

087

IN THE SUPREME COURT OF FLORIDA

WARREN ZUNDELL,

Petitioner,

CASE NO. 81,057

FILED

SID J. WHITE

✓ MAR 26 1993

v.

DADE COUNTY SCHOOL BOARD
and GALLAGHER BASSETT
SERVICES, INC.,

CLERK, SUPREME COURT

Respondent,

By _____
Chief Deputy Clerk

Appeal from Decision of
The First District Court of Appeal

Initial Brief of Petitioner

✓ STEVEN M. DUNN, ESQUIRE
DUNN & JOHNSON, P.A.
Attorneys for Petitioner
4770 Biscayne Blvd., #980
Miami, Florida 33137
(305) 576-9076
Florida Bar No. 488534

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ISSUE I

Whether there is competent substantial evidence in the record to support the J.C.C.'s denial of the claim where there is uncontroverted evidence in the record that an accident causing injury occurred in the course and scope of claimant's employment.

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STATEMENT OF THE CASE

The Petitioner, Claimant filed a claim for worker's compensation benefits alleging he sustained a ruptured artery in his brain as a result of an accident while in the course and scope of his employment. The Judge of Compensation Claims denied the claim on the basis that the claimant failed to meet the requirements of the Victor Wine rule. The claimant appealed to the 1st DCA which heard the case en banc. The order was affirmed in a 7-5-2 opinion with 2 separate dissenting opinions filed. The majority certified the case to this court on a question of great public importance. Petitioner shall be referred to as Mr. Zundell and claimant interchangeably. The respondent shall be referred to as employer/carrier. References to the record shall be made with an "R" followed by the appropriate page number.

STATEMENT OF FACTS

Mr. Warren Zundell began teaching school in 1958. He was a mathematics teacher having taught high level algebra for the last eight to ten years of his career (R.20). Additionally, he began teaching at Hialeah Junior High since it opened in 1964 and continued there until his retirement following the January 5, 1985 accident (R.21).

The accident involved a student who had recently been assigned to the claimant's classroom. He was placed in the class approximately two months after the school year began (R.28).

Prior to the accident Mr. Zundell had to warn the student several times for acting up in class. In fact, the claimant

contacted the student's grandmother, with whom the student was living, to complain about the behavior (R. 28). Also, prior to the accident, on two separate occasions, the student commented that he understood Mr. Zundell was in a concentration camp (R. 28).

On January 5, 1988 the student arrived in class sporting a "strange hair-do" and was hyperactive (R. 26). He was talking loud and disrupting the other students (R. 26). According to Mr. Zundell the student would not sit in his chair or take out his pencils. After finally getting him to sit down the claimant noticed the student chewing a large wad of gum. After being asked to throw the gum away the student got up, went to the front of the room, and threw it into the waste basket hard enough to create a very loud noise after which the student screamed, "I'm not interrupting your class now. Go on with your class (R. 26)." At that point Mr. Zundell did not feel he was able to control the class (R. 26).

Claimant did prevail upon the student to sit down. However, the student refused to open his book or otherwise cooperate (R. 30). Thereafter claimant decided the student would have to be taken to the assistant principal's office (R. 30). The assistant principal directed Mr. Zundell to take the student to the disciplinary office (R. 30). Again the student defied the claimant by refusing to enter the disciplinary office. The student's voice raised and he commented, "You're not the boss the assistant principal is (R. 31)." The student was left at the disciplinary office and Mr. Zundell returned to his class to resume the lesson

(R. 31). Suddenly, he noticed the student attempting to come back into the classroom. Mr. Zundell headed him off at the door where a very serious confrontation began (R. 31). At the door Mr. Zundell and the student were standing nose to nose (R. 32). The student insisted he was going to enter the room. The claimant responded that he was not and if he did he would have to walk over the claimant to do so. The student then stated, "If I hit you I'm going to get into trouble (R. 31-32)." Immediately following that remark Mr. Zundell began to feel very tense, as though he was in a combat situation. The claimant described physical manifestations he had never experienced previously (R.38):

A. Well, when he said that I was standing by the door because I wasn't going to let him in to the classroom and we were standing nose to nose. We were that close to each other. And I said -- I just felt tense and very as if I was in some kind of combat and he -- I refused to let him into the classroom.

Q. When you say you felt tense, had you ever felt that way before?

A. Not that way. The back of my neck started to get very, very tight and my muscles became very, very tense and I became very, very nervous.

Q. Did you have any type of fears?

A. Well, when I told him that he's not going to go back into the classroom, he's going to have to walk over me if he wants to go back in there and he mentioned to me that if I hit you, I get into trouble, I didn't expect him to say that and I felt that he could have raised his fist and tried to push me through the door or get back into the room. (R. pg.32, line 6-23).

Mr. Zundell was able to persuade the student to go back to the office (R. 33). Then as he and the student turned toward the hallway the following exchange occurred.

Q. After you held your ground and told him that you wanted to take him to the office, what happened?

A. It looked like he was going to go to the office and then we turned around and we're walking. I turned to head toward the hallway and I put my arm out to sort of guide him out and he jumped back and I thought this is where I'm going to get slammed. I thought he was going to attack me there or at least swing at me, but it didn't occur.

Q. How did you feel at that moment?

A. That's the second time I felt this tenseness come over me, but it disappeared and I felt very nervous and I at least got him downstairs to the office.

Q. Other than this tension and tenseness that you felt, did you feel anything else? Did you feel anything in your head?

A. Those two times when he first said, "If I hit you I'll get into trouble", I felt that tenseness in the back here. And the second time when he jumped when I was to escort him down to the room I felt it. And then after that I left him at the office and I thought everything was fine I felt extremely nervous and very, very tense. But then I said, "Everything will be all right. Just go back to class and do your job."

Then when I got back to the classroom I felt very, very strange and I felt I couldn't move. The first thing I did was loosen up my tie and then I unbuttoned my shirt and I did something that I never do. I just sat in front of the class and I didn't do anything and I just said to myself just relax for five minutes or ten minutes and everything will be fine and then start your lesson.

So I just sat there. And these were good students. They weren't jumping around or anything.

Finally one student asked me, "Mr. Zundell, is anything wrong?" And I said, "Yes. Something is definitely wrong with me. I don't know what it is. You'd better go to the office and get the administrators."

The second incident likewise created a physical response never before experienced by Mr. Zundell (R. 38):

Q. Now, that second time that you felt that

tension in your body and in your head, did you feel like you were being threatened?

A. Yes. Because when he jumped I thought that -- or when he actually shrugged, I thought that he was going to attack me.

Q. And physically what was your response to that?

A. Well. I tensioned up. I was getting ready to get hit. I tensed up, rather, and I was getting ready to get hit.

Q. When you say you tensed up, could you -- can you describe that?

A. Well, it's like -- I emphasize the best way to describe it, if somebody was going to raise his fists to hit you, your automatic reaction would be to tense up and get ready to get hit. I guess that would be about the best way to describe it. (R. pg.33, line 11-25, pg. 36,line 1-2).

According to the claimant, he had never had a confrontation like this. (R.37).

Prior to this incident the claimant underwent regular medical examinations and was in excellent health. (R.23) Likewise, he was not under any medication or being treated for any conditions (R.23).

According to Neurosurgeon Dr. Yates this unusual confrontation caused a hemorrhage in Mr. Zundell's brain (R. 92,110). The confrontation created a sudden, dramatic surge in blood pressure that put pressure on one of the vessels in the brain, probably an artery, and caused it to rupture (R.92,94). The vessel went into spasm to stop the bleeding and then according to the doctor the artery thrombosed or clotted and never bled again (R.95).

Two arteriograms failed to disclose evidence of an aneurysm, arteriovenous malformation, intracranial source of the hemorrhage, or any other preexisting condition (R. 87, 90, 100, 110, 126).

SUMMARY OF ARGUMENT

The Judge of Compensation Claim erred in applying the Victor Wine rule to the instant case where the uncontroverted medical evidence establishes that claimant did not suffer from a preexisting cardiovascular condition. The claimant proved with uncontroverted medical evidence that his injury was caused directly by the confrontation with the student. As such the accident should be compensable.

ISSUE

Whether there is competent substantial evidence in the record to support the denial of compensability where there is uncontroverted evidence in the record that an accident causing injury arose out of and in the course and scope of employment.

ARGUMENT

There is no competent substantial evidence in the record to support the denial of compensability where there is uncontroverted evidence in the record that an accident causing injury arose out of and in the course and scope of employment.

There is no precedent in Florida for applying the Victor Wine Rule to the instant case. Victor Wine & Liquor v. Beasley 141 So.2d 589 (Fla 1962) and the many cases that have followed make it abundantly clear that the concern regarding the compensability of heart attacks is that industry should not shoulder the burden for heart attacks that fortuitously occur on the job by claimant's who are predisposed to heart attacks. This Court in Tintera v. Armour & Company, 362 So.2d 1344, 1346(Fla.1978), approved the language of the Industrial Relations Commission which found

that Victor Wine is premised upon recognition of the fact that a great portion of our work force comes upon the work scene with heart defects that would result in heart attacks in any event.

The foregoing language is cited by the majority below at page 8 of its opinion.

There can be no such concern with Mr. Zundell where his

neurosurgeon testified that there was no medical evidence of any preexisting cardiovascular condition disabling or otherwise to explain the subarachnoid hemorrhage. The only and uncontroverted medical evidence is that this incident caused the injury. The order of the J.C.C states as follows:

I have also examined the deposition testimony of Dr. Basil Yates, neurosurgeon. Dr. Yates stated that he saw the claimant for the first time on January 5, 1988, the date of the alleged incident. He last saw the claimant on July 23, 1990. Dr. Yates saw the claimant consistently between those two dates. Dr. Yates stated that an arteriogram was performed on the claimant which indicated that there was no cause for the brain hemorrhage which was diagnosed. A repeat arteriogram was done and again failed to indicate any cause for the hemorrhage. Dr. Yates' final diagnosis was the occurrence of the subarachnoid hemorrhage, which he felt was precipitated by the confrontation with the student on January 5, 1988.

There is no question but that Mr. Zundell's injury arose out of and in the course and scope of his employment. There is no sound reason or rationale in placing a greater burden on him than any other healthy individual who sustains injury on the job. To do so would create a windfall for this employer/carrier and an injustice to Mr. Zundell. As stated by Judge Webster on page 11 of his dissenting opinion below

by affirming the denial of benefits in this case, it is the majority who makes a substantial change in existing law.


CONCLUSION

Based upon the foregoing it is respectfully requested that the order of the Judge of Compensation Claims be reversed and the claim of Mr. Zundell be found compensable. Additionally it is respectfully requested that the order of the 1st D.C.A. denying claimant's motion for attorney's fees be overruled.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of above and foregoing was mailed this 24th day of March, 1993 to: SYLVIA KRAININ, ESQUIRE and STEVEN KRONENBERG, ESQUIRE, 15600 N.W. 67th Avenue, Miami Lakes, Florida 33014 and Cecilia F. Renn, General Counsel, Department of Labor & Employment Security, Suite 307 Hartman Building, 2012 Capital Circle SE, Tallahassee, Florida 32399-2189.

DUNN & JOHNSON, P.A.
STEVEN M. DUNN, ESQUIRE
Attorneys for Petitioner
4770 Biscayne Blvd., #980
Miami, Florida 33137
(305) 576-9076

BY: 
STEVEN M. DUNN