TAMMY J. (OMLIE) BEHM, Employee/Petitioner, v. BEST WESTERN SKYWOOD INN and DODSON INS. GROUP/ADJUSTING SERVS. UNLIMITED, Employer-Insurer.

WORKERS' COMPENSATION COURT OF APPEALS
OCTOBER 27, 1998

HEADNOTES

VACATION OF AWARD - SUBSTANTIAL CHANGE IN CONDITION. Where the employee had an arguable change in diagnosis but only minor increased permanent partial disability; no unanticipated additional medical expenses, which were in any event still available under the settlement agreement; and no change in her ability to work; and where the medical reports submitted by the employee did not demonstrate a causal relationship between the work injury and the employee's current condition, the employee did not establish good cause to vacate the award on stipulation.

Petition to vacate award denied.

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

OPINION

DEBRA A. WILSON, Judge

The employee petitions to vacate an award on stipulation filed on January 17, 1995, on the basis of a substantial change in the employee's medical condition. Finding inadequate basis to vacate the stipulation, we deny the petition.

BACKGROUND

The employee sustained a work-related injury to her low back on June 18, 1989, while working for Best Western Skywood Inn [the employer]. As a result of her low back injury, the employee had nine surgeries to her back, including a three-level lumbar fusion. The employer and insurer accepted liability for the injury, and by December of 1994 they had paid $55,109.56 in temporary total disability benefits, $968.49 in temporary partial disability benefits, $2,639.25 in permanent partial disability benefits, and $185,916.19 in medical and hospital expenses.

On March 21, 1994, the employee filed a claim petition seeking permanent partial disability benefits for a 31% whole body impairment. The employee later amended that claim petition to include claims for permanent total disability benefits and a treadmill prescribed by the employee's treating doctor.

The parties entered into a stipulation for settlement in late December of 1994. At that time, the employee was contending in part that she continued to require additional medical treatment and that she may need additional surgery in the future, that she had not reached maximum medical improvement from her work injury, that she was permanently totally disabled, and that she had sustained at least a 31% permanent partial disability to the body as a whole. The employer and insurer disputed many of the employee's contentions. The stipulation provided that the employee would be paid a lump sum of $120,000 for a full, final, and complete settlement of all claims, past, present and future, with the exception of claims for medical treatment. The parties also stipulated that the employee had been permanently totally disabled commencing June 18, 1989. An award on stipulation was filed on January 17, 1995.

Apparently the employee had additional surgery on July 24, 1995, in the form of a right sacroiliac fusion. On January 6, 1997, the employee was operated on again for removal of instrumentation and exploration of the fusion with decompression of the right L5-S1 nerves. On July 22, 1998, the employee filed a petition to vacate the January 17, 1995, award on stipulation, alleging that there had been a substantial change in her medical condition. In an affidavit attached to the petition, the employee's attorney alleges that the April 29, 1998, report of Dr. James Ogilvie establishes that the employee's condition has substantially worsened and that the employee has additional permanent partial disability as a result of new conditions that did not exist at the time of the settlement at issue. The employer and insurer objected to the petition.

DECISION

The Workers' Compensation Court of Appeals may vacate an award for cause. For awards filed on or after July 1, 1992, Minn. Stat. § 176.461 limits cause to:

1) a mutual mistake of fact;
2) newly discovered evidence;
3) fraud; or
4) a substantial change in medical condition since the time of the award that was clearly not anticipated and could not reasonably have been anticipated at the time of the award.

A number of factors may be considered in determining whether an award should be vacated based on a substantial change in condition, 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/nursing services than initially anticipated, and a causal relationship between the injury covered by the settlement and the employee's current worsened condition. Fodness v. Standard Cafe, 41 W.C.D. 1054 (W.C.C.A. 1989).

The employee contends that there has been a change in her diagnosis, in that sacroiliac dysfunction, arachnoiditis, and reflex sympathetic dystrophy [RSD] are new and unexpected results of her work injury. The employer and insurer respond that arachnoiditis and RSD had been diagnosed prior to the award on stipulation. We have reviewed the medical records

attached to the employer and insurer's objection to the petition to vacate and agree that those diagnoses had been made prior to January of 1995. We note, however, that none of the medical records in the division file predating January of 1995 contain any diagnosis of sacroiliac dysfunction. Therefore, it appears that sacroiliac dysfunction is a new diagnosis.

Secondly, the employee contends that there has been a change in her ability to work, even though she was unemployed at the time of the stipulation for settlement. We are not convinced. The employee was not working at the time of the stipulation for settlement and she is apparently not working now. The parties stipulated in the settlement agreement that the employee was permanently totally disabled, and that has not changed.

The employee also contends that she has sustained additional permanent partial disability, specifically, an additional 1.5% permanency over and above that rated at the time of the award on stipulation. However, under the circumstances of this case, the minor increase in the employee's permanency rating does not demonstrate any substantial change in the employee's condition. VanVickle v. Action Moving Services, No. *[redacted to remove social security number]* (W.C.C.A. Jan. 2, 1997); Villiard v. Jeno's, Inc., No. *[redacted to remove social security number]* (W.C.C.A. July 14, 1997).

It is also the employee's contention that she has undergone two unanticipated additional surgeries since January of 1995. At oral argument, counsel for the employee argued that the employee did not anticipate the number of surgeries, how quickly after the settlement those surgeries would be needed, the extent of the surgeries, or the extent of her disability thereafter. Counsel further contended that the employee is now unable to ambulate. However, while the surgeries occurred, we are not persuaded that they were unanticipated. In the stipulation for settlement, the employee asserted that she continues to require additional medical treatment, and that she may need additional surgery in the future. We find no particular relevance in the timing of the surgeries here. In addition, it appears that the employer and insurer have paid for the employee's additional surgeries, as medical expenses were left open in the 1995 stipulation for settlement.[1] Less emphasis is placed on the necessity of more costly and extensive medical care when medical expenses remain available under a settlement agreement. Burke v. F & M Asphalt, 54 W.C.D. 363 (W.C.C.A. 1996). With regard to the employee's claim of an inability to ambulate, we note that no medical records were furnished to this court to support this allegation.

Lastly, citing two medical reports of Dr. James Ogilvie, the employee contends that her current diagnoses and need for medical treatment are causally related to her work injury. However, we find no causation opinion in either of those reports.[2]

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[1] The parties filed a stipulation for settlement on April 3, 1998, which settled all claims for medical expenses through October 15, 1997. An award on stipulation was filed on April 7, 1998.

[2] At oral argument, counsel for the employer and insurer indicated that they have admitted liability for the employee's sacroiliac dysfunction but deny liability for the arachnoiditis and RSD.

After reviewing the factors to be considered in determining whether there has been a substantial change in the employee's medical condition, we find that the employee has not established good cause to vacate, and we therefore deny the employee's petition.