

STEVEN E. SANDER, Employee/Petitioner, v. ROSSCO INDUS. and MINN. ASSIGNED RISK PLAN/BERKLEY ADM'RS, Employer-Insurer, and MN DEP'T OF ECON. SEC., Intervenor.

WORKERS' COMPENSATION COURT OF APPEALS  
JULY 30, 1999

No. [REDACTED SSN]

HEADNOTES

PETITION TO VACATE - SUBSTANTIAL CHANGE IN CONDITION. Where the employee's diagnosis remained unchanged, he had a 5% increase in permanent partial disability, causation was not disputed, medical expenses had been left open, but there was little, if any, evidence supporting the conclusion that the employee was medically unable to work, there was insufficient basis to vacate a 1990 award on stipulation or even to refer the issue of ability to work to OAH for a hearing.

Petition to vacate award on stipulation denied.

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

OPINION

STEVEN D. WHEELER, Judge

The employee petitions to vacate an award on stipulation, served and filed August 7, 1990, on the grounds of a substantial change in his medical condition. We deny the petition to vacate.

BACKGROUND

The employee, Steven E. Sander, was working as a machine operator for the employer, Roscco Industries, in the Fergus Falls area, when he sustained a specific injury on February 1, 1988, and a Gillette injury<sup>1</sup> in May of 1989. At the time of the latter injury, the employee was 38 years of age and had a weekly wage of \$220.00. The employee injured his low back while lifting heavy rolls of vinyl for processing on his machine.

The employee was first treated for his low back pain by Dr. Daniel Lemeke on February 1, 1988. He was not treated again until he returned to see Dr. Lemeke on June 7, 1989. Subsequent treatment in June and July led to a referral to orthopedic surgeon Dr. E. Alan Williams, who ordered a CT scan. Both physicians are with the Fergus Falls Medical Group. The July 26,

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<sup>1</sup> Gillette v. Harold, Inc., 257 Minn. 313, 101 N.W.2d 200, 32 W.C.D. 105 (1960).

1989 scan was interpreted to show a posterior herniated disc at spinal level L4-5, on the left. Shortly thereafter, on July 31, 1989, Dr. Williams performed a discectomy. The employee had a relatively good recovery and apparently was able to return to light duty on October 9, 1989 with the employer. By December 7, 1989, Dr. Williams noted that the employee was improving, although he complained of occasional low back pain.

The employee continued to work full time in his light-duty job until January 26, 1990, when he was laid off due to lack of work. On March 7, 1990, he was recalled and was so employed on March 19, 1990, when he was seen by Dr. David Boxall, at the request of the employer and insurer. (Ex. 1, attached to employee's counsel's affidavit.)<sup>2</sup> At that time the employee was complaining of occasional low back pain on the left which lasted only a few hours with no radicular symptoms. Dr. Boxall concurred with Dr. Williams' diagnosis of a herniated disc and indicated that the employee had a permanent partial disability of 9% of the whole body. Minn. R. 5223.0070, subp. 1B(2)(a) (herniated disc treated by surgery with excellent results). Dr. Boxall indicated that the employee could work subject to restrictions, including avoidance of prolonged sitting or standing and only lifting "50 pounds at waist level and 35 pounds intermittently or in other positions." He opined that the employee should not be permitted to return to his machine operator position.

The employee again saw Dr. Williams on May 1, 1990. At that time the employee complained of low back pain because of his work at a bakery. Dr. Williams advised the employee to find light duty work. By his next office visit with Dr. Williams on May 24, 1990, the employee had found light duty work. Dr. Williams' notes indicate that the employee was restricted from repetitive lifting of more than 35 pounds. At that time Dr. Williams indicated that the employee had a permanent partial disability but released him from further treatment unless he had additional problems. In a report dated July 5, 1990, Dr. Williams rated the employee's permanency at 11% of the whole body based on Minn. R. 5223.0070, subp. 1B(2)(b) (average results from surgery).

Shortly thereafter, in late July 1990, the parties entered into a stipulation for settlement, which called for a full, final and complete release of all of the employee's claims against the employer arising out of the 1988 and 1989 low back injuries, except for future medical expenses related to those injuries. The stipulation stated that the employer and insurer contended that the employee was entitled to no benefits because he had failed to provide notice of his claimed injuries in a timely fashion and that the injuries did not arise out of the course and scope of his employment. In addition, the employer and insurer maintained that the employee's permanent partial disability was no greater than 9% of the body as a whole. The employee claimed that he was entitled to temporary total disability from June 9, 1989 through October 9, 1989 and temporary partial disability from October 9, 1989 through the date of settlement and continuing. He also

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<sup>2</sup> The dates concerning when the employee worked and for whom he worked have been taken from the histories provided by Dr. Boxall (Ex. 1, 3/19/90 report) and the office notes of Dr. Williams (Ex. 6, attached to attorney Nicolai's affidavit). From these materials it is unclear when the employee finally left the employer in 1990 and went to the bakery.

contended that he had not reached maximum medical improvement but that he had a permanent partial disability of at least 11% of the body as a whole. The employer and insurer agreed to pay \$20,000 to the employee and also pay for certain medical expenses, the employee's attorney's costs and disbursements and the claims of an intervenor.

Following the settlement the employee was next seen by Dr. Williams on December 20, 1990. At that time the employee was complaining of some low back pain and some left leg pain. The employee advised Dr. Williams that he had been laid off from work and was looking for work. On examination the employee was found to have a normal gait and full flexion, being able to touch his toes. A neurological examination was found to be normal. Dr. Williams stated that, "I am sure he will get over his back problems without too much trouble."

There is no evidence in the materials provided by the employee that he received any medical treatment for his low back during 1991, 1992 or 1993. The next indication of treatment was an office visit to Dr. Williams on September 13, 1994. The employee complained of left-sided low back pain and left leg pain. Dr. Williams took the following history:

About five years ago he did have a percutaneous discectomy for a small L4-5 disc. He seemed to do reasonably well after that procedure. However, his symptoms never completely went away. This spring he had some discomfort in the left side of his back. In June he started working at Power Century [sic] here in Fergus Falls. Initially he was doing a sitting and standing job and more recently he has been doing a lot of standing. Over the last week or so his pain has gotten worse and he has left leg pain. This has been a very gradual deterioration with no discrete reinjury. He describes his present pain as severe although he appears comfortable throughout the interview. He has no right-sided symptoms. There is a cough and sneeze effect. He has been taking over the counter medication with some benefit.

Dr. Williams ordered a CT scan which was interpreted to show "a very definite L4-5 left-sided HNP which appears to be irritating L5 nerve root." After a course of physical therapy was unsuccessful Dr. Williams performed a second discectomy at the L4-5 level of the employee's spine on October 17, 1994.

There is no evidence that the employee was seen in follow-up by Dr. Williams until April 2, 1996. At that time the employee had apparently returned to work at Power Sentry. Dr. Williams' office note from that date states, in part, as follows:

... Recently the set up at his place of employment has been changed and he is going to have to do more sitting and he feels he is not going to be able to tolerate this. This situation means that he may lose his job. He is somewhat agitated in the clinic today. He complains of

low back pain and some left leg pain. Intermittently he has some right leg pain. He doesn't take any medication other than the occasional Tylenol. He manages to work and do the activities of daily living. . . My advice to the patient is that he may need to change his employment, he may need some form of training . . . From a strictly medical point of view I don't think there is any further intervention which is going to help this gentleman. He needs to do exercises to keep his back stretched out and he assures me that he does this on a daily basis. . . .

The employee's next office visit with Dr. Williams was on November 12, 1996, at which time the employee reported that he was continuing to work at Power Sentry, within his restrictions. Apparently the employee had been requested by the employer to obtain an update of his restrictions. On that date the doctor completed a form for the employer.

When next seen by Dr. Williams on April 10, 1997, the employee reported that he had quit his position at Power Sentry in early February 1997 "because his back and leg pain got worse." The employee stated that he did try to return to some part time work in March but that he could not tolerate this activity. At the time of the examination he complained that he was having continuous low back pain which was central in nature and which radiated "into both hips and both legs, left worse than right." Dr. Williams made the following notation concerning the employee's condition:

Steve's education level is a high school graduate and he has earned his living with manual work all his life. Steve is applying for social security disability because he feels he cannot do an [sic] work to be gainfully employed. Whatever he has tried to do has been too much for him. He has tried working at Telnet sitting down. He has tried doing factory work, etc.

An examination of the employee at that time indicated that the employee's range of motion was restricted and that he had a positive result on the straight leg raising test. Dr. Williams' office notes stated that there was no indication of a recurrent disc but "clearly he has a chronic low back condition and a failed low back syndrome." On July 17, 1997, the employee again consulted with Dr. Williams. The employee advised his physician that his application for social security disability had been denied. Dr. Williams noted that,

He certainly has chronic low back pain which ultimately has prevented him from being gainfully employment. Over the last few years this patient has attempted many jobs but has not been able to keep them because of his back pain. Even sedentary jobs such as telemarketing have not worked out. I have filled out a Social Service's card today.

In response to a letter of inquiry from the employee's attorney, on September 12, 1997, Dr. Williams issued a report in which he opined that the employee's need for surgery in 1994 and current low back pain were substantially caused by his 1988 and 1989 work injuries. Dr. Williams also stated that these post-settlement problems were not anticipated even as late as December 1990, when he felt the employee would not have much future difficulty. Dr. Williams stated that the employee had an additional 5% permanent partial disability of the whole body. He also issued restrictions on the employee's ability to work, stating:

. . . the patient could work full time provided he could change positions regularly. He should have a weight restriction for lifting of about 30 lbs. He should lift using his knees and not his back. In the time subsequent to the second surgery, his back symptoms have deteriorated to the extent that in April of 1997 he had continuous central low back pain which radiated to both hips and both legs and was aggravated by physical activity and sitting. The patient was not able [to] tolerate work activity which involved sitting all day or which involved continuous lifting all day.

The employee was not seen by Dr. Williams again for almost a year when, on June 11, 1998, he presented himself with complaints of chronic low back pain and specifically requested pain medication. Dr. Williams' office notes indicate that he explained to the employee that narcotics would be inappropriate but that he would try him on some anti-inflammatory medications. At the time of the examination the employee was apparently not working and was on general assistance. Thereafter until the last notation in Dr. Williams' records on November 2, 1998, it appears that the employee was given a series of different types of anti-inflammatory medications in an effort to find one which would relieve the employee's symptoms.

On January 26, 1999, the employee filed his petition to vacate the August 7, 1990 award on stipulation based on his claim of a substantial change in his condition since the time of the settlement.

## 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 Café, 41 W.C.D. 1054 1060-61 (W.C.C.A. 1989). While a review of the record in light of these factors reveals that the employee's condition has worsened over the years, we cannot conclude that the change in his overall circumstances are sufficiently substantial to warrant vacation of the 1990 settlement.

The employee's 1988 and 1989 work injuries for the employer resulted in a herniated disc at the L4-5 level, on the left. Dr. Williams has indicated that all of the employee's current problems stem from a recurrence of the herniation at the L4-5 level and a deterioration of his condition over time. While Dr. Williams has described his current difficulties as a "chronic low back condition" or a "failed low back syndrome" the employee's diagnosis remains as a post surgery herniated disc at the L4-5 level.

The employee alleges that he is no longer able to work, as evidenced by the fact that he has not worked on any regular basis since February of 1997. He has advised his treating physician, Dr. Williams, that his work activity in early 1997 aggravated his low back condition which causes him substantial low back pain with radicular symptoms into his legs, the left being worse than the right. It appears that the employee is currently receiving general assistance as his application for social security disability benefits has been denied. The employer and insurer contend that the employee's restrictions have not changed in any substantial way and that at best it is unclear whether the employee is really unable to work or simply describing increased pain from inappropriate work activities. We have reviewed Dr. Williams' office notes concerning the employee's ability to work, and it does appear that he is merely reporting the employee's feelings that he has been unable to work because of increased pain. There have been no vocational or functional capacity evaluations undertaken and no rehabilitation services rendered. As a result, very little evidence has been presented on the question of the level of the employee's ability to work. The last restrictions issued by Dr. Williams in September 1997 appear to be approximately the same as those provided by Dr. Boxall and Dr. Williams in 1990. The employee was released to work but was prohibited from prolonged periods of standing or sitting and from any frequent bending or lifting in excess of 30 pounds.

There does not appear to be any dispute concerning the increase in the amount of permanent partial disability that the employee has incurred at the present time. Dr. Williams' September 12, 1997 report supports a conclusion that the employee has an additional 5% whole body rating based on a recurrent herniated disc at the same level previously treated by surgery. Minn. R. 5223.0070, subp. 1B(3). In addition, there does not appear to be any controversy with respect to causation of the employee's current difficulties. Dr. Williams clearly indicates, again in his September 1997 report, that all of the employee's difficulties, including the October 1994 surgery and the deterioration of the employee's condition, are causally related to the initial injuries in 1988 and 1989. The employer and insurer's brief did not discuss these two factors and we assume they are conceded.

In summary, we find that there has been no change in diagnosis, there has been very little change in permanency and all future medical treatment has been provided for in the original

award on stipulation. There may be a question concerning the employee's ability to work, although the evidence set forth by the employee is not sufficient to raise a factual issue which would cause us to refer this matter to the Office of Administrative Hearings for a hearing. On balance, we do not find sufficient cause to vacate the award on stipulation and the employee's petition is denied.