

JOHN LAWRENCE MUSTA, Employee/Petitioner, v. GREATER MINNEAPOLIS ASS'N OF EVANGELICALS and LIBERTY MUT. INS. CO., Employer-Insurer.

WORKERS' COMPENSATION COURT OF APPEALS  
AUGUST 12, 1999

No. [REDACTED SSN]

HEADNOTES

VACATION OF AWARD - SUBSTANTIAL CHANGE IN CONDITION. Where the employee had a change in diagnosis with significant degeneration at the originally injured levels of the spine, a substantial change in his ability to work, some increased permanent partial disability and no issue of causation presented by the employer and insurer, there was cause to vacate a 1985 award on stipulation.

Petition to vacate award on stipulation granted.

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

OPINION

STEVEN D. WHEELER, Judge

The employee petitions this court to vacate an award on stipulation filed in 1985, based on a substantial change in the employee's condition since the date of settlement. We grant the petition.

BACKGROUND

The employee sustained a work-related injury to his low back on September 29, 1980, while working for the Greater Minneapolis Association of Evangelicals, herein the employer or GMAE. At the time of the injury the employee was 35 years old and had a weekly wage of \$229.16. The employee had been hired approximately eight months prior to the injury to supervise persons who were in a halfway house situation, transitioning back into mainstream society after having been in the state correctional system.<sup>1</sup> The employee had previously been in the correctional system and had also worked as a furniture upholsterer. The work of the employer apparently was the reupholstering and refurbishing of church pews, which involved significant lifting activities. On the date of injury, the employee had been engaged in lifting activities but

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<sup>1</sup> The factual background set forth in this decision is taken primarily from information taken from medical reports and records and filings with the Department of Labor and Industry contained in the the judgment roll.

did not feel a problem with his back until he was running up some stairs.

Following the employee's injury he consulted with several chiropractors until the latter part of 1981. He first saw Jay Wilson, D.C., within a few days of the injury. The last chiropractor, Richard Green, D.C., was able to provide some relief for the employee. Apparently the employee visited V. J. Plundquist, M.D., for an examination but received no treatment of his low back in August of 1982. In late 1983 the employee consulted with Phillip Kofran, M.D., who diagnosed a right inguinal hernia during a general physical examination. He received no treatment for his back at that time. In March 1984 the employee resigned his position with the employer. The employee contends that the reason for his resignation was the fact that his work activities exacerbated his low back problems. The employer contends that the employee quit for personal reasons, namely, to go into business as a self-employed furniture reupholsterer. Both parties agree that between the date of injury and the date of his resignation the employee lost no time from work as a result of his injury.

On April 10, 1984, the employee had a surgical repair of the hernia and spent over a month in recovery. In late May 1984 the employee sought treatment from Thomas Trainer, D.C., complaining of moderate to severe low back pain with intermittent episodes of radiation into both legs. The employee indicated that he was "stiff all the time" and that his pain became more severe as he attempted to perform more physical activities. In his report of October 24, 1984, Dr. Trainer indicated that treatment since May of 1984 had been moderately successful and that the employee was no longer experiencing radicular symptoms. The employee, however, was still complaining of significant pain and stiffness in his back, especially exacerbated by physical activities. Dr. Trainer opined that the employee had sustained a permanent partial disability of 12% of the back, which he indicated was causally related to his work injury of September 29, 1980. Dr. Trainer stated that the employee "must consider future employment and occupations that do not require much lifting, bending or twisting activities. A job which is stressful to the low back will more than likely result in future exacerbations of the [employee's] condition." He also stated that the employee would need future chiropractic care on an as-needed basis to help maintain his ability to be employed.

On October 23, 1984, the employee was referred to Dr. Donald M. Garland, an occupational injury specialist. At the time of the examination the employee indicated that his back was somewhat improved with primarily low back stiffness and "not any severe pain." He had no radicular pain into his legs and no numbness or tingling or weakness. The employee indicated that he had not worked since the summer of 1984, at which time he had supervised a crew of persons reupholstering pews at a church in Alexandria, Minnesota. Dr. Garland ordered a lumbar CT scan which was conducted on October 24, 1984. The conclusion of the radiologist interpreting the scan is as follows:

1. Degenerative disc disease at L5-S1 associated with slight symmetrical bulging of the disc and minimal posterior marginal spurring of L5 and S1. There is no central or lateral canal stenosis.
2. Minimal narrowing of the lateral nerve root canal on the left

at L5-S1 with no nerve root compression.

3. Tropism of the facet joints at L5-S1. Minimal degenerative changes in the facets at L4-5 and L5-S1. Slight vascular calcification is noted.

4. At L3-4, there is central prominence of the disc which is consistent with a small central herniation. There is no nerve root compression.

A permanent partial disability rating of 20% of the back was issued by Dr. Garland, along with restrictions which indicated that the employee “must avoid any heavy lifting over 30 - 35 pounds and any frequent lifting over 20 - 25 pounds. He must also avoid frequent and/or deep bending or twisting or turning at the waist and comparably heavy pushing or pulling. Ideally, work where he can either sit or stand would be helpful.” Dr. Garland stated that the cause of the employee’s disability was the lifting that he had done at his job for GMAE. The condition which this physician described as being caused by the work activity was a continual aggravation of “traumatic lumbar disc disease at three levels, particularly L5-S1 where there is moderately severe disc space narrowing as well as a bulging disc. There is also a small herniated disc at L3-4. There is also traumatic degenerative facet disease producing a mechanical low back pain syndrome.” Dr. Garland further noted that,

[A]t present symptomatically he is improved and the examination of his back at the present time is relatively benign. However, the lumbar CT scan done has revealed the extent of his injuries to his lumbar spine and makes clear the resulting impairment. He must significantly restrict the use of his back if he is to avoid further significant progression of the lumbar disc and facet disease and this creates a substantial impairment even when he is symptomatically and functionally doing reasonably well.

Dr. Garland further pointed out that, “If his symptoms and disc disease should progress, he may in the future be a candidate for chemonucleolysis. If there should be evidence of further disc herniation and eventual disk rupture, then he may require lumbar laminectomy and disc fragment excision.” (Judgment Roll: report of Dr. Garland of 11/12/84.)

On November 29, 1984, the employee filed an R-4, Request for Workers’ Compensation Rehabilitation Benefits, and a request to change his qualified rehabilitation consultant [QRC]. The matter came before a representative of the Department of Labor and Industry at an administrative conference on February 11, 1985. In an order issued February 22, 1985, the employee’s request for rehabilitation was denied. In a claim petition filed March 18, 1985, the employee requested payment of permanent partial disability in the amount of 20% of the back and approximately \$2,500.00 in medical expenses as a result of the September 29, 1980 low back injury. On March 20, 1985, the employee appealed the rehabilitation decision from February.

On April 24, 1985, the employee was examined by Dr. David R. Johnson, a neurosurgeon, at the request of the employer and insurer. At that time, the employee gave a history of "continued intermittent and variable lower back pain and stiffness" which he indicated was aggravated by lifting. The employee stated that he had had no leg problems for approximately four to six weeks prior to the examination. X-rays showed moderately severe disc space narrowing at L5-S1 and minimal degenerative changes in the facets at L4-5 and L5-S1. Dr. Johnson's diagnosis was "mild ligamentous leg strain" as a result of lifting furniture on September 29, 1980. He stated that the employee had a moderately degenerative disc condition at L5-S1, which was probably present before the 1980 injury, that he had mild to moderate facet degeneration at levels L4-5 and particularly at L5-S1. Dr. Johnson indicated that the employee could return to manual labor which involved moderate bending and lifting. He stated that the employee had a 10% permanent partial disability of the spine which he related to "old degenerative disc disease at L5-S1." He opined that no definite medical treatment was indicated for the employee at that time. (Judgment Roll: report of 4/24/85.) In a follow-up report the next day, April 25, 1985, Dr. Johnson indicated that the employee had not been temporarily totally disabled since at least July 1984 when he had worked on the refurbishment of the church in Alexandria, Minnesota.

On June 7, 1985, the parties filed a stipulation for settlement with the Department of Labor and Industry. The stipulation provided that the employee had sustained a low back injury at the employer on September 29, 1980, that certain medical benefits had been paid, that the employee had no lost time as a result of the injury and that his weekly wage at the time of injury was \$229.16. The stipulation further provided that the employee contended that he had sustained temporary total and temporary partial disability from April 1984 to the present and continuing and that he had a 20% permanent partial disability of the spine. The employer's position was that the employee's permanent partial disability was limited to 10% and that it was not causally related to the 1980 work injury. The employer further pointed out that the employee was not entitled to any temporary total or temporary partial disability because he had voluntarily resigned his position with the employer to become self-employed as a furniture upholsterer. The terms of settlement provided that the employee was to receive \$10,295.54, which included a payoff of a permanent partial disability rating of 15% of the back (52.5 weeks times \$152.70). In addition, the employer and insurer agreed to pay medical expenses in the amount of \$2,204.46 and taxable costs and disbursements. The settlement constituted a full, final and complete resolution of all claims except for rehabilitation services after five years and future medical treatment. An award on stipulation was issued on June 18, 1985.

Following the settlement the employee claims that he worked as a furniture reupholsterer until approximately 1991 and periodically treated with a chiropractor as a result of flare-ups and pain in his back. The records in the judgment roll indicate that the employee apparently sought chiropractic treatment from G. W. Selicki, D.C., at least in 1985. On January 19, 1988, the employee filed a medical request, requesting a change of doctor, from Dr. Selicki to John Brett, D.C., and the payment of certain medical bills from Dr. Brett for treatment after October 6, 1987. It is unclear if the employee treated with Dr. Selicki after 1985 or with Dr. Brett before October 1987. On February 16, 1988, Dr. Brett issued a report in which

he indicated that his treatment from October of 1987 until January of 1988 was a result of exacerbations of the employee's low back problems which had emanated from his September 29, 1980 injury. On February 18, 1988, the employer and insurer denied the request on the basis that the change of doctors had not been authorized and that the treatment was not reasonable and necessary.

On March 21, 1988, the employee was examined by J. W. Hammond, D.C., at the request of the employer and insurer. Dr. Hammond found the employee's lumbar spine to be essentially normal but recognized that the results of the 1984 CT scan indicated that the employee had permanent degenerative changes. He stated that this condition predated the September 29, 1980 work incident. He noted that past chiropractic treatment had provided only temporary relief and indicated that further such treatment would not be reasonable or necessary. He suggested that the employee continue with the essentially sedentary work he had been doing since 1984 and engage in a home exercise and stretching program. Following an administrative conference on May 3, 1988, a decision was issued which found that the treatment by Dr. Brett had been reasonable and necessary and that the parties had agreed to the change of physicians. Thereafter, Dr. Brett requested that the employee undergo a CT scan, which was completed on July 7, 1988. Dr. Kenneth Heithoff interpreted the scan to show that there was a chronic disc herniation at L5-S1 with slight impingement of the left S1 nerve root, that spinal level L4-5 was normal and spinal level L3-4 showed a mild bulging disc with no impingement or stenosis. He stated that these findings represented no change from the CT scan performed on October 24, 1984.

There are no other medical records in the judgment roll or submissions until a report from Dr. Brett dated September 25, 1991. (Resp. Ex. 6.) Dr. Brett noted that the employee had been seen on August 8, 1991, complaining of low back pain and bilateral sciatica. Dr. Brett's examination found a number of tests to be positive and noted the presence of muscle spasm in the employee's paraspinal muscles. He diagnosed "[d]egenerative disc disease at L5-S1 with a central left sided disc herniation at L5-S1 with minimal impingement on the left S1 nerve root, with mild uncinatate spurring at L5-S1" and "L3-4 central bulge of L3-4 disc." Dr. Brett indicated that his prognosis for the employee "must be considered poor." He stated that the permanent damage to the employee's lumbar spine was caused by the September 29, 1980 injury and that this injury "will cause the patient continued discomfort and prevent certain activities throughout the [employee's] life." Dr. Brett issued a series of restrictions which included "no lifting of more than 30 pounds floor to bench or 20 pounds bench to shelf." He stated the employee was "unable to work in furniture reupholstery or similar trades such as a carpenter or jobs that require manual labor with lifting, twisting and pulling." He also indicated that the employee "is unable to do heavy household duties such as shoveling snow, moving furniture, raking, lawn mowing, without causing severe pain." He stated that the employee was restricted from "standing for longer than thirty minutes at one time without resting," "stooping repeatedly," "bending repeatedly" and "climb[ing] stairs repeatedly." He provided that the employee "must be able to stand and stretch and move around after sitting for 15 minutes." Dr. Brett opined that the employee had a 20% permanent partial disability of the back as a result of the September 29, 1980 work injury.

The employee's affidavit further claims that "[a]fter 1992, I could no longer work

as a furniture reupholster due to the increase symptoms of pain I experienced. My back pain was more constant versus the periodic flare-ups I experienced prior to 1992. Also, the pain in my legs was more intense and causing numbness and weakness.” (Affidavit of EE dated 12/18/98, Pet. Ex. C to 1/4/99 memorandum, ¶ 6.)

On January 22, 1992, the employee filed a claim petition seeking temporary total disability benefits from January 1, 1990 to date and continuing, permanent partial disability in the amount of 20% of the back, and retraining and job search assistance. On February 3, 1992, the employee filed an affidavit of hardship indicating that he had received no income since June 1991 and had been receiving AFDC payments since September 1991. The Minnesota Department of Human Services filed a request for intervention, indicating that since September 1991 it had paid AFDC payments to the employee in the total amount of \$9,150.00. In an answer served and filed September 19, 1992, the employer and insurer admitted that the employee had sustained a low back injury on September 29, 1980 but stated that all claims for indemnity benefits had been foreclosed by the stipulation for settlement and award on stipulation of June 18, 1985. It denied that the employee was entitled to rehabilitation assistance based on the February 22, 1985 rehabilitation order. On June 23, 1992, the parties filed a stipulation for settlement and an award on stipulation was issued that same day. The settlement called for a full, final and complete release of all claims relating to rehabilitation and retraining benefits with the payment by the employer and insurer to the employee of the sum of \$4,500.00. Medical benefits were to remain available to the employee.

The employee’s December 18, 1998 affidavit indicates that at some point he attended classes at the Dakota County Vocational Technical College to learn furniture repair so that he would be able to work without lifting more than 15 pounds. Following completion of the program he claims to have obtained work at Excell Interiors, presumably in furniture repair and refinishing. In a subsequent affidavit, dated May 11, 1999, attached to the employee’s amended memorandum as Exhibit D, the employee stated that he earned approximately \$30,000 per year at Excell. While employed by Excell, his symptoms of pain worsened and he consulted with Dr. A. V. Anderson, medical director at the Pain Assessment and Rehabilitation Center. Dr. Anderson’s report of July 2, 1998 indicates that he first treated the employee in June of 1996. (Pet. Ex. F, to 1/4/99 memorandum.)

The employee’s affidavits state that he worked for Excell Interiors for approximately three years, after which he was unable to do this work because of severe back and leg pain. Thereafter, he apparently began working for himself in a furniture repair business at limited hours. He further states that at the time of his first affidavit on December 18, 1998, he could only spend approximately three hours a day working restoring furniture. He indicated that even this activity increases his level of pain. (Pet. Ex. C, ¶ 12.) In a March 16, 1999 office note, Dr. Anderson stated that the employee reported having tried to work about six hours, but that the work aggravated his symptoms. (Resp. Ex. 9.) In his second affidavit, in May 1999, the employee stated that he was completely unable to work because of “severe back pain and depression.” (Pet. Ex. D, to amended memorandum in support of petition.) The employee further claims that he had received narcotic pain medication from Dr. Anderson to permit him to

function on a limited basis but without completely eliminating his pain.

The medical reports from Dr. Anderson, the earliest of which is dated April 28, 1997, indicate that the employee has been complaining of lower back and leg pain. Later reports confirm that Dr. Anderson put the employee on a prescription of narcotic pain medication as early as December 12, 1997. Dr. Anderson ordered that the employee undergo a lumbar MRI on September 2, 1997, and lumbar discography on December 9, 1997. (Pet. Exs. G and H.) Dr. Anderson states that the MRI and discography show abnormal discs at spinal levels L3-4, L4-5 and L5-S1. The discography report indicated that the L5-S1 disc was severely degenerated, the L4-5 disc showed a partial thickness annular disruption and the L3-4 disc showed a posterior annular tear and a Grade II internal fissure laterally to the right. Dr. Anderson's notes from December 12, 1997, indicate that he has discussed the option of surgery with the employee. The employee apparently indicated that surgery would be his last option. In his report of July 2, 1998, Dr. Anderson stated that the employee was then able to work as a result of the use of narcotic medications which masked his pain. This report did not provide any specific restrictions on the type or length of work the employee was then permitted to perform in his disabled condition. He stated that the employee had a 30% permanent partial disability rating of the spine and that the employee's condition was worsening.

In more recent reports by Dr. Anderson and a psychologist at Dr. Anderson's clinic, Ronald Beck, in 1999, attached as exhibits to the employee's amended memorandum, both opined that the employee was currently unable to work as a result of the effects of his low back pain and consequential depression. (Pet. Ex. I, 4/28/99 report of Dr. Anderson; Pet. Ex. K, Social Security questionnaire completed by Dr. Anderson on 2/8/99; Pet. Ex. L, Social Security questionnaire completed by Ronald Beck on 4/5/99.) In his April 28, 1999 report, Dr. Anderson also stated that the employee is "a definite candidate for surgery. This will involve a fusion of the lumbar spine as well as a foraminotomy." He indicated that he was working with the employee to increase his weight and decrease his pain medication in preparation for surgery by Dr. Timothy Garvey, a neurosurgeon.

In February 1999, the employee had been referred to Dr. Garvey by Dr. Anderson. (Resp. Ex. 7, Dr. Anderson's note of 2/4/99.) In a report dated February 15, 1999, Dr. Garvey stated his assessment of the employee's condition was as follows: "Multilevel degenerative disc disease of the lumbar spine. Depression. Chemical dependency. Nutritional deficiency. Tobacco abuse." Dr. Garvey further indicated that the employee "may receive some benefit from operative intervention, however, he has a number of issues that need to be addressed prior to surgical intervention." (Resp. Ex. 8, p. 3.) Dr. Garvey recommended that the employee reduce his use of pain medication and quit smoking. He expressed concerns about the employee's weight loss and possible other medical problems. He also stated that he would need to review the actual MRI and discogram films and possibly repeat the MRI before making a final determination concerning surgery. Id.

Primarily based on the medical reports of Dr. Anderson and Mr. Beck, and the results of the MRI and discography in the latter part of 1997 as compared with the October 24,

1984 CT scan, the employee petitioned this court for vacation of the June 1985 award on stipulation based on a substantial change in his medical condition.

## DECISION

The law in effect on the date of settlement is controlling for purposes of vacating an award on stipulation. Franke v. Fabcon, Inc., 509 N.W.2d 373, 49 W.C.D. 520 (Minn. 1993).<sup>2</sup> “Cause” to vacate the award in the present case include: (a) fraud, (b) mistake, (c) newly discovered evidence and (d) substantial change in condition. Krebsbach v. Lake Lillian Coop. Creamery Ass’n, 350 N.W.2d 349, 353, 36 W.C.D. 796, 801 (Minn. 1984). A number of factors may be considered in determining whether an award should be vacated based on a substantial change in condition, including:

- (a) Change in diagnosis;
- (b) 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;
- (e) Causal relationship between the injury covered by the settlement and the employee’s current worsened condition;  
and
- (f) The contemplation of the parties at the time of settlement.

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

With regard to the first factor, it appears that the employee has had a worsening of his condition at spinal levels L5-S1, L4-5 and L3-4. The 1997 diagnostic tests indicate that the condition of the discs at L5-S1 and L3-4 have degenerated. With respect to spinal level L4-5, it appears that the disc structure had little or no degenerative changes at the time of settlement. (See

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<sup>2</sup> The employer and insurer argue that the “substantial change in medical condition” concept found in the “cause” standard set forth in Minn. Stat. § 176.461 (1992) should be considered in this case because the employee entered into a stipulation for settlement in June 1992 which cross referenced the 1985 settlement. They argue that the employee could have anticipated the further degeneration of the three spinal levels with the passage of time and thus a vacation would be unwarranted. Even if that theory were appropriate, the argument is not persuasive because the statutory standard incorporating the concept of what “could not reasonably have been anticipated” was not effective until July 1, 1992. The supreme court in Franke specifically indicated that for pre-July 1, 1992 awards, only the change in physical condition was to be considered by the WCCA and what may have been or could have been anticipated at the time of settlement was not a relevant consideration. The employer and insurer also argue that the employee’s answers to certain questions in the 1992 stipulation should bar vacation. Even if this theory was persuasive, we note that the employee does not seek to vacate the 1992 award on stipulation, and the answers to the questions have no bearing on the 1985 award on stipulation.

report of CT scans of 10/24/84 and 7/7/88.) The employee's physician did note, however, some minimal facet joint degeneration at this level. The 1997 MRI and discography indicate that there has been a change in the condition of the disc at the L4-5 level. It is unclear if the facet joint degeneration has progressed. At the time of settlement the employee was not experiencing any significant radicular symptoms into his legs and no numbness or tingling. Based on the reports of Dr. Anderson, it appears that the employee's pain condition is substantially worse and now includes significant radicular symptoms into his legs. These clinical statements of pain are supported by the findings of the diagnostic tests conducted in 1997 that there has been an increase in the impingement on nerve roots, especially at the L5-S1 level. The employee also points to findings from the 1997 MRI that he now has degenerative changes at the T-12 through L2-3 spinal levels. (Pet. Ex. M.) In addition, the employee claims to have a depression condition. This contention is supported by the reports of Dr. Anderson and Mr. Berk. As a result, we find un rebutted evidence of changes in the diagnoses of the employee's difficulties.

At the time of the settlement the employee was apparently able to work full time, although under restrictions as to lifting, stooping and bending. He apparently was regularly employed as a reupholsterer from 1985 through 1991. (Pet. Ex. C.)<sup>3</sup> From June 1991 until he was retrained and began work for Excell, the employee was unemployed for a significant period of time. The employee stated that he was able to work as a furniture refinisher for Excell, a light duty job requiring lifting of less than 15 pounds, for approximately three years, presumably in the mid 1990s. This work, however, became too taxing for the employee and he sought treatment from Dr. A. V. Anderson, M.D., in 1996. In 1998 Dr. Anderson indicated that the employee was limited in his ability to work, but that he was aided by the pain-masking effects of narcotic medications. (Pet. Ex. H, report of 7/2/98.) More recent medical reports state that the employee is totally disabled from work. The February 8, 1999 "Social Security Physical RFO Questionnaire" filled out by Dr. Anderson indicates that the employee is not capable of any substantial employment and is subject to "severe restrictions." (Pet. Ex. K.) The April 5, 1999 psychological evaluation from Ronald Berk provides that the employee has a depressive condition and is unable to work. (Pet. Ex. L.) Dr. Anderson's April 28, 1999 letter specifically states that the employee is permanently totally disabled and that he is a definite candidate for fusion surgery. (Pet. Ex. I.) The employee's latest affidavit states that he is not able to work the three hours per day he could in December 1998. This evidence is somewhat tempered by Dr. Anderson's March 16, 1999 note that the employee was trying to work up to six hours per day, but was having severe pain as a result. Based on this evidence, which was not rebutted in any significant way by the employer and insurer, we conclude that there has been a significant decrease in the employee's ability to work at this time.<sup>4</sup>

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<sup>3</sup> The primary evidence concerning the employee's work activities during this period comes from the employee's affidavits. The medical records make some reference to this period and indicate that the employee's work may have been rather sedentary, including work with antiques and work involving the trading of baseball cards. (Resp. Ex. 4, history in the 3/21/88 report of Dr. Hammond.)

<sup>4</sup> The employer and insurer indicate that the proper method for resolving this case is for

With respect to permanent partial disability, the level of disability recognized at the time of the settlement was 15% of the spine. Dr. Anderson recently opined that the employee has a 30% permanent partial disability rating of the spine. The employer and insurer have offered no evidence concerning the employee's current permanent partial disability level other than to observe that Dr. Brett's 1991 rating was only 20% of the spine, which is identical to Dr. Garland's rating in 1984.

The employer and insurer contend that there is a question about the causal relationship between the employee's 1980 injury and the employee's current difficulties. The only evidence offered by the employer and insurer or in the judgment roll on the causation issue are reports by the employer and insurer's medical evaluators, Drs. Hammond and Johnson, from periods prior to 1989. The recent reports of Dr. Anderson and Ronald Berk support the conclusion that there is a causal relationship between the 1980 injury and the employee's current difficulties. We also note that the employer and insurer did not contend that they had refused to pay for any of the chiropractic and medical treatment from 1985 to the present. This is another indication that, at least to this point, the employer and insurer have considered all the employee's chiropractic and medical treatment, including the use of narcotic drugs, to have been substantially caused by the original admitted injury. While our observations with respect to causation are not binding on a compensation judge in any future hearings, and the employer and insurer have not waived their defense in this area, the un rebutted evidence before us is sufficient to support a granting of the

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the court to refer the matter to the Office of Administrative Hearings for an evidentiary hearing. This hearing would be preceded by a period of discovery during which the employer and insurer would conduct an investigation into the employee's work activities since 1985 and to have an IME performed. They argue that the 45 days provided in our rules for a response to the petition would have been inadequate to complete such discovery. As a result, the employer and insurer mistakenly conclude that such discovery techniques (depositions and IMEs) were not available in connection with a petition to vacate. In the past, parties have used these techniques to obtain information relevant to the petition process, even if it required a request for additional time to complete. In that vein, we note that in this case the employee's attorney requested additional time to obtain medical reports and the employer and insurer agreed to delay the hearing scheduled for April 26, 1999. Frequently it is the information from such discovery which creates a factual dispute concerning one or more of the Fodness factors and causes the court to refer the matter to OAH for resolution of the factual conflicts. Here, however, there are few factual conflicts, as most of the information has been provided by the employee. As a result, there is no reason to refer the matter to OAH. We recognize the employer and insurer's arguments attacking the strength of the employee's evidence and its argument that the employee may be a candidate for surgery, which makes the question of the employee's ability to work subject to bona fide dispute. This may be true, but our function is to review the evidence before us. Based on the record presented, we find no significant factual disputes. Perhaps, when the entire case is reopened, material disputes may arise. In that case the employer and insurer are not prejudiced in its defense on the merits of the employee's claims for benefits by any conclusions we have made in the context of a petition to vacate. All its defenses to the employee's claims are preserved.

petition to vacate, as it relates to the area of causation.

Considering all the Fodness factors, we find that there has been an adequate un rebutted showing of a change in diagnosis, ability to work, an increase in permanent partial disability and causation, to support a finding that there is cause to vacate the award on stipulation served and filed June 18, 1985. As a result, the employee's petition is granted.<sup>5</sup>

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<sup>5</sup> We note that the employee has only requested vacation of the June 18, 1985 award on stipulation and did not request a vacation of the 1992 award on stipulation which closed out any claims for rehabilitation and retraining benefits. That award on stipulation is not vacated and remains in full effect.