

FLORENCE M. ANDERSON, Employee/Petitioner, v. METZ BAKING CO. and LIBERTY MUT. INS. CO., Employer-Insurer.

WORKERS' COMPENSATION COURT OF APPEALS
AUGUST 29, 2001

No. [REDACTED SSN]

HEADNOTES

VACATION OF AWARD - SUBSTANTIAL CHANGE IN CONDITION. Where the employee did not adequately demonstrate a change in diagnosis, a change in ability to work, or the need for any significant additional medical care, the employee had not established good cause to vacate the award on stipulation, despite a modest increase in permanent partial disability.

Petition to vacate award denied.

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

OPINION

DEBRA A. WILSON, Judge

The employee petitions to vacate an award on stipulation filed on August 24, 1984, based on newly discovered evidence and substantial change in condition. Finding no basis to vacate the award, we deny the petition.

BACKGROUND

The employee sustained an admitted work-related injury to her low back on May 16, 1978, while working for Metz Baking Company [the employer]. She was apparently unable to work after May 17, 1978, and was treated conservatively with physical therapy and trigger point injections. The employee filed a claim petition on August 21, 1978, seeking temporary total disability benefits, permanent partial disability benefits, and medical expenses. She subsequently returned to work for the employer in August of 1980, but was sent home, and then worked for the employer for four days in January of 1981, but quit in pain.

The claim petition proceeded to hearing, and the compensation judge apparently awarded the claimed temporary total disability benefits but declined to award permanent partial disability benefits.¹ The case was appealed, and, in a decision filed March 24, 1982, the Workers' Compensation Court of Appeals awarded the employee benefits for a 15% permanent partial

¹ The findings and order are not a part of the file, but this information appears in the subsequent decision from the Workers' Compensation Court of Appeals.

disability of the back, indicating that the employee had difficulty sleeping, vacuuming, lifting, bending, and walking, and that her symptoms more closely fit the analysis of Dr. Robert Wengler.²

The employee treated with Dr. Frank Budd on June 11, 1982, and he opined that her “problem is mechanical back strain superimposed on a mild amount of scoliosis in the thoracolumbar region and probably some degenerative joint disease of the small joints which is not yet evident radiographically.” A CT scan and myelogram were apparently normal. In February of 1983, Dr. Budd recommended that the employee take part in a pain control program. A year later, on February 16, 1984, Dr. Budd noted that the employee was still having a lot of low back pain, left leg radiation, and a lot of aches and pains, indicating, “I don’t know where to go with her. I told her we’d run all the tests known to man and I have no other good recommendations. If something changes, she can come back anytime, but I see no point in pursuing any further diagnostic studies; she’s had them all.”

Apparently sometime in 1984, the employer and insurer filed a notice of intention to discontinue temporary total disability benefits. The parties ultimately entered into a full, final, and complete settlement of the employee’s claims, with the exception of medical expenses, in August of 1984. An award on stipulation was filed on August 24, 1984.

In July of 1992, an MRI of the employee’s lumbar spine revealed multi-level degenerative changes from L5-S1 through L1-2, and some stenosis. In April of 2000, after examining the employee and the MRI, Dr. Duane Person opined that the employee’s condition may have worsened since 1984 and that she had a 35% permanent partial disability of the spine as a result of the work injury.

The employee filed an application to set aside the 1984 award on stipulation on April 20, 2001, based on a substantial change in condition and newly discovered evidence.³ The employer and insurer object to the petition.

DECISION

For awards issued prior to July 1, 1992, cause for vacation of an award on stipulation includes substantial change in condition, with the inquiry limited to the extent of improvement or worsening of the injury; the change in condition need not be unanticipated. Franke v. Fabcon, Inc., 509 N.W.2d 373, 49 W.C.D. 520 (Minn. 1993). Factors relevant in determining whether an award should be vacated on this basis include:

² Dr. Wengler’s report is not contained in the file, but Dr. Wengler apparently rated the employee as having a 25% permanent partial disability of the back for a herniated disc at L5-S1. Apparently it was also Dr. Wengler’s opinion that the employee was disabled from working. Dr. W. S. Pollard had diagnosed a strain and had opined that the employee had no permanent partial disability.

³ At oral argument before this court, counsel for the employee withdrew his claim of newly discovered evidence.

- I. whether there has been a change in the employee's diagnosis;
- II. whether there has been a change in the employee's ability to work;
- III. whether the employee has additional permanent partial disability;
- IV. whether the employee has required more costly and extensive care than was initially anticipated; and
- V. whether there is a 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).

First, the employee contends that, with the benefit of modern diagnostic imaging, Dr. Person

has confirmed the presence of degenerative disc disease and degenerative arthritis, with both central and lateral spinal stenosis at multiple levels of her lumbar spine. This is a far more serious condition than that which was felt to exist at the time of settlement as she was felt to have nothing more than a musculoligamentous strain.

We note that the employee is apparently not claiming a change in diagnosis, but rather a clarification in diagnosis. In fact, in June of 1982, Dr. Budd had theorized that the employee "probably" had some degenerative joint disease that was not showing up on radiographic studies. In his April 2000 report, Dr. Person noted that "the nature of the MRI findings are such that if the MRI could have been done in 1984, Ms. Anderson's lumbar spine condition would have been diagnosed as essentially the same as it was when the MRI was done in 1992." As such, the employee has not established a worsening of her condition.

The employee also contends that, although she was not working at the time of the settlement, no one felt that she would never work again, and, consequently, "her ability to work has been terribly affected." We are not persuaded. Apparently at the time of the award on stipulation, the employee had been released to return to work with restrictions;⁴ however, the award on stipulation was issued six years after the work injury, and the employee had worked no more than a handful of days during that period. The employee's affidavit in support of the petition to vacate indicates that she has only worked one day since the award on stipulation. The only medical report attached to the petition to vacate that post dates the award on stipulation is the April 13, 2000, report of Dr. Person, who offered no opinion regarding the employee's ability to work. The employee has not established a change in ability to work.

⁴ No medical records were attached to the petition to vacate that would establish the nature of those restrictions.

The employee has submitted a medical report that establishes an increase in permanent partial disability. Dr. Wengler had apparently rated the employee as having a 25% permanent partial disability of the spine prior to the 1981 hearing. Dr. Person has now rated the employee as having a 35% permanent partial disability of the spine. However, with regard to the issue of medical care, there is no evidence that the employee has received any medical treatment since the award on stipulation, with the exception of the MRI performed in 1992 and the subsequent evaluation with Dr. Person, which appeared to be for the sole purpose of filing the petition to vacate.

Finally, Dr. Person has issued a causation opinion indicating that the employee's current condition is causally related to the 1978 work injury. While the employer and insurer dispute the foundation for this opinion, they offered no evidence to the contrary. However, Dr. Person did not definitively state that the employee's condition has worsened since the time of the award on stipulation. Rather, he stated only that her condition "may" have worsened and that the 1992 MRI allowed him to "better define her lumbar spine condition as to the more specific diagnosis and of course the resulting permanent disability."

Because the employee has inadequately demonstrated a change in diagnosis, a change in ability to work, or the need for additional extensive medical treatment, we decline to grant the employee's petition to vacate the 1984 award on stipulation.⁵

⁵ We note that it is advisable to have up-to-date medical records attached to a petition to vacate. The most recent record attached to this petition pre-dated the petition by twelve months, and the employee indicated in her affidavit that she had had a stroke in the interim.