

ANN LAWRENCE, Employee/Petitioner, v. WHISPERING PINES NURSING HOME and LIBERTY MUT. INS. CO., Employer-Insurer.

WORKERS' COMPENSATION COURT OF APPEALS
MAY 17, 2001

No. [REDACTED SSN]

HEADNOTES

VACATION OF AWARD - SUBSTANTIAL CHANGE IN CONDITION. Where the evidence is conflicting with respect to (1) the petitioner's employment history at the time of the 1991 Stipulation for Settlement and from October 1991 to the present, and (2) a causal relationship between the employee's current changed condition and her July 15, 1987 personal injury, the case is referred to the Office of Administrative Hearings for a fact hearing on the disputed factors.

Referred to OAH.

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

OPINION

THOMAS L. JOHNSON, Judge

The employee petitions this court to vacate an Award on Stipulation filed October 11, 1991, contending she has experienced a substantial change in her medical condition since the time of the award.

BACKGROUND

Ann Lawrence, the employee, injured her low back on July 15, 1987, while working for Whispering Pines Nursing Home, the employer. The employee's weekly wage was \$220.15. Her injury occurred while she was trying to lift a 125-pound patient out of a wheelchair. She experienced an immediate onset of low back pain which radiated down her left leg to her heel and down her right leg to her knee. The employee did not return to work for the employer thereafter.

The employee sought medical care at St. Joseph's Medical Center following her personal injury. A lumbar CT scan on July 28, 1987, showed some asymmetric bulging of the L5-S1 disc which appeared to impinge on the S1 nerve root on the left side. The L3-4 and L4-5 discs were reported as being unremarkable. The employee was then referred to Dr. Peter Schmitz, an orthopedic surgeon. The records of Dr. Schmitz are incomplete, but indicate the doctor treated the employee for low back pain through, at least, February 19, 1993. (Resp. Ex. 4.)

On March 3, 1989, the employee was examined by Dr. Robert Wengler at the request of her attorney. On examination, the doctor noted the employee's left ankle reflex was absent but he noted no sensory loss or motor weakness. Dr. Wengler reviewed the CT scan which

he reported showed a minimal herniated disc at L5-S1 on the left with impingement of the first sacral nerve root. He diagnosed a first sacral nerve root entrapment secondary to a herniated disc. Dr. Wengler did not recommend surgery, but imposed a ten pound lifting restriction with limited bending, stooping, pushing and pulling. Finally, Dr. Wengler rated a 14 percent permanent partial disability for the L5-S1 disc.¹ (Pet. Ex. D.)

The employee filed a claim petition seeking payment of medical expenses and permanent partial disability benefits. In their answer, the employer and insurer admitted the employee sustained a temporary injury on July 15, 1987, and denied liability for benefits. In a Findings and Order filed August 9, 1989, the employer and its insurer were ordered to pay medical, rehabilitation and wage loss benefits and benefits for a 14 percent permanent partial disability.

On January 24, 1991, the employee filed another claim petition seeking penalties for a failure to pay temporary partial disability benefits, costs and attorney fees in a timely manner. The parties entered into a settlement in September 1991. In the stipulation, the employee contended that the employer and insurer failed to make timely payment of benefits. The employer and insurer denied the employee was entitled to penalties. In exchange for a payment of \$10,000.00 consisting of compensation of \$9,000.00 and penalties of \$1,000.00, the employee settled all claims on a full, final and complete basis with the exception of claims for medical expenses. An Award on Stipulation was filed on October 11, 1991.

Shortly before the stipulation, on August 8, 1991, the employee was seen at the St. Joseph's Medical Center. The doctor noted the employee had been working at Crosby Nutrition at different sites in various capacities which required lifting food trays out of cars and lifting trays of dishes. The doctor diagnosed chronic low back pain and stated the employee was unable to do that kind of work. On September 5, 1991, the doctor re-examined the employee and noted that lifting more than 20 pounds caused the employee to become sore and felt her disability was significantly greater than it was previously. (Resp. Ex. 10.)

Dr. Schmitz ordered a lumbar MRI scan which was obtained on March 13, 1992. The scan showed some facet joint hypertrophy at L3 without spinal stenosis or a herniated disc. At L4-5, the scan showed marked facet joint hypertrophy with prominent ligamentum flavum and narrowing of the spinal canal. At L5-S1, the spinal canal appeared inadequate. Several years later, on December 9, 1994, another lumbar MRI scan showed a minimal central disc protrusion at L5-S1 and moderately severe facet hypertrophy at L3-4 and L4-5 with a mildly bulging disc at L4-5 causing moderate to moderately severe spinal stenosis at that level. (Resp. Ex. 4.)

On January 2, 1997, the employee was seen by Dr. David M. Kane at the Billings Clinic in Billings, Montana. The doctor noted the employee had recently moved to Montana from Minnesota. The employee reported she was then working eight-hour shifts at the convalescent center but felt she needed to reduce her work to four-hour shifts because of her back pain. The doctor diagnosed arthritis and prescribed Relafen, an anti-inflammatory drug. (Pet. Ex. F.)

¹ Minn. R. 5223.0070, subp. 1.B.(1)(b).

On June 18, 1997, the employee saw Dr. Robert Schultz, an orthopedic surgeon, at the Billings Clinic. The doctor reported the employee was then 62 years old and working at a local nursing home doing CNA and laundry type duty. The employee complained of low back and leg pain for 20 years. On examination, the doctor noted mild tenderness to palpation in the lumbar area without spasm or leg numbness or weakness. Dr. Schultz diagnosed fibromyalgia and referred the employee to a neurologist, Dr. Joav Kofman. On examination, Dr. Kofman noted decreased sensation to pin prick in the L4 and L5 dermatomal regions and positive straight leg raising. An EMG showed left L4-5 radiculopathy with evidence of active denervation. An MRI scan on August 8, 1997, showed disc space narrowing and a bulging annulus at L3-4 causing non-stenotic spondylotic narrowing of the spinal canal with moderate compromise of the lateral recesses bilaterally. The scan also showed a subluxation of the L4 and L5 severe spondylotic stenosis of the spinal canal and spondylotic changes with a midline disc bulge at L5-S1. Dr. Kofman diagnosed lumbosacral radiculopathy secondary to lumbar spinal stenosis due to spondylitic changes and subluxation. Dr. Schultz then recommended surgery. (Pet. Ex. F; Resp. Ex. 5.)

On October 9, 1997, the employee was admitted to Deaconess Hospital where Dr. Schultz performed a decompressive laminectomy at L3 through S1 with arthrodesis at L4-S1 with internal fixation and an iliac crest bone graft. (Pet. Ex. F.) The employee followed up with Dr. Schultz after the surgery and received physical therapy. By report dated April 15, 1998, the doctor noted the employee's arthrodesis appeared to have healed solidly and instructed the employee to commence walking. By report dated July 2, 1998, Dr. Schultz opined the employee's surgery was in part necessitated by her 1987 injury.

The employee filed a claim petition on February 10, 1999, seeking payment of medical bills for the employee's care, treatment and surgery in Montana. The employer and insurer contended the outstanding medical bills were not reasonable or necessary to cure and relieve the effects of the employee's work injury. In a Stipulation for Settlement, the employee, the employer and insurer and the medical providers entered into a compromised settlement of the medical expense claims. An Award on Stipulation was filed on June 1, 2000.

On September 15, 1999, Dr. Schultz noted the employee was having a recurrence of her lumbar spinal stenosis symptoms. (Pet. Ex. F.) On July 21, 2000, the employee was re-examined by Dr. Robert Wengler. The employee told the doctor her back had gradually deteriorated since her 1987 injury. Dr. Wengler noted the employee had worked as a nursing assistant and practical nurse for 40 years until her 1987 injury and continued light-duty work until 1990, but had not worked since then. The doctor diagnosed chronic degenerative disc disease and failed low back surgery. Dr. Wengler rated a 28 percent permanent disability for the three-level stenosis decompression² and 22.5 percent for the two-level spinal fusion. (Pet. Ex. E.)

DECISION

The employee contends there has been a substantial change in her medical condition since the date of the 1991 Award on Stipulation which justifies a vacation of the award. She contends her diagnosis has changed, she is now unable to work, and she has sustained

² Minn. R. 5223.0070, subp. 1.C.(2).

additional permanent partial disability and medical care, all of which is causally related to her work injury. The employer and insurer argue there has been no change in diagnosis, rather the employee's condition inevitably degenerated as a result of the aging process. Further, they contend, the employee has not changed in her ability to work. Accordingly, the respondents request this court deny the employee's petition to vacate.

This court's authority to vacate an award on stipulation filed prior to July 1, 1992, is governed 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.2d 538, 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 may consider in making this determination include a 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).

With respect to a change in diagnosis, the July 28, 1987, CT scan showed an asymmetric bulging of the L5-S1 disc which appeared to impinge on the left S1 nerve root. The L3-4 and L4-5 discs were reported as unremarkable. Dr. Wengler, in 1989, diagnosed nerve root entrapment secondary to a herniated disc and concluded surgery was not appropriate for the employee's condition. In 1997, an MRI scan showed disc space narrowing and a bulging annulus at L3-4 causing narrowing of the spinal canal and severe spondylotic stenosis at L4-5. Dr. Schultz then performed a decompressive laminectomy from L3-S1 with an arthrodesis at L4 through S1 with internal fixation and a bone graft. There was no evidence in 1987 of any injury or abnormalities at L3-4 and L4-5. We conclude there has been a significant change in the employee's diagnosis since the date of the Award on Stipulation.

The employee clearly has an increase in her permanent partial disability solely by reason of the 1997 fusion surgery. Dr. Wengler provided a 50.5 percent permanent partial disability rating. We find no evidence in the medical records or the stipulation that either party anticipated the employee's injury would require surgery. Medical expenses were kept open in the settlement, and the employer and insurer entered into a compromise settlement of the employee's surgical expenses. The employer and insurer do not, however, concede a causal relationship between the employee's injury and her subsequent deterioration and need for surgery.

Based on the medical records, it appears the employee was working in August 1991 in Crosby, Minnesota. The award was filed on October 11, 1991. In 1997, the employee told her doctors at the Billings Clinic she was working in a convalescent facility. In his July 21, 2000 report, however, Dr. Wengler stated the employee had not worked since 1990. The employee's petition to vacate contains no affidavit from the employee. An affidavit from Ronald Drewski, her attorney, states the employee was capable of light-duty work until her surgeries in 1997. Mr. Drewski further states the employee's symptoms have worsened in the past year such that she is now unable to perform any work.

The court concludes a factual hearing is necessary. The case is, accordingly, referred to the chief administrative law judge at the Office of Administrative Hearings to schedule a hearing. We ask the compensation judge to make factual findings regarding the employee's employment history at the time of the settlement and from October 12, 1991, through the date of the hearing, and to make findings as to whether there exists a causal relationship between the employee's current changed condition and her July 15, 1987 personal injury.