IN THE SUPREME COURT OF FLORIDA

WARREN ZUNDELL,

Petitioner,

v.

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

Respondent,
_____/

CASE NO. 81,057

Appeal from Decision of
The First District Court of Appeal

Reply Brief of Petitioner

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REPLY BRIEF OF PETITIONER

The petitioner respectfully submits that the proper decision in this case is one in which the purpose and policy of Florida Workers' Compensation Law will be facilitated. As stated by Judge Webster in Zundell at p.1373:

> *It should be apparent to anyone who has read Florida's Workers' Compensation Law (Chapter 440, Florida Statutes) that it represents the manifestation of a legislative intent to deal comprehensively with the important topic of injuries in the workplace. "As has been pointed out many times[,] workmen's compensation legislation is designed to relieve society generally, and injured employees specifically, of the economic burden resulting from work[-]connected injuries and place the burden on industry." J. J. Murphy & Son, Inc., v. Gibbs, 137 So. 2d 553, 558-59 (Fla. 1962).*

It is clearly with that purpose in mind that this Court in Victor Wine created the legal standard of compensability for heart attacks and later all cardiovascular injuries. Victor Wine protects industry from shouldering the burden for heart attacks and cardiovascular failures which occur on the job fortuitously by persons with pre-existing conditions. As stated previously, this Court approved the following language in Tintera v. Armour & Co., 362 So 1344, 1346 (Fla. 1978),

> *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 any event.*

The majority below, the Appellee, and amicus, strongly argue that Victor Wine applies to cases in which there is no evidence of a pre-existing cardiovascular condition. All ignored the first paragraph of this Court's decision in Victor Wine:

> *upon petition of the claimant, and to dispel the confusion apparently engendered by previous decisions of this Court involving claims for compensation for a disability alleged to have resulted from the acceleration of a disability from a pre-existing heart disease by work connected activities, rehearing was granted in this case.* ***Victor Wine*** *at p. 587.*

Contrary to the assertions of the Appellee and Amicus, neither this Court nor the First DCA has addressed the issue that is before the Court today: Whether the purpose of and policy behind Florida Workers' Compensation Law will be facilitated by application of **Victor Wine** in cases where there is evidence within a reasonable degree of medical probability that the claimant did not suffer from a pre-existing cardiovascular condition and the claimant's injury was directly and causally related to his work activities.

Neither the Majority nor the Appellee and Amicus explain how the application of **Victor Wine** to this case is consistent with the longstanding principle and policy of the Florida Workers' Compensation Law.

The majority below appears most concerned that the state of the art in cardiovascular medicine is not sophisticated enough to rule out within reasonable medical probability pre-existing cardiovascular disease. The Majority stated as follows at p. 1370:

> *In many of these cases, the existence of a preexisting heart or cardiovascular defect may be difficult or impossible to establish. In a number of cases, it is apparent that the incident would not have occurred without the undetectable defect, and notwithstanding*

*the existence of such a prior defect, it is difficult, if not impossible, to directly attribute the injury to emotional stresses. See **Richard E. Mosca**, **supra**. The instant case is illustrative of the difficulties involved. The doctor's, diagnosis in this case is based upon the fact that the arteriogram revealed no prior condition. Yet when asked whether the arteriogram would have revealed a weakness in the artery wall that may have led to the escape of blood, the doctor had to admit it would not. The speculative nature of the doctor's testimony concerning the prior existing condition coupled with the high incidence of heart and cardiovascular disease demonstrates the necessity for adopting a legal causation test as was done in **Victor Wine** and **Richard E. Mosca**. Abrogation of the **Victor Wine** test in this type of situation would allow compensation to be paid in many cases where it could not be reliably proven that the industry brought about the injury. The supreme court in **University of Florida v. Massie**, 17 F.L.W. S306 (Fla. May 28, 1992), cautioned against such an attempt by this court to legislate. Id. at S310.*

Apparently the majority and respondents argue that unless the state of the art in cardiovascular medicine is such that a preexisting condition can be conclusively ruled out[1], the claimant must shoulder the burden for an injury that is otherwise within reasonable medical probability directly, causally related to his work activities[2].

Both Judge Webster and Judge Ervin responded to that aspect of the majority opinion in their respective dissents. Judge Webster stated at p. 1373 as follows:

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1) Assuming arguendo that the state of art is such that a preexisting condition cannot be ruled out conclusively would the majority and respondent advocate a reversal of the majority opinion if subsequently a diagnostic test was developed that could conclusively rule out a preexisting condition?

2) Neither the majority nor the respondent cite to any authority nor has petitioner found any authority that would require a claimant to prove a medical fact conclusively.

The majority concludes that the rigorous additional burden of proof required by the ***Victor Wine*** *rule should be applied to all cases involving a failure of any part of the cardiovascular system (regardless of whether the claimant had a pre-existing cardiovascular defect or disease) because it is significantly more difficult to establish a pre-existing cardiovascular defect or disease than it is to establish other types of pre-existing defects or diseases. I do not know whether this is true or not. Certainly, the majority offers no medical authority to support this ex cathedra pronouncement. However, even if we assume, for purposes of argument, that such is the case, it seems to me that the appropriate branch of government to decide whether such a deficiency in the present level of medical technology is sufficiently important to justify a significantly more onerous burden of proof in cardiovascular failure cases than in internal failure cases generally is the legislature, rather than the judiciary.*

On page 1384 Judge Ervin stated:

Finally, the majority refers to the speculative nature of the doctor's testimony regarding whether the claimant suffered from a personal condition. I assume that the majority has not concluded that the attending physician's testimony supported an implicit finding that claimant suffered from a prior weakness or disease. Certainly, the judge below never made any such finding. If he had done so and the issue on appeal related simply to whether there was any competent, substantial medical evidence sufficient to support the finding, I cannot conceive that any appellate court would, on this record, have affirmed the same. Dr. Yates, a neurosurgeon, testified without any contradiction that his opinion, founded upon reasonable medical probability, the claimant's confrontation with the student caused the claimant's subarachnoid hemorrhage. In addition to the history taken from claimant, Dr. Yates based his opinion upon his examination of several cerebral arteriograms of Zundell, from which he was unable to find any prior condition which may have predisposed claimant to the injury, such as a weakened wall of an artery which could result in an aneurysm, an arteriovenous malfunction, or any lesion of that sort. The fact that the doctor testified that the arteriogram could not reveal a prior weakening of vessels in Zundell's brain, but could otherwise reveal a bulge in the artery,

certainly does not compromise Dr. Yates' medical opinion directly connecting claimant's injury to the emotional encounter.

An appellate court can do no more than review the record before it, and it would be entirely inappropriate for us to decide that because the tests Dr. Yates conducted did not conclusively rule out all possibilities of any prior weakening of the vessels in the employee's brain, Dr. Yates' opinion had no evidentiary foundation. On the contrary, based upon all the evidence in the record before us, it would be entirely speculative for us to say that Zundell must have suffered from preexisting cerebral disease. As Professor Larson points out, it is not al all uncommon for a record to arrive before an appellate court showing, for example, that a worker with no prior history of heart disease suffered a heart attack.

Larson asks the following question as to what a court should do under such circumstances:

> *Shall it say that, although there is no evidence in the record of heart disease, it will supply that fact by judicial notice, because the preponderance of medical theory holds that the man must have had preexisting heart disease? But this may actually contradict the record, which may contain undisputed testimony that the man was healthy and had no previous history of heart disease.*
>
> *The legal answer is that the determination of preexisting heart disease is one of medical fact in the particular case, and that the burden of proof of that fact is on the party alleging its existence as part of his case. More frequent use of autopsies, when possible, may be justified in cases in which this issue can be foreseen.*

1A Larson, 38.83(d) at 7-339 (footnote omitted).

In that appellant presented sufficient evidence satisfying all elements necessary to establish the compensability of his claim, and there is not competent, substantial evidence to the contrary supporting the order denying compensability, the order in my judgment should be reversed, and

the case remanded for further proceedings consistent with this opinion.

The appellee's reliance on **Mosca** and **Massie** is unfounded because in both cases the claimant suffered from a preexisting condition and failed to show the requisite **Victor Wine** non routine on the job physical exertion. Likewise the appellee's reliance on **City of Holmes Beach v. Grace**, 17 FLW 5261 (Fla. 1992) is unfounded because there the claimant claimed compensability exclusively for a psychiatric illness, which is specifically excluded by S440.02(1) FSA. In the instant case, the claimant is not making a claim for treatment for a psychiatric illness. As pointed out in footnote 20 of Judge Ervin's dissent:

> *The fact that the claimant below suffered a physical injury shortly following the emotional encounter with the student brings his injury outside the exception provided in section 440.02(1), stating that accidental injury does not include "[a] mental or nervous injury due to fright or excitement only." **Cfr. City of Holmes Beach v. Grace**, 598 So. 2d 71 (Fla. 1992). As in **Popiel v.Broward County School Board**, 432 So. 2d 1374, 1376 (Fla. 1st DCA), review denied, 438 So.2d 831 (Fla. 1983), the injury at bar "does not involve a mental or nervous injury, but rather, a very serious physical injury." **Zundell at 1383.***

Judge Webster in his dissent, at page 1372, explains **Massie** and provides the historical underpinning for a finding of compensability in this case:

> *Of particular interest regarding this analysis is the recent decision in **University of Florida v. Massie**, 602 So.2d 516 (Fla. 1992). In **Massie**, the the supreme court was called upon to determine whether an exacerbation, caused by job-related stress, of the claimant's pre-existing multiple sclerosis was com-compensable. In concluding that it was not, the court*

reaffirmed the **Victor Wine** rule, which it then expressly extended to the fact situation with which it was presented. In doing so, it paraphrased that rule as follows: "In order for a pre-existing condition to be compensable, it must be exacerbated by some nonroutine, job-related physical exertion, or by some form of repeated physical trauma." Id. at 524.

As the majority correctly points out (ante, at 6), all workers' compensation claimants must establish the existence of three separate elements before a compensable injury may be found to exist: (1) that the claimant suffered an "accident"; (2) that the "accident" occurred "in the course of employment"; and (3) that the "accident" arose out of the employment. See, e.g., **Southern Bell Tel. & Tel. Co. v. McCook**, 355 So.2d 1166 (Fla. 1977). It is well-established that, with regard to internal failure cases generally, a discrete physical impact, such as a fall or a blow, is not a necessary prerequisite to a finding that a claimant suffered an "accident"; rather, all that is necessary is proof that an unexpected or unusual injury was sustained while the claimant was performing his or her usual employment duties in a normal manner, even if the precise cause is unknown. See, e.g., **Victor Wine**, **supra**; **Gray v. Employers Mut. Liab. Ins. Co.**, 64 So.2d 650 (Fla. 1952); **Duff Hotel Co. v. Ficara**, 150 Fla. 442, 7 So.2d 790 (1942). The majority does not seriously dispute the proposition that claimant suffered an "accident," as thus defined. Likewise, the majority does not dispute the proposition that the "accident" occurred "in the course of [claimant's] employment." Rather, the majority asserts that claimant failed to establish that the "accident" arose out of his employment.

The majority concludes that claimant has failed to establish that the "accident" arose out of his employment because he failed to meet the requirements of the **Victor Wine** rule, which it asserts applies to all internal failures involving the cardiovascular system, regardless of whether there was any pre-existing defect or disease. In particular, claimant failed to prove that his subarachnoid hemorrhage was the result of an "unusual strain or over-exertion not routine to the type of work [claimant] was accustomed to performing." **Victor Wine**, **supra**, at 589.

In this case, there is no evidence that claimant suffered from any pre-existing cardiovascular defect or disease. On the contrary, the uncontroverted

evidence, lay and medical, is that the cause of claimant's hemorrhage was a confrontation with a student, which occurred "in the course of [claimant's] employment" as a teacher. There can be no question about the fact that, in the ordinary workers' compensation case (including those involving internal failures), such evidence would have been sufficient to satisfy the requirements that a claimant establish by competent substantial evidence, based upon reasonable medical probability, a causal connection between his or her injury and his or her employment--i.e, that the "accident" arose out of his or her employment. See generally Orange County Bd. of County Comm'rs v. Brenemen, 233 So.2d 377 (Fla. 1970); Gadsden County Bd. of Pub. Instruction v. Dickson, 191 So.2d 562 (Fla. 1966); ATE Fixture Fab v. Wagner, 559 So. 2d 635 (Fla. 1st DCA 1990); Computer Products, Inc. v. Williams, 530 So.2d 1006 (Fla. 1st DCA 1988).

Additionally, the appellee's argument that placing the burden of proof on the employer to prove a preexisting condition violates the general concept that the burden is on the claimant to demonstrate compensability in all instances [3] simply ignores the fact that employer/carriers must plead and prove its defenses including but not limited to apportionment, statute of limitations, more logical cause, untimely notice, and no accident arising out of and in the course and scope of employment.

It is submitted in any case that it should matter not who has the burden of proof with respect to preexisting condition so long as the meaning and spirit of the law is achieved. See also the discussion by Judge Ervin on burden of proof at page 1384 of the dissent below.

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3) Page 17 of the amicus brief points out that the employer/carrier must plead and prove defenses. Also on page 77 of the record on appeal the pretrial stipulation provides a specific section for statement of defenses.

Finally, the respondent argues that a holding of compensability in this case would result in a determination that failures of the cardiovascular system should be treated differently than heart attacks. To the contrary, a holding of compensability would clarify the legal test to be used in heart attack and cardiovascular cases where there is either evidence of no preexisting condition or no evidence of preexisting condition. See Judge Ervin's dissent at (1384).

CONCLUSION

Based upon the foregoing it is respectfully submitted that a finding of compensability in this case is consistent with the meaning and spirit of the Florida worker's compensation law and in accord with the holdings in the vast majority of states. Accordingly the certified question of the majority should be answered in the affirmative or the certified question of the dissent answered in the negative.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing mailed to Steven P. Kronenberg, Esquire, 15600 N.W. 67 Avenue, Suite 204, Miami Lakes, Florida 33014 and Sylvia A. Krainin, Esquire, 15600 N.W. 67 Avenue, Suite 204, Miami Lakes, Florida 33014 and Cecilia F. Renn, General Counsel, Department of Labor & Employment Security, Suite 307, Hartman Building, 2012 Capital Circle SE, Tallahassee, FL 32399-2189, this 16th day of July, 1993.

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