5-11-1976

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

Reply Brief 1976-SC-0188

REPLY BRIEF

3790

SUPREME COURT OF KENTUCKY

File No. 76-188

RICHARD D. SIMMONS — **APPELLANT**

Vs.

DRAVO - GROVES - NEWBERG and KENTUCKY WORKMEN'S COMPENSATION BOARD — **APPELLEES**

REPLY BRIEF

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This is to certify that copies of this Brief have been served on Schultzman, Hardy, Terrell & Boswell; Citizens Bank Building, Paducah, Kentucky 42001, attorneys for appellee Dravo-Groves-Newberg; on Hon. Wm. L. Huffman, Director, Workmen's Compensation Board, Frankfort, Kentucky 40601; and on Hon. James M. Lassiter, Judge, 42nd Judicial District, Court House, Murray, Kentucky 42071, on this the 10 day of ~~March~~ May, 1976.

Attorney for Appellant

TABLE OF CONTENTS AND AUTHORITIES

Pages

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KENTUCKY WORKMEN'S
COMPENSATION BOARD — APPELLEES

MAY IT PLEASE THE COURT:

PURPOSE OF THE BRIEF

The purpose of appellant's reply brief is to discuss the errors of factual and legal analysis which appear in the appellee's brief.

QUESTIONS TO WHICH BRIEF ADDRESSED

I. THE APPELLANT"S ARGUMENTS HAVE BEEN CONSISTENT AT ALL LEVELS OF THIS CASE.

II. WHERE IT APPEARS THAT THE BOARD HAS NOT ANSWERED A KEY, OR ULTIMATE FACTUAL ISSUE, THE BOARD'S DECISION MUST BE REMANDED FOR A FINDING ON THAT ISSUE.

III. CAN DRAVO QUESTION THE BOARD'S FINDING THAT PROMPT NOTICE WAS GIVEN BEFORE THIS COURT WITHOUT RAISING THE ISSUE IN THE LOWER COURT?

IV. DR. LOVE ADMITTED HIS TESTIMONY WAS LIMITED TO WHAT WAS A USUAL OR UNUSUAL STRAIN.

ARGUMENT

NOTE: Unless otherwise apparent or otherwise indicated throughout this brief, numbers in parentheses standing alone refer to pages in the original record of the Kentucky Workmen's Compensation Board. The Transcript of Record of the Livingston Circuit Court is noted as "TR".

I. THE APPELLANT'S ARGUMENTS HAVE BEEN CONSISTENT AT ALL LEVELS OF THIS CASE.

Appellee's first two arguments are posited on an an erroneous assumption. The appellant Richard Simmons, hereinafter Simmons, has not raised any issue before this court which was not raised below. We agree with the appellee, Dravo-Groves-Newberg, hereinafter referred to as Dravo, that this court should not have to pass upon issues which were not raised in the court below. Simmons has consistently asserted the same apparent errors in the Board's decision at all levels. This is demonstrated handily by comparing the arguments expressed before the Board, before the Livingston Circuit Court, and before this Court. Simmons' motion for reconsideration, filed with the Board, concludes with the following:

> "The plaintiff respectfully requests that the Board reconsider its Opinion which presently reads as though no injury which occurs at the employee's home could be work-related. Insofar as that appears to be the standard applied, the plaintiff respectfully requests that the Board reconsider its decision in light of Beech Creek Coal Co. v. Cox, supra." (p. 211)

Then, the relief requested from the Livingston Circuit Court was, inter alia, to remand the case to the Workmen's Compensation Board:

> "To clarify its ambiguous and legally meaningless finding that the back injury occurred at home." (TR 11)

Then in Simmons' initial brief to this Court, the first issue presented was:

> "The Workmen's Compensation Board improperly applied strict 'time and location of the injury' as the sole and determinative criteria for work-relatedness in a second injury case." (Appellant's brief p. 1)

In context, the reference in appellant's brief that the Board cited a repealed statute as its conclusion of law was to further demonstrate that the Board gave outcome determinative signifigance to where and when the second injury occurred. If appellant's initial brief is examined, what does it say about KRS §342.005? We cite a Kentucky case and quote Professor Larson's treatise to demonstrate that KRS §342.005 has been construed as emphasizing time and place considerations in determining causal relation. (Appellant's brief p. 6) Before the Board and before the Court below the flaw in the Board's opinion raised by Simmons has been the same--to wit under Beech Creek Coal Co. v. Cox, Ky., 237 S.W.2d 57 (1951) and 1 Larson's Workmen's Compensation Law, §13.11, the key fact issue in a second injury case is whether the second injury is related in whole or in part to the initial injury, assuming the first injury was work-related.

A point apparently overlooked by Dravo when it argues that Simmons raised new issues on appeal is the distinction between raising new theories or bases of relief and simply voicing a new argument in support of the same theory. It is hornbook law that:

> "The rule requiring adherence to the theory relied on below does not mean that the parties are limited in the appellate court to the same reasons or arguments advanced in the lower court upon the matter or question in issue." 5 Am Jur 2d "Appeal and Error" §547, p. 32

Appellant pointed out the repealed statute, KRS §342.005 because of its emphasis on time and place considerations. This is because, as the plaintiff has asserted ever since the Board's opinion, the Board's decision has all the earmarks of being reached by giving outcome determinative significance to time and place.

The Board's emphasis on time and place seems apparent when one examines all the references in the Board's opinion dealing with causality. The Board cites KRS §342.005 which refers to time and place of the injury. In the Board's "Findings of Fact," where the factual "nut" of the Board's decision is to be set out, the Board states:

> "The plaintiff's back injury did not occur while he was at work." (TR 5) (Emphasis ours)

Once again, reference to time and place. In the Board's terse opinion, it is stated:

> "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." (TR 4) (Emphasis ours)

Viewing the Board's decision as a whole, it is hard to conclude that "clearly and unequivocally" (Dravo's expression) the Board answered the key factual question--was the second injury caused wholly or in part by the first injury? It appears that the Board may very well have applied "time and place" as outcome determinative.

The Board's reference to a repealed statute with heavy emphasis on time and place was listed simply as another indication that an improper standard had been applied. Simmons has consistently pointed to this same flaw, i.e. time and place as conclusive, at all levels of appeal.

II. WHERE IT APPEARS THAT THE BOARD HAS NOT ANSWERED A KEY, OR ULTIMATE FACTUAL ISSUE, THE BOARD'S DECISION MUST BE REMANDED FOR A FINDING ON THAT ISSUE.

Dravo in its brief argues that the Board need not make a specific finding on each fact supporting the Board's conclusion. Simmons has no quarrel with that statement of the law. Apparently overlooked by Dravo is the distinction between setting out all of the factual bases for the Board's conclusion, which is not required, and the necessity that the Board make a specific, clear finding on key, or ultimate fact issues. While the Board doesn't have to specify how they reach their conclusion on a key factual issue, they must clearly set forth their conclusion on a key factual issue. This was the holding of Blue Diamond Coal Company v. Stepp, Ky., 445 S.W.2d 866 (1969). Dravo in its brief made no attempt to distinguish that decision. Blue Diamond, supra stands for the simple proposition that where it appears after reading the Board's opinion, the Board did not answer a key question of fact presented, it is unfair for the losing party to have to assume that the Board applied the correct analysis. It is one thing to disagree with the Board's conclusion of fact on a disputed record; it is quite another to have to wonder if the vital question was even considered.

III. CAN DRAVO QUESTION THE BOARD'S FINDING THAT PROMPT NOTICE WAS GIVEN BEFORE THIS COURT WITHOUT RAISING THE ISSUE IN THE LOWER COURT?

The Board in its findings of fact stated:

"2. The defendant received due and timely notice of plaintiff's claim." (TR 5)

In Dravo's petition for reconsideration filed with the Board, Dravo raised two issues; (1) There was no evidence to support an award of 10% based on the ankle injury; and (2) The Board erred in calculating benefits (by using the method approved in C. E. Pennington Company, Inc. v. Windburn, 22 KLS 1 (January 9, 1976). (207,208)

In Dravo's petition to the Livingston Circuit Court, these same two issues were raised, and only these two issues, i.e. no evidence to substantiate 10% disability on the ankle injury, and the "Pennington" method of computing benefits (TR 2, 3). In Dravo's brief before this court, they set out at length the rule that new issues or theories of relief cannot be raised on appeal when not raised in a lower court. It is difficult to see why the rationale of Dravo's cases does not apply to Dravo's interjecting the notice question into this appeal. That was not responsive to any of Simmons' arguments.

Simmons did not raise any new issues in its brief. Simmons did point out an additional factor, i.e. the Board's reference to a repealed statute which emphasized time and place considerations, in support of the same issue Simmons has consistently raised.

If the court is to give serious consideration to the defendant's argument concerning notice,

reference should be made to Simmons' reply brief to the Board (201, 202) where this was thoroughly explored.

Dravo's argument is self-contradictory anyway. In Dravo's brief, at page 15 it is stated:

> "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."

Then Dravo proceeds to quote from Blue Diamond Coal Company v. Stepp, Ky., 445 S.W.2d 866 (1969), as if this somehow contradicted Simmons. It should be noted that even in the defendant's quote it is stated:

> "Delay is excused only by the employer's actual knowledge of the claim or by mistake or other reasonable cause." Blue Diamond Coal Company, id. at 866, 868.

It is difficult to comprehend how that authority contradicts Simmons' claim, which is posited on the same reasoning. It was thoroughly argued to the Board and Dravo has not since (until now) questioned the Board's finding.

IV. DR. LOVE ADMITTED HIS TESTIMONY WAS LIMITED TO WHAT WAS A USUAL OR UNUSUAL STRAIN.

Another incongruity in Dravo's argument is found on page 19 where Dravo states:

> "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." (Emphasis theirs.)

Amidst the rambling three page quote from Dr. Love's deposition set out in Dravo's brief, the doctor began his discussion with the following:

> "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." (p. 18) (Emphasis ours)

If there is a distinction between what "one sees most of the time" and what is "usual" or "normal", it is slight. Dr. Love's testimony, by his own admission, is pertinent only if Kentucky is to regress to the standard of requiring an "unusual strain" (whatever that is).

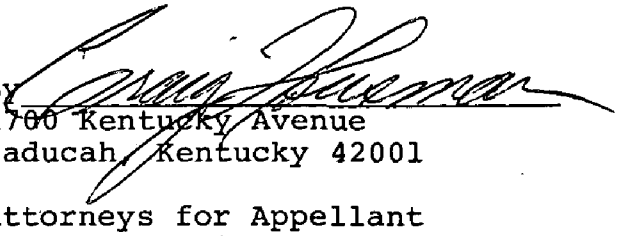
CONCLUSION

There was one basic factual issue to be decided relating to the compensability of Mr. Simmons' back injury -- did the first, admittedly work related injury, contribute to causing the second injury? The Board did not answer that question, and every reference to causality in the Board's decision emphasizes time and place. Since it appears likely that the Board applied time and place as outcome determinative, the Board's decision in its present form should not stand. Mr. Simmons is entitled to know, not to

have to assume, that the Board in fact answered the key factual issue.

Respectfully submitted,

CHAS. A. WILLIAMS & ASSOCIATES



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