

JAMES CALVIN BROWN, Employee/Petitioner, v. SPECIAL SCH. DIST. #1, SELF-INSURED, Employer.

WORKERS' COMPENSATION COURT OF APPEALS  
SEPTEMBER 15, 2000

No. [REDACTED SSN]

HEADNOTES

VACATION OF AWARD - SUBSTANTIAL CHANGE IN CONDITION. Because the employee adequately demonstrated a change in diagnosis, some time loss from work, additional permanent partial disability, and the need for more extensive medical care than initially anticipated, and because causation was apparently uncontested, good cause existed to vacate the award on stipulation.

Petition to vacate award on stipulation granted.

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

OPINION

DEBRA A. WILSON, Judge

The employee petitions this court to vacate an award on stipulation filed on June 22, 1992, based on a substantial change in condition. Finding sufficient basis to vacate the award on stipulation, we grant the petition.

BACKGROUND

The employee's history of neck symptoms dates back to 1976, when his car was rear-ended in a nonwork-related accident. In February of 1987, the employee was involved in a second nonwork-related motor vehicle accident, again injuring his neck and causing him to be off work for approximately six months. Two cervical CT scans performed after the 1987 accident were viewed as normal for spinal levels C3 and above, but the employee's large size "prevent[ed] diagnostic visualization of the disc material" at levels C4 through C7. On April 25, 1989, the employee injured his neck again, this time while working for Special School District No. 1 [the employer] as a bus driver. He apparently missed five or six months from work and received extensive physical therapy.

In May of 1992, the parties entered into a stipulation for settlement, which provided that the employee would receive \$2,500 in full, final, and complete settlement of his claims of cervical and lumbar spine and left knee injuries on April 25, 1989. Medical expenses were left open as they related to the cervical and lumbar spine. At the time of the stipulation, the employee was claiming, in part, entitlement to benefits for a 4.2% whole body impairment related to his

cervical spine.<sup>1</sup> The self-insured employer admitted that the employee had injured his neck in the April 1989 accident but denied that the accident had resulted in any permanent partial disability. An award on stipulation was issued on June 22, 1992.

On January 20, 1993, the employee was involved in another work-related accident when he slipped on ice and fell, striking his head and low back on the ground. A subsequent MRI of the cervical spine revealed a central and left-sided disc herniation at C6-7. On September 21, 1993, the employee underwent a hemilaminectomy at C6-7, for which the employer paid, based on an independent medical examination by Dr. David Boxall, who apportioned liability to the 1989 work injury. The employer also paid some wage loss benefits for an admitted injury to the low back occurring on January 20, 1993. At some point, the employer apparently discontinued benefits, and the employee filed an objection to discontinuance.

A hearing took place in October of 1993, before a compensation judge, where the primary issue was causation of the employee's herniated cervical disc and resulting disability. In findings filed on December 20, 1993, the compensation judge found, in part, that the employee's cervical symptoms and need for treatment after March 5, 1993, including surgery, were not causally related to the January 20, 1993, injury. The employee appealed and petitioned to vacate the June 1992 award on stipulation based on a substantial change in condition. In a decision filed on May 31, 1994, this court affirmed the judge's finding that the herniated cervical disc was not causally related to the January 1993 injury, and we denied the employee's petition to vacate because the hemilaminectomy had occurred just a month before the hearing and the employee had submitted little or no medical evidence as to his condition following the surgery.

On June 9, 2000, the employee filed another petition to vacate the 1992 award on stipulation based on a substantial change in condition. Attached to that petition were an affidavit of the employee, numerous medical records predating the 1993 hemilaminectomy, and the December 22, 1995, report of Dr. Richard V. Johnson. Dr. Johnson opined that the surgery had relieved the severe pain down the employee's arm but that the employee was not able to return to bus driving. Dr. Johnson also rated the employee as having an additional 11% whole body impairment related to the cervical spine. The employer objects to the employee's petition to vacate.

## DECISION

For awards issued prior to July 1, 1992, "cause" to vacate includes a substantial change in condition. A number of factors may be considered in determining whether an award should be vacated based on a substantial change in condition, including:

1. a change in diagnosis;
2. a change in the employee's ability to work;
3. additional permanent partial disability;

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<sup>1</sup> The employee's other claims related to alleged injuries to his lumbar spine and left knee. He was not making any claim for wage loss benefits at that time.

4. necessity of more costly and extensive medical care/nursing services than initially anticipated; and
5. causal relationship between the injury covered by the settlement and the employee's current worsened condition.

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

In the present case, it is apparent that the employee's diagnosis has changed. At the time of the award on stipulation, the employee had been diagnosed with a cervical strain; he was not diagnosed with a cervical disc herniation until 1993.

Whether there has been a change in the employee's ability to work is more problematic. The employee was apparently working as a bus driver at the time of the 1992 stipulation for settlement, and the only subsequent medical report submitted with the petition to vacate indicates merely that the employee was unable to return to bus driving after the 1993 injury; there is no description of the period of time during which the employee was totally off work or of the period of time, if any, during which the employee worked at a wage loss. In addition, it is unclear from Dr. Johnson's report whether the employee's inability to return to work as a bus driver was related to his cervical spine condition or to a subsequent leg amputation. The employee's affidavit was also vague, suggesting that he did return to bus driving after the surgery but that "I had problems doing continuing work and my neck pain continued to affect my ability to drive a bus." At oral argument, employee's counsel was unable to delineate what periods of time the employee missed work due to his cervical condition and whether the employee had in fact returned to school bus driving.<sup>2</sup> However, regardless of the deficiencies in the evidence, we assume that, at a minimum, the employee was off work completely for a period of time following his hemilaminectomy due to that surgery.

With regard to causation, the only report submitted was that of Dr. Johnson, who stated that the cervical disc herniation was caused by the 1993 work injury. However, this court has already affirmed a compensation judge's finding that the cervical disc herniation was not causally related to the January 1993 injury. The employer, however, evidently does not dispute causation as to the 1989 injury and has paid the surgical expenses.

There has been an increase in the employee's permanent partial disability, at least according to Dr. Johnson. The employee was seeking benefits for a 4.2% whole body impairment at the time of the stipulation for settlement, and Dr. Johnson now rates the employee as having an additional 11%.

The employee has also undergone a surgery that would have not have been anticipated for a cervical strain. However, where medical expenses are not closed out by the award, we put less emphasis on this factor. Burke v. F & M Asphalt, 54 W.C.D. 363 (W.C.C.A. 1996).

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<sup>2</sup> Employee's counsel did suggest that the employee took disability retirement from the employer in 1997 due to his leg amputation.

Because the employee has adequately demonstrated a change in diagnosis, at least some time loss from work, additional permanent partial disability, and the need for more extensive medical care than initially anticipated, and because the relationship between the cervical disc herniation and the 1989 injury is apparently uncontested, we find good cause to vacate the 1994 award on stipulation.<sup>3</sup> However, nothing in this decision should be construed as an opinion as to the employee's entitlement to benefits. Rather, this decision is limited to a determination of whether cause exists to vacate the award. Stanslaski v. Northern States Power Co., 39 W.C.D. 59 (W.C.C.A. 1986).

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<sup>3</sup> The employer argues that the employee should not prevail on his petition to vacate because he cannot show there has been a substantial change in condition that was unanticipated at the time of the 1992 settlement. As we stated in our decision of May 31, 1994, "[t]he Minnesota Supreme Court has indicated that, in cases not governed by the current statute, foreseeability of the worsening of the employee's medical condition is not determinative in evaluating whether an award should be vacated on grounds of substantial change in condition." Again, on this second petition to vacate, we are unpersuaded by the employer's argument. See Franke v. Fabcon, Inc., 509 N.W.2d 373, 49 W.C.D. 520 (Minn. 1993).