

CHRISTOPHER J. COLFORD, Employee/Petitioner, v. H & M TRUCK EQUIP., INC. and REINSURANCE ASS'N OF MINN., Employer-Insurer.

WORKERS' COMPENSATION COURT OF APPEALS
APRIL 25, 2001

No. [REDACTED SSN]

HEADNOTES

PETITION TO VACATE - SUBSTANTIAL CHANGE IN CONDITION. Where the employee's ability to work has gone from working full time to a complete inability to work and he has had four surgeries, including two fusion surgeries and has an increase in permanent partial disability from 9% to 22.5%, there is just cause to vacate the 1989 award on stipulation, even though permanent partial disability above 9% and medical benefits were not closed out by the settlement.

Petition to vacate award granted.

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

OPINION

STEVEN D. WHEELER, Judge

The employee petitions to vacate an award on stipulation, served and filed March 30, 1989, on the grounds that he has sustained a substantial change in his medical condition. The petition is granted.

BACKGROUND

The employee, Christopher Colford, sustained an admitted low back injury on September 8, 1986, while employed by H & M Truck Equipment, hereinafter the employer. The employee was paid various workers' compensation benefits, including substantial temporary total disability, temporary partial disability, medical expenses and rehabilitation benefits. His weekly wage was \$400.00 per week. At the time of the injury he was 31 years of age.

The employee was off work until at least September 10, 1988, after receiving 104 weeks of temporary total disability and economic recovery compensation benefits. (NOID, filed 8/19/88.) The employee returned to work in September 1988 as a veterinary clinic assistant and received temporary partial disability benefits. Rehabilitation services were provided to the employee and resulted in a retraining plan. In November of 1988, he was employed in an on-the-job training position with Eagle Engineering to become a motorcycle mechanic. He was so employed in March of 1989 when the parties entered into a settlement agreement. (Ex. A: Stip. for Settlement, ¶ I.)

The settlement agreement, which was approved on March 30, 1989, provided that the employee would receive a lump sum payment of \$47,500.00, and released the employer and insurer from any claims for workers' compensation benefits except for permanent partial disability benefits above 9% and medical benefits related to the employee's low back injury. (Ex. A.) At the time of the settlement it was the contention of the employee that,

As a result of the compensable September 8, 1986, personal injury, he has suffered a permanent partial disability totaling 9 percent permanent partial disability to his body as a whole based upon the May 30, 1988, rating and report of his treating physician, Dr. Strefling.

He is entitled to receive permanent partial disability benefits paid as economic recovery pursuant to this rating.

Pursuant to the November, 1988 On-The-Job Training Plan and Agreement, he is entitled to receive ongoing temporary partial disability benefits based upon wage loss suffered as a direct result of his September 8, 1986, compensable personal injury.

He is entitled to receive temporary partial disability benefits based upon that wage loss for so long as said wage loss continues.

(Ex. A, ¶ II.) It was the contention of the employer and insurer at the time of settlement as follows:

As a result of the compensable September 8, 1986 injury, the employee has sustained a permanent physical impairment to his spine in an amount not exceeding 3.5 percent whole body physical impairment as rated by the independent medical examiner, Dr. John A. Dowdle, in his September 18, 1988, independent medical examination report.

The employee has previously been compensated for a 3.5 percent whole body disability paid as 21 weeks of economic recovery compensation at the weekly rate of \$266.68 or a total ERC payment of \$5,600.28.

This payment of economic recovery compensation benefits to the employee fully, finally, and completely compensates the employee for any physical impairment or disability suffered as a result of the September 8, 1986 compensable accident.

(Ex. A, ¶ III.)

Sometime following the execution of the settlement agreement, the Eagle Engineering Company eliminated the on-the-job training program in which Mr. Colford was a participant. As a result, the employee found employment at A-O-K Rental in 1990. At this location, he was paid \$10.50 per hour. As a result of low back and leg pain and incapacitation resulting from several subsequent surgeries, the employee was only able to work part time for this employer, until the end of 1997, when he ceased work for them completely. The employee has not performed any work since January 1, 1998. (EE Affidavit, ¶ 7.)

The employee claims that since the stipulation, his back condition has considerably worsened and he has undergone the following four surgical procedures: (1) lumbar decompression in March 1991; (2) lumbar decompression in October 1992; (3) lumbar fusion at L4-5 and L5-S1 with BAK cages in January 1995; and (4) removal of BAK cages and spinal fusion from L4 to the sacrum with instrumentation in October 1998. During this time, the employee treated with Dr. James Allen of the Minneapolis Clinic of Neurology, Dr. Marlen Strefling, Dr. Mark Engasser and Dr. John Sherman, orthopedic surgeons, and Dr. Ensor Transfeldt, of Twin Cities Spine Center. In his June 30, 2000 report, Dr. Engasser indicated that the employee is totally disabled from any full time, gainful employment. (Ex. G.) The employee's permanent partial disability rating, as a result of the fusion surgeries, is 22.5% of the whole body. The employer and insurer have voluntarily paid these PPD benefits to the employee, less the 9% previously settled by the March 1989 stipulation.

DECISION

This court's authority to vacate an award on stipulation executed prior to July 1, 1992, is covered by Minn. Stat. §§ 176.461 and 176.521, subd. 3. An award may be set aside if the employee makes a showing of good cause, for which grounds may 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.2d538, 539, 41 W.C.D. 648, 649 (Minn. 1989).

In this case, the employee claims good cause to vacate the award on stipulation based on a substantial change in medical condition. Factors this court considers in making this determination include change in diagnosis, change in the employee's ability to work, additional permanent partial disability, the necessity of more costly and extensive medical care and services than initially anticipated, and whether there is a causal relationship between the employee's changed condition and the injury covered by the settlement. Fodness v. Standard Café, 41 W.C.D. 1054, 1060-61 (W.C.C.A. 1989).

We have reviewed each of these factors as they relate to the case at hand. The factor relating to additional medical expenses is not significant in this case as medical expenses were left open by the settlement. There is no issue with respect to causation, as the employer and insurer have paid for all of the medical treatment associated with the surgeries performed on the employee following the date of settlement. The three factors which need analysis are whether the employee has sustained a substantial increase in his permanent partial disability rating and whether there has been a change in his diagnosis and/or in his ability to work.

The issue most hotly debated is whether the employee has sustained a change in his diagnosis. At the time of the settlement, the most recent report from the employee's physician, Dr. Marlen Strefling was dated May 30, 1988. In that report, Dr. Strefling stated as follows:

I appreciated the opportunity to review your letter and also to review Mr. Colford's reports. As you know from my previous note I had not received the MRI x-rays themselves or the report from C.D.I. In the previous correspondence with Ms. Joyce Maki of RAM I had offered the opinion that this gentleman's back problems were basically nondiscogenic in nature and rendered an opinion in terms of permanency that he had a 3.5 percent permanent partial disability as applied to the whole body. This was utilizing the Minnesota Workers' Compensation Guidelines for a nondiscogenic back injury. I have since reviewed the MRI of 11/20/87 addressed to Dr. Bensman. The previous diagnostic studies were also again reviewed by me. From the beginning we were concerned about central bulging at the L4-5 level slightly to the left of the midline. The lumbar myelogram combined with the enhanced CT scan done at St. Mary's showed mild changes at that level. The CT scan done at C.D.I. suggested at the L4-5 level the small to moderate central bulging with some mild protrusion of the disc material to the left of the midline and the suggestion of some indentation of the thecal sac. The MRI suggested at the L5-S1 level again the central bulging with some prominence however to the left of the midline but also suggested some mild central bulging at the L5-S1 level, possibly somewhat to the right of the midline. Also indicated on MRI some evidence of annular tearing at the L5-S1 level.

The difficulties that I have in terms of feeling comfortable with his diagnoses and even a rating situation in this gentleman is that his examination has not been always consistent with purely a discogenic problems or a nerve root irritation [sic]. Therefore, I feel that the diagnosis of a nondiscogenic back problem is still accurate; however, based on the MRI studies I think that it may not be accurate or fair in my ratings to not include the fact that he has lumbar disc herniation. Therefore, I will be sending a letter also to Ms. Maki indicating that I feel that my rating was an error in that it should more accurately be changed to 5223.0070, Subpart 1 Lumbar spine B 1 (a) or a 9 percent permanent partial disability as applied to the whole body rather than the previous determination given of 5223.0070, Subpart 1 Lumbar spine A 2 or a 3.5 percent permanent partial disability as applied to the whole body.¹

¹ The disability schedule sections used by Dr. Strefling provide as follows:

In Dr. Strefling's earlier April 18, 1988 report, he indicated that the employee's diagnosis was "muscle and ligamentous injury with intermittently some radicular discomfort." He also stated that he felt that surgical treatment is not advisable and a continued program of muscle strengthening on a long-term continuing basis is appropriate. He indicated that these exercises could be done by the employee at home. He further stated that the employee was restricted to light-duty work and that he should gradually decrease his pain medication usage. (Ex. I.)

The employee was examined by Dr. John A. Dowdle, an orthopedic surgeon, at the request of the employer and insurer on September 18, 1988. In his report of that date, Dr. Dowdle stated that the employee's diagnosis was "mechanical low back pain" and "significant functional overlay with subjective complaints without objective findings." He indicated that no additional medical, physical therapy, rehabilitation or chiropractic care was necessary, with the exception of a pain clinic or psychological evaluation, since the employee had been through a physical reconditioning program. He rated the employee as having a 3.5% permanent partial disability impairment of the body as a whole rated under Minn. R. 5223.0070, subp. 1A(2).

It is the contention of the employee that as a result of the significant deterioration of his lumbar spine, resulting in two laminectomies and two fusion surgeries, that his diagnosis has significantly changed from that of a sprain/strain to a significant lumbar spinal degeneration. He argues that the four surgical procedures not contemplated by any party at the time of settlement and the significant increase in his PPD rating, to 22.5%, attest to the substantial nature of the changes. On the other hand, the employer and insurer argue that the employee's change is simply

5223.0070 MUSCULOSKELETAL SCHEDULE; BACK.

Subpart 1. Lumbar spine. The spine rating is inclusive of leg symptoms except for gross motor weakness, bladder or bowel dysfunction, or sexual dysfunction. Permanent partial disability of the lumbar spine is a disability of the whole body as follows:

A. Healed sprain, strain, or contusion:

* * *

(2) Pain associated with rigidity (loss of motion or postural abnormality) or chronic muscle spasm. The chronic muscle spasm or rigidity is substantiated by objective clinical findings but without associated demonstrable degenerative changes, 3.5 percent.

* * *

B. Herniated intervertebral disc, single vertebral level:

(1) Condition not surgically treated:

(a) X-ray or computerized axial tomography or myelogram specifically positive for herniated disc; excellent results, with resolution of objective neurological findings, 9 percent.

the result of a gradual deterioration of his original condition and that, although his symptoms, level of permanency and treatment have changed significantly, the underlying diagnosis has not changed substantially. They point out that the surgeries were at the same spinal levels that Dr. Strefling identified as either being bulging or herniated. Were change of diagnosis the sole factor supporting vacation, this would be a close case. When we factor in the significant change in the employee's ability to work and his significant increase in permanent partial disability rating, however, we feel that there is just cause to vacate the award on stipulation in this case.

With respect to the employee's ability to work, there seems to be no dispute that from the time of the settlement in 1989, the employee was able to work at some occupation on a full or part time basis until the end of 1997. As a result of the effects of the continued deterioration of his lumbar spine, the employee, based on all the evidence presented at this time, has been unable to work since January 1, 1998. While the employer and insurer suggest that, with rehabilitation, the employee may be able to return to some employment, no evidence that his condition is other than was determined by Dr. Engasser was provided for our consideration. Based in the record before us it appears that the employee's ability to work has substantially deteriorated.

The employee's permanent partial disability rating, as a result of the fusion surgeries in 1995 and 1998, has increased from the 9% whole body rating he claimed in 1988 to a 22.5% whole body rating. The employer and insurer have paid the additional PPD benefits to the employee. This constitutes a significant increase in his permanent partial disability. While the effects of this increase are somewhat compensated for by the fact that PPD was not closed out by the 1989 settlement, this increase represents an indication of a significant change in the employee's condition and still should be given some consideration on the issue of whether there is just cause to vacate the award.

Given the substantial change in the employee's ability to work and the significant deterioration of his lumbar spine condition, we believe that there has been just cause shown to vacate the March 30, 1989 award on stipulation and it is so ordered.