

LAUNA R. HEID, Employee/Petitioner, v. ANNANDALE CARE CTR. and ST. PAUL FIRE & MARINE CO., Employer-Insurer.

WORKERS' COMPENSATION COURT OF APPEALS  
NOVEMBER 9, 1999

No. [REDACTED SSN]

HEADNOTES

VACATION OF AWARD - DISMISSAL. Where the medical evidence requires a determination of the extent of the contribution of several alleged injuries, involving multiple employers and insurers not parties to the original stipulation for which vacation is sought, where a claim is pending at the Office of Administrative Hearings which deals with the issues presented in their entirety, and where no evidence was submitted as to the employee's current condition following her most recent surgery, the employee's Petition to Vacate is dismissed as premature.

JURISDICTION. This court has no jurisdiction to consider a motion to dismiss a claim petition where neither the motion nor the claim petition has been considered by a compensation judge of the Office of Administrative Hearings and no appeal therefrom is accordingly pending before this court.

Petition to vacate award on stipulation dismissed.

Motion to dismiss claim petition dismissed.

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

OPINION

STEVEN D. WHEELER, Judge

The employee has petitioned to vacate an Award on Stipulation, served and filed October 14, 1986, on the ground of a substantial change in his medical condition. We dismiss the petition as premature. Employer West Metro Nursing, Inc., and its insurer have moved this court to dismiss the employee's Amended Claim Petition. We dismiss the motion for want of jurisdiction.

BACKGROUND

The employee, Launa R. Heid, sustained successive admitted work injuries to the back on July 29, 1983 and March 18, 1985 while in the employ of Annandale Care Center. In a letter report dated November 12, 1985 Dr. Mahmoud G. Nagib set forth the following history:

She was apparently initially injured in 1983 where in an attempt to

help a patient and prevent a fall she suffered from an acute lumbar and lumbosacral pain which rapidly involved the left lower extremity in a posterolateral distribution. She was treated on a conservative basis and progressively improved. However, in August of 1984, she again injured herself at work and experienced a similar symptomatology. Studies were withheld, however, because of her pregnancy. Following her delivery, she suffered from an exacerbation of her discomfort which is not unusual with this kind of straining. . . . She was seen by [Dr. Roger E. Farber] and a CT scan was performed. . . on October 30 [1995], where a bulging disc was noted at L5-S1 with a predominance on the left side.

(Pet. Exh. B: Dr. Nagib, at 1.)

In his examination of the employee on November 12, 1985, Dr. Nagib noted positive straight leg raising at about 70 degrees on the left, and the employee was seen to ambulate with a limp. Subjective sensations demonstrated a subjective hyperesthesia along the lateral aspect of the foot as well as the dorsum of the foot. Dr. Nagib did not detect any significant nerve root entrapment on the employee's CT study. He diagnosed a musculoskeletal problem, combined with an SI nerve root irritation. On November 15, 1985 Dr. Farber opined that the employee's injuries had resulted in degenerative disc disease in the lumbar spine. He recommended that the employee seek a job change which would allow her to avoid heavy lifting beyond 10-15 pounds and without twisting or bending of the lumbar spine. (Pet. Exh. B.)

The employee entered into a stipulation for settlement with the employer Annandale Care Center and its insurer on August 28, 1986 and a compensation judge served and filed an Award on Stipulation on October 14, 1986. The stipulation recited that the employee was at that time employed part time by Carefree Living, St. Cloud, Minnesota, as a licensed Practical Nurse. The stipulation paid the employee \$2,000.00 as compensation for future rehabilitation, \$8,014.00 representing 235.71 weeks of future temporary partial disability compensation, and \$13,986.00 representing payment for a 25 percent permanent partial disability to the spine, or a total of \$24,000.00, less \$5,000.00 deducted for attorney fees. In return, the employee agreed to waive any existing claims for interest, penalties and attorneys fees, agreed to a full, final and complete close-out of any claims for permanent partial disability up to 25 percent of the spine, and agreed to a full, final and complete close-out of temporary total and temporary partial disability benefits and rehabilitation benefits. (Judgment Roll: 1996 Stipulation.)

The employee continued to work as a licensed practical nurse between 1985 and 1994. In April 1994, while working for the Howard Lake Good Samaritan Center, the employee experienced an increase in the pain in her low back. She sought medical treatment and underwent a lumbar CT scan on April 15, 1994. The scan showed evidence of a small broad-based contained central and left-sided disk herniation at L5-S1 with slight impingement on the ventral aspect of the thecal sac and the left S1 nerve root. Slight disc bulging was noted at L4-5 and L2-3. The

employee was treated by epidural injection and obtained good relief. She was able to return to her career as a nurse. (Pet. Exhs. C, D, F, G.)

In 1995 the employee began working for West Metro Nursing. She continued to work as a licensed practical nurse. In April 1997 she noticed a sharp increase in her symptoms. An MRI was performed on April 25, 1997 and showed a high signal intensity annular tear at L5-S1 with a central disc protrusion contacting the left first sacral nerve root. The radiologist also reported postero-lateral left-sided disc herniation at L3-4. The employee noticed further increase in her symptoms in summer of 1997. She was placed on work restrictions and was able to continue working. (Id.)

On June 25, 1997 the employee filed a Claim Petition seeking various medical benefits and alleging the injury dates of July 29, 1983 and March 18, 1985 with the employer Annandale Care Center as well as a new date of injury on April 15, 1994 during employment with the Howard Lake Good Samaritan Center. (Judgment Roll.)

The employee was seen for an independent medical examination by Dr. Mark C. Engasser, M.D., an orthopedic surgeon, on September 8, 1997. Dr. Engasser's diagnosis was of a lumbar disc herniation at L5-S1 and a lumbar disc herniation at L3-4. He rated the L5-S1 level with a whole-body permanent partial disability of 12 percent, and the L3-4 level with a seven percent whole-body permanency. He attributed causation for all of the permanency at the L5-S1 level to the injuries prior to April 15, 1994. He opined that the employee's L3-4 condition was the result of a Gillette injury caused by the employee's work activities for West Metro Nursing. He further opined that the employee's recent time off work and need for medical treatment was attributable wholly to the Gillette injury. (Pet. Exh. F.)

The employee was next seen for an independent orthopedic evaluation on September 16, 1997 by Dr. David W. Boxall, M.D. Dr. Boxall opined that the employee had pre-existing chronic intermittent low back pain dating to 1971 and that this condition was permanently aggravated by the July 28, 1983 work injury following which a CT scan suggested a disc herniation at L5-S1. He opined that she sustained temporary flare-ups of her pre-existing condition as a result of the injuries of March 18, 1985 and April 15, 1994, and that she then sustained a Gillette injury to the low back as a result of her work activities in March 1997 resulting in a permanent flare-up of her pre-existing condition. Dr. Boxall attributed three-fourths of the employee's current need for treatment to the July 1983 injury and one-fourth to the Gillette injury of March 1997. He rated her whole-body permanent partial disability at 12 percent for the herniation at L5-S1 and apportioned nine of the 12 percent to the 1983 injury and the remainder to the 1997 Gillette injury. In his opinion, the employee's L3-4 level did not warrant a permanency rating as he did not consider her neurologic findings and complaints consistent with the effects of a herniation at that level. Dr. Boxall opined that the employee was capable of working within light duty restrictions. (Pet. Exh. G.)

The employee underwent an L3-4 microdiscectomy and foraminotomy on the left side conducted by Dr. Michael A. Amaral, M.D., at the St. Cloud Hospital on October 13, 1997.

(Pet. Exh. E.)

The employee filed an Amended Claim Petition on February 2, 1998 adding claims for permanent partial disability and temporary total disability and adding a date of Gillette injury of July 1, 1997 alleged to have occurred in the service of employer West Metro Nursing, Inc. (Judgment Roll.)

On May 19, 1998 the employee was seen by Dr. Gilbert Westreich, M.D., for an independent medical evaluation. Dr. Westreich rated the employee with a total permanent partial disability of 30 percent. In his opinion, the employee did not sustain a specific or Gillette injury as a result of her work at West Metro Nursing, and none of her permanent partial disability or need for surgery were in any way related to that employment. He considered the employee's L3-4 disc condition to have resulted from a change in body mechanics due to her L5-S1 problems and considered the employee's current low back conditions to be due to her prior low back injuries "long before her job at West Metro." Dr. Westreich did not offer any specific opinion apportioning causation for the employee's permanency or surgical treatment as between the injuries sustained prior to the employment with West Metro Nursing. (Pet. Exh. D.)

The employee was also examined for purposes of an orthopedic consultation by Dr. Robert A. Wengler, M.D. on June 23, 1998. Dr. Wengler apportioned 75 percent of the causation for the employee's disability at the L5-S1 level to the 1994 injury and 25 percent to the prior 1983 and 1985 injuries. He also considered the deterioration of employee's L3-4 disc to have been the direct result of changed body mechanics relating to the presence of the degeneration at the lower L5-S1 level and accordingly opined that liability for the employee's L3-4 condition should be apportioned in the same manner as liability for the L5-S1 condition. (Pet. Exh. C; Resp. Exh. G.)

On September 1, 1998 a compensation judge of the Office of Administrative Hearings served and filed an Order striking the employee's Amended Claim Petition from the active trial calendar by agreement of the parties pending further surgical treatment for which the employee was then scheduled, subject to reinstatement upon the compensation judge being advised that the parties are ready to proceed to trial, or to a dismissal without prejudice if not reinstated within 180 days. (Judgment Roll.)

The employee reportedly underwent additional surgery in the form of an anterior diskectomy and fusion at the L5-S1 level on September 11, 1998. (Pet. to Vacate: Aff. of Ronald Drewski.)

On July 23, 1999 the employee filed with this court a Petition to Vacate the October 14, 1986 Award on Stipulation on the ground of a substantial change in medical condition and on August 4, 1999, the employer Annandale Care Center and its insurer filed a response objecting to the employee's Petition to Vacate.

On October 25, 1999 the employer West Metro Nursing, Inc. and its insurer filed a

Motion with this court seeking that the employee's Amended Claim Petition be dismissed without prejudice for failure to prosecute the claim.

## DECISION

We have considered the employee's Petition to Vacate and the Motion of the employer West Metro together in that these two matters relate in substantial part to the same underlying case and facts.

### Petition to Vacate

Pursuant to Minn. Stat. § 176.461 (1986) and Minn. Stat. § 176.521, subd. 3, this court may vacate a prior award on stipulation for cause. For awards on stipulation filed prior to July 1, 1992, the Minnesota Supreme Court has stated that "cause" is present if one of the following circumstances exists: (1) the award was based on fraud; (2) the award was based on mistake; (3) there is newly discovered evidence; or (4) there is a substantial change in the employee's condition. Krebsbach v. Lake Lillian Coop. Creameries Ass'n, 350 N.W.2d 349, 36 W.C.D. 796 (Minn. 1984).

In order to vacate an award based on substantial change in medical condition, this court in the past 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/nursing care, (5) causal relationship between injury covered by the settlement and current worsened condition, and (6) contemplation of the parties at the time of settlement. Fodness v. Standard Café, 41 W.C.D. 1054, 1060-61 (W.C.C.A. 1989). Pursuant to the Minnesota Supreme Court's decision in Franke v. Fabcon, Inc., the issue of the contemplation of the parties at the time of the settlement appears to be irrelevant with respect to awards on stipulation filed prior to July 1, 1992. Franke, 509 N.W.2d 373, 49 W.C.D. 520 (Minn. 1993). Based on our review of her medical records, and the affidavit of the employee's attorney, it appears that there are significant questions with respect to the extent of the employee's current permanent partial disability, the extent of changes in her ability to work, and whether there is a substantial causal relationship between the injury covered by the settlement and the employee's current worsened condition and the surgical treatment she has undergone in 1997 and 1998.

Vacation of an award on the basis of substantial change in condition is not appropriate without a showing of a causal relationship between the employee's current condition and the work injury. Cf. Bennett v. Hoiseth Motor Sales, 302 Minn. 534, 224 N.W. 2d 148, 27 W.C.D. 604 (1974); Wollschlager v. Standard Constr. Co., 300 Minn. 550, 220 N.W. 2d 346, 27 W.C.D. 495 (1974). There is no clear agreement among the medical experts whose opinions have been offered to this court in connection with the petition to vacate as to the extent to which the employee's current disabilities are or are not causally related to the 1983 and 1985 injuries.

Under some circumstances, this court has referred a petition to vacate to a compensation judge for factual findings on such factors where the evidence is conflicting, prior to determining the merits of the petition. See, e.g., Bruce v. Courier Dispatch Group, slip op.

(W.C.C.A. April 30, 1993). However, in the present case, where the medical evidence requires a determination of the extent of the contribution of several alleged injuries, involving multiple employers and insurers not parties to the original stipulation for which vacation is sought, and where a claim is pending at the Office of Administrative Hearings which deals with the issues presented in their entirety, we consider it an inappropriate duplication of judicial resources to follow such a procedure on the pending petition. In addition, there is no evidence before us as to the employee's current condition following her most recent surgery. We therefore dismiss the employee's Petition to Vacate as premature. Following determination below of the issues of the nature and extent of the employee's permanent partial disability and current ability to work, and of the causal relationship between the employee's disability and her various injuries, the employee may again petition to vacate the 1986 Award on Stipulation should circumstances so warrant.

### Motion to Dismiss

West Metro's Motion was made to this court solely on the basis of our jurisdiction over the employee's Petition to Vacate, a matter over which we have original jurisdiction pursuant to the Workers' Compensation Act. The Motion to Dismiss, however, pertains not to the employee's Petition to Vacate, but to the employee's Amended Claim Petition. With respect to an employee's claim petition, this court's jurisdiction is limited by statute to review of an appeal from an award or disallowance of compensation, or of an appeal from an order affecting the merits of the case. Minn. Stat. §176.421, subd. 1. Neither the motion nor the underlying claim petition has been heard or determined below, and no appeal from such a determination is presently before this court. We accordingly have no jurisdiction to consider this matter, and dismiss the motion. West Metro should, if desired, renew its Motion in the proper forum before a compensation judge of the Office of Administrative Hearings.