DARLENE J. KINNUNEN, Employee/Petitioner, v. BROCKWAY GLASS and LIBERTY MUT. INS. CO., Employer-Insurer, and CONTINENTAL LOOSE LEAF, INC. and AM. COMP. INS. CO./RTW, INC., Employer and Insurer, and SPECIAL COMP. FUND.

WORKERS' COMPENSATION COURT OF APPEALS
JANUARY 27, 2000

No. [REDACTED SSN]

HEADNOTES

VACATION OF AWARD. Where the employee has entered into a stipulation for settlement with one employer and insurer and later sustains a new work-related injury with a different employer and insurer, the second employer and insurer are liable for full payment of workers' compensation benefits due the employee. Johnson v. Tech Group, Inc., 491 N.W.2d 287, 47 W.C.D. 367 (Minn. 1992). The employee here has a claim petition pending against both employers and insurers, with the potential for full recovery from the second employer and insurer. The employee's petition to vacate the stipulation for settlement is, therefore, premature, and is dismissed without prejudice.

Petition to vacate award on stipulation dismissed.

Determined by: Johnson, J., Rykken, J., and Wheeler, C.J.

OPINION

THOMAS L. JOHNSON, Judge

The employee petitioned to vacate and set aside a Stipulation for Settlement and Award on Stipulation, served and filed April 3, 1991, on the basis of a substantial change in medical condition. We conclude the employee's petition is premature and, accordingly, dismiss the petition to vacate without prejudice.

BACKGROUND

The employee, Darlene J. Kinnunen, sustained admitted injuries to the low back on November 15, 1979 and February 17, 1981, while employed by Brockway Glass Company, insured for workers' compensation purposes by Liberty Mutual Insurance Company. Partial Awards on Stipulation were issued in 1983 and 1987. On March 18, 1991, the parties entered into a third Stipulation for Settlement closing out the employee's claims on a full, final and complete basis in return for a lump sum payment to the employee of $70,000.00. Future causally-related, reasonable and necessary medical expenses were left open under the stipulation. An Award on Stipulation was served and filed on April 3, 1991.

On April 26, 1999, the employee filed a claim petition listing her 1979 and 1981 injuries and alleging a new injury to the low back on June 6, 1998, while employed by Continental Loose Leaf, Inc., her current employer. Continental is insured for workers' compensation purposes

by American Compensation Insurance Company/RTW, Inc. The employee sought approval for a two-level lumbar fusion, claiming the need for the surgery was a result of her November 15, 1979 and February 17, 1981 work injuries and/or the new injury on June 6, 1998. The employee also sought wage loss benefits, permanent partial disability benefits, payment of various medical expenses and rehabilitation services. Continental/American Compensation-RTW denied primary liability. Brockway Glass[1] and Liberty Mutual denied liability asserting, in part, that the employee's claims against Brockway Glass/Liberty Mutual were precluded by the 1991 Stipulation for Settlement.

On September 20, 1999, Brockway Glass/Liberty Mutual petitioned for a Temporary Order, agreeing to pay for the requested two-level fusion, pending a determination of liability for the surgery between Brockway Glass/Liberty Mutual and Continental/American Compensation-RTW. A Temporary Order was issued on October 1, 1999.

On October 18, 1999, the employee filed a Petition to Vacate the April 3, 1991 Award on Stipulation on the basis of a substantial change in medical condition. The employee asserted that because Continental/American Compensation-RTW had denied primary liability, and because her claims for subsequent wage loss benefits had been closed out by the April 3, 1991 Stipulation for Settlement, she would be without wage loss benefits during the recovery period following her fusion surgery. Brockway Glass/Liberty Mutual objected to the petition, asserting the employee's petition to vacate was premature.

DECISION

Normally, in a case involving a petition to vacate, this court would review the facts to determine whether the employee established "good cause" to vacate the award, including factors such as a change in the employee's diagnosis, ability to work, permanency rating, need for additional medical care, and causation. Minn. Stat. § 176.461; Minn. Stat. § 176.521, subd. 3; Fodness v. Standard Café, 41 W.C.D. 1054, 1060-1061 (W.C.C.A. 1989).[2] The basic concern under Minn. Stats. §§ 176.461 and 176.521, subd. 3, is to ensure compensation proportionate to the degree and duration of disability. Krebsbach v. Lake Lillian Coop. Creamery Ass'n, 350 N.W.2d 349, 353-54, 36 W.C.D. 796, 801 (Minn. 1984).

Here, however, a claim petition is currently pending against both Brockway Glass/Liberty Mutual and Continental/American Compensation-RTW. The employee alleges that her current need for medical treatment and other workers' compensation benefits is a result of her 1979 and 1981 admitted low back injuries at Brockway Glass and/or a new injury on June 6, 1998 in the course and scope of her employment at Continental Loose Leaf, Inc. The parties submitted

[1] Brockway Glass is now out of business.

[2] This court's authority to vacate is governed by the provisions of the workers' compensation act relating to vacation of awards in effect at the time of the parties' settlement. Franke v. Fabcon, Inc., 509 N.W.2d 373, 49 W.C.D. 520 (Minn. 1993).

medical records and opinions that could support the employee's claim that she sustained a new injury on June 6, 1998 at Continental that substantially contributed to her current disability.[3]

Where an employee has entered into a stipulation for settlement with one employer and insurer and later sustains a new work-related injury with a different employer and insurer, the second employer and insurer are liable for full payment of the benefits due the employee. Johnson v. Tech Group, Inc., 491 N.W.2d 287, 47 W.C.D. 367 (Minn. 1992); Webeck v. Mochinski General Contractors, 41 W.C.D. 1063 (W.C.C.A. 1989). It is not necessary to establish the second injury is the sole cause of the employee's current disability. See Salmon v. Wheelabrator Frye, 409 N.W.2d 495, 497-98, 40 W.C.D., 117, 122 (Minn. 1987). Thus, if the employee successfully establishes that the alleged June 6, 1998 injury is a substantial contributing factor to her current disability, she will be entitled to full recovery from Continental/American Insurance-RTW.[4] It is, therefore, unnecessary and premature to vacate the April 3, 1991 Award on Stipulation. See Weaver v. Foodmaster Supermarket, slip op. (W.C.C.A. Nov. 9, 1994). If a compensation judge finds the employee did not sustain a new injury in 1998 while employed by Continental, or that the 1998 injury is not a substantial contributing cause of the employee's current disability, the employee may file a new petition to vacate. We, accordingly, dismiss the employee's Petition to Vacate Award on Stipulation, without prejudice.

[3] By this decision, we make no determination regarding causation for the employee's current disability and/or need for surgery.

[4] With the exception of possible apportionment of liability for medical expenses for the employee's surgery between Brockway Glass/Liberty Mutual and Continental/American Insurance-RTW.