TERRENCE NIESEN, Employee/Petitioner, v. BRIGHAM JENNIFER GRP., INC. and MINN. ARP/OCCUPATIONAL HEALTHCARE MGMT. SERVS., Employer-Insurer.

WORKERS' COMPENSATION COURT OF APPEALS
DECEMBER 11, 2001

No. [REDACTED SSN]

HEADNOTES

VACATION OF AWARD - SUBSTANTIAL CHANGE IN CONDITION. Where claim petitions by the employee were currently pending against two subsequent employers, with one of which the employee was purportedly injured prior to his award on settlement with the employer here a party, the court concluded that the employee's petition to vacate the award at issue was premature.

Petition to vacate award dismissed.

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

OPINION

WILLIAM R. PEDERSON, Judge

The employee petitions this court to set aside the Award on Stipulation served and filed in this matter on October 6, 1995, on grounds that his medical condition has substantially changed since the issuance of the Award. Concluding that the employee's petition is premature, we dismiss the Petition to Vacate without prejudice.

BACKGROUND

On July 22, 1994, and August 6, 1994, Terrence Niesen [the employee] sustained admitted injuries to his left shoulder and neck while employed by Brigham Jennifer Group, Inc. [Brigham]. Brigham and its insurer paid wage loss benefits, medical expenses, rehabilitation benefits, and permanent partial disability benefits for a 7% whole body impairment. In April of 1995, the employee evidently found employment with the Sealy Corporation [Sealy] and allegedly sustained another injury to his neck on June 9, 1995. In September of 1995, the employee, Brigham, and its insurer entered into a full, final, and complete settlement, leaving open only claims for medical expenses. An Award on Stipulation was filed on October 6, 1995, and Brigham paid the employee $2,500.00 in satisfaction of his claims. Later that year, in December of 1995, the employee filed a Claim Petition against Sealy, alleging entitlement to temporary total disability benefits as a result of his alleged work injury of June 9, 1995. Sealy and its insurer denied liability for the disability claimed by the employee and affirmatively alleged a Jewison defense, contending that the employee had made a false representation as to his physical condition at the time of his

employment.[1] An Order Striking the Employee's Claim Petition from the Active Trial Calendar was served and filed on June 21, 1996.

Subsequent to his employment at Sealy, the employee became employed at Joseph's Rice Street Car Wash [Joseph's]. While employed at Joseph's, the employee allegedly sustained an injury to his back on June 4, 1997. The employee subsequently retained a third attorney, and a Claim Petition was evidently filed in April of 2000, alleging entitlement to unspecified medical and rehabilitation benefits. Joseph's and its insurer responded specifically denying primary liability for the claimed injury of June 4, 1997.[2]

Subsequent to the employee's four claimed injury dates, the employee's overall medical condition appears to have substantially deteriorated. In April of 1998, the employee was seen by Dr. Manuel Ramirez-Lassepas, a neurologist at Regions Hospital, who diagnosed spastic paraparesis of unknown etiology. On October 14, 1998, the employee provided Dr. Ramirez-Lassepas with a history of a previous injury to his cervical spine in 1994. Because of this additional history, the doctor ordered an MRI of the employee's cervical spine on October 28, 1998. The radiologist interpreting the MRI concluded that there was a prominent disc protrusion at the C5-6 level that was resulting in neural impingement. The employee was admitted to the hospital on November 23, 1998, where an anterior cervical fusion of C5-6 was performed by neurosurgeon Dr. Walter Bailey.

On December 11, 2000, in a letter directed to the employee's counsel, Dr. Ramirez-Lassepas diagnosed the employee's neck condition as "cervical myelopathy secondary to cord compression from the spondylitic lesion with disk herniation." The doctor opined that the employee's injuries of July 22 and August 6, 1994, had substantially contributed to the employee's spondylitic changes and had "started the cascade of events that ended in his cervical myelopathy." Dr. Ramirez-Lassepas also opined that the employee's 1995 injury at Sealy had also contributed to the employee's cervical cord problem. With regard to the 1997 injury, the doctor stated that "[i]t is very possible that the lumbar lesion that Mr. Niesen suffered at the accident on June 4, 1997 is the one responsible for his sensory level and will contribute to his disability as stated above." Dr. Ramirez-Lassepas opined that the employee was totally and permanently disabled secondary to his cervical and thoracic lumbar conditions.

The employee petitions this court to vacate the Award on Stipulation of October 6, 1995, on grounds that there has been a substantial change in his condition. Brigham objects to the Petition.

DECISION

Normally, in cases involving a petition to vacate on grounds of a substantial change in medical condition, this court would review the facts to determine whether the employee has

[1] See Jewison v. Frerichs Constr., 434 N.W.2d 259, 41 W.C.D. 541 (Minn. 1989).

[2] The employee's claim petition apparently is pending at the Office of Administrative Hearings.

established "good cause" to vacate the award. Relevant factors would include a change in the employee's diagnosis, a change in his ability to work, a change in his permanency rating, his need for additional medical care, and the causal relationship between any change and the work injury. Fodness v. Standard Café, 41 W.C.D. 1054, 1060-61 (W.C.C.A. 1989). In the present case, however, Brigham argues that, because claim petitions are currently pending against Sealy and Joseph's, it is unnecessary and premature to vacate the October 6, 1995, Award on Stipulation. We agree.

In support of its objection to the employee's petition, Brigham cites the case of Kinnunen v. Brockway Glass, slip op. (W.C.C.A. Jan. 27, 2000). In Kinnunen, this court held that, if an employee has closed out claims against one employer, has sustained a subsequent work injury with a different employer, and has claims pending against that subsequent employer, it is premature to vacate the stipulation for settlement with the first employer.[3] The facts in the present case are consistent with those present in Kinnunen. Dr. Ramirez-Lassepas's report of December 11, 2000, appears to support a claim against the 1995 and 1997 alleged injuries. If the employee successfully establishes that the claimed injury or injuries of June 9, 1995, and/or June 4, 1997, is/are substantially causally related to his current disability, he may be entitled to full recovery from Sealy and/or Joseph's, with the possible exception of some apportioned share of medical expenses. Under these circumstances, vacating the settlement with Brigham may be unnecessary. If the employee is unable to establish that he sustained a work-related injury on June 9, 1995, and/or June 4, 1997, or if it is determined that neither of those alleged injuries substantially contributed to the employee's current disability, the employee may file a new petition to vacate. We therefore dismiss without prejudice, as premature, the Petition to Vacate that is here at issue.[4]

[3] Citing Johnson v. Tech Group, Inc., 491 N.W.2d 287, 47 W.C.D. 367 (Minn. 1992), and Webeck v. Mochinski Gen. Contractors, 41 W.C.D. 1063 (W.C.C.A. 1989), for the proposition that "[w]here an employee has entered into a stipulation for settlement with one employer and insurer and later sustains a new work-related injury with a different employer and insurer, the second employer and insurer are liable for full payment of the benefits due the employee." Kinnunen, slip op. at p. 3.

[4] Accordingly, we make no determination as to the employee's claims of a substantial change in condition.