

ERIC M. LAUTER, Employee/Petitioner, v. RED OWL STORES, INC., and TRAVELERS INS. CO., Employer-Insurer.

WORKERS' COMPENSATION COURT OF APPEALS  
JUNE 23, 1999

No. [REDACTED SSN]

HEADNOTES

VACATION OF AWARD - SUBSTANTIAL CHANGE IN CONDITION. Although the employee's knee condition has significantly deteriorated over the years by progression of degenerative processes resulting from the work injury, the employee failed to establish good cause to vacate an award on stipulation where there was no change in his ability to work, medical expenses were left open by the settlement, his overall permanent partial disability has not worsened past the amount claimed and compensated in the stipulation, and his treating physician had diagnosed the "early" stages of a degenerative knee condition prior to the stipulation.

Petition to vacate award on stipulation denied.

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

OPINION

STEVEN D. WHEELER, Judge

The employee has petitioned to vacate an Award on Stipulation, served and filed May 26, 1987, on the ground of a substantial change in his medical condition. We deny the petition to vacate.

BACKGROUND

The employee, Eric Lauter, was born in 1950 and is 49 years old. In 1970 he was employed in Ohio by a paint company, Hanna Paint Manufacturing. In July of that year he sustained a work-related injury to the back when he was tilting a 55-gallon paint drum onto a two-wheeled cart, tripped and fell, and the paint drum fell onto his right side and right leg. He was off work for several months and was treated with therapy and a back brace. The employee was subsequently rated with a 5 percent permanent partial disability ("PPD") to the back as a result of this injury. He returned to his job for Hanna Paint but reinjured his back in a fall at work in December 1970, after which he was again medically off work for several months. (T. 23-27.<sup>1</sup>)

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<sup>1</sup> Transcript references in this opinion refer to the transcript of testimony taken at the September 3, 1986 hearing before Compensation Judge Edward Toussaint, a copy of which is in

On May 25, 1973 the employee was injured in a nonwork-related motorcycle accident when his motorcycle struck a telephone pole. He was hospitalized and treated for his injuries, the most significant of which was a large laceration of the left buttock and thigh and an open fracture of the greater trochanter at the left hip joint. The employee was treated surgically with debridement and exploration of the sciatic nerve and wire fixation of the left greater trochanter. Another surgery was performed about six months later to remove the fixating wires. (T. 27, 64-66.)

The employee sustained a work-related injury to his right arm on April 19, 1976 in Ohio while working for Area Roofing. According to a rating subsequently offered by Dr. A.V. Anderson, the employee sustained 15 percent PPD to the right arm. (T. 28-29; Exh. 4: 3/1/84.)

The employee moved from Ohio to Minnesota in about 1977. Over the next several years he worked for a number of companies in a variety of jobs, beginning part-time work for the employer, Red Owl Stores, in about September 1980 in its grocery warehouse in Hopkins, Minnesota. In November 1980 the employee started working full time for the employer. On February 23, 1981 the employee was standing at a counter in the employer's warehouse preparing paperwork for the next order he was to pull from the warehouse when he was struck by a motorized pallet jack which its operator had been unable to stop. The employee was struck on the right side of his body at a level somewhere below the right hip and was knocked into and under the counter at which he was standing, striking his left hip against the wall under the counter.

The employee was taken to the hospital immediately after the injury. He was released later that day, but remained off work. He initially treated with his family physician and later saw a number of different physicians. The employee's symptoms included pain in the left and right hips, left leg pain, intermittent locking up of the right knee with pain in the knee joint, and back pain. (T. 42-45.) The employer and insurer admitted the injury and paid temporary total and temporary partial disability compensation and other benefits. (T. 30-42.)

The employee was off work until about mid-September 1981, when he returned to work for the employer at a part-time light duty job. He apparently continued to work in that position until about the end of October 1982, by which time he stopped working because it caused too much pain. He has not returned to any form of substantial employment since that time. (T. 46-48; Judgment Roll: schedule of benefits paid as attached to 3/13/87 NOID.)

On February 4, 1982 an arthroscopy of the employee's right knee was performed, but no signs of tearing of the cruciates or meniscus were found. The employee continued to complain of pain into the right knee with problems with complete extension of the knee and persistent crepitus in the knee joint. An extensive arthroscopic exploration of the right knee was performed by Dr. Robin C. Crandall on December 7, 1982. No internal derangement was seen but significant hypertrophic synovitis was noted. The doctor performed a limited synovectomy

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the DOLI file.

during the arthroscopic procedure. (Exh. 3: 2/4/82; Exh. 4: 9/7/82; Exh. 5: 12/7/82.)

On February 9, 1983 Dr. Crandall performed a further surgical procedure, this time to the employee's left hip. The surgery consisted of "removal of trochanteric bursa with incision into the ilial tibial band and relief of ilial tibia band over the left greater trochanter," as well as removal of some trochanteric wire still in the hip from the employee's 1973 surgery. When the employee was seen in follow-up by Dr. Crandall on May 16, 1983, the doctor rated the employee with a 10 percent PPD to the left hip and a ten percent PPD to the right leg, the latter for his knee injury with arthroscopy and synovectomy. (Exh. 5: 2/9/83, 5/16/83.)

The employee was examined by Dr. Robert Wengler on July 24, 1984. He found crepitation in the right knee joint. He did not feel it was characteristic of a cartilage tear, but rather that the employee's problems with the right knee were symptomatic of an internal derangement causing instability. He did not think this problem had been corrected by the surgery performed by Dr. Crandall. Dr. Wengler also found a recurrent trochanteric bursal cyst in the left hip, which he removed surgically on September 5, 1984. His diagnosis was synovial osteochondromatosis. He rated the employee's permanent partial impairment at 25 percent of the left leg for the continuing left hip difficulties and at 10 percent of the right leg for the employee's right knee problems. (Exh. 8, Wengler Dep. at 4-5, 20-24.)

On October 20, 1985, Dr. A.V. Anderson, the employee's treating physician, rated the employee with a 15 percent permanent impairment to the right lower extremity for the knee condition, a 25 percent impairment of the left lower extremity for the hip condition, and a 10 percent impairment of the back, all of which he attributed to the 1981 work injury, and which he considered to be in addition to any permanency resulting from the 1973 motorcycle accident. (Exh. 4: 10/20/85.)

The employee was examined by Dr. John T. Anderson, an orthopedic specialist, on March 11, 1986. On examination this physician found the employee's right knee to be "objectively normal." He stated that the employee's subjective complaints to "be greatly exaggerated." Dr. Anderson considered the employee's lumbar problems to constitute a chronic lumbar strain secondary to his 1970 fall at work in Ohio. He diagnosed the employee's left hip problem as chronic left trochanteric bursitis which he deemed solely residual to the 1973 motorcycle accident and subsequent surgeries. (Exh. 14.)

On March 30, 1986, Dr. A.V. Anderson offered the opinion that the employee had been effectively totally disabled for the last five years due to the injuries to his lumbar spine, left hip and right knee. (Exh. 4: 3/30/86.)

An MRI study of the employee's right knee on July 10, 1986 was read as normal. However, Dr. A.V. Anderson, in his examination notes on July 29, 1986, noted that the employee continued to complain of pain problems in the right knee and hip and that surgery had not substantially changed the employee's condition. With respect to the right knee, his diagnosis was of a chronic muscle and ligamentous injury with probable early degenerative joint changes. (Exh.

9; Exh. 4: 7/29/86.)

On September 12, 1986, a psychologist, Ronald J. Berk, offered the opinion that the employee was unable to function in a work or social setting as a result of his physical and psychological conditions. (Exh. 13.)

The employer and insurer had paid the employee permanent partial disability benefits for a 10 percent impairment of the left leg, a 10 percent impairment of the right leg, and a 5 percent impairment of the back. However, the employee alleged entitlement to further permanent partial disability consistent with the opinions of Dr. A.V. Anderson and Dr. Wengler. (Judgment Roll: Claim Pet. of 7/24/85.) A hearing was held on this issue before a compensation judge of the Office of Administrative Hearings on September 3, 1986. Following the hearing, the judge found that the employee's 1981 work injury had caused a 10 percent PPD to each of the right and left lower extremities and a 5 percent PPD to the employee's back, the degree of permanency previously paid by the employer and insurer. The judge further found that, due to an error in the calculation of the compensation rate, the employer and insurer had overpaid permanent partial disability and were entitled to a credit in the amount of \$3,076.75. (Judgment Roll: 10/31/86 F&O, Findings 3, 4.)

The employee filed an appeal to this court from the findings regarding the permanency ratings on November 19, 1986. However, on April 28, 1987, the employee and the employer and insurer entered into a stipulation for settlement and the employee requested dismissal of the appeal. (Judgment Roll.)

The stipulation noted that the employee had been paid permanent partial disability compensation in the amount of \$5,368.00 for a 10 percent PPD of the left leg, \$5,368.00 for a 10 percent PPD to the right leg, \$8,540.00 for a 10 percent PPD of the back, and a multiple injury factor of \$2,891.00. In addition, the employee had received 273.2 weeks of temporary total disability compensation amounting to \$80,212.25 and temporary partial disability compensation amounting to \$2,255.76. Medical, vocational and rehabilitation expenses had been paid in the amount of \$52,503.10. The employee continued to claim entitlement to additional PPD, in the amount of 15 percent of the left leg, 5 percent of the right leg for the right knee, and 5 percent of the back. The employee agreed to a full, final and complete settlement of his claims arising from the 1981 work injury, excepting future medical expenses, in return for a lump sum payment of \$65,000.00. The stipulation recited that this amount expressly included compensation for an additional 10% PPD to the left leg, 3 percent PPD to the right leg, and 5 percent PPD to the back. The employer and insurer also agreed to waive any prior overpayments. (Judgment Roll: 4/28/87 stipulation.) An award on stipulation was issued by this court on May 26, 1987. (Judgment Roll.)

The employee continued to experience pain in his right knee and left hip, and received cortisone injections for periodic right knee problems. His knee condition continued to progress with chronic patellofemoral pain with moderate to severe chondromalacia. On January 18, 1991, the employee underwent another diagnostic arthroscopy of the right knee,

together with arthroscopic debridement of the right patella and modified MaQuet elevation of the right patellofemoral joint. He also underwent another surgical procedure for his left hip pain, consisting of excision of the left greater trochanteric bursa. (Exh. 4: 5/1/90; Exh. 11: 1/18/91; Exh. 7: 11/29/90.)

On January 25, 1993, the employee was seen by Dr. A. V. Anderson who again opined that the employee's pallet jack accident in February 1981 had caused a chronic and permanent disorder of the right knee which could be expected to continue to degenerate as the years went by. Because arthritic changes at the patellofemoral joint of the employee's right knee continued to worsen, another arthroscopic procedure was performed on March 4, 1993, which confirmed the preoperative diagnosis of advanced chondromalacia of the patella. In September 1994 Dr. Donald B. Miller, an orthopedic surgeon, opined that the employee's right knee pain was a combination of the severe degenerative changes involving his right patella as well as significant atrophy involving his right thigh muscles. He recommended that the employee undergo a patellectomy to relieve the pain from the severe arthritis of the employee's right patellofemoral joint, noting that "patients who undergo a patellectomy can often function near full capacity." The employee underwent the patellectomy on November 22, 1994. (Exh. 4: 1/25/93, 3/2/93, 5/14/93, 9/12/94; Exh. 7: 3/4/93, 4/21/93, 3/4/94, 11/22/94.)

On March 27, 1998, Dr. Anderson opined that the specific course of the employee's subsequent treatment would not have been anticipated as of May 1987, since "we cannot accurately predict the degenerative characteristics of either the hip or knee problem." Dr. Anderson further opined that the employee was already permanently and totally disabled as of May 1987. He opined that the employee was now permanently partially disabled to the extent of 34 percent of the right knee. (Exh. 10: 3/27/98.)

The employee now petitions this court to vacate the April 28, 1997 Stipulation for Settlement on the ground of a substantial change in medical condition.

## DECISION

This court's authority to vacate an award on stipulation executed prior to July 1, 1992 is governed by Minn. Stat. §§176.461 and 176.521, subd. 3. An award may be set aside if the employee makes a showing of good cause, for which grounds may exist if "(a) the award was based on fraud; (b) the award was based on mistake; (c) there is newly discovered evidence; or (d) there is a substantial change in the employee's condition." Stewart v. Rahr Malting Co., 435 N.W.2d 538, 539, 41 W.C.D. 648, 649 (Minn. 1989).

In this case, the employee claims good cause to vacate the award on stipulation based on a substantial change in medical condition. Factors this court considers in making this determination include change in diagnosis, change in the employee's ability to work, additional permanent partial disability, the necessity of more costly and extensive medical care and services than initially anticipated and whether there is a causal relationship between the employee's changed condition and the injury covered by the settlement. Fodness v. Standard Cafe, 41 W.C.D.

1054, 1060-61 (W.C.C.A. 1989). While a review of the record in the light of these factors reveals that the employee's right knee condition has worsened over the years, we cannot conclude that the change in his overall circumstances are sufficiently substantial to warrant vacation of the 1987 settlement.

The employee's 1981 work injury resulted in aggravations or injuries to multiple parts of the employee's body, the back, left hip, and right knee. Prior to the April 28, 1987 stipulation for settlement, the employee's back problem had been diagnosed as a chronic lumbar strain and his left hip problem had been diagnosed as chronic left trochanteric bursitis. The recent diagnoses for these problems have not changed and most recently were mechanical back syndrome and left trochanteric bursitis. (Compare T. 169, Exh. 14, and e.g., Exh. 4: 2/15/95.) The employee does not assert that either of these conditions have shown any significant increase in permanent partial disability. Rather, the employee relies solely upon the progression of his right knee condition as the basis for his petition.

The employee alleges that the diagnosis of his right knee condition has changed significantly, in that the degenerative changes in his right knee joint worsened to a level of severe arthritic changes to the patella that have required surgical treatment, including a patellectomy in 1994. These changes and treatments do represent a substantial progression of the *extent* of the degenerative changes to the employee's knee. We note, however, that Dr. A.V. Anderson's basic diagnosis of the employee's condition on July 29, 1986, prior to the stipulation, was of a chronic muscle and ligamentous injury which was causing "the early stage of some degenerative changes, whether it be under the patella or . . . in the joint surfaces." That diagnosis is substantially unchanged. The employee's current condition is best characterized as the result of the degenerative process diagnosed by Dr. Anderson prior to the stipulation rather than a new or distinct diagnosis. (T. 178, 198; Exh. 4: 7/29/86.)

The record discloses no significant change in the employee's ability to work. The employee was totally disabled prior to and at the time of the stipulation. He claimed at the time of the stipulation that he was totally disabled and would remain so indefinitely. While the employee now agrees that he is and was permanently totally disabled, he contends that the permanent nature of his inability to work became certain only in retrospect. In the analysis of this factor we are not, however, focused on when the employee's permanent total status became certain. We are primarily concerned about his demonstrated abilities. In this case there is not much dispute concerning the lack of change in the employee's ability to work. Prior to settlement, the employee had not worked since October 1982. In addition, as early as February 1985, Dr. A. V. Anderson, in a letter to the Social Security Administration, indicated that the employee was totally disabled and that it was unlikely that he would improve. Dr. Anderson's July 29, 1986 report also substantiates the extent of the employee's total disability from substantial employment.

With respect to the claim of substantial additional PPD the employee relies on Dr. A. V. Anderson's March 27, 1998 opinion. In that report, Dr. A. V. Anderson now gives the employee a 34 percent PPD rating to his right knee. A 34 percent PPD rating to the knee translates to a whole-body disability of 11.56 percent. At the time of the 1987 stipulation, the employee

was claiming PPD for his right knee condition to the extent of 15 percent of the right leg, which converts to a whole-body disability of 6 percent.<sup>2</sup> Thus, if we provisionally accept Dr. A.V. Anderson's 1998 rating, there appears to be an increase in the employee's whole body permanency as related solely to his right knee.

In the context of a petition to vacate, however, we need to consider the employee's permanent partial disability related to all of the injuries covered by the settlement. At the time of the stipulation, the employee was alleging the equivalent of an approximately 24.4 percent whole-body permanency, when combining all conditions relating to the 1981 injury. The stipulation expressly compensated him for disability ratings which convert to an approximately 21.6 percent whole-body permanency. For those same areas of the body, the left and right legs and low back, the employee's current claims, even with the increased right knee permanency, amount to just slightly over an 18 percent whole body PPD rating.<sup>3</sup> Considering the employee's alleged current

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<sup>2</sup> See Minn. R. 5223.0250, subp. C, which tabulates certain conversion factors and sets forth further methodology for use in converting pre-1984 ratings of disability to individual bodily members to a whole-body rating. In the table provided, a rating for the leg must be multiplied by 40 percent to obtain a whole-body rating, and a rating for the back must be multiplied by 71 percent to obtain a whole-body rating. See also Minn. R. 5223.0510, subp. 1, and Minn. R. 5223.0550, which together provide that the whole-body equivalent of a percentage rating of a knee condition is equivalent to 34 percent of the rating to that member.

<sup>3</sup> Using the method given by rule for determining the equivalent whole-body permanency for permanency rated to bodily members (see fn. 2, supra), we calculated the whole-body ratings discussed in this paragraph as follows:

Permanency Claimed in Stipulation:

Pursuant to ¶ V of the stipulation (Exh. 1), the employee had already received payment from the employer and insurer for 10% PPD of the left leg due to the left hip condition, 10% PPD of the right leg due to the right knee condition, and 10% PPD of the back. The employee was claiming an additional 15% PPD of the left leg for a total of 25%, an additional 5% of the right leg for a total of 15%, and an additional 5% of the back for a total of 15%. The claimed PPD translates to whole-body ratings of 10% for the left hip condition (40% of 25%), 6% for the right knee condition (40% of 15%) and 10.65% for the back (71% of 15%). Using the A + B(1-A) combinatory formula in Minn. Stat. §176.105, subd. 4c, the overall whole-body permanency claimed was approximately 24.5 percent [ $10\% + 6\% (.9) + 10.65\% (.846) = 24.41\%$ ]

Permanency Compensated in Stipulation:

The stipulation expressly states that it was intended to compensate the employee for an additional 10%, 3% and 5%, respectively, in addition to the 10% left leg, 10% right leg and 10% back PPD already paid, so that the permanency compensated under the stipulation was 20% to the left leg [left hip condition], 13% to the right leg [right knee condition] and 15% to the back. These translate to whole-body ratings of 8% for the left hip condition (40% of 20%), 5.2% for the right knee condition (40% of 13%) and 10.65% for the back (71% of 15%). Again applying the

overall permanency related to the 1981 injury, there has not been an increase over what was claimed and compensated for at the time of the 1987 settlement.

The employee has undergone several surgical procedures which, according to Dr. A.V. Anderson, were not specifically anticipated at the time of the stipulation. However, as we have previously noted, the necessity of more costly and extensive medical care and services than initially anticipated is of limited significance to vacation of an award on stipulation where, as here, the settlement has left open the right to reimbursement for reasonable and necessary medical expenses.

While the employee may have had an increase in whole body permanency related to his right knee, his overall permanency may not have increased substantially. His present right knee condition is merely the result of surgical treatment of the natural degenerative process occasioned by the original condition and cannot be considered to be a substantial change in diagnosis, and there has been no change in the employee's ability to work. Considering the relevant Fodness factors, we do not find just cause to vacate the 1987 Award on Stipulation.

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combinatory formula, the overall whole-body permanency compensated in the stipulation was about 21.7% [8% + 5.2%(.92) + 10.65%(.87216) = 21.59%]

Current Permanency: At oral argument in this matter, the employee's counsel noted that the employee did not seek vacation of the October 31, 1986 findings and order which were on appeal at the time the stipulation was signed. Nor has the employee alleged any increase in the PPD applicable to the back or left hip. The current ratings for the employee's back and left hip conditions are therefore, as a matter of law, those established in the prior findings. Accordingly, the employee's hip condition has a whole-body permanency rating of 4% (40% of 10%), and his back condition has a whole-body permanency rating of 3.55% (71% of 5%). If Dr. A.V. Anderson's rating of the current disability of employee's right knee condition is accepted, the employee's knee condition bears an 11.56 percent whole-body rating, as previously discussed in the text of this opinion. No higher rating was provided in support of the petition to vacate. The employee's current overall disability, as a matter of law, thus is at most only slightly above 18% [4% + 3.55%(.96) + 11.56%(.92592) = 18.11%]