SING V. DUVAL CORP., 1981-NMCA-129, 97 N.M. 84, 636 P.2d 903 (Ct. App. 1981)

EDDIE C. SING, Plaintiff-Appellee,
vs.
DUVAL CORPORATION, a subsidiary of PENNZOIL and INSURANCE COMPANY OF NORTH AMERICA, Defendants-Appellants.

No. 5150

COURT OF APPEALS OF NEW MEXICO

1981-NMCA-129, 97 N.M. 84, 636 P.2d 903

November 05, 1981

Appeal from the District Court of Eddy County, Walker, Judge.

COUNSEL

C. A. FEEZER, DOW & FEEZER, Carlsbad, New Mexico, Attorney for Appellee.

PAUL M. BOHANNON, HINKLE, COX, EATON, COFFIELD & HENSLEY, Roswell, New Mexico, Attorney for Appellants

JUDGES

Lopez, J. wrote the opinion. I CONCUR: Mary C. Walters, C.J., LEWIS R. SUTIN, J., (Dissenting).

AUTHOR: LOPEZ

OPINION

LOPEZ, Judge.

{1} The trial court granted judgment to the plaintiff in a workmen's compensation case for 30% partial permanent disability, plus 13 1/2% physical impairment due to hearing *{*85}* loss in his left ear, with compensation payable at the rate of $201.04 per week, the applicable rate as of the date of the hearing of this case. The defendants appeal the judgment with respect to the rate of workmen's compensation only. We reverse.

{2} The sole issue on appeal is whether the date of disability or the time of judicial determination of disability controls the rate of compensation.

{3} On December 5, 1977 the plaintiff was struck in the head by a pipe wrench while drilling for ore, working for the defendant, Duval. He attempted to return to work in the mine but was unable to perform his duties. He returned to work for Duval on March 25, 1980 as a janitor at a lower salary. He had been receiving workmen's compensation benefits from the date of the accident until he began working in March 1980 at the rate of $142.59 per week. When he commenced working again the workmen's compensation payments stopped completely. The trial court found he was 100% disabled from performing any work for which he was fitted from the date of the accident until March 25, 1980. The court further found the plaintiff was suffering from a hearing loss of 13 1/2% in his left ear as a result of this accident, and that the hearing loss did not disable him from performing either his past or his present job. From March 25, 1980 until the date of the trial, the court found the plaintiff was 30% disabled from performing any work for which he was fitted, according to his age, education, training, etc., because the injury had caused him dizziness, nausea, mental and emotional anxiety. All the compensation amounts arrived at by the trial court were based on an applicable rate of $201.04 per week which was the applicable rate at the time of the judicial determination.

{4} The applicable statute reads as follows:

Section 52-1-48, N.M.S.A. 1978

Additional limitation on benefits.

The benefits that a workman shall receive during the entire period of disability, and the benefits for death, shall be based on, and limited to, the benefits in effect on the date of the accidental injury resulting in the disability or death.

{5} The trial court applied the rule laid down in **Purcella v. Navajo Freight Lines, Inc.**, 95 N.M. 306, 621 P.2d 523 (Ct. App. 1980).

{6} In **Purcella** the plaintiff was injured on March 20, 1977. Workmen's compensation was paid until March 19, 1978 for temporary total disability at the applicable rate at the date of injury which was coexistent with disability. The plaintiff returned to work and payments of compensation were stopped. Suit was filed on September 15, 1978. On November 16, 1979 a stipulation was entered between plaintiff and the defendant that the plaintiff had a 35% permanent partial disability commencing on March 20, 1978. From March 20, 1978 until October 29, 1979 compensation was stipulated and paid at the applicable rate on the date of the disability. The parties stipulated to allow the trial court to determine the rate of compensation commencing on October 30, 1979. The trial court awarded workmen's compensation payable at the rate applicable at the date of the stipulation.

{7} On appeal this court affirmed the trial court's decision and said:

On November 16, 1979, defendant admitted that the plaintiff was disabled and it was at fault in terminating payments.

We hold the rule to be that when a workman suffers disability as a result of an accidental injury and the employer voluntarily pays compensation benefits and then wrongfully terminates payments thereof, causing the workman to seek relief in the courts, the date that disability is determined in the court proceedings is the date that the applicable rate of compensation applies, not the date of the accidental injury * * *. We have said innumerable times that an employer and a workman must comply with the spirit of the Workmen's Compensation Act, i.e., a common sense concept of fairness in the view of a subjective eye that reviews the facts.

{8} The established rule is that the rate of compensation is that the rate of compensation *{*86}* in effect on the date of disability and the law effective at that time controls. **Moorehead v. Gray**, 90 N.M. 220, 561 P.2d 493 (Ct. App. 1977); **De La Torre v. Kennecott**, 89 N.M. 683, 556 P.2d 839; **Lamont v. New Mexico Military Institute**, 92 N.M. 804 595 P.2d 774 (Ct. App. 1979); **Casias v. Zia Co.**, 93 N.M. 78, 596 P.2d 521 (Ct. App. 1979).

{9} With the rules laid down by the above cases, and the **Purcella** rule, we view the evidence, findings of fact and conclusions of law in this case to determine if the judgment of the trial court can be affirmed. It is our duty to affirm the trial court's decision, unless the findings are not supported by the evidence or the conclusions are not supported by law. In other words, if the trial court's decision is based on an erroneous application of the law we must reverse. **In the Matter of Briggs**, 91 N.M. 84, 570 P.2d 915 (1977); **Barber's Super Markets v. Stryker**, 84 N.M. 181, 500 P.2d 1304 (Ct. App. 1972).

{10} We view, in particular, the following findings of fact and conclusions of law of the trial court:

Findings of Fact

No. 9. Defendant Insurance Company of North America has paid 120 weeks of workmen's compensation benefits to the Plaintiff at a rate of $142.59 per week.

No. 11. Defendant Insurer should pay to the Plaintiff the accrued 30% disability payments from March 25, 1980 to date in a lump sum at the rate of $60.31 per week plus accrued interest thereon as provided by statute from the date of entry of Judgment in this cause to the date of satisfaction of such Judgment.

No. 12. Defendant Insurer should hereafter pay unto the Plaintiff in not less than biweekly payments a 30% disability compensation at the rate of $60.31 per week until further order of this Court.

Conclusions of Law:

No. 7. Plaintiff's Workmen's Compensation rate determined as of the date of hearing is in the sum of $201.04 per week on a total disability basis.

No. 8. Plaintiff has an additional impairment under the scheduled injury section which is a 13 1/2% hearing loss to his left ear.

{11} The trial court did not make any findings that the defendant had admitted disability and that the defendant had admitted fault in terminating compensation benefits. The **Purcella** rule requires the payment of workmen's compensation to be wrongfully terminated as a condition precedent for its application. The plaintiff argues that the defendant knew, at the time of termination of workmen's compensation that the plaintiff had a 100% disability to perform the type of work he was doing at the time of the accident and 30% disability to perform work for which he was fitted and that that the defendant was acting in bad faith.

{12} The defendant argues that the payment of compensation was terminated in good faith when a doctor recommended light duty and when plaintiff actually returned to work on March 25, 1980.

{13} The defendant further argues that one doctor had evaluated the plaintiff as only having 10% disability. The record shows that when the plaintiff terminated compensation benefits that the medical evidence as to his disability was conflicting.

{14} The plaintiff's contentions mean that every time workmen's compensation payments are terminated that the employer is acting wrongfully and that the rate of compensation should escalate from the date of disability to the date of judicial determination of disability. This would end in absurd results because in order for the trial court to obtain jurisdiction of a workmen's compensation case there must be termination of workmen's compensation. **See**, § 52-1-31, N.M.S.A. 1978. This would mean that in every compensation case filed in the district court, the rate of compensation would automatically change to the date of judicial determination from the date of disability. In almost every compensation case the evidence from the very beginning of the injury is conflicting and there is no definite degree of disability until determination by the *{*87}* court or stipulation of the parties. This judicial procedure as urged by the plaintiff, would change the Workmen's Compensation Act drastically in a manner not contemplated by the Legislature.

{15} The defendant asks this court to overrule **Purcella**. We decline to do so. We believe that **Purcella** is a valid, logical and reasonable interpretation of the Workmen's Compensation Act regarding the rate of workmen's compensation, but it must stand on its own set of facts.

{16} We believe that common sense is a key ingredient in the administration of justice. Application of that ingredient in this case calls for a reasonable application of the **Purcella** rule and all the cases decided by our appellate courts. We can only arrive at one conclusion. The trial court erred in the application of the law regarding the rate of compensation.

{17} We hold that the general rule is that the date of disability controls the rate of workmen's compensation, but **Purcella** creates an exception. The record in this case does not justify the application of the **Purcella** exception. Rather, we hold that the general rule is controlling.

{18} The trial court erred in its decision.

{19} Judgment is reversed and the cause is remanded for proceedings consistent with this opinion.

{20} IT IS SO ORDERED.

I CONCUR: Walters, C.J.

LEWIS R. SUTIN, J., (Dissenting).

DISSENT

SUTIN, Judge (Dissenting).

{21} I dissent.

{22} The trial court made extensive findings of fact too numerous to mention. The defendant insurer had paid plaintiff 120 weeks of workmen's compensation benefits at the rate of $142.59 per week. Subsequently the court found that plaintiff was earning wages which entitled him to compensation at the rate of $201.04 per week. This was the applicable rate as of the date of the court hearing. The court concluded that plaintiff's compensation rate determined at the date of hearing was $201.04 per week on a total disability basis.

{23} In this appeal, defendant did not challenge any of the findings of the court nor mention the findings in the Brief-In-Chief. The entire brief is devoted to the **Purcella** case cited in Judge Lopez' opinion. There was no compliance with Rule 9(m) of the Rules of Appellate Procedure for Civil Cases entitled "Statement of proceedings." There was no compliance with Rule 9(d) entitled "References to evidence" which states in pertinent part:

The brief must set forth an attack on any finding in accordance with these rules or such finding shall be conclusive.

{24} Appellant is bound by findings not properly attacked in his brief. **State ex rel. Thornton v. Hesselden Const. Co.,** 80 N.M. 121, 452 P.2d 190 (1969). Findings not attacked are binding on this court. **State ex rel. State Highway Commission v. Sherman,** 82 N.M. 316, 481 P.2d 104 (1971). We need only determine if the trial court's conclusions and the judgment are correct based upon the facts found. The trial court concluded on the basis of facts found that plaintiff was entitled to judgment. The trial

court's conclusion and judgment are correct. **American General Companies v. Jaramillo,** 88 N.M. 182, 538 P.2d 1204 (Ct. App. 1975). Judge Lopez states:

In other words, if the trial court's decision is based on an erroneous application of the law we must reverse. **In the Matter of Briggs,** 91 N.M. 84, 570 P.2d 915; **Barber's Super Markets v. Stryker,** 84 N.M. 181, 500 P.2d 1304.

{25} Briggs simply held that any finding of fact which is unsupported by substantial evidence and which rests on mere speculation and conjecture cannot stand. **Stryker** merely held that in a trial before the court, we cannot reverse unless we are convinced that the findings cannot be sustained by evidence or inferences therefrom. Neither case stands for the rule announced.

On the other hand, **Petty v. Williams,** 71 N.M. 338, 340-1, 378 P.2d 376 (1963) said:

We cannot condone such a total lack of regard, by attorneys practicing in this court, of the basic rules governing appeals. **However, lest we be unjustly charged with disposing of appeals on technical grounds rather than on a consideration of the merits**, we will briefly summarize the ultimate facts found by the trial court. [Emphasis added.]

{26} State ex rel. Newsome v. Alarid, 90 N.M. 790, 793, 568 P.2d 1236 (1977) said:

We construe the requirement of our rule [9(m)(2)] liberally **in this case only**, so that the cause on appeal may be determined on the merits. [Emphasis added.]

{27} The time should come to lay at rest, uncertainty that exists in a determination of an appeal on the merits in the face of complete non-compliance with the rules. This determination is not, however, for this Court to declare.

{28} It might be refreshing to discourse upon the part that appellate rules of this nature should play in a search for a just result. Violations of these rules are now and have always been commonplace. The failure to comply is a matter of inadvertence, inattention, oversight or carelessness. Nevertheless, in cases that are brought before us, the function of a reviewing court is to see that justice is done according to law. We should adopt a rule of long ago that "... the substantial rights of litigants are of greater weight than the inadvertence or omissions of their attorneys." **King Solomon Tunnel & D. Co. v. Mary Verna Mining Co.,** 22 Colo. App. 528, 127 P. 129, 131 (1912). When essential to prevent a miscarriage of justice, we should notice plain reversible error despite non-compliance. Plain reversible error should be placed within the category of fundamental error. If justice demands it, we should adopt such a rule **sua sponte**. Otherwise a reviewing court cannot "see that justice is done."

{29} Some of the rules of appellate procedure should be guidelines for lawyers to follow. An orderly presentation which is sought so much by legal technicians interested in the smoother functioning of judicial machinery should give way to the basis for and function

of an appellate court. "If the mode thus selected impels the speedy enforcement of a right, or induces the hasty redress of a wrong, and, as a correct exposition of the law, is appropriate to the facts involved, **it is controlling and ought to be adopted**, **though the legal principle may not have been suggested by either party**." [Emphasis added.] **Patty v. Salem Flouring Mills Co.,** 53 Or. 350, 100 P. 298, 300 (1909). If a pure question of law, the answer to which terminates litigation, is or is not presented by either party in an appeal, no technical judicial rules should stand as obstacles in the way to a just result. Our duty should not be confined to a correction of errors in the court below solely upon those presented in an inadequate brief. Our duty should extend beyond the perimeters of the brief. It should require a study of the record and the transcript of proceedings, and an independent research, if necessary, to seek a just result, regardless of the burden placed on a court of review. For treatises on this subject matter, see, Vestal, **Sua Sponte Consideration in Appellate Review**, 27 Fordham Law Review 477 (1958); Tate, **Sua Sponte Consideration on Appeal**, 9 Trial Judges Jour. 68 (1970).

{30} In the instant case, the employer did not wrongfully terminate compensation payments due plaintiff. It was not at fault. It welcomed plaintiff's return to full-time work as a utility employee at a respectable salary, work in which plaintiff was employed at the time of trial. It did not use devious routes in search for relief. It complied with the spirit of the Workmen's Compensation Act.

{31} Judge Lopez arrived at a fair result. Whether non-compliance with the rules of appellate procedure, **supra**, shall yield to a fair result, is not for this Court to say. For this reason, I dissent.