ELIZABETH L. CONNELL-WANDRICK, Employee/Petitioner, v. GOLDEN AGE HEALTH CARE CTR. and LUMBERMEN'S UNDERWRITING ALL., Employer-Insurer.

WORKERS' COMPENSATION COURT OF APPEALS
JANUARY 2, 2001

No. [REDACTED SSN]

HEADNOTES

VACATION OF AWARD - SUBSTANTIAL CHANGE IN CONDITION. Because the employee adequately demonstrated a change in diagnosis, additional permanent partial disability, a change in her ability to work, and her need for extensive medical care, good cause existed to vacate the award on stipulation.

Petition to vacate granted.

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

OPINION

The employee petitions this court to set aside an award on stipulation served and filed on June 22, 1992, on grounds that her medical condition has substantially changed since the award was issued. Finding sufficient cause to vacate the award, we grant the employee's petition.

BACKGROUND

On December 4, 1990, Elizabeth Wandrick, formerly known as Elizabeth Connell, the employee, sustained a lumbar spine injury while employed as a certified nursing assistant for Golden Age Healthcare Center, the employer, which was insured for workers' compensation liability by Lumbermen's Underwriting Alliance, the insurer. On that date, the employee was thirty-three years of age and earned a weekly wage of $213.49. The employer and insurer initially denied primary liability, but after the employee filed a claim petition on March 15, 1991, the employer and insurer accepted liability for a lumbar spine injury, entered into a to-date settlement, and paid benefits pursuant to an August 29, 1991, award on stipulation. The parties did not agree to the extent of permanent partial disability. The employee filed a second claim petition; the parties thereafter entered into a full, final, and complete settlement which left open claims for future medical care for the lumbar spine. An award on stipulation was filed on June 22, 1992, and an amended award on stipulation was filed on July 8, 1992.

The employee first consulted Dr. John Dowdle on February 27, 1991, and reported low back and right leg symptoms originating with her injury on December 4, 1990. He recommended an MRI scan of the lumbar spine, which was performed on March 5, 1991, and which showed degenerative disc disease at the L5-S1 level with a full thickness central annular tear and considerable thickening and bulging of the posterior disc annulus, but no evidence of S1 nerve root compression. The MRI also showed spinal stenosis at L5-S1. (Ee. Ex. C.) As of

October 1991, the employee had received permanent restrictions from Dr. Dowdle including a limit on sitting, walking, or standing only six hours out of an eight hour day; bending, squatting, crawling, crouching, kneeling, balancing, pushing, and pulling on an occasional basis; lifting and carrying up to 10 pounds frequently and 24 pounds on an occasional basis. The employee continued to receive treatment from Dr. Dowdle. He recommended conservative care, and by January 10, 1992, released her to light-duty work.

In Dr. Dowdle's chart note of February 19, 1992, he stated: "She continues to have some mechanical symptoms. She is better with decreasing her hours. I have indicated that she does have a significant lesion of her lower back. She may, in fact, come to a fusion. She is not interested in proceeding with that now." (Ee. Ex. C.) On that date, Dr. Dowdle also released the employee to eight-hour work days with physical work restrictions. The employee continued to have prescriptions filled through Dr. Dowdle, and sought treatment in October 1993. Dr. Dowdle again suggested surgery as a possible treatment. The employee continued to experience right leg and hip pain, and returned to Dr. Dowdle in the summer of 1996. Ultimately, the employee underwent a lumbar fusion surgery at L5-S1, with a BAK device, performed by Dr. Dowdle on November 6, 1996. The insurer initially denied liability for medical expenses related to the fusion surgery, but subsequently paid these expenses.

The employee continued to experience right leg and hip pain. By June 1997, Dr. Dowdle referred her to Dr. Jack Bert for evaluation of her leg and hip symptoms. Dr. Bert referred the employee for a right hip x-ray, which revealed a "Grade 4 coxarthrosis with approximately 30% lateral subluxation and complete collapse of the lateral half of the joint space." Dr. Bert recommended a total right hip arthroplasty, which is a complete hip replacement, which the employee underwent on July 25, 1997. Dr. Bert opined that the employee's hip condition was causally related to her 1990 work injury, stating that "I believe it is reasonable to assume that this [injury] definitely permanently aggravated this condition if it was pre-existent. This occurred at the Golden Age Center." (Ee. Ex. D.)

At the time of the settlement in June 1992, the employee was beginning a new job as a trained medication assistant with a different employer after going through a rehabilitation process. In 1994, the employee began operating a daycare in her home. After her 1996 fusion surgery and her 1997 hip replacement, the employee claims she was required to hire an assistant to perform the actual daycare work.

The employee has now petitioned this court to set aside an award on stipulation, filed June 22, 1992. The employer and insurer object to the petition.

DECISION

The Workers' Compensation Court of Appeals may set aside an award for good cause. Minn. Stat. § 176.461 and § 176.521, subd. 3 govern this court's authority over petitions to vacate. An award on stipulation may be set aside only upon a showing of good cause. Stewart v. Rahr Malting Co., 435 N.W.2d 538, 539, 41 W.C.D. 648, 649 (Minn. 1989). For awards issued prior to July 1, 1992, such as this one, "good cause" is limited to:

1) a mistake of fact;
2) newly discovered evidence;
3) fraud; or
4) a substantial change in medical condition since the time of the award.

Franke v. Fabcon, Inc., 509 N.W.2d 373, 49 W.C.D. 520 (Minn. 1993); Krebsbach v. Lake Lillian Coop. Creamery Ass'n, 350 N.W.2d 349, 353, 36 W.C.D. 796, 801 (Minn. 1984).

The employee claims a substantial change in condition as a result of her 1996 lumbar fusion surgery and her 1997 total right hip replacement. Where a change in condition is alleged as the basis for vacation, the focus of this court's inquiry is on whether the alleged change has been "substantial or significant" and whether there is adequate evidence of a causal relationship between the worsened condition and the work injury. See Franke v. Fabcon, Inc., 509 N.W.2d 373, 377, 49 W.C.D. 520, 525 (Minn. 1993). The Workers' Compensation Court of Appeals has delineated additional factors to be considered in determining if a substantial change in condition has occurred. Those factors include a change in the employee's 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 than had been 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 Café, 41 W.C.D. 1054 (W.C.C.A. 1989).

The employee in this case alleges that her 1996 lumbar spine fusion surgery and her 1997 right total hip replacement represent a substantial change in medical condition which has occurred since the 1992 award on stipulation but was clearly not anticipated in 1992. The employee alleges that this change represents a factual and legal basis for setting aside the 1992 award on stipulation "for cause" pursuant to Minn. Stat. § 176.461(4). We note that for petitions to vacate awards on stipulation entered into before July 1, 1992, it is not required to show that the substantial change in condition was clearly not anticipated.

Regarding the employee's 1997 hip replacement, no right hip injury was claimed by the employee at the time of the stipulation for settlement in 1992, and no right hip injury claims were closed out by the stipulation. Injuries which were unknown at the time of a settlement cannot be closed out by a stipulation for settlement. Sweep v. Hanson Silo, 391 N.W.2d 817, 39 W.C.D. 46 (Minn. 1986). Therefore, we will not consider the employee's right hip condition in determining this petition to vacate. In addition, the issues as to whether that hip condition and related surgery are causally related to the employee's December 4, 1990 injury were not before us so we make no determination on those issues.

We therefore will consider the employee's petition to vacate on the basis of a substantial change of condition after her 1996 lumbar fusion surgery. First, we note that the employer and insurer have paid the medical expenses related to this surgery. 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).

While the employer and insurer initially denied liability for the fusion surgery, the insurer did pay the medical expenses for the surgery, and at this time the employer and insurer do not deny that the fusion surgery is causally related to the employee's work injury. In addition, the employer and insurer admit that the employee's permanent partial disability rating has increased as a result of the surgery. At the time the employee entered into the stipulation for settlement in 1992, Dr. Dowdle had assigned a rating of 7 percent permanent partial disability of the whole body as a result of her lumbar spine condition.[1] The employer and insurer admit that the employee now would be assigned a rating of 17.5 percent permanent partial disability of the body as a whole based upon Minn. R. 5223.0070, subd. 1D. Dr. Dowdle assigned that revised rating in a report dated January 27, 2000.[2]

The employee's diagnosis at the time of settlement was mechanical low back pain and degenerative disc disease. Post-surgery, the employee's diagnosis included a solid fusion with residual stenosis and compression of the L5-S1 nerve root. The employer and insurer argue that the employee was aware that surgery had been suggested at the time of the settlement. The employee argues that she was responding to conservative treatment at the time of the settlement, and while surgery had been discussed, it was not contemplated that it would be required. In any event, the employee's diagnosis has changed considerably since the settlement.

Whether the employee has experienced a change in her ability to work is more problematic since the employee has changed jobs since the time of the 1992 settlement. At the time of the settlement, after undergoing training paid by the employer and insurer, the employee was beginning a new job as a trained medication assistant with a different employer, a job which was approved by her QRC. In 1993, the employee began operating a daycare in her home. After her 1996 fusion surgery, the employee was required to hire replacement care in order to continue that business. While there is no indication in the record whether operating this business was within

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[1]On March 11, 1992, Dr. Dowdle rated the employee as having a 10.5 percent permanent partial disability to the body as a whole, based on Minn. R. 5223.0070, subp. 1A(3)(6), due to multi-level degenerative changes. In a letter dated May 6, 1992, Dr. Dowdle corrected that permanency rating to 7 percent permanent partial disability to the body as a whole. In arriving at that rating, Dr. Dowdle did not cite but apparently utilized Minn. R. 5223.0070, subp. 1A(3)(a), which refers to a single level of degenerative change. The employee was diagnosed as having degenerative changes at the L5-S1 level.

[2]Minn. R. 5223.0070, subd. 1D, provides in relevant part:

> The spine rating is inclusive of leg symptoms except for gross motor weakness, bladder or bowel dysfunction, or sexual dysfunction. Permanent partial disability of the lumbar spine is a disability of the whole body as follows:
>
> D. Spinal fusion surgery for single vertebral level with or without laminectomy, 17.5 percent.

the employee's restrictions at the time of the settlement, the employee claims she was able to perform this job until she needed the surgery.

The employer argues that there are no documented changes in the employee's physical work restrictions, and therefore her ability to work, since the time of the settlement. The employer argues that although the employee is not presently employed in the same capacity as that at the time of the settlement, there is no evidence the employee's restrictions have changed. The employer also argues that the daycare position was neither reviewed nor approved by the employee's QRC nor Dr. Dowdle, and that this change in employment might have involved lifting beyond her restrictions. The employer also argues that any determination as to the employee's change in employability, one of the Fodness factors, must be viewed in light of employment at the time of the stipulation for settlement, and that no evidence exists that the employee is presently unable to work as a trained medication assistant.

The employee testified at her deposition taken on June 9, 2000, that she believed she was still under the same permanent restrictions as given by Dr. Dowdle on October 25, 1991. (Er. Ex. 1, Ee. Depo., p. 43.) She also testified that she felt she could not continue working as a trained medication assistant, and that she quit that job after less than one year as the required standing bothered her back and leg. She testified that she decided to perform in-home daycare, thinking that she "could do that without being in so much pain," and that "it would be better for me to do that then [sic] trying to go push meds or take care of residents or–what I was trained for." (Er. Ex. 1, p. 12.)

The restrictions assigned by Dr. Dowdle in October of 1991 included a limit on sitting, walking, or standing only six hours out of an eight hour day; bending, squatting, crawling, crouching, kneeling, balancing, pushing, and pulling on an occasional basis; lifting and carrying up to 10 pounds frequently and 24 pounds on an occasional basis. The exhibits now presented by the parties do not include any more recent restrictions assigned by Dr. Dowdle, so the most recent medical report providing an opinion on restrictions is that of Dr. Wicklund, who examined the employee on June 23, 2000, at the request of the employer and insurer. He assigned the following restrictions due to the employee's back condition: no repetitive bending, twisting, stooping or lifting more than 20 pounds. The last chart note in the record from Dr. Dowdle is dated September 2, 1999. On that date, the employee reported discomfort in her back. Dr. Dowdle stated that flexion/extension views showed some disc degeneration at the L4-5 level and some early instability. Although the employee's currently assigned physical restrictions from Dr. Wicklund are similar to those assigned by Dr. Dowdle in 1991, it does appear that there has been a change in the employee's functional ability, based upon her deposition testimony.

In summary, the employee's diagnosis has changed since the settlement was reached in 1992, as has her level of permanent partial disability. The employee testified that her ability to work has decreased since 1992. In view of these factors, coupled with the employee's 1996 low back surgery, we believe that the employee has established her burden of demonstrating a substantial change in her condition since entering into the 1992 stipulation for settlement. Therefore, we grant the employee's petition to vacate the 1992 award on stipulation.