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IN THE SUPREME COURT OF FLORIDA

ARLEEN J. MCGUIRE,

Petitioner

vs.

PUBLIX SUPER MARKETS, INC., ET AL.

Respondent

CASE NO. 82,619
1st DCA CASE NO. 92-884

PETITIONER'S REPLY BRIEF

On Review from the District Court
of Appeal, First District
State of Florida

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CITATIONS OF AUTHORITY

PRELIMINARY STATEMENT

As in Petitioner's Initial Brief, Petitioner, Arleen J. McGuire, will be referred to as "Claimant." Respondents, Publix Super Markets, Inc., and Hartford Insurance will be referred to as "Employer/Carrier" or "E/C". The Honorable Ann L. Robbins, Judge of Compensation Claims, will be referred to as the "JCC." References to the record will be as follows: R_____. In addition, references to Respondent's Brief will be as follows: Br_____.

STATEMENT OF THE CASE AND OF THE FACTS

Rather than specifically address those areas in Petitioner's Statement of the Case and of the Facts with which it disagrees, Respondent E/C has chosen to restate all the "facts." Br 1-5. In doing so, the E/C challenges the findings of the JCC in several instances, despite the First District's determination that such findings were supported by competent substantial evidence, and despite the E/C's failure to raise specifically any objection on appeal to the JCC's findings of fact as not being based on competent substantial evidence. Claimant adheres to her original Statement of the Case and Facts as presented in her Initial Brief.

The E/C states the Claimant "sustained either a coronary artery spasm or a heart attack" and cites to R 194 of the record, Br 1. In fact, the medical testimony is that Claimant had a coronary artery spasm, and that testimony was found credible by the JCC. R 75-76, R 236. Indeed, the E/C stipulated in its Pretrial Stipulation that the "injuries" were "coronary artery spasm." R 60.

With reference to the meeting between Claimant and Kapocsi, the E/C has chosen to present the evidence in the light most favorable to its position, see Br 1-2. However, the JCC rejected Kapocsi's testimony that the meeting was "cordial," R 239, and accepted Claimant's testimony that Kaposci was "upset with her," R 238. In its opinion below, the First District held these findings to be supported by competent substantial evidence.

Publix Super Markets, Inc. v. McGuire, 18 Fla. L. Weekly D2220, 2221 (Fla. 1st DCA October 12, 1993) (en banc).

It is important to note that Claimant testified in person at the JCC's hearing, R 4-29. The E/C however has cited to pages in Claimant's deposition, R 192-214, without any indication that the E/C was limited in any way in its cross-examination of Claimant and without any evidence of inconsistencies.

The E/C states flatly that Doctor Naman, Claimant's treating physician, was "unwilling to testify...that his opinion that the artery spasm was precipitated by the emotional stress of the argument was based upon reasonable medical probability," Br 4, citing R 89. The testimony, in fact however, is as follows:

> Q. And in answering one of the previous questions about the cause of the artery spasm you said that you felt that it was the emotional stress that she described to you. Is that opinion based upon reasonable medical probability?
>
> A. See, the only thing -- that's what I'm saying. There's what's known as spontaneous spasm. People come in and, you know, could have a spasm without anything. And there are occasions where people have sustained heart attacks over heated argument and they're, you know, in a fight, watching a very lively, you know, ball game, collapse.
>
> So, you know, all these are associated with excess adrenaline surge. And adrenaline is -- you know, can cause spasms. So, though I cannot, you know, say that's the cause, you know, it's presumed because, you know, here there was an incident at that time when she developed the pain.

R 88-89. The JCC specifically found that the "emotional episode at work" was the "logical cause" of Claimant's coronary artery

spasm, R 241-2, and again, the First District specifically upheld this finding as being supported by competent substantial evidence. McGuire, supra, at D2222 (opinion below).

Finally, the E/C places considerable emphasis, in his argument on Issue I below, on Claimant's medically controlled hypertension and age-related arterial blockage (labelled "mild to moderate"). Nowhere in the medical testimony is there any indication that either condition contributed to the coronary artery spasm suffered by Claimant. The JCC's references to these two conditions are minimal, probably because of their irrelevance. Nonetheless, the JCC does include in her findings the following: 1) "With the exception of some high blood pressure for which she had been taking medication, [Claimant] was in excellent health." R 237. 2) "There was no potential for a heart attack caused by plaque because of the minimal blockage of the coronary artery shown by the catheterization." R 240.

SUMMARY OF REBUTTAL ARGUMENTS

Issue I - Certified Question: The E/C raised two arguments in connection with the requirement of pre-existing illness as a trigger for the Victor Wine heightened burden of proof. The first argument challenges the facts of the case by emphasizing Claimant's medically-controlled hypertension and age-related arterial plaque, even though no evidence in the record establishes any causal relationship between these two benign conditions and Claimant's coronary artery spasm. The E/C's argument that those two conditions render the certified question moot is based on neither logic nor precedent.

The E/C's argument in response to the certified question itself relies on case law which in fact does not support its position. The case law has never specifically addressed the issue raised by the certified question, except in Zundell v. Dade County School Board, 609 So.2d 1367 (Fla. 1st DCA 1992) (en banc), which is also currently pending before this court, on the same certified question.

Issue II: In addressing Claimant's argument as to the sufficiency of emotional (as opposed to physical) stress to support compensability, where medical testimony establishes a direct causal link and there is no predisposing or contributing pre-existing disease, the E/C does not address the issue raised, but again challenges the factual findings of the JCC as to causation. Because the JCC's findings are supported by competent

substantial evidence in the record, the E/C's argument must fail.

Issue III: Again, the E/C does not address the issue framed by the record: whether there can be an "internal failure of the cardiovascular system" absent evidence of a predisposing or contributing pre-existing problem, where expert testimony establishes the causal link between the workplace incident and the injury. Claimant, therefore, relies on the arguments advanced on this issue in her Initial Brief.

ARGUMENT

ISSUE I

Certified Question

> WHETHER THE "RULE FOR HEART CASES" ANNOUNCED IN VICTOR WINE & LIQUOR, INC. V. BEASLEY AND LATER EXTENDED TO "OTHER INTERNAL FAILURES OF THE CARDIOVASCULAR SYSTEM" BY RICHARD E. MOSCA & CO. V. MOSCA IS APPLICABLE TO CASES IN WHICH THERE IS NO EVIDENCE THAT THE CLAIMANT SUFFERED FROM A "PRE-EXISTING NON-DISABLING" CARDIOVASCULAR DEFECT, FAILURE, OR DISEASE, THEREBY REQUIRING PROOF THAT, AT THE TIME OF THE INJURY, A CLAIMANT WAS "SUBJECT TO UNUSUAL STRAIN OR OVER-EXERTION NOT ROUTINE TO THE TYPE OF WORK" A CLAIMANT WAS ACCUSTOMED TO PERFORMING.

The E/C's argument on this issue is two-fold: First, "[a]lthough there is [admittedly] no evidence in the record that [Claimant's medically-controlled hypertension or age-related arterial plaque] contributed to [Arleen] McGuire's cardiovascular injury or predisposed her to such injury," Br 12 (e.s.), the E/C argues that nonetheless the mere presence of these benign conditions is enough to constitute the necessary "pre-existing coronary artery disease" to trigger the Victor Wine test. Second, the E/C contends that the holding in Victor Wine does not require any pre-existing condition (the issue raised by the Certified Question).

Argument I: Essentially, the E/C argues that the First District's certified question need not be addressed on the facts of this case, because Claimant had medically controlled hypertension and some evidence of age-related arterial plaque,

even though there was no evidence that either condition had any causal relevance to Claimant's coronary artery spasm.

If one reads the cases cited by the E/C for this proposition, however, it becomes clear that the rationale of Victor Wine is to avoid burdening industry with medical costs arising from non-industrial causes. Where, as here, the only cause of Claimant's injury was work-place related, according to medical testimony, the fact that she had other non-contributing medical conditions is irrelevant.

As Victor Wine itself states:

> workers are entitled to compensation if there is competent substantial medical testimony, consistent with logic and reason, that the strain and exertion of a specifically identified effort, over and above the routine of the job, combined with a pre-existing non-disabling heart disease to produce death or disability sooner than it would otherwise have occurred....

Victor Wine & Liquor, Inc. v. Beasley, 141 So.2d 581, 589 (Fla. 1962) (e.s.).

City of Miami v. Rosenberg, 396 So.2d 163 (Fla. 1981), involved a myocardial infarction in which stress, but no physical exertion, combined with "long standing arteriosclerotic heart disease with coronary atherosclerosis" to produce the myocardial infarction. In other words, claimant Rosenberg's heart attack was specifically the result of concurrent causes, where the stress aggravated the pre-existing disease and combined with the disease to cause the injury. In the case before the court here, there is no such evidence of joint causation in the record.

Richard E. Mosca & Co., Inc. v. Mosca, 362 So.2d 1340, (Fla.

1978), dealt with a very different cardiovascular event: the rupture of a congenital cerebral aneurysm. Mosca's medically controlled hypertension may also have been a factor in the rupture. This court certainly did not hold in Mosca that irrelevant medically controlled hypertension is enough to trigger the Victor Wine test; rather, the emphasis in Mosca was on the congenital defect, the element of personal risk which Mosca brought to the job site.

Undersigned counsel has been unable to find any case in the State of Florida in which a benign pre-existing disease, totally unrelated to the cardiovascular incident, has been held to trigger the Victor Wine test. In fact, the premise of Victor Wine and its progeny is that "heart" cases present joint medical causes for the resulting injury. Absent joint causes, the reason for Victor Wine disappears.

Argument II: The E/C here addresses the actual question certified by the First District, by citing a few cases in which pre-existing disease is allegedly not specifically mentioned in the particular opinion.

Tintera v. Armour & Co., 362 So.2d 1344 (Fla. 1978), although not mentioning a particular pre-existing condition, relies on the Victor Wine rule as being

> 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.

Tintera, supra, at 1346. Thus, the Tintera court clearly presumes a pre-existing "heart defect" in rendering its decision.

Diaz v. City of Miami, 427 So.2d 1085 (Fla. 1st DCA 1983), deals with various symptoms which manifested themselves while Diaz was at home. The First District held simply that a causal connection with the workplace had not been established.

In City of Opa Locka v. Quinlan, 451 So.2d 965 (Fla. 1st DCA 1984), the sole issue addressed by the court is whether there was any non-routine physical activity. The threshold question relevant to the instant case -- i.e. was there a pre-existing condition which predisposed the claimant to the heart attack he in fact suffered -- is apparently never raised.

Richards Department Store v. Donin, 365 So.2d 385 (Fla. 1978) specifically involves a heart attack claimant who had an earlier heart attack before the one in question. The issue discussed in Donin is whether a particular activity was "routine" for the claimant.

Walker v. Friendly Village of Brevard, 559 So.2d 258 (Fla. 1st DCA 1990) and Gardinier, Inc. v. Coker, 564 So.2d 254 (Fla. 1st DCA 1990), also deal exclusively with whether the claimant's activity was "routine to the job." Thus, none of the cases cited by the E/C stand for the proposition that the Victor Wine rule specifically does not require any pre-existing cardiovascular disease or defect.

* * *

The real issue, only briefly addressed by the E/C, is whether, as a matter of sound public policy, the enhanced burden of proof imposed on a claimant by the Victor Wine line of cases

should apply, absent any evidence of pre-existing (and contributing) heart or cardiovascular defect, failure, or disease.

The E/C's argument -- that the Victor Wine requirement is necessary "to ensure that the Workers' Compensation system is not converted into generalized health insurance," Br 15 -- makes no sense if there is no pre-existing cardiovascular defect, failure, or disease. If there is no evidence in the record of something other than the work-related cause contributing to the injury -- such as a pre-existing disease or a congenital problem -- then making the industry pay for an injury caused solely by the industry (according to the medical testimony) is doing precisely what workers' compensation was designed to do.

ISSUE II

WHETHER, IN LIGHT OF MODERN MEDICAL KNOWLEDGE, UNUSUAL WORKPLACE EMOTIONAL STRAIN ALONE, INDEPENDENT OF UNUSUAL PHYSICAL STRAIN, IS SUFFICIENT TO SUPPORT COMPENSABILITY WHERE EXPERT TESTIMONY ESTABLISHES A DIRECT CAUSAL LINK BETWEEN THE EMOTIONAL STRAIN AND THE PHYSICAL INJURY AND THERE IS NO PRE-EXISTING CARDIOVASCULAR DEFECT, FAILURE, OR DISEASE.

The essence of the E/C's argument on this issue is simply to challenge the facts established by the testimony below, included in the JCC's findings of facts, and determined by the First District to be supported by competent substantial evidence. See discussions above at pages 2 through 4 of this brief in connection with the Statement of the Case and of the Facts.

If we accept, as did the First District, the JCC's finding that the unusual workplace confrontation between Claimant and her superiors caused her coronary artery spasm, and if we accept the absence of any evidence of contributing pre-existing cardiovascular disease or defect, then we are left with the issue raised by the Claimant: is unusual workplace emotional strain sufficient to support compensability where expert testimony establishes a direct causal link and there is no pre-existing contributing condition? The E/C never addresses this issue in its Answer Brief. Claimant urges the court to hold that on these facts, where medical cause has been established and there is no pre-existing condition, Claimant should receive her workers' compensation benefits for the reasons stated in her Initial Brief.

ISSUE III

WHETHER CORONARY ARTERY SPASM IS AN "INTERNAL FAILURE OF THE CARDIOVASCULAR SYSTEM" SUCH AS TO REQUIRE APPLICATION OF THE VICTOR WINE/MOSCA RULE, ABSENT EVIDENCE OF PRE-EXISTING CARDIOVASCULAR DEFECT, FAILURE OR DISEASE.

In its Answer Brief, the E/C has not addressed the issue before the court: whether the particular injury suffered by Claimant properly constitutes an "internal failure of the cardiovascular system," where there is no record evidence of a pre-existing condition either contributing to the injury or predisposing the Claimant to the injury. During the hearing before the JCC, the E/C was free to develop such evidence if it existed; it did not develop any such evidence in this case. Reliance on Richard E. Mosca & Co., Inc. v. Mosca, 362 So. 2d 1340 (Fla. 1978) and University of Florida v. Massie, 602 So. 2d 516 (Fla. 1992), both of which cases do involve pre-existing contributing conditions, is therefore misplaced.

Claimant submits that, absent evidence of a predisposition of some kind to cardiovascular failure, a coronary artery spasm of the kind involved here should not be denied compensability on the basis of rules established for cases involving prior contributing disease, for the reasons stated in her Initial Brief.

CONCLUSION

Based on the arguments presented, Claimant respectfully requests this court to answer the certified question in the negative, quash the opinion of the First District Court of Appeal, and affirm the Order of the JCC. In the alternative, if the court answers the certified question in the affirmative (i.e. that pre-existing disease is not a prerequisite for the application of the Victor Wine/Mosca rule), then Claimant respectfully requests that the court 1) revisit the issue of whether and when unusual emotional stress is a sufficient causative factor legally to permit compensability where medical causation by emotional stress is proved by competent substantial evidence; or 2) hold that, on the facts of this case, the coronary artery spasm is not an "internal failure of the cardiovascular system"; and 3) remand for the taking of additional evidence as necessary.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Petitioner's Reply Brief has been furnished by regular U.S. Mail to Lynn H. Groseclose, Esquire, and Andrew R. McCumber, Esquire, Lane, Trohn, Clarke, Bertrand & Williams, P.A., Post Office Box 551, Bradenton, FL 34206, on this 28th day of December, 1993.

Sondra Goldenfarb, Esquire