PUBLIC LAW BOARD NO. 1795

Award No. 9
Case No. 9

PARTIES TO DISPUTE: BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
SOUTHERN PACIFIC TRANSPORTATION COMPANY
(Pacific Lines)

STATEMENT OF CLAIM:

1. That the Carrier violated the Agreement when on March 1, 1976 it refused to allow Bridge and Building Carpenter Gary L. Lamb to resume his duties after being released by his attending physician for unrestricted duty.

2. That the Carrier now return Claimant to his assigned position of Bridge and Building Carpenter and compensate him for all wage loss suffered beginning March 1, 1976, and continuing until he is allowed to return to service.

STATEMENT OF FACTS: Claimant entered the service of Carrier on September 18, 1968. As of March 1, 1976, and for some time prior thereto, his job classification was that of Bridge and Building Carpenter. On October 31, 1968, while working on steel structure, Claimant slipped and fell and suffered a rather severe back injury, as the record indicates. Subsequently, he resumed work for a short period but was unable to perform his duties due to back pain. He again returned to work from May, 1971, until April, 1973 at which time Carrier made arrangements for Claimant to receive treatment. On September 8, 1975, and again on March 1, 1976, Claimant reported to Carrier and in each case presented what purported to be a doctor's release to return to duty without any restrictions. In each case, Carrier rejected the medical release and refused to allow Claimant to return to work.

Such rejection and refusal, Petitioner asserts, violated various cited Rules of the Agreement between the principals, particularly

as relating to Claimant's claimed right to return to duty after medical release.

Carrier responds that Claimant "has been compensated for his loss of future employment and is now estopped to assert a continuing relationship exists . . ." The basis of Carrier's contention is the fact that some time prior to September 8, 1975, Claimant instituted an action against Carrier in Federal Court, under the Federal Employers' Liability Act, in which he obtained a jury verdict after trial in the sum of $150,000, based on his claim of permanent disability and loss of past and future earnings. The fact that such claim was actually made is fully evidenced by the docket extracts of the court testimony of Claimant, the statements made in summation to the jury by Claimant's attorney and, more important, by the testimony of his physician, summed up in the following statement under oath:

> "In my opinion . . . the chances of his being able to work that heavy or strenuous is practically zero. I do not think, in other words, that he would be able to do so, even with the best of disc results." (Emphasis added).

On July 21, 1976, Carrier advised the Organization by letter that it was rejecting its appeal on the instant claim, stating in part:

> ". . . that Claimant had been caught up in a web of his own making, for it is a uniform holding that a party may not prevail in a legal proceeding on one theory and then, simply because his interests have changed, assume a contrary position in another forum. Claimant proved total permanent disability and loss of future earnings for the term of his work expectancy and was compensated for the detriment he sustained. He is now estopped from asserting a claim that he is not now suffering such permanent disability. For the reasons preceding, the record of Claimant with the Company was closed . . ."

Nevertheless, Petitioner contends that the Court proceeding and the jury award have "no relevancy whatsoever" in view of the existing Agreement between the parties.

Finally, to further buttress its position, Carrier refers the Board to the case of Scarano v. Central R. Co. of New Jersey, 203 Fed. 2nd 510, Circuit Court of Appeals, 3rd District (1953), as conclusive and binding precedent for the proposition that Claimant is

estopped from asserting the instant claim.

FINDINGS: There is little doubt, in the opinion of the Board, that the United States Circuit Court of Appeals, being a Court of considerable precedent and authority, a decision by that Court involving the same basic facts and the same legal principles as are involved in the instant dispute, would be controlling and conclusively binding upon this Board. We quote the following, therefore, from the opinion of the Court as to the specific facts involved in the Scarano case cited above:

> "On February 11, 1949 the present plaintiff, then an employee of defendant railroad, was injured by falling from the top of a locomotive. He brought suit against defendant under the Federal Employers' Liability Act, . . . to recover for his injuries. Plaintiff alleged and defendant denied that plaintiff was 'totally incapacitated from resuming his former occupation or from engaging in any other form of labor.' Each side produced medical witnesses who testified in support of its position. For example, one of plaintiff's witnesses, testified that plaintiff was 'totally disabled' and that his 'condition will become progressively worse should he attempt' any work involving 'the normal range of use of the back that is usually required in any physical effort.' This issue, along with others, was submitted to a jury which, on October 4, 1950, returned a verdict in favor of plaintiff in the sum of $35,000."

Defendant moved for a new trial, alleging excessive damages, and a settlement was then reached in the sum of $27,750., which was paid by defendant Carrier on November 27, 1950.

> "Within less than 30 days thereafter, on December 24, 1950, and again on January 2, 1951, plaintff called upon defendant to reinstate him in his job, relying on the terms of a collective bargaining agreement . . . While the exact terms of the contract are not before us, the parties have proceeded on the assumption that it provides that an employee injured in the course of his employment is entitled to reinstatement with seniority rights as soon as he is physically able to perform the duties of his job. Defendant refused to reinstate plaintiff or to examine him to determine his physical condition.
>
> Plaintiff thereupon brought the present action alleging breach of contract and demanding damages for wages already lost since defendant's refusal on December 24, 1950 to reinstate him, and for future loss of wages. Defendant, without answering the complaint, moved for summary judgment on the ground that 'the amount of (the) judgment (in the earlier action) was based upon

the plaintiff's claim, supported by his medical testimony, that he was totally and permanently disabled from doing railroad work, and therefore bars the right to plaintiff to any further compensation . . . either under the contract or otherwise.' The record of the earlier action was offered in support of the motion. Plaintiff denied that the earlier litigation was conclusive as to his present condition. The District Court granted summary judgment for defendant. 107 F. Supp. 622. From this judgment, plaintiff now appeals.

This case presents only the question whether plaintiff can thus be stopped at the outset or whether he is entitled to go further in his effort to prove his claim. Plaintiff's theory advanced in this court is that in his present suit on a contract the only relevant question relating to his health is whether or not he was physically qualified to perform the necessary work on the day that he applied for reinstatement, and that this fact is not judicially determined by the judgment entered in the earlier action since there is no way of knowing whether the jury in that action decided that plaintiff was permanently disabled. In any event plaintiff insists that the basis of the general verdict and the settlement are for present purposes disputed questions of fact."

We quote the following from the Court's opinion as to the law of the Scarano case:

"Although plaintiff's argument has merit, we think he was properly stopped at the threshold. It is at least clear from what was before the court that in order to recover for the alleged breach of contract plaintiff must show that when he sought reinstatement he was physically able to perform the work in question. We hold that in the circumstances of this case plaintiff was estopped from making such an assertion."

. . . . .

"The 'estoppel' of which, for want of a more precise word, we here speak is but a particular limited application of what is sometimes said to be a general rule that 'a party to litigation will not be permitted to assume inconsistent or mutually contradictory positions with respect to the same matter in the same or a successive series of suits.' II Freeman on Judgments #631 (5th ed. 1925). Whether the correct doctrine is that broad we do not decide. The rule we apply here need be and is no broader than this. A plaintiff who has obtained relief from an adversary by asserting and offering proof to support one position may not be heard later in the same court to contradict himself in an effort to establish against the same adversary a second claim inconsistent with his earlier contention. Such use of inconsistent positions would most flagrantly exemplify that playing 'fast and loose with the courts' which has been emphasized as an evil the courts should not tolerate. See Stretch v. Watson, 1949, 6 N. J. Super, 456, 469, 69 A.2d 596, 603, reversed in part on other grounds, 5 N.J. 268, 74 A.2d 597. And this is more

than affront to judicial dignity. For intentional self-contradiction is being used as a means of obtaining unfair advantage in a forum provided for suitors seeking justice.

(2) At the same time, in the nature of the problem, it has rightly been pointed out by the Court of Appeals for the District of Columbia that in applying this rationalization 'each case must be decided upon its own particular facts and circumstances.' Galt v. Phoenix Indemnity Co., 1941, 74 App.D.C. 156, 120 F.2d 723,726. The particular facts and circumstances we rely on here are these. Plaintiff asserted in a judicial proceeding, and introduced evidence tending to prove that he was not able and would not be able to work. He claimed damages for this lost ability to earn wages. As a result of that claim, and by the aid of that judicial proceeding, plaintiff obtained from defendant a sum of money which by its size considering plaintiff's age and earning record, indicates that it was intended to recompense him for his loss of ability to earn wages for at least a substantial future period. Now he asks the same court to hear him on a claim that less than a month after this compensatory recovery he was physically rehabilitated and entitled to be restored to duty and pay status by the defendant on peril of a new compensatory recovery for loss of wages from the date of requested reemployment. Not only does plaintiff found successive claims on inconsistent facts, but he now seeks a duplicating recovery, if we are to respect the legal theory of the earlier claim in settlement of which he received a substantial sum. In these circumstances we think it was proper for the District Court to refuse to allow plaintiff to litigate a claim in contradiction of his earlier position.

The judgment will be affirmed." (All emphasis added)

Recognizing that over 23 years have elapsed since the Scarano case was decided, we have researched the pertinent authorities to determine whether the principles enunciated in that case have since then been modified or overruled. We find to the contrary. On the facts and principles there involved Scarano is accepted as the leading case on the proposition of estoppel and has been cited with approval and followed in many later decisions.

See for example, among others:

Ellerd v. So. Pac. R. Co., 191 F.Supp. 722 (1961)
Hodges v. Atlantic Coast Line RR Co., 238 F.Supp. 425 (1964)
Gibson v. Missouri Pac. RR Co., 314 F.Supp 1211 (1970)

Gleason v. United States, 458 Fed.2d171,175 (1972)

City of Kingsport, Tenn. v. Steel & Roof Structures, Inc., 500 Fed.2d 617,620 (1974)

Duplar Corp. v. Deering Milliken, Inc. 397 F.Supp 1146,1178 (1975)

In the Gibson case, supra, the controlling principle was stated succinctly as follows:

> "It is a sound principle that an employee is estopped to assert a right to return to work after pursuing an FELA claim in which he holds out his inability to work and recovers a large sum of money in satisfaction of his claim."

Thus, the principle of estoppel enunciated in the Scarano case becomes the applicable law in the dispute now before us, assuming the facts in both cases to be identical. In that context, the following facts are present in the Scarano case:

1. Claimant suffered a severe back injury in the course of his employment.

2. He brought suit against Carrier under the Federal Employers' Liability Act, in which he introduced evidence and medical testimony to prove that he was not able and would not be able to work.

3. Substantial damages were claimed based on permanent disability, loss of earnings and loss of future earnings measured by the term of his work expectancy.

4. Substantial damages were awarded after trial compensating Claimant for loss of earnings and for loss of ability to earn wages for at least a substantial future period.

5. Claim was thereafter filed with Carrier for reinstatement based on the collective bargaining Agreement, particularly as relating to his being physically able to resume the dutes of his job.

6. Carrier refused to reinstate Claimant or to have him examined to determine his physical condition.

7. Claimant was held estopped at the outset from asserting the validity of his claim in contradiction to his earlier position.

Precisely the same facts are present in this dispute. Accordingly, we find that the facts and legal principles in the Scarano case are on all fours with those in the instant case. Indeed, even more so; for in Scarano the jury's award was in the sum of $35,000., whereas in the case now before us the jury's award was in the sum of $150,000. Clearly, Claimant recovered "a large sum of money in satisfaction of his claim", not only for loss of current earnings but for loss of prospective earnings "for a substantial future period" based on permanent disability.

As was stated by the Court in the Ellerd case, supra:

> "In the face of these facts, the applicable rule of law is firmly established that one who recovers a verdict based on future earnings, the claim to which arises because of permanent injuries, estops himself thereafter from claiming the right to future re-employment." (Emphasis added)

In these circumstances therefore, and based upon the controlling precedent of the Scarano case and the further precedents cited above, we find that Claimant is conclusively estopped from asserting the instant claim. Accordingly, we have no alternative but to deny the claim in toto.

AWARD: CLAIM DENIED.

LOUIS NORRIS, Neutral and Chairman

S.E. FLEMING, Organization Member

E.J. HALL, Carrier Member

DATED: San Francisco, California
January 12, 1977