

DAVID A. DYSON, Employee, vs. JAMAR CO. and ST. PAUL COS., Employer-Insurer/Petitioner and PRINCIPAL LIFE INS. CO./HRI, Intervenor.

WORKERS' COMPENSATION COURT OF APPEALS
NOVEMBER 29, 2001

No. [REDACTED SSN]

HEADNOTES

VACATION OF AWARD - FRAUD. Because the evidence regarding causation was conflicting, the matter was referred to the Office of Administrative Hearings 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 employer and insurer's petition.

Referred to the Office of Administrative Hearings for evidentiary hearing.

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

OPINION

MIRIAM P. RYKKEN, Judge

The employer and insurer petition to set aside the award on stipulation served and filed on January 22, 2001, and to set aside decisions and orders pursuant to Minn. Stat. § 176.106, served and filed on April 26 and October 27, 1999, on the basis of fraud. We refer the matter to the Office of Administrative Hearings for an evidentiary hearing and findings as to causation.

BACKGROUND

David A. Dyson, the employee, was employed by Arrowhead Refrigeration, owned by Jamar Company, the employer, on September 9, 1995. He worked as a service technician on commercial heating and cooling units, earning a weekly wage of approximately \$714.80. On that date, the employer was insured for workers' compensation liability in the state of Minnesota by the St. Paul Companies, the insurer. Born in 1964, the employee was 30 years old on that date.

The employee claims that on September 9, 1995, he sustained an injury which arose out of and in the course and scope of his employment. The employee claims that he fell from a ladder at a job site, near the end of his work shift, and broke his right foot. On September 10, 1995, the employee sought medical treatment in the emergency room at St. Luke's Hospital, Duluth, Minnesota, reporting to the treating physician that he fell approximately five feet from a ladder affixed to the side of a building at his job site, falling onto concrete and injuring his right foot, right elbow, right wrist, right shoulder and low back. He was diagnosed as having a fifth metatarsal fracture in his right foot, was placed in a splint and was instructed to use crutches so as to bear no weight on his right foot. On September 11, 1995, the employee consulted Dr. J.A. Zamzow, orthopedic surgeon, who placed his right foot in a cast which he utilized for

approximately five weeks. In October 1995, the cast was removed and the employee utilized a walking boot. By November 16, 1995, the employee was released to return to work without restrictions.

The employee reported this injury to the employer on September 11, 1995; the employer filed a First Report of Injury on February 9, 1996. Following the employee's injury, the employer and insurer admitted primary liability, and paid certain workers' compensation benefits to and on behalf of the employee, including temporary total disability benefits for 11.8 weeks, from January 31 through April 22, 1996; temporary partial disability benefits for 3.8 weeks between April 23 and May 19, 1996; and impairment compensation based upon 2.5 percent permanent partial disability of the body as a whole. In addition, the employer and insurer paid medical expenses on behalf of the employee.¹

As of January 2, 1996, the employee's treating physician recommended that the employee remain off work, and that he should undergo sympathetic block treatment. In 1996, the employee received additional neurological and orthopedic care, including joint injections, orthotics, and a work hardening program in April and May, 1996. In 1997, the employee underwent a CT scan and was referred to a foot and ankle specialist for a second opinion concerning surgery. The employee's pain continued; his medical records reflect that his symptoms continued until at least February 2001, the date of the latest medical report in the record.

The employee continued working for the employer, both in his regular job and on a light-duty basis, until he was laid off in February 1998. He was recalled to work for the employer in September 1998 and continued working until his employment was terminated in February 1999.²

At the request of the employer and insurer, the employee was examined by Dr. Peter Daly on May 28, 1998. Dr. Daly diagnosed fourth and fifth metatarsal fractures with joint incongruity of the fifth tarsometatarsal joint, with persistent right lateral mid foot pain. At that point, Dr. Daly recommended that the employee either consider a fusion of his fifth tarsometatarsal joint, or continue with permanent restrictions as outlined in a report issued following a functional capacity evaluation performed in August 1996. Dr. Daly assigned work restrictions of lifting and carrying limited to 80-100 pounds. Dr. Daly advised that these restrictions would remain in effect on a permanent basis if the employee did not undergo fusion surgery.

¹ In their pleadings, the employer and insurer assert that they have paid \$28,007.93 as indemnity and rehabilitation expenses to and on behalf of the employee, and \$19,524.03 in medical expenses.

² According to rehabilitation reports generated in 1999 by QRC Michael McKenna, R.N., the employee completed computer certification training in August 1999, and continued with an active job search until at least September 16, 1999, the date of the last rehabilitation report in the record. According to the employee's affidavit dated August 17, 2001, he is presently employed by the State of Minnesota.

On December 31, 1998, Dr. Daly issued a second report, after viewing a surveillance videotape provided by the employer and insurer which showed the employee performing various activities in October 1998. Dr. Daly revised his opinion, and concluded that the employee did not need any specific physical restrictions, and that the previously-recommended fusion surgery would not necessarily improve on the employee's functional status "and it may in fact make him worse."

Repeated litigation has ensued on this claim. In March 1999, the employee filed a rehabilitation request, alleging entitlement to retraining. Following an administrative conference, a compensation judge issued a decision and order, served and filed April 26, 1999, determining that the employee's retraining request was premature, but that the issue of retraining was preserved for future determination. In August 1999, the employee filed a rehabilitation request, alleging entitlement to job search mileage reimbursement. The employee also filed a medical request in August 1999, alleging entitlement to various medical expenses. Following an administrative conference, in two decisions and orders filed October 27, 1999, a representative of the Commissioner of the Department of Labor and Industry ordered payment for psychological treatment expenses and job search mileage, but denied the employee's claim for physical examination charges and reimbursement for costs of special boots.

The employer and insurer appealed from those decisions and orders, requesting a formal hearing. The parties ultimately entered into a stipulation for settlement, agreeing that the employer and insurer would pay \$1,127.17 as reimbursement of job search mileage and \$245.00 as reimbursement for purchase of special boots. In addition, the employer and insurer agreed to pay the outstanding bill at Northland Family Physicians pursuant to the workers' compensation fee schedule, in exchange for a to-date settlement of all employee's claims. An award on stipulation was served and filed on January 22, 2001.

During the pendency of litigation, the employee underwent a debridement of his right cuboid fourth and fifth metatarsal joints on January 26, 2000. According to a report by Dr. J. Chris Coetzee, dated April 14, 2000, the employee reported that his pain continued, that he was able to slowly put full weight on his right foot, but that he could not walk with a normal gait. Dr. Coetzee diagnosed osteoarthritic changes in his right foot, based upon a CT scan performed on April 13, 2000. Dr. Coetzee also concluded that the employee should continue activity that does not cause "excruciating pain" and that he should continue working at a sedentary job "indefinitely." Dr. Coetzee suggested that fusion surgery be considered in the future.³

Dr. Daly re-examined the employee on February 21, 2001. At that point, the employee continued to report pain and discomfort in his right foot. Dr. Daly diagnosed persistent chronic pain, right lateral mid foot, status post right fifth tarsometatarsal joint debridement and prior fracture. Dr. Daly indicated that the proposed surgical treatment of fusion of the fifth tarsometatarsal joint is reasonable, and related it to the foot fracture injury on September 9, 1995. Based on those recommendations, Dr. Daly determined that the employee was not yet at maximum

³ The record does not indicate what additional medical treatment was rendered after April 14, 2000.

medical improvement (MMI) from his foot injury, and also concluded that it was premature to determine any level of permanent partial disability.

The employer and insurer later asked Dr. Daly to review three affidavits prepared by a former co-worker and two acquaintances of the employee, two videotapes generated through investigation, and six still images taken directly from one of the videotapes. On May 16, 2001, Dr. Daly prepared an affidavit after reviewing this information in which he stated his opinion that the employee did not fracture his right foot or injure his right upper extremity at work on September 9, 1995. Dr. Daly based this opinion on “the orthopedic fact that Mr. Dyson could not do that which he is clearly seen doing (full weight bearing on right foot) in the videotape from September 9, 1995, mentioned above and the still images taken from that videotape, if he had broken his right foot at or about 2:00 p.m. earlier the same day of the video (September 9, 1995).” Dr. Daly also stated that “a fall down steps, as described by [one of the affiants] is consistent with the injuries ultimately sustained to Mr. Dyson’s right foot.”

On May 22, 2001, the employer and insurer petitioned to set aside the award on stipulation and the three decisions and orders outlined above, alleging fraud on the part of the employee. They based their petition, in part, on Dr. Daly’s opinion and on the affidavits and exhibits submitted with their petition.

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 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 seek a vacation of the stipulation and each of the three decisions and orders on the grounds of 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 material and susceptible of 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) the other person must in fact act on the false representation; and (7) the misrepresentation must be the proximate cause of actual damages. Weise v. Red Owl Stores, Inc., 286 Minn. 199, 202, 175 N.W.2d 184 (1970). To prevail on a claim of fraud regarding the stipulation for settlement in this matter, the petitioner must establish that the employee made false representations inducing the employer and insurer to enter into the stipulation for settlement. Boileau v. A-Plus Indus., 58 W.C.D. 549, 555 (W.C.C.A. 1998).

The employer and insurer allege that the employee falsely represented the events surrounding his right foot injury in September, 1995, in order to obtain workers’ compensation

benefits and in order to induce the employer and insurer to enter into the settlement of January 2001. In support of their contentions, the employer and insurer submitted the following items: medical records; photographs of the job site where the employee worked on the afternoon of September 9, 1995; videotape of the employee taken at a wedding reception and dance on the evening of September 9, 1995; videotape of a room and stairwell at the wedding reception hotel where the employee admittedly fell down a flight of stairs during the evening of September 9, 1995; and affidavits prepared by a former co-worker, two acquaintances of the employee and a private investigator.

The employee disputes the allegations set forth by the employer and insurer, alleging that his injury arose out of and in the course of his employment on September 9, 1995. The employee also argues that the doctrine of laches should apply to defeat the employer and insurer's claim, in that the employer and insurer waited until 2001, approximately six years post-injury, to bring forth affidavits and documents supporting their assertion of fraud.

The evidence presented by the employer and insurer raises significant factual questions concerning the causation of the employee's injury. Because the evidence is conflicting, we refer this matter to the Office of Administrative Hearings for an evidentiary hearing and findings of fact. Specifically, the compensation judge shall make findings regarding whether the employee sustained a personal injury on September 9, 1995, which arose out of and in the course and scope of his employment with the employer. Discovery necessary to resolution of these questions should be allowed, and either party may appeal from the factual findings made by the judge following the hearing. When these findings have been made, the matter shall be returned to this court for consideration of the employer and insurer's petition, and for a determination as to whether there is a basis for vacation of the stipulation and decision and orders based upon fraud.