4-22-1976

Richard D. Simmons v. Dravo-Groves-Newberg and Kentucky Workmen's Compensation Board

Appellee's Brief 1976-SC-0188

APPELLEE'S BRIEF

3790

SUPREME COURT OF KENTUCKY

File No. 76-188

RICHARD D. SIMMONS - - - - - Appellant

versus

DRAVO-GROVES-NEWBERG and
KENTUCKY WORKMEN'S COMPENSATION
BOARD - - - - - - - - - Appellees

Appealed from Livingston Circuit Court

BRIEF FOR APPELLEE, DRAVO-GROVES-NEWBERG

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I certify that copies of this Brief have been served on Hon. Craig Housman, Charles A. Williams & Associates, 312 Century Building, Paducah, Kentucky 42001, attorney for appellant; Hon. William L. Huffman, Director, Workmen's Compensation Board, Frankfort, Kentucky 40601; and Hon. James M. Lassiter, Judge, Court House, Murray, Kentucky 42071, on this 21st day of April, 1976.

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BRIEF FOR APPELLEE, DRAVO-GROVES-NEWBERG

COUNTERSTATEMENT OF CASE

On January 4, 1973, the appellant was working as a mechanic for the appellee, Dravo-Groves-Newberg (TOrR, p. 34). On that date he hurt his ankle but not his back (TOrR, pp. 28 and 31; TD, pp. 24 and 27). He alleges that he hurt his back at home in February, 1973 while recovering from the ankle injury.

The appellant has a long history of previous back trouble. He testified that he has regularly been treated by chiropractors for his backaches ever since he was in high school (TOrR, p. 26). Following his graduation the appellant injured his lower back in 1971 when he slipped and fell approximately three feet (TOrR, pp. 70-71, affidavit of Dr. Bolton). This occurred while working for TVA. He was seen and treated by a Dr. Bolton of the Trover Clinic (TOrR,

pp. 70-71, affidavit of Dr. Bolton). Although the appellant denied at the hearing that his back had ever caused him pain in his hip and thigh prior to his alleged back difficulty in 1973, the evidence reveals that the injury in 1971 produced pain which radiated into the posterior aspect of his left hip (TOrP, pp. 70-71; affidavit of Dr. Bolton; TOrR, p. 40; TOrP, p. 50, Dep. Dr. Love).

In December, 1974, Dr. Love, an orthopaedic surgeon, also of the Trover Clinic, examined the x-rays taken of appellant's back in 1971 by Dr. Bolton. The old x-rays demonstrated a narrowing of the L5-S1 interspace (TOrR, pp. 122-124, Dep. Dr. Love). It was at this same space, L5-S1, that Dr. Noonan removed an intervertebral disc in 1973 following the alleged incident at the appellant's home in February of that year (TOrR, p. 58). Prior to the onset of his alleged back difficulty in February of 1973, Dr. Miller noted in his record concerning the appellant's ankle injury that the appellant also "had had chronic backache" (stipulation of medical report dated 1/10/73 of Dr. Miller, TOrR, pp. 66-67).

On January 31, 1973, Dr. Miller surgically removed two small fragments from the appellant's ankle. He was hospitalized for four or five days (TOrR, p. 13). Following the surgery on his ankle, the appellant was placed on crutches by Dr. Miller and told to rest and stay off the ankle (TOrR, p. 14). The appellant, to use his own word, "started" having trouble with his back as he was walking down some steps on crutches at home in February, 1973 (TOrR, p. 14). He did

not slip or fall, but instead he just went down a normal step and felt pain (TOrR, pp. 45-46, Dep. Dr. Noonan; TOrR, p. 31). This was about a week and a half after the appellant had returned home following his ankle surgery (TOrR, p. 14). After visting chiropractors on several different occasions following the incident at home, the appellant finally had back surgery at the hands of Dr. Noonan of Paducah, Kentucky (TOrR, p. 58, Dep. Dr. Noonan; TOrR, pp. 15 and 17). Nine weeks after the back surgery, the appellant returned to work for the appellee, Dravo.

Contrary to the inference in the appellant's brief, Dr. Noonan did not testify that the disc injury at home was caused by the appellant's ankle injury or his walking on crutches. He merely pointed out that, *according to the appellant,* "this is the *time* at which the disc actually herniates and contracts the nerve" (TOrR, pp. 51-54). (Emphasis ours.) He also "assumed" that when the appellant was walking down the steps on his crutches that this is "*where* the problem started" (TOrR, p. 54). (Emphasis ours.) He never testified *why* the problem developed, except that he did acknowledge that the appellant probably had a weakened back prior to the development of back pain at home in 1973 (TOrR, pp. 61-62). It is interesting to note that Dr. Noonan was not aware of the appellant's 1971 back injury until his deposition was taken in this case (TOrR, p. 57).

Dr. Love, the Board appointed physician, was of the opinion that neither the crutches nor the ankle injury caused the appellant's back condition. It was

his view that the appellant's back problem was an ongoing condition and that the crutches, in the absence of a fall or trauma, were simply coincidental with the disc herniation. In other words, in the absence of a fall, walking with crutches would not be any more likely to produce a ruptured disc than walking without them (TOrR, pp. 147-149, pp. 154-155).

At the time of the hearing, the appellant was working for Dravo (TOrR, p. 21). It was stipulated by all parties in February of 1975, just before the case was briefed to the Board, that the appellant was then working for the Huber Construction Company of Calvert City as an "operator" at $8.65 per hour and that he had not missed any work for Huber as a result of any injury or disease (TOrR, pp. 136-138). His wages at the time of his ankle injury in 1973 were $6.90 (TOrR, p. 8).

The Board issued its Opinion and Award on June 2, 1975. In discussing the evidence of the case the Opinion stated:

> "While the plaintiff was at home recovering, he claims to have hurt his back in some way. Later he submitted to disc surgery to correct his back problem. *The evidence does not show that the back injury is in any way related to the plaintiff's work. It is simply an injury that occurred at home*" (TOrR, p. 205). (Emphasis ours.)

In its formal "Findings of Fact" the Board stated in number three that "Relative to the ankle injury of January 4, 1973, the plaintiff was acting within the course and scope of his employment." The fifth find-

ing was that "The plaintiff's back injury did not occur while he was at work" (TOrR, pp. 205-206).

The appellant and the appellee, Dravo, petitioned the Board to reconsider its opinion. Both petitions were denied and the case was then appealed to the Circuit Court by the appellee, Dravo. The appellant cross-appealed from that portion of the Board's Opinion and Award "which indicates ambiguously that plaintiff's back injury and disc surgery were nonwork-related" (TOrR, pp. 10-11). The appellee, Dravo, appealed the Board's finding that the appellant had a 10% partial disability as a result of his ankle injury.

On September 8, 1975 the circuit court found that:

> "There is sufficient, reliable, probative and material evidence to sustain the finding of the Board that the injury to the back of the respondent, Richard E. Simmons, was not work-related and it is, therefore, not compensable" (TOrR, pp. 13-14).

Concerning the ankle injury, the court found that:

> "There is no reliable, probative or material evidence to sustain the Board's finding that the ankle injury of Richard D. Simmons resulted in any permanent partial disability." (TOrR, pp. 13-14).

From the Court's order dated September 8, 1975, the appellant has appealed to this Court.

ARGUMENT

I. The Supreme Court Should Not Consider the Appellant's Argument That the Board Erred in Referring to a Repealed Statute in Its "Ruling of Law" Since That Issue Was Not Raised Before the Board or Court Below.

It will be demonstrated in Argument No. II below that the citation by the Board of KRS 342.005, a repealed statute, makes no difference in this case where the Board unequivocally and clearly found that the back condition of the appellant was not work-related. None the less, the Court need not consider the point that the Board referred to a repealed statute since the appellant did not first raise that issue before the Board or the Circuit Court.

The law is quite clear that an appellate court will consider only such questions as were raised and reserved in the lower tribunals (2 Am. Jur. 2d, Administrative Law, Sec. 724). Our state's highest court has so held on many occasions. In *Pittsburgh & Midway Coal Mining Company* v. *Rushing,* Ky., 456 S. W. 2d 816, the court held that "The rule is firmly established that the trial court should first be given an opportunity to rule on questions before they are available for appellate review." And in the case of *Bisset* v. *Goss,* Ky., 481 S. W. 2d 71, where one of the appellant's complaints on appeal concerned the finding of the trial court below that the appellant should pay interest on the judgment fixing compensatory damages, the court answered:

> "In the first place, the record does not show that this question was presented to the trial court. Ordinarily this court will not review questions not presented to the trial court" (p. 75).

KRS 342.281 provides an avenue by which a party should petition the Board for reconsideration of obvious errors in the Opinion. That statute requires that:

> "The petition for reconsideration *shall clearly* set out the errors relied upon with the reasons and arguments for reconsideration of the pending award, order, or decision. . . . The Board shall be limited in such review to the correction of errors *patently appearing on the face of the award, order, or decision* and overrule the petition for reconsideration or make such correction within 10 days after submission." (Emphasis ours.)

As stated therein, KRS 342.281 is designed to give the Board an opportunity to correct errors which patently appear on the face of the award. In his petition for reconsideration to the Board, the appellant nowhere mentioned that he felt the Board erred in citing KRS 342.005 as a Ruling of Law. He only requested a review of the Board's Findings of Fact. In his opening paragraph in the petition for reconsideration, appellant states as follows:

> "The appellant, pursuant to KRS 342.281, respectfully requests that the Board reconsider its finding of fact No. 5: 'The plaintiff's back injury did not occur while he was at work,' and to change its order and judgment accordingly. In the text of Board Member Simpson's opinion, it is stated

'The evidence does not show that the back injury is in any way related to the plaintiff's work' " (TOrR, pp. 207-208).

Similarly, in the appellant's "Answer and Cross-Petition" filed with the Livingston Circuit Court, the Court was not apprised of the Board's reference to the statute referred to above. In his cross-petition, the appellant once again asked the Court to change the Board's finding of fact that his injury was not work-related, but he did not ask for review of the rulings of law (TR, pp. 10-11).

KRS 342.285(2), the statute providing for an appeal of the award of the Workmen's Compensation Board to the Circuit Court, states that: "The petition shall state *fully* the grounds upon which a review is sought, and assign *all* errors relied on." (Emphasis ours.) The court's decision was based on the record as it existed before the Board with the exception of the pleadings filed in Circuit Court. The first time the appellant raised the question that the Board cited a repealed statute was in its brief to the Supreme Court.

II. The Board's Reference to a Repealed Statute Was "Harmless Error" in Light of Its Clear and Unequivocal Finding That "the Evidence Does Not Show That the Back Injury is in Any Way Related to the Plaintiff's Work. It is Simply an Injury That Occurred at Home."

The appellant and this appellee both reviewed the case of *Beech Creek Coal Company* v. *Cox,* Ky., 237 S. W. 2d 256, in their briefs before the Board. In that case the Court stated a second injury would be compensable if it were "considered a natural outgrowth of the first injury. . . ."

KRS 342.610 provides that "(1) Every employer subject to this chapter shall be liable for compensation for injury, . . ." "Injury" is defined in KRS 342.620(1) as: "Any *work-related* harmfull change in the human organism, . . ." (Emphasis ours.) Both 610 and 620 were enacted after *Beech Creek Coal Company supra.*

Employing the same language in KRS 342.620, "work-related," the Board found that the back problem was not "in any way *related* to the plaintiff's work." (Emphasis ours.) Under *Beech Creek Coal Company* case, *supra,* KRS 342.005 or KRS 342.620(1) the Board's conclusion would, as a matter of law, have to be the same. Simply changing the statute citation would not alter what the Board believed the facts to be. By finding that the back injury was not related to the plaintiff's work, the Board necessarily rejected the appellant's strong contention that the ankle injury, or walking on crutches, caused his back condition. Its

additional finding that the injury occurred at home was simply one link in its reasoning which lead to the ultimate conclusion that the back problem was not related to appellant's work.

It has long been the rule in most jurisdictions that where an error is made by the lower tribunal, but the affected party is not entitled to succeed in any event, the error will be considered harmless. In the case of *Spradling* v. *Coyzens,* 5 Ky. Opinion 282, the Court ruled that where the evidence preponderates in favor of the finding of the jury, the Court of Appeals will not reverse for a mere technical or verbal error.

In *Grubbs* v. *Slate,* Ky., 266 S. W. 2d 85, the appellant, as in the instant case, complained because the lower court failed to make separate findings of fact on each issue. The court acknowledged that this was not done but held that it did not constitute reversible error for the reason that there was no dispute concerning the essential facts, "and for the further reason that the record would justify no finding of fact which would result in a different legal conclusion from that reached" (p. 87). A similar finding was made in *Moody-Mitchell Lumber & Building Company* v. *City of Louisville,* Ky., 183 S. W. 2d 481. The plaintiff sought to have title to a lien quieted but failed to establish adverse possession in his grantors and failed to comply with the statute after acquiring the property. The Court held that the question whether the City was estopped to claim title need not be considered on appeal, since plaintiff could not recover anyway. This is exactly the situation presented in the instant case. The

Board's interpretation of the facts precludes recovery under any rule mentioned by appellant.

The appellant contends that the case should be remanded to the Board with instructions to specifically find whether or not the ankle injury contributed to the cause of the back condition, since, in his opinion, this question was not answered in the Board's Opinion and Award. Of course, as noted above, that question *was* answered, even though part of it was not labeled a "finding of fact." But past decisions of the Kentucky Court of Appeals reveal that the reviewing court will not be concerned with whether or not the Board's findings are labeled, so long as it is clear from the opinion what the Board believed the facts to be. Consider, for example, the case of *Lewis* v. *Fordson Coal Company,* 249 Ky. 258, 60 S. W. 2d 585. In that case, the plaintiff had filed a motion to reopen a previous Workmen's Compensation award on the theory that since the initial award he had been totally disabled by a stroke of paralysis, which he contended was a result of the injury he had received two years before. The Board entered the following order:

> "This claim having been reopened upon the application of plaintiff, is now submitted to the Board for trial and award, on the pleadings, proof and record upon the question of whether or not the claimant is entitled to additional compensation, and the Board having considered the same and being sufficiently advised, finds, orders and adjudges that the stroke of paralysis of August 23, 1929, or any disability therefrom, was not the re-

> sult of injuries sustained on March 2, 1928. Claim for additional compensation is hereby dismissed" (p. 259).

The case was appealed to the Court of Appeals, and the appellant insisted that the case should be remanded to the Board for a statement of its findings of fact and its award thereon. The Court dismissed the appellant's claim by stating that the Board's order was:

> "A clear finding of fact from which there could be but one conclusion of law, which, though not described as such, was actually reached and stated in the next sentence, 'claim for additional compensation is hereby dismissed.' We therefore conclude that the statement of the findings and the rulings of law was a sufficient compliance with Section 4922, Ky. Statutes" (p. 260).

Despite the appellant's contention to the contrary, the Board need not make a separate finding as to every fact leading up to its ultimate conclusion. In the case of *Calloway* v. *Octavia J. Coal Mining Company,* 271 Ky. 8, 111 S. W. 2d 395, the crucial question was whether or not the plaintiff died of work-related electrocution. Benefits were denied by the Board. The appellant argued that the Board's findings of fact were not sufficient because there was not a separate finding on every disputed fact. The Board had simply found that the death of Calloway was "not caused by electric shock or other traumatic injury while engaged in the performance of his work and employment of the defendant." The Court held that:

> "It is not necessary that it shall make a separate finding as to every fact in the chain of evidence

> leading up to the ultimate fact. In the recent case of Lewis v. Fordson Coal Company, 249 Ky. 258, 60 S. W. 2d 585, a finding 'that the stroke of paralysis of August 23, 1929, or any disability therefrom, was not the result of injuries sustained on March 2, 1928,' was held sufficient" (p. 15).

The Court has also held that where the Board makes a clear finding which would preclude liability for compensation, there is no necessity for a ruling of law in its opinion. *Inland Steel Company* v. *Newsome,* 281 Ky. 681, 136 S. W. 2d 1007. In that case the Court held that the remand of the case to the Board by the Circuit Court for the purpose of separating its rulings of law and findings of fact was error "since the finding of the Board that the deceased did not die by reason of traumatic injury received in the course of his employment rendered unnecessary any ruling of law" (p. 684). That same rule should be applied in the instant case. The Board in its opinion clearly believed the back condition not to be work-related. There is no necessity for a ruling of law, and it was harmless error for the Board to refer to the repealed statute, KRS 342.005.

III. As a Matter of Law, the Appellant Failed to Give the Appellee, Dravo, Notice of His Alleged Back Injury.

Notice was provided for the primary injury, the ankle, but the law requires notice of the specific injury for which the appellant claims compensation (KRS 342.185 and 342.195). In the case of *Proctor and*

Gamble Manufacturing Company v. *Little,* 357 S. W. 2d 866, the Court said at p. 867:

> "Although KRS 342.185 requires only notice of the accident, in view of KRS 342.190 we have construed the requirement of notice to include the specific injury for which the employee is claiming compensation for disability."

In the *Proctor and Gamble* case the employee was involved in an accident while driving a truck. He suffered bruises and abrasions, but died 13 months later from complications arising from his injuries.

The reason for the requirement of notice of the specific injury was explained in *Buckles* v. *Kroger Grocery and Baking Company,* 280 Ky. 644, 134 S. W. 2d 221, a case very similar to the present one.

> "While the rule of liberal construction will be applied to the Workmen's Compensation Statutes, yet, liberal construction does not mean total disregard of the statute, or repeal of it under the guise of construction. And furthermore, it must not be forgotten that the very nature of appellant's injury was such that needed immediate attention. Hernia is a progressive injury and will increase with time. Whether or not appellant's hernia was an old one or a fresh one sustained at the time he claimed was indeed of much importance to appellee since, if it was of the former class, appellee would not have been liable. And, if appellant had received immediate treatment, his disability, in all reasonable probability, might have been lessened if not entirely cured. Appellee was entitled to the benefit of an earlier opportunity to ascertain whether the appellant sustained the hernia at the

> time claimed by him or whether it existed previous thereto, and also an opportunity to have him treated in an effort to cure, or, at least, minimize the extent of his disability."

In the instant case, there is no proof that the employer, Dravo, ever knew about the present back ailment until the Form 11 was filed. Consequently, Dravo had no opportunity to investigate the circumstances surrounding the appellant's back condition. Certainly, it had no reason to suspect that the appellant would be likely to have back pain as a result of an ankle injury.

In his reply brief before the Board, the appellant argued that KRS 342.200 provides that a claim will not be barred for want of notice if occasioned by mistake or other reasonable cause. However, in the case of *Blue Diamond Coal Company* v. *Stepp,* Ky., 445 S. W. 2d 866, the Court held on pp. 867 and 868:

> "We reject the no prejudice argument. . . . The statute makes lack of prejudice a controlling consideratiton only in relation to an inaccuracy in compliance with the notice requirements. Delay is excused only by the employer's actual knowledge of the claim or by mistake or other reasonable cause. By no reasonable interpretation can the statute be held to mean that delay is excusable if the employer was not prejudiced. To the extent that it so held Mengel Company v. Axley is overruled as are the cases repeating its doctrine, which include Osborne Mining Corporation v. Barrera."

The appellant in the instant case is claiming a herniated disc. As a matter of law it should have been

reported. The Court, in the case of *Whittle* v. *General Mills,* Ky., 252 S. W. 2d 55, said:

> "We are not prepared to say that herniated disc is such an injury that no prejudice would result to the employer for delay in giving notice."

IV. The Board's Finding That the Appellant's Herniated Disc Was Not Work Related is Supported by Reliable, Probative and Material Evidence.

The appellant argues that as a matter of law his disc herniation should have been a compensable injury. His primary contention is that, somehow, walking down a step on crutches at his home caused his back injury, though he admits there was no slip or fall (TOrR, p. 27). The testimony of Dr. Love on this point is lengthy, but informative.

TOrR, p. 14 — "10. Now, Doctor, I am going to ask you to assume that following this patient's ankle injury events occurred while he was on crutches which could be described by this patient 'about a week and a half after I got home I started having trouble with my back. I had gone, well, I was going outside and was going to go down home and I stepped out the front door and there was about a foot step down and whenever I went down I had a dull ache in my back. I never thought nothing about it and I leaned back up against the wall and straightened up. Of course, I was all hunched over on my crutches anyway' and I am going to ask you further

TOrR, p. 48, Dr. Noonan

to assume, Doctor, that the same individual, in giving a history to the physician who performed the laminectomy, related the following—that he had no problems with his back after that until he was recovering in February, 1973, from surgery on his ankle about a week and a half after this patient left the hospital, from the surgery on his ankle, and while walking on crutches he steps down about one foot and at that time he feels a dull ache in his back and I am going to ask you to assume hypothetically further that in being questioned

TOrR, p. 54, Dr. Noonan

regarding the history given the physician who performed the laminectomy to assume that this type of history was given in response to questions: Having been asked the question 'He didn't say that he slipped or anything, did he? Didn't he just say that he stepped down and felt the pain?' and the answer given was 'this is what he said to me, yes.' Now, assuming those facts, Doctor, . . . I would like for you to assume those facts in relation to the patient you examined and I would like for you to express an opinion, if you would, with respect to whether or not the existence of crutches or an ankle injury would have anything to do with the back problem you observed?

A. Well . . .

Mr. Sparks: I would OBJECT to the form of the question.

Mr. Terrell: Would you state specifically with respect to form?

Mr. Sparks: Well, Burke, I OBJECT to the form of the question as well as the competency of the question is the basis of my OBJECTION and were I to conclude what is irregular you would be able to apply pose the question.

Mr. Terrell: And that's why you have to OBJECT to form of depositions so that the person has the opportunity to apply pose the question.

Mr. Sparks: My OBJECTION is as to the form as well as the competency of the question.

Mr. Terrell: Can you answer the question, Doctor?

A. Basically, what you are asking is can a person, by walking down a stair on a pair of crutches produce. . . .

11. Basically, what I am asking is, is that any different from a man walking down stairs otherwise?

A. Going back to where I was interrupted, as he goes down the stairs on a pair of crutches, can this produce injury to the back—and using the criteria of what does one see most of the time in answering such a question, most probably that individual would not injure his back. I think the point is here that by history the individual points out in 1971 he has already injured his back so one would have to assume that this is part of his ongoing problem and I don't think any physician is smart enough to tell you that, we are dealing with cause and effect. When a person falls off of something . . . or you can show that on the date of 1973 when he injured his ankle that he actually was seen with a back injury but I think it is still conjecture as to whether the walking of this man with crutches was productive of the herniated disc. Obviously, there is some alteration in all of our evaluation of the patient because when an individ-

ual speaks with me and I only can tell you what his comment is, the individual had fallen. . . .

Mr. Sparks: Again I will OBJECT on the grounds that Dr. Love is the evaluating physician and not the treating one.

Mr. Terrell: Well, of course, Doctor, having read your report that is why I asked the question hypothetically as I did.

12. Would the person on crutches be more vulnerable to a herniated disc than a person not on crutches?

A. My opinion would be no" (TOrR, p. 145, Dr. Love).

The essence of Dr. Love's testimony is that the appellant, in the absence of a fall, would be just as likely to hurt his back in going down steps without crutches as he would with crutches. In fact, it would seem that crutches would actually support the spinal column rather than strain it.

Dr. Love did not limit himself to discussing the question of an "unusual strain" or to the question of whether walking on crutches will "*normally* produce a herniated disc." Dr. Love directed his testimony to *this* appellant and to the facts of *this* particular case. His answer to the hypothetical question propounded to him on page 145 of the record, and noted above, is evidence of this. His further testimony on pages 154 and 155 of the record is also clear that he felt the appellant's back condition was merely an "ongoing problem" which had nothing to do with the incident on crutches.

V. There Was No Reliable, Probative, or Material Evidence to Sustain the Board's Finding That the Appellant's Ankle Injury Resulted in a 10% Partial Disability, and the Circuit Court Was Correct in Reversing the Board.

Although the appellant mentions the reversal of the Board's finding that he had a 10% permanent partial disability as a result of his ankle injury, he fails to make any argument on that issue in his brief to this Court. The appellee, Dravo, assumes that the appellant conceded that the Circuit Court was correct in setting aside the Board's award of 10% permanent partial disability as a result of the ankle injury.

CONCLUSION

For the foregoing reasons, the Judgment of the Circuit Court was correct and should be affirmed.

Respectfully submitted,

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