

MICHAEL DAHL, Employee/Petitioner, v. MARSDEN BLDG. MAINT. and CNA INS. CO., Employer-Insurer, and SPECIAL COMP. FUND.

WORKERS' COMPENSATION COURT OF APPEALS  
JULY 2, 2001

No. [REDACTED SSN]

HEADNOTES

VACATION OF AWARD - SUBSTANTIAL CHANGE IN CONDITION. Because the evidence regarding causation was conflicting, the matter was referred to OAH for creation of a record and factual findings concerning causation. Following issuance of the compensation judge's decision, the matter is to be returned to the WCCA for consideration of the employee's petition.

Referred to OAH for evidentiary hearing.

Determined by Wilson, J., Rykken, J., and Pederson, J.

OPINION

DEBRA A. WILSON, Judge

The employee petitions to vacate an award on stipulation filed on January 20, 1987, based on substantial change in condition. We refer the matter to the Office of Administrative Hearings for an evidentiary hearing and findings as to causation.

BACKGROUND

The employee sustained a work-related injury to his lumbar spine on February 25, 1981, while working for Marsden Building Maintenance [the employer].<sup>1</sup> He was subsequently diagnosed with an L4-5 herniation, and a laminectomy was performed on April 6, 1981. The employee apparently worked intermittently from July 26, 1981, to at least April of 1986 and was paid for a 12% permanent partial disability of the back.

An August 15, 1986, report of Dr. Alan Bensman indicates that, approximately seven months prior to that time, the employee had begun to note a return of radicular symptoms in his left leg associated with increasing pain. A CT scan taken on May 21, 1986, was read as demonstrating a small residual or recurrent contained central disc herniation at L4-5, which impinged on the thecal sac, and a mild broad based central bulging of the L5-S1 disc. Dr. Bensman opined that the employee was unable to work at that time and recommended electrodiagnostic studies to determine if the left L5 nerve root involvement was active. The studies were

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<sup>1</sup> Information in the background is derived from the petition to vacate, memorandum of law, memorandum in opposition to the petition, and the exhibits attached thereto. The judgment roll in the file does not contain any entries prior to June 26, 1997.

subsequently done and interpreted as being normal. Dr. Kenneth Heithoff reviewed the 1986 CT scan and opined that there was an osteophyte at the L4-5 level on the left as well as very minimal impingement of the post-ganglionic portion of the left L4 nerve root. It was his opinion that L5 nerve compression, if any, would be secondary to either post-operative fibrosis or residual disc material on the left side. Dr. Bensman recommended a three-month reconditioning program.

Dr. Bensman completed a Functional Capacities Evaluation on November 24, 1986, which restricted the employee from all bending, stooping, and crouching, with occasional squatting, crawling, climbing, reaching, and kneeling, along with weight restrictions. The doctor opined that the employee could sit thirty minutes, stand for fifteen minutes, and walk for one hour within an eight-hour work day. He also restricted the employee to driving no more than twenty minutes before taking a break and driving an automatic shift car only.

In early January of 1987, the parties entered into a stipulation for settlement. At that time, the employee was contending that he had been disabled from working since April of 1986 and that he wanted to discontinue job search and enter a retraining program of his own choosing. The parties agreed that the employer and insurer would pay \$40,000 in a lump sum as a full, final, and complete settlement of any and all claims, with the exception of medical expenses. An award on stipulation was filed on January 20, 1987.

Subsequently, in 1998, the employee entered into a stipulation for settlement with the employer and insurer and with Frontier Irrigation [Frontier] and its workers' compensation insurer. The employee claimed that he had sustained a work-related injury on June 24, 1997, while employed by Frontier, and was alleging entitlement to temporary total disability benefits, medical expenses, and benefits for an additional 5% permanent partial disability of the body as a whole. Pursuant to this stipulation for settlement, Frontier paid the employee \$22,500 for a full, final, and complete settlement, including medical expenses. The employer and insurer paid all medical expenses, with Frontier reimbursing them for 20% of their payments. All parties agreed that the alleged 1997 injury was a temporary aggravation of the employee's pre-existing low back condition, resulting in no permanent injury.

In 2000, the employee entered into a stipulation for settlement with the employer and insurer and Quality Underground [Quality] and its workers' compensation insurer. The employee alleged a work-related injury to his low back on May 19, 1999, while working for Quality. Pursuant to the stipulation for settlement, Quality agreed to pay the employee \$5,000 for a full, final, and complete settlement, including medical expenses. The employer and insurer paid the outstanding medical expenses and Quality reimbursed them \$1,750 in complete satisfaction of any and all claims for contribution or reimbursement. An award on stipulation was filed on May 5, 2000.

On February 16, 2001, the employee filed a petition to vacate the 1987 award on stipulation, alleging a substantial change in condition.

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).

A number of factors may be considered in determining whether an award should be vacated based on a substantial change in condition, including:

- I. a change in diagnosis;
- II. a change in the employee's ability to work;
- III. additional permanent partial disability;
  - (d) necessity of more costly and extensive medical care/nursing services than initially anticipated;
  - (e) 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 his memorandum of law, the employee contends that there has been a substantial deterioration in his condition since 1987, that he underwent a fusion at L4-5 in 1998, and that Dr. Gregg Dyste now believes that the fusion is not solid and that the employee needs an additional fusion at L5-S1. The employee further contends that he had no problems at the L5-S1 level at the time of settlement.

The medical records attached to the employee's petition to vacate do not include a diagnosis of the employee's condition at the time of the stipulation for settlement, although, in hindsight, doctors appear to agree that the employee was "status post laminectomy" with degenerative disc disease. As of August 2000, Dr. Dyste diagnosed the employee with failed lumbar fusion at L4-5 and recommended extending the fusion to L5-S1 based on positive results on a discogram.<sup>2</sup> There appears to have been a change in diagnosis.

The employee also contends that, at the time he signed the stipulation for settlement, he had been released to return to work, and that he was able to engage in substantial gainful employment between 1987 and 1999. We note, however, that, at the time he signed the stipulation for settlement, the employee was claiming that he was temporarily totally disabled and that he wanted to be retrained in a program of his own choosing. While there are references in the medical records to the employee working intermittently thereafter, the relevant comparison is between the employee's present condition and the condition at the time of the award. Battle v.

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<sup>2</sup> However, contrary to the employee's assertion, there were findings at the L5-S1 level at the time of the award on stipulation. A CT scan performed on May 21, 1986, was read as demonstrating mild broad-based central bulging of the disc at L5-S1, and, on examination in August of 1986, the employee had decreased pinprick along the left L5 dermatome and "questionably along the S1 dermatome."

Gould, Inc., 42 W.C.D. 1085 (W.C.C.A. 1990). It appears that the employee was not working at the time of the award on stipulation and that he is not working now. It also appears that restrictions placed upon the employee in November of 1986 are similar to restrictions recommended for the employee by independent medical examiner Dr. Paul Hartleben in March of 2000 (the most current restrictions furnished to this court). Therefore, there is insufficient evidence of a change in the employee's ability to work.

The employee's claim that he has increased permanent partial disability is based on the fact that the employee underwent a fusion surgery in 1997. While no doctor has assigned an increased rating, it is likely that the employee will be rated as having significantly more permanent partial disability.<sup>3</sup>

The employee also contends that he did not anticipate fusion surgery at the time of the award on stipulation and that Dr. Dyste has now recommended a two-level fusion. Where medical expenses are not closed out by the award, this court places less emphasis on the factor of the necessity of more costly and extensive medical care. Burke v. F&M Asphalt, 54 W.C.D. 363 (W.C.C.A. 1996). Medical expenses were left open under the 1987 award on stipulation.

With respect to causation, we note that Dr. Dyste did provide an opinion that the employee's present problems are due to the low back injury of February 25, 1981. However, in his March 13, 2000, report, Dr. Paul Hartleben opined that the employee had "effectively recovered from the injuries sustained in the 1981 injury." In their memorandum of law, the employer and insurer contend that causation "is questionable."

This case is a close call, and, because the evidence is conflicting as to causation, we refer the matter to the Office of Administrative Hearings for an evidentiary hearing and findings on whether the 1981 work injury is a substantial contributing factor in the employee's current condition. Discovery necessary to resolution of this question should be allowed. This court will make a determination as to whether there has been a substantial change in condition, sufficient to vacate the award, upon return of the requested findings from the Office of Administrative Hearings.

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<sup>3</sup> Under the current disability schedules, a fusion is rated higher than a laminectomy. With a 1981 injury date, the employee's rating would be a percentage of the body part.