2005

Vaeleen Roberts v. Labor Commission of Utah, Kindercare Learning Centers, Inc. and/or American Assurance Co. : Brief of Appellee

Utah Court of Appeals

ORIGINAL

IN THE UTAH COURT OF APPEALS

VAELEEN ROBERTS,	:	
		Court of Appeals
Petitioner/Appellant,	:	Case No.: **2005-0695-CA**
vs.	:	
LABOR COMMISSION OF UTAH, KINDERCARE LEARNING CENTERS, Inc. and/or AMERICAN ASSURANCE CO.,	:	
	:	Labor Commission No.: 03-1164
	:	Priority No. 7
Respondents/Appellees.	:	

BRIEF OF APPELLEES KINDERCARE LEARNING CENTERS, INC. and/or AMERICAN ASSURANCE CO.

Appeal from the Utah Labor Commission

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RESPONDENTS RESPECTFULLY REQUEST ORAL ARGUMENT AND THAT THIS CASE BE REPORTED.

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ISSUE PRESENTED AND STANDARD OF REVIEW

Whether there exists substantial evidence to support the Labor Commission's determination that a treating physician's Summary of Medical Record form was insufficient to create a conflicting medical report to justify referral of the case to a Medical Panel.

The issue concerning adequacy of this form was raised at the Labor Commission at Record, 43-57.

Standard of Review

Whether medical records conflict with each other is a question of fact. See Brown & Root Inds. Serv. v. Industrial Commission, 947 P.2d 671, 677 (Utah 1997); Kahler v. Martin Husereau, 2003 UT. App. 239. That review is determined based upon a substantial evidence standard. See Utah Code Annotated §63-46b-16(4)(g). So long as administrative findings are supported by substantial evidence, the appellate court will not overturn them, even if another conclusion is permissible. Utah's courts have defined substantial evidence as, "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, even if another conclusion is permissible." Harken v. Board of Oil, Gas & Mining, 920 P.2d 1176, 1180 (Utah 1996). Substantial evidence is more than a scintilla of evidence, though less than the weight of the evidence. See Commercial Carriers v. Industrial Comm'n., 888 P.2d 707, 711 (Utah App. 1994).

In addition, a party challenging a factual finding must first marshal all of the evidence that might support the challenged findings and then demonstrate why, in light of this

marshaled evidence, the findings are not supported by the record. See Gates v. Labor Commission, 2002 UT. App. 428; Whitear v. Labor Commission, 973 P.2d 982 (Utah 1998).

When reviewing the commission's application of its own rules, the appellate court will not disturb the agency's interpretation or application of an agency rule unless its determination exceeds the bounds of reasonableness and rationality. See Brown and Root, 947 P.2d at 677.

DETERMINATIVE LAW

The determinative law is *Utah Code Ann.* § 34A-2-601. This section provides:

> (1)(a) The Division of Adjudication **may** refer the medical aspects of a case described in this Subsection (1)(a) to a medical panel appointed by an administrative law judge.

(Emphasis added). (*Utah Code Ann.* § 34A-2-601).

Although the Labor Commission has discretion under this statute to decide when to convene a medical panel, the Labor Commission has adopted Rule R602-2-2, *Utah Administrative Code*, which limits that discretion in certain instances. Rule R602-2-2 provides in part:

> A. A panel will be utilized by the Administrative Law Judge where one or more significant medical issues may be involved. Generally a significant medical issue must be shown by conflicting medical reports. Significant medical issues are involved when there are:
>
> 1. **Conflicting medical opinions related to causation of the injury or disease;**
>
> . . .

(Emphasis added). (*Utah Admin. Code* R602-2-2).

STATEMENT OF THE CASE

Nature of the Case and Course of the Proceedings

This case presents the question whether an Administrative Law Judge properly refused to send a case directly to a medical panel for review when the treating physician's summary of medical record failed to indicate whether there was a medical causal connection between the claimed industrial accident and the medical problems in which he had been treating.

On November 25, 2003, Petitioner Vaeleen Roberts (hereinafter, "Roberts") filed an Application for Hearing with the Labor Commission. She claimed entitlement to workers' compensation benefits based upon a industrial injury and/or occupational disease sustained while working for Kindercare Learning Centers, Inc., (hereinafter, "Kindercare") during the period of 1989 to June 2, 2003. See R., 1.

On November 26, 2003, the Labor Commission issued an Order for Answer. See R., 8.

On December 22, 2003, Respondents filed an Answer to the Application for Hearing. See R., 10-12.

On July 1, 2004, an evidentiary hearing was conducted before Administrative Law Judge Richard M. LaJeunesse (hereinafter, the "ALJ"). See R., 28. No transcript of this hearing is on record.

On December 29, 2004, the ALJ issued his Findings of Fact, Conclusions of Law, and Order. The ALJ ruled that no medical opinion existed that confirmed a medical causal relationship between

Roberts' employment exertions at Kindercare and her low back problems at issue in this case. Therefore, the ALJ dismissed Roberts' claim with prejudice. See R., 36-42.

On January 28, 2005, Roberts filed a Motion for Review. See R., 43-46.

On February 15, 2005, Kindercare filed a Response to Motion for Review. See R., 47-57.

On July 21, 2005 the Labor Commission entered an Order Denying Motion for Review, affirming the ALJ's Order. See R., 60-63.

On August 17, 2005 Roberts filed a Petition for Review with this court seeking review from the final order of the Labor Commission. See R., 64. A Docketing Statement was filed on or about September 17, 2005.

Statement of Facts

The facts of this case are accurately set forth in the ALJ's December 29, 2004 Findings of Fact, Conclusions of Law, and Order and are incorporated herein by reference. See R., 36-42. The parties do not dispute the underlying facts of this matter. In short:

1. Roberts worked for Kindercare from 1989 through June 2, 2003.
2. Roberts claims that she suffered either an occupational disease or cumulative trauma to her back from the repetitive physical exertions of her employment at Kindercare.
3. Up to July 2002, Roberts worked as a teacher of pre-school aged children. In June 2002, Kindercare promoted Roberts to assistant director. As assistant director, Roberts worked in the office, drove the children in a Kindercare van, cooked, washed dishes, staffed in the infant room, and taught a phonics class.

4. Roberts spent three to four hours per day, two days per week, in the kitchen. Roberts washed dishes two times per week, which took her on average four hours with interruptions. Roberts was required to bend over a deep set sink at the waist when she washed dishes.

5. Once a week, Roberts worked in the kitchen putting food orders away. The food orders consisted of cereal, frozen food and canned goods.

6. Roberts prepared meals when she worked in the kitchen. Roberts served all of the meals from a cart. None of the meal items served by Roberts weighed over one pound.

7. For three to four days per week, Roberts also worked in the infant room between one to four hours per day. Roberts had responsibility for four infants when she worked in the infant room. She had to lift each infant from three to four times per hour in order to feed, change, and comfort the children. The infants cared for by Roberts weighed between ten and thirty-five pounds depending upon the age and size of each child.

8. On January 29, 1991, x-rays of Roberts lumbar spine revealed: "[a] mild lumbar scoliosis with mild rational abnormalities but nothing too serious." (See R., J-1, MRE, at 81).

9. On August 17, 1998, Roberts was treated by Dr. Jeffery Oka for back pain. Dr. Oka stated: "she [Roberts] has had a previous lower back problem in 1994/1995 for which she sought chiropractic adjustments and did improve." (See R., J-1, MRE, 142).

10. On August 20, 1998, Dr. Oka again treated Roberts for upper back pain and bilateral posterior neck pain following a work related motor vehicle accident that took place on August 19, 1998.[1] (See R., J-1, MRE, 146).

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[1] The August 19, 1998 work related motor vehicle accident claim was later resolved by the parties. Roberts entered into a stipulated Settlement Agreement with Kindercare on

11. On February 9, 2000, Dr. Oka again treated Roberts for persistent neck pain. Dr. Oka states: "she [Roberts] had been doing fairly well until about two weeks ago **and for no known reason developed posterior neck pain.**" (See R., J-1, MRE, 159).

12. On August 7, 2001, Dr. Oka again treated Roberts. Dr. Oka states: "I have seen Vaeleen in the past for neck and upper back pain. **Approximately five days ago for no known reason she began having some mild low back pain.** It progressed over the week to become rather intense with some radiation into the left lower extremity." (See R., J-1, MRE, 170).

13. On November 13, 2002, Dr. Oka treated Roberts and stated: **"she [Roberts] was bending over and sneezing and had instantaneous back pain.** This has been going on for three days. Walking, standing or sitting give her increased pain." Dr. Oka's impression was as follows: 1) acute lumbar strain; and 2) probable lipoma of the lumbar region. *Id.*

14. On March 24, 2003, Dr. Oka again treated Roberts. Dr. Oka's impression of Roberts' back pain was as follows: "**acute low back pain, etiology unclear.**" Dr. Oka also stated as follows: "**the etiology of Vaeleen's back pain is still unclear.** It may be musculoskeletal, but she has now had another episode within this year, this time lasting for four weeks without improvement." (See R., J-1, MRE, 173).

15. On March 24, 2003, x-rays were taken of Roberts' lumbar spine. The purpose for the x-rays was to evaluate for degenerative changes or spondylolysis. The x-rays revealed

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October 4, 2000. This Settlement Agreement resolved the claims which Roberts believed had arisen in her favor in connection with this accident, and are not the subject of Roberts' current claim for benefits.

"degenerative changes, L4-5 and also L5-S1 in patient with rotatory scoliosis, convex – left." (See R., J-1, MRE, 004).

16. On May 12, 2003, an MRI of Roberts' lumbar spine revealed the following impression: 1) small broad-based disk bulges at L3-4 and L4-5; 2) herniated disk, central and left lateral, at L5-S1. Findings consistent with an inferiorly extruded fragment. (See R., J-1, MRE, 15).

17. On November 11, 2003, Dr. Oka completed a treating physician's Summary of Medical Record form. **Dr. Oka did not circle the 'yes' option when specifically asked: "Is there a medically demonstrative causal relationship between the industrial accident (repeated lifting of children and heavy kitchen work) and the problem you have been treating?"** (See R., 3, and J-1, MRE, 182).

18. On April 5, 2004, Dr. Richard T. Knoebel opined that Roberts' onset of low back and left leg pain was insidious. There was no specific accident or injury. Roberts' work is not unusually strenuous or unique. Dr. Knoebel also stated as follows: "Therefore, it cannot be stated with a reasonable degree of medical probability that the patient's low back and left leg pain beginning, by history, in about 3/03 and noted as an industrial claim on 6/2/03 were caused, contributed to or permanently aggravated by her work." (See R., J-1, MRE, 128).

SUMMARY OF THE ARGUMENT

The Labor Commission's Order Denying Motion for Review should be affirmed.

First, there is adequate evidence in the record to support the ALJ and Labor Commission's refusal to submit this case to a medical panel for review. The ALJ and the Labor Commission properly determined that Dr. Oka's Summary of Medical Record did not create any medical conflict with Dr. Knoebel's report, as to medical causation, that would justify referral of the case to a medical panel.

Second, Roberts' argument fails because she failed to Marshal the evidence. Roberts simply cites to the facts in support of her argument. She fails to provide any meaningful evidence or analysis which supports the Labor Commission's finding that no medical conflict exists. For this reason, the Court must assume that the record supports the Labor Commission's factual finding and affirm the Order Denying Motion for Review.

ARGUMENT

THE LABOR COMMISSION PROPERLY DETERMINED THAT THE TREATING PHYSICIAN'S SUMMARY OF MEDICAL RECORD WAS NOT SUFFICIENT TO CREATE A CONFLICTING MEDICAL REPORT THAT WOULD JUSTIFY REFERRAL OF THIS MATTER TO A MEDICAL PANEL

Roberts claims that the Labor Commission erred in affirming the ALJ's decision not to refer this case to a medical panel. Specifically, Roberts disputes the Labor Commission's finding that Dr. Oka did not offer a conflicting medical opinion regarding the cause of Robert's injury. She argues that there was a dispute as to medical causation between Drs. Knoebel and Oka, sufficient to warrant medical panel review. Kindercare disagrees.

A. SUBSTANTIAL EVIDENCE SUPPORTS THE LABOR COMMISSION'S FINDING THAT NO MEDICAL CONFLICT EXISTS

Section 34A-2-601, *Utah Code Ann.*, governs medical panel referrals in workers' compensation cases. This statute provides in part:

> (1)(a) The Division of Adjudication **may** refer the medical aspects of a case described in this Subsection (1)(a) to a medical panel appointed by an administrative law judge.

(Emphasis added).

Although the Labor Commission has discretion under this statute to decide when to convene a medical panel, the Labor Commission has adopted Rule R602-2-2, *Utah Administrative Code*, which limits that discretion in certain instances. Rule R602-2-2 provides in part:

> A. A panel will be utilized by the Administrative Law Judge where one or more significant medical issues may be involved. Generally a significant medical issue must be shown by conflicting medical reports. Significant medical issues are involved when there are:
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(Emphasis added).

This Rule requires the administrative law judge to submit the case to a medical panel when "one or more significant medical issues may be involved." See, e.g. Kahler v. Martin Husereau, 2003 UT. App. 239 (holding that substantial evidence supported the Labor Commission's refusal to send case to a medical panel when there were no conflicting medical reports).[2]

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[2] Interestingly, Attorney Shell, counsel for Roberts, was also counsel for the petitioner in Kahler. Given this involvement, Attorney Shell should be familiar with the applicable

In this case, the ALJ was first required to determine whether there were conflicting medical opinions related to the cause of Roberts' chronic back pain. Assuming so, an ALJ would be required to send a case to a medical panel per administrative rule. Kindercare contends that there is substantial evidence to support the Labor Commission's ruling that there did not exist any conflicting medical opinions related to the cause of Roberts' back pain. Therefore, it was not necessary for the ALJ and/or the Labor Commission to refer this case to the medical panel for review.

It is well-settled that an injured employee bears the burden to establish, on a more probable than not basis, that the stress, strain or exertion required by his or her occupation led to the resulting injury or disability. See Workers Compensation Fund v. Industrial Comm'n., 761 P.2d 572 (Utah 1988); Southern Pac. Co. v. Industrial Comm'n., 96 Utah 510 (1939).[3] Roberts' failed to meet her initial burden of proof. See Giesbrecht v. Board of Review, 828 P.2d 544 (Utah App. 1992).

Contrary to her allegations, Roberts did not provide the Labor Commission with any medical opinion which established, on a more probable than not basis, a medically demonstrative causal relationship between Roberts' repeated lifting of children, and heavy kitchen work, and her chronic low back problems. Roberts argues that it is insignificant that her own attending physician failed to establish a medically demonstrative causal relationship between her work activities and her low back pain when Dr. Oka failed to make such an indication on the treating physician summary of medical record form on November 11, 2003. Roberts suggests that Dr. Oka's summary of medical

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medical causal requirements necessary to invoke medical panel review.

[3] In Southern Pacific, the Court held that the Industrial Commission may not base a "material finding" on "incompetent evidence." "Nor can it's award be based upon mere conjecture." This court stated that while a finding of the Commission may not rest on possibilities, it may properly rest on probabilities.

record, must be read, "as a whole" and in doing so, a medical opinion controversy is created. Roberts overlooks the fact, however, that Dr. Oka, who had been treating Roberts since July 1998, provides a long history of medical documentation which suggests that Dr. Oka himself could not clearly establish, on a more probable than not basis, a direct medical link between Roberts' work activities at Kindercare and her chronic low back pain. Dr. Oka did not simply overlook the medical causation question presented to him on the physician's summary of medical record form.

Indeed, the medical records exhibit is replete with medical notes prepared by Dr. Oka which support the fact that the etiology of Roberts' low back pain was not certain.[4] This is not to suggest, however, that Dr. Oka was not certain whether Roberts work activity was the cause of her back pain. Dr. Oka was only uncertain as to whether Roberts' pain was musculoskeletal in nature or whether the back pain came from some other source within Roberts' lumbar spine. (See R., J-1,MRE, 172).

Further, Dr. Oka is not unfamiliar with workers' compensation cases and the necessary medical forms which are oftentimes required to be completed in such cases. For example, on April 11, 2000, Dr. Oka completed a similar summary of medical record form when he was asked to comment on the medical causation, if any, between Roberts' soft tissue upper thoracic injury following a blunt trauma caused by a student at work. (See R., J-1,MRE, 162). In that case, Dr. Oka checked 'yes' in answer to question no. 7 as to the issue of medical causation. Moreover, Roberts

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[4] See R., J-1,MRE 173. Impression: Acute low back pain, etiology unclear. See MRE 172. She [Roberts] was bending over and sneezing and had instantaneous back pain. This has been going on for three days. See MRE 170. I have seen Vaeleen in the past for neck and upper back pain. Approximately five days ago for no known reason, she began having some mild low back pain. It progressed over the week to become rather intense with some radiation into the left lower extremity. See MRE 159. I have seen Vaeleen in the past with intermittent neck pain. She has been doing fairly well until about two weeks ago and for no known reason developed posterior neck pain.

had ample opportunity before the Labor Commission evidentiary hearing to request from Dr. Oka, another opinion letter, or that Dr. Oka should revise or further clarify the treating physician's summary of medical record regarding the medical connection, if any, between Roberts' back pain and her work for Kindercare. Dr. Oka could not, or would not, expressly state that such a medical connection existed because he did not reasonably believe that Roberts' low back pain was work related.

It is not the obligation, or the requirement, of the medical panel to develop evidence in support of Roberts' claim where Roberts herself has failed to first establish medical causation in support of her claim. The medical panel serves to resolve a dispute between the conflicting medical opinions of two or more doctors which has already been established by the parties.

A review of the record as a whole reveals that both Dr. Oka and Dr. Knoebel could not find a medical causal connection between Roberts' work activities for Kindercare and her chronic low back pain. In fact, on April 5, 2004, Dr. Knoebel evaluated Roberts. Dr. Knoebel opined that it could not be stated with a reasonable degree of medical probability that Roberts' low back pain and left leg pain were caused, contributed to, or permanently aggravated by her work. See, R., J-1, MRE, 128. Dr. Knoebel's opinion was not uncertain, nor did the review of evidence of medical causation require Dr. Knoebel to make a complicated and technical medical evaluation.

Moreover, the ALJ did not engage in weighing the credibility or weight of Dr. Knoebel's report with that of Dr. Oka's summary of medical record form. These two medical opinions, when read side-by-side, do not conflict with each other. The lack of any medical conflict between these two reports suggests that the ALJ and the Labor Commission reasonably refused to send this case to a medical panel for review.

B. THE COURT SHOULD ASSUME THE RECORD SUPPORTS THE LABOR COMMISSION'S FACTUAL FINDINGS SINCE ROBERTS FAILED TO MARSHAL THE EVIDENCE

An appellant's challenge to a tribunal's factual finding requires that he or she first marshal all of the evidence that might support the challenged findings and then demonstrate why, in light of this marshaled evidence, the findings are not supported. See Gates v. Labor Commission, 2002 UT. App. 428; Whitear v. Labor Commission, 973 P.2d 982 (Utah 1998). This burden requires that the challenger list all evidence supporting the trial court's findings and then demonstrate that the evidence is inadequate to sustain those findings, even when viewed in the light most favorable to the court below. Indeed, counsel must extricate himself from the adversary's position and may not merely present selected evidence favorable to his or her position without presenting any of the evidence supporting the trial court's position.

> This requirement contemplates that an appellant present every scrap of competent evidence introduced at trial which supports the very findings the appellant resists and then ferret out a fatal flaw in the evidence, becoming a "devil's advocate."

State v. Green, 2005 UT. 9 (Utah 2005) (internal citations omitted).

In this case, Roberts fails to meet her duty to marshal the evidence. Roberts simply cites to the facts in support of her argument. She fails to provide any meaningful evidence which supports the Labor Commission's finding that no medical conflict exists. For this reason alone, the Court must assume that the record supports the Labor Commission's factual finding and affirm the Order Denying Motion for Review. See West Valley v. Stangl, 869 P.2d 9, 12 (Utah App. 1994).

CONCLUSION

Based upon the arguments set forth herein, Kindercare contends that the Labor Commission's refusal to submit this case to a medical panel is supported by substantial evidence. Moreover, because Roberts did not meet her duty to marshal the evidence, the Court should affirm the Labor Commission's findings.

For these reasons, the Court should affirm the Labor Commission Order Denying Motion for Review.

Respectfully submitted this 23 day of March, 2006.

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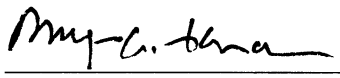

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CERTIFICATE OF SERVICE

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