TERRI E. GRIFFITHS, Employee, v. DULUTH TRANSIT AUTHORITY and UTICA MUT./REPUBLIC FRANKLIN INS. CO., Employer-Insurer/Petitioners.

WORKERS' COMPENSATION COURT OF APPEALS
OCTOBER 18, 2000

No. [REDACTED SSN]

HEADNOTES

VACATION OF AWARD - FRAUD. Where the employer and insurer alleged that the employee fraudulently induced a settlement in 1992 and a settlement in 1993, it was necessary that they satisfy all the seven requirements of fraud. Where the employer and insurer failed to establish that the employee made any false statements prior to the settlements, their petition to set aside the awards on the basis of fraud is denied.

PENALTIES; VACATION OF AWARD. Where the employer and insurer failed to establish that the employee had made any false statements to induce the settlements in 1992 and 1993, and where the evidence provided by the employee was either unbelievable or totally irrelevant to the issue of fraud, the filing of a petition based on fraud does not rise to the level of a legitimate controversy and should be considered to be frivolous. As a result, pursuant to Minn. Stat. § 176.225, subd. 1a, penalties should be assessed against the employer and insurer for the filing of a frivolous petition.

VACATION OF AWARD - SUBSTANTIAL CHANGE IN CONDITION. Where the principal basis for the employer and insurer's argument that the employee's condition had substantially changed was its medical examiner's opinion that the employee was currently able to work, their petition should be denied where it is determined that the videotapes upon which the physician relied were over two years old and the medical diagnostic tests upon which the employer and insurer's expert relied were no longer accurate. In addition, the videotapes did not, in the view of the Workers' Compensation Court of Appeals, demonstrate that the employee was able to engage in full-time or part-time employment on a sustained basis. As a result, the employer and insurer's petition based on a substantial change in condition should be denied.

VACATION OF AWARD - NEWLY DISCOVERED EVIDENCE. Where the allegedly newly discovered evidence could have been discovered by a reasonable investigation prior to entering into the stipulation, it cannot be considered to be newly discovered evidence simply because it was found in a recent review of records.

VACATION OF AWARD - MISTAKE. Where the employee claimed entitlement to benefits from credit life insurance insurers and they may have been potential intervenors, the employer and insurer have no standing to complain that a potential intervenor had been excluded from the settlement such that the settlement should be voided. Additional facts which support denial of the petition in this case are that there is no evidence that the credit policies contained a right of reimbursement and no claims for reimbursement had ever been made.

Petition to vacate awards on stipulation denied.

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

OPINION

STEVEN D. WHEELER, Judge

The employer and its insurer petitioned this court for the vacation of awards on stipulation served and filed March 26, 1992, and July 30, 1993, on the basis that the employee committed fraud in inducing those settlements, that there has been a substantial change in the employee's condition since the date of the settlements, that there has been a mutual mistake of fact and that there is newly discovered evidence. We deny the petition and award attorney fees and penalties to be paid by the employer and insurer.

BACKGROUND

Terri E. Griffiths, the employee, while employed as a bus driver for the Duluth Transit Authority, hereinafter the employer, was involved in several motor vehicle accidents while operating her bus and sustained injuries to her back. The first injury occurred on March 7, 1978, and the second injury occurred on August 9, 1984.

Prior to the first injury, the employee had a preexisting low back condition, apparently related to a congenital condition. On February 21, 1975, the employee had a lateral mass fusion at spinal levels L5-S1. Following the 1978 injury, a laminectomy was performed at L4 and L5, with disc removal at the L5 level on the right, by Dr. P. L. Boman on April 24, 1981. After the first injury, the employer registered the employee's condition with the Second Injury Fund of the Special Compensation Fund on December 28, 1981, with a permanent partial disability rating of 27.5 percent of the spine.

After the 1984 injury, several additional surgeries were performed on the employee: (1) on April 14, 1988, Dr. Boman performed a laminectomy and disc removal at L5 on the right; (2) on July 12, 1988, Dr. Boman performed a laminectomy and disc removal at L5 on the left with a lateral mass fusion at L5-6 as a result of a recurrent disc herniation.

In 1984 the employee lost her job at the bus company and attended college, graduating from St. Scholastica College in 1987 with a degree in computer science. At least a portion of her education was paid for by the employer and insurer pursuant to a retraining program. (Pet. Ex. 19.) At some point thereafter, she went to work for United Hardware in the Twin Cities, and later became a program analyst or auditor with United Healthcare in Duluth, positions which would accommodate her low back difficulties. In 1990, the employee developed hip problems and on June 8, 1990, had a bursa removed.

The employee continued to have significant low back and radicular pain in early 1992 which caused her to undergo a laminectomy at L4 and L5 by Dr. Boman on February 26, 1992. The employee was out of work from February 7 through April 24, 1992. During that time,

the employee entered into a stipulation for settlement, with the award issued on March 26, 1992. This stipulation closed out all liability to the employee through January 8, 1992. The Special Compensation Fund agreed to accept second injury liability for the 1984 injury.

On June 12, 1992, the employee's surgeon, Dr. Boman, issued a report in which he indicated that all of the employee's prior surgeries had failed and she would continue to have chronic pain. He gave her a 37.5 percent whole body permanent partial disability rating. On July 24, 1992, the employee filed a claim petition seeking temporary total disability from February 7, 1992, and payment of permanent partial disability in the amount of 37.5 percent of the whole body, together with payment of medical expenses. Apparently the employee was able to perform some work for United Healthcare, but last worked there on August 22, 1992. (Affidavit of employee; affidavit of Cindy Corey.) The employee received short-term disability from United Healthcare from September 11 through December 18, 1992. She received long-term disability from the UNUM Life Insurance Company from November 23, 1992, through at least June 23, 1993. (Judgment Roll: Petitions to Intervene; July 1993 settlement at p. 4.)

On November 2, 1992, a myelogram and CT scan were performed on the employee which indicated that she had a bulging disc at the L3-4 level. In late November 1992, the employee filed applications with two disability insurers, Credit Life Insurance and J. C. Penney Credit Insurance, seeking disability payments due to her disability and inability to pay her debt to J. C. Penney, and perhaps to make a car payment. In connection with these claims, reports of disability were filed by Dr. Boman in December 1992 and January 1993, in which he indicated that the employee was totally disabled as a result of chronic low back pain and hip pain. In the applications, the employee indicated that she had applied for Social Security disability, but was not receiving Social Security or workers' compensation benefits. The employee's January 2000 affidavit states that those statements were true when made, as she was not receiving workers' compensation or Social Security benefits at the time she completed the applications.

The parties subsequently entered into a stipulation for settlement which was approved in an award on stipulation served and filed July 30, 1993. In the stipulation, the parties agreed that the employee was permanently and totally disabled and that she would be paid temporary total disability benefits for the period February 7 through April 24, 1992, and would receive permanent total disability benefits from August 22, 1992. In addition, the employer and insurer paid the employee a lump sum of $6,000.00 to close out all claims for permanent partial disability, rehabilitation and other benefits, except for future medical expenses. The stipulation also stated that the intervention interests of the short and long-term disability insurers (United Healthcare and UNUM) would be paid from the temporary total disability and permanent total benefits paid to the employee. The Special Compensation Fund agreed to reimburse the employer and insurer for all benefits paid, subject to the appropriate deductions and for payments of statutory threshold levels of medical and temporary total disability benefits.

On December 9, 1999, the employer and insurer filed a petition to vacate, alleging that the employee had committed fraud in inducing the 1992 and 1993 settlements, that there has been a substantial improvement in the employee's condition, that there has been a mutual mistake of fact and that there is newly discovered evidence.

DECISION

This court's authority to consider petitions to vacate awards on stipulation is governed by Minn. Stat. §§ 176.461 and 176.521, subd. 3. For this court to vacate an award on stipulation, the petitioner must show good cause. The law in effect on the date of the settlement is controlling for purposes of determining what constitutes good cause. Franke v. Fabcon, Inc., 509 N.W.2d 373, 49 W.C.D. 520 (Minn. 1993). For awards issued prior to July 1, 1992, good cause to vacate an award was limited to (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. Stewart v. Rahr Malting Co., 435 N.W.2d 538, 41 W.C.D. 648 (Minn. 1989). For awards issued after July 1, 1992, Minn. Stat. § 176.461 defines cause as limited to the following: (1) 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. The employer and insurer allege that each of the four causes for the vacation of an award is applicable with respect to each of the two awards on stipulation contested.

Fraud

To establish fraud, there must be (1) a false representation of facts; (2) the representation must deal with a past or present fact; (3) the fact must be susceptible to knowledge; (4) the representing person must know the fact is false; (5) the representing party must intend that another be induced to act based on the false representation; (6) and the other person must in fact act on the false representation; and (7) the misrepresentation must be the proximate cause of actual damages. Specialized Tours, Inc. v. Hagen, 392 N.W.2d 520 (Minn. 1986); Weise v. Red Owl Stores, Inc., 286 Minn. 199, 202, 175 N.W.2d 184, 187 (1970). To prevail on a claim of fraud, the petitioner must prove that the employee misrepresented her physical condition and/or ability to work at the time of settlement in order to induce the settlement. Boileau v. A-Plus Indus., 58 W.C.D. 549 (W.C.C.A. 1998).

The employer and insurer offered voluminous medical records, videotapes of the employee, tax returns, applications for disability insurance, vocational assessment reports and investigators' reports in support of their contention that the employee falsely represented her physical capabilities in order to induce the employer and insurer to enter into the settlements of March 1992 and July 1993. (ER/INS brief at p. 17.)

With respect to the July 1993 settlement, the employer and insurer claim that the employee made false representations of fact in November and December 1992 on forms she submitted to the Credit Life Insurance Company and to the J. C. Penney Credit Insurance Company. (Pet. Exs. 3, 4, 5, 15, 16.) The employer and insurer contend that on these forms the employee falsely denied receiving workers' compensation or other disability benefits. The employer and insurer contend that prior to the date of the applications, the employee had received workers' compensation benefits and may have received Social Security benefits. (ER/INS brief at pp. 17-20.)

The employee responds to these allegations by pointing out that at the time the applications were filled out the employee was not receiving workers' compensation benefits and had not been approved for receipt of Social Security disability benefits. (EE affidavit of 1/12/00.) The last prior workers' compensation payment was the lump sum paid to her in March 1992 in conjunction with the settlement approved March 26, 1992. As such, she indicated that the statements made on the applications were true.

We agree with the employee that the employer and insurer's position with respect to the representations made to Credit Life and J. C. Penney Insurance cannot form the basis for a claim that the employee made false misrepresentations in order to induce the employer and insurer to enter into the 1993 settlement. The employer and insurer's position with respect to this claim appears to be not only factually incorrect but legally spurious. First, it appears that the statements were not false. The employee did not receive workers' compensation benefits until after the July 1993 award and did not receive Social Security payments until late in 1993. (1993 Stipulation for Settlement; Notice of Decision from SSA of 12/30/93.) Second, the statements, even if assumed to be false, were not made to the employer and insurer and played no role in reaching the 1993 settlement. This evidence can form no basis for establishing fraud in connection with a petition to vacate either of the awards on stipulations.

In addition, the employer and insurer make the general allegation that the employee "misrepresented her physical condition at the time of the Stipulations for Settlement." (ER/INS brief at p. 20.) In support of their position, they state that the employee gave histories to her treating physicians, Drs. Boman and Martinson,[1] which caused them to opine that the employee was unable to perform any physical activities.[2] They contend that since the medical reports from these physicians were accepted by the parties as part of the basis for entering into the settlements, the employee should be deemed to have misrepresented her condition to induce the employer and insurer to enter into the settlements. The principal evidence offered to prove that the employee's statements made to her treating physicians were untrue in 1992 and 1993 consisted of several videotapes and investigators' reports concerning the employee's activities during three separate weeks between September 1996 and June 1997. The employer and insurer contend this evidence demonstrates that the employee had the ability to go shopping, push shopping carts, lift bags into a trunk, paint her home in awkward positions, stand on stepladders, bend and twist while painting her home, balance on a stepladder, bend and twist as she painted doors, fold and carry ladders, push and pull a wheelbarrow, unload and carry flat bags from her trunk, engage in gardening while sitting on her knees, bending forward using both hands to pull weeds, and carrying garden tools in 1996 and 1997. In its brief, the employer and insurer stated the following:

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[1] Dr. Boman had been the employee's treating surgeon since 1975. There is no indication that Dr. Martinson was involved with the employee's case in 1992 or 1993. The records offered by petitioners indicate that Dr. Martinson was first involved with the employee's case in January 1995. (Pet. Ex. 14.)

[2] The employer and insurer do not specify which reports of pain or statements to her physicians were false and misleading. They only make a general allegation to that effect.

> None of the histories that the treating physicians obtained from the employee include any mention of the physical capabilities that she demonstrated in the videotapes. It is highly likely that the employee underestimated her physical capabilities at the time of the stipulations for settlement.

(ER/INS brief at p. 21.)

The employee responds to these allegations by indicating that the activities depicted in the videotapes do not demonstrate that the employee is even capable of sustained employment in 1996 and 1997. In addition, the employee argues that her ability to engage in the activities depicted in the videotapes in 1996 and 1997 do not in any way contradict the complaints of pain and statements made to her treating physicians in 1992 and 1993 concerning her ability to function. The employee points out that the activities depicted in the videotapes are not strenuous in nature and were undertaken on an intermittent basis. The employee also indicated that these activities frequently caused her pain and distress but that she engaged in them nevertheless in order to satisfy personal interests. We have reviewed the videotapes and find that they do not demonstrate that the employee has engaged in any activities which would support the conclusion that the employee is capable of sustained part-time or full-time employment. In addition, we find the videotapes taken in 1996 and 1997 are so remote in time as to provide no help or guidance with respect to the credibility of statements the employee may have made to her physicians in 1992 and 1993.[3]

In further support of its allegation that the employee committed fraud, the employer and insurer state that, "Additional persuasive evidence that [sic] the employee's misrepresentations include tax returns the employee submitted for the years 1994 to 1997." (ER/INS brief at p. 21.) The employer and insurer point out that in November 1997 they sent a questionnaire to the employee, which she filled out and returned, indicating that she could not participate in any social activities or drive her vehicle. (Pet. Ex. 9.) The employer and insurer contend that disclosures in the employee's tax returns (Pet. Ex. 12) prove that the employee was able to travel to gambling casinos in Las Vegas, Nevada, in 1994 and to Hinckley, Minnesota, in 1997. The employer and insurer's brief stated:

> If the Employee misrepresented her physical condition after the Stipulation for Settlement, it is likely that she misrepresented her physical abilities at the time that the Petitioner signed the Stipulations for Settlement.

(ER/INS brief at p. 21.) Even if the employee made minor incorrect statements concerning her ability to travel, we do not find they were material misrepresentations. In addition, it is a huge leap of logic to then conclude that possible minor exaggerations in 1997 proved that the employee misrepresented her condition in 1992 and 1993. Even if the employer and insurer's claims are

[3] In addition, they are also remote in time as to the employer and insurer's contention that at the time of the petition in December 1999 the employee was fully capable of resuming full or part-time employment.

true, we find that the statements made in the questionnaire have no bearing on the issue of whether the employee fraudulently induced the earlier settlements.[4]

An additional argument made by the employer and insurer is that the employee misrepresented her ability to be employed during the time she was receiving permanent total benefits. (ER/INS brief at p. 22.) The employer and insurer asserted that evidence obtained from its investigation service indicated that the employee was earning part-time wages from United Healthcare as late as 1996. (Pet. Ex. 7, report of 11/20/96.)[5] The employer and insurer suggest that the employee was engaged in self-employment during the years 1995 to 1997, as indicated by losses reported on her tax returns for those years. (ER/INS brief at p. 23.) In response to the claims that she was working, the employee, by affidavit, indicated that the last time that she worked at United Healthcare or for any employer was in August of 1992. Her statement is supported by the affidavit of Cindy Corey, an employee of United Healthcare in its payroll department. The employee stated that she did receive a distribution from her retirement plan at United Healthcare. The tax returns, on their face, indicate that the distribution in 1995 was made from a retirement or pension plan. In addition, the employer and insurer have provided no direct evidence from United Healthcare. The only evidence they submitted consisted of a statement from an investigator, that he talked with a Ms. Gabrielson who allegedly indicated that the employee was a temporary employee. In the face of Ms. Corey's affidavit and without some verification directly from the employer, United Healthcare, we find this evidence wholly unbelievable.

With respect to the claims of self-employment, the employee indicated in her affidavit that the tax returns for 1995 through 1997 were joint returns with her husband. She also stated that she and her husband gave money to a relative to assist him in starting a career as a model. The attempt was unsuccessful and the payments were treated as a loss. The employee stated that she had not been actively engaged in any work from her home or elsewhere. She did admit to some volunteer work with AAUW and Headstart, which she stated she could do because it was not continuous and allowed her to be active when she was physically able. (EE affidavit of 1/2/00.)

Finally, in support of its allegation of fraud, the employer and insurer state that the vocational assessment of its vocational expert, QRC David Russell, and the medical opinion of its expert, Dr. Larry Stern, establish that the employee is not permanently and totally disabled, primarily based on Dr. Stern's observations of the employee's activities depicted on the

[4] There is a question concerning whether the answers given were incorrect. The employee's response to these allegations included evidence from the employee's travel agent that she flew nonstop on a charter aircraft from Duluth to Las Vegas. We take judicial notice that Hinkley, Minnesota, is very close to Duluth. The employee also indicated that she did volunteer work for the AAUW and Headstart, but the work was intermittent and allowed her to accommodate her limitations.

[5] Another investigative report submitted by the employer and insurer suggested that their contacts with United Healthcare verified that the employee was fully employed by them from November 21, 1989 to January 1, 1995. (Pet. Ex. 13.)

videotapes. (ER/INS brief at p. 23.) The employer and insurer point out that Dr. Stern opined that the employee could work on a part-time or full-time basis, despite her previous surgeries. Mr. Russell, based on Dr. Stern's release to work, opined that the employee was capable of earning between $5.88 per hour and $32.00 per hour, with a specified average expectation of $11.33 per hour. (Pet. Exs. 17, 18.) Even if we assume that the assessment and opinions of Mr. Russell and Dr. Stern are correct, they have no bearing on the question of whether the employee committed fraud in inducing the original settlements in 1992 and 1993. The assessment and opinion may relate in some way to the question of whether the employee is capable of more than insubstantial income at the present time, which relates more directly to the issue of whether there has been a substantial change in the employee's condition since the time of the settlements. With respect to the allegation of fraud, however, this evidence is not persuasive.

Even if we were to accept all of the evidence presented by the employer and insurer for the matters that they are asserted to represent, the employer and insurer have presented no evidence which would support an allegation that the employee had committed fraud in the inducement of the 1992 and 1993 settlements. There is no evidence that the employee made a false representation of any fact prior to the consummation of the settlements in 1992 and 1993 and as a result none of the factors required to be established to show fraud have been presented by the employer and insurer. We find that the arguments made with respect to the allegation of fraud are based on evidence which is either factually incorrect or irrelevant to the allegation. As a result, we find the allegation of fraud is frivolous at best.[6]

The employee has petitioned the court for an assessment of penalties with respect to the employer and insurer's frivolous allegation that the employee engaged in fraud in inducing the settlement in this matter. While we are normally reluctant to issue an award of penalties, we believe that in certain rare instances it may be appropriate. We believe that this case is one of those where penalties should be assessed. Lund v. A-1 Excelsior Van & Storage, 35 W.C.D. 296 (W.C.C.A. 1982).

Pursuant to the provisions of Minn. Stat. § 176.225, subd. 1(a), we award penalties against the employer and insurer, in favor of the employee, in the amount of 15 percent of all permanent total disability payments made to the employee from the time of the filing of the petition to vacate on December 9, 1999, until the date of issuance of this decision. We believe that the employer and insurer's allegation of fraud had no factual basis and there was no evidence to

[6] We are troubled by the lack of any attempt by the insurer to avail itself of the 1998 offer by the employee's attorney to make the employee available for taking a statement regarding its concerns. We note from the affidavit of Gayle Korenchen, a paralegal with Mr. Falsani's office, when concerns were raised by a representative of the insurer, he was invited to get a statement from the employee at her attorney's offices. Indeed, the employer and insurer would have been permitted to take the employee's deposition, just as it had her examined by Dr. Stern in 1998. In addition, in the face of the evidence presented by the employee in opposition to the petition, the employer and insurer persisted in pressing its claim of fraud when it had reason to seriously question whether much of the evidence they had presented was accurate or relevant.

support the allegation. As a result, the employer and insurer's instituting of a proceeding based on that allegation did not present a real controversy but was frivolous, in the extreme.

Mutual Mistake of Fact

The employer and insurer argue that the J. C. Penney Credit Insurance Company and the Credit Life Insurance Company may each have an intervention interest which was not dealt with in the 1993 settlement. Based on the disability claim forms found in the medical records of Dr. Boman at the Duluth Clinic (Exs. 3, 4, 5, 15, 16), the employer and insurer speculate that the employee received some form of disability benefits during the latter part of 1992 and early 1993, a period during which she also received temporary total or permanent total disability benefits. As a result, they contend that under this court's reasoning in Milner v. Schwan's, Inc., slip op. (W.C.C.A. June 9, 1999), there has been a fundamental mistake by both parties as to the status of intervention claims. They argue that the stipulation for settlement in 1993 should therefore be vacated. They contend that both parties assumed at the time of the 1993 settlement that there were no intervention interests other than those of United Healthcare and UNUM Life Insurance Companies. They point out that the stipulation for settlement in 1993 failed to dispose of the potential intervention claims of the Credit Life Insurance Company or the J. C. Penney Credit Insurance Company.

The employer and insurer's reliance on Milner is misguided. The facts in the Milner case are clearly distinguishable from the case at hand. In that case, the compensation judge was fully aware of the potential rights of the South Dakota hospital and exceeded his jurisdiction in attempting to extinguish those rights, necessitating this court to void the award on stipulation. In Milner the hospital in South Dakota had obtained a judgment against the employee and had transferred the judgment to Minnesota and was prepared to make collection. That fact gave the employee the right to request that the award on stipulation be voided in order to permit it to process a claim against the insurer for protection against the hospital.

In the case at hand, neither of the entities suggested by the employer and insurer as being potential intervenors has made a request for repayment. There is no evidence that either of the contracts of insurance provided the insurers with a right to reimbursement if the insured received workers' compensation benefits for periods of disability covered by their consumer credit policies. The employee's attorney's affidavit states that to the best of his knowledge and belief, the insurance contracts did not provide for reimbursement. (1/12/200 affidavit of Robert Falsani, ¶¶ 2, 3.) In addition, even if these insurers had a potential interest we do not believe that the employer and insurer in this case have standing to assert any rights with respect to the potential intervenors. As well, at this time the intervenors would not have an independent claim or right to petition this court to vacate the 1993 award on stipulation. The intervenors may have rights against the employee under their contracts, but that would not give rise to a right of the employer and insurer to vacate the 1993 award on stipulation. In addition, the events that occurred in late 1992 and early 1993 would have had no effect on the viability of the March 1992 award on stipulation.

Newly Discovered Evidence

The employer and insurer contend that the disability claim forms and claimant statements filed with the J. C. Penney Credit Insurance Company and the Credit Life Insurance Company by the employee and her physician constituted newly discovered evidence. Apparently the employer and insurer only became aware of these statements after it conducted an investigation and found the records in the files of Dr. Boman at the Duluth Clinic.

We are not persuaded by the employer and insurer's arguments for several reasons: (1) as discussed above, the information contained in these reports would have no bearing on a claim for fraud or mutual mistake of fact and therefore could not form the basis for a cause to vacate the award on stipulation, and (2) the documents could have been discovered by a review of Dr. Boman's records prior to entering into the stipulation in 1993 and are not newly discovered simply because they were noticed in a subsequent investigation.

Substantial Change in Condition

In determining whether a substantial change in the employee's medical condition has occurred, this court in the past has examined such factors as (1) change in diagnosis; (2) change in the employee's ability to work; (3) additional permanent partial disability; (4) necessity of more costly and extensive medical care/nursing services than initially anticipated; (5) causal relationship between the injury covered by the settlement and the current worsened condition; and (6) contemplation of the parties at the time of settlement. Fodness v. Standard Cafe, 41 W.C.D. 1054, 1060-62 (W.C.C.A. 1989) (citations omitted). Fodness and the decisions upon which the Fodness factors were based generally involved cases in which an employee was requesting vacation of a settlement on the basis of a worsening of his or her medical condition. The case at hand, however, involves a less common situation, a petition by an employer and insurer asserting an improvement in the employee's medical condition. As a result, not all of the Fodness factors are applicable.

The principal argument made by the employer and insurer is that it appears that the employee's ability to work has changed. Based on the medical opinion of Dr. Stern and the vocational assessment by Mr. Russell, the employer and insurer contend that the employee could work part-time or full-time on a sustained basis and make more than an insubstantial income. Essentially they are arguing that the employee is no longer permanently and totally disabled.

The primary evidence provided by the employer and insurer is the opinion of Dr. Larry Stern at EvaluMed. Dr. Stern examined the employee on November 21, 1998, at the request of the employer and insurer. Dr. Stern stated that the employee's physical condition had not appreciably changed since 1992, primarily based on the results of an October 1997 lumbar MRI. Dr. Stern indicated that he reviewed the five videotapes taken during 1996 and 1997 and found the activities depicted therein to be inconsistent with the employee's statements during the examination concerning her capabilities. Based on the scenes depicted in the videotapes, Dr. Stern indicated that the employee is not disabled on a permanent basis. He stated that the employee would be able to return to work with a lifting restriction of 50 pounds. He opined that he would not limit her in any way from bending at the waist, kneeling or crawling. He stated that she was

capable of working "either on a part time or full time basis despite her previous surgeries." Dr. Stern also indicated that the employee was not in need of any future medical treatment, including medications, physical therapy or back surgery. (Pet. Ex. 17, report of 11/21/98.) In a supplemental report, dated May 28, 1999, Dr. Stern stated that in his opinion "there clearly has been a change in her ability to work since the time of her settlement in July 1993 when both parties apparently agreed she was totally and permanently disabled. I base this on the fact her diagnosis has remained virtually the same since 1992, but the videotapes clearly suggest she is capable of much greater activity than apparently she was able to tolerate when the settlement was reached." (Pet. Ex. 17.)

The employer and insurer provided numerous records and medical information to L. David Russell, a rehabilitation specialist. Relying primarily on Dr. Stern's assessment that the employee was able to return to part-time or full-time work, Mr. Russell opined that the employee was capable of earning, on average, $11.33 per hour and was not permanently and totally disabled. (Pet. Ex. 18, reports of 8/4 and 8/5/99.)

While the employer and insurer recognized that the employee had substantial and significant surgeries which were performed in February 1975, April 1981, April 1988, July 1988 and February 1992, they point out that the employee did not seek medical treatment from August 1995 through March 1997, and that the surveillance videos from 1996 and 1997 demonstrate an ability to perform certain functions that suggest the employee is capable of gainful employment. In addition, the employer and insurer cite the statements of the employer and insurer's investigator that the employee had worked at United Healthcare continuously from November 1, 1989 through January 1, 1995, and that she was actually working eight hours a week at United Healthcare in 1996.[7]

The evidence submitted by the employee concerning her current ability to work contains recent medical reports from Dr. Martinson and Dr. Dulebohn, and the affidavit of the employee. The medical reports indicate that the employee underwent anterior fusion surgery at spinal level 3-4 on March 2, 2000. This surgery was apparently necessitated by the findings on an MRI which was performed on November 20, 1999, which showed a significant change from the 1992 CT scan and the 1997 MRI, namely, a disc protrusion at L3-4 with a high probability of right-sided L4 nerve root encroachment. Following a review of the MRI, Dr. Dulebohn opined that the employee was not capable of employment on a competitive and sustained basis. This opinion was supported by Dr. Martinson, who stated that the employee continued to be totally disabled. (Report of Dr. Dulebohn and Dr. Martinson dated 1/4/00.)

[7] The employer and insurer offered a handwritten statement from an employee of the insurer, Timothy P. Culkin, dated September 14, 1999, in which he related that in March of 1998, he called and faxed United Healthcare in Duluth and received a reply voicemail from an unidentified person who apparently stated that the employee had worked for United Healthcare from November 21, 1989 to January 1, 1995. (Pet. Ex. 13, Culkin statement; Pet. Ex. 7, report of 11/20/96). We place no value on Mr. Culkin's statement, as it is based on rank hearsay and is totally inconsistent with other verifiable information.

The employee filed an affidavit in which she stated that she did not perform any work for any employer after the 1993 stipulation for settlement was signed in this matter. She did state that in 1995 she was required by United Healthcare to remove her 401(k) savings from their plan. It was these payments which were noted on the1099-R form attached to the employee's tax returns. (Pet. Ex. 12.) This payment, however, was not related to work activities performed in 1995, as the employee had not worked since 1992. (EE's affidavit of 1/2/00, ¶¶ 2, 3.) In support of this position, the employee provided an affidavit from Cindy Corey, who is an employee in the payroll department of United Healthcare. Ms. Corey stated that the employee was placed on disability as of August 24, 1992, and last worked on August 22, 1992 for United Healthcare. The 1993 stipulation for settlement confirms that the employee received disability payments from United Healthcare and UNUM Insurance. The employee's tax returns from 1994 through 1997 show that the employee had no earned income during those years. (Pet. Ex. 12.) The employee stated that she was capable of performing certain tasks like gardening, as depicted in the videotapes, and volunteer work, but she could not do these activities on a sustained basis as they aggravated her symptoms. She indicated that she tries to keep as active as her symptoms permit. (EE's affidavit, ¶¶ 8, 9.)

We have watched the videotapes provided to Dr. Stern and also the investigators. We agree with the employee's assessment that these tapes and reports do not show the employee engaged in sustained physical activity. The only work shown of any duration occurred on June 2, 1997, when the employee planted flowers for approximately three and a half hours. We note that on most of the 25 days the investigators attempted to watch the employee, no activity or only minimal activity was noted. We also note that the surveillance confirmed that the employee regularly went to do whirlpool therapy early in the morning. We also note that no activity was reported for a full week after the June 2, 1996 work activity.

Dr. Stern's November 1998 report was not updated, even after the employee offered the reports from Drs. Dulebohn and Martinson concerning the 1999 MRI and the March 2000 fusion surgery. As a result, Dr. Stern's opinion, based on surveillance conducted two to three years prior to his opinion and not based on current diagnostic test results should be given little weight on the issue of the employee's current medical condition and ability to work. We find that the employer and insurer have not established that the employee's condition has changed substantially.

As we have concluded that the allegations of fraud are unfounded, that there has been no mutual mistake of fact or newly discovered evidence and that there has been no substantial change in the employee's condition, there is no basis to vacate the 1992 and 1993 awards on stipulation.