EDWARD VIRNIG, Employee/Petitioner, v. CARLEY FOUNDRY, INC., and EMPS. INS. OF WAUSAU, Employer-Insurer.

WORKERS' COMPENSATION COURT OF APPEALS
OCTOBER 8, 1999

No. [REDACTED SSN]

HEADNOTES

VACATION OF AWARD - SUBSTANTIAL CHANGE IN CONDITION. Absent any medical records of the employee's treating physician contemporary with the award at issue, and absent a more definitive current medical opinion attesting to the causal relationship between the employee's currently worsened low back condition and his 1978 work injury, there was insufficient cause to vacate the employee's 1982 Award on Stipulation on grounds that the employee had sustained a substantial change in his condition, causally related to his work injury, since the time of the award.

VACATION OF AWARD - VOID OR VOIDABLE AWARD; STATUTES CONSTRUED - MINN. STAT. § 176.521. Where a compensation judge has jurisdiction to issue an award on stipulation but relies improperly on the presumption of fairness and reasonableness contained in Minn. Stat. § 176.521, the judge's award is not necessarily void but is instead void*able* by this court, after consideration of the equities involved. See Sondrol v. Del Hayes & Sons, Inc., 47 W.C.D. 659, 665 (W.C.C.A. 1992). In this case, where the employee himself was represented by an attorney at the time of the settlement, the employee was without grounds for contending that the Award at issue was void on its face for the judge's application of the statutory presumption of fairness just because the employer and insurer were unrepresented by legal counsel at the time of the stipulation for settlement.

Petition to vacate award on stipulation denied.

Determined by: Pederson, J., Rykken, J., and Johnson, J.

OPINION

WILLIAM R. PEDERSON, Judge

The employee petitions this court to vacate an Award on Stipulation served and filed August 11, 1982. Concluding that the employee has not shown good cause to vacate the Award at issue, we deny the employee's Petition.

BACKGROUND

On about May 4, 1978, Edward Virnig sustained an injury to his back in the course

of his work as a laborer with Carley Foundry, Inc. Mr. Virnig [the employee] was thirty-one years old at the time and was earning a weekly wage of $238.00. Carley Foundry, Inc. [the employer], and its workers' compensation insurer admitted liability for the injury and its treatment and commenced payment of benefits. Eventually the employee apparently underwent surgery related to his work-injured back. On April 30, 1981, about three years after his work injury, the employee was examined by a member of the St. Paul Orthopaedic Surgeons, P.A., apparently Dr. Paul Yellin.[1] Dr. Yellin diagnosed "status post discectomy and interbody fusion, L3-4" and "status post bilateral lateral transverse interbody fusion, L3 to the Sacrum," together with degenerative disc disease, concluding apparently that the employee could work, but with the following "severe restrictions regarding his back":

> Excessive bending and stooping will not be tolerated. He could perhaps alternately sit and stand during a normal work routine but most likely would only be able to sit at bench height where he is not forced to be flexed with regards to his lumbar spine. His lifting restriction would be also quite severe with perhaps a 10 pound lifting restriction overall and not to be done on a repetitive basis.

Dr. Yellin indicated also that the employee had a minimum of 25% permanent partial disability of the spine and perhaps as much as 35%, "depending on future evaluation."

About six months later, on November 3, 1981, the employer and insurer filed a Notice of Intention to Discontinue [NOID] payment of benefits on grounds that the employee had been offered a job within his restrictions and had refused it. On December 10, 1981, the employee filed an Objection to Discontinuance. Several months later, on June 30, 1982, the employee, his attorney, and the insurer's claims supervisor executed a stipulation for full, final, and complete settlement of all claims arising out of the employee's May 4, 1978, work injury. By the date of that Stipulation, the employer and insurer had already paid the employee over $46,000.00 in temporary total and permanent partial disability benefits and attorney fees. The Stipulation for Settlement provided that it was the employee's position at the time that his May 1978 work injury had resulted in a 25% permanent partial disability to his back and that he had been and continued to be temporarily totally disabled by that injury since the date of its occurrence. The Stipulation provided also that the employee's position was "supported in whole or in part by the medical reports of Dr. Paul G. Patterson attached hereto and made a part hereof by reference." The Stipulation provided further that it was the employer and insurer's position that the employee had

[1] The second page of a related medical report is in the file attached to a copy of the employer and insurer's subsequent November 3, 1981, Notice of Intention to Discontinue Compensation Benefits. This partial report is dated April 30, 1981, and appears under the St. Paul Orthopaedic Surgeons' letterhead, which lists Dr. Yellin as one of four members of the firm, but the author of this particular report is not identified. Paragraph IV of the eventual Stipulation for Settlement in this matter, dated June 30, 1982, indicates that the employer and insurer's position "is supported by the medical report of Dr. Paul Yellin dated April 20 [sic], 1981."

not been temporarily totally disabled since October 26, 1981, that the employee had failed to make a reasonable and diligent effort to secure employment after that date, and that this position was supported by an April 20, 1981, medical report of Dr. Yellin.[2] Pursuant to this Stipulation, the parties agreed that the employer and insurer would pay the employee over $111,000.00 in benefits and attorney's fees, together with all medical expenses reasonably related to the May 1978 work injury, in exchange for the employee's full, final, and complete release of all claims to compensation for temporary total, temporary partial, permanent partial, and permanent total disability arising out of his May 1978 work injury. On August 11, 1982, Compensation Judge J. E. Murray issued an Award on Stipulation relating to that settlement, suggesting that provisions of Minn. Stat. § 176.521, subd. 2, and related rules compelled such an award because Stipulations for Settlement when all parties are represented by legal counsel are, pursuant to that statute, "conclusively presumed to be fair, reasonable, and in conformity with the Minnesota Workers' Compensation Law."

About sixteen years later, on June 20, 1998, the employee saw Dr. Richard Helvig regarding "a problem with his back since June 15th." Dr. Helvig's notes indicate that the employee "has a long [history] of back pain dating back many years" and, regarding his recent pain, "does not recall any specific injury," although "[h]e does work very hard, cleaning floors at the Eagles and the Legion Club." Dr. Helvig diagnosed "[m]uscular back pain / muscle spasm" and prescribed heat treatment and medication. Four days later, on June 24, 1998, the employee returned to see Dr. Scott Gerling, complaining of continuing pain "into his left paraspinous muscles and somewhat into his left buttocks." Dr. Gerling concluded that the employee's "problem has a lot to do with muscle spasm," and he recommended that a muscle relaxant be added to the employee's medications. Three days later, on June 27, 1998, the employee was apparently treated on an emergency basis with narcotics and ibuprofen by Dr. Thomas Edwards for acute pain control. On June 29, 1998, he underwent an MRI scan of the lumbar spine, which revealed "[l]oss of disc signal and disc height" at all lumbar levels, "[a]nterior traction osteophytes" at L1-2 and L2-3, a moderately narrowed spinal canal at L1-2 and L2-3, and mild posterior disc protrusions at T12-L1 through L2-3, although the latter did not appear to be impinging significantly on the thecal sac or exiting nerve roots. By July 7, 1998, the employee's primary treating physician, Dr. Dennis Scherer, was concluding that "the chances of [the employee] maintaining his work longterm [are] very poor," and he recommended that the employee apply for Social Security disability benefits.

The employee's pain continued, and, after experiencing a marked increase in pain while bending to lift a mop bucket about the middle of July 1998, the employee apparently stopped working about the first of August 1998. By September 10, 1998, his low back pain was radiating into his right knee and keeping him from sleeping more than two or three hours a night. Straight leg raising tests at that time proved negative, but Dr. Scherer found no right Achilles reflex and noted that the employee did stand stooped over and tilted. Surgical evaluation was discussed, and Dr. Scherer noted that the employee "does have osteophytes in the low back and previous laminectomy fusion L3-S1," although he found "[n]o definite nerve root impingement."

[2] See Footnote 1.

Dr. Scherer's notes for September 22, 1998, indicate that by that date the employee had gone out of the cleaning business and was "looking into retraining." On that same date, Dr. Scherer noted that the employee was "post[-]op laminectomy and fusion L3 to S1 with spinal stenosis and osteophytes and asymmetrical disc protrusion to the l[ef]t with previous surgery around 1980. He had recurrence of problems 6/15/98 and was first seen here for the recurrent [problems] 6/20/98." By October 7, 1998, the employee's back pain problems were reported to be "acute and chronic," and he was walking "in a stooped forward fashion." On October 19, 1998, Dr. Scherer noted "generalized osteophytes and disc degeneration" in the low back, "significant spinal stenosis L1-L3," and "an eccentric bulging T12, L1, eccentric to the l[ef]t and some milder generalized bulging discs." On those findings Dr. Scherer concluded on that date that the employee was "totally disabled and . . . not capable of competitive work." He indicated that he "suspect[ed] this to be a chronic, slowly progressive problem with recurrent exacerbations," that surgical options had been discussed but that he had concluded that the employee "would be a very poor surgical candidate," and that repetitive lifting and other work "would risk more extensive and severe problems."

On November 28, 1998, the employee filed a Claim Petition, alleging entitlement to medical benefits in the amount of $1,548.79, and on December 17, 1998, he amended his claim to allege entitlement also to physical therapy recommended by his doctor on about December 1, 1998. In their Answer filed January 12, 1999, the employer and insurer denied liability, alleging that "any need for medical care which has not been paid for arose from causes wholly unrelated to the Employee's injury of May 4, 1978." Also in that Answer, the employer and insurer indicated that they intended to schedule the employee to be evaluated by an independent medical examiner.

On May 4, 1999, the employee filed a Petition to Vacate his 1982 Award on Stipulation, on grounds (1) that he had experienced a substantial change in condition related to his May 1978 work injury with the employer and (2) that "the original Award on Stipulation is defective on its face."

DECISION

This court's authority to vacate a compensation judge's award is found in Minn. Stat. § 176.461 and, with regard to settlements, § 176.521, subd. 3. An award may be set aside if the petitioning party makes a showing of good cause to do so. With regard to awards on stipulation issued prior to 1992, good cause is held to 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).[3] In Fodness v. Standard Café, 41 W.C.D. 1054

[3] These bases were codified in slightly different language in a 1992 amendment of Minn. Stat. § 176.461. In that amendment, the mistake basis was stated as "a mutual mistake of fact," and the substantial change basis was stated as "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." Id. (emphasis added). The supreme court has indicated that the statute's language as to foreseeability of the change in condition constitutes a modification in the

(W.C.C.A. 1989), this court identified a number of factors that it considers in deciding whether to vacate an award based on a substantial change in medical condition. These factors include the following: (1) changes in the employee's diagnosis; (2) changes in the employee's ability to work; (3) the development of any additional permanent partial disability; (4) the necessity of more costly and extensive medical or nursing care than was anticipated; (5) the causal relationship between the work injury and the worsening of the condition; and (6) the contemplation of the parties at the time of the award.[4]

In the present case, the employee's contention that he is entitled to vacation of his Award on Stipulation based on a substantial change in his condition is grounded primarily on an assertion that he has realized a significant change in his ability to work since that Award. For about sixteen years after the Award, he argues, he was able to work, but now, since October 1998, pursuant to the opinion of his treating physician, he is totally disabled from working by consequences of his work injury. He explains in the Memorandum to his Petition that

> [i]t appears on the face of the medical records that [the employee] may at this time be permanently and totally disabled. At the time of the drafting of the earlier Stipulation, [the employee's] claim was for temporary total disability benefits. Permanent total disability claims had not yet been made and did not appear to be contemplated at that time.

The file as we have received it does not contain an Objection from the employer and insurer to the employee's Petition. However, in their January 12, 1999, Answer to the employee's December 17, 1998, Amended Claim Petition in this matter, the employer and insurer contest the causal relationship between the employee's 1978 work injury and his currently worsened condition, asserting that "any need for medical care which has not been paid for arose from causes wholly unrelated to the Employee's injury of May 4, 1978." While we concede that the employee's low back condition and certainly his ability to work do appear to have deteriorated in the seventeen years since his Award on Stipulation, we do not find in the very thin file as we have received it sufficient evidence of a causal relationship between that deterioration and the employee's 1978 work injury to conclude at this time that good cause exists to vacate the 1982 Award on Stipulation here at issue.

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law not effective until July 1, 1992. See Franke v. Fabcon, Inc., 509 N.W.2d 373, 377, 49 W.C.D. 520, 525 (Minn. 1993).

[4] As suggested in Footnote 3 above, in its decision in Franke v. Fabcon, Inc., 509 N.W.2d 373, 377, 49 W.C.D. 520, 525 (Minn. 1993), the supreme court implied that this "contemplation of the parties" factor under Fodness, applicable prior to the 1992 statutory codification of case law grounds for vacation under Stewart, did not require that a change in condition be totally unforeseeable in order to be grounds for vacation.

A copy of the parties' 1982 Stipulation for Settlement without referenced attachments is included as an exhibit in the employee's Petition to Vacate. Although the Stipulation for Settlement indicates at Paragraph II that the employee's "claims are supported in whole or in part by the medical reports of Dr. Paul G. Patterson attached hereto and made a part hereof by reference," no medical reports are attached to the copy of the Stipulation that is included in the employee's Petition to Vacate. Without Dr. Patterson's records at the time of the Award on Stipulation, we are unable to compare the employee's diagnosis at the time of his Award with his diagnosis at the time of his Petition. The copy of the Stipulation as we find it in the employee's Petition does contain and constitute some evidence as to the employee's ability to work at the time of the Award, and this evidence is to a great extent reinforced by the April 30, 1981, partial report of Dr. Yellin that is in the record attached to the employer and insurer's November 3, 1981, NOID. Moreover, this evidence of the employee's work ability at the time of the Award might to an extent be compared constructively to the 1998 medical records of Dr. Scherer submitted by the employee with his Petition. However, and most importantly, these records of Dr. Scherer contain no clear or definitive statement causally relating the currently evident worsening of the employee's low back condition to his 1978 work injury. Absent records of the employee's treating physician, Dr. Patterson, contemporary with the Award at issue, and absent a more definitive current medical opinion attesting to the causal relationship between the employee's currently worsened low back condition and his 1978 work injury, we simply have no sufficient evidence at this time upon which to conclude that the employee has sustained, since the time of his Award on Stipulation, a substantial change in his medical condition that is causally related to his 1978 work injury.

The employee has also argued that Judge Murray's Award on Stipulation should be vacated for being defective on its face. He argues that the Award was erroneously issued based on the statutory presumption of fairness where parties to a settlement are all represented by counsel, as provided for in Minn. Stat. § 176.521. In this case, the employee argues, that presumption should not have been applied, because only the employee was represented by counsel, not the employer and insurer. Instead of applying the presumption, he argues, the judge "was obligated under the Statute to make an independent evaluation of the propriety of the settlement." We are not persuaded that the judge's application of the presumption in this case is grounds for granting the employee's Petition to Vacate the agreement between the parties.

Where a compensation judge has jurisdiction to issue an Award on Stipulation but relies improperly on the presumption of fairness and reasonableness contained in Minn. Stat. § 176.521, the judge's Award is not necessarily void but is instead void*able* by this court, after consideration of the equities involved. See Sondrol v. Del Hayes & Sons, Inc., 47 W.C.D. 659, 665 (W.C.C.A. 1992). Any unfairness that may have resulted from any lack of legal representation in this case would have been endured by the employer and insurer, the unrepresented party in this case. The employer and insurer have not petitioned for vacation of the Award, and since the employee himself was represented by an attorney at the time of the settlement, as is evident by the attorney's signature on the Stipulation for Settlement, the employee is without grounds for contending that the Stipulation was for lack of representation unfair with regard to his interests.

Finding, in the extremely spare record as we have received it, no clear showing of a definite change in diagnosis or of a causal relationship between the employee's currently worsened low back condition and his 1978 work injury, and finding no evidence that the parties' 1982 Stipulation for Settlement was not fair and reasonable with regard to the employee's interests at the time of its execution, we conclude that the employee has not at this time shown good cause to vacate his 1982 Award on Stipulation on grounds that he has undergone a substantial change in condition related to his work injury or that the Award at issue was void for being defective on its face.