1-8-2015

Chavez v. Stokes Appellant's Brief Dckt. 42589

BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

SOHAR CHAVEZ,	)	Docket No. 42589-2014
	)	
Claimant/Respondent,	)	I.C. No: 2012-025814
v.	)	
	)	
KEVIN STOKES,	)	
	)	
Defendant/Appellant.	)	
	)	

APPELLANT'S BRIEF

APPEAL FROM THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

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I.

STATEMENT OF THE CASE

Claimant Sohar Chavez was injured on September 8, 2012, when his left pinky finger got caught in a motorized chain on some wheel lines he was moving. Local EMT personnel responded with an ambulance, and Claimant was life-flighted from the scene of the accident, just outside Payette, Idaho, to St. Alphonsus Regional Medical Center in Boise, Idaho. At St. Alphonsus, the amputation was completed. Claimant recovered from the injury and the treatment he received uneventfully.

Claimant filed a Complaint on October 10, 2012. Defendant Employer, Kevin Stokes, initially responded through counsel with the filing of an Answer on November 5, 2012, denying that Claimant was an employee. An Amended Answer with new counsel was filed by Defendant Employer on December 17, 2012, admitting that Claimant was an employee. Defendant Employer Stokes paid for all of Claimant's temporary disability and paid for his impairment. He also paid for all the medical expenses Claimant incurred with the exception of the Life Flight Network bill, which was $21,201.00.

On September 3, 2014, the Industrial Commission issued a Notice of Intent to Dismiss. On September 6, 2014, Claimant's counsel filed a Request for Calendaring on the only issue that remained, which was the reasonableness of the Life Flight Network service under Idaho Code § 72-432. The matter was calendared to be heard on October 30, 2013, at which time a hearing was conducted by Referee Michael E. Powers. Exhibits were offered and admitted at hearing, and

testimony was taken from Defendant Employer Kevin Stokes. At the conclusion of the hearing, both parties and the Referee decided that briefing was not necessary.

Referee Powers submitted his Findings of Fact, Conclusions of Law and Recommendation on March 10, 2014. The Referee concluded in his proposed decision that he was "unable to find in the record as submitted any evidence that it was reasonable or necessary to life-flight Claimant from near Fruitland to Boise based upon an apparent misconception that Claimant's small fingertip could be salvaged." He went on to note that "there is no evidence that such could not have been accomplished at Holy Rosary or that arrangements could not have been made to transfer him to St. Alphonsus." (Agency Record, p. 13).

The Industrial Commission chose to not adopt the Referee's proposed decision, and by letter dated April 7, 2014, requested briefing on whether a finding that the Life Flight Network care was not reasonable would leave Claimant exposed to a civil action for collection of the bill. (Agency Record, p. 15). The parties then submitted briefing, and the Industrial Commission issued its decision on September 26, 2014. In that decision the Industrial Commission concluded that treatment in the form of life-flighting Claimant from outside Payette to St. Alphonsus Regional Medical Center in Boise was reasonable under Idaho Code § 72-432 and under the decision of *Sprague v. Caldwell Transportation, Inc.,* 116 Idaho 720, 722, 779 P.2d 395, 397 (1989). Defendant Employer timely filed an appeal of the Industrial Commission decision.

A. FACTS OF CASE:

Defendant Employer Kevin Stokes is a farmer in Fruitland. (HT, p. 17, ll. 8-22). He hired Sohar Chavez, the claimant in this case, to help him with irrigation in April of 2012. (HT, p. 18,

ll. 6-14). On the day of the accident Defendant Employer Stokes got a phone call from Payette County Dispatch advising him that Claimant had been injured and where he was. (HT, p. 19, ll. 21-24). He went to the scene of the accident, at which time he found three Payette County paramedics, a Sheriff's deputy, and Defendant's uncle. Claimant was there as well. (HT, p. 20, ll. 1 - 6). Claimant had obviously received first aid evidenced by the fact he was holding his hand up in the air elevated and it was bandaged. (HT, p. 20, ll. 9-12). Defendant Stokes immediately inquired as to what was going to happen next, and did not get an answer from any of the personnel there. (HT, p. 20, ll. 15-19). He initiated the inquiry, because the ambulance was there and he couldn't figure out why they weren't taking Claimant to the hospital. (HT, p. 20, l. 22 – p. 21, 1). That was when he found out that a helicopter was going to show up, and he asked them why that was necessary. (HT, p.21, ll. 1 - 15). Defendant Stokes did not believe that bringing Life Flight Network into the equation was reasonable and expressed these concerns to the personnel on the scene. They did not respond to his inquiries in this regard. (HT, p. 21, ll. 8-20).

After the incident, Defendant Stokes drove the distance between the accident scene and Holy Rosary Hospital in Ontario, Oregon, 3 times at different times of the day. It took 15 minutes at the longest, and 12 minutes at the shortest. (HT, p. 22, ll. 4 - 8). The distance between the accident scene and the ER door of Holy Rosary in Ontario turned out to be 9.8 miles. (HT, p. 22, ll. 20-21). After Defendant Stokes showed up, it was at least 10 minutes until the helicopter showed up. (HT, p. 22, l. 25 – p. 23, l. 1). Defendant Stokes has lived in the Fruitland area most of his life. He is aware that there are several orthopedic surgeons in the vicinity. (HT, p. 24, ll. 1-7).

Later on in the evening Defendant Stokes received a phone call from Claimant at St. Alphonsus Regional Medical Center in Boise. Defendant Stokes drove over to Boise, picked Claimant up, and took him home. During the drive home, Claimant asked him why he was flown to Boise -- that is to say, he did not know why he was flown to Boise. (HT, p. 27, ll. 5-10).

Exhibits include the Form 1, which documents that the accident occurred on September 8, 2012, at 5:00 p.m. The Form 1 establishes that Claimant was moving irrigation lines when his left hand got caught up in the chain of a motor. (Defendant's Ex. 1). Payette Paramedic records establish that they responded to the incident on September 8, 2012, and that when they arrived, a language barrier prohibited them from learning how the injury had occurred or other "subjective information." These records document that some off-duty Payette County paramedic EMT telephoned in to "Medic 20." (Defendant's Ex. 2). As pointed out in the Commission's decision, we do not know who or what "Medic 20" is. (Agency Record, p. 48, footnote 3). The paramedic records document that some unidentified person requested Life Flight Network service (Defendant's Ex. 2). These records do not document what, if any, conversation they had with Claimant as to what his desires were for treatment. Keep in mind, Defendant Stokes was there for at least 10 minutes before the helicopter arrived and could have aided in the conversation with Claimant as to what his desires were had anyone made the attempt.

Life Flight Network records document that a request came in from Payette County EMTs for a 41-year-old man who sustained an amputation of his pinky finger. (Defendant's Ex. 3). These records do not establish any sort of a protocol for some sort of a triage review, which clearly should have occurred in order to determine whether using an asset that valuable and

expensive was appropriate. The records do not establish any sort of critical situation or emergency that sought to be addressed by transporting Claimant to the hospital in this fashion at this point in time.

Records from St. Alphonsus Regional Medical Center start with a September 8, 2012, Emergency Department report authored by Dr. Elliott, who quickly concluded that the pinky finger was likely nonviable. He brought in Dr. Clawson to consult on definitive treatment. Dr. Clawson authored an Emergency Department Consultation the same date, September 8, 2012, noting an incomplete amputation of the left small finger at two levels. He reviewed x-rays and concluded that the finger was not salvageable. He then proceeded to complete the amputation and repair the stump. (Defendant's Ex. 4).

Dr. Clawson saw Claimant in followup on December 27, 2012, and observed that the stump was well healed. He concluded that Claimant was medically stable and had suffered a 95% small finger impairment, which he noted corresponded to a 10% hand impairment, or 9% upper extremity impairment. He did not recommend any restrictions or followup care for Claimant. (Defendant's Ex. 5).

Defendant had the matter reviewed by Dr. Paul Collins, an orthopedic surgeon, who concluded that the injury sustained by Claimant was "not in any way, shape or form life critical." He pointed out that Claimant should have been taken to Holy Rosary in Ontario and worked up, and that if it turned out for some reason he needed to be taken to Boise for vascular reconstruction, there still would have been plenty of time to get that done. (Defendant's Ex. 6).

II.

ISSUE PRESENTED ON APPEAL

Whether life-flighting Claimant from the scene of the accident outside of Payette to St. Alphonsus Regional Medical Center in Boise, Idaho for partial amputation of a pinky finger was reasonable and necessary given that Holy Rosary Hospital in Ontario, Oregon was less than 10 miles away.

III.

ARGUMENT

A. There is No Evidence in the Medical Record which Supports the Notion that Transporting Claimant to St. Alphonsus in Boise was reasonable

Idaho Code § 72-432 defines the parameters of an employer's responsibility for medical treatment of an injured worker. Subsection (1) of the statute requires the employer to provide, "reasonable medical" . . . "as may be reasonably required by the employee's physician," or, "needed immediately after an injury" . . . "and for a reasonable time thereafter." Idaho Code § 72-432(1)(emphasis added). In this matter, there exists no dispute as to the facts in the record. Claimant sustained crush injuries to his pinky finger. Emergency medical personnel responded. They provided first aid at the scene of the accident. What is not clear from the record is how the decision was made, by whom the decision was made, or why the decision was made to transport Claimant from the Payette area to St. Alphonsus Regional Medical Center in Boise. As the Industrial Commission's ultimate decision establishes, "The record does not clarify if the responders to Claimant's injuries were paramedics or EMTs." (Agency Record, p. 47). The only

portion of the record that sheds any light on this series of events states, "Off-duty Payette County paramedics EMT landlines Medic 20 and advises finger may be able to be surgically fixed. Life Flight Network is requested to launch." (Defendant's Ex. 2). The fact is, there is no evidence that anyone in Payette "ordered" Claimant to be life-flighted. The record reflects that a "request" was made.

The fact of the matter is that from this record one cannot glean exactly what happened. All one can determine is that there was some conversation apparently initiated by an off duty Payette County paramedic. It is clear that a call was put in to Life Flight Network. It is not clear whether this was an order for medical care or that they were in a position to order Life Flight Network to do anything. In the record it was characterized as an action that was "requested."

While Defendant Employer was never able to discover exactly how Life Flight Network goes about determining whether they will respond, Defendant Employer did attempt to research the issue to some extent. Defendant Employer put into evidence a Position Statement put out by American College of Emergency Physicians and National Association of EMS Physicians, entitled "Guidelines for Air Medical Dispatch Policy Resource and Education Paper." The policy paper establishes that in general it is a good idea for Life Flight Network services to establish guidelines to determine when they will respond. The paper goes on to outline a number of questions that the Life Flight Network service should pose and answer before agreeing to respond. Finally, it suggests specific situations are more likely to be appropriate for transport than others. As to orthopedic injuries to the extremities, it suggests that finger and thumb amputations are only appropriate for helicopter transport when replantation consideration is

contemplated and rapid surface transport is not available. (Ex. 10, p. 12). There is nothing in the record as to what Life Flight Network protocol was or whether that protocol was followed. We do know that rapid surface transport was available, because an ambulance was present.

In the current instance, Claimant was less than ten (10) miles from Holy Rosary Hospital. Driving the speed limit, it would have taken between 12 and 16 minutes to get Claimant from the spot at which the helicopter picked him up to Holy Rosary Hospital. Holy Rosary Hospital, obviously has an emergency room with medical physicians and all sorts of imaging devices at their disposal to examine injuries and make recommendations for medical care. In this particular case, there is absolutely no explanation in the record as to why Claimant could not have been taken to Holy Rosary and had a medical workup conducted at that facility to determine what medical care might be most appropriate, including reattachment. If reattachment were an option, the determination as to whether local orthopedic surgeons were up to such a task or whether if that decision turned out to be an attempt at reattachment, further determination made there at Holy Rosary as to whether local orthopedic surgeons were up to such a task, or whether Claimant needed to be life-flighted to Boise in order to explore the same, could have been made at Holy Rosary. This was the obvious and the logical course of action to take. Common sense tells you as much.

This is not, however, the analysis that the Industrial Commission decided to employ in this case. The Industrial Commission instead cites the case of *Sprague v. Caldwell Transportation, Inc.,* 116 Idaho 720, 722, 779 P.2d 395, 397 (1989), in an overly rigid fashion to avoid the common sense review of the facts that it should undertake. The Commission cites to

the test attributed to *Sprague*. The test is whether (a) the claimant made gradual improvement from the treatment received; (b) the treatment was required by the claimant's physician; and (c) the treatment received was within the physician's standard of practice, the charges for which were fair, reasonable and similar to charges in the same profession. *Hipwell v. Challenger Pallet and Supply,* 124 Idaho 294, 299, 859 P.2d 330, 335 (1993). *Hipwell* has been read by the Commission as reducing the matter to an examination as to whether the treatment was required by the claimant's physician. That is not the standard set out in the statute, and it is not the standard industry uses. The treating physician does not get to announce what treatment is required only to never be subject to review by anybody. The Court in Sprague quoted Idaho Code § 72-432(1) as follows:

> The employer shall provide for an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and hospital service, medicines, crutches and apparatus, as may be required by the employee's physician, immediately after an injury or disability from an occupational disease, and for a reasonable time thereafter. If an employer fails to provide the same, the injured employee may do so at the expense of the employer. *Sprague v. Caldwell Transportation, Inc.,* 116 Idaho 720, 722, 779 P.2d 395, 397 (1989)(emphasis added).

That is not what the statute says. In pertinent part, the statute reads:

> As may be reasonably required by the employee's physician. Idaho Code §72-432(1).

The difference is obvious. Through the erroneous version utilized by the Court in *Sprague* and subsequently relied upon in *Hipwell*, one can read the statute in a fashion such that there can be no review of a treating physician's determination of what is required in the way of medical care. However, the statute makes it clear that the treating physician has to be reasonable in his

assessment as to what is required. That, of course, makes much more sense. In pretty much all areas of the law we require people to act in a reasonable fashion, and we allow for a review as to whether their actions and/or their recommendations were reasonable, especially when it comes to medical care. Who would want to foster unreasonable medical care?

In the current instance, the Industrial Commission conceded that it could not identify the treating physician in the sense that they could not identify the individual who ultimately had the decision making authority to determine if Life Flight Network service was appropriate and to order the launch of the helicopter itself. The Commission, in a footnote, speculated that it was either an off duty paramedic or Medic 20. The fact of the matter is, there is no medical record identifying who has the authority to order Life Flight Network service. We do not even know whether either one of these individuals, who the Commission presumed to have medical credentials allowing them to rise to the status of a treating physician, actually made the call. It could have been "Bertha", a part-time volunteer with no credentials, who actually made the call.

Similarly, we do not know what transpired on the other end. That is to say, we do not know who received the call from Payette. We know a call was made, because ultimately a helicopter was launched and managed to find its way to where Claimant was. What we do not know is who took the call, nor do we know what kind of a review process was in place with Life Flight Network to review the reasonableness or necessity of response, let alone whether that process was followed. It seems axiomatic to Defendant that you cannot say the treating physician reasonably required the launch of a Life Flight Network helicopter when you cannot even

identify (1) the people who were involved in the process; (2) the people who ultimately decided to respond; and (3) the criteria they utilized in making the decision.

The Industrial Commission then went on to conclude that Claimant improved or benefitted in some fashion from the Life Flight Network service by virtue of the fact that when he showed up at St. Alphonsus Regional Medical Center the amputation was completed and he was left with a healthy stump. There is no nexus demonstrated in the record between the life-flighting of Claimant to St. Alphonsus Regional Medical Center in Boise and the ultimate outcome or improvement. The outcome would have been the same had he simply been transported to Holy Rosary Hospital.

Ultimately, if we try to apply the test outlined by *Sprague* to the facts of this case, the claim for compensation to the tune of $21,201.00 must fail, because there literally is no factual basis to support the Commission's decision.

The fact that there was no basis to support the Commission's decision was obvious to the Referee who actually heard the case. Neither party nor the Referee at the end of the hearing felt that briefing would be of any value:

> Referee Powers: Okay. Do you gentlemen want to write briefs?
>
> Mr. Owen: I'd be repeating basically the same thing I said here today.
>
> Mr. Bowen: I really don't – would it be of benefit to the Commission?
>
> Referee Powers: Not in this case I don't think. I think it is clear.
>
> Mr. Bowen: I don't see the need for it.

> Referee Powers: I could rule from the bench if I could rule, but I can't so I won't.

(HT, p. 28, ll. 12-22).

When briefing was ordered by means of Commissioner Baskin's April 7, 2014 letter, briefing was not requested on the issue posed by the case, that being whether or not Life Flight Network services constituted reasonable care under Idaho Code § 72-432, but, rather, they requested briefing as to the following issue:

> If the Commission determines the treatment is unreasonable, thus freeing employer from the obligation of paying, is the Claimant exposed to civil action for collection of the bill?

(Agency Record, p. 15).

In other words, the decision was not based upon the issue posed by the case, nor was the decision based upon the facts put before the Commission in order to decide the issue posed by the case, but, rather, the case was decided based upon the Industrial Commission's concerns that if they found Life Flight Network services unreasonable, Claimant might face potential exposure in another forum. That concern has never been the basis for a determination as to what constitutes reasonable or unreasonable medical care as envisioned by Idaho Code § 72-432(1). That concern is based upon mere speculation as to what might happen in the future if the Commission finds for the Defendant. Anytime the Industrial Commission finds for a defendant on a compensability issue, a claimant faces potential exposure for medical treatment rendered.

The provisions of the Workers' Compensation Act are to be liberally construed in favor of the employee. *Holdiman v. American Fine Foods*, 117 Idaho 955, 956, 793 P.2d 187, 188

(1990). However, the Commission is not required to construe facts liberally in favor of the worker when evidence is conflicting. *Aldrich v. Lamb-Weston, Inc.,* 122 Idaho 361, 363, 834 P.2d 878, 880 (1992). Claimant must provide medical testimony by way of physician's testimony or written medical record, which supports a claim for compensation to a reasonable degree of medical probability. *Langley v. State Industrial Special Indemnity Fund,* 126 Idaho 781, 785, 890 P.2d 732, 736 (1995). One of the fundamental rules of procedure is that the party seeking affirmative relief has the burden of proof. *Woodruff v. Butte Mkt, L.C. Co.,* 64 Idaho 735, 137 P.2d 325 (1943).

Claimant's counsel requested that there be a hearing on the issue as to whether the Life Flight Network services were reasonable under Idaho Code § 72-432(1). Defendant agreed that it was appropriate to have the issue heard. The burden of proof was on Claimant, the party seeking relief. A hearing was held, at which time all the medical records involved in the case were put before the Industrial Commission in the form of exhibits. Defendant offered, in addition, an April 9, 2013 letter authored by orthopedic surgeon Paul C. Collins, M.D., who opined:

> I do not understand why Life Flight was called or addressed in the first place, and why the patient was not taken to Holy Rosary. Indeed, it is extremely reasonable that the patient would be taken physically to Holy Rosary Hospital. Had there been an incident which may in some way benefitted from a vascular reconstruction, then the patient could be transferred to St. Alphonsus or St. Luke's. Indeed, this was in no way necessary.

(Hearing Ex. 6, p. 55).

The facts of the case themselves make it clear that there can be no justification for what was done. The injury on a relative scale was minor. A perfectly fine hospital with orthopedic

surgeons was 10 to 15 minutes away. There was no critical time element or emergency per the opinion of Dr. Collins, or otherwise demonstrated in any of the medical records, which would justify flying Claimant to Boise. This was apparent to the employer when he arrived on the scene and he posed the question to the emergency personnel in attendance. He wondered why Claimant was not being taken to Holy Rosary. Nobody would provide him an answer.

Claimant was flown to St. Alphonsus Regional Medical Center in Boise, where it was clear that there was not really any possibility of revascularization of the digit, and the amputation was completed. Claimant was then basically stranded 60 miles from home.

Idaho Code § 72-432(1) is not a difficult statute to understand. It requires the employer to provide reasonable medical care to an injured worker. Determining what is reasonable is not rocket science -- it is a standard used in pretty much all areas of the law. Here it is quite clear that there was absolutely no reason why Claimant was not taken to the local hospital for diagnosis, triage, imaging, and where further decisions could be made about his medical care, including the need for transport. We do not know who made the decision. We do not know why the decision was made, other than a cryptic reference contained in the medical to the effect that the digit "may" be subject to revascularization. We do not know who made this observation or what their credentials might be to make such an observation. What we do know is that nothing would have been lost had they just simply taken Claimant to Holy Rosary, where all these determinations could be made by individuals who could have actually inspected the finger and utilized vastly superior credentials and equipment to make the decision. Common sense tells us that the life-flighting of this gentleman to Boise was not reasonable. There is no substantial competent

evidence to support the Industrial Commission decision. The decision itself seems to be premised upon the notion that once a medical decision has been made, the reasonableness of that decision cannot be reviewed. As previously pointed out, the statute clearly indicates otherwise, and the record contains no facts to support the decision.

IV.

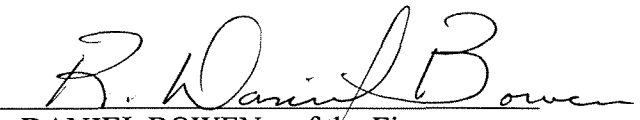
CONCLUSION

The Industrial Commission's decision does not pass scrutiny by applying the test that was utilized in *Sprague*. There is no competent substantial evidence in the record to support such a finding utilizing *Sprague*. The Industrial Commission decision does not pass scrutiny by applying common sense. The Industrial Commission decision is result oriented based upon concerns beyond the purview of the issue posed by the parties. The Industrial Commission was concerned about Claimant's potential for exposure in another forum, an issue that it was not asked to address. Idaho Code § 72-432 requires that the analysis of the compensability of medical care be based upon what is reasonable at the time care is contemplated. Utilizing that criteria, it is clear that the life-flighting of Claimant to Boise was not reasonable. Not only was nothing gained, but to the alternative, sending him to Holy Rosary to more accurately determine the scope of his injuries and need for care was by far the better option and preserved all potential remedies, including subsequent life-flighting from Holy Rosary itself to St. Alphonsus. All that Life Flight Network service accomplished in this instance was a big bill, tying up otherwise limited resources and stranding Claimant 60 miles from his home.

In this era of escalating medical costs, it is absolutely critical the public retain some ability to scrutinize the delivery of medical care. Part of that scrutiny is clearly the ability to review the reasonableness of the care proposed and the care delivered. If we forego such a review, rest assured medical costs will explode, and the delivery of medical care will become increasingly thoughtless and unreasonable. In this instance, the claim is fairly straightforward, as Referee Powers commented upon at the hearing. There are no facts in the record which explain how this decision was made, who made the decision, what level of medical expertise they had such that they had any business making the decision, or why the alternative, that being ground transport to Holy Rosary, was not a better alternative. To the contrary, the only known physician who has reviewed the record found no basis upon which he could justify the transportation of Claimant to Boise, Idaho for treatment. The Industrial Commission decision should be reversed.

RESPECTFULLY SUBMITTED this 8th day of January, 2015.

BOWEN & BAILEY, LLP



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 8th day of January, 2015, a true and correct copy of the foregoing document was delivered to the following party(ies) in the method indicated:

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