

DANNY J. BOILEAU, Employee, v. A-PLUS INDUS. and LIBERTY MUT. INS. CO.,
Employer-Insurer/Petitioner.

WORKERS' COMPENSATION COURT OF APPEALS
OCTOBER 1, 1998

HEADNOTES

VACATION OF AWARD - FRAUD. The petitioners have failed to establish any false misrepresentations by the employee inducing the petitioners to enter into the 1995 stipulation for settlement. The stipulated agreement represents a compromise settlement of various disputed claims, including the extent of the employee's ability to work. There is no evidence of misrepresentation amounting to fraud sufficient to vacate the 1995 award on stipulation in this case.

VACATION OF AWARD - SUBSTANTIAL CHANGE IN CONDITION. The employer and insurer's petition to vacate is denied where the petitioners failed to establish a substantial change or improvement in the employee's diagnosis, permanency, need for medical care, or ability to engage in sustained, gainful employment since the 1995 award on stipulation.

Petition to vacation award on stipulation denied.

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

OPINION

THOMAS L. JOHNSON, Judge

A-Plus Industries and Liberty Mutual Insurance Company petition to vacate an Award on Stipulation filed May 3, 1995. Concluding the employer and insurer have failed to establish good cause to vacate, we deny the petition.

BACKGROUND

The employee, Danny J. Boileau, was born on February 17, 1943, and is currently 55 years old. He left school in the ninth grade because he was working full-time as a truck mechanic. Around 1960, the employee worked for Harmon Glass for two years. He then went to work as a sheet metal worker for the employer, A-Plus Industries. On April 20, 1978, the employee injured his cervical and lumbar spine while working for the employer, then insured by Liberty Mutual Insurance Company. The employer and insurer admitted liability for the injury and commenced payment of benefits to the employee. In May 1982, the parties entered into a to-date settlement of all claims, including a claim for a 25 percent permanent partial disability of the spine. An Award on Stipulation was filed on June 9, 1982.

In 1987, the employee returned to his family physician, Dr. Moriarity, complaining of increasing back pain. A CT scan taken in September 1987 showed severe spinal stenosis and foraminal narrowing bilaterally at C6-7, severe foraminal narrowing at C3-4 on the left, and moderate arthritic changes at C5-6. A lumbar scan showed central stenosis and small bulging discs at L3-4 and L4-5. Dr. Moriarity referred the employee to Dr. Richard V. Johnson, who first saw the employee on October 29, 1987. On examination, the doctor noted mild limitation of cervical range of motion and mild hypesthesia of the left toes. Dr. Johnson ordered an EMG which he believed was consistent with possible early polyneuropathy or concussive mononeuropathies and radicular findings at C7. Continuing conservative care was recommended.

Following the work injury, the employee was self-employed as a custom window frame maker. The employee's wife and son worked with him in this business. Until 1989, the employee's earnings exceeded his date of injury wage. In April 1989, the employee was referred to Dr. Charles Ray at the Institute for Low Back Care. Dr. Ray performed surgery consisting of a paralateral approach for exploration with a decompression and partial pediclectomy, removal of bone spurs and disc material, decompression of ganglion, and release of the lateral entrapment of a ligament on the right at L3-4. The employer and insurer paid temporary total disability benefits through November 30, 1989, following the surgery. After December 1, 1989, the employee's wife and son assumed increasing responsibility for the framing business.

Dr. Johnson examined the employee again on February 27, 1991. Another CT scan was obtained which showed a large herniated disc at C4-5 unchanged from the prior study. A lumbar MRI scan on April 3, 1991, showed fibrosis on the right at L3-4 with mild disc bulging from L3 to S1. Dr. Johnson did not believe further surgery was indicated. On May 28, 1991, Mrs. Boileau told Dr. Johnson about episodes since 1989 in which the employee became disoriented and talked gibberish. The doctor ordered an EEG which showed focal spikes in the left temporal region. Tegretol was prescribed to control these episodes. The employee returned to see Dr. Johnson in March 1992. He had stopped taking the Tegretol and had what the doctor described as a major motor seizure.

In December 1992, the employee complained to Dr. Johnson of worsening left-sided pain, right leg pain and depression. The doctor believed a pain clinic would be appropriate. On January 28, 1993, the employee was evaluated by Dr. Matthew Monsein. Dr. Monsein diagnosed multilevel degenerative cervical and lumbar disc disease, a seizure disorder, depression and chronic pain syndrome. Dr. Monsein also recommended the employee participate in a chronic pain program. In a report dated July 29, 1993, Dr. Johnson opined the employee had chronic degenerative changes in his cervical and lumbar spine secondary to his 1978 work-related injury, depression and chronic pain syndrome. He concluded the employee had not been able to work for some time due to his pain, and had severe restrictions on his ability to work.

On June 11, 1993, the employee filed a claim petition alleging entitlement to ongoing temporary total, temporary partial, or permanent total disability benefits from and after November 30, 1989. In a Findings and Order filed November 19, 1993, a compensation judge at the Office of Administrative Hearings awarded temporary total disability benefits to the employee

from January 1, 1990 and continuing, and ordered the employer and insurer to pay for chronic pain treatment. On appeal, the Workers' Compensation Court of Appeals vacated the decision of the compensation judge and remanded the case for further consideration. The Workers' Compensation Court of Appeals decision was affirmed by the Supreme Court on October 25, 1994.

While the appeals were pending, the employee was seen by Dr. Joseph Flake, on March 9, 1994, complaining of left knee pain, back and leg pain, and increased neck stiffness and pain. The employee stated he injured his left knee in December 1993. On examination, the doctor noted decreased cervical range of motion and paravertebral muscle spasm, more on the right. His examination of the low back was normal. The diagnosis was left knee injury, probable intra articular pathology, chronic low back pain with radiculopathy, and cervical strain with a recent increase in pain. (Er-Ins Exh. B.) On March 8, 1995, the employee was seen by Dr. Lowell Wigdahl for a psychiatric evaluation. The doctor noted a past history of depression, low back pain, and partial seizures which developed after the 1989 back surgery. Dr. Wigdahl diagnosed a chronic major depressive disorder, a seizure disorder, and degenerative disc disease with chronic pain. (Er-Ins Exh. I.) The employee saw Dr. William Kane on March 9, 1995. The doctor noted the employee took Tegretol for epilepsy. He opined the employee was suffering from a chronic pain disorder, as well as nonorganic problems and depression. Dr. Kane concluded surgery was not appropriate, and recommended a chronic pain treatment program. (Er-Ins Exh. I.)

In April 1995, the parties entered into a Stipulation for Settlement and Stipulation to Permanent Total Disability Status. The parties stipulated the employee was permanently and totally disabled as of November 30, 1989, and agreed that the employee had received Social Security disability benefits (SSDI) since November 1, 1992. The employer and insurer paid the employee a lump sum of \$95,000.00, less attorney's fees, in settlement of all claims through August 1, 1994. An additional \$9,200.00 was paid to the employee closing all claims for permanent total benefits from August 1, 1994 through February 28, 1995. The parties agreed that as of November 1, 1992, the employer and insurer would be entitled to reduce permanent total disability benefits by the offset set forth in Minn. Stat. § 176.101, subd. 4. Finally, the employer and insurer agreed to issue payment of ongoing permanent total disability benefits from and after February 28, 1995, with appropriate payment of supplementary benefits, and with an offset taken by the employer and insurer for the employee's receipt of Social Security Disability income. The Award on Stipulation was filed on May 3, 1995.

In July 1997, the insurer engaged the R&D Agency, Inc., to investigate the employee's activities. The R&D Agency obtained surveillance videotape of the employee on August 21 and 22, September 16, 18 and 30, and October 1 and 2, 1997 at the employee's property in Brook Park, Minnesota. (Er-Ins Exh. E.) The R&D Agency also prepared surveillance reports dated September 15, September 25, and October 8, 1997. (Er-Ins Exhs. F, G, H.) The court has reviewed the videotape and surveillance reports. They show the employee operating a golf cart, a small tractor, a large tractor, and a front end loader while performing various tasks around his property. The tapes show the employee on various occasions bending to pick up small rocks and debris from the ground, loading them into a trailer and then unloading the trailer. This activity

occurred several times over the course of the surveillance. On one occasion, the employee picked up a child, placed her on his left shoulder and carried her around. On another occasion, the employee lifted the child up into a tree. The employee dug in the ground with a pick axe and was observed lifting a large rock into the trailer with the aid of his wife.¹

In March 1998, the R&D Agency conducted an additional investigation regarding the employee's custom framing business, General Services & Manufacturing. The investigator spoke with persons at Hoffer's Glass who stated Hoffer's used General Services & Manufacturing for work done at the Mall of America. They also learned that Brin Northwestern Glass Company and Harmon Glass Company had employed the employee's business on various projects. (Er-Ins Exh. K.) Pamela Snyder, a physical therapist, reviewed certain medical records and the surveillance tape at the request of the insurer. She concluded the employee was not totally disabled, and opined the employee was orthopedically capable of sedentary to light employment on a full-time basis. (Er-Ins Exh. J.)

On July 9, 1998, the employee was seen by Dr. Timothy A. Garvey at the University of Minnesota Orthopedic Clinic for evaluation of neck pain and headaches. The employee described an acute onset of headaches following an epidural steroid injection in February 1998. Dr. Garvey reviewed x-rays from August 1996 that showed degenerative changes primarily at L3-4. A follow-up x-ray in April 1997 showed advanced degenerative changes at L3-4 with herniated discs at L4-5 and L5-S1. An MRI scan taken June 19, 1998, showed a small herniated disc at T1-2 and C5-6 with spondylosis. The doctor seconded Dr. Johnson's recommendation of a radio isotope study to check for a spinal fluid leak.

In April 1998, Dr. Johnson reviewed the employee's chart and the videotapes prepared by the R&D Agency. Dr. Johnson opined the employee continues to suffer from chronic back pain, and stated there has been no change in his diagnosis. The doctor noted the employee suffered complications from an epidural injection resulting in post-spinal headaches, and that the employee continues to suffer from quite severe depression. Dr. Johnson concluded the employee is not employable on a regular basis. (Ee Exh. F.)

In an affidavit signed April 30, 1998, the employee states he developed an ongoing seizure disorder and major depression after his 1989 back surgery. He states he continues to suffer from severe back pain, and has severe and constant headaches following an epidural injection into his spine. He acknowledged he engages in some yard work, but asserts that the activities increase his pain and he becomes stiff and sore afterwards. Currently, the employee states he takes medication for back pain, seizures, headaches and, occasionally, anti-depressants. (Ee Exh. E.)

¹ This is not intended to be an exhaustive list of all of the activities recorded on the videotape but, rather, a summary only.

DECISION

This court may set aside an award on stipulation for cause pursuant to Minn. Stat. § 176.461 and Minn. Stat. § 176.521, subd. 3 (1995).² Cause is limited to four grounds, including fraud or a substantial change in medical condition since the time of the award that was clearly not anticipated and could not reasonably have been anticipated at the time of the award. Minn. Stat. § 176.461(3) and (4); Franke v. Fabcon, Inc., 509 N.W.2d 373, 376, 49 W.C.D. 520, 523 (Minn. 1993). The employer and insurer seek a vacation of the May 3, 1995 Award on Stipulation on the grounds of fraud or a substantial change in medical condition.

Fraud

The employer and insurer contend the surveillance information establishes the employee is capable of various labor intensive activities, contrary to the employee's assertion that he continues to be totally disabled. Investigator Mark Conrad spoke with the employee on September 26, 1996. He reported the employee told him he could not do much of anything except a little walking and some driving, and that he was incapable of getting in and out of bed without the help of a trapeze. (Er-Ins Exh. C.) These claims, the petitioners contend, are inconsistent with the physical activities shown on the surveillance tape. They argue the evidence submitted proves the employee is no longer permanently and totally disabled, and the employee's representation that he continues to be totally disabled is, accordingly, fraudulent and constitutes grounds for discontinuing payment of permanent total disability benefits.

To prevail on the ground of fraud, the petitioners must establish that the employee made false representations inducing the employer and insurer to enter into the stipulation for settlement.³ Thus, the employer and insurer must show the employee misrepresented his physical condition and/or ability to work at the time of the settlement. See, e.g., Millette v. Victoria Grain Co., No. [redacted to remove Social Security Number] (W.C.C.A. September 25, 1992); Mehta v. Meldisco, No. [redacted to remove Social Security Number] (W.C.C.A. October 26, 1995). In this case, the employer and insurer do not allege the employee falsely misrepresented his physical condition and ability to work prior to the 1995 Stipulation for Settlement. Rather, they contend

² The law in effect on the date of the award on stipulation is controlling for purposes of a petition to vacate. Franke v. Fabcon, Inc., 509 N.W.2d 373, 49 W.C.D. 520 (Minn. 1993).

³ To vacate an award on the ground of fraud, the petitioner must provide evidence of: (1) a false representation of past or present fact; (2) the fact must be susceptible of knowledge; (3) the representing person must know the fact is false; (4) the representing party must intend that another be induced to act based on the false representation; (6) the other person must in fact act on the false representation; and (7) the misrepresentation must be the proximate cause of actual damages. Green v. Setterholms Fairway Foods, 42 W.C.D. 907 (W.C.C.A. 1989); see, e.g., Weise v. Red Owl Stores, Inc., 286 Minn. 199, 202, 175 N.W.2d 184, 187 (Minn. 1970).

only that the employee has misrepresented his current eligibility for ongoing permanent total disability payments.

The employer and insurer acknowledge case law holding that the fraudulent acts or statements relied upon by the petitioner must occur at or before the time of the settlement agreement. They argue, however, that this rule is fundamentally inappropriate in cases where the employer and insurer have ongoing liability for disability benefits, and urge this court to limit the rule to full, final and complete settlements. They point out that in a full, final and complete settlement, a lump sum payment is made based on the employee's condition as of the date of the settlement. However, the petitioners argue that part of any settlement agreement providing for ongoing liability is an implicit agreement that the employee's condition will remain as represented at the time of the settlement. The employer and insurer contend the employee has falsely represented that he has remained totally disabled. Therefore, the petitioners assert, they have established fraud sufficient to vacate the award. We are not persuaded.

The parties' stipulated agreement represents a compromise settlement of disputed claims for ongoing wage loss benefits. Prior to the settlement, the employer and insurer defended against the employee's claims contending, in part, that the employee was not medically disabled from gainful employment. The settlement clearly benefitted both parties. The employee was awarded ongoing benefits in the form of permanent total disability, and the employer and insurer were entitled to reduce their liability for workers' compensation benefits by the Social Security offset provided in Minn. Stat. § 176.101, subd. 4. The employer and insurer clearly continue to dispute the employee's ability to work. There is, however, no evidence of current or past representations amounting to fraud here. Compare Millette, *id.* At best, the evidence offered by the petitioners may establish a change in the employee's ability to work since the 1995 stipulation for settlement. We, therefore, deny vacation of the award on stipulation on the basis of fraud.

Substantial Change in Medical Condition

The employer and insurer also contend there has been a substantial improvement in the employee's medical condition since the award on stipulation justifying vacation of the 1995 award on stipulation. They assert the surveillance films show the employee performing a variety of physically intensive activities on his property and prove the employee is currently physically able to work. Pamela Snyder, a physical therapist, reviewed the employee's medical records and the surveillance tapes. She concluded there has been a substantial improvement in the employee's physical condition and his ability to function. Ms. Snyder opined the employee is not now permanently disabled and is able to work on a full-time basis at sedentary to potentially light-medium work. (Ex. J.) We are not persuaded.

In determining whether a substantial change in the employee's condition has occurred, this court in the past has examined factors such as: (1) a change in diagnosis; (2) a change in the employee's ability to work; (3) additional permanent partial disability; (4) the necessity of more costly and extensive medical care/nursing services

than initially anticipated; (5) a causal relationship between the injury covered by the settlement and the employee's current medical condition; and (6) the contemplation of the parties at time of settlement. Fodness v. Standard Cafe, 41 W.C.D. 1054, 1060-61 (W.C.C.A. 1989) (citations omitted). These factors must be applied in a manner consistent with Minn. Stat. § 176.461(4) which requires a change in medical condition "that was clearly not anticipated and could not reasonably have been anticipated at the time of the award." See, e.g., Soeffner v. McGuire's Motor Inn, 40 W.C.D. 21, 22 (W.C.C.A. 1987) (medical proof that condition was unanticipated is necessary to show substantial change in medical condition).

Just prior to the settlement agreement, on March 9, 1994, the employee saw Dr. Joseph Flake. The employee's chief complaint was left knee pain following an injury in December 1993. The employee also complained of right and left leg pain, low back pain and cervical pain and stiffness. Dr. Flake diagnosed a left knee injury, chronic low back pain with radiculopathy and cervical strain. On March 8, 1995, Dr. Lowell Wigdahl diagnosed a chronic major depressive disorder, a seizure disorder and degenerative disc disease with chronic pain. The next day, Dr. Kane opined the employee was suffering from chronic pain and depression. Dr. Kane recommended a chronic pain treatment program, as had Dr. Johnson and Dr. Monsein. The employee apparently never obtained such treatment.

On July 9, 1998, Dr. Garvey noted that degenerative changes previously noted at L3-4 had advanced with herniated discs at L4-5 and L5-S1, T1-2 and C5-6 with spondylosis. Rather than improving, it appears the employee's degenerative spinal condition may have progressed since the date of the settlement. We see no evidence that the employee's depression or chronic pain problem has improved since May 3, 1995. We conclude the employer and insurer have failed to prove a change in the employee's diagnosis. Nor is there any evidence of a decrease in either permanent partial disability or anticipated medical care.

The petitioners rely primarily on the surveillance videotapes and the opinions of Ms. Snyder to establish a substantial change in medical condition. This evidence, they assert, proves the employee is now physically capable of working. We acknowledge the videotape demonstrates the employee is physically able to perform certain tasks. However, we also note the employee is 55 years old with a ninth grade education, and has not been competitively employed since 1978. Dr. Johnson, who examined the employee both before and after the stipulation for settlement, opined that the employee remains incapable of employment on a sustained basis. "Permanent total disability is primarily dependent on an employee's vocational potential, rather than his physical condition." Thompson v. Layne of Minn., 50 W.C.D. 84, 100 (W.C.C.A. 1994), *summarily aff'd* (Minn. Jan. 19, 1994); see McClish v. Pan-O-Gold Baking Co., 336 N.W.2d 538, 542, 36 W.C.D. 133, 139 (Minn. 1983) (concept of total disability depends on employee's ability to find and hold job, not on his or her physical condition). Although Ms. Snyder opined the

employee was physically capable of working, there is no evidence of what, if any, jobs exist in the Mora area which are vocationally and physically suitable for the employee.

The employee offered the opinion of Dr. Johnson that his condition had not changed, and he remains unable to work on a regular basis. The employee stated that his symptoms vary from day to day and that, although he engages in physical activity from time to time, the activity causes his symptoms to increase. The employee has been diagnosed with a degenerative spinal condition, chronic pain, seizures, and major depression. All of these conditions adversely affect the employee's ability to engage in sustained, gainful employment. We conclude the petitioners have failed to establish evidence of a substantial improvement in the employee's medical condition which was not anticipated or could not have been reasonably anticipated at the time of the settlement.

Although this court has jurisdiction to refer factual disputes to the Office of Administrative Hearings for a determination before a compensation judge, Minn. Stat. § 176.381, in this case, we conclude that there is nothing in the evidence submitted requiring referral for an evidentiary hearing. Accordingly, the petition to vacate the May 3, 1995 Award on Stipulation on the grounds of fraud or a substantial change in medical condition is denied.