MELVIN JACOBS, Employee/Petitioner, v. CUSTOM DELIVERIES, INC. and FIREMAN'S FUND INS. CO., Employer-Insurer.

WORKERS' COMPENSATION COURT OF APPEALS
MARCH 15, 2001

No. [REDACTED SSN]

HEADNOTES

VACATION OF AWARD - SUBSTANTIAL CHANGE IN CONDITION. Where the employee had already received substantial total compensation for injuries he received consequent to his work-related motor vehicle accident, including substantial temporary benefits, and where the employee did not establish a change in diagnosis or ability to work, and where an increase in permanent partial disability was not substantial, the employee did not meet his burden proving a substantial change in condition to warrant vacation of the award on stipulation.

Petition to vacate denied.

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

OPINION

WILLIAM R. PEDERSON, Judge

The employee petitions this court to vacate an Award on Stipulation served and filed February 8, 1988. Concluding that the employee has not shown good cause to vacate the award at issue, we deny the employee's petition.

BACKGROUND

On July 7, 1978, and July 20, 1979, Melvin Jacobs sustained two separate work-related injuries to his low back. On October 17, 1979, Mr. Jacobs' treating physician, orthopedic surgeon Dr. David Olson, noted his opinion that the employee was "not able to return to work as a truck driver." On October 28, 1979, Dr. Olson indicated that Mr. Jacobs would have a 10% permanent partial disability of the spine as a result of his two low back injuries. In a subsequent 1979 treatment note,[1] Dr. Olson indicated that psychologist Phil Haber had indicated that he also believed that Mr. Jacobs "should stay as far away from truck driving as is possible," though for spacial-relations and coordination reasons rather than for physical reasons. On January 29, 1980, Dr. Olson indicated that Mr. Jacobs was restricted from lifting over thirty pounds and from performing any repetitive bending or lifting. Mr. Jacobs' claims related to his two low back injuries were eventually settled on a full, final, and complete basis by an Award on Stipulation filed three years later, on January 24, 1983, in exchange for a lump-sum payment of $35,000.00

[1] The date is not legible in the exhibit of record.

On August 23, 1983, Mr. Jacobs was involved in a motor vehicle accident in the course of continuing work as a truck driver, now with Custom Deliveries, Inc. Mr. Jacobs [the employee] was thirty-seven years old at the time and was earning from Custom Deliveries, Inc. [the employer], an average weekly wage of $205.05. Subsequent to his accident, the employee complained of problems in his right knee, and on October 27, 1983, he was examined by orthopedic surgeon Dr. Edward Salovich, who diagnosed mild chondromalacia. In an eventual report to the insurer, dated December 1, 1983, Dr. Salovich stated that the employee had some crepitation in the knee but little other instability, indicating that the knee "was injured on or about August 28 [sic], 1983." On December 1, 1983, Dr. Salovich indicated that, pursuant to an examination on November 25, 1983, he had recommended arthroscopic surgery.

The employee received post-accident treatment also from chiropractor Dr. Howard Johnson, whose diagnosis in November 1983 was of right knee sprain with chondromalacia. On December 14, 1983, the employee's field supervisor, David Howell, completed a workers' compensation First Report of Injury, listing only "knee injury" as the claimed injury. On that same date, December 14, 1983, Dr. Johnson addressed a letter "To Whom It May Concern," stating in the first paragraph that the employee's injury occurred when the truck that he was driving struck an overpass, "which threw him forward causing right knee pain and shoulder pain" (emphasis added). On apparently the following day, Mr. Howell wrote to the insurer, stating in part that "no report of any knee injury was made prior" to the employee's lay-off on October 14, 1983, and that the employee had claimed only a shoulder injury at the time of his August accident and had "made no mention of [the] knee." On January 10, 1984, the insurer filed a Notice of Denial of Liability for the employee's knee problems, on grounds that they were "unrelated to claimed accident of 8-23-83."

On that same date, January 10, 1984, the employee saw orthopedist Dr. Lowell Kleven, complaining of having injured both his left shoulder and his right knee in his August 23, 1983, accident. In his treatment notes, Dr. Kleven stated, "Apparently the shoulder was stiff and tender [after the accident] but the symptoms there subsided. [The employee] states that his right knee has given him nothing but trouble since." In the months that followed, the employee continued to receive treatment from Dr. Kleven and from his associate, Dr. George Osland, and on August 8, 1984, he underwent arthroscopy with chondroplasty of the medial facet of the patella and medial femoral condyle. Subsequent to his surgery, the employee petitioned for various workers' compensation benefits.

On January 25, 1985, the employee was examined for the employer and insurer by orthopedic surgeon Dr. R. H. N. Fielden, who concluded that the employee was unrestricted by the condition of his right knee; no other condition is referenced in Dr. Fielden's report. On March 12, 1985, however, Dr. Osland diagnosed reflex sympathetic dystrophy and restricted the employee from working for at least two months. Hearing was held in the matter on March 28, 1985, and by Findings and Order filed May 6, 1985, the employee was paid $8,828.05 in permanent partial and temporary total disability compensation related to his knee condition. About a year later, on February 14, 1986, the employee was reexamined by Dr. Fielden, who concluded again that the employee was physically unrestricted and recommended "psychological

investigation and treatment on that basis." A second hearing was held in the matter on August 16, 1986, and by Findings and Order filed October 23, 1986, the employee was paid $9,536.96 in temporary total disability compensation. On November 7, 1986, Dr. Osland indicated in a treatment note that he did "not believe that [the employee] can return to the rigors of his regular work[,] even light work, though he might be capable of doing some type of sedentary occupation." On December 9, 1986, Dr. Osland reiterated his diagnosis of reflex sympathetic dystrophy and rated the employee's permanent partial disability at 15% of the right lower extremity, indicating that the employee's "prognosis remains guarded as far as long-term use of the knee joint and employment."

On March 10, 1987, the employee's attorney wrote to the insurer, requesting settlement. In his letter, the attorney emphasized that, under law applicable to the employee's injury, "we could easily foresee several years of ongoing temporary total disability in [the employee's] case." He stated his opinion that the employee "will have a great deal of difficulty returning to employment because of his lack of education, the significant restrictions his injuries impose upon him and the present market for unskilled labor." The attorney suggested further that a specific advantage of the settlement that he was proposing was that "it allows [the insurer] to avoid the potential of [compensating indefinitely] a relatively young man who could end up to be permanently and totally disabled."

On April 23, 1987, the employee underwent a Functional Capacity Evaluation, which revealed significant chondromalacia and possible early degenerative arthritis, although it was found that the employee's "physical efforts and motivation getting to physical therapy as well as during his rehabilitation time at the clinic do not match those of a motivated person." A third hearing was held in the matter on June 26, 1987, which, by Findings and Order filed August 20, 1987, and amended September 2 and September 17, 1987, resulted in payment of $6,213.78 in temporary total disability compensation and an additional $3,007.62 in permanent partial disability compensation related to the employee's right lower extremity.

On January 19, 1988, the parties entered into and filed a Stipulation of Settlement, pursuant to which the employee agreed to accept a lump sum of $15,000.00 in exchange for a "full, final and complete settlement for temporary partial, temporary total, permanent total disability, rehabilitation benefits, and retraining benefits" implicitly relating to his August 23, 1983, work accident. Nowhere in the stipulation is the complete nature of the employee's injury or injuries expressly defined, but the stipulation does make reference to the employee's having already been paid compensation for 5% permanent partial disability of the right lower extremity, and pursuant to the stipulation the employer agreed to pay, in addition to the $15,000.00 otherwise agreed upon, an additional $3,007.62 less $1,500.00 already advanced as and for the additional 10% permanent partial disability awarded by the compensation judge. At the time of the stipulation, the employee had apparently not worked since being laid off by the employer in October of 1983, and it was his position "that he remains temporary total or temporary partially disabled . . . and that he remains so disabled indefinitely into the future." Future permanent partial disability and medical benefits were not expressly closed out by the agreement. An Award on Stipulation related to this agreement was issued and filed on February 8, 1988.

Apparently about ten years later, the employee began treating with orthopedic surgeon Dr. Paul Crowe for renewed symptoms in his left shoulder. On June 20, 1999, Dr. Crowe completed a Functional Capacities Evaluation of the employee, indicating that the employee could work full time, with restrictions that included a restriction against doing any reaching above shoulder level. On July 27, 1999, without furnishing any further detail, Dr. Crowe reported to the employee's attorney that he had "recently seen [the employee] for his left shoulder" and that, in his opinion, "[b]ased on the [employee's] history the left shoulder is directly related to his automobile accident of 19[8]3" and "[t]he symptoms have become substantially worse over the past few years." On August 24, 1999, Dr. Crowe rated the employee's disability of the left shoulder at 3% of the body as a whole, without stating any basis in the permanency schedules for his whole-body rating.

The employer and insurer eventually accepted liability for the employee's left shoulder disability in addition to his right knee condition, and on January 6, 2000, converting the whole-body shoulder rating to pre-1984 permanency schedules, they indicated in a Notice of Benefit Payment served on that date that they would be paying the employee permanent partial disability accordingly. The Notice indicated also that the employer and insurer's final payment of $761.40 would be issued on that same date, pursuant to an Award on Agreement between the parties dated December 28, 1999.[2] On September 13, 2000, the employee filed a Petition to Vacate his Award on Stipulation filed February 8, 1988, on grounds that there had been a substantial change in his medical condition since the date of that Award.

DECISION

This court's authority to vacate a compensation judge's award is found in Minn. Stat. §§ 176.461 and, with regard to settlements, 176.521, subd. 3. An award may be set aside if the petitioning party makes a showing of good cause to do so. With regard to awards issued prior to the 1992 amendment of Minn. Stat. § 176.461, such as the award here at issue, good cause is held to 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.2d 538, 539, 41 W.C.D. 648, 649 (Minn. 1989). In a change of condition case, inquiry is restricted to the extent of improving or worsening of the injury on which the original award was based. See Franke v. Fabcon, Inc., 509 N.W.2d 373, 49 W.C.D. 520 (Minn. 1993). The employee in this case argues that there has been a substantial change in his condition since his 1988 Award on Stipulation. In Fodness v. Standard Café, 41 W.C.D. 1054 (W.C.C.A. 1989), this court identified a number of factors that it may consider in deciding whether to vacate an award based on a substantial change in condition. These factors include: (1) changes in the employee's diagnosis; (2) changes in the employee's ability to work; (3) the development of any additional permanent partial disability; (4) the necessity of more costly and extensive medical or nursing care than was anticipated; and (5) the causal relationship between the work injury and the worsening of the condition. Fodness, 41 W.C.D. at 1060-61. In the present case, the employee contends that, while his actual diagnosis does not appear to have changed, his "medical picture" has changed since his 1988 Award on Stipulation; that his ability to work has been diminished

[2] We do not find this award in evidence before this court.

since that date, primarily due to restrictions on use of his shoulder; that his rated permanent partial disability has increased since that date; that he has required more medical care than was anticipated on that date, particularly with regard to his shoulder condition; that causation of the shoulder condition by the work injury here at issue is not in dispute; and that no party anticipated that the shoulder condition would prove permanent and so disabling. We are not persuaded that any change in the employee's condition has been shown to be substantial enough to constitute good cause to vacate the Award at issue.

Diagnosis

In his argument that there has been a change in the diagnosis of his condition, the employee states that, "[t]hough the actual diagnosis does not appear to have changed, the medical picture has." The employee goes on to explain that, whereas his shoulder condition was considered minor and temporary at the time of his Award, it is now one that requires regular treatment and has been medically determined to be permanent. These factors of symptomatic severity and permanence, however, although perhaps relevant to assessment of change in the employee's overall "condition," do not constitute changes specifically in the diagnosis of his shoulder condition. Indeed, although the employee contends in his Memorandum that an attached medical report of Dr. Crowe "clearly establishes a change in diagnosis" (emphasis added), we find in the attached reports of Dr. Crowe no diagnosis at all, of any kind, either of the employee's current condition or of his condition at the time of the Award on Stipulation. Moreover, Dr. Crowe himself states that "[t]here is no clear objective change but . . . just the advancing symptomatology." At any rate, to the extent that they may be relevant, the factors of symptom severity and permanence cited by the employee are subsumed under other Fodness factors addressed below. We find no showing that the employee's diagnosis has changed.

Ability to Work

Already by the end of 1979, over eight years prior to the Award here at issue, the employee was considered by his own treating orthopedic surgeon and an examining psychologist to be unable both physically and psychologically to work as a truck driver, due to his low back condition. This was nearly four years prior to the truck-driving accident here at issue, subsequent to which the employee became substantially disabled also with regard to his right knee condition. Subsequent to surgery on that knee, the employee was diagnosed also with reflex sympathetic dystrophy and received both temporary and permanent disability compensation related to his work injury. Already by November of 1986, over a year prior to the Award here at issue, that injury had rendered the employee, in the opinion of his treating surgeon, unable to return to "even light work, though he might be capable of doing some type of sedentary occupation." In March of 1987, the employee's own attorney indicated that the employee would "have a great deal of difficulty returning to employment because of his lack of education, the significant restrictions his injuries impose upon him and the present market for unskilled labor," expressly suggesting that the employee "could end up to be permanently and totally disabled." About a month later, an examining physical therapist suggested that the employee also needed treatment for a chronic pain syndrome. At the time of his Award on Stipulation, the employee's position was that he remained temporarily disabled by his work injury and "remains so disabled indefinitely into the future." We

conclude that the employee's ability to work at all was already very substantially questioned at the time of the Award here at issue and that that ability remains insubstantially changed since that time.

Permanency

It is true that, since the Award here at issue, the employee has been medically rated with and apparently compensated for an additional 3% permanent partial disability of the whole body, recalculated at 5% permanent partial disability of the shoulder, as a result of a work-related injury to his shoulder for which the employer and insurer have accepted liability. We conclude that that additional permanency is not of itself, however, dispositive of any entitlement to vacation of the employee's Award on Stipulation, particularly in that fair compensation for such additional permanent partial disability benefits was never foreclosed by or denied on the basis of the Award here at issue. See Holt v. Country Club Markets, Inc., No. [REDACTED SSN] (W.C.C.A. Feb. 12, 1991) (where the settlement merely closed out claims for permanency from 15% up to 20%, vacation was not necessary to assure adequate compensation to an employee merely on grounds that the employee now had a 30% permanency rating).

Medical Care

With regard to the factor of more costly and extensive medical care than was initially anticipated, the employee's entire argument is as follows:

> The employee has undergone physical therapy for his shoulder and has had office visits for the condition. As the attached report indicates, this treatment was totally unexpected at the time of the settlement. The dollars are not as massive as surgical intervention, but any cost here means more costly and extensive th[a]n anticipated. There is not a listed amount of money that the employee must over[]come to reach the more costly criteria. The knee treatment was anticipated, the shoulder was not anticipated.

At the time of the award on stipulation, the employee was not receiving treatment for his shoulder. However, where medical expenses have not been closed out by the award, we put less emphasis on the need for additional treatment. Burke v. F & M Asphalt, 54 W.C.D. 363 (W.C.C.A. 1996). In the instant case, aside from two very brief reports of Dr. Crowe, the employee has submitted no records of the treatment at issue, nor has he indicated even the number of treatments that he has undergone or the total cost of those treatments.

Causation

The causal relationship between the work injury and the current conditions on which the employee bases his Petition to Vacate is not contested. While the absence of such a relationship would be an important basis for denial of vacation, see Pratt v. Federal Stampings, No. [REDACTED SSN] (W.C.C.A. Apr. 17, 1991) (where medical records were inadequate bases

for concluding that the employee's current back, neck, and mental problems were causally related to his work injury, the employee failed to make a prima facie showing of good cause to vacate the award on stipulation), the presence of such a relationship is by itself not furthering of the employee's position, absent a showing of the actual changes implied in the diagnosis, ability to work, and medical care factors.

The employee in this case has not demonstrated any change in his diagnosis or any substantial change in his ability to work. Moreover, under the settlement here at issue, he is not precluded from receiving compensation for any and all additional permanent partial disability found attributable to his work accident of August 23, 1983, including his shoulder disability. Further, he continues to have any and all related medical expenses paid by the employer. We conclude that the employee has not shown sufficient cause to vacate the Award on Stipulation here at issue on grounds of a substantial change in his condition, and on that basis we deny his Petition to Vacate that Award.