HENRY HOEKSTRA, Employee/Petitioner, v. GIBSON TRUCKING and AM. COMP. INS. CO./RTW, Employer-Insurer.

WORKERS' COMPENSATION COURT OF APPEALS
JUNE 7, 1999

No. [REDACTED SSN]

HEADNOTES

VACATION OF AWARD - MISTAKE. The employee's petition to vacate a mediation award requires referral to a compensation judge of the Office of Administrative Hearings for factual findings regarding the nature and extent of the employee's work injury, the causal relationship between the employee's injury and subsequent disability and medical treatment, and the understanding of the parties at the time of the mediation award.

Petition to vacate award referred to OAH.

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

OPINION

STEVEN D. WHEELER, Judge

The employee has petitioned to vacate the Mediation Resolution/Award served and filed June 26, 1996, on the ground of mutual mistake of fact. We refer the matter to the Office of Administrative Hearings for assignment to a compensation judge to take evidence and make findings regarding the parties' understanding of the employee's medical condition as of the date of the Mediation Award.

BACKGROUND

The employee, Henry Hoekstra, has sustained three work-related injuries to his low back. The first injury occurred in July 1980 when the employee sustained torn ligaments and/or a low back strain while he was lifting a flywheel in the course and scope of employment as a mechanic in Arizona. The employee was off work for about three months, and was rated with a five percent permanent partial disability. (Pet. Ex. F; Resp. Ex. 1.)

The employee sustained another low back injury on November 18, 1991 while employed by Willmar Poultry Company shoveling corn. The employee was off work for about eight months. He was initially treated with physical therapy. His low back pain progressively increased and he experienced right leg pain extending to the foot and ankle. An MRI scan of the lumbar spine on February 18, 1992 revealed degenerative disc disease from L3-4 through L5-S1 with marked disc space narrowing and mild stenosis at L5-S1 and a posterior annular tear at L4-5

without associated herniation. The employee was treated with facet blocks and an epidural block in the spring of 1992. On July 7, 1992, the employee was evaluated by Dr. Sunny S. Kim, who diagnosed three-level degenerative disc disease from L3-4 to L5-S1. Dr. Kim recommended a trial of a gravity lumbar traction chair. He further offered the opinion that if the employee's symptoms were persistent or became excruciating, a three-level fusion could be considered as a last resort treatment at some time about one to one and one-half years in the future. (Pet. Ex. F; Resp. Exs 1, 2.)

The record before us does not disclose specific information about the employee's medical treatment or restrictions over approximately the next three years, although it appears that the employee continued to treat with Dr. Maria R. Zorowska, M.D., through July 30, 1993. The employee entered into a stipulation for settlement with the Willmar Poultry Company, self-insured, on February 14, 1994. The stipulation discloses that this employer had paid the employee permanent partial disability compensation for a 5.5 percent whole-body disability related to the 1991 work injury. The stipulation recites the position of the Willmar Poultry Company that the employee's then current disability and any further disability was causally related solely to the 1980 work injury in Arizona. The stipulation provided for a full, final and complete close-out of the employee's claims related to the November 18, 1991 injury, excepting future reasonable and necessary medical expenses, in return for a lump sum payment of $30,000.00. The stipulation was reviewed by a compensation judge and an Award on Stipulation was served and filed on February 24, 1994. (Resp. Ex. 3.)

The employee began working for the employer, Gibson Trucking, on about October 1, 1995 as a semi-truck driver hauling sugar beets. On December 13, 1995, the employee sustained an admitted injury to the low back when he slipped on a mound of packed snow while refueling his truck and fell, landing on his buttocks. He was unable to get up and was taken by ambulance to the Olivia Hospital, but was released the following day and began treating with Dr. Lyle Munneke, M.D. Physical therapy treatments did not provide significant benefit and the employee was referred back to Dr. Zorowska, who saw the employee on January 4, 1996. Dr. Zorowska's chart notes recite as history that the employee had done quite well with occasional low back pain since last seen three years previously, but had a significant increase in low back pain after falling at work on December 13, 1995. Dr. Zorowska continued the employee on physical therapy and released him to return to work at a light-duty job on a part-time basis, to increase to eight hours after one week. (Pet. Exh. F; Resp. Ex. 4: 1/4/96.)

Some time in February 1996 the employee returned to work for the employer in a light-duty office job as an operations assistant. The employee progressed to eight hours per day in the light-duty job. He continued to experience intermittent low back pain, sometimes quite severe. As of April 2, 1996, the employee was medically placed on a seven-hour per day schedule. On April 25, 1996 the employee was unable to tolerate his back pain at work and left work about 9:30 a.m. Dr. Zorowska took him medically off work for that day. (Pet. Exs. A, F; Resp. Ex. 4: 3/4/96, 4/2/96; Resp. Exs. 6, 7.)

On May 9, 1996 the employee was examined by Dr. David W. Boxall, M.D., on

behalf of the employer and insurer. Dr. Boxall diagnosed chronic low back pain with multiple level degenerative disc disease. He noted that the employee had a significant preexisting low back condition, for which he gave a 10.5 percent whole body permanent partial disability rating under Minn. R. 5223.0390, subp. 3C(2). He attributed all of this rating to causes before the December 13, 1995 injury. He opined that the December 13, 1995 injury had caused a temporary flare-up of the preexisting condition. He stated that maximum medical improvement had been reached from the aggravation in February 1996. (Pet. Ex. F, healthcare provider report dated 5/9/96.) Dr. Boxall recommended that the employee observe restrictions limiting lifting over 50 pounds, prolonged sitting and repetitive bending or lifting. Dr. Boxall opined that the employee could work in his pre-injury job on a full-time basis, including overtime, so long as he observed those restrictions. (Pet. Ex. F, report dated 5/9/96.)

According to the employee's affidavit, on May 20, 1996 the employer assigned the employee to his pre-injury job as a truck driver, with duties including the cleaning out of the truck trailer after unloading. He asserts that he was unable to perform this work because of the ongoing effects of his December 13, 1995 injury. The employer made a formal written job offer on May 26, 1996. The offer was for work as a truck driver, initially from 12:30 p.m. until 10 p.m. each day until September, when the employee was to begin working 12-hour driving shifts from 4:00 p.m. to 4:00 a.m. as performed prior to the injury. (Pet. Aff.; Pet. Ex. B.)

On June 20, 1996 the employee, who was not represented by counsel, entered into a mediation settlement with the employer and insurer which provided for a full, final and complete close-out of all workers' compensation claims arising from the admitted December 13, 1995 injury, except for future reasonable and necessary medical treatment other than chiropractic, psychological or pain clinic treatment or durable medical equipment, in return for a lump sum payment of $5,000.00. The settlement was served and filed in the form of a Mediation Award on June 26, 1996. As part of the same settlement between the parties, the employee also resigned his employment with the employer. (Judgment Roll; Pet. Ex. D.)

The employee was seen for a surgical consultation by Dr. Sunny S. Kim on February 14, 1997 on referral from Dr. Zorowska. Dr. Kim's chart note of that date notes that he had previously examined the employee for possible surgery in 1992, when he "told him he was not a surgical candidate at that time." By way of history, Dr. Kim recorded that the employee had then been treated with a radio frequency block and further physical therapy and had done well until he sustained the 1995 work injury, after which "everything has been down hill." Dr. Kim noted that the employee had not been able to work since June 1996 due to back and bilateral leg pain. Straight leg raising was positive bilaterally. A CT scan was done which showed severely collapsed and degenerated foraminal stenosis on both the right and left at the L5-S1 disc. Dr. Kim recommended surgery in the form of a one-level fusion and bilateral nerve root decompression at L5-S1 with installation of threaded fusion cages. (Resp. Ex. 8.)

The employee underwent the recommended surgery. He experienced excellent results and was first released to return to work with a 25-pound lifting restriction on July 28, 1997 and was released to return to heavy-duty work on October 27, 1997 with restrictions limiting lifting

to 50 pounds occasionally. Dr. Munneke has apportioned 75 percent of the causation for the employee's back problem and associated surgery to the December 1995 work injury, with 25 percent apportioned to the 1982 injury. (Resp. Ex. 9.)

The employee has also submitted medical records which indicate that in August 1998 the employee has also been diagnosed with an inoperable T2-T3 thoracic disc herniation which significantly negatively affects his prospects of finding gainful employment. The medical records submitted do not discuss causation for this condition. (Pet. Supplemental Ex., filed 3/15/99.)

The employee seeks vacation of the Mediation Award on the ground of mutual mistake of fact.

DECISION

This court may set aside an award on stipulation "for cause" pursuant to Minn. Stat. §§ 176.461 and 176.521, subd. 3 (1994).[1] "Cause" is limited to four grounds, including newly discovered evidence; a substantial change in medical condition since the time of the award that was clearly not anticipated . . . at the time of the award; or a mutual mistake of fact. Minn. Stat. § 176.461; Franke v. Fabcon, Inc., 509 N.W.2d 373, 376, 49 W.C.D. 520, 523 (Minn. 1993); compare Krebsbach v. Lake Lillian Coop. Creamery Assn., 350 N.W.2d 349, 36 W.C.D. 796 (Minn. 1984).

Under Minn. Stat. § 176.461, as amended, effective July 1, 1992, this court's authority to vacate an award on the ground of mistake "extends not to any mistake, but only to a *mutual* mistake of fact by the parties to the stipulation." Shelton v. Schwan's Sales Enters., 53 W.C.D. 110, 113 (W.C.C.A. 1995), *summarily aff'd* (Minn. Sept. 5, 1995) (emphasis added); see also Malz v. Natrogas, Inc., slip op. (W.C.C.A. Nov. 19, 1996); Eldred v. DeZurik, slip op. (W.C.C.A. Dec. 21, 1994). A mutual mistake of fact occurs when both parties to a stipulation misapprehend some material fact relating to the settlement. Shelton at 113. In a mutual mistake case, the inquiry focuses on what the situation was, and what was known at the time of settlement. Franke, 509 N.W.2d at 377, 49 W.C.D. at 525.

In the instant case, the employee alleges that "at the time of the Settlement, there was a mutual mistake of fact as to the actual extent of the injury to Petitioner's back." (Motion to Vacate at 4.) On the evidence presented, it appears that the parties may have settled this case on the impression that the employee's 1995 injury was solely a temporary aggravation to the employee's preexisting condition, resulting in no additional permanent partial disability, and that the employee's temporary disability after that injury either had fully resolved or was almost fully resolved. Certainly the relatively small dollar amount of the lump sum payment made under the

[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).

settlement would appear consistent with such an understanding. The only contemporary medical opinion provided to us on this issue was that of Dr. Boxall, whose opinion was to that effect. The evidence also suggests that the employee's 1995 injury may have been a substantial contributing cause of subsequent surgery, additional temporary total disability, and further permanency.

We cannot, however, say that the evidence submitted clearly establishes the basis for a vacation of the mediation award. We conclude that a full exploration of the facts is necessary before we can consider the employee's petition. We therefore refer this matter to the Office of Administrative Hearings for hearing before a compensation judge. Specifically, the compensation judge shall make findings regarding (1) the nature and extent of the 1995 injury, including whether that injury was a temporary or permanent aggravation of the employee's preexisting condition, (2) whether the 1995 injury was a substantial contributing cause of subsequent disability, medical treatment and permanent partial disability, and (3) the understanding of the parties regarding the nature of the employee's injury as of the date of the mediation award. When these findings have been made, the matter shall be returned to this court for consideration of the employee's petition.