

DARLENE MENZEL, Employee/Petitioner, v. AM. REST. GRP./STUART ANDERSON and AM. INT'L GRP., adm'd by CRAWFORD & CO., Employer-Insurer.

WORKERS' COMPENSATION COURT OF APPEALS  
MAY 6, 1999

No. [REDACTED SSN]

HEADNOTES

VACATION OF AWARD - SUBSTANTIAL CHANGE IN CONDITION. Because the changes in the employee's right shoulder condition could reasonably have been anticipated at the time of the settlement and were not substantial, no basis existed to vacate the award on stipulation on grounds of "a substantial change in medical condition since the time of the award that was clearly not anticipated and could not reasonably have been anticipated at the time of the award," as specified by Minn. Stat. § 176.461. Further, because claims for the employee's neck condition were not closed out by the settlement, a change in the employee's neck condition provides no grounds to vacate.

SETTLEMENTS. Pursuant to Sweep v. Hanson Silo Co., 391 N.W.2d 817, 39 W.C.D. 51 (Minn. 1986), a stipulation for settlement may not close out claims for unknown injuries.

Petition to vacate award on stipulation 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 on June 29, 1994, based on a substantial change in her medical condition. Finding no basis to vacate the award, we deny the petition.

BACKGROUND

A first report of injury was completed on October 22, 1991, indicating that the employee had slipped and injured her elbow on October 21, 1991, while working as a prep cook for Stuart Anderson [the employer].<sup>1</sup> About a month later, on November 19, 1991, the employee was seen by Dr. Ingrid Abols, relating a history of right arm, elbow, and hand pain since falling

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<sup>1</sup> This is the only first report of injury contained in the division file for injuries in October of 1991 and July of 1992.

onto a flexed elbow at work in October of 1991. Dr. Abols ordered an EMG, which revealed mild carpal tunnel syndrome. The employee continued to work and was examined again by Dr. Abols on May 5, 1992. A repeat EMG done at that time showed carpal tunnel syndrome and “possibly suggest[ed] a lower plexus involvement or a C8-T1 radiculopathy of a mild degree.” The employee declined to be evaluated for carpal tunnel surgery at that time.

On August 4, 1992, Dr. Abols noted the employee was still having “problems with tenderness in the right upper extremity lateral epicondyle and numbness in her hands when she wakes up in the morning, together with achiness and some swelling.” The employee also noted difficulty when she reached over her shoulder. Another EMG was interpreted as showing no change from May of 1992. Dr. Abols diagnosed overuse syndrome of the right upper extremity, mild carpal tunnel syndrome, and right epicondylitis.

On October 26, 1992, Dr. Abols issued a maximum medical improvement [MMI] report, stating that the employee had reached MMI and rating the employee as having an 8.75% whole body impairment pursuant to Minn. R. 5223.0100, subps. 1B(2) and 2.

On January 25, 1993, the employee was examined by independent medical examiner Dr. David P. Falconer, who noted that the employee considered her right shoulder problems to be the “most severe or bothersome of her problems.” In his report, Dr. Falconer opined that,

the local lateral elbow symptoms of mild lateral epicondylitis are directly related to the work injury of October of 1991. I do not, however, think that the carpal tunnel complaints and symptoms which have been documented on EMG and are anatomically consistent in the median nerve distribution are at all related to the focal injury of October of 1991. . . . I do think these are much more likely due to the repetitive grip, grasp and squeeze activities that she pursues on a regular basis on her job. In addition, the shoulder symptoms that she has manifested are entirely consistent with a subacromial bursitis or shoulder impingement syndrome. Again, I do not think this is likely to be related to the specific focal traumatic incident of October 1991, but more likely related to the repetitive reaching and stretching that she does retrieving materials from high shelves.

The doctor went on to opine that the employee did not have any ratable permanent impairment. He also stated, however, that the employee should have restrictions on her shoulder of “avoidance of overhead elevation beyond the low chest position so as to avoid flexing or abducting the shoulder beyond 75 degrees.” Dr. Falconer further suggested that if the employee did not have a good clinical response to physiotherapy and cortisone shots, she might require surgery.

The employee filed a claim petition on September 27, 1993, alleging injuries on

October 21, 1991, and July of 1992, in the nature of “right upper extremity and carpal tunnel” arising out of her employment with the employer. At that time, the employee was seeking benefits for an 8.75% permanent partial disability to the whole body based on the October 26, 1992, MMI report of Dr. Abols. On October 12, 1993, the employer and insurer answered the employee’s claim petition, admitting a work-related injury to the right elbow on October 21, 1991, but denying all other allegations.

The parties entered into a stipulation for settlement in June of 1994. At that time, the employee was alleging “a work-related injury to her right upper extremity and also that she has sustained a carpal tunnel injury as a direct and proximate result of her work activities on or about October 21, 1991 and July of 1992.” It was the employer and insurer’s position at that time that the employee had sustained a right elbow injury on October 21, 1991, but that she had fully recovered from the effects of that injury. The employer and insurer also alleged lack of notice as to an injury occurring on or about July of 1992. Pursuant to the stipulation, the employee was paid \$1,875.00 in full, final, and complete settlement of her claim, with the exception of future medical benefits related to the right elbow. From that amount, \$375.00 was withheld and paid to Helen Dovolis as attorney fees. An award on stipulation was filed on June 29, 1994.

On November 30, 1998, the employee petitioned to set aside the award on stipulation based on a substantial change in her medical condition. Attached to the petition was an affidavit of the employee’s current attorney, Lorrie Bescheinen. The employer and insurer filed an objection to the petition to vacate on December 8, 1998, alleging that the employee had failed to satisfy the requirements of Minn. Stat. § 176.421, in that there was no medical support for the employee’s claim attached to the petition, and that the employee had failed to establish a prima facie case. A memorandum of law was subsequently filed on December 16, 1998, and medical records were filed on April 28, 1999.<sup>2</sup>

## DECISION

The Workers’ Compensation Court of Appeals may vacate an award for “cause.” For awards filed on or after July 1, 1992, “cause” is limited to the following:

- 1) a mutual mistake of fact;
- 2) newly discovered evidence;
- 3) fraud; or
- 4) a substantial change in medical condition since the time of the award that was clearly not anticipated and could not reasonably have been anticipated at the time of the award.

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<sup>2</sup> Minn. R. 9800.1100, subp. 1, requires that a petition to vacate be accompanied by a memorandum of law and supporting medical records. The employee failed to satisfy this requirement, but, at oral argument, counsel for the employer and insurer stipulated that this court could consider the late-filed documentation.

Minn. Stat. § 176.461. The employee contends that there has been a substantial change in her medical condition, citing Fodness v. Standard Cafe, 41 W.C.D. 1054 (W.C.C.A. 1989), as setting forth factors which may be relevant in determining whether there has been a substantial change in condition. Those factors include:

- 1) a change in diagnosis;
- 2) a change in the employee's ability to work;
- 3) additional permanent partial disability;
- 4) the need for more costly and extensive medical care than anticipated; and
- 5) whether a causal relationship exists between the injury covered by the settlement and the currently worsened condition.

Id. at 1060-1061.

The employee first contends that there has been a change in diagnosis. This appears to be accurate. The December 7, 1998, report of Dr. Steven Lebow indicates that the employee has “an extensive partial thickness tearing involving the articular surface of the mid supraspinatus tendon as well as severe AC joint hypertrophic changes and bursitis.” With regards to the employee's neck, Dr. Lebow stated, “she has a focal C4-5 disc herniation with mild flattening of the cord, superimposed on degenerative retrolisthesis of C4-5 and mild to moderate degenerative changes at multiple other levels.”

In January of 1993, prior to the stipulation for settlement, Dr. Falconer had noted that the employee complained of shoulder pain with radicular pain into the deltoid insertion and pain and difficulty with reaching overhead. While Dr. Falconer noted that the employee had findings on examination that were characteristic of subacromial bursitis, tendinitis, and shoulder impingement syndrome, no additional tests were performed at that time. There are, therefore, no pre-stipulation radiological studies to compare with the 1998 findings.<sup>3</sup> The employee made no complaints of neck pain at the time of Dr. Falconer's examination, and Dr. Abols' report of November 19, 1991, states that the employee gave no history of neck injury and on examination had full range of neck motion. Clearly there are now complaints and findings as to a cervical condition.

Second, the employee contends that there has been a change in her ability to work, in that she was released to work with restrictions at the time of the award on stipulation but is currently permanently and totally disabled “as a result of her current difficulties she is experiencing with her neck, shoulder and hands.” We are not persuaded. The only medical records provided by the employee to support this allegation are those of Dr. Lebow. In his report of June 10, 1998,

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<sup>3</sup> In her memorandum of law and at oral argument, counsel for the employee indicated that the employee was alleging a shoulder injury at the time of the stipulation for settlement.

he noted that the employee “has been cleared for work with substantial restrictions on lifting with her hands, her arms above shoulder level, repetitive bending, etc.”<sup>4</sup> In a brief letter to employee’s counsel dated November 4, 1998, Dr. Lebow then stated, “I would also stipulate that her work-related injury of 1991 played a substantial role in her ongoing restrictions that eventually led to permanent and total Social Security Disability.”

In 1993, Dr. Falconer had recommended restrictions against the employee working with her arms over “low chest position.” He had also suggested that the employee be restricted from repetitive grip and squeeze activities with the hand and repetitive wrist flexion activities. However, from the records submitted, this court is uncertain that there have been additional restrictions placed on the employee, post-settlement, as a result of the 1991 work injury. The medical records do indicate that the employee was working at the time of the award on stipulation but has apparently not worked since her August 1997 injury with a different employer.

Third, the employee contends that she was never rated for permanent partial disability at the time of the award on stipulation but that she currently would be entitled to permanency for both her neck and her shoulder. On this point, we are not convinced.

Dr. Falconer, in his report of 1993, indicated that, if the employee went on to have surgery on her right shoulder, she would be entitled to a whole body rating of 3% to 6%. Dr. Lebow’s report of December 7, 1998, indicates that he would defer to Dr. Steubs as to a rating of the shoulder, but Dr. Steubs’ records were not provided to this court. Dr. Lebow does now rate the employee’s ongoing neck problems at 10%, but, as will be discussed later, a neck injury was never claimed at the time of the stipulation for settlement.

Fourth, the employee contends that at the time of the stipulation no doctor had recommended shoulder surgery. This may be true, but it was clearly anticipated that the employee might need such surgery in the future. In fact, in his 1993 report, Dr. Falconer noted,

I have advised [the employee] that in general, subacromial bursitis and impingement syndrome usually respond to a combination of physiotherapy and cortisone injections but in some instances, especially if this condition is not treated, this can deteriorate to the point where decompression surgery is necessary or, alternatively, eventually erosive damage occurs to the rotator cuff that requires more major open rotator cuff surgery.

Finally, the employee relies on Dr. Lebow’s opinion that the employee’s current condition is causally related to her 1991 work injury.

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<sup>4</sup> It should be noted that the employee apparently sustained a work-related injury to her thumb and/or hand on or about August 28, 1997, while employed by Holiday Foods.

While there have been changes in the employee's right shoulder diagnosis, we cannot say that those changes rise to the level of a substantial change that was clearly not anticipated and could not reasonably have been anticipated at the time of the award on stipulation. The employee's shoulder complaints were addressed in Dr. Falconer's 1993 report. He recommended physiotherapy and possible cortisone injections at that time. He also advised the employee that her shoulder condition could worsen and she might need surgery in the future, and he recommended restrictions on the employee's activities that appear to be no more restrictive than those currently imposed. Finding that there has not been an unanticipated, substantial change in the employee's shoulder, we deny the petition to vacate on that basis.

The employee also claims a substantial change in her neck condition. The neck condition, however, was never mentioned in the stipulation for settlement. There is nothing in the division file to indicate that the employee was claiming a work-related injury to her neck at the time of the settlement. At oral argument, counsel for the employer and insurer argued that the stipulation for settlement was intended to be "global" and close out all potential injuries. The stipulation reads at paragraph V, "[s]aid payment is in consideration for any claims being brought or that could have been brought involving the alleged injuries or any other injuries the Employee may have sustained up to the date of the Stipulation." (Emphasis added.) However, counsel for the employer and insurer also admitted that there was no known claim for injury to C4-5 at the time of the stipulation. A stipulation for settlement may not close out claims for unknown injuries. Sweep v. Hanson Silo Co., 391 N.W.2d 817, 39 W.C.D. 51 (Minn. 1986). Therefore, as neck injury claims were not closed out by the settlement, the award will not be vacated based on a substantial change in the employee's neck condition.