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IN THE SUPREME COURT OF FLORIDA

UNIVERSITY OF FLORIDA and
DIVISION OF RISK MANAGEMENT,

Petitioners,

vs. CASE NO.: 76,414

EMMETT H. MASSIE,

Respondent.

_____/

ON PETITION TO REVIEW A DECISION OF THE DISTRICT COURT OF APPEAL OF THE FIRST DISTRICT OF FLORIDA

REPLY BRIEF OF PETITIONERS, UNIVERSITY OF FLORIDA and DIVISION OF RISK MANAGEMENT

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ARGUMENT

I. THE DISTRICT COURT OF APPEAL ERRED IN FINDING THAT RESPONDENT HAD SUSTAINED AN "ACCIDENT" WITHIN THE MEANING OF §440.02(1), FLORIDA STATUTES.

Although the district court of appeal does not explain its refusal to apply the Victor Wine standard to the facts of this case, 570 So.2d at 969 n.4, the respondent suggests several factors to distinguish this case from the "heart attack" cases.

For example, it is suggested that compensation was denied in Tintera v. Armour & Company, 362 So.2d 1344 (Fla.1978), because Mr. Tintera's "stress" was due in part to stress in his non-employment life, whereas there was no non-employment stress in the instant case. While the opinion does indicate that the claimant was going through a divorce, was required to commute through heavy traffic, and had been in a minor automobile accident, these factors were not the basis for the denial. Rather, compensation was denied because this court did not believe that the type of non-physical stress alleged, i.e., concern about being laid off from work, working exceptionally long hours, etc., was the type of stress contemplated by Victor Wine. 362 So.2d at 1346.

Moreover, that theory would not explain this court's holdings in Richard E. Mosca & Company, Inc. v. Mosca, 362 So.2d 1340 (Fla.1978); Richards Department Store v. Donin, 365 So.2d 385 (Fla.1978); or City of Miami v. Rosenberg, 396 So.2d 163 (Fla.1981). There was no evidence in any of those cases to suggest that the claimants' "stress" was anything other than employment-

related. Nor would these personal factors explain the district court's own holding in State Real Estate Com'n. v. Felix, 383 So.2d 941 (Fla.1st DCA 1980).

In that case, the claimant was an attorney employed by the Florida Real Estate Commission. In May 1978, he had scheduled 20 depositions in 15 cities within a two-week period. He suffered a myocardial infarction during the second week of these depositions. There is no indication that his stress was due to any non-employment factors. Nevertheless, the claimant's hard work and undoubtedly long working hours were held insufficient to support an award of compensation. 383 So.2d at 942.

Respondent further suggests that the "heart" cases are somehow distinguishable because: (1) multiple sclerosis is a relatively rare disorder whereas cardiovascular disease is widespread in the population; (2) evidence of medical causation in cases of cardiovascular disease is often speculative whereas that was not so in the instant case; and (3) cardiovascular disease, but not multiple sclerosis, often involves "sudden failures" which are as likely to occur off the job as on.

First, there is no record support for the contention that cardiovascular disease is a more frequently recurring problem in the population than is multiple sclerosis. Even if true, however, your petitioners are wholly unable to discern why that should make any difference in how the two are treated for purposes of entitlement to workers' compensation benefits.

The contention that the cardiovascular disease cases turn

solely on questions of medical causation is likewise without merit. As the district court of appeal has held, Victor Wine imposes tests of both legal and medical causation. Each test is separate and distinct, and both must be satisfied before compensation may be awarded. McCall v. Dick Burns, Inc., 408 So.2d 787 (Fla.1st DCA 1982).

Moreover, the respondent confuses "speculative" medical testimony with "conflicting" medical testimony. The evidence in Mosca may have conflicted on the issue of medical causation, but it was certainly not speculative. 362 So.2d at 1341-42. Likewise, the treating physician in Tintera testified that it was the claimant's employment-related stress which caused his myocardial infarction, 362 So.2d at 1345, yet compensation was denied.

As for the "suddenness" argument, your petitioners submit that the occurrence of a "sudden" heart attack while in the course of employment would actually be a factor militating toward rather than away from compensability since an "accident" is defined as "an unexpected or unusual event or result, happening suddenly." §440.02(1), Florida Statutes (emphasis added). While at a business meeting, the claimant in Mosca suffered a "sudden" rupture of a congenital cerebral aneurysm which, according to his physicians, was caused by the stress of his employment, including long working hours. 362 So.2d at 1341-42. Compensation was denied despite the "suddenness" of the event on the job because "[e]motional stress is too elusive a factor to be utilized, independent of any physical activity, in determining whether there is a causal connection

between a heart attack or other internal failure of the cardiovascular system and the claimant's employment." 361 So.2d at 1342.

Alternatively, the respondent suggests that if a Victor Wine analysis is to be employed, the facts of this case fall within the parameters of compensability outlined in Silvera v. Miami Wholesale Grocery, Inc., 400 So.2d 439 (Fla.1981). Mr. Silvera was employed as a sales representative for Miami Wholesale Grocery. Although the loading of ships was not a part of his regular employment duties, the evidence showed that he did so on the occasion in question. Following this unusual physical exertion and an emotional confrontation with the ship's captain, the claimant suffered a heart attack. The medical testimony found "a close nexus between the heart attack and Silvera's physical and emotional exertion, both causally and temporally." 400 So.2d at 441.

The question presented in Silvera was not whether there must be an "unusual strain or over-exertion" or a "specifically identified effort" in order to award compensation, but whether there must be "a precise correlation between physical effort and the onset of a heart injury, and whether an 'effort' encompasses a combined physical and emotional sequence which is identifiable apart from normal work pressures." 400 So.2d at 441.

Evidently, the district court was not persuaded that Silvera supported a finding of compensability herein. The court's discussion of Silvera contained in the June 2, 1988 opinion, 13 F.L.W. at 1343-44, was deleted from the final opinion of June 29,

1990. This lack of reliance on Silvera can probably be explained at least in part by the fact that the respondent testified (R:155,159) and the judge of compensation claims specifically found (R:406) that there was no unusual strain or over-exertion preceding any of his "attacks" of multiple sclerosis, the most severe of which occurred in April 1980 (R:306). Rather, the respondent testified that it was "everything that was going on" (R:159,308). In fact, he described his job duties during his last three years of employment as "mostly administrative" consisting of "budgeting, supervising, meetings." (R:274-75).

The only evidence demonstrating any "physical trauma" in this case is the respondent's "long hours" of work. Yet, there is competent substantial evidence to show that the long hours had nothing to do with the aggravation of his multiple sclerosis (R:340-41, 358-59). Accordingly, the respondent has failed to carry the heavy burden of proof applicable to disease cases. In D'Avila, Inc. v. Mesa, 381 So.2d 1172 (Fla.1st DCA 1980), the district court of appeal denied a claim for aggravation of the claimant's pre-existing asthma. Relying on longstanding precedent from this court, the district court held:

> In cases involving an employee's disease, as distinguished from an external accident sustained by the employee, the employee must prove a causal connection between injury and employment by clear evidence, not just by a preponderance of the evidence, or by speculation or conjecture. Harris v. Josephs of Greater Miami, 122 So.2d 561 (Fla.1960).

381 So.2d at 1173.

Contrary to the district court's holding and the respondent's

contention, the "repeated trauma" or "exposure" test contained in Festa v. Teleflex, Inc., 382 So.2d 122 (Fla.1st DCA 1980), simply does not work under the facts of this case. This is especially true since the district court of appeal has recently conceded that an employee's "prolonged exposure" under Festa need not be "prolonged" after all in order to sustain an award of compensation.

In Florida Power Corporation v. Stenholm, 16 F.L.W. D859 (Fla.1st DCA March 28, 1991), the district court of appeal held that prolonged exposure to a harmful fungus causing cryptococcal meningitis was not necessary to award compensation; rather, a one-time exposure to a single molecule of the fungus is sufficient. 16 F.L.W. D860-61.

What does this decision mean in the instant case? What are "long hours?" Is a 40-hour week the standard? Are 10 hours of overtime sufficient? Five hours? One hour? Because the Festa test was not intended to be applied where there has been no exposure to a harmful substance or force in the workplace, application of its principles herein produces absurd results.

But one need not rely upon petitioners' hypotheticals in order to see where the district court's holding will lead us, for the long slide down the slippery slope has already commenced as a result of the district court's June 2, 1988 opinion. Attached hereto is a copy of a compensation order from the Honorable Patrick J. Murphy, judge of compensation claims in District M, dated January 31, 1990. Alan Davis (deceased) v. Property & Accounting Management. [Appendix I].

The decedent/employee in that case had a longstanding history of epilepsy. Some weeks prior to the accident, the employer undertook a change of personnel, and the employee undertook some additional responsibilities in working hours. Although his physical undertakings were actually reduced to a certain extent, there was some disruption of the ordinary routine of the employer's business, causing the employee some degree of increased anxiety. The frequency and severity of his seizures increased at that point.

On the date of the accident, the employee was found dead in the employer's restroom. The cause of death was established as a profound epileptic seizure. The medical testimony, accepted by the judge of compensation claims, established that the employee's perceived anxiety caused an increase in the frequency and severity of his seizures, thereby resulting in his death. Judge Murphy found that the death would be compensable under the district court's holding in Massie.

Other attempts to make an "end run" around the Victor Wine rule have been thwarted. Hodgen v. Burnup & Sims Engineering, 420 So.2d 885 (Fla.1st DCA 1982) (declining to apply an "occupational disease" analysis to a fatal heart attack); Accord Pfeiffer v. State Dept. of Natural Resources, 436 So.2d 350 (Fla.1st DCA 1983); Russell v. State Dept. of Corrections, 464 So.2d 1202 (Fla.1st DCA 1984). This attempt should be thwarted as well.

Accordingly, petitioners respectfully this court to quash the decision of the district court of appeal and to reinstate that of the judge of compensation claims.

II. THE DISTRICT COURT OF APPEAL ERRED IN REVERSING THE ORDER OF THE JUDGE OF COMPENSATION CLAIMS DATED APRIL 30, 1986 WHICH DENIED RESPONDENT'S PETITION FOR MODIFICATION.

The thrust of respondent's argument to this court is that there was no competent substantial evidence to support the findings of fact made by the judge of compensation claims in his original order of February 17, 1984 and that the judge has conceded as much. Those are the same arguments made to the district court of appeal in the original appeal[1] [Appendix II] and to this court on petition to review the decision of the district court[2] [Appendix III].

Surely the respondent should not be permitted to continue making these same arguments over and over again. As this court held in Mabson v. Christ, 96 Fla.756, 119 So.131 (1928):

> It has been well said that there must be some point in every court proceeding when the cause is finally disposed of, its thread cut, and the parties out of court . . . . The public welfare demands that there shall be some definite end to litigation - a point sometime, somewhere, when every case is terminated. We cannot afford to return to the interminable and outrageous practice similar to that depicted in Dickens' case of Jarndyce v. Jarndyce.

96 Fla. at 759, 119 So. at 132.

The only question properly before this court is whether the judge of compensation claims erred in his order of April 30, 1986 by denying the mistake-of-fact petition for modification. Your

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[1] Case No. AY-12, 463 So.2d 383 (Fla.1st DCA 1985).

[2] Case No. 66,744, pet. for rev. denied, 472 So.2d 1181 (Fla.1985).

petitioners respectfully submit that the district court of appeal was correct when it held in its June 2, 1988 opinion:

> Modification under section 440.28 cannot be employed to avoid the quest for finality of decision which the doctrines of law of the case and res judicata are intended to accomplish, especially when the sufficiency of the evidence has been appealed and decided by an appellate court. (Emphasis added).

13 F.L.W. at 1346.

Petitioners do not disagree in principle with the notion that an appellate court may, under appropriate circumstances, reconsider a previous ruling that established the law of the case. For example, in Brunner Enterprises, Inc. v. Dept. of Revenue, 452 So.2d 550 (Fla.1984), this court held that it would not be bound by the law of the case where, in an intervening opinion, the United States Supreme Court reached a decision directly contrary to this court's previous holding on the same point of law. The instant case, however, is not a proper one for application of this principle. The result is an absurdity.

The judge of compensation claims was presented with evidence of a mistake of fact which was legally insufficient under Power v. Joseph G. Moretti, Inc., 120 So.2d 443 (Fla.1960), a point conceded by the district court in its June 2, 1988 opinion. By its holding herein, the district court has accomplished indirectly what the judge of compensation claims could not do directly. The district court has ordered the judge of compensation claims to engage in a "reanalysis of the prior record . . . and . . . change . . . his conclusions as a result of a retrospective exploration of the

original record" in direct violation of Power. 120 So.2d at 446.

Stated more plainly, although the district court is not bound by the doctrines of res judicata and law of the case where application of those doctrines would result in "manifest injustice," the court does not possess carte blanche in that regard. It is not free to disregard these doctrines where the result would be contrary to established precedent from this court. Perhaps it is a subconscious recognition of this point which explains the district court's yearning for the authority to overrule binding precedent from this court even though in the same breath it disavows the need to exercise that authority in this case. 570 So.2d at 969-76, 977-78.

Accordingly, petitioners respectfully request this court to quash the decision of the district court of appeal and to reinstate that of the judge of compensation claims.

CONCLUSION

For the foregoing reasons and for those stated in the initial brief, petitioners respectfully request this court to quash the decision of the district court of appeal and to reinstate that of the judge of compensation claims.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Terrence J. Kahn, Esquire, at 2929 Plummer Cove Road, Jacksonville, Florida, 32223; to H. George Kagan, Esquire, at 455 Fairway Drive, Suite 101, Deerfield Beach, Florida, 33441; and to Harold E. Regan, Esquire, at 211 South Gadsden, Tallahassee, Florida, 32301, by U.S. Mail, this 29th day of May, 1991.

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