

GLEN A. KASHUBA, Employee/Petitioner, v. DONALDSON CO., INC., and TRAVELERS INS. CO., Employer-Insurer

WORKERS' COMPENSATION COURT OF APPEALS
JANUARY 12, 2001

No. [REDACTED SSN]

HEADNOTES

VACATION OF AWARD - SUBSTANTIAL CHANGE IN CONDITION. The employee has submitted evidence sufficient to support vacation of an Award on Stipulation, served and filed October 16, 1986, on the basis of a substantial worsening of his low back condition since the parties' August 28, 1986 Stipulation for Settlement.

Petition to vacate granted.

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

OPINION

THOMAS L. JOHNSON, Judge

The employee has petitioned to vacate and set aside an Award on Stipulation, served and filed October 16, 1986, on the basis of a substantial change in condition. We conclude the employee has established good cause sufficient to vacate the award, and accordingly, grant the petition.

BACKGROUND

Glen A. Kashuba, the employee, sustained an admitted personal injury to his low back on February 21, 1984, while employed as a laborer by the Donaldson Company, Inc., insured for workers' compensation purposes by Travelers Insurance Company. The employer and insurer accepted liability, and paid medical, temporary total and permanent partial disability benefits.

Following the injury, the employee was treated conservatively with physical therapy, a TENS unit, anti-inflammatories and an epidural steroid injection. On December 6, 1984, discouraged by his failure to improve with conservative modalities, the employee sought a second opinion from Dr. Alexander Lifson at the Institute for Low Back Care. The employee reported persistent right-sided low back pain without any radicular pain or paresthesia. Dr. Lifson noted that CT scans taken in April 1984 and on December 6, 1984, showed a bulging or herniated disc at L5-S1 with impingement of the right S1 nerve root and a small central bulge at L4-5.

On February 23, 1985, the employee underwent a discectomy and laminectomy at L5-S1. He continued to report significant low back pain, and on August 1, 1985, he was seen by Dr. Matthew Monsein for a chronic pain evaluation. The employee described persistent low back

pain extending across the right hip. He denied any leg pain. On examination, Dr. Monsein noted slight tenderness of the paravertebral muscles and iliac crest on the right, but no muscle spasm. Straight leg raising was normal. The employee's left ankle reflex was present, but the right ankle reflex was absent. Dr. Monsein diagnosed a failed back surgery with chronic pain syndrome. The employee completed the chronic pain clinic at Sister Kenny Institute, after which Dr. Monsein and Dr. Lifson released the employee to return to work with light-duty restrictions.

On May 5, 1986, the employee was seen by Dr. Bruce M. Tennebaum at the Noran Neurological Clinic with persistent low back pain extending across the right hip. Dr. Tennebaum noted that new CT scans were taken on August 16, 1985 and January 29, 1986, which appeared to show a recurrent herniated disc at L5-S1. The doctor provided a permanent partial disability rating of 18 percent, but did not believe the employee was a candidate for additional surgery. The employee returned to see Dr. Tennebaum on June 23, 1986. The doctor referenced a recent MRI scan which was read as showing degenerative disc disease at L4-5 and L5-S1, with a small, central and right-sided herniated disc at L4-5 and a bulging disc at L5-S1. On examination there was mild limitation of forward flexion. The right ankle reflex was absent, but straight leg raising was negative and the employee's strength was intact. The doctor reassured the employee there was "nothing about his degenerative disc disease that prognosticates a definite downhill course." (Stip. for Settlement: attached 6/23/86 office note.) Dr. Tennebaum encouraged the employee to continue to walk and swim, and to look for work within his restrictions.

On August 4, 1986, the employer and insurer served the employee with a notice of intent to discontinue benefits (NOID), asserting maximum medical improvement (MMI) had been reached effective April 28, 1986 and the 90 days post-MMI period had elapsed. The employer and insurer sought discontinuance of temporary total disability benefits and began payment of periodic economic recovery benefits. The employee requested an administrative conference.

On about August 27, 1986, the parties entered into a Stipulation for Settlement. The employee alleged he was in need of retraining to find suitable employment; that he had sustained an 18 percent permanent partial disability; and that he was entitled to temporary partial disability benefits either in his current job as a bank teller trainee, or in the future when he secured different employment. The employer and insurer denied the employee was in need of retraining; denied he had sustained anything more than a 13 percent permanency; and denied the employee was entitled to temporary partial disability asserting no suitable job offer had been accepted. The employer and insurer agreed to make a lump sum payment of \$60,860.00 (less attorney fees) in return for a full, final and complete settlement of the employee's claims, except future medical expenses and including, specifically, sums for retraining if the employee so desired. An Award on Stipulation was served and filed on October 16, 1986. The employee testified he did not pursue retraining after the settlement, but was self-employed in a business buying and selling coins and sports memorabilia.

On August 20, 1993, the employee began treating with Dr. Manuel R. Pinto on referral from Dr. Tennebaum. The employee complained of chronic intermittent low back pain without any radicular symptoms. He reported the pain had gradually increased since 1985 with more frequent and longer-lasting exacerbations. The doctor noted an MRI scan from December 1992 that showed post-surgical changes at L5-S1 and mild posterior bulging at L4-5. On

examination, the employee had essentially full range of motion in the lumbar spine and a normal neurological examination, with the exception of a previously noted meralgia peresthetica in the left thigh¹ and no right ankle reflex. Dr. Pinto diagnosed degenerative disc disease at L4-5 and L5-S1. He prescribed Flexeril and referred the employee for physical therapy, including pool therapy using an aqua jogger. Dr. Pinto's treatment notes show no significant change in the employee's low back condition or diagnosis through 1997, with continuing conservative treatment.

On November 11, 1998, the employee returned to Dr. Pinto reporting he had been doing quite well until about six weeks ago when he noted, without any significant injury, increased symptoms including left leg pain radiating into the buttock, posterior thigh and calf. On examination, the doctor noted positive straight leg raising on the left, but the employee was otherwise neurologically intact. Dr. Pinto prescribed a Medrol Dosepack and suggested an epidural steroid injection and/or MRI scan if the employee did not improve.

According to Dr. Pinto's notes, the employee continued to experience flare-ups of severe low back and bilateral leg pain during 1999, and on November 3, 1999, the employee elected to proceed with a fusion from L4 to S1 with a repeat laminectomy and decompression. The surgery was performed by Dr. Pinto on January 28, 2000.

Following the surgery, the employee experienced complete resolution of his low back pain. However, he reported burning and dysesthesia bilaterally in his buttocks, thighs and calves with significant lower extremity pain and spasm. Dr. Pinto prescribed vicodin for pain and referred the employee for physical therapy and further testing. In July 2000, the employee was seen for depression secondary to his chronic back problem. Anti-depressant medication was prescribed, and the employee was referred for counseling with a psychotherapist. The employee's symptoms persisted, and, as of August 2000, his lower extremity symptoms had not improved.

On September 14, 2000, the employee filed a petition to vacate the 1986 Award on Stipulation, asserting a substantial change in condition since the stipulation. The employer and insurer oppose the petition.

DECISION

This court may set aside an award for "good cause," pursuant to Minn. Stat. § 176.461 and Minn. Stat. § 176.521, subd. 3 (1986).² Good cause includes a substantial change in the employee's medical condition. Krebsbach v. Lake Lillian Coop. Creamery Assn., 350 N.W.2d 349, 36 W.C.D. 796 (Minn. 1984). Where a change in condition is alleged, the focus of this court's inquiry is on whether there has been a substantial or significant worsening of the employee's

¹ Meralgia peresthetica is numbness in the outer surface of the thigh caused by entrapment of the lateral femoral cutaneous nerve in the leg. See Dorland's Illustrated Medical Dictionary (29th ed.) at 1087.

² This court's authority to vacate is governed by the provisions of the workers' compensation act relating to vacation of awards in effect at the time of the parties' settlement. Franke v. Fabcon, Inc., 509 N.W.2d 373, 49 W.C.D. 520 (Minn. 1993).

condition, and whether there is adequate evidence of a causal relationship. This inquiry looks back on events, comparing the employee's condition at the time of settlement with the employee's condition at the time of the petition to vacate. Davis v. Scott Moeller Co., 524 N.W.2d 464, 466-67, 51 W.C.D. 472, 475 (Minn. 1994); Franke v. Fabcon, Inc., 509 N.W.2d 373, 376-77, 49 W.C.D. 520, 525 (Minn. 1993). A number of factors may be considered in determining whether a substantial change in condition has occurred, including a change in diagnosis, a change in the employee's ability to work, additional permanent partial disability, the necessity of more costly and extensive medical care than anticipated, a causal relationship between the work injury and the worsened condition, and the contemplation of the parties at the time of the settlement. Fodness v. Standard Café, 41 W.C.D. 1054 (W.C.C.A. 1989).

Although the employee continues to have a diagnosis of degenerative disc disease at L4-5 and L5-S1, the treatment records submitted indicate his condition has substantially worsened since the October 1, 1986 Award on Stipulation. At the time of the settlement, the employee had low back pain with some pain across the right hip. There is no record of any lower extremity radicular symptoms or complaints. On June 23, 1986, Dr. Tennebaum noted mild limitation of forward motion, and although the doctor noted an absent right ankle reflex, straight leg raising was negative and the employee's strength was intact. Other neurological and orthopedic findings were essentially normal. No further surgery was contemplated. The employee had been released to return to work with sedentary or light-duty restrictions, and was self-employed, buying and selling coins and sports memorabilia, for many years following the settlement.

On November 11, 1998, the employee saw Dr. Pinto reporting left leg pain radiating into the buttock, posterior thigh and calf. On examination, Dr. Pinto noted positive straight leg raising on the left. In May 1999, Dr. Pinto recorded bilateral lower extremity pain. An MRI scan taken at that time showed complete annular tears at L4-5 and L5-S1 with mild foraminal stenosis. A lumbar discography performed on October 14, 1999 resulted in severe concordant left-sided low back, buttock and hip pain at L5-S1 and intense concordant right-sided low back pain at L4-5. In a report dated July 6, 2000, Dr. Pinto stated the employee had been unable to work since October 1999.

On January 28, 2000, Dr. Pinto performed a two-level fusion with a repeat laminectomy. Although the employee's low back pain resolved, he developed burning dysesthesias and paresthesias in the posterior thighs, calves and feet bilaterally. The employee testified he was worse following the surgery, with intense pain going down the back of both legs from the buttocks to his feet, resulting in difficulty sitting or standing for any length of time. The employee began using vicodin, prescribed by Dr. Pinto, on a regular basis for pain control. In his July 6, 2000 report, Dr. Pinto stated he believed the employee had sustained additional permanent partial disability and that the employee's February 21, 1984 work injury continued to play a substantial contributing role in the employee's current condition.

While this is a relatively close case, we believe the employee has shown that "evidence of subsequent developments exists which will establish that his condition has substantially worsened and that there is a causal relationship between the injury covered by the award and his present worsened condition." Franke at 377, 49 W.C.D. at 525; Davis at 466-67,

51 W.C.D. at 474-75. We, accordingly, grant the employee's petition to vacate and set aside the Award on Stipulation filed October 16, 1986.