

DOROTHY HOSHAL-HYVONEN, Employee/Petitioner, v. BOVEY MOOSE LODGE and FIREMAN'S FUND INS. CO., Employer-Insurer, and SPECIAL COMP. FUND.

WORKERS' COMPENSATION COURT OF APPEALS
JANUARY 19, 1999

No. [REDACTED SSN]

HEADNOTES

VACATION OF AWARD - SUBSTANTIAL CHANGE IN CONDITION. Where there was no evident change in the employee's ability and work and no medical or other evidentiary basis for comparing her current symptoms and ability to function with her symptoms and ability to function at the time of her settlement, and where the employee's surgical expenses had been paid by the employer and insurer, good cause was not shown to vacate the award on stipulation on grounds of substantial change in condition, notwithstanding the fact that the employee's post-settlement surgery had resulted in a new diagnosis and an increase in ratable permanency.

Petition to vacate award denied.

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 April 8, 1994, on grounds that her medical condition has substantially changed since the issuance of the award and that the change was clearly not anticipated and could not reasonably have been anticipated at the time of the award. We deny the petition.

BACKGROUND

On January 20, 1990, Dorothy Hoshal-Hyvonen, the employee, sustained a work-related injury to her low back while working for Bovey Moose Lodge #1061 [the employer]. On that date, the employee was fifty-one years of age. The injury occurred when she bent over to pick up a case of beer and "something just felt like it snapped." The employer and its workers' compensation insurer, Fireman's Fund Insurance Company, acknowledged liability for the injury and commenced payment of workers' compensation benefits.¹

¹ The employee received 99 weeks of temporary total disability benefits from January 22, 1990, through December 15, 1991, and 25.2 weeks of economic recovery compensation for a 4.2% whole body impairment, as well as medical benefits and rehabilitation services.

The employee's medical records reflect a long history of low back problems predating the injury of January 20, 1990. The records of the Itasca Clinic and Itasca Memorial Hospital indicate that the employee was hospitalized on at least five occasions for treatment of her back prior to undergoing a laminectomy and disc removal at the L4-5 level on March 22, 1977.² The surgery was performed by Dr. Robert F. Donley of the Duluth Clinic, Ltd. Following her surgery, the employee apparently got along fairly well until approximately September of 1985, when she began to develop low back pain and pain radiating down her left leg. She again returned to the Itasca Clinic, where she was referred to physical therapy for traction and other conservative modalities in January of 1986.

The medical records submitted reflect no additional treatment for the low back until following her injury of January 20, 1990, when the employee once again came under the care of Dr. Donley. An MRI scan of the spine was performed on January 31, 1990. According to Dr. Donley's office note of December 4, 1990, the scan demonstrated a small central disc herniation at L3 and degenerative disc disease from L3 through L5. A subsequent MRI, in December 1990, evidently showed improvement at the L3-4 level.³

On July 17, 1991, the employee was examined by Dr. Jay Davenport at the request of the insurer. Dr. Davenport concluded that the employee had severe degenerative disc disease from L4 through S1, with large posterior osteoarthritic spurs. He felt that it was highly unlikely that she would be employable on any sustained basis, and he rated her permanent partial disability at 10.5%, referable to the lumbar spine. He further indicated that "[c]ertainly her degenerative disc disease and hypertrophic arthritic changes of her back are going to worsen with time and I think that realistically she in her present state of weight is not employable."

On February 8, 1993, the employer and insurer arranged for an employability evaluation with employment specialist Jan Lowe. In a report dated April 14, 1993, Ms. Lowe recounted that the employee "does not believe she is able to work because of her physical condition." A Functional Capacities Evaluation [FCE] performed at the Bemidji Hospital in July of 1992 released the employee to work three hours a day as long as she alternated body positions. Ms. Lowe concluded that, although an anticipated rehabilitation program could be somewhat lengthy and intensive, the employee was not permanently and totally disabled.

On November 30, 1993, the insurer arranged for a second independent medical

² The employee was hospitalized at the Itasca Memorial Hospital from March 10 to March 15, 1973; from November 14 to November 21, 1973; from June 5 to June 12, 1974; and from August 5 to August 10, 1975. The employee was also seen in Duluth by Dr. Al Nisswandt, who did a myelogram between her hospitalizations in November 1973 and June 1974.

³ The actual reports of the two MRI scans performed in 1990 were not part of the record for review.

examination of the employee, this time with Dr. Michael Davis. Dr. Davis diagnosed a postoperative herniated disc with laminectomy at the L4-5 level, together with degenerative disc disease at the lower three levels of the lumbar spine. He concluded that the employee's prognosis for improvement was "relatively poor," although she was capable of working full time as long as she avoided activities "requiring repetitive bending, a great deal of twisting, and lifting more than 20 pounds."

The employee's attorney referred her for a vocational evaluation by vocational consultant Douglas W. Brown on January 11, 1994. In a report dated January 17, 1994, Mr. Brown stated that, "[c]onsidering all factors, such as age, educational background, lack of retraining or reeducation potential, lack of independently vocationally relevant transferrable skills, exertional and non-exertional limitations, I feel a reasonable degree of vocational certainty exists that Ms. Hoshal is not capable of engaging in substantial gainful employment and is not employable at this time." At her evaluation, the employee advised Mr. Brown that she had constant pain in her low back, with periodic right leg pain. She told him that she was limited in almost all areas of daily living and that she had difficulty sleeping in a bed and had slept in a recliner for the past two years. She stated that anything she attempted to do increased her pain. She further advised Mr. Brown that she could not return to her previous occupational areas and did not feel that she was employable. She had not been employed since her injury on January 20, 1990.

The employee filed a series of claim petitions, culminating in a Second Amended Claim Petition filed on November 17, 1992. In that petition, the employee claimed permanent total disability benefits continuing from January 20, 1990, based upon the vocational assessment of Mr. Brown, together with a 10.5% whole body permanent partial disability based upon the rating by Dr. Donley.

The employer and insurer disputed the employee's contention that she was permanently and totally disabled. The parties entered into a stipulation for settlement on a full, final and complete basis, with the exception of "non-chiropractic medical treatment," for the sum of \$36,000. In the stipulation, the employer and insurer contended that the employee was capable of sustained gainful employment but had failed to make a reasonably diligent effort to obtain such employment. In support of their contentions, the employer and insurer relied upon the reports of Dr. Michael Davis, Dr. Sheldon Segal, Jan Lowe, and QRC Dan Fern. An award on this stipulation was issued on April 8, 1994.⁴

Subsequent to the issuance of the award, the employee was referred to Dr. John G. Stark for a surgical consultation. Dr. Stark requested an updated MRI scan, which was performed on June 19, 1995. When Dr. Stark examined her on July 12, 1995, the employee complained of continuing back and leg pain. Dr. Stark diagnosed contiguous degenerative changes at three

⁴ The Special Compensation Fund, acknowledging future liability for supplementary benefits, agreed to reimburse the insurer \$8,640 of the sum paid to the employee.

vertebral levels and concluded that a two-level spinal fusion would be appropriate. The employee sought a second opinion with Dr. Richard Salib of the Institute for Low Back Care, on September 7, 1995. The employee complained to Dr. Salib of constant pain in her low back, with periodic right leg pain. Dr. Salib was of the opinion that the employee suffered from multi-level degenerative disc disease spanning three levels, with lateral spinal stenosis, noting that she was also postoperative from a previous laminectomy at L4-5. Dr. Salib recommended a three-level anterior posterior fusion of the lumbar spine, and this surgery was performed on November 2, 1995. Due to pseudoarthrosis of L3-4, L4-5, and L5-S1 and a loosening of the fixation device, the employee underwent repair surgery on June 25, 1996, with implantation of a bone growth stimulator.

On November 19, 1996, the employee was seen for a third independent medical evaluation, this time by Dr. John Dowdle. Dr. Dowdle noted that the employee had undergone a three-level fusion for significant mechanical pain with degenerative changes in the low back. He opined that the injury of January 20, 1990, was a substantial contributing factor in the need for surgery. Based upon Dr. Dowdle's opinion, the employer and insurer assumed liability for the reasonable and necessary medical expenses relating to the surgeries.

The employee petitions this court to vacate her April 8, 1994, Award on Stipulation, contending that her condition has substantially changed since its issuance. The employer and insurer object to the petition.

DECISION

For this court to grant a petition to vacate, the moving party must show good cause. Stewart v. Rahr Malting Co., 435 N.W.2d 538, 539, 41 W.C.D. 648, 649 (Minn. 1989). The employee claims good cause to vacate the award on stipulation based on a substantial change in her medical condition that was clearly not anticipated and could not reasonably have been anticipated at the time of the award. See Minn. Stat. § 176.461 (1994). In considering petitions based on a change in medical condition, we must compare the employee's *condition* at the time of the petition with the employee's *condition* at the time of settlement. See, e.g., Franke v. Fabcon, Inc., 509 N.W.2d 373, 377, 49 W.C.D. 520, 525 (Minn. 1993). This court has delineated a number of factors that may be considered in determining whether a substantial change in medical condition has occurred. These factors include the following: a change in diagnosis, a change in the employee's ability to work, an increase in permanent partial disability, the necessity of more costly and extensive medical care or nursing services than was initially anticipated, the causal relationship between the injury covered by the settlement and the employee's current worsened condition, and the contemplation of the parties at the time of settlement. Fodness v. Standard Cafe, 41 W.C.D. 1054 (W.C.C.A. 1989). Although this is a close case, we are not persuaded that the employee has proven a substantial change in her medical condition.

Regarding the factor of change in diagnosis, the employee contends that at the time of settlement she had suffered an injury to only the L3-4 level of her spine and that there was no indication at that time that two additional levels of her spine would later become involved. She

also argues that the MRI scans performed prior to the signing of the 1994 stipulation revealed none of the major “injuries” found on the subsequent MRI. We do not believe that the employee’s contentions are supported by the medical evidence. However, we do agree that there has been a change in diagnosis attributable to the employee’s surgeries.

It is very clear that at the time of settlement the medical evidence supported the diagnosis of multi-level degenerative disc disease. The employee complained of chronic low back pain and periodic right leg pain. She was claiming a 10.5% whole body permanent partial disability based upon Minn. R. 5223.0070, subp. 1A(3)(b), and the medical report of Dr. Robert F. Donley, dated May 1, 1992. The IME doctors, Dr. Jay Davenport on July 17, 1991, and Dr. Michael Davis on November 30, 1993, concurred with that diagnosis. Subsequent to the settlement agreement, the employee continued to experience chronic low back pain and intermittent leg pain as a result of her degenerative disc disease. At the time of surgery, Dr. Salib’s diagnosis was three-level degenerative disc disease post previous laminectomy at L4-5, with intermittent right leg pain of uncertain etiology. This was essentially the same as the employee’s diagnosis at the time of settlement. The employee’s contention that additional “injuries” were revealed on an MRI study that was performed after the settlement is not supported by the evidence. As we indicated earlier in a footnote, the actual reports of the scans performed in 1990 were not offered into the record. It is impossible for this court to compare the findings reported in 1990 with the alleged changes in 1995. Nor, more importantly, has the employee submitted any medical opinions relative to these alleged differences and their clinical significance in this case.

Based upon the IME report of Dr. John Dowdle, dated November 19, 1996, which is the most current medical report submitted by the employee, the employee’s current diagnosis is 1) status post fusion, anterior and posterior L3-4, L4-5, L5-S1, and 2) slight bilateral S1 joint inflammation. While we acknowledge that this diagnosis does represent a change in medical diagnosis since the time of settlement, we believe that this change is not so much the result of any worsening in the employee’s condition as it is the simple result of surgical procedures employed to treat the condition in its due course.

The stipulation for settlement noted that the parties had reached an agreement for amicable settlement of “their differences.” One of their differences centered around the employee’s ability to work. The employee contended that she was permanently and totally disabled from sustained gainful employment. The employee’s FCE, her lack of success in job search, and the expert opinion of Douglas Brown constituted substantial evidence to support her contentions. Moreover, all of the physicians who examined the employee up to the date of settlement believed that she had significant limitations in her ability to engage in any form of employment. As early as July 17, 1991, Dr. Davenport reported that the employee was not employable. Further, he felt that her degenerative disc disease and the hypertrophic arthritic changes in her back were going to worsen with time. It was the employee’s specific contention at the time of settlement that her physical condition, coupled with her age, her training, her

experience, and the type of work available to her rendered her permanently and totally disabled.⁵ Subsequent to the settlement, but prior to the employee's surgeries, the employee's treating physician, Dr. Jack Carlisle, also opined that the employee was not employable.⁶ Although the employer and insurer contended at the time of settlement that the employee was not totally disabled from working, it is now clear that, at least up through the end of the current record, the employee has still not returned to work in the nine years since the date of her work injury. Even if we were to accept the position that the employee is employable after all, the restrictions placed on the employee by Dr. Dowdle in November of 1996 are essentially the same as those recommended by Dr. Davis in his report of November 30, 1993. We fail to see any evidence of a significant change in the employee's ability to work since the Award on Stipulation.

At the time of settlement, the employee clearly had a level of permanent partial disability attributable to only her degenerative disc disease and previous laminectomy. There can be no dispute that she would now be entitled to some additional permanency as a consequence of her three-level fusion. According to the stipulation, the employer and insurer had paid the employee benefits for a 4.2% permanent partial disability prior to the stipulation. The employee contends that as a result of her most recent surgeries she has suffered an additional 27.5% whole body impairment, pursuant to Minn. R. 5223.0070, subp. 1D, which rates disability for fusion of three levels of the lumbar spine. She contends that this is a considerable and unanticipated change in her medical condition. We agree that there has been a change in the employee's ratable permanent partial disability subsequent to the stipulation as a result of her surgeries, but we are not persuaded that that change is here dispositive, in that the employee has not offered any medical evidence of a change in her ability to function consequent to that change.

There is no question that the employee has undergone some very costly and extensive medical treatment since the date of settlement. However, where a stipulation for settlement leaves future medical expenses open and the employer and insurer have paid such expenses, the factor of increased necessity of medical care carries less weight in determining whether a substantial change in condition has occurred since the settlement. Burke v. F-M Asphalt, 54 W.C.D. 363, 368 (W.C.C.A. 1996).

Ongoing causation is an essential factor under Fodness. We concur with the employer and insurer that the employee's current problems represent primarily an ongoing manifestation of the multi-level degenerative disc disease that was already present at the time the employee entered into the settlement.

We acknowledge that this is a close case, particularly in light of the nature of the surgeries undergone by the employee and the consequent increase in permanency. However, we cannot necessarily conclude, simply by virtue of the surgeries, that there has been a substantial

⁵ See the vocational evaluation report of Douglas W. Brown dated January 17, 1994.

⁶ See the letter of Dr. Jack Carlisle dated August 24, 1995.

deterioration of the employee's condition since the award. It may be assumed that the employee anticipated some improvement in her chronic low back pain when she agreed to have the post-settlement surgery. The petition to vacate filed May 18, 1998, contains no current medical information. The last office note from Dr. Salib is dated November 22, 1996, and the last narrative summary is the November 19, 1996, IME report of Dr. Dowdle. We have no way of comparing the employee's *condition at the time of the petition to vacate* - - i.e., following full recovery and benefit from the post-settlement surgery - - with her *condition* at the time of the award. This fact, coupled with the absence of any substantial change in the employee's ability to work, and the payment of her medical expenses by the employer and insurer, leads us to conclude that the employee has not established good cause to vacate the award.