THOMAS C. LARSON, Employee/Petitioner, v. BRYAN ROCK PRODS. and HOME INS. CO./RISK ENTERPRISE MGMT., Employer-Insurer.

WORKERS' COMPENSATION COURT OF APPEALS
MAY 5, 1999

No. [REDACTED SSN]

HEADNOTES

VACATION OF AWARD - SUBSTANTIAL CHANGE IN CONDITION. Because there had not yet been a change in the employee's ability to work, additional surgery, or additional permanent partial disability, there had not yet been a substantial change in condition sufficient to justify vacating the award on stipulation.

Petition to vacate award denied.

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

OPINION

DEBRA A. WILSON, Judge

The employee petitions to vacate an award on stipulation filed in 1988, based on a substantial change in his medical condition. Finding an insufficient basis to vacate the award on stipulation at this time, we deny the petition.

BACKGROUND

The employee sustained a work-related injury to his low back on May 10, 1983, while working for the employer as a heavy equipment operator. He was eventually diagnosed as suffering from marked degeneration of the L5-S1 disc, with calcification and bilateral lateral stenosis associated with spondylolysis and spondylolisthesis. The employer and insurer paid the employee various workers' compensation benefits, including benefits for a 17.5% permanent partial disability to close out permanency to the extent of 20% of the back.

The employee underwent spinal fusion surgery, at L5-S1, in September of 1986. On May 11, 1987, his treating doctor, Dr. Thomas V. Rieser, noted that the employee was doing quite well but should be restricted from lifting more than thirty pounds on a repetitive basis, carrying more than thirty pounds on a repetitive basis, sitting more than six hours, standing more than four hours per day, and walking more than four hours per day, with only occasional bending and squatting. He also opined that the employee could not return to the work he was doing before

the injury. The employee apparently returned to work on November 8, 1987.[1]

On March 31, 1988, the employee filed a claim petition, seeking benefits for an additional 10% permanency of the back based on a March 8, 1988, report of Dr. Rieser, which indicated that the employee had a 30% disability of the spine. When the employee was seen by Dr. Rieser on May 9, 1988, for follow-up, Dr. Rieser noted that the employee was having increased difficulties with the back. The doctor's notes reflect that the employee was "standing about 8 hours a day doing twisting type of work" but that the employee had the opportunity to do lighter work in approximately one month. The doctor recommended physical therapy. The report from the physical therapy evaluation performed on May 11, 1988, at St. Croix Valley Memorial Hospital indicates that the employee had constant back pain and intermittent buttock and leg pain to the knee. The employee was reported at that time as being limited to four hours of sitting, four hours of standing, and forty miles of driving for work. Physical therapy notes from June 8, 1988, reflect that the employee was to be seen on a weekly basis to monitor pain progress.

In June of 1988, when the parties entered into a stipulation for settlement, the employee was receiving $265.00 per week in temporary partial disability benefits. The stipulation provided that the employee would receive $87,500, less $6,500 in attorney fees, in full, final, and complete settlement of all claims, with the exception of medical expenses. An award on stipulation was filed on June 22, 1988.

On May 8, 1998, the employee filed a petition to vacate the 1988 award on stipulation, which he subsequently withdrew. Another petition to vacate was filed on December 17, 1998, based on a substantial change in the employee's medical condition. On January 22, 1999, the employer and insurer filed a memorandum in opposition to the petition to vacate.

DECISION

For awards issued prior to July 1, 1992, "cause" to vacate includes a substantial change in condition. 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

[1] This information was taken from medical records contained in the division file. The only medical records attached to the employee's petition to vacate were a 1985 CT scan report and records from 1998. The employer and insurer submitted additional medical records that cover periods preceding the stipulation for settlement.

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

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

In the present case, it appears that the employee's diagnosis has changed, at least in part. The employee had a fusion at L5-S1, but the CT taken in November of 1984 showed the L4-5 level to be normal. In contrast, the post-settlement March 3, 1998, MRI revealed "facet degeneration bilaterally at L4-5 with mild bilateral front-back lateral stenosis at L4-5 without frank L4 ganglionic compression." Dr. Escobar opined in May of 1998 that x-rays showed "some retrolisthesis of the level above the prior fusion at the L4-5 level." Dr. Escobar also noted that the discogram "shows that he has a tear of the L4-5 disc." Dr. Pinto opined in May of 1998 that the employee has "some foraminal stenosis at L4-5" and that a CT showed facet arthritis at L4-5.[2]

The only change in the employee's ability to work, however, has been an apparent increase in work activities. At oral argument, the attorneys indicated that the employee was working only part time for the DNR at the time of the settlement but that he at some point thereafter returned to full-time employment as a heavy equipment operator, a position he continues in to the present time. While employee's counsel contended that the employee was working in great pain and operated only new equipment equipped with air seats, etc., this was only counsel's unsupported allegation; there was no affidavit of the employee attached to the petition to vacate. In addition, records in the division file show that the restrictions imposed by Dr. Rieser in May of 1987 were more stringent than those imposed by Dr. Bruce Bartie on March 31, 1998.[3]

The employee has provided no medical reports that rate permanent partial disability over and above that which he was claiming at the time of the stipulation for settlement. He does, however, contend that additional fusion surgery at an adjacent level would give rise to additional permanency. In determining whether an employee has experienced a substantial change in his medical condition, this court compares his condition at the time of the award on stipulation with his condition at the time of the petition to vacate. Battle v. Gould, Inc., 42 W.C.D. 1085 (W.C.C.A. 1990). Prospective or anticipated changes do not provide a basis for vacation.

The employee also contends that additional fusion surgery at L4-5 "is likely," based on the March 31, 1998, report of Dr. Bartie, and that this is more costly and extensive medical

[2] The employee's attorney, in his affidavit attached to the petition to vacate, also contends that the employee now has an incomplete fusion at L5-S1, based on a discography and post-discography CT scan. We are unable to verify that allegation, as the discography and CT scan reports were not submitted to this court, and both Drs. Escobar and Pinto opined that the fusion looks solid on the CT.

[3] Dr. Bartie restricted the employee to a maximum lift of 40 pounds, "25 regular," and limited stooping, lifting, twisting, and climbing.

treatment than was anticipated at the time of the stipulation for settlement. While we agree that no medical records reflect any recommendation for surgery at L4-5 at the time of the settlement, the surgery is still prospective and has not been scheduled. And, where, as here, medical expenses are not closed out by the award, we put less emphasis on the need for additional treatment. Burke v. F & M Asphalt, 54 W.C.D. 363 (W.C.C.A. 1996).

Finally, the employee provides the opinions of Dr. Bartie and Dr. Pinto that the condition at L4-5 is related to his work injury. Both doctors are of the opinion that the fusion at L5-S1 placed increased stress at L4-5, which over time led to degeneration of the disc. In contrast, the employer and insurer's independent medical examiner, Dr. Thomas Litman, opined that changes at the L4-5 level "must be considered due to the work activities he has participated in since the time of his fusion operation," because "all of the current findings that point to a new level have developed since that fusion operation."

This is a close case. However, because there has not yet been a change in the employee's ability to work, additional surgery, or additional permanent partial disability, we find that there has not yet been a substantial change in the employee's condition, and we therefore deny the petition to vacate.