TIMOTHY A. BLOCH, Employee/Petitioner, v. HOFFER'S, INC. and EMPLOYERS INS. OF WAUSAU, Employer-Insurer, and WOODBURY'S and EMPLOYERS INS. OF WAUSAU, Employer-Insurer.

WORKERS' COMPENSATION COURT OF APPEALS
OCTOBER 27, 1998

HEADNOTES

VACATION OF AWARD - SUBSTANTIAL CHANGE IN CONDITION. Where the employee had adequately demonstrated a change in diagnosis, change in ability to work, additional permanent partial disability, and a causal relationship between his 1988 work injury and current worsened condition, good cause existed to vacate the award on stipulation covering the 1988 injury; however, given the lack of evidence connecting the employee's current condition to his 1980 work injury, the employee's petition to vacate the award on stipulation concerning that injury would be denied.

Petition to vacate 1983 award denied; petition to vacate 1990 award granted.

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

OPINION

DEBRA A. WILSON, Judge

The employee petitions to vacate two awards on stipulation based on substantial change in condition. Finding no basis to vacate the 1983 award on stipulation, we deny the petition to vacate with regard to that award. However, we grant the petition to vacate the 1990 award on stipulation.

BACKGROUND

The employee sustained a work-related injury to his back on December 9, 1980, while working for Hoffer's as a glazier. The employee was diagnosed with a sprain/strain and was paid benefits for a 5% permanent partial disability of the back due to this injury. In August of 1982, the parties requested an administrative conference at the Department of Labor and Industry to discuss the employee's request to move to the Hibbing area to attend school and pursue employment opportunities. In March of 1983, the parties entered into a stipulation for settlement, wherein Hoffer's and its workers' compensation insurer paid the employee $14,256.32 (representing 52 weeks of temporary total disability benefits), plus $1,500 toward medical care of the employee's choice, in return for a full, final, and complete settlement of the employee's claims, including claims for future medical treatment. An award on stipulation was filed on June 1, 1983. Sometime in 1983, the employee returned to work in the construction trades.

On December 12, 1988, the employee suffered a second work-related injury to his back while working for Woodbury's as a tile setter. The employee was subsequently diagnosed as having a mild bulging disc at L5-S1. On April 2, 1990, Dr. George Rounds rated the employee as having a 7% whole body disability for a lumbar strain with degenerative changes. The employee and Woodbury's and its workers' compensation insurer entered into a stipulation for settlement in May of 1990.[1] At that time, the employee was contending that he had been temporarily totally disabled from December 16, 1988, through January 1, 1990, and that he was entitled to economic recovery compensation for a 7% whole body impairment. Pursuant to the stipulation for settlement, Woodbury's and its insurer agreed to pay the employee $49,500 for a full, final, and complete settlement of all past, present, and future claims related to this injury, with the exception of medical expense claims. An award on stipulation was filed on May 22, 1990.

Apparently due to increased back pain, the employee underwent a myelogram on February 10, 1992, which revealed a defect at L5 on the right. A laminectomy with disc removal at L5 was performed on February 26, 1992, and Woodbury's and its insurer paid for this surgery. In October of 1993, the employee quit his job because of back pain, and by May of 1994 Dr. Rounds had diagnosed arachnoiditis due to scar tissue from the laminectomy. In June of 1994, the employee underwent a functional capacities evaluation. As a result of that evaluation, Dr. Rounds opined that the employee could sit one hour, stand two hours, and walk two hours in an eight-hour day if the employee could alternate activities and incorporate breaks. Dr. Rounds also restricted the employee from any squatting or carrying and limited the employee's lifting to up to six pounds. Dr. Rounds also restricted the employee from any repetitive movements of the feet, as in operating foot controls.

On May 14, 1998, the employee petitioned this court to vacate the 1983 and 1990 awards on stipulation based on a substantial change in condition. The employers and insurer filed an objection to the petition.

DECISION

The Workers' Compensation Court of Appeals may vacate an award for cause. 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 mistake, newly discovered evidence, fraud, and substantial change in condition. Krebsbach v. Lake Lillian Coop. Creamery Ass'n., 350 N.W.2d 349, 36 W.C.D. 796 (Minn. 1984). The employee in the present case alleges substantial change in condition as the basis for vacation of the two awards on stipulation.

[1] Employers Insurance of Wausau was the workers' compensation insurer for both Hoffer's and Woodbury's.

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, at the time of the first award on stipulation, the employee had been diagnosed with a sprain/strain, and at the time of the second award on stipulation, the employee had been diagnosed with a bulging disc. Following the second award on stipulation, the employee had surgery for a herniated disc and then developed arachnoiditis as a result of that surgery. Therefore, it is clear that there has been a change in diagnosis since the issuance of the awards.

There has also been a change in the employee's ability to work, in that the employee has not worked since the fall of 1993, and the restrictions recommended by Dr. Rounds in 1994 would severely impair the employee's ability to find any employment. The employers and insurer contend that the change in the employee's ability to work is the result of a fall in December of 1992 or an incident in August or September of 1992, when the employee turned and experienced a popping in his back. We note, however, that in January of 1997 the employee litigated a claim for medical bills and medical mileage. In a decision filed on March 7, 1997, a compensation judge specifically found that [t]he turning incident of late summer 1992, an exacerbation, does not constitute an intervening, superseding injury, and that [t]he tripping incident of December 1992, a temporary exacerbation, does not constitute a superseding, intervening injury.

The employee claims that he is entitled to an additional 13% whole body disability as a result of the laminectomy performed in 1992. In response, the employers and insurer contend that there is no medical opinion supporting that rating. They do not dispute, however, that the employee had a laminectomy with poor results. Because the 13% rating alleged by the employee is rated under Minn. R. 5223.0070, subp. 1B(2)(c), which requires surgery with poor surgical results and major restriction of activities related to back and leg pain, and because medical records establish that the employee has had a poor surgical result and has major restrictions, the absence of a medical opinion to support the claimed rating is of little consequence. The employers and insurer's other argument is that the employee was earlier rated for 5% permanency related to the 1980 injury and 7% permanency related to the 1988 injury. The employers and insurer fail to acknowledge, however, that the 5% rating was to the back and that a 13% whole body rating is

significantly greater than the 7% whole body rating that had been assigned under the new law at the time of settlement in 1990 and that undoubtedly encompassed the earlier 5% rating to the back.

The employee has also received additional medical treatment, in the form of surgery, since the issuance of the awards on stipulation. However, medical benefits were left open under the terms of the 1990 award on stipulation, and where medical expenses have not been closed out by an award, we will place less emphasis on the factor of necessity of more costly and extensive medical care.[2] Burke v. V.F. & M Asphalt, 54 W.C.D. 363 (W.C.C.A. 1996).

Finally, we find sufficient connection between the 1988 work injury and the employee's current worsened condition but no such connection between the 1980 work injury and the employee's current condition. Dr. Peter Boman stated in his March 24, 1993, report that the employee's 1988 work injury was a substantial contributing factor in his need for surgery and medical care thereafter. On May 4, 1994, Dr. Boman opined that the employee's complaints at that time were related to that injury.[3] Also, in 1997, a compensation judge found, in an unappealed finding, that [a]s a direct result of the injury of December 16, 1988, and the necessary surgery of February 1992, the employee has developed arachnoiditis from the scar tissue which condition, with its development over time, has gradually resulted in increased symptomatology for the employee and has necessitated the employee's need to obtain ongoing medical care and treatment. There is, however, no medical opinion indicating that the 1980 work injury is a substantial contributing factor in the employee's current condition.

Because the employee has adequately demonstrated a change in diagnosis, a change in ability to work, additional permanent partial disability, and a causal relationship between his 1988 work injury and his current condition, we find good cause to vacate the 1990 award on stipulation.[4] There being no causation opinion relating the employee's current condition to his 1980 work injury, we find no basis to vacate the 1983 award on stipulation.

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[2] In a 1997 decision, a compensation judge ordered Woodbury's and the insurer to pay for the employee's treatment.

[3] Dr. Boman has referred to the December 1988 injury as the employee's original injury.

[4] However, nothing in this decision should be construed as an opinion as to the employee's entitlement to benefits for periods subsequent to the 1990 award on stipulation. The burden of proof in this regard remains with the employee.