PHILLIP L. JUNTUNEN, Employee/Petitioner, v. OGSTON'S, INC., and STATE FUND MUT. INS. CO., Employer-Insurer, and SILVERNESS PLUMBING, HEATING & EXCAVATING, INC., and MINN. WORKERS' COMP. ASSIGNED RISK PLAN/BERKLEY ADM'RS, Employer-Insurer, and SILVERNESS PLUMBING, HEATING & EXCAVATING, INC., and STATE FUND MUT. INS. CO., Employer-Insurer.

WORKERS' COMPENSATION COURT OF APPEALS
JANUARY 26, 1999

No. [REDACTED SSN]

HEADNOTES

VACATION OF AWARD - SUBSTANTIAL CHANGE IN CONDITION. Where colorable changes in the employee's ability to work, extent of permanency, and need for additional medical expense were not shown, in any way, to be causally related to the work injuries covered by the stipulation for settlement, the employee failed to demonstrate good cause to vacate his award on stipulation on grounds of a substantial change in condition.

Petition to vacate award denied.

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

OPINION

WILLIAM R. PEDERSON, Judge

The employee petitions this court to set aside an award on stipulation served and filed October 30, 1995,[1] on grounds that his condition has substantially worsened since the issuance of the award. We deny the petition.

BACKGROUND

The employee, Phillip L. Juntunen, has alleged that he sustained work-related injuries to his lower back in the course of his employment with Silverness Plumbing, Heating &

[1] The judgment roll contains awards on stipulation filed March 9, 1994, and October 30, 1995. Without specifying the date of any award or stipulations that may be here at issue, the employee in his Application to Vacate requests that this court "issue an order setting aside the award [singular] approving the Stipulations [plural] for Settlement the employee entered into with the employers and their insurers." Because the 1994 award represented only a "to date" settlement, we presume that it is the "full, final and complete" settlement of October 30, 1995, that the employee now seeks to vacate.

Excavating, Inc. [Silverness], on May 1 and August 1, 1990, and with Ogston's, Inc. [Ogston's], on May 19, 1993. Silverness was insured against workers' compensation liability by the Minnesota Workers' Compensation Assigned Risk Plan/Berkley Administrators [ARP/BA] for the alleged injury of May 1, 1990, and by State Fund Mutual Insurance Company [State Fund] for the alleged August 1, 1990, injury. State Fund was also Ogston's' Minnesota insurer at the time of the alleged May 19, 1993, injury.[2]

On April 11, 1990, at thirty-one years of age and while employed by Silverness as a laborer and heavy equipment operator, the employee sought treatment for a lower back problem with Dr. R. R. Juntunen, the employee's uncle. He complained to Dr. Juntunen that for the past two or three weeks he had experienced low back pain that radiated down his right leg. He reported no history of injury. A lumbosacral x-ray was performed, which revealed a slightly narrowed L4 interspace with associated hypertrophic changes. The employee was given a prescription for Voltaren, and on April 19, 1990, he sought further treatment with chiropractor Dr. John A. Benson. The employee complained to Dr. Benson also of "shooting pain down [right] leg" that had begun three weeks earlier, noting that he had "had it before but [it] went away." Again the employee identified no cause of the condition, and he refrained from relating it to his work.[3] Dr. Benson subsequently treated the employee five more times between April 20 and May 4, 1990, without effecting much improvement, and neither of his two May 1990 records relate the employee's problems to any particular activity on or about May 1, 1990, although the record for May 4, 1990, does note "[symptoms] yesterday [May 3, 1990] while working." On August 6, 1990, the employee returned to Dr. Benson's clinic, complaining again of lower back pain, this time as a result of an injury sustained at Silverness on August 1, 1990. Following an MRI scan on December 27, 1990, the employee was referred to surgeon Dr. Robert Donley, who diagnosed an extruded right L5 disc with right S1 root entrapment. Surgery was recommended, and on February 7, 1991, Dr. Donley performed a laminectomy with excision of a herniated disc at L5-S1 on the right. In a Maximum Medical Improvement Physician's Report dated October 2, 1992, Dr. Donley indicated that the employee had achieved maximum medical improvement [MMI] on February 7, 1992, from a work injury on August 2, 1990, and as a result of that injury had sustained a 9% impairment to the body as a whole pursuant to Minn. R. 5223.0070, subp. 1B(2)(a). In a subsequent report, dated June 11, 1993, Dr. Donley related the employee's condition to injuries sustained while employed by Silverness both in August 1990 and in May 1990.

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[2] Silverness and its insurers have maintained a denial of primary liability for both the May 1 and the August 1, 1990, injuries in both stipulations for settlement approved in this matter. Although Ogston's, together with its Wisconsin insurer, Aetna Casualty & Surety Company, has admitted liability for an injury under Wisconsin jurisdiction on May 19, 1993, Ogston's and State Fund have contested liability in Minnesota on jurisdictional and other grounds.

[3] On Dr. Benson's intake form, the employee entered a question mark in the blank for reporting the cause of the condition or the manner in which it developed, and he checked "insurance" and "Health Ins." rather than "employer" and "Workman's Comp." as being responsible for paying for his treatment.

On July 16, 1993, subsequent to termination of employment with Silverness and reemployment with Ogston's, the employee filed a claim petition seeking impairment compensation for a 9% permanent partial disability, together with payment of certain medical expenses, both related to alleged injuries with Silverness in May and August 1990. The employee and Silverness entered into a stipulation for settlement that was approved on March 9, 1994. Pursuant to that settlement, the employee's permanency claims were compromised by payment of impairment compensation for a 7.5% whole body impairment, closing out the employee's permanency to the extent of 9%. All claims for benefits were settled through January 18, 1994, the date of an earlier settlement conference. Silverness and its workers' compensation insurers expressly maintained a denial of primary liability for any injuries on May 1 or August 1, 1990.

The employee evidently sustained a reinjury of his low back while employed by Ogston's on May 19, 1993. At the time of the injury, the employee was working for Ogston's at a construction project in Wisconsin. The employee was apparently off work for approximately three weeks following this injury. He was paid workers' compensation benefits by Aetna Casualty & Surety Company [Aetna], Ogston's workers' compensation insurer in Wisconsin. Aetna did not provide coverage in the state of Minnesota. The employee was apparently able to return to his job with Ogston's, and he worked until he was laid off at the end of the season on about December 3, 1993.

The employee thereafter filed a series of claim petitions, culminating in a Second Amended Claim Petition filed on March 3, 1995. In that petition, the employee sought temporary total disability benefits from January 15, 1994, to the present and continuing, together with compensation for a 13.5% permanent partial disability to the whole body, as a result of injuries on May 1, 1990, August 1, 1990, and May 19, 1993. Ogston's and State Fund filed a Motion to Dismiss on June 26, 1995, based upon a lack of jurisdiction. The motion was subsequently denied, and the parties entered into a full, final, and complete settlement on which an award was issued on October 30, 1995. Pursuant to that award, the employee received a total of $25,900, after attorney fees and a compromise payment to the intervenors, Department of Economic Security/RI and the Department of Labor and Industry/VRU. In return for a payment of $30,000, Silverness and its insurers received a full, final, and complete settlement of all claims arising out of alleged injuries on May 1 and August 1, 1990, including future medical care and treatment. In return for a payment of $5,500, Ogston's and State Fund received a full, final, and complete settlement of all claims in the state of Minnesota arising out of the May 19, 1993, injury, including medical care and treatment. The employee specifically reserved the right to pursue a claim against Ogston's and Aetna for workers' compensation benefits in the state of Wisconsin.

The employee apparently sought rehabilitation assistance at the Vocational Rehabilitation Unit at the Minnesota Department of Labor and Industry on January 30, 1995. His file was subsequently closed upon his obtaining employment at Koski Trucking [Koski] in the spring of 1995. The employee apparently continued working for Koski until the summer of 1996. The record reflects that he has not returned to work since that time. On July 21, 1998, the employee filed an Application to Vacate Award based upon a substantial change in his medical

condition since the 1995 settlement. Silverness and its insurers and Ogston's and its Minnesota insurer have filed objections.

DECISION

This court may set aside an award for "good cause" pursuant to Minn. Stat. § 176.461 and Minn. Stat. § 176.521, subd. 3 (1995).[4] Good cause includes a substantial change in the employee's medical condition. See Krebsbach v. Lake Lillian Coop. Creamery Ass'n, 350 N.W.2d 349, 36 W.C.D. 795 (Minn. 1984). Where a change in condition is alleged, the focus of this court's inquiry is on whether there has been a substantial or significant change and whether there is adequate evidence of a causal relationship. We must compare the employee's condition at the time of the petition with the employee's condition at the time of settlement. Franke at 376-77, 49 W.C.D. at 525. Also, the substantial change in medical condition must be a change "that was clearly not anticipated and could not reasonably have been anticipated at the time of the award." Minn. Stat. § 176.461 (1995).

The employee alleges that at the time of settlement he reasonably believed that the treatment he had received to relieve his back condition had been successful and that he would have no long-term impairment of his ability to be gainfully employed in some capacity. He now contends, however, that treatment he has received since that time to relieve the effects of his alleged back injuries has failed and that he has now developed additional problems in his thoracic and cervical spine that were not apparent at the time he signed the stipulation.

Attached to the employee's Application to Vacate is an evaluation report completed by Dr. D. F. Person on February 18, 1998. Included as a part of Dr. Person's report is an x-ray consultation and report of that same date. Dr. Person's report suggests that, since the time of his settlement, the employee has sustained *additional* injuries to his lumbar spine, as well as injuries to his thoracic and cervical spine. Also submitted with the employee's Application to Vacate is a vocational evaluation summary prepared by vocational rehabilitation expert Jack Casper on May 20, 1998. In that report, Mr. Casper opines that the employee is now permanently and totally disabled. The employee has submitted no medical records documenting his treatment prior to the October 30, 1995, date of the award at issue, nor any records regarding care and treatment since that time. Although Dr. Person's report references certain medical records, none of these records are either attached to the report or otherwise submitted with the employee's application.

It is true that certain changes are evident in the employee's overall condition since the award on stipulation that is here at issue. Subsequent to that award, for instance, the employee has developed problems in his neck and upper mid back. The employee advised Dr. Person that these neck and upper mid back problems began in February or March of 1997. On November 3,

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[4] This court's authority to vacate an award is governed by statutory provisions 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).

1997, the employee underwent a posterior laminectomy and decompression at two levels of the cervical spine to relieve these problems. The employee does not recall any particular incident that would have triggered these upper spinal symptoms. He reports also that his upper back condition has actually worsened since his neck surgery. Dr. Person has related these problems to Gillette injuries,[5] culminating some time after February 1997. He does not relate these injuries to the employee's alleged work injuries in 1990 or 1993. There was absolutely no indication that the employee was experiencing neck or mid back problems at the time of settlement. Absent a causal relationship between the employee's neck and mid back problems and the injuries covered by the settlement, there is no basis to vacate the 1995 award on stipulation for reasons related to the employee's upper back condition.[6]

With regard to the employee's lumbar condition, we are not persuaded that the employee has established a substantial change in his condition that was clearly not anticipated and could not reasonably have been anticipated at the time of the award, or that there exists a causal relationship between any alleged change and the injuries covered by the settlement.

In the several medical records attached to the stipulation for settlement in October 1995,[7] the consensus diagnosis was chronic back pain status post hemilaminectomy with disc excision at L5-S1 on the right. However, in a letter to the employee's attorney on February 3, 1995, Dr. Jed Downs had opined that the employee "has had multiple levels of involvement with regards to his mechanical difficulties from L3-S1, [and] it's obvious that he has more problems than simply his L5-S1 level." Additionally, Dr. Thomas Litman, in his report of February 13, 1995, and Dr. William Fleeson, in his report of May 24, 1995, both recommended that the employee undergo an additional MRI scan of the lumbar spine. These doctors agreed that such a scan was necessary to evaluate whether the employee had in excess of the 9% permanent impairment attributable to his 1991 surgery. It was quite apparent that additional medical treatment was not only anticipated but being recommended.

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[5] See Gillette v. Harold, Inc., 257 Minn. 313, 101 N.W.2d 200, 21 W.C.D. 105 (1960).

[6] We note that Dr. Person's report might be construed as containing opinions relative to potential injuries with the employers herein that are separate from and additional to the alleged injuries in May 1990, August 1990, and May 1993 that were the subject of the 1995 award on settlement. Nothing contained in the stipulation for settlement that is here at issue precludes the employee from filing a claim petition seeking benefits for these separate and additional injuries. There is no contention that the parties intended to settle out claims that were unknown at the time of settlement. Claims related to the thoracic and cervical spine were not contemplated by the parties in 1995. It is not necessary that the 1995 award be vacated in order for the employee to bring these additional claims.

[7] These include records from Dr. R. F. Donley, Dr. Michael Davis, Dr. J. E. Downs, Dr. Thomas Litman, Dr. David Boxall, Dr. William Fleeson, and Dr. John Benson, D.C.

When he was examined by Dr. Litman, Dr. Boxall, and Dr. Fleeson in 1995, prior to the award here at issue, the employee complained of persisting low back pain with pain radiating into his right leg. Dr. Fleeson reported that the employee "described essentially constant numbness, pins and needles, and sharp pains from the mid line low back down the back of the right leg. Some days are worse, without certain reason." Dr. Litman reported that on examination, the employee "stands with significant list to the left." When evaluated on February 18, 1998, two years after the award at issue, the employee advised Dr. Person that "[h]e has pain. It is steady. It is aching pain, and he has pain which goes down into the right leg. He describes this as a steady aching pain going down to the low calf area. At times the pain is worse than at other times." The employee's symptom complaints relative to the low back do not appear to be substantially different from what they were at the time of settlement.

In his report of February 18, 1998, Dr. Person diagnosed an old herniated intervertebral disc at L5-S1 which required a surgical hemilaminectomy and disc excision. The doctor related the L5-S1 herniated disc to the work activities at Silverness Plumbing prior to the 1991 surgery. He rated a 9% permanent partial disability of the whole body directly to that surgery. There is no indication in his report that the employee has experienced a worsening of his condition attributable to the L5-S1 level of the spine. However, Dr. Person then goes on to diagnose a herniated intervertebral disc with a mass effect and scarring impinging on the L5 nerve root at L4-5 of the lumbar spine. He also opines that there is a herniated intervertebral disc with moderate spinal stenosis and compromise of the right L4 nerve root at the L3-4 space of the lumbar spine. The doctor opines that there is a 24% permanent partial disability of the whole body related to these levels in accordance with Minn. R. 5223.0390, subp. 4E(1), (2), and (4).[8] Dr. Person does not attribute these "additional problems" in the employee's lumbar spine to injuries in 1990 or 1993.[9] In light of Dr. Downs' opinion in February 1995 recognizing lumbar problems as high up as L3, and given the recommendations of Drs. Fleeson and Litman at the time of settlement that the employee undergo an additional scan to evaluate his condition, it cannot be said that the findings reported by Dr. Person were clearly unanticipated. Nor is it clear that the employee's findings on physical examination were any different at the time of the award than they were at the time of Dr. Person's evaluation.

Although it is apparent that there has been a substantial change in the employee's overall condition since the award on stipulation, he has failed to establish a causal relationship between the injuries covered by the settlement and his current worsened condition. Instead, it appears that most if not all of the worsening of the employee's condition is due to problems in his neck and upper mid back that he has suffered subsequent to the award. The employee's current low back complaints, although significant, are essentially the same as they were in 1995. It was

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[8] The permanency rules cited by Dr. Person are effective only for injury dates after July 1, 1993.

[9] The doctor states that the employee suffered a Gillette-type injury, culminating on or about September 1, 1996.

apparent in records attached to the stipulation for settlement that the employee was continuing to suffer from low back pain and radicular symptoms that required further evaluation. Even if we were to agree that there has been some change in the employee's low back since the award, the evidence does not establish that that change is substantial or that the employee's ongoing problems were unanticipated at the time of the award. Dr. Person gives no explanation as to how his finding of increased permanent disability in the lumbar spine correlates to the employee's findings on physical examination. The rules cited by Dr. Person were not in existence at the time of the injuries in question, and they refer to surgeries that were not performed in this case. Furthermore, the doctor relates the additional permanency that he has found to an injury culminating after the award on stipulation. For all of these reasons, we find no basis for vacating the 1995 award on stipulation.