

SUE E. BUSKE, Employee/Appellant/Petitioner, v. STATE, DEP'T OF HUM. SERVS., SELF-INSURED, and MAYO FOUND., Intervenor.

WORKERS' COMPENSATION COURT OF APPEALS
NOVEMBER 5, 1999

No. [REDACTED SSN]

HEADNOTES

SETTLEMENTS - INTERPRETATION; EVIDENCE - EXPERT MEDICAL OPINION; PRACTICE & PROCEDURE - REMAND. Where the compensation judge erred in concluding that the employee's consequential injury claim was barred by the terms of a stipulation for settlement and erred in concluding that the causation opinion of the employee's treating doctor lacked foundation, the employee's consequential injury claim would be remanded to the compensation judge for reconsideration and further findings.

VACATION OF AWARD - SUBSTANTIAL CHANGE IN CONDITION. The evidence in the file, when evaluated in light of the factors contained in Fodness v. Standard Cafe, 41 W.C.D. 1054 (W.C.C.A. 1989), did not justify vacating the award on stipulation on grounds of substantial change in condition.

Reversed, in part, and remanded.
Petition to vacate award denied.

Determined by Wilson, J., Johnson, J., and Rykken, J.
Compensation Judge: Jeanne E. Knight.

OPINION

DEBRA A. WILSON, Judge

The employee appeals from the compensation judge's finding that the employee did not sustain a consequential injury to her right hand and wrist as a result of her 1975 work-related left hand and wrist injury and from the judge's decision that the employee's claim for a consequential injury was closed out by a 1992 award on stipulation. The employee also petitions to vacate the 1992 award on stipulation based on substantial change in condition. We reverse in part, remand in part, and deny the petition to vacate.

BACKGROUND

The employee sustained a significant work-related injury to her left hand and wrist

on November 10, 1975,¹ while working for the Minnesota Department of Human Services [the employer].² Dr. William Cooney has been the employee's treating doctor for her left hand and wrist since 1975. Although she moved to California in 1982, the employee continued to return to Minnesota for medical treatment with Dr. Cooney.

On March 2, 1991, the employee was involved in an automobile accident while driving to California from Minnesota where she had been treated by Dr. Cooney. As a result of that accident, the employee injured her left knee and ribs, and the knee injury necessitated several surgeries. The employee eventually filed a claim petition seeking various workers' compensation benefits as a result of the 1991 automobile accident. In May of 1992, the parties entered into a stipulation for settlement wherein the employee agreed to accept \$75,000 in full, final, and complete settlement of any and all claims "arising out of Employee's accidents of [November] 10, 1975, and March 2, 1991." The stipulation also indicated that, "[i]t is agreed that certain portions of future medical care and treatment arising out of the Employee's injury of [November] 10, 1975, shall remain open as described below, however, any consequential injuries to any portion of Employee's body other than her left hand and wrist alleged to have arisen in her accident of March 2, 1991, or otherwise, are foreclosed"

Eventually the employee developed right hand pain and soreness. The first medical record of treatment for the right hand and wrist is from October 27, 1997, when the employee was seen in the emergency room of St. Mary's Hospital, giving a history of having lifted wet laundry from the floor ten days previously and "has had worsened right wrist pain since." Doctors diagnosed a possible flexor carpi radialis tendon rupture at that time and placed the employee's wrist in a supportive splint. The employee treated with Dr. Cooney the next day, at which time he recorded that the employee had "felt a pop while lifting wet clothes. Primarily, she is using just her right hand. She felt a snap, and a lump formed." After reviewing an ultrasound, Dr. Cooney opined that it was unlikely that there was a tendon rupture and that it was "more likely the patient had a strain of the wrist causing swelling around the tendons which then aggravated the previous ganglion cyst, making it currently symptomatic." Treatment of the ganglion cyst was delayed, apparently because the employee was scheduled for surgery on her other wrist.³

¹ The judge's findings reflect an injury date of November 11, 1975, but the stipulation for settlement uses a date of January 10, 1975. The first report of injury and most of the pleadings on the judgment roll indicate that the correct date of injury is November 10, 1975.

² The employee has had thirteen surgeries to her left hand and wrist since 1975.

³ Dr. Cooney's office note actually reads, "[d]elayed treatment of the ganglion cyst of the left wrist is recommended noting that the patient is scheduled for surgical treatment of her right wrist once workers' compensation approval is obtained." However, other medical records clearly reflect that the ganglion cyst was on the employee's right wrist and that surgery was scheduled at that time on the employee's left wrist.

The employee returned to Dr. Cooney on December 31, 1997, at which time he recorded a history of the employee having had swelling and tenderness in the right wrist after having fallen two weeks before. X-rays did not reveal any fracture, but the employee's wrist was placed in a plaster cast.

On May 29, 1998, Dr. Cooney issued a report indicating that "[d]uring the [employee's] treatment for her left wrist, she was forced to use her right wrist related to daily activities and developing increasing pain in her right wrist which culminated in a full blown reflex sympathetic dystrophy." He further opined,

It is my belief that her right hand, which developed pain dysfunction, was a consequence of our treating her left hand, inability to use the left hand forcing increased use in the right hand. This is aggravated by a minor injury, but primarily the problem is secondary to overuse leading to the sympathetic dystrophy.

In a letter dated June 3, 1998, Dr. Cooney wrote to employee's counsel, referring to the May 29, 1998, narrative report and stating, "[a]s you can see, we have tried to tie the right hand to the left hand in a causal way so that both can be covered by work compensation. The diagnosis for her right hand and wrist is reflex sympathetic dystrophy caused by overuse and a minor injury."

On October 21, 1998, the employee filed a medical request seeking, in part, payment of medical expenses incurred in treatment of her right hand and wrist. The matter proceeded to an administrative conference, and in an order filed thereafter a compensation judge ordered the employer to pay the claimed expenses. The employer then filed a petition for formal hearing, which came on for hearing on March 5, 1999. In findings and order filed on May 4, 1999, the compensation judge found, in part, that the employee's claim for a consequential injury to the right hand and wrist was foreclosed by the stipulation for settlement and that the employee did not prove that she had sustained a consequential injury to her right hand and wrist as a result of her work injury. The employee appeals from these findings and also petitions this court to vacate the 1992 award on stipulation.

STANDARD OF REVIEW

In reviewing cases on appeal, the Workers' Compensation Court of Appeals must determine whether "the findings of fact and order [are] clearly erroneous and unsupported by substantial evidence in view of the entire record as submitted." Minn. Stat. § 176.421, subd. 1 (1992). Substantial evidence supports the findings if, in the context of the entire record, "they are supported by evidence that a reasonable mind might accept as adequate." Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 59, 37 W.C.D. 235, 239 (Minn. 1984). Where evidence conflicts or more than one inference may reasonably be drawn from the evidence, the findings are to be affirmed. Id. at 60, 37 W.C.D. at 240. Similarly, "[f]actfindings are clearly erroneous only if the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed." Northern States Power Co. v. Lyon Food Prods., Inc., 304 Minn. 196, 201, 229

N.W.2d 521, 524 (1975). Findings of fact should not be disturbed, even though the reviewing court might disagree with them, “unless they are clearly erroneous in the sense that they are manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole.” Id.

DECISION

Effect of the 1992 Stipulation

The employee contends that the compensation judge erred in concluding that the 1992 stipulation barred any claim the employee might have for future consequential injuries. We agree.

In Sweep v. Hanson, 319 N.W.2d 817, 39 W.C.D. 51 (Minn. 1986), the Minnesota Supreme Court held that a stipulation was broader than permissible where it purported to close out claims for work-related injuries for which an employee had made no claim and which were not a subject of dispute between the parties at the time of the settlement. Relying on Sweep, this court has held that stipulation language is impermissibly broad where it purports to compromise claims for consequential injuries that were not in existence and not a subject of dispute between the parties. See Munkelwitz v. Bladholm Bros., slip op. (W.C.C.A. July 28, 1993) (alleged consequential left knee injury not closed out in full and final stipulation settling right knee injury where there was no evidence or claim of left knee injury at the time of settlement); see also Golen v. J.C. Penney Co., slip op. (W.C.C.A. Oct. 27, 1993) (full, final, and complete settlement closing out all claims “past, present and future, known or unknown, relating to the personal injury” did not close out a claim for consequential depression, where there was no evidence or claim of a psychological injury at the time of the stipulation). Accordingly, we conclude here that the 1992 stipulation for settlement did not close out the claimed consequential right hand and wrist injury, and we reverse the compensation judge’s finding to the contrary.

Consequential Right Hand and Wrist Injury

The employee contends that inconsistent findings by the compensation judge compel the conclusion that her right hand and wrist condition is a compensable consequence of her work-related left wrist condition. We agree that the judge made inconsistent findings, but we do not agree that those inconsistencies compel a finding of compensability as to the employee’s right hand and wrist.

The compensation judge at Finding 7 found in part:

The employee gradually developed right hand pain and soreness. She had no right hand problems at the time of the 1992 Stipulation. Because of the deterioration of her left hand, the employee began to rely on the use of her right hand for the activities of daily living. Her right hand gradually got worse, with increased pain and

swelling. She began to lose motion of the fingers of the right hand and motion of the wrist

The compensation judge also found at Finding 8:

In October 1997, the employee was in Rochester waiting for left hand surgery. When she lifted her laundry with her right hand, she experienced a popping and snapping sensation. Her right hand became so painful that she thought she had broken her hand and went to the emergency room

And, at Finding 11, the judge found:

The history on December 31, 1997, states the employee has complaints of pain in her right wrist, “having fallen some 2 weeks ago onto her right wrist.”

The judge then concluded, at Finding 12:

The employee has not proved by a preponderance of the evidence that she sustained a consequential injury to her right hand and wrist as a result of her injury of November 10, 1975.

While Finding 7, standing alone, suggests a conclusion that the employee sustained a consequential injury,⁴ the subsequent findings are confusing. In her memorandum, the compensation judge noted that the medical records did not contain any reports of overuse of the right hand and wrist, and she concluded, “[t]he records do not provide adequate foundation for Dr. Cooney’s opinion that the employee’s right wrist problems were a consequence of the admitted left hand and wrist problem.” However, Dr. Cooney has been the employee’s treating doctor since 1975 and is well aware of the employee’s medical treatment and condition over the years. As this court has explained in the past, where a treating doctor is familiar with the employee’s medical conditions, history, and complaints, that doctor has sufficient “foundation” to issue a causation opinion. Hempel v. Crystal Cabinet Works, Inc., slip op. (W.C.C.A. Oct. 21, 1998). Under the circumstances of this case, Dr. Cooney clearly had foundation to render a causation opinion.⁵

Notwithstanding our conclusion that the judge erred in rejecting Dr. Cooney’s

⁴ The compensation judge did not find that “the employee testified” to the facts contained in this finding, rather she phrased it as an ultimate finding of fact.

⁵ The judge’s concern about the lack of documentation in the medical records of any reports of overuse of the right hand and wrist would go to the persuasiveness or weight to be given Dr. Cooney’s opinion, not the foundation for that opinion.

opinion on foundation grounds, we might have affirmed the judge's ultimate conclusion if there were any indication, in her decision, that the judge had another, legitimate basis for denying the employee's claim. The employer contends that the compensation judge "found" that the employee's right hand and wrist problem was caused by the laundry lifting incident in October of 1997 and the fall in December of 1997. While the judge made findings outlining treatment following those incidents, she never made an ultimate finding that those incidents were the sole cause of the employee's right hand and wrist condition. Neither did the judge ever indicate that she found the employee's testimony or the opinions of Dr. Cooney to be lacking in credibility. The judge also did not expressly accept a contrary causation opinion; in fact, it appears that no contrary causation opinion was offered.

For all of the reasons indicated above, we are compelled to vacate the judge's decision as to the claimed consequential injury and remand the matter for reconsideration and additional findings on that issue. On remand, the judge should give specific reasons for whatever findings she might make on that issue. The issue of the compensability of medical expenses incurred in treatment of the employee's right hand and wrist should also be addressed. We do not intend to imply that the judge must award the benefits in dispute, only that she must make findings adequate to resolve the dispute and to provide a reasonable basis for review in the event of another appeal. The judge should base her decision on the current record.

Petition to Vacate

The employee petitions to vacate the 1992 award on stipulation on the basis of a substantial change in condition. For pre-July 1992 awards, the inquiry is limited to the extent of improvement or worsening of the injury; the change in the employee's condition need not be unanticipated. Franke v. Fabcon, Inc., 509 N.W.2d 373, 49 W.C.D. 520 (Minn. 1993).

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; and
- (e) causal relationship between the injury covered by the settlement and the employee's current worsened condition.

Fodness v. Standard Café, 41 W.C.D. 1054, 1060-61 (W.C.C.A. 1989).

The employee did not discuss the Fodness factors in her petition to vacate. No medical records from 1992, or earlier, were introduced, so there is no evidence of what the employee's diagnosis was at the time of the award on stipulation. However, Dr. Cooney did state, in his July 15, 1999, affidavit, that the employee has developed medial epicondylitis in the left

elbow that was not present in May of 1992. Thus, it appears that there has been a change in diagnosis.

At oral argument, counsel for the employee contended that the employee was working and going to school at the time of the award on stipulation but is unable to work at this time. The employer denies that allegation, and language in the stipulation itself would suggest that the employee was not working at the time of the stipulation for settlement, as the employee was claiming “ongoing weekly benefits for temporary total disability.” Therefore, even assuming that the employee is physically unable to work at the current time, her situation has apparently not changed in this regard since the time of the award.⁶

The employee makes no allegations of increased permanent partial disability. The stipulation reflects that the employee was claiming 48% permanent partial disability of the left hand and wrist, and no medical records were provided that would indicate that any doctor has subsequently rated the employee as having greater permanency.

The employee has had more extensive medical treatment to the left hand and wrist since the time of the award on stipulation, and Dr. Cooney indicated that surgery was not indicated or contemplated at the time of the award on stipulation. However, less emphasis is placed on this factor where, as here, medical expenses have not been closed out by the award.

Dr. Cooney does relate the employee’s current symptoms to her work injury. However, because there is no evidence of a change in the employee’s ability to work or any increase in her permanent partial disability, and because medical expenses were left open as they relate to the left hand and wrist, we find an inadequate basis for vacating the award on stipulation, and we deny the employee’s petition.

⁶ The employee contends that her right hand and wrist should be considered in determining whether there has been a substantial change in her condition, and she relies in part on the July 15, 1999, affidavit of Dr. Cooney. In his affidavit, Dr. Cooney opined,

The disability to the right hand and wrist makes the disability to the left hand, wrist and elbow substantially greater than would be such disability, standing alone. This is because Ms. Buske is now substantially impaired on both the left and right sides and is functionally unable to compensate for the loss of use and disability on the left side. This will have substantial negative impact on her ability to find and hold a job.

We note, however, that Dr. Cooney’s May 29, 1998, narrative report indicated that the reflex sympathetic dystrophy involving the employee’s right hand had resolved, and there is no evidence that Dr. Cooney has treated the employee since May 29, 1998, or has ever placed permanent restrictions on the employee’s use of her right hand and wrist.