

MARY A. RUSSELL, Employee/Petitioner, v. CARLSON MUSIC CTR. and CITIZENS SEC. GRP./CLAIM SOLUTIONS, INC., Employer-Insurer.

WORKERS' COMPENSATION COURT OF APPEALS
SEPTEMBER 17, 1999

No. [REDACTED SSN]

HEADNOTES

VACATION OF AWARD - SUBSTANTIAL CHANGE IN CONDITION. The employee adequately established an unanticipated change in her medical condition, under the factors contained in Fodness v. Standard Cafe, 41 W.C.D. 1054 (W.C.C.A. 1989), to establish good cause to vacate the award on stipulation.

Petition to vacate award on stipulation granted.

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 August 28, 1996. Finding there has been a substantial unanticipated change in the employee's condition, we grant the petition.

BACKGROUND

The employee sustained a Gillette-type injury¹ to her upper extremities, and upper back and neck area, as a result of her work for Carlson Music Center [the employer] from January 1, 1994, to July 24, 1995. She initially treated with Darren R. Tollefson, D.C., who diagnosed "subacute recurrent multilevel cervical subluxation complex with attendant tendinitis . . ." The employee was off work for approximately six weeks, returning to work with the employer in early September of 1995, at four hours per day. The employee also, apparently, worked additional hours through employment with Manpower. On October 23, 1995, Dr. Tollefson opined that the employee had reached maximum medical improvement [MMI] and rated the employee as having a 3.5% whole body disability for a healed sprain/strain of the cervical spine. Her employment with the employer terminated at the end of October 1995, but the employee continued to work for Manpower.

¹ Gillette v. Harold, Inc., 257 Minn. 313, 101 N.W.2d 200, 21 W.C.D. 105 (1960).

On November 27, 1995, the employee filed a claim petition seeking temporary partial disability benefits, medical expenses, and rehabilitation services. On May 30, 1996, the employee's deposition was taken. At that time, she testified that she was looking for full time work but was working only part time because of health concerns regarding her husband. She also testified that the symptoms she had had while working at the employer had "been significantly alleviated as long as I'm careful."

In August of 1996, the parties entered into a stipulation for settlement. At the time of the stipulation, the employee was claiming intermittent temporary total disability benefits from July 13, 1995, to December 27, 1995; intermittent temporary partial disability benefits thereafter; and 26 weeks of economic recovery compensation pursuant to Minn. Stat. § 176.101, subd. 3t(b). It was the employer and insurer's position that the employee had not been temporarily totally or temporarily partially disabled and that the employee was not entitled to benefits under subdivision 3t(b). Under the terms of the stipulation, the employee was paid \$12,250 for a full, final, and complete settlement of her claims, with the exception of future medical expenses. An award on stipulation was filed on August 28, 1996.

The employee continued to treat with Dr. Tollefson, who eventually referred her to Dr. Steven Noran. When Dr. Noran first examined her on September 2, 1997, the employee gave a history of ongoing neck, shoulder, and arm problems since 1995. At that time, her primary complaint was "ongoing neck pain, left greater than right, into the shoulder and down into the arm." Dr. Noran recommended restrictions "which probably will preclude [the employee from] working for at least three months" An MRI of the employee's left shoulder performed on September 6, 1997, revealed a full thickness tear of the supraspinatous tendon. An MRI of the cervical spine taken on that same date revealed diffuse spondylosis with degenerative changes and mild posterior marginal spurring at C6-7, moderate stenosis to the left and right of the C6-7 neural foramina, and moderate stenosis to the right of the C4-5 and the left of the C3-4 neural foramina.

The employee was referred to Dr. Paul Dale, an orthopedist, who examined the employee on September 24, 1997, and opined that the majority of the employee's shoulder and arm discomfort was secondary to her full thickness rotator cuff tear. He ordered an EMG to ascertain whether cervical neurocompression was contributing to her pain. When the employee was seen in follow-up on October 9, 1997, Dr. Dale noted that, although there was no evidence of a left radiculopathy, there was some evidence of a right C5 or possibly C6 cervical radiculopathy. The employee underwent rotator cuff repair surgery on December 15, 1997. In a brief report dated January 8, 1998, Dr. Dale stated that at the time of surgery "it was noted that her rotator cuff tear appeared chronic in nature likely being possibly a year or two old or older."

The employee filed a Medical Request on December 4, 1997. In an Order on Medical Request filed February 11, 1998, a settlement judge found that the 1995 Gillette injury was a substantial contributing cause of the employee's need for the rotator cuff surgery and the employee's treatment with Dr. Noran and Dr. Dale. The employer and insurer did not appeal from this decision.

On July 29, 1998, Dr. Noran restricted the employee from using her arms and neck on any repetitive basis and from lifting more than five pounds. Dr. Noran also rated the employee as having a 10% whole body impairment related to her neck condition and deferred to Dr. Dale for a rating on the employee's left arm. Dr. Dale restricted the employee to sedentary work with no extended periods of upper extremity use "even at the sedentary level," and on March 2, 1999, he rated the employee as having a 17% whole body impairment pertaining to the left shoulder.

The employee petitions this court to set aside the award on stipulation on grounds of mutual mistake of fact and a substantial change in medical condition.

DECISION

The employee petitions to set aside the 1996 award on stipulation based on a mutual mistake of fact and/or a substantial change in medical condition that was clearly not anticipated and could not reasonably have been anticipated at the time of the award. We are convinced that the employee has established sufficient evidence of a substantial change in medical condition to warrant vacation of the award on stipulation.

Fodness v. Standard Cafe, 41 W.C.D. 1054 (W.C.C.A. 1989), sets forth factors that may be relevant in determining whether there has been a substantial change in condition. Those factors include:

- 1) a change in diagnosis;
- 2) a change in the employee's ability to work;
- 3) additional permanent partial disability;
- 4) the need for more costly and extensive medical care than initially anticipated; and
- 5) whether a causal relationship exists between the injury covered by the settlement and the currently worsened condition.

Id. at 1060-1061.

There appears to be a change in the employee's diagnosis. The diagnosis at the time of the stipulation for settlement was "multilevel cervical subluxation," but, in 1997, for the first time, the employee was diagnosed as having a left rotator cuff tear.

The employee contends that there has also been a change in her ability to work, in that she was working full time at the time of the award on stipulation but is only able to work one hour a day, five days per week at present. However, no evidence was attached to the application to establish that the employee was working full time at the time of the award. We note that the last medical report outlining restrictions, before the stipulation for settlement, was Dr. Tollefson's letter of November 1, 1995, wherein he restricted the employee to lifting less than fifteen pounds on an occasional basis, a maximum of two hours per day of continuous repetitive activity with use

of the upper extremity, hand, and neck, and “diversification of standing, sitting and walking.” That letter was written after the employee reached MMI. The employee’s restrictions after her rotator cuff surgery are found in the records of Dr. Noran and Dr. Dale. On July 28, 1998, Dr. Noran restricted the employee to no lifting over five pounds and no repetitive use of the arms and neck. We assume that that restriction is related to the employee’s neck condition. Dr. Dale, who has treated the employee’s left shoulder, has restricted the employee to sedentary work, with no extended periods of upper extremity use even at the sedentary level. Therefore, while there is no medical support for the allegation that the employee is only able to work one hour per day, five days per week, the evidence adequately indicates that there has been a change in the employee’s ability to work.

The employee also contends that there has been an increase in her permanent partial disability. The medical records attached to the application support this allegation. The employee was rated as having a 3.5% whole body impairment at the time of the award on stipulation, but she has now been rated as having a 10% whole body impairment related to her neck condition and a 17% whole body impairment related to her left upper extremity.

There is also support in the medical records for the employee’s contention that she has required more costly and extensive medical care than was anticipated at the time of the award on stipulation. At the time of the award on stipulation, the employee was receiving chiropractic care only, but, since then, she has undergone surgery. There is nothing in the chiropractic records preceding the stipulation for settlement to suggest that it was ever anticipated that the employee would require surgery in the future. However, where medical expenses have not been closed out by the award, we put less emphasis on the need for additional treatment. Burke v. F & M Asphalt, 54 W.C.D. 363 (W.C.C.A. 1996).

Finally, the employee correctly notes that an unappealed order of a settlement judge found a causal relationship between the employee’s 1995 Gillette injury and her need for medical care for her neck and shoulders, including rotator cuff surgery. Dr. Noran and Dr. Dale relate the employee’s condition, in 1997, to her work activities with the employer. Therefore, the causal connection between the employee’s neck and shoulder conditions and her work injury has been adequately established.²

Because the employee has adequately demonstrated a change in diagnosis, a change in ability to work, additional permanent partial disability, the need for more extensive medical care than initially anticipated, and a relationship between her work injury and her current condition, we find cause to vacate the 1996 award on stipulation.³ However, nothing in this decision should be

² Social Security records attached to the employee’s petition suggest that the employee suffers from other conditions that may impact her disability, specifically fibromyalgia, carpal tunnel syndrome, a sleep disorder, and depression. There has never been an adjudication that any of these conditions are causally related to the work injury.

³ Our conclusion on this issue renders the employee’s argument as to mutual mistake of

construed as an opinion as to the employee's entitlement to benefits. The burden of proof in this regard remains with the employee.

fact moot.