

JAMES MICHAEL COOK, Employee/Petitioner, v. ALPHA HOMES, INC. and EMPLOYERS
INS. OF WAUSAU, Employer-Insurer.

WORKERS' COMPENSATION COURT OF APPEALS
JULY 9, 1998

No. *[redacted to remove social security number]*

HEADNOTES

VACATION OF AWARD - SUBSTANTIAL CHANGE IN CONDITION. The employee's petition to vacate a 1987 Stipulation for Settlement is granted where there is evidence of a change of diagnosis from myofascial strain to mechanical low back pain with degenerative disc disease at L4-5 resulting in a fusion surgery subsequent to the stipulation for settlement, along with evidence of increased limitations on the employee's ability to work, increased medical care and expenses, and increased permanent partial disability, and the employee's treating doctor opined that the change in condition was causally related to his 1986 work injury.

Petition to vacate award on stipulation granted.

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

OPINION

THOMAS L. JOHNSON, Judge

The employee petitions to vacate an Award on Stipulation served and filed March 30, 1987, on the basis of a substantial change in condition. We conclude that the employee has established good cause sufficient to set aside the award and, accordingly, grant the petition to vacate.

BACKGROUND

The employee sustained an admitted, work-related injury to his low back on January 6, 1986, while working as a human services technician for the employer. The employee was initially seen by Dr. R.M. Kaiser who treated the employee for a lumbar spine myofascial strain. Dr. Kaiser referred the employee to Dr. Raymond L. Struck, an orthopedic surgeon, who first saw the employee on January 28, 1986. Dr. Struck diagnosed a resolving myofascial strain and treated the employee conservatively. On April 28, 1986, the doctor completed a Functional Capacities Evaluation (R-33) releasing the employee to return to work with restrictions. Dr. Struck subsequently opined the employee reached maximum medical improvement (MMI) for his low back injury as of January 6, 1987. He provided a permanent partial disability rating of 3.5 percent, and indicated that the employee would not be able to return to his former employment.

On January 13, 1987, the employer and insurer filed a notice of intent to discontinue temporary total benefits (NOID) based on Dr. Struck's MMI report. The employee objected and requested an administrative conference. On February 20, 1997, the employer and insurer filed a second NOID, alleging that the employee had returned to work on December 22, 1986, and that temporary total disability benefits had been mistakenly paid. Shortly thereafter the parties entered into a Stipulation for Settlement providing for a full, final and complete settlement of the employee's workers' compensation claims, except future medical expenses, in return for a lump sum payment of \$7,800.00. An award on stipulation was filed on March 30, 1987.

Approximately two years later, the employee sought treatment from Dr. Peter Holmberg, an orthopedic surgeon, reporting persistent lumbar spine problems. Although an MRI scan, taken on February 27, 1989, showed disc degeneration at L4-5, Dr. Holmberg continued to diagnose a lumbar spine strain. The doctor did not believe that the employee was a candidate for surgery, and continued conservative treatment. Dr. Holmberg dismissed the employee from his care in November 1992, indicating that long-term management of non-operative conditions was outside the scope of his specialty, and citing concerns about possible prescription drug abuse.

On August 3, 1994, the employee began treating with Dr. John A. Dowdle, an orthopedic surgeon. The employee reported constant low back pain with exacerbations that did not appear to be activity related. Dr. Dowdle diagnosed mechanical low back pain with degenerative disc disease at L4-5. In October 1994, following an MRI scan and discography, Dr. Dowdle recommended spinal fusion surgery, but refused to do the surgery until the employee was drug free.

On August 4, 1997, the employee sought work restrictions from Dr. Dowdle reporting that he was having a difficult time meeting the physical demands of his job as a cabinetmaker. The employee asserted that he was unable to continue his employment with Northland Cabinets as a result of the restrictions imposed by Dr. Dowdle. On October 21, 1997, the employee underwent fusion surgery at Fairview Southdale Hospital, performed by Dr. John E. Sherman. According to the employee, Dr. Sherman took him off work for three months following the surgery, and subsequently imposed work restrictions significantly limiting his physical activities.

Although the employer and insurer approved and paid for the fusion surgery, they now assert that they paid under a mistake of fact and, pursuant to the Stipulation of Settlement, have denied liability for any further wage loss or permanent partial disability benefits. The employee alleges entitlement to additional benefits and petitions to set aside the award on stipulation on the ground of a substantial change in condition. The employer and insurer oppose the petition to vacate.

DECISION

This court may set aside an award for good cause, pursuant to Minn. Stat. § 176.461 and Minn. Stat. § 176.521, subd. 3 (1987).¹ Good cause includes a substantial change in the employee's condition. Stewart v. Rahr Malting Co., 435 N.W.2d 538, 539, 41 W.C.D. 648, 649 (Minn. 1989). To justify vacation of an award, the employee must show that evidence of subsequent developments exists which will establish that [the employee's] condition has substantially worsened, and that there is a causal relationship between the work-related injury and the employee's present condition. Davis v. Scott Moeller Co., 524 N.W.2d 464, 466-67, 51 W.C.D. 472, 474-75 (Minn. 1994), quoting Bennett v. Hoiseth Motor Sales, 302 Minn. 534, 224 N.W.2d 148, 27 W.C.D. 604 (1974); see Franke v. Fabcon, Inc., 509 N.W.2d 373, 49 W.C.D. 520, (Minn. 1993).

The employee contends that his low back condition has substantially worsened since the parties' settlement in a manner and to an extent not anticipated at the time of the stipulation. In determining whether a substantial change in the employee's condition has occurred, this court has considered various factors, including: a change in diagnosis, a change in the employee's ability to work, additional permanent partial disability, the necessity of more costly and extensive medical care than anticipated, a causal relationship between the work injury and the worsened condition, and 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).

Change in Diagnosis

The employee's diagnosis, at the time the settlement was entered into, was a myofascial strain of the lumbar spine. Although a CT scan taken on January 31, 1986, showed slight central bulging at L4-5 and L5-S1, in Dr. Struck's opinion, the scan revealed no evidence of any significant abnormality. The employee was last seen by Dr. Struck, prior to the settlement, on January 9, 1987. While the employee continued to complain of low back soreness, the only abnormality noted on examination was some tenderness at the lumbosacral junction. Following this examination, Dr. Struck completed a report in which he opined that the employee had reached MMI on or about January 6, 1987, and had a permanent partial disability of 3.5 percent under Minn. R. 5223.0070, subd. 1.A.(2).² He further stated that he saw no need for further diagnostic testing or workup at that time.

¹ This court's authority to vacate is governed by the provisions of the workers' compensation act relating to vacation of awards in effect at the time of the parties' settlement. Franke v. Fabcon, Inc., 509 N.W.2d 373, 49 W.C.D. 520 (Minn. 1993).

² Minn. R. 5223.0070, subp. 1.A.(2) provides a 3.5% rating for a healed sprain or strain, with pain associated with loss of motion or chronic muscle spasm, but *without* demonstrable degenerative changes.

On February 27, 1989, an MRI scan was taken at the request of Dr. Holmberg. This scan revealed a degenerative disc at L4-5 with moderate stenosis of the spinal canal due to herniation of the disc and articular joint hypertrophy at that level. A repeat MRI scan on February 2, 1992, reflected similar findings.³ Dr. Holmberg, however, continued to diagnose and treat the employee for a lumbar strain, which he believed was due, at least in part, to the employee's non-work-related myoclonic jerk syndrome.

In August 1994, the employee began to treat with Dr. Dowdle, reporting constant low back pain. On examination, the doctor noted pain with palpation over the lower lumbar spine, and limited range of motion with difficulty returning to an erect position. Another MRI scan was obtained on September 23, 1994. The scan images were degraded due to motion artifact, but did confirm degeneration and annular deformity of the disc at the L4-5 level. A lumbar discography, performed on October 14, 1994, produced immediate onset of severe concordant low back pain. Markedly abnormal disc morphology with circumferential annular disruption and leakage of contrast material was noted. Dr. Dowdle diagnosed mechanical low back pain with degenerative disc disease at L4-5, and recommended a spinal fusion. The employee did eventually undergo fusion surgery on October 21, 1997, with a different surgeon.

There is no indication or suggestion in any of the medical records pre-existing or contemporaneous with the stipulation for settlement of a medically significant degenerative disc disease, or even a remote possibility of future surgical intervention. We believe, based on these facts, that the employee has provided evidence of a significant change in his diagnosis, sufficient to support vacation of the award on stipulation.

Change in Ability to Work

At the time the stipulation was entered into, the employee had accepted a job with School District No. 742, and was claiming entitlement to temporary partial disability benefits. Although work restrictions had been imposed by Dr. Struck, by 1992 the employee reported to Dr. Holmberg that he was not limiting his activities. When initially seen by Dr. Dowdle in August 1994, the employee was permitted to resume work without restrictions. By August 4, 1997, however, Dr. Dowdle imposed work restrictions slightly more restrictive than those provided by Dr. Struck in 1987. The employee was apparently unable to continue his employment as a cabinetmaker for Northland Cabinets, the job he held at that time, and remained unemployed until sometime shortly before the hearing in this matter. He was totally disabled for a period of time following the fusion surgery, and work restrictions, significantly limiting the employee's physical activities, were subsequently imposed. When considered in combination with other factors, we

³ The employee suffers from a myoclonic jerk syndrome, that is, involuntary muscle contractions, resulting in motion artifacts and some degradation of the images on the employee's CT and MRI scans. The February 6, 1992, MRI scan was done under anesthesia to try to minimize this problem.

believe the employee has shown a change in his ability to work since the time of settlement sufficient to support the petition to vacate.

Medical Expenses, Increased PPD

Although future medical expenses were left open by the stipulated settlement, there is no question that the employee's repeat MRI scans and fusion surgery, as a result of the diagnosis of a degenerative disc at L4-5, resulted in more costly and extensive medical care than anticipated at the time of the settlement. Similarly, the employee may have a claim for permanent partial disability of up to 22.5 percent following the fusion surgery.⁴

Causal Relationship

Finally, although the employer and insurer dispute causation, the sole medical report addressing causation is that of Dr. Dowdle, who opined that the employee's 1986 work injury was a substantial contributing cause of his mechanical low back pain and degenerative disc disease at L4-5. This is sufficient to establish causation for the purpose of a petition to vacate. The ultimate determination of whether the employee's present low back condition and fusion surgery are causally related to his January 6, 1986 admitted work injury is best made by a compensation judge following an evidentiary hearing. See Davis, 524 N.W.2d at 467, 51 W.C.D. at 475.

In light of the foregoing, we are satisfied that the employee has provided sufficient evidence to establish a substantial change in his condition since the time of the settlement, and we, accordingly, grant the petition to vacate. By this decision, the court makes no determination with respect to any claim made by the employee for additional compensation. Any such claim remains subject to proof at hearing.

⁴ Minn. R. 5223.0070, subp. D, provides a 22.5% permanency rating for a two-level fusion surgery.