

1986

Irwin G. Bunnell v. Industrial Commission of Utah, U. S. Steel Corporation, and Second Injury Fund : Reply Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

860196

IRWIN G. BUNNELL

Applicant and
Appellant

vs

INDUSTRIAL COMMISSION OF UTAH,
U.S. STEEL CORPORATION, and
SECOND INJURY FUND

Defendants and
Respondents

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APPLICANT'S REPLY BRIEF

Case Number 860196

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TABLE OF CONTENTS

	Page
Cases Cited.....	None
REPLY ISSUES.....	1
FACTS ESSENTIAL FOR REPLY.....	1
(For Summary of Argument See SUMMARY AND CONCLUSION).....	9
ARGUMENT.....	2
SUMMARY AND CONCLUSION.....	9

ISSUES ON REPLY

It is apparent from the Second Injury Fund's arguments that there is a tacit fundamental misunderstanding of Mr. Bunnell's claim which distorts the nature of the claim and, therefore, the nature of the proof needed to establish the claim. The commission seems to hold the same incorrect view. The purpose of this reply is to explicate the implicit assumptions about the case and show how a correct view of the nature of the claim affects the relevance and weight of the evidence in such a way as to render most of the defendant's evidence irrelevant and to clarify the value and weight of Mr. Bunnell's evidence so as to justify his position that no substantial evidence supports the commission's denial of his well supported claim.

For a summary of argument please see the Summary and Conclusions at the end.

FACTS ESSENTIAL FOR REPLY

As a starting point of reference it is understood and agreed that in 1968 Mr. Bunnell became permanently and totally disabled by pulmonary problems. The Second Injury Fund acknowledges that fact in its response brief on page 4 in the summary of arguments.

There is also no dispute that Mr. Bunnell was severely injured in an industrial accident in 1953 which included blunt chest injury with several broken ribs followed by x-ray evidence of infiltrates or "consolidations" into the lungs.

The question before the industrial commission was whether

the pulmonary failure which disabled Mr. Bunnell in 1968 was caused by the 1953 industrial accident.

ARGUMENT

The Second Injury Fund's arguments on the evidence all appear to be targeting facts which are not really probative or relevant to the central issue unless certain implicit assumptions are accepted which are not correct.

The first assumption is that the pulmonary failure which caused Mr. Bunnell to become disabled in 1968 was the same thing as the coughing problem. The cough is reported variously as existing more than a year before September 1968. It got worse about the first of August 1968 and resulted in Mr. Bunnell's being hospitalized several times starting in September 1968.

The second assumption follows from the first and is that to prove his case, Mr. Bunnell had to establish as a fact that the 1968 cough was contiguous with the 1953 accident.

These assumptions are implicit in the arguments attempting to show:

1. Absence of chest complaints between 1953 and 1968 (Respondent brief pp 5-6).
2. Evidence as to when the cough started (id. p 5).
3. Evidence referring to the various diagnoses of the 1968 problem (id. p 6).
4. Evidence referring to comments on x-ray reports such as the "Routine X ray" requested by the company doctor in 1966, all implying that his lung problems were fairly benign prior to 1968 (id. pp 6-7).

5. Evidence argued from the lack of mention of lung problems by the company doctor or by Dr. Linden's permanent impairment evaluation in 1954 (id. pp 7-8).

6. Evidence of lack of ratable lung impairment by the 1955 disability rating board (id. p 8).

All of these arguments assume that the pulmonary failure was the same as the 1968 coughing problem and that Mr. Bunnell had to prove that cough was contiguous with the 1953 accident.

But neither of these assumptions is correct. The lung failure was not the cough. It was the failure of the lungs to respond normally or to heal normally from whatever caused the cough. Whether it was caused by dust at work, or a common cold or whatever, a normal lung will heal after a week or two or in extreme cases a cough might last six weeks or even three months. But Mr. Bunnell's cough lasted over a year, then got worse. He was hospitalized. The fits of coughing lasted for hours and progressed from a dry cough to where he was coughing up copious amounts of fluid. This was not a normal response of healthy lungs to a common cough. It was so severe that it led the doctors to consider congestive heart failure, emphysema, tuberculosis, asthma, allergy and various other possibilities all of which were ruled out as discussed in Mr. Bunnell's applicant brief.

The bottom line is that Mr. Bunnell's lungs failed to respond normally to the cough when it came along. And it is the failure of his lungs to be able to cope with whatever he caught in 1968 that is the essential fact, the subject of all inquiry

and proof before the industrial commission.

The central question is whether the 1953 injury to Mr. Bunnell's chest was a direct cause of his lung failure that rendered him unable to cope with whatever caused his coughing problems in 1968.

It is the incorrect assumption that the lung failure was the same thing as the 1968 cough that leads to confusion as to what is necessary to be proved, what evidence is necessary and how the standard of proof applies.

Once it is clear that Mr. Bunnell's pulmonary failure refers to the lungs' loss of ability to cope, it would also become clear how the evidence shows that Mr. Bunnell's pulmonary failure was caused by the industrial accident and why he feels that is the one inevitable conclusion to which the evidence leads.

The first and most obvious result of correcting the assumption that the lung failure was the cough is that it is not necessary for Mr. Bunnell to prove that the cough was contiguous with the 1953 accident.

The testimony was not to prove that the 1968 cough started in 1953. The coughing problems were off-and-on as indicated in both the testimony and the medical records. Nor did Mr. Bunnell claim disability from lung problems at the time of the disability rating in 1955. Thus all the argument and evidence showing discontinuity between the 1968 coughing problem and the 1953 accident are not really relevant.

The Second result of dropping the incorrect assumptions is that this pulmonary failure did not occur in 1968. The pulmonary

failure occurred at the time of the accident in 1953 and only became totally disabling in 1968.

This is the essence of Mr. Bunnell's case which he feels the evidence overwhelmingly demonstrates and which is not refuted by any substantial evidence.

The fact that the pulmonary failure existed prior to 1968 is clearly demonstrated in the 1960 hospitalization record which says "Chills, fever, pain in chest and continuous coughing for 3-4 days. Present illness began 3 days [ago] with slight cold and gradually developed in severe above symptoms." (record p 111).

Thus as early as 1960 the lungs inability to cope is demonstrated dramatically when a slight cold led to 3 or 4 days of continuous coughing and finally necessitated hospitalization, essentially the same coping failure as was demonstrated in 1968.

In an obvious attempt to justify or explain this serious failure of Mr. Bunnell's lungs to cope normally with a slight cold, the same doctor records 1/3 down the same page under his systems review: "Chest - he was in a severe accident at Geneva Steel and his chest was crushed about 3 years ago and fractured ribs."

This evidence is repeated here to show how differently this evidence is weighted and viewed when it is considered as evidence of Mr. Bunnell's pulmonary coping failure caused directly by the 1953 accident and extant since 1953. The same evidence might be greatly discounted if the incorrect assumption is adopted that what is being proved is that the 1968 coughing was the same thing as the lung failure. It is hard to see the connection between a

cough in 1960 and another cough in 1968 when there appears to be no particular problem in between. But Mr. Bunnell is not claiming that either cough was caused by the 1953 accident. The 1960 cough was originally a slight cold.

It is neither just nor fair to try to make Mr. Bunnell prove that those coughing problems were caused by the industrial accident nor to view the evidence as proving or failing to prove that causal connection. Yet that appears to be the basis of the Second Injury Fund's arguments and the commission's findings.

What the 1953 accident did do was injure Mr. Bunnell's lungs so as to render them incapable of coping; a slight cold in 1960 led to hospitalization; in 1967 a cough never healed and in 1968 led to more hospitalizations and total disability.

To prove his pulmonary failure was caused by the industrial accident Mr. Bunnell presented the hospital records from 1968, 1960 and 1953 demonstrating clearly the injury to the chest and the subsequent pulmonary failure to cope with common ailments. This evidence was bolstered by x-ray reports from before the accident which mention no lung problems, the initial hospitalization X rays which show progressive development of x-ray evidence and subsequent X rays which all show evidence of lung abnormality (Usually called emphysema by the company doctor though actual emphysema was later ruled out).

Further testimonial evidence showed a pre-accident history of exceptional lung health including activity in high school sports and as an adult mountain climbing guide. Additional evidence of family and fellow workers showed continual on-and-off

chronic smokers cough type problems during the 15 years from 1953 to 1968 demonstrating that the episodes requiring hospitalization in 1960 and 1968 were not unique events but were merely extreme cases in a continual ongoing struggle in which Mr. Bunnell's lungs failed to function as normal healthy lungs.

Mrs. Bunnell's hearsay testimony which was corroborated by the 1968 medical records was that the treating doctor informed the Bunnell's in 1953 that his lungs were permanently injured and he would have a tendency to get pneumonia. (See Applicant brief p 11 paragraph "f" for references.) This pulmonary failure started at the time of the 1953 accident and continued until 1968 when Mr. Bunnell failed to cope with what for a person with uninjured lungs might have been a minor cough. But for Mr. Bunnell, because of his injury and resulting pulmonary failure, this became a totally disabling event.

With all the evidence, the cause of Mr. Bunnell's disability might seem obvious to a layman without more. But Mr. Bunnell also offered the uncontradicted opinion evidence of two treating doctors.

Mr. Bunnell's evidence takes on a different significance when the pulmonary failure is properly understood to mean the failure of his lungs to cope, rather than as tacitly and incorrectly understood by the Second Injury Fund and the commission to refer to the 1968 coughing problem.

Correcting this misunderstanding has even greater significance in evaluating whether any substantial contrary evidence exists. Two examples will illustrate. The "substantial

contrary evidence" the Second Injury Fund asks us to rely on consists of:

1. A hearsay statement in medical history referring to 16 years of no "Chest Complaints." (Respondent brief p 5, applicant brief p 21, Record p 127). If this is granted as ambiguous and resolved in favor of the commission's interpretation, it stands alone in contradiction of massive amounts of testimony and medical record evidence including hospitalization records of 1960 which show it is simply not true. If it is granted as true(giving benefit of any doubt, what then does it mean. It is a bit of medical history to be taken into account along with a great number of other medical facts. After a courageous leap from that to some conclusion about causation (which goes against the treating physician's opinion), we have , at best, a bit of evidence that might be distantly relevant to proving that Mr. Bunnell's 1968 coughing problem was not caused by the industrial accident. But that assumes that the pulmonary failure refers to the 1968 coughing problem. Mr. Bunnell doesn't claim that cough started in 1953. And if this unlikely leap of faith is taken as fact, a 16 year period of "no chest complaint" bears no relevance if Mr. Bunnell's pulmonary failure amounted to a loss of his lungs' capacity to cope with a causal agent that did not appear until 16 years later.

2. The second bit of evidence we are asked to rely on is alleged X-ray evidence that lung problems existed in 1952 prior to the accident (Referred to in respondent brief on pp 6, 8 top, 9 bottom).

The only evidence in the record for this assertion is in a 1966 X-ray report (Record p 114) which says the "appearance of the chest is very similar to that seen in 1952." This comment was brought up off the record and objected to as probably a typographical error or mistaken date since the only 1952 X ray was to check of rib fracture and makes no mention of any other problems. (Record p 88) Furthermore, the chest X rays the day of the accident, 11-13-53 also make no mention of lung problems other than fractured ribs though lung "consolidations" do appear in follow-up X rays 9 days later (Record p 95).

The defendants dropped the point at that time and made no effort to offer the 1952 X Rays to prove pre-existing lung problems. The administrative law judge did not rely on that evidence or make any finding regarding X-ray evidence of pre-existing lung problems, and the Second Injury Fund did not offer to argue that point on appeal to the commission. It seems inappropriate that they now ask us to rely on that evidence.

If it is taken as true evidence, however, it has not substantial probative value on the question of the pulmonary failure since there was no evidence, given that the X rays did show scarring, that such scarring related to any pulmonary problems. The only evidence was that prior to the accident Mr. Bunnell had exceptionally healthy lungs except perhaps for some childhood bronchitis which in any case had caused no lung breakdown during the years between his high school athletics and age 50 when the fall occurred.

SUMMARY AND CONCLUSION

The evidence and arguments made by the Second Injury Fund and the commission are based on a the incorrect and tacit assumption that Mr. Bunnell's pulmonary failure consisted of the coughing problem that disabled him in 1968 and that, therefore, the case turned on evidence of the nature of the 1968 diagnoses and contiguity between the coughing and the 1953 accident. Defendants urge rejection of Mr. Bunnell's claim on that basis.

Mr. Bunnell's claim is, however, that his pulmonary failure consists in loss of capacity to cope with common ailments. A massive amount of evidence demonstrated the nature and extent of this loss of coping ability and showed that it did not exist before the accident but did immediately and continuously thereafter and was caused thereby. It was predicted by the treating doctor in 1953 and demonstrated by a long history of chronic coughing, hospitalization following failure to cope with a slight cold in 1960 and finally total disability when his lungs were unable to cope with whatever agent caused his problems in 1968.

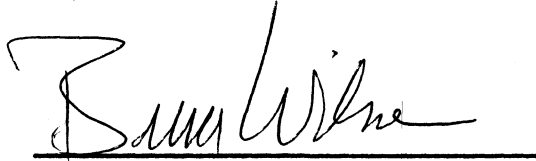
Any relevant contrary evidence is so insubstantial that to deny Mr. Bunnell's claim on the basis thereof would constitute an arbitrary and capricious denial.

Even if some modicum of substantial evidence were found, to reject Mr. Bunnell's claim on that basis in light of the massive amount of evidence in his favor would bring into serious question as a separate issue whether there were any substantial evidence to show that Mr. Bunnell failed to prove his case by a preponderance of the evidence, which was the only ultimate

finding of the commission.

Accordingly, Mr. Bunnell requests his case be remanded to the commission with an order to enter findings in accordance with the only inevitable conclusion supported by the evidence.

Dated this 29th day of November, 1986.

A handwritten signature in cursive script, appearing to read "Bruce Wilson", is written over a solid horizontal line.

Bruce Wilson

Attorney for Applicant

CERTIFICATE OF MAILING

I certify that on Dec 15th, 1986, four copies each of the attached Applicant's Reply Brief were mailed first class mail postage paid or personally hand delivered to the following:

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