MARILYN MOE, Employee/Petitioner, v. TARGET STORES and TRAVELERS INS. CO., Employer-Insurer.

WORKERS' COMPENSATION COURT OF APPEALS
APRIL 10, 2001

No. [REDACTED SSN]

HEADNOTES

VACATION OF AWARD - SUBSTANTIAL CHANGE IN CONDITION. Although the case did not fit neatly under Fodness v. Standard Café, 41 W.C.D. 1054 (W.C.C.A. 1989), the employee established cause to vacate the award on stipulation to the extent it could be construed as limiting home health care services.

Petition to vacate award granted.

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

OPINION

DEBRA A. WILSON, Judge

The employee petitions to vacate an award on stipulation filed on December 18, 1996, on the basis of substantial change in condition. Finding sufficient cause to do so, we vacate the award to the extent that it appears to limit home health services.

BACKGROUND

The employee sustained a work-related injury to her low back on August 9, 1967, while working for Target Stores, Inc. [the employer]. The employer and its workers' compensation insurer accepted liability for the injury and have apparently paid total disability benefits since August 23, 1967.[1]

In March of 1996, the employee filed a medical request, seeking payment of services for a home health aide. The employer responded that the need for home health services was not related to the work injury.

The parties entered into a stipulation for settlement in December of 1996. The stipulation reflected that the employer had paid more than $500,000 in indemnity benefits to date as well as $177,039.19 in medical benefits. At that time, the employee contended that she was entitled to twelve hours per week of home health services and reimbursement of $7,000 in out-of-pocket expenses for home health services rendered. The employer and insurer alleged that the

[1] This information appears in annual claims for reimbursement of supplementary benefit forms contained in the file.

home health services rendered had been unreasonable, unnecessary, and excessive and that the employee was entitled to no more than six hours of home health services per week. Under the terms of the settlement, the employer and insurer agreed to pay the employee $6,201.75 for out-of-pocket home health expenses and further agreed that as of November 1, 1996, the employee would receive nine hours of home health services per week "from May 1 to October 31 each year" and twelve hours per week "from November 1 to April 30 each year." The parties also formalized their agreement that the employee had been permanently and totally disabled since August 10, 1967. The stipulation provided that "it is specifically understood and agreed that this settlement concerns permanent total status and past, present and future home health care only."

In May of 2000, the employee filed a medical request seeking , in part, fourteen hours of home health care **per day**.[2] The employer responded that it would not pay for more than nine hours of home health care **per day**. The matter proceeded to a pre-trial on September 5, 2000, and, in an order dated September 11, 2000, a compensation judge struck the case from the active trial calendar "until such time as the employee advises the Calendar Judge that she is prepared to go forward with a hearing on the merits." On December 21, 2000, the employee filed a petition to vacate the award on stipulation, based on a substantial change in condition. The employer and insurer did not respond to the petition.

DECISION

The employee petitions to vacate the award on stipulation based on substantial change in condition. Fodness v. Standard Café, 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, including:

I. a change in diagnosis;
II. a change in the employee's ability to work;
III. additional permanent partial disability;
IV. the need for more costly and extensive medical care than initially anticipated; and
V. 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 diagnosis. In his report of July 9, 1996, Dr. Bruce Van Dyne diagnosed chronic low back pain and failed back syndrome after six back surgeries. He noted that, on examination, the employee walked with a wide-based and unsteady gait and relied on a walker for support and balance. The notes of Dr. Kathleen Peter dated January 14, 2000, contain a diagnosis of "left lower extremity static equinus contracture, dynamic rectus spasticity,

[2] The employee also sought authorization for ankle surgery, which the employer denied. The 1996 award on stipulation specifically left claims for such medical expenses open.

[and] increased forefoot supination" and suggest that the employee has been wheelchair-bound since an additional surgery in 1998 .[3]

There has been no change in ability to work, and the employee did not provide this court with any definitive ratings of increased permanent partial disability. There appears, however, to be a need for more costly and extensive home health services than initially anticipated. The stipulation for settlement dealt with a dispute as to whether the employee needed six or twelve hours **per week** of home health services, and the employee's treating doctor, Dr. Louis Millman, now opines that the employee needs fourteen hours **per day** of home health services. Dr. Richard Hadley, an independent medical examiner, also states that nine hours of home health assistance **per day** is reasonable.

The employer and insurer appear to admit causation and do not appear to dispute the employee's right to make an additional claim for home health services.[4]

This is not the typical "substantial change in condition" case and does not fit neatly within the Fodness factors, but there has been a change in diagnosis, all doctors agree that the employee's need for home health services has increased significantly and the employer and insurer admit causation and do not appear to dispute the employee's right to bring an additional claim for home health services. Under these circumstances, we conclude that, to the extent that the December 18, 1996, award on stipulation could be construed as limiting claims for home health services, it should be vacated. However, only those provisions dealing with home health care services are vacated; the remainder of the stipulation remains in full force and effect.[5]

[3] The medical records attached to the petition to vacate are very limited. This court has also reviewed medical records attached to the stipulation for settlement, medical request, and response to medical request as contained in the judgment roll.

[4] As evidenced by their response to the employee's medical request, and the May 11, 2000, letter from Joanie Thorpe, claim representative, stating that the insurer will pay for nine hours of home health care **per day**. As stated above, the employer did not file a response to the petition to vacate.

[5] Specifically, the provisions dealing with permanent total disability.