where the employee had additional surgery, increased restrictions, and additional permanent partial disability following the issuance of the award on stipulation, and where the causal connection between the work injury and the employee's worsened condition was adequately established, good cause had been shown to vacate the award.

Petition to vacate award granted.

Determined by Wilson, J., Johnson, J., and Pederson, J.

OPINION

DEBRA A. WILSON, Judge

The employee petitions this court to vacate an award on stipulation filed in 1983, based on a substantial change in condition. We grant the petition.

BACKGROUND

The employee sustained a work-related injury to his low back on February 25, 1975, while working for Howard Bohanon Roofing [the employer]. The employee was eighteen years old at the time. The employer and its workers' compensation insurer accepted liability for the injury and paid various benefits. The employee underwent three surgical procedures following the work injury: a 1978 L4-5 laminectomy and discectomy on the right, a 1979 laminectomy and discectomy at L4-5 on the left, and a 1980 extensive laminectomy L4-5 and L5-S1 with extradural scar excision and intradural neurolysis. The employee was rated as having a 30% permanent partial disability of the back, for which the employer and insurer paid permanent partial disability benefits.

In 1982, the employee completed a chronic pain program. On July 12, 1982, Dr. John Wallestad released the employee to return to work, restricted from lifting more than fifty pounds.

In August of 1983, the parties entered into a stipulation for settlement. As of the time of the settlement, the employer and insurer had paid 368 weeks of temporary total disability benefits and were contending that the employee was entitled to only 350 weeks of such benefits based on the law in effect on the date of his injury. The employer and insurer further alleged that the employee was not permanently totally disabled and that he had not cooperated or diligently pursued retraining and rehabilitation. In the settlement agreement, the employee admitted that he was not interested in retraining or job placement as he wanted to go into business with his father in the manufacture and sale of cabinets. The matter was settled on a full, final, and complete basis, with the exception of medical expenses, for \$25,000. An award on stipulation was filed on August 30, 1983.

The employee apparently worked intermittently thereafter. He was taken off work by Dr. Wallestad in September of 1984, was hospitalized for a week, and eventually returned to work full time as a parts runner. The employee changed jobs sometime thereafter, and, in April of 1992, when he was seen by Dr. Wallestad, he reported that he was working full time as a cabinet maker. Because of increased back pain at that time, he was again taken off work, but apparently returned to work by May 4, 1992.

Dr. Wallestad's records reflect that the employee had an aggravation of his back condition in July of 1993, which caused him to miss some time from work, and again in October of 1994. Dr. Wallestad's November 2, 1994, office note reflects that the employee had been laid off by his employer at that time. By December of 1994 the employee was reporting ongoing back and leg pain with episodes of his right leg giving way, and he continued to treat regularly with Dr. Wallestad. In an office note of February 3, 1995, Dr. Wallestad opined that the employee was temporarily totally disabled. Two years later, in February of 1997, the employee reported a significant increase in back discomfort with numbness into the right leg. An MRI conducted on March 3, 1997, revealed a recurrent disc herniation on the right at L4-5 with impingement of the right L5 nerve root.

On May 15, 1997, the employee underwent surgery for a redo right laminectomy and discectomy at L4-5 with anterior posterior fusion of L4-5 and L5-S1. Dr. David Kraker, one of the employee's surgeons, noted that [h]e has a long history of chronic back pain that has been progressive. On November 14, 1997, Dr. Kraker released the employee to return to light-duty work with a ten to fifteen pound weight restriction, working three to four hours per day. Dr. Kraker has since rated the employee as having a 49% permanent partial disability of the back.

On May 21, 1998, the employee filed a petition to vacate the 1983 award on stipulation based on a substantial change in condition. Attached to the petition was the March 16, 1998, report of Dr. Kraker, wherein he opined that the employee's condition had substantially deteriorated since 1984. The employer and insurer filed an objection to the petition on June 29, 1998. Among materials submitted with that objection was the June 19, 1998, report of independent medical examiner Dr. Lloyd Leider.

DECISION

The law in effect on the date of settlement is controlling for purposes of vacating an award on stipulation. Franke v. Fabcon, Inc., 509 N.W.2d 373, 49 W.C.D. 520 (Minn. 1993). Cause to vacate the award in the present case includes (a) fraud, (b) mistake, (c) newly discovered evidence, and (d) substantial change in condition. Krebsbach v. Lake Lillian Coop. Creamery Ass'n., 350 N.W.2d 349, 353, 36 W.C.D. 796, 801 (Minn. 1984). A number of factors may be considered in determining whether an award should be vacated based on a substantial change in condition, including:

- (a) a change in diagnosis;
- (b) a change in the employee's ability to work;
- (c) additional permanent partial disability;
- (d) necessity of more costly and extensive medical care/nursing services than initially anticipated;
- (e) causal relationship between the injury covered by the settlement and the employee's current worsened condition; and
- (f) the contemplation of the parties at the time of the settlement.

Fodness v. Standard Cafe, 41 W.C.D. 1054, 1060-61 (W.C.C.A. 1989).

With regard to the first factor, the last medical record prior to the award was the July 12, 1982, office note of Dr. Wallestad, which listed a diagnosis of chronic pain. In addition, it must be assumed that the employee carried a diagnosis of status post surgery for laminectomies and discectomies. At the present time, the employee is status post surgery for an anterior posterior fusion as well. Also, after the award on stipulation, the employee had a recurrence of a herniated disc. We conclude there has been a change in diagnosis.

There has also been a change in the employee's ability to work. Dr. Wallestad's restriction on the employee's work activities on July 12, 1982, was no lifting over fifty pounds.¹ The stipulation for settlement itself indicates the employee's understanding that he would be able to return to work in cabinet making with those restrictions. In contrast, after his fusion surgery in 1997, the employee has a ten to fifteen pound weight restriction and is to work only three to four hours per day. Even Dr. Leider, the employer and insurer's examiner, has indicated that the employee should not lift more than thirty-five pounds on a repetitive basis. This increase in restrictions will undoubtedly affect the employee's ability to find work.

¹ At oral argument, counsel for the employer and insurer indicated that this court should rely on the vocational records at the time of the award on stipulation for an accurate reflection of the employee's physical restrictions at that time. We note, however, that no vocational records after December 14, 1981, are contained in the file.

The employee's permanent partial disability has also increased since the time of the award on stipulation. Dr. Kraker has rated an additional 19% of the back, over and above the 30% for which the employee had been rated and paid at the time of the award on stipulation. Even Dr. Leider admits that the employee's recent surgery would increase his permanent partial disability rating.

With regard to the factor concerning additional medical care, the employee has been hospitalized a couple of times since the award on stipulation and has undergone fusion surgery; however, medical expenses were left open under the award, and it appears that the employer and insurer have paid these expenses. Where medical expenses are not closed out by the award, the Workers' Compensation Court of Appeals puts less emphasis on the factor of necessity of more costly and extensive medical care. Burke v. F & M Asphalt, 54 W.C.D. 363 (W.C.C.A. 1996).

Finally, we find sufficient connection between the injury covered by the settlement and the employee's current worsened condition. While Dr. Kraker does not specifically state that the employee's current worsened condition is causally related to the 1975 work injury, he notes no other history of injury. Similarly, Dr. Leider notes no injuries to the employee other than the 1975 work injury. Moreover, at oral argument, counsel for the employer and insurer admitted that the employee's current condition is causally related to the 1975 work injury.

Because the employee has adequately demonstrated a change in diagnosis, a change in ability to work, additional permanent partial disability, and an ongoing relationship between his work injury and his current condition, we find cause to vacate the 1983 award on stipulation. However, nothing in this decision should be construed as an opinion as to the employee's entitlement to benefits for periods subsequent to the award on stipulation. The burden of proof in this regard remains with the employee.