AMY BRICKER, Employee/Petitioner, vs. MY PLACE CAFE, Employer, and KEMPER NATIONAL INSURANCE CO., Insurer.

WORKERS' COMPENSATION COURT OF APPEALS
FEBRUARY 6, 1998

HEADNOTES

VACATION OF AWARD - MISTAKE. The employee's petition to vacate a mediation award requires referral to a compensation judge of the Office of Administrative Hearings for factual findings regarding the nature and extent of the employee's work injury, primary liability and the causal relationship between the employee's injury and subsequent medical treatment.

Referred to OAH.

Determined by Johnson, J., Hefte, J., and Wheeler, C.J.

OPINION

THOMAS L. JOHNSON, Judge

The employee petitions to vacate the mediation award served and filed January 25, 1996, on the basis of a mutual mistake of fact and a substantial change in her medical condition. We refer this matter to a compensation judge at the Office of Administrative Hearings for a hearing and factual findings in accordance with this opinion.

BACKGROUND

In mid-April 1995 the employee, Amy Bricker, slipped at home and injured her right ankle. Dr. David Kittleson, an orthopedic surgeon, diagnosed an anterior lateral talar dome fracture, and tomograms revealed a nondisplaced fracture of the talus with no evidence of separation of the bone fragment. (Ex. B, tomogram of 5/19/95.)[1] By mid-June, Dr. Kittleson stated the fracture appeared to be healing, but the employee had pain and swelling in the area of the lateral ligaments. He elected to treat the employee as for a Grade II ankle sprain until her ligamentous symptoms subsided, then consider arthroscopic surgery if the fractured fragment was not healing in properly. (Ex. B, note of 6/13/95.) Six weeks later the employee still had swelling and tenderness, and pain with weight-bearing and walking, and Dr. Kittleson and the employee discussed an arthroscopic exam to assess the articular damage of the lateral talar dome. (Ex. B,

[1] All exhibits were offered in support of the employee's petition to vacate the mediation award. The employer and insurer submitted no exhibits with their objection to the employee's petition.

note of 8/1/95.) The employee did not seek further treatment for her ankle condition for more than two months.

In September 1995 the employee began working as a waitress for the employer, My Place Cafe. She alleged she injured her right ankle on October 3, 1995,[2] when she slipped on a wet floor at work and fell. She saw Dr. Kittleson's associate, Dr. Arnulf Svendsen, on October 10th, and x-rays revealed further fragmentation of the talar dome. Dr. Kittleson later stated the employee's new x-rays showed dramatic changes: in June there was a small osteochondral defect over the most lateral aspect of the ankle joint with the suggestion of a free-floating fragment, but the rest of the joint looked good. In October, however, there was extensive fragmentation and degeneration of the lateral half of the talar dome, with multiple loose fragments. Dr. Kittleson recommended surgery to remove the loose bone fragments and assess the joint surface to see if abrasion was necessary. (Ex. B., note of 10/18/95.) The surgery took place on January 30, 1996. Dr. Kittleson removed multiple loose fragments of bone and cartilage and performed an abrasion chondroplasty due to extensive damage to the lateral half of the talar dome. (Ex. B, note and surgery note of 1/30/96.)

Approximately one month after the surgery, the employee saw a chiropractor, Dr. Michael Hemple, with complaints of low back pain. She reported not only the October 3rd injury, but a second slip-and-fall on December 22, 1995, while working at Tequilaberry's. She reported falling on her back on a wet floor, striking her head, neck and back. She went to Mercy Hospital, but no x-rays were taken and she received no follow-up care. (Ex. D, letter of 9/8/97.)[3] Dr. Hemple stated that x-rays taken in his office on February 22, 1996, showed pelvic unleveling with the left iliac crest higher than the right, multiple subluxations in the lumbar spine with a generalized tilt to the right and flexion malpositions at all lumbar levels, posterior disc compression at L3-4, L4-5 and L5-S1, and spondylosis at the L2-3 disc space. Dr. Hemple opined that the employee's low back pain was caused by the gait disturbance resulting from her right ankle fracture and casting. He opined further that the fall at Tequilaberry's aggravated her low back and neck, and treated her for that injury on February 23rd and 26th.

The employee also followed up with Dr. Kittleson after her surgery. Although there was some gradual improvement in her condition, in August 1996 she still needed to wear a support when walking and standing. In mid-September the employee sustained two further injuries to her right ankle, hitting it on the lateral side in an incident at home and reporting a slip-

[2] Some of the medical records state this injury occurred on October 5, 1995. Documents filed with the Department of Labor and Industry state the date of injury is October 3rd.

[3] No corroborating records from Mercy Hospital were submitted.

and-fall accident at work.[4] There were no new findings or changes on examination or x-ray after these incidents. (Ex. B, note of 9/12/96.) The employee's condition remained symptomatic in December 1996, and in January 1997 she sought an opinion from Dr. Harold Kitaoka, an orthopedic surgeon at the Mayo Clinic. Dr. Kitaoka recommended ankle realignment and fusion. (Ex. C.) The employee also returned to see the chiropractor, Dr. Hemple, on January 23, 1997, for complaints she related to a slip-and-fall at Colonial Liquor Store on November 21, 1996.[5] She reported slipping on a wet floor and falling, striking her head and neck. (Ex. D, letter of 9/8/97 at 2.) Dr. Hemple took the employee off work and appears to have treated her through at least March 1997, primarily for head and neck complaints. He noted, however, that she continued to have difficulty walking due to her right ankle injury, and continued to have gait disturbance and low back pain as a consequence.

Dr. Kittleson performed a fusion of the employee's right ankle on May 7, 1997. By September 1997 she was able to use a removable walking brace, but could not yet bear weight without the brace. She also complained of low back pain, which Dr. Kittleson attributed, at least in part, to an uneven stance resulting from the employee's favoring of her right ankle. He stated the employee had not attained maximum medical improvement, and he was therefore unable to make a final determination regarding the extent of the employee's permanent partial disability. (Ex. B, letter of 9/10/97.)

The employer and its insurer, Kemper National Insurance Company, initially denied liability for the employee's injury pending further investigation. (Judgment Roll, Notice of Denial of Liability dated 10/18/95.) Less than four months after the injury, on January 25, 1996, the parties participated in a mediation session at the Department of Labor and Industry. In a mediation award served and filed the same day, the parties entered into a full, final and complete settlement of all the employee's Apast, present and future@ claims for workers' compensation benefits as a result of the October 3, 1995, injury. In return for a lump sum payment of $5,000 and payment of medical costs from the date of injury through December 31, 1995, all claims were closed out, including claims for wage loss benefits, permanent partial disability, rehabilitation and medical benefits. The employee now petitions to vacate the mediation settlement.

DECISION

Minn. Stat. §§ 176.461 (Supp. 1993) and 176.521, subd. 3 (1992) govern this court's authority over petitions to vacate. An employee must show good cause in order for us to exercise this authority. Stewart v. Rahr Malting Co., 435 N.W.2d 538, 539, 41 W.C.D. 648, 649 (Minn. 1989). "Good cause" to vacate an award is limited to: (1) a mutual mistake of fact;

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[4] The employee seems to have held several part-time jobs over the years, often working for more than one employer at the same time. We cannot determine where this alleged work injury occurred.

[5] It is unclear whether the employee was working at the store, or was a customer.

> (2) newly discovered evidence; (3) fraud; or (4) 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. The employee requests vacation of the mediation award on the grounds of mutual mistake of fact and/or substantial change in medical condition.[6]

The employee argues the parties believed, at the time of the mediation and award, that she sustained only a temporary aggravation of her right ankle condition on October 3, 1995. She argues this assumption constitutes a mutual mistake of fact because the injury has proven to be permanent. We believe it is clear the mediation settlement is based on the assumption that the injury was temporary. First, the mediation award states that its intent is to resolve a temporary aggravation of a pre-existing condition to the right ankle. (Mediation Award at page 1.) Second, the parties were aware that the employee was going to undergo surgery on her ankle less than one week after the settlement discussions - i.e., on January 30, 1996 - yet the award specifically closed out all medical claims after December 31, 1995. Finally, on a checklist completed by the employee to verify her understanding of the agreement, she indicated that waiver of her right to sue the insurer to establish liability for her injury was not applicable. All of these facts evidence a belief by all parties that the employee's October 3rd injury was temporary.

The facts presented by the employee, however, could suggest that the injury was permanent. Dr. Kittleson stated the findings on x-ray differed considerably after October 3rd when compared to prior x-rays. He also causally related the injury to the 1996 surgery, stating the injury caused extensive traumatic fracturing of the right ankle joint, necessitating arthroscopic surgery in January 1996. He opined that the non-work injury in April 1995 caused minimal damage and clearly would not have led to the need for arthroscopic surgery. (Ex. B, letter of 9/10/97 at 3.) Although he did not express a definite causation opinion regarding the 1997 fusion surgery, he stated that the need for fusion of the ankle could not have been anticipated at the time of the settlement. Dr. Hemple causally related the injury to the employee's back pain, stating the ankle injury caused an alteration in her gait, which in turn altered the mechanics of her spine

[6] Argument submitted with employee's petition to vacate discussed only substantial change in medical condition. At oral argument, however, the employee's attorney argued both grounds for vacation of the mediation award.

and caused low back pain.[7] He suggested also that the ankle fracture and subsequent alteration in gait contributed to other reported incidents of slipping and falling. (Ex. D, letter of 9/8/97.)[8]

There is, however, also evidence of a significant number of other injuries and accidents beginning in April 1995, and the employer and insurer maintain their denial of primary liability. We conclude a full exploration of the facts is necessary before we can consider the employee's petition. We therefore refer this matter to the Office of Administrative Hearings for hearing before a compensation judge. Specifically, the compensation judge shall make findings regarding the nature and extent of the injury or injuries sustained,[9] the employer and insurer's liability for any injury/injuries that might have been sustained, and the causal relationship between any injury/injuries sustained and the medical care received by the employee. When these findings have been made, the matter shall be returned to this court for consideration of the employee's petition.

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[7] As noted previously, Dr. Kittleson also attributed the employee's low back pain, at least in part, to her ankle injury. If mediation agreement, which closes out all . . . future claims . . . related to the October 1995 injury, purports to close out claims for unknown injuries, including alleged consequential injuries, the agreement may well be contrary to law. See Sweep v. Hanson Silo Co., 391 N.W.2d 817, 39 W.C.D. 51 (Minn. 1986). See also Chopp v. Itasca County, 49 W.C.D. (W.C.C.A. 1993); Phillips v. Honeywell, 48 W.C.D. (W.C.C.A. 1992), summarily aff'd (Minn. March 5, 1993).

[8] In addition to the other injuries and accidents referenced earlier in this opinion, the employee also reported an unrelated injury to her **left** ankle in September 1995, without any deficits. (Ex. B, note of 10/18/95.)

[9] The employee shall promptly file a Claim Petition with the Office of Administrative Hearings and serve a copy on the employer and insurer. The Petition should set out the employee's claims regarding the injury or injuries claimed, the date(s) of injury, the nature and extent of the injury/injuries, and the benefits claimed. The employer and insurer shall then have 20 to serve and file their answer in accordance with Minn. Stat. § 176.321.