

WILLIAM PENDZIMAS, Employee/Petitioner, v. NORTHSTAR DRILLING and ZURICH AM. INS. CO., Employer-Insurer, and LAKES GAS and EMC INS. CO., Employer-Insurer, and WHOLESale SERV. CTR. and FEDERATED INS. CO., Employer-Insurer, and ABBOTT NW. HOSP., Intervenor.

WORKERS' COMPENSATION COURT OF APPEALS
MARCH 29, 2001

No. [REDACTED SSN]

HEADNOTES

VACATION OF AWARD. Where the employee had pending claims against employers and insurers for injuries not covered by settlement agreement, it was premature to vacate the settlement agreements with respect to the employee's first injury, pursuant to Kinnunen v. Brockway Glass, No. [REDACTED SSN] (W.C.C.A. Jan. 27, 2000).

Petition to vacate dismissed.

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

OPINION

DEBRA A. WILSON, Judge

The employee petitions to vacate the awards on stipulation filed on March 11, 1998, and November 10, 1998, based on substantial change in condition and/or mutual mistake of fact. Concluding that the employee's petition is premature, we dismiss.

BACKGROUND

On May 1, 1996, the employee, William Pendzimas, sustained an admitted work-related injury affecting his left shoulder while employed by Wholesale Service Center, Inc. [Wholesale]. Wholesale and its insurer paid wage loss benefits, medical expenses (including expenses for two shoulder surgeries), and permanent partial disability benefits for a 6% whole body impairment. In March of 1998, the parties entered into a full, final, and complete settlement, leaving open only claims for medical expenses and possibly permanent partial disability in excess of 6% of the whole body.¹ An award on stipulation was filed on March 11, 1998. Later that year, in November of 1998, the parties entered into another stipulation for settlement. At that time, the

¹ Both the employee and Wholesale contend that this stipulation for settlement closed out everything but medical expenses. However, we note that, in paragraph VII and "NOW, THEREFORE" paragraph A, both on page 5, the stipulation states that the agreement covers all claims "with the exception of medical care treatment expenses **and permanent partial disability in excess of 6% whole body impairment**" (emphasis added). In any event, we need not interpret the settlement to resolve the matter currently before us.

employee was claiming he required a third surgery on his left shoulder. Pursuant to the terms of the stipulation, the employee was paid \$3,400,

representing a compromised settlement of the employee's claims for medical care, treatment and expenses involving surgery and surgical care, chiropractic care, treatment or expenses whether provided by a chiropractor or otherwise, nursing home services, home nurse care assistance, any and all psychiatric or psychological types of treatment including, but not limited to, pain clinic type treatments past, present or future.

An award on stipulation was filed on November 10, 1998.

On June 21, 1999, the employee sustained a work-related injury to his neck and left shoulder while employed by Lakes Gas Company [Lakes Gas].^{2, 3} It is unknown if any benefits were paid as a result of that injury.⁴ Five months later, on November 29, 1999, the employee allegedly sustained a work-related injury to his head, neck and shoulder while working for Northstar Drilling Company [Northstar]. Northstar and its insurer apparently denied liability for that injury.⁵

On February 11, 2000, the employee filed a claim petition against Northstar, seeking temporary total disability benefits commencing December 20, 1999, rehabilitation benefits, and permanent partial disability benefits as a result of the alleged November 29, 1999, injury. In its answer, Northstar denied liability for a work injury but alleged that, if the employee had sustained an injury as claimed, such injury was minor and temporary.

Dr. Gary Wyard performed an independent medical examination on November 2, 2000, on behalf of Northstar. In his report of that same date, Dr. Wyard found that each of the employee's three work injuries significantly contributed to the employee's disability and need for restrictions.⁶ The employee filed an amended claim petition on November 29, 2000, naming Northstar, Lakes Gas, and Wholesale as parties to the action. Lake Gas answered, admitting an injury on June 21, 1999, exclusively to the neck and left shoulder, in the form of a temporary

² According to Lakes Gas's answer to claim petition filed on December 27, 2000.

³ The employee, in his memorandum in support of the petition to vacate, contends that the June 21, 1999, injury was "largely to [the employee's] low and mid back." That contention is in contradiction to Lakes Gas's admission that the June 1999 injury "was exclusively a neck and left shoulder aggravation of a temporary nature" and Dr. Wyard's history of that injury.

⁴ No payment records are in the file.

⁵ According to their subsequent answer to claim petition filed February 28, 2000.

⁶ Dr. Wyard also stated that he agreed with the employee that he was misdiagnosed after the 1996 work injury and that he has actually had a neck problem all along.

aggravation that had fully resolved. Wholesale admitted a work injury on May 1, 1996, to the left shoulder only, and alleged that only medical claims remained open under the prior stipulations for settlement. On April 12, 2000, the employee apparently underwent neck surgery in the form of an anterior cervical discectomy and fusion at C5-6.

The employee petitions this court to vacate the stipulations for settlement and awards on stipulation, alleging a substantial change in condition and a mutual mistake of fact. Wholesale objects to the petition.

DECISION

Wholesale contends there is no need to vacate the stipulations for settlement because the employee's claims remain open with regard to both of the 1999 injuries. In support of their position to this effect, Wholesale cites the case of Kinnunen v. Brockway Glass, No. [REDACTED SSN] (W.C.C.A. Jan. 27, 2000). We agree.

In Kinnunen, this court held that, if an employee has closed out claims against one employer and 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.⁷ The pertinent facts of the instant case are consistent with those present in Kinnunen. The employee attached to his petition to vacate the report of Dr. Wyard, which appears to support his claim that he sustained injuries on June 21, 1999, and November 29, 1999, which substantially contribute to his current disability.⁸ If the employee successfully establishes that the June 21, 1999, and/or the November 29, 1999, work injuries are substantial contributing causes of his current disability, he will be entitled to full recovery from Lakes Gas and/or Northstar, with the possible exception of some apportioned share of medical expenses and perhaps permanent partial disability from Wholesale. Under these circumstances, vacating the settlements with Wholesale would be unnecessary.

If the employee is unable to establish that he sustained work-related injuries on June 21, 1999, and/or November 29, 1999, or if it is determined that neither of those injuries substantially contribute to the employee's current disability, the employee may file a new petition

⁷ Citing Johnson v. Tech Group, Inc., 491 N.W.2d 287, 47 W.C.D. 367 (Minn. 1992), 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.”

⁸ The employee has not provided this court with any medical opinion indicating that the 1996 work injury is solely responsible for the employee's disability, restrictions, or need for medical treatment.

to vacate. We therefore dismiss the employee's petition to vacate the stipulation for settlement as premature, without prejudice.⁹

⁹ Accordingly, we make no determination as to the employee's claims of substantial change in condition and mutual mistake of fact.