

AMY BRICKER, Employee/Petitioner, v. MY PLACE CAFE and KEMPER NAT'L INS. CO., Employer-Insurer, and MN DEP'T OF HU. SERVS., BLUE CROSS/BLUE SHIELD OF MINN./BLUE PLUS and MEDICA CHOICE/HRI, Intervenors.

WORKERS' COMPENSATION COURT OF APPEALS
MAY 26, 1999

No. [REDACTED SSN]

HEADNOTES

VACATION OF AWARD - MISTAKE. Where the award specifically states the intent of the mediated settlement is to "resolve a temporary aggravation" which has since been found to be a permanent aggravation of the employee's pre-existing right ankle condition, the employee has established a mutual mistake of fact sufficient to vacate the award.

VACATION OF AWARD - SUBSTANTIAL CHANGE IN CONDITION. The employee has established a substantial change in her medical condition since the mediation award that was clearly not anticipated at the time of settlement, sufficient to support vacation of the mediation award.

Petition to vacate mediation award granted.

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

OPINION

THOMAS L. JOHNSON, Judge

The employee petitions to vacate a 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 grant the petition and vacate the Mediation/Resolution Award.

BACKGROUND

In mid-April 1995 the employee, Amy Bricker, slipped at home and injured her right ankle.¹ On May 17, 1995, the employee saw Dr. David Kittleson, an orthopedic surgeon. The doctor diagnosed an anterior lateral talar dome fracture, and a tomogram revealed a small, nondisplaced fracture of the talus with no evidence of separation of the bone fragment. (Pet.

¹ The employee testified this injury took place in "April of '95." (T. 28.) Dr. Kittleson initially recorded the date of April 17, 1995. (Pet. Ex. F.) In a later report, however, he stated the employee had a non-work injury on May 4, 1995. (Pet. Ex. F, April 23, 1998 report.)

Ex. F, tomogram of 5/19/95.)² 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 for a Grade II ankle sprain until her ligamentous symptoms subsided, then consider arthroscopic surgery if the fractured fragment was not healing in properly. Six weeks later the employee still had swelling and tenderness over the joint, 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. (Pet. Ex. F, 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, 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 concluded the October 10th x-rays showed dramatic changes. The June 1995 x-ray showed 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. The October 1995 x-ray revealed 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. (Pet. Ex. F, note of 10/18/95.)

The employee notified the employer of the claimed October 3, 1995 work-related injury to her right ankle on or about October 18, 1995. The employer and insurer filed a Notice of Denial of Liability on October 19, 1995. On December 14, 1995, the employee was examined by Dr. Mark Thomas at the request of the employer and insurer. He diagnosed an osteochondral fracture of the right ankle talar dome which he considered to be a stage III lesion. The doctor recommended an arthroscopic removal of the fracture fragment. He opined the need for surgery was due entirely to the employee's initial injury of May 1995 and the injury of October 3, 1995 was only a temporary aggravation of that underlying problem. (Resp. Ex. 2.)

On January 25, 1996, the employee and a representative of the insurer participated in a mediation session conducted by a staff member at the Department of Labor and Industry. A Mediation Resolution/Award was served and filed that day. That document provided for a full, final and complete settlement of all past, present and future claims by the employee for workers' compensation benefits resulting from the October 3, 1995 injury in return for a lump-sum payment of \$5,000.00 and payment of medical expenses from the date of injury through December 31, 1995. (Judgment Roll: Pet. Ex. E.)

The employee had surgery on her right ankle 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. (Pet. Ex. F.)

² All citations to exhibits refer to those received in evidence at the hearing before the compensation judge on June 8, 1998.

On February 22, 1996, the employee saw a chiropractor, Dr. Michael Hample, 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. The employee stated she fell 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. The employee also told Dr. Hample she was experiencing low back pain caused by limping due to the right ankle fracture. Dr. Hample 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. Hample 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. (Pet. Ex. H.)

The employee followed up with Dr. Kittleson after her January 1996 surgery. Although there was some gradual improvement in her condition, by August 1996 she still needed to wear a support when walking and standing. In mid-September, the employee reported she hit the right ankle on the lateral side in an incident at home and also slipped and twisted her ankle at work. There were no new findings or changes on examination or x-ray after these incidents. (Pet. Ex. F.) 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. (Pet. Ex. G.) The employee also returned to see the chiropractor, Dr. Hample, on January 23, 1997, for complaints she related to a slip-and-fall at Colonial Liquor Store on November 21, 1996. She reported slipping on a wet floor and falling, striking her head and neck. Dr. Hample 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. (Pet. Ex. H.)

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. The doctor 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. (Pet. Ex. F.)

On October 2, 1997, the employee petitioned the Workers' Compensation Court of Appeals to set aside the mediation award. In a decision served and filed February 6, 1998, this court referred the matter to the Office of Administrative Hearings (OAH) for a hearing before a compensation judge. The court instructed the compensation judge to make findings regarding the nature and extent of the employee's injury, the employer and insurer's liability for any injuries sustained by the employee, and whether there existed a causal relationship between any injury sustained and the medical care received by the employee. The court further directed the employee

to file a claim petition setting forth the claimed dates of injury and the benefits claimed. Bricker v. My Place Cafe, slip op. (W.C.C.A. February 6, 1998).

Dr. Mark Thomas re-examined the employee on April 30, 1998, at the request of the employer and insurer. Dr. Thomas diagnosed an osteochondral fracture of the right ankle talar dome, right ankle degenerative arthritis status post tibiotalar arthrodesis, subtalar joint degenerative arthritis and valgus hindfoot deformity. The doctor limited the employee to ten pounds lifting, walking and standing for less than one hour per day, and use of a cane or crutch for aid with walking. The doctor concluded the employee would require further surgical intervention, probably involving a subtalar joint arthrodesis and would be left with limited function of the foot and ankle. Dr. Thomas concluded the employee's May 17, 1995 non-work injury was the cause of her right ankle problems. The doctor opined the October 3, 1995 injury was a temporary aggravation of her underlying problem. (Resp. Ex. 2.)

The employee filed a claim petition on March 2, 1998 claiming right ankle and back injuries and seeking payment for a 17 percent permanent partial disability secondary to the right ankle injury. This court's order of referral was consolidated with the employee's claim petition. The consolidated cases came on for hearing before a compensation judge at OAH on June 9, 1998. In a Findings and Order on Remand, served and filed September 8, 1998, the compensation judge found the employee's injury of October 3, 1995 was a permanent aggravation of a pre-existing right ankle condition. The compensation judge further found the medical care received by the employee through the date of hearing was reasonable, necessary and causally related to the personal injury of October 3, 1995, and found the employee sustained a minimum 10 percent whole body disability as a result of her personal injury. Finally, the compensation judge found the employee sustained a consequential injury to her back secondary to her personal injury of October 3, 1995. The employer and insurer appealed each of these findings. By a decision filed March 30, 1999, this court affirmed the Findings and Order on Remand. We now deal with the employee's petition to vacate the mediation award.

DECISION

This court's authority to consider petitions to vacate is governed by Minn. Stat. §§ 176.461 and 176.521, subd. 3 (1996). To vacate an award, the employee must show good cause. 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; (2) newly discovered evidence; (3) fraud; (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.³

³ In her petition, the employee sought vacation of the award based only on substantial change in medical condition. At oral argument, however, the employee's attorney argued both grounds for vacation of the mediation award.

Mutual Mistake of Fact

“A mutual mistake of facts occurs when opposing parties to the stipulation both misapprehend some fact material to their intended settlement of a claim or claims.” Shelton v. Schwan’s Sales Enterprises, 53 W.C.D. 110, 113 (W.C.C.A. 1995), summarily aff’d (Minn. Sept. 5, 1995). The employee argues that, at the time of the mediation and award, the parties believed she sustained only a temporary aggravation of her right ankle condition on October 3, 1995. The compensation judge found the injury was permanent. The employee argues this misapprehension of a material fact constitutes a mutual mistake of fact.

We believe it is clear the mediation settlement is based on the mutual assumption that the October 3, 1995 injury was temporary. The mediation award states that its intent is “to resolve a temporary aggravation of a pre-existing condition to the right ankle.” (Pet. Ex. E.) The award does not state that either party contended the injury was permanent or would result in further disability. The parties were aware that the employee would undergo surgery on her ankle on January 30, 1996, less than one week after the settlement discussions. Despite this knowledge, the award specifically closed out all medical claims after December 31, 1995. Presumably, both parties believed the injury was not a substantial or contributing cause of the need for the surgery. These facts evidence a belief by both parties that the employee’s October 3rd injury was temporary. In his findings and order on remand, the compensation judge found the October 3, 1995 injury was a permanent aggravation of a pre-existing right ankle condition. This court affirmed that decision. We conclude the employee has established a mutual mistake of fact.

Substantial Change in Medical Condition

Good cause to vacate an award includes a substantial change in medical condition that was clearly not anticipated and could not reasonably been anticipated at the time of the award. Minn. Stat. §176.461. In determining whether a substantial change in the employee's condition has occurred, this court in the past has examined such factors as:

- (1) Change in diagnosis.
- (2) Change in employee's ability to work.
- (3) Additional permanent partial disability.
- (4) Necessity of more costly and extensive medical care/nursing services than initially anticipated.
- (5) Causal relationship between injury covered by the settlement and current worsened condition.
- (6) Contemplation of 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 Minnesota Statutes § 176.461 which requires the change be “clearly not anticipated and could not be reasonably anticipated at the time of the award.”

Following the October 3, 1995 injury, the employee saw Dr. Svendsen, who ordered x-rays which revealed further fragmentation of the talar dome. On October 18, 1995, Dr. Kittleson stated the October 10th x-rays showed extensive fragmentation and degeneration on the latter half of the talar dome with multiple loose fragments. Dr. Kittleson opined the employee had a pre-existing osteochondral fracture with a reinjury on October 3rd causing further fracturing and fragmentation of loose bodies within the joint. The doctor recommended arthroscopic ankle surgery to remove the loose fragments and assess the integrity of the joint surface. The doctor opined recovery could take as long as three months after surgery. (Pet. Ex. F.) The employee settled her case on January 25, 1996 and the surgery took place on January 30, 1996. By May 21, 1996, Dr. Kittleson noted the employee was developing early arthritis in her ankle. In January 1997, Dr. Kitaoka, an orthopedic surgeon at the Mayo Clinic, concluded the employee had a problem with right ankle and hindfoot arthritis, valgus malalignment, and bony deficiency of the talus. The doctor recommended ankle realignment and fusion which Dr. Kittleson performed on May 7, 1997. (Pet. Ex. G.) On December 16, 1997, Dr. Kittleson diagnosed some posterior tibialis dysfunction accentuated following the loss of motion of the employee's ankle joint leading to an eversion deformity. (Pet. Ex. F.)

When Dr. Thomas initially examined the employee on December 14, 1995, he diagnosed an osteochondral fracture of the right ankle talar dome. At the time of his second examination on April 30, 1998, his diagnosis was osteochondral fracture of the right ankle talar dome, degenerative arthritis, subtalar joint degenerative arthritis and valgus hindfoot deformity. In 1998, the doctor limited the employee to ten pounds lifting, and walking and standing for less than one hour per day with the use of a cane or crutch for aid with walking. Dr. Thomas concluded the employee would clearly require further surgical intervention, probably involving a subtalar joint arthrodesis and would be left with limited function of the foot and ankle. (Resp. Ex. 2.)

The compensation judge found the October 3, 1995 right ankle injury was a permanent aggravation of a pre-existing condition. (Finding 2.) The compensation judge further found the May 7, 1997 fusion surgery did not produce a successful result and the employee was worse following the surgery. (Finding 7.) The judge further noted the employee was scheduled for additional surgery on October 5, 1998. The compensation judge found the employee has a minimum of 10 percent permanent partial disability secondary to her right ankle injury. (Finding 8.) Finally, the compensation judge found the October 3, 1995 right ankle injury was a substantial contributing cause of the employee's low back symptoms and her need for chiropractic treatment. (Finding 5.)

We conclude the employee's diagnosis has worsened as compared to January 25, 1996. The employee now has significant restrictions secondary to her ankle injury which will impact her ability to work. The employee has undergone multiple surgeries since the settlement and has a minimum of 10 percent permanent partial disability. The compensation judge found a causal relationship between the personal injury and the employee's current condition. Finally, neither party contemplated, at the time of settlement, the employee's condition would worsen to the extent it has. We therefore conclude the employee has established a substantial change in her medical condition that was not clearly anticipated at the time of the mediation award.

The employee has established a mutual mistake of fact and a substantial change in condition. Accordingly, we vacate the Mediation/Resolution Award filed January 25, 1996.