AMY L. GARTHUS, Employee, v. BENEDICTINE HEALTH CTR., SELF-INSURED, adm'd by BERKLEY ADM'RS, Employer/Petitioner, and SPECIAL COMP. FUND.

WORKERS' COMPENSATION COURT OF APPEALS
MAY 20, 1999

No. [REDACTED SSN]

HEADNOTES

VACATION OF AWARD - MISTAKE. The petitioner, the self-insured employer, failed to establish a mutual mistake of fact at the time of settlement sufficient to vacate the stipulation for settlement.

VACATION OF AWARD - FRAUD; VACATION OF AWARD - SUBSTANTIAL CHANGE IN CONDITION. The petitioner's claims of fraud in the inducement or, in the alternative, of a substantial change in condition since the settlement, are referred to a compensation judge at the Office of Administrative Hearings for a hearing and factual findings.

Petition to vacate referred for hearing at OAH.

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

OPINION

FACTUAL BACKGROUD

Amy L. Garthus, the employee, sustained an admitted personal injury to her neck and low back on April 24, 1989, while working for the employer, Benedictine Health Center. The employer was self-insured for worker's compensation purposes at all relevant times. The employee began treating with Dr. William Fleesen in April 1989. Dr. Fleesen referred the employee to Dr. Richard Freeman, a neurosurgeon, who performed a cervical discectomy and fusion at C4-5 and C5-6 on July 18, 1989. The employee returned to work for the employer in a modified job in February 1990.

The employee contended she sustained a second injury to her neck and low back on October 24, 1990. The employer denied liability for this injury. The employee filed a claim petition seeking wage loss and permanent partial disability benefits resulting from both injuries. In a findings and order filed March 4, 1992, a compensation judge found the employee sustained a work-related injury to her neck and low back on October 24, 1990. The judge further found the employee sustained a 16.5% permanent partial disability to the body as a whole as a result of the injuries to her cervical spine and a 10.5% whole body disability secondary to the lumbar spine

injuries.[1] The judge assigned 90% of the employee's disability to the April 24, 1989 injury and attributed 10% to the October 24, 1990 injury.[2] (Findings and Order, March 4, 1992.)

The employee returned to see Dr. Fleesen on July 23, 1992, reporting no improvement since the fusion surgery. She complained of headaches, neck pain radiating into her left arm and low back pain. Dr. Fleesen reviewed MRI and CT scans and plain x-rays and concluded the studies demonstrated a solid fusion at C5-6, a fusion breakdown at C4-5 with the development of a pseudoarthrosis, and a possible C6-7 disc herniation. The doctor referred the employee to Dr. Timothy Garvey for evaluation for a possible refusion and/or intervention at C6-7. (Pet. Ex. 11-14.)

The employee saw Dr. Garvey on September 10, 1992. Following a cervical discography, Dr. Garvey recommended a C4-5 fusion to correct the pseudarthrosis. Dr. Garvey opined there was a 50/50 chance the surgery would relieve the employee's pain. On December 9, 1992, Dr. Garvey performed a posterior cervical fusion from C4 to C6 with internal fixation and an iliac crest bone graft. Thereafter, Dr. Garvey recommended the employee follow up with Dr Fleesen and hoped the employee could return to light-duty work. (Pet. Ex. 11-15.)

The employee was off work from October 24, 1990 until September 1993 when she returned to a modified job with the employer. The employee worked for about one week. She then remained off work and was paid temporary total disability benefits by the employer. On October 19, 1993, Dr. Fleesen stated he had nothing further to offer the employee from a treatment standpoint. The doctor concluded the employee was not a candidate for further surgery, physical therapy or psychotherapy, although some short-term counseling might be helpful. Dr. Fleesen concluded the employee was permanently and totally disabled. He opined the employee was able to spend only two to four hours a day devoted to family or employment activities and had to lie down and rest to treat her pain and headaches during the rest of the day. Dr. Fleesen noted the employee told him "she cannot tolerate even a couple of hours of lightest work, and I take this at face value - - at this point in this case, with this patient." Finally, Dr. Fleesen concluded there was only a small likelihood a pain management program would increase the employee's tolerance for the activities of daily living. (Pet. Ex. 11-14.)

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[1] The compensation judge also found a 10% permanent disability of the thoracic spine secondary to childhood scoliosis. The employee has a Harrington Rod bridging the lower thoracic spine anchored at T-12. (Pet. Ex. 11-14.)

[2] The Special Compensation Fund accepted registration on October 18, 1990 for a 16% permanent partial disability to the whole body as a result of impairment to the cervical spine. The compensation judge found the disability resulting from the 1990 injury was substantially greater because of the registered impairment than what would have resulted from the second injury done. The employer was, therefore, entitled to reimbursement from the Special Compensation Fund. See Minn. Stat. § 176.131.

The employee was seen by Dr. Fleeson on January 31, 1994, essentially without change. On February 1, 1995, Dr. Fleesen again examined the employee who complained of increased upper back and neck pain over the past month. On examination, the doctor noted extreme limitation of cervical motion with normal reflexes. The diagnosis was multiple cervical spine fusions with a residual unoperated C6-7 disc protrusion. The doctor believed the increased pain was possibly due to problems with the fusion or increased disc degeneration.

The employee had filed a claim petition, on September 23, 1993, seeking permanent total disability benefits from and after December 9, 1992, additional permanent partial disability and rehabilitation benefits. In March 1995, the parties entered into a stipulation for settlement. The employee contended she was permanently and totally disabled and alleged entitlement to additional permanent partial disability benefits, rehabilitation benefits and medical expenses. The self-insured employer denied the employee was permanently and totally disabled and relied upon the independent medical evaluation of Dr. Robert H.N. Fielden, dated December 3, 1993.[3] To settle their claims, the parties stipulated the employee became permanently and totally disabled on October 24, 1990. The parties acknowledged the employee was receiving Social Security Disability benefits and agreed the employer and insurer would be entitled to the offset provisions of Minn. Stat. § 176.101, subd. 4. The parties agreed the self-insured employer would "pay ongoing permanent total disability benefits pursuant to the terms of this stipulation, subject to an offset for Social Security payments and subject to applicable supplementary benefits." The parties further agreed the self-insured employer would have the right to terminate permanent total disability benefits should the employee later be disqualified from receiving Social Security Disability benefits or other disability benefits subject to the offset. The self-insured employer paid the employee $17,281.50 in lieu of ongoing rehabilitation services and $12,500.00 to settle all claims for additional permanent partial disability benefits to the extent of 33% of the cervical spine and 10.5% of the lumbar spine. (Stipulation for Settlement, March 1995). An Award on Stipulation was served and filed on March 28, 1995.

The employee returned to Dr. Fleesen on December 5, 1995, with complaints of severe cervical pain, headaches, nausea and vomiting. Dr. Fleesen ordered new cervical spine studies which showed a solid fusion at C4-5 and C5-6 with narrowing and spurring at the C6-7 disc space. Dr. Fleesen referred the employee to Dr. Garvey and Dr. Edward E. Martinson, a specialist in physical medicine and rehabilitation at the Duluth Clinic, for further evaluation and treatment. (Pet. Ex. 11-14; Resp. Ex. G.)

The employee was seen by Dr. Garvey in February 1996. Dr. Garvey noted the most recent CT scan showed significant degenerative changes at C6-7 and recommended

[3] Dr. Fielden diagnosed status post two level discectomy and fusion with degenerative changes and prior scoliosis fusion. The doctor concluded the employee demonstrated constant, subjective complaints without any significant objective clinical abnormality. The doctor opined the employee was capable of light duty work subject to a 25 pound lifting restriction and limited sitting and standing. The restrictions were secondary to the cervical fusion. (Resp. Ex. N.)

additional surgery. On May 29, 1996, the employee underwent a diskectomy and fusion from C6-7 to T1. (Pet. Ex. 11-15.) The employee began treating with Dr. Martinson in June 1996. The doctor noted a history of a C4-5 through C7-T1 fusion with excellent surgical outcome and improving cervical radiculopathy and no objective clinical evidence of a new or recurrent radiculopathy or neuropathy. He further diagnosed low back pain secondary to the employee's work injury with findings consistent with facet syndrome and multilevel degenerative changes but no evidence for radiculopathy or peripheral neuropathy. Dr. Martinson observed the employee was deconditioned and advised her to continue with an ongoing home activity program. In October 1996 and March 1997, Dr. Martinson again advised the employee to continue with her home exercise and activity program. (Pet. Ex. 11-6.)

The self-insured employer instituted surveillance of the employee on July 16, July 23, July 30, August 6, August 9, and August 13, 1997. Investigators obtained videotape footage of the employee engaging in activities around her home and batting and fielding as a member of a softball team. (Pet. Ex. 15.) In response, the employee submitted affidavits from friends and family attesting to the employee's pain and limited ability to function. (Resp. Exs. O-X.)

The employee returned to see Dr. Garvey on October 9, 1997. She reported she engaged in a light active exercise program over the summer and then had a flare-up of back pain with radiation into her legs, left greater than right. Dr. Garvey saw the employee again on December 11, 1997 and she complained of increasing pain with standing and walking. Dr. Garvey recommended the employee stay with a light active exercise program, simple medication and restriction of aggravating physical activities. Dr. Garvey further stated:

> As it relates to Amy playing softball, if this were a simple family event playing with children, then it would not be inconsistent with her complaints. I.e., if she had some simple walking or light running, occasional batting and throwing, that would be reasonable. If, however, there were consistent, repetitive documentation of playing active softball on an adult team, it would appear to be inconsistent with her current history. It is possible that things have deteriorated since the summer, but it would suggest that in the summer she was significantly improved. I do not know the facts of that, but I would anticipate that you will be reviewing in entirety the video tapes that were made of Ms. Garthus and will provide the factual scenario to me. If, in fact, Amy was able to play on an adult team on a repetitive basis, it would suggest that she was functioning at a higher level this summer than I previously documented. It is possible that this could have aggravated her underlying condition and currently makes her more symptomatic. (Resp. Ex. J.)

On December 17, 1997, the employee was evaluated by Dr. H. Kent Newman, a psychologist. Dr. Newman diagnosed depression, secondary to chronic pain and panic disorder.

The doctor concluded it was highly unlikely the employee would be able to carry out job functions in a competitive work situation due to the interference of pain, depression and the panic disorder. (Resp. Ex. L.)

On May 4, 1998, Dr. Martinson referred the employee to Dr. James Callahan, a neurosurgeon, for an opinion on possible surgical intervention. On June 8, 1998, Dr. Martinson again examined the employee and advised her to continue with her home exercise and activity program, including walking. The employee saw Dr. Callahan on May 26 and June 16, 1998 at the Duluth Clinic. Dr. Callahan noted the employee complained of continuing low back pain radiating into the buttocks and leg primarily after prolonged standing and walking. A lumbar MRI scan showed no evidence of spinal stenosis but showed mild disc degeneration at L3-4 without evidence of herniation or spondylolisthesis. Dr. Callahan advised against surgical intervention for the employee's lumbar pain. On July 15, 1998, Dr. Martinson again advised the employee to continue with her home exercise and activity program with slow progression of activities. The doctor provided a work slip allowing the employee to remain off work while on Social Security Disability.

The employee was examined by Dr. Daniel C. Randa, a neurologist, on September 10, 1998 at the request of the self-insured employer. Dr. Randa performed a physical examination, reviewed extensive medical records and watched the surveillance videotapes of the employee. Dr. Randa noted the employee voluntarily limited her lumbar mobility which was inconsistent with her examination, the imaging studies and the videotape. The employee's neurological function was intact and the limitation of cervical motion was consistent with the prior fusions. The doctor diagnosed a cervical musculoligamentous strain superimposed upon cervical degenerative spondylosis with C4-5 and C5-6 disc herniations secondary to her personal injuries. He found no evidence for cervical radiculopathy and/or cervical myelopathy and no evidence the employee sustained a lumbosacral injury. Dr. Randa opined the employee should avoid lifting 20-25 pounds on a repetitive basis and avoid prolonged flexion of the cervical and lumbar spine. Within these restrictions, the doctor concluded the employee was capable of working on a full-time basis. On October 12, 1998, the employee was examined by Dr. Charles McCafferty, a psychiatrist, also at the request of the self-insured employer. Dr. McCafferty diagnosed a somatoform disorder of the conversion disorder type with associated passive dependent personality traits. He stated there was no psychiatric condition causing any permanent work disability but opined the employee had no motivation to return to work. Dr. McCafferty concluded the employee was capable of working on a full-time basis after a period of rehabilitation and work hardening and that it would be therapeutic for the employee to return to work.

The petitioner also submitted a letter report by Ms. Jan Lowe, a vocational expert. She was asked by petitioner's counsel about the status of general labor conditions in the Duluth/ Cloquet area for light and medium work. Ms. Lowe stated that opportunities for light/medium jobs in that labor market were excellent. Ms. Lowe listed types of jobs available in 1997 and opined that a person seeking light or medium work should be successful. (Pet. Ex. 16.)

The employee has undergone numerous imaging studies of the cervical and lumbar

spines. A CT scan of the cervical spine on October 6, 1991 showed the C4-5 and C5-6 bone grafts in place. The scan showed a mild low cervical uncinate spondylosis without evidence of any significant compression of the neural structure. A cervical MRI scan on August 14, 1992 showed a central disc herniation at C6-7 without cord compression and without progression as compared to the prior scan from 1989. Cervical discography on September 17, 1992 showed 4/10 nonconcordant pressure with abnormal morphology at C6-7. A cervical CT scan on January 2, 1996 was normal at C3-4 and showed significant cervical and uncinate spondylosis at C6-7 with an uncinate spondylitic ridge and encroachment upon the lateral neural canal. An MRI scan on March 13, 1996 showed a solid-appearing fusion mass at C4 through C6 with evidence of dorsal annular tears and prominent lesions at C3-4 and C6-7. The spinal cord was visibly indented and deformed at C6-7.

An MRI scan of the lumbar spine on October 25, 1990 demonstrated no neural compromise with mild to moderate facet joint arthritic changes throughout. Lumbar x-rays in July 1992 showed mild scoliosis of the thoracic spine, convexed to the left. A June 1, 1993 lumbar x-ray showed mild facet hypertrophy at L4-5 and L5-S1 with mild narrowing of the right L5-S1 apophyseal joint. Lumbar discography on November 26, 1997 reproduced back and leg pain similar, but more intense, to the patient's normal pain at the L3-4 disc level. Lumbar x-rays on June 16, 1998 showed a normal lumbar curvature with adequately maintained disc spaces and normal vertebral body height.

On December 15, 1997, the self-insured employer filed a petition to vacate the award on stipulation. The employer contends the award should be vacated based on fraud, mistake of fact, and substantial change in the employee's medical condition. In support of its petition, the employer submitted extensive medical records and an edited version of the surveillance videotapes of the employee. On February 26, 1998, the employee filed an objection to the petition to vacate. Thereafter, each party supplemented its pleadings with additional medical information and a supplemental brief. The case was heard before a panel of the Workers' Compensation Court of Appeals on March 30, 1999.

DECISION

This court's authority to consider petitions to vacate is governed by Minn. Stat. §§ 176.461 (Supp. 1993) and 176.521, subd. 3 (1992). To vacate an award on stipulation, the petitioner 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; 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 petitioner here alleges mutual mistake of fact, fraud and a substantial change in medical condition.

Mutual Mistake of Fact

The self-insured employer first contends the award on stipulation should be vacated

based on a mutual mistake of fact. At the time of the settlement, the employee contended she was permanently and totally disabled and was unable to work more than an hour or two a day. The self-insured employer asserts that it accepted the employee's claim that she was unable to work and, based on this understanding, entered into the settlement. The videotape surveillance and medical reports from Dr. Randa and Dr. McCafferty, the petitioner contends, demonstrate the employee is capable of vigorous physical activity. Accordingly, the petitioner argues, the award on stipulation was based on a mutual mistake of fact and must be vacated. We are not persuaded.

"A mutual mistake of fact occurs when opposing parties to the stipulation both misapprehend some fact material to their intended settlement of a claim or claims." Selton v. Schwann's Sales Enters., 53 W.C.D. 110, 113 (W.C.C.A. 1995), summarily aff'd (Minn. Sept. 5, 1995). We find no mutual mistake of fact in this case. In her 1993 claim petition, the employee asserted she was permanently and totally disabled. The employer denied this contention and alleged the employee was physically able to return to work. The intent of the parties in the settlement was to resolve a disputed issue of fact regarding the employee's ability to work. The fact that the employer chose to settle the case is not, in and of itself, evidence of a mistake of fact. Even assuming the employer was wrong about the employee's ability to work in 1993, the misjudgment was unilateral. The employee has consistently maintained she was and continues to be totally disabled. We see no evidence that both parties misapprehended any fact material to the resolution of the total disability issue. Accordingly, the petitioner has failed to establish a mutual mistake of fact sufficient to vacate the stipulation for settlement.

Fraud

To establish fraud there must be (1) a false representation of facts; (2) the representation must deal with a past or present fact; (3) the fact must be susceptible of knowledge; (4) the representing person must know the fact is false; (5) 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. Specialized Tours, Inc. v. Hagen, 392 N.W.2d 520 (Minn. 1986); Weise v. Red Owl Stores, Inc., 286 Minn. 199, 202, 175 N.W.2d 184, 187 (1970). To prevail on a claim of fraud, the petitioner must prove the employee misrepresented her physical condition and/or ability to work at the time of the settlement. Boileau v. A-Plus Indus., 58 W.C.D. 549 (W.C.C.A. 1998).

In support of its petition to vacate, the self-insured employer offers voluminous medical records, videotapes of the employee and medical reports from Dr. Hartman and Dr. Randa. The petitioner points to the opinions of Dr. Randa and Dr. McCafferty who believe the employee was exaggerating her symptoms at the time of their medical examinations on September 10, 1998 and October 12, 1998. Dr. Randa concluded the employee's subjective symptoms were inconsistent with the employee's physical activities contained on the surveillance videotape.

The petitioner also argues that Dr. Garvey agrees with Dr. Randa. In his January 9, 1998 report, Dr. Garvey stated: "If, in fact, Amy was able to play on an adult team on a repetitive basis, it would suggest she was functioning at a higher level this summer than I previously

documented." He further stated that "If . . . there were consistent, repetitive documentation of playing active softball on an adult team, it would appear to be inconsistent with her current history." (Pet. Ex. 11-15.) The petitioner asserts the medical evidence and the videotape prove the employee intentionally misrepresented her physical condition and the employer, in reliance on that fraudulent misrepresentation, entered into the 1995 stipulation for settlement.

We have carefully reviewed the evidence submitted by the petitioner and by the employee. Depending on the weight given to the evidence, one conclusion that could, but need not, be drawn is that the employee in 1993 intentionally misrepresented her condition in order to induce a settlement with the employer. This court is not a fact finding tribunal. Without factual findings, this court is unable to determine whether the employer and insurer have established fraud within the meaning of Minn. Stat. § 176.461 and the case law. We therefore refer this case to the Office of Administrative Hearings for assignment to a compensation judge for a hearing. At the hearing, the parties may offer evidence on the issue of fraud. The burden of proof of fraud is on the self-insured employer. The compensation judge should consider all the evidence and make findings of fact as to each element of fraud.

Substantial Change in Medical Condition

In determining whether a substantial change in the employee's medical 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). This case involves the less common petition by an employer and/or insurer asserting a change in the employee's medical condition for the better. Accordingly, not all the Fodness factors are equally applicable. Cook v. J. Mark, Inc., 51 W.C.D. 432 (W.C.C.A. 1994).

The petitioner contends the employee's medical condition has substantially improved because there has been a change in diagnosis and a significantly increased ability to work. Dr. Randa, in his September 1998 report stated the employee had an intact neurological examination with no evidence of radiculopathy and/or myelopathy of the cervical, thoracic or lumbar spine. The doctor concluded the employee demonstrated "a substantial change in her status from that described previously." Both Drs. Randa and McCafferty opined the employee exaggerated her symptoms during their examinations. Accordingly, the petitioner contends the employee's objective condition and subjective symptoms have improved since the date of the

settlement. The self-insured employer also contends the employee has a significantly increased ability to work. The surveillance videotape, the petitioner contends, demonstrates the employee's physical abilities are substantially greater than what she disclosed to the medical providers. Dr. Randa opined the employee is capable of competitive employment, subject to restrictions, and Ms. Lowe opined jobs are available in the relevant labor market.

The employee denies there has been any substantial change in her medical condition that was not or could not reasonably have been anticipated at the time of the March 28, 1995 award. She asserts her diagnosis at the time of the settlement and today remains the same, that is, neck pain secondary to a C4-5 to C7-T1 fusion and low back pain with degenerative disc and joint disease. The employee further argues there has been no change in her ability to work as evidenced by the opinions of Dr. Newman and Dr. Martinson. The videotape, the employee contends, does not prove the employee is capable of working on a sustained and gainful basis. She asserts the softball activity was an attempt to restore some normalcy into her life and perform an activity which she used to enjoy. Playing softball, however, caused significant pain. (Resp. Ex. X.) Finally, the employee argues there is no medical proof that her condition has improved. The 1998 report of Dr. Randa, the employee argues, differs very little from the 1993 report of Dr. Fielden. Accordingly, the employee urges the petition to vacate be denied.

We conclude that further development of the facts is necessary in this case. We, therefore, also refer the self-insured employer's claim of a substantial change in medical condition to a compensation judge at the Office of Administrative Hearings, pursuant to Minn. Stat. §§ 176.381, subd. 1, and 176.521, subd. 3. The compensation judge shall take evidence and make findings of fact with respect to the employee's restrictions and her ability to engage in substantial gainful employment, at the time the stipulation was entered into and at the present time.

The compensation judge's findings of fact, with respect to both fraud and substantial change in medical condition, shall be reported to this court for a determination of whether the self-insured employer has established good cause sufficient to vacate the award on stipulation filed March 28, 1995.