

RICHARD A. McQUARRY, Employee/Petitioner, v. ROTO ROOTER and CNA INS. CO.,  
Employer-Insurer.

WORKERS' COMPENSATION COURT OF APPEALS  
JUNE 6, 2001

No. [REDACTED SSN]

HEADNOTES

PETITION TO VACATE - SUBSTANTIAL CHANGE IN CONDITION. Where the employee's degenerative condition deteriorated significantly and required two additional surgeries, which, although successful, subjected the employee to further permanent partial disability, and where the employee's original condition at the time of settlement may have been erroneously attributed solely to a psychological condition, just cause exists to vacate the 1990 award on stipulation.

Petition to vacate award granted.

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

OPINION

STEVEN D. WHEELER, Judge

The employee has petitioned to vacate an award on stipulation served and filed February 21, 1990, on the basis of a substantial change in the employee's medical condition and mutual mistake of fact.

BACKGROUND

The employee sustained an admitted low back injury on August 29, 1988, and a disputed low back injury on March 1, 1989. At the time of these injuries he was employed by Roto Rooter, the employer, as one of its technicians. At the time of the injury the employee was 26 years of age.

Immediately following the March 1989 injury, the employee underwent a CT scan which showed a large right herniated disc at the L5-S1 level and a prominent bulge and/or right mid-line disc abnormality at the L4-5 level. Two disc herniations were confirmed by an April 17, 1989 myelogram. On May 25, 1989, Dr. Jerry Reese, M.D., performed a laminectomy and hemilaminectomy and right discectomies at spinal levels L4-5 and L5-S1. (5/13/97 report of Dr. Ahlberg.) Initially the employee showed some improvement, but within a relatively short period of time he continued to complain of severe pain in his low back. In addition, the employee complained of gastrointestinal problems, urinary and bladder difficulties and emotional concerns and depression. The employee's affidavit, attached to the petition to vacate, indicates that he felt, after consultation with his surgeon, that his pain complaints may be related to his emotional disturbance and anger with respect to the manner in which his workers' compensation claim was

being handled. Based on the belief by his physician that many of his difficulties were non-organic and were psychogenic and that a settlement “might help me,” he determined that it would be advisable to settle his claim so that he might have a better chance of recovery. (EE’s affidavit, ¶¶ 10, 11, 13.)

On February 21, 1990, the parties entered into a settlement in which all claims except certain future medical expenses were released on a full, final and complete basis. The employee received a lump sum payment of \$33,150.00, of which \$6,500.00 was paid to his attorney. The only medical expenses which were left open by the settlement were for care and treatment for the employee’s low back injuries of August 29, 1988 and March 1, 1989. The terms of the settlement excepted payment for any future psychiatric and/or treatment for any condition other than the low back, specifically listing as excluded “any type of pain clinic,” psychiatric/psychological treatment or therapy or treatment for stomach or gastrointestinal problems. (2/21/90 Stipulation, ¶ VIII.) It was the contention of the employee that “he has sustained psychiatric emotional problems as a result of said injuries and has undergone certain medical care and treatment for this condition. That all expenses and treatment related to this condition are therefore compensable.” (*Id.*, ¶ VI.) It was the contention of the employer and insurer that “any psychiatric problems or psychological problems are pre-existing” and “are in no way related to either of the alleged injuries while in the employ of Roto-Rooter.” (*Id.*, ¶ VII.)

Following settlement of the dispute, the employee’s condition did not improve and he sought additional medical treatment and diagnosis at the Mayo Clinic. (*Id.*, ¶¶ 12-13.) On August 15, 1990, an MRI of the lumbar spine was taken at the Mayo Clinic. This MRI was read to disclose no additional disc herniations or organic abnormalities. The radiologist report indicated that the only physiological findings related to evidence of the surgery which had occurred on May 25, 1989. There was no evidence reported by the radiologist to indicate any physiological reasons to explain the employee’s continuing claims of significant low back pain.

On March 21, 1991, the employee filed a petition to vacate the February 1990 award on stipulation. On August 26, 1991, this court issued a decision denying the employee’s claim. At that time, the employee was claiming a substantial change in condition, primarily related to increased gastrointestinal symptoms, including cramping pain, nausea and abdominal discomfort and increased back pain. In that decision, we noted that there was no organic cause that had been found for these problems and that the consensus of medical and psychological opinion was that these conditions and the employee’s pain were psychogenic in origin. The court found that the employee’s psychological and gastrointestinal difficulties were apparent for some time prior to the settlement and it could not be shown that they had significantly increased at the time of the petition to vacate. As a result, it was determined that there was insufficient evidence to support a finding of a substantial change in the employee’s medical condition.

The employee continued to have low back pain and never returned to work after leaving the employer on March 1, 1989. The employee was under the primary care of Dr. Dan Feeley. He was referred to Dr. Ensor A. Transfeldt, an orthopedist, who diagnosed chronic pain syndrome with functional overlay exaggerating the employee’s chronic pain. The employee has sought medical assistance from time to time and has received disability benefits under the Social Security disability program.

Because of persistent symptoms, in 1996 the employee sought additional medical treatment. He was first referred to orthopedist Dr. Brian O'Neill, who ultimately referred him to Dr. Daniel B. Ahlberg, M.D., a neurosurgeon. Dr. Ahlberg first saw the employee on December 20, 1996. Dr. Ahlberg requested that the employee obtain copies of all of his prior medical records, including the actual hard copies of any x-rays or MRIs, specifically including the MRI taken on August 15, 1990 at the Mayo Clinic. In addition, Dr. Ahlberg had additional diagnostic studies done. Lumbosacral x-rays of January 13, 1997 showed "mild degenerative spondylosis at L4-5 and L5-S1. An MRI, which was performed on February 10, 1997, "clearly showed a herniated disc at L5-S1 on the right with the differential diagnosis of scar tissue as well as significant abnormality at L4-5 on the right." As a result of his examination of the employee and review of his records, Dr. Ahlberg recommended that the employee undergo an additional surgical procedure, which was completed on May 8, 1997. This surgery consisted of a right L5-S1 lumbar foramenectomy/facetectomy, laminectomy/discectomy to relieve pressure on the S1, L5 and L4 nerve roots. (5/13/97 report of Dr. Ahlberg, p. 4.)

The employee requested that the employer and insurer pay for the 1997 surgery, pursuant to the terms of the stipulation for settlement which had not closed out future medical expenses related to treatment for the employee's low back condition resulting from the injuries in 1988 and 1989. The employer and insurer contended that the surgical procedure was not causally related to the earlier injuries and resisted payment, until shortly before the date of hearing. (EE's affidavit, ¶ 21.) During the litigation process, on September 19, 1997, the deposition of Dr. Ahlberg was taken concerning the issue of causation of the employee's need for surgery. During this deposition, Dr. Ahlberg also testified concerning the nature of the employee's difficulties following his injury and following his surgery in May 1989. He stated that, based on evidence in the actual MRI scan taken at the Mayo Clinic on August 15, 1990, the employee actually had a physiological abnormality at the L4 level which was causing pressure on the L4-5 nerve roots, and explained his complaints of pain. In his deposition he indicated that the Mayo Clinic radiologist report failed to note this abnormality and this failure led to the conclusion that the employee's difficulties were essentially psychogenic. (Depo. at 34-40; Dr. Ahlberg's report of 5/13/97, p. 3.) Dr. Ahlberg testified that by the time of the 1997 MRI, the abnormality evident in the 1990 MRI had "healed and/or partially resolved." By that time, however, the employee had developed recurrent herniated discs at spinal levels L4-5 and L5-S1, which placed pressure on the S1, L5 and L4 nerve roots, requiring surgery in 1997.

Following the 1997 surgery, the employee indicates that he made some improvement for a few months. Later, his pain returned and he was found to have another recurrent disc herniation, which was surgically treated by Dr. Ahlberg on May 4, 1999. This surgery helped the employee's symptoms and he stated that, "I am better than I have been for many years." (Id., ¶ 22.)

On September 15, 2000, the employee filed a petition to vacate, alleging that there had been a substantial change in his medical condition since the date of the award on stipulation and that there had been a mutual mistake of fact concerning the employee's condition at the time the stipulation was entered into. On October 30, 2000, the employer and insurer filed its memorandum in opposition to the petition to vacate.

## DECISION

This court's authority to vacate an award on stipulation executed 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 his medical condition and a mutual mistake of fact at the time of entering into the stipulation.

### Substantial Change in Condition

Factors this court considers in making a determination with respect to whether there has been a substantial change in condition are (1) change in diagnosis, (2) change in the employee's ability to work, (3) additional permanent partial disability, (4) the necessity of more costly and extensive medical care and services than initially anticipated and (5) 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).

The employee contends that there has been a change in his diagnosis, in that the degenerative processes which were started by the 1988 and 1989 injuries have continued and necessitated the surgical procedures which were performed in May 1997 and 1999. The employee points out that Dr. Ahlberg testified that the employee's condition prior to the 1997 surgery was a worsening of the condition that existed at the time of the settlement. With respect to the issue of the employee's ability to work, the employee agrees that at the time of his stipulation he was unable to work because of the pain but was contemplating retraining as a vending machine repair person. Following the settlement he attempted the training but never completed the classes "because of the intense pain and depression." (EE's affidavit, ¶ 14.) The employee was not working at the time of this petition to vacate, but seeks reopening of his claim so he can have his "entire vocational situation reevaluated." (Id., ¶ 23.) The employee states that as a result of the change in diagnosis by Dr. Ahlberg in 1997 there is evidence that the employee has additional permanent partial disability as a result of recurrent disc herniations at levels L5-S1 and L4-5. The employee also contends that additional extensive medical care and treatment was necessitated by his condition and resulted in the surgical procedure. In addition, the employee notes that Dr. Ahlberg recommends that he undergo extensive reconditioning in order to make him able to return to active employment. The employee points out that the employer has admitted that there is a causal relationship between the employee's current condition and the 1988 and 1989 injuries.

In response, the employer and insurer contend that the employee's diagnosis is unchanged, namely degenerative disc disease at L4-5 and L5-S1, which has simply continued to worsen. The employer and insurer note that the employee's claim with respect to his ability to work is less than clear and, since he has made a good recovery after the 1999 surgery, his condition has actually improved. The employer and insurer argue that any additional permanent partial disability is limited, since the original settlement was based on a 16% whole body permanent

partial disability rating. They further point out that all medical care necessitated by the employee's back condition was provided for in the stipulation for settlement, and as a result it need not be vacated in order to provide adequate medical assistance to the employee.

This is a very close case. There does appear that there has been a change in the employee's diagnosis, in that substantial additional deterioration has occurred at the L4-5 and L5-S1 levels of the employee's spine and that now the employee's S1 nerve root was affected by his condition. It is less clear whether there has been a change in the employee's ability to work, although his back condition may be slightly less symptomatic as a result of the 1999 surgery. In order to evaluate the employee's employment status, it appears that a reconditioning program would need to be completed, followed by a vocational assessment. The employee's condition may represent some additional permanent partial disability, although the amount is unknown, and no reports were submitted to support a specific amount. The issue of medical expense is not particularly significant in this case since the stipulation does not close out payment for such treatment. This is a very unique and unusual case, and on balance we believe justice would compel a reopening of the employee's claim. The most unusual aspect of the case, and one which helps tip the scale in favor of vacation, is the evidence presented to the court, in the form of Dr. Ahlberg's deposition testimony, that the employee's problems in 1989-90 were erroneously attributed solely to his depression and somatization conditions. Dr. Ahlberg testified that the August 1990 MRI taken at the Mayo Clinic was misread as showing no evidence of an objective physiologic condition. In addition, the employee's condition worsened significantly in 1996 and 1997, necessitating two additional surgeries. We believe there is just cause to vacate the February 1990 award on stipulation.<sup>1</sup>

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<sup>1</sup> None of the statements of facts in this decision are binding on the parties in this case in connection with future proceedings and have been made solely in connection with our consideration of the petition to vacate the award on stipulation.