VIRGINIA D. MOULDS, Employee/Petitioner, v. WCI FREEZER DIV./FRIGIDAIRE and CNA/GALLAGHER BASSETT SERVS., Employer-Insurer.

WORKERS' COMPENSATION COURT OF APPEALS
DECEMBER 10, 2001

No. [REDACTED SSN]

HEADNOTES

VACATION OF AWARD - SUBSTANTIAL CHANGE IN CONDITION. Because the employee had provided no clear evidence of a change in diagnosis or a change in her ability to work, because she had provided no medical opinion or other evidence to indicate that her need for right shoulder surgery could not have been anticipated, and because medical expenses had at any rate been left open under terms of the stipulation for settlement at issue, the court denied the employee's petition to vacate her award on settlement based on a substantial change in condition, even though there was medical evidence that her bilateral shoulder condition was causally related to her work injury.

VACATION OF AWARD - MISTAKE. Where the employer and insurer did not concede that they had misapprehended any fact material to their intended settlement, where the dispute on petition appeared to relate to the language of the stipulation at issue and not to any extrinsic fact, where it was clear from the stipulation that the parties intended to fully resolve all issues except claims for medical expenses, and where it was clear from the stipulation that claims for treatment other than treatment of the employee's left shoulder remained subject to the employer and insurer's defenses including a denial of primary liability, there was no basis for concluding that there had been any mutual mistake of fact such as would be grounds for granting the employee's petition to vacate her award on stipulation.

Petition to vacate award denied.

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

OPINION

WILLIAM R. PEDERSON, Judge

The employee petitions this court to set aside the Award on Stipulation served and filed August 16, 1994, on grounds that it was based on a mutual mistake of fact and that there has been a substantial change in her medical condition since the issuance of the award that was clearly not anticipated and could not reasonably have been anticipated at the time of the award. We deny the petition.

BACKGROUND

On March 13, 1992, Virginia Moulds [the employee] was employed as a spot welder by WCI Freezer Division/Frigidaire [the employer]. On that date, the employee was thirty-

five years of age. A First Report of Injury was completed on April 20, 1992, describing the employee's claimed injury as a sore right wrist from spot welding. The claimed date of injury was March 13, 1992, and Continental Loss Adjusting Services [the insurer] commenced payment of temporary total disability benefits to the employee effective April 27, 1992.[1]

The employee's diagnoses following her injury ranged from probable right-sided carpal tunnel syndrome and right lateral epicondylitis to severe cumulative trauma disorder. Following an MRI scan of both shoulders in March 1993, Dr. Steven Trobiani diagnosed impingement syndromes of both shoulders and referred the employee to orthopedist Dr. Paul Crowe. On March 23, 1993, Dr. Crowe diagnosed clinical impingement syndromes, left greater than right, and injected the employee with a steroid. On April 21, 1993, the employee reported to Dr. Crowe that the shoulder injection had not helped and that, as she had been experiencing symptoms for about a year, she wanted to consider surgical acromioplasty of her left shoulder.

On May 12, 1993, the employee was examined for the employer and insurer by orthopedist Dr. David Boxall. In a report on that date, Dr. Boxall opined that the employee exhibited no evidence of impingement syndrome of the shoulders and that her complaints were related to significant functional overlay. He concluded that the employee had reached maximum medical improvement, had no ratable permanent partial disability, and did not require further medical treatment, including surgery.

On August 17, 1993, the employee filed a medical request, seeking open left shoulder acromioplasty surgery as recommended by Dr. Crowe. By order issued September 29, 1993, the proposed left shoulder acromioplasty was approved, and the surgery was performed on December 14, 1993. In a report dated February 11, 1994, Dr. Crowe indicated that the employee continued to have significant neck pain and was still recovering from her surgery. He rated the employee's whole body impairment related to her left shoulder at 3%. He noted further that "[the employee] is not particularly susceptible to further re-injury of this, although we still don't know what type of results she is going to have. She may have restricted range of motion. . . . If she were to get a good result on the left, I think she could be considered for an acromioplasty procedure on the right."

The employee filed a Claim Petition on April 21, 1994, in which she claimed injuries to both wrists, arms and shoulders as a result of her work for the employer on March 13, 1992. She further claimed entitlement to compensation for the 3% permanent partial disability rated by Dr. Crowe. The employer and insurer responded by admitting liability for the employee's left shoulder condition but denying the nature and extent of the disability claimed.

[1] It is unclear from the record what the employee was paid in workers' compensation benefits following the injury of March 13, 1992. According to an NOID filed on August 30, 1993, the employee was paid temporary total disability benefits from April 27, 1992, through August 24, 1993. The employer and insurer's request to discontinue benefits at that time was denied at an administrative conference held under Minn. Stat. § 176.239, and the employee apparently continued to receive benefits through July 12, 1994.

The parties entered into a stipulation for settlement in July 1994. At that time, the employee was alleging that she had sustained injuries "to her left upper extremity, right upper extremity, left shoulder, right shoulder, and spine." It was the employer and insurer's position that the employee had not sustained any injuries on March 13, 1992. Under the terms of the stipulation, the employee was paid $7,815.00 in "full, final and complete settlement of all claims for workers' compensation benefits arising out of any and all alleged injuries occurring at Frigidaire on or about March 13, 1992," except claims for medical expenses. At Paragraph X. 8, the employer and insurer admitted primary liability for the employee's left shoulder condition. And in Paragraph X. 10, the employer and insurer agreed to "reimburse all reasonable and necessary medical expenses related to the left shoulder condition pursuant to the fee schedule." As to the claimed injuries other than the "left shoulder condition," the employer and insurer, in Paragraph X. 9, reserved "all their defenses to Employee's claim, including a denial of primary liability." An Award on Stipulation was served and filed on August 16, 1994.

On May 5, 1998, the employee was seen by family practitioner Dr. Jeri Vergeldt regarding complaints of chronic right shoulder pain. The employee advised Dr. Vergeldt that she had previously undergone left shoulder surgery, but that it did not resolve her pain and therefore she did not want to have surgery on her right shoulder. Dr. Vergeldt stated, "Now she wonders if she should see an orthopedist to see if they still recommend surgery." The employee was subsequently referred to orthopedist Dr. Thomas Kaiser, who diagnosed chronic impingement in both shoulders with adhesive capsulitis and some degenerative change of the AC joint in both shoulders. Dr. Kaiser obtained an MRI arthrogram of the right shoulder, which he interpreted as showing evidence of tendonitis of the supraspinatus tendon, indicating chronic impingement. He also felt there was probably a partial-thickness rotator cuff tear of the supraspinatus tendon anteriorly. On January 14, 1999, Dr. Kasiser recommended arthroscopy of the right shoulder.

On April 16, 1999, the employee filed a pro se Claim Petition seeking approval of the surgery proposed by Dr. Kaiser. The employer and insurer denied that the employee had sustained an injury to her right shoulder on March 13, 1992. In addition, they moved for dismissal of the claim on grounds that the statute of limitations barred recovery because the employee's petition was filed either more than six years after the date of the claimed injury or, in the alternative, more than three years following the stipulation for settlement and the Award on Stipulation of August 16, 1994.

On June 22, 1999, the employee underwent right shoulder arthroscopy for repair of a rotator cuff tear, anterior acromioplasty, distal clavicle excision, and "Bankart repair." This surgery was apparently more helpful than the previous left shoulder surgery.

The employer and insurer's motion to dismiss based on the statute of limitations was denied by Order dated November 5, 1999, and the statute of limitations issue was subsequently consolidated with the issues raised by the employee's April 1999 Claim Petition by Order served January 7, 2000.

The employee was examined for the employer and insurer by orthopedist Dr. William Call on March 6, 2000. Based on the history of the employee's work activities, Dr. Call concluded that the "claimed events of March 13, 1992, caused, aggravated, and

accelerated the right shoulder condition and ultimate need for surgery." The employee was also examined by orthopedist Dr. Duane Person on March 17, 2000. Dr. Person also concluded that the employee's work activities for the employer were significant in causing and aggravating the employee's bilateral shoulder conditions. He further indicated that the employee qualified for compensation for permanent partial disability of 21% of her whole body related to her right shoulder condition[2] and to permanent partial disability of 15% of her whole body related to her left shoulder condition.[3]

The employee's claim for medical expenses resulting from her right shoulder condition was evidently scheduled for a hearing before a compensation judge on September 13, 2000. Prior to trial, however, the parties agreed to continue the hearing to allow the employee to petition this court to set aside the 1994 Award on Stipulation. On May 31, 2001, the employee, through her attorney, petitioned to set aside the Award on Stipulation on grounds of a substantial change in her medical condition and a mutual mistake of fact. The employer and insurer filed an objection to the petition to vacate, alleging that the employee failed to satisfy the requirements of Minn. Stat. § 176.421, in that any alleged change in the employee's condition was not shown to be unanticipated and any mistake of fact was not shown to be mutual.[4]

DECISION

This court may set aside an award for "cause" pursuant to Minn. Stat. § 176.461 and Minn. Stat. § 176.521, subd. 3 (1994). For awards filed on or after July 1, 1992, "cause" is limited to the following: (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. Minn. Stat. § 176.461.[5] The employee here alleges that there has been a substantial change in her medical condition and a mutual mistake of fact.

Substantial Change in Medical Condition

In determining whether a substantial change in the employee's condition has occurred, this court in the past has examined such factors as the following: (1) changes in the employee's diagnosis; (2) changes in the employee's ability to work; (3) additional permanent

[2] Pursuant to Minn. R. 5223.0450, subp. 3A(2), and supb. 4A(1)(c), B(1)(c), and C(2)(b).

[3] Pursuant to Minn. R. 5223.0450, subp. 4A(1)(c), B(1)(c), and C(2)(b).

[4] In their Objection to Petition to Vacate, the employer and insurer also contended that the petition should be denied because the employee's claim for medical treatment expenses associated with her right shoulder condition is barred by Minn. Stat. § 176.151. We decline to address this issue in the context of the employee's petition to vacate the Award on Stipulation.

[5] This court's authority to vacate an award is governed by statutory provisions in effect at the time of the parties' settlement. Franke v. Fabcon, Inc., 509 N.W.2d 373, 49 W.C.D. 520 (Minn. 1993).

partial disability; (4) the necessity of more costly and extensive medical care than was initially anticipated; and (5) the existence of a causal relationship between the injury covered by the settlement and the currently worsened condition. Fodness v. Standard Café, 41 W.C.D. 1054, 1060-61 (W.C.C.A. 1989) (citations omitted). These factors must be applied in a manner consistent with Minn. Stat. § 176.461, which requires that the change in the employee's condition be one that was "clearly not anticipated and could not be reasonably anticipated at the time of the award." Powell v. Abbott-Northwestern Hosp., slip op. (W.C.C.A. Aug. 17, 1995); see also Soeffner v. McGuire's Motor Inn, 40 W.C.D. 21, 22 (W.C.C.A. 1987) (medical proof that condition was unanticipated is necessary to show substantial change in medical condition).

The employee does not contend in her brief, nor has she offered any specific medical opinion, that there has been any substantial change in her diagnosis between the time of the award and her petition to vacate. In fact, it is evident from the medical records that the employee has always had a primary diagnosis of bilateral impingement syndrome. This diagnosis was made by Dr. Crowe in 1993 and was the basis for his consideration for an acromioplasty procedure on the right shoulder in his report of February 11, 1994. While the employee's right shoulder surgery in 1999 may have been more extensive than that contemplated by Dr. Crowe in 1994, the employee has offered no medical opinion regarding any substantial change in her actual diagnosis or, if there has been a change, that it was unanticipated. Likewise, while there is suggestion by Dr. Kaiser that the employee's left shoulder condition is symptomatic and that additional surgery is being considered, there is no medical opinion that her current condition represents a change in diagnosis or, again, if there has been a change, that it was unanticipated.

The employee has not alleged any change in her ability to work. The medical records reflect that the employee was not working at the time of the settlement and has not returned to work since that time. Therefore, the employee has not established any change in her ability to work.

The employee has provided medical evidence of additional permanent partial disability. At the time of the Award on Stipulation, the only opinion regarding permanency was Dr. Crowe's rating of 3%. In his report of May 17, 2000, Dr. Person opines that the appropriate ratings are 21% of the body as a whole, relative to the employee's right shoulder, and 15% of the body as a whole, relative to the employee's left shoulder. While there is no question that the permanency ratings have increased, the employee has offered no medical opinion that the increases were "clearly not anticipated and could not be reasonably anticipated at the time of the award." In February of 1994, six months prior to the award here at issue, the employee was reported by Dr. Crowe to be still recovering from her left shoulder surgery, with the prognosis for her result still unknown and her range of motion prognosis specifically in question. Moreover, surgery was being considered for the right shoulder. The employee has presented no evidence that those questions were resolved prior to her award. We conclude the employee has not established that her additional permanency was unanticipated under the facts of this case.

The employee contends that she has incurred medical expenses not anticipated at the time of the stipulation, specifically those expenses associated with her right shoulder surgery. She also contends that she is faced with the prospect of additional surgery to the left shoulder. We cannot agree that the employee's right shoulder surgery was unanticipated at the time of the award.

Dr. Crowe specifically noted the possibility of an acromioplasty procedure on the right shoulder in his report of February 11, 1994. We acknowledge that a second surgery on the employee's left shoulder was not being considered at the time of settlement, but the surgery in question is still prospective at the present time and has not been scheduled. At any rate, where, as here, medical expenses are not closed out by the award, 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).

We acknowledge that the employee has provided medical evidence, including the opinion of Dr. Call, the examiner for the employer and insurer, that her bilateral shoulder condition is causally related to her work injury of March 13, 1992. However, because the employee has provided no clear evidence of a change in diagnosis or a change in her ability to work, because there is no medical opinion or other evidence to indicate that the employee's need for right shoulder surgery could not have been anticipated, and because medical expenses have at any rate been left open under the terms of the Stipulation for Settlement, we conclude that the employee has not made a sufficient showing to warrant vacation of the Award on Stipulation on grounds that she has experienced a substantial change in medical condition.

Mutual Mistake of Fact

The employee also asserts that, because she understood the Stipulation for Settlement to be leaving open medical expense claims, and because the employer and insurer now contend that such claims were foreclosed, there was an obvious misunderstanding between the parties at the time of settlement. She contends that this misunderstanding as to what was foreclosed and what was not constitutes a substantial and material mistake of fact. We disagree.

First of all, "A mutual mistake of fact occurs when opposing parties to the stipulation both misapprehend some fact material to their intended settlement of a claim or claims." Shelton v. Schwan's Sales Enter., 53 W.C.D. 110, 113 (W.C.C.A. 1995), *summarily aff'd* (Minn. Sept. 5, 1995) (emphasis added). In this case, the employer and insurer do not concede that they misapprehended any fact material to their intended settlement. The dispute here appears to relate to the language of the stipulation, not to any fact extrinsic to that language. It is clear from Paragraph X. 1 of the Stipulation that the parties intended to resolve their dispute on a full, final, and complete basis, except claims for medical expenses. It is also clear, from Paragraph X. 9 of the Stipulation, that claims for medical treatment other than claims for treatment of the employee's left shoulder condition remained subject to the employer and insurer's defenses, including a denial of primary liability. We find no ambiguity in this language and no basis to conclude that there has been a mutual mistake of fact. Therefore, the employee's petition to vacate the award based on a mutual mistake of fact is denied.

While the employee's condition may have deteriorated since the time of the award, we cannot say that the deterioration rises to the level of a substantial change that was not clearly anticipated and could not reasonably have been anticipated at the time of the Award on Stipulation. This court will not vacate an award on stipulation unless there is good cause to do so. The employee filed her April 1999 Claim Petition in an effort to obtain payment of medical expenses related to her right upper extremity. At the time of their Stipulation for Settlement, the parties

contemplated that such claims for medical treatment would remain open, subject to the defenses of the employer and insurer. Under the facts of this case, there is no need to vacate the Award on Stipulation in order to allow the employee to advance her claim.