In the

Supreme Court of the United States

ALEXANDER McCLANAHAN,

Petitioner,

v.

MORAUER & HARTZELL, INC., et al.,

Respondents.

No. 70-5097

Washington, D. C.
October 21, 1971

Pages 1 thru 24

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

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Washington, D. C.,

Thursday, October 21, 1971.

The above-entitled matter came on for argument at 1:55 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

JOHN LOUIS SMITH, JR., ESQ., 850 Washington Building, Washington, D. C. 20005, for the Petitioner.

JAMES C. GREGG, ESQ., 1625 K Street, N.W., Washington, D. C., 20006, for the Respondents.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments now in McClanahan against Morauer & Hartzell, 5097.

Mr. Smith, you may proceed.

ORAL ARGUMENT OF JOHN LOUIS SMITH, JR., ESQ.,

ON BEHALF OF THE PETITIONER

MR. SMITH: Mr. Chief Justice, and may it please the Court:

The chief issue in this case involves Section 933(g) of the Workmen's Compensation Act of the District of Columbia, which is the Longshoremen's and Harbor Workers' Compensation Act. It involves the use of the term "compromise" involving settlements in which the insurance carrier for the workmen's compensation company hasn't participated.

For a brief history of the case: Mr. McClanahan, the petitioner, was injured on the job in October of 1962. He seasonably filed an action in the Workmen's Compensation -- or the Bureau of Employees' Compensation in the District of Columbia, and also a third-party action was filed against a third-party tort-feasor, in the U. S. District Court in the District of Columbia.

The compensation claim was settled, award was made of $3780, in 1964. The third-party action came up for trial in February of 1967. At that time a settlement was made in the chambers of Judge Luther Youngdahl, in which an award of

$5,000 was made; $3,000 of which went to Mr. McClanahan's wife on consortium, and the balance of $2,000 went to the claimant, Mr. McClanahan.

A motion to modify the workmen's compensation award was then filed, which was now 1967, three years after the original claim had been filed, before the Deputy Commissioner. A hearing was held in December of '67 and April of '68 in which the Deputy Commissioner asked what issues were before him, and he was advised that it was just the issue of the compromise as to whether or not this was a judicial evaluation made by this consent judgment in the third-party case.

The Deputy Commissioner, having heard all this evidence, made a finding that it was a judicial evaluation, and made a temporary partial disability award of 25 percent, which he stated ended in November of 1965, and that the claimant's condition reverted back to his status as of that time.

Motions for summary judgment were filed in the U. S. District Court, in which both sides argued that the findings did not -- were not sustained by sufficient evidence.

Judge Hart ruled in favor of the respondent in this case, and stated that it was not a judicial evaluation, that it was a compromise, and that, therefore, the claimant could not return to the Compensation Board for further money.

This was appealed to the United States District Court,

and they affirmed, finding three distinctions between this case and Banks vs. Chicago Grain Trimmers Association, 1968 decision of the United States Supreme Court. They felt that it was distinguishable, first of all, on the grounds that it was not the result -- the compromise was not the result of a full hearing of all the evidence. Secondly, that the Chicago Grain Trimmers did involve a remittitur, and because of this the party did not have to accept it, that this was a judicial evaluation by a judge, presumably just finding that his valuation of the claim varied from that of the jury, and he had this right to offer the parties the remittitur if they wished to wish to set it.

And third, that they were free to reject this, and this "free to reject" resulted in prejudice to the employer and his carrier.

Now, it was urged, Your Honor, that this decision in the court below is not in accord with Banks vs. Chicago Grain Trimmers or the Bell vs. O'Hearne case, and this is the ground on which the petitioner's certiorari was filed.

I urge that this ruling is more in terms of the earlier decisions under Section 33(g) of the Longshoremen's and Harbor Workers' Act, and that the interpretation placed on it since then by the Banks case and Bell have shown a desire to encourage settlements, Your Honor. And that this decision will completely discourage them, because, as a practical matter,

it's not very easy to get an insurance carrier to agree to a settlement of an award for an amount less than they've already paid.

The two claims are not of equal footing, one being of the nature of a non-fault insurance, which is really a first kind of non-fault insurance; and many times in the better case, especially if you have very poor liability, to prove fault.

Q Doesn't this case turn on whether the enterprise that took place in the judge's chambers is the judicial determination or the compromise settlement? Isn't that the heart of the case?

MR. SMITH: Yes, Your Honor.

Q Is it part of your thesis that if a judge suggests a figure of settlement, assuming that he did so here, that that takes it out of the compromise area and makes it into a judicial evaluation or judicial determination?

MR. SMITH: Well, yes, in effect, Your Honor. What I am saying is that the Banks case does state in its language that it differed from these earlier cases in the fact that it was evaluated by a trial judge.

Now, what I am stating is that in this particular instance the trial judge had before him certain information, perhaps not the information that you'd have from a fully conducted trial, but he did have the pretrial statement, which is available in all those cases; he had a deposition that had

been given by the plaintiff. He had something to go on, on which to evaluate this claim.

Q Are you suggesting that he had enough to decide the case?

MR. SMITH: I think -- yes, Your Honor, I believe that he could make a fair --

Q Then why shouldn't we have district judges dispose of all cases without trial, just on the pretrial statement?

MR. SMITH: Well, I wouldn't go so far -- I wouldn't go so far as that, Your Honor. All I'm saying is that I think he had as much information that is necessary to make a fair evaluation of the claim, and that if somebody at a later date wishes to challenge it, I think that they should have an obligation to show that there was some prejudice to them from this settlement.

I don't think that we should presume conclusively the fact that the judge interceded in the settlement that it's not a fair evaluation of the claim.

Q Couldn't either party reject it?

MR. SMITH: Yes, Your Honor. They could reject it and go to trial.

Q Well, you don't normally reject judgments, do you? You're bound by them.

MR. SMITH: Well, yes, Your Honor. But of course these other two cases, as a matter of fact --

Q So the remittitur or the judge knew all the facts in the case, he sat through the whole trial in the case. Am I right?

MR. SMITH: Well, yes, Your Honor, but no one had to accept the remittitur figure. He could have gone to trial.

Q But he had all the facts, didn't he?

MR. SMITH: Yes, Your Honor. He had all the --

Q But this judge didn't. He was just helping out, wasn't he?

MR. SMITH: Well, I think, Mr. Justice Marshall, it was a little more than just helping out. I think that he --

Q Well, what more?

MR. SMITH: Well, he may not have had as many facts as you would have at a trial under ideal conditions. But I think there's many a trial that you would have just about as much information as he had.

Q Well, suppose the judge had held the discussion in the library of the court, would that be judicial? I'm trying to get what mileage you get out of "it was in his chambers". I don't get any mileage out of that at all.

Do you?

MR. SMITH: Well, I feel, Your Honor, that he did have enough information before him where he could make an evaluation of it and enter into a consent judgment, which was done in this instance. I think that in every case of arbitration of a

settlement we have some limitations as to the information that a judge has, and I certainly can't come forth and say that he had as much information as he would have had with a full-fledged trial.

But I'm not sure that a full-fledged trial is necessary in all these instances to evaluate a claim. And I think that a man who sat as a district court judge has little greater ability of measuring a value of a claim than 12 people, even when they do have all the evidence. He has at least as much, from the many years of experience that he's had.

Q Well, what you're saying adds up to the proposition that when a judge, a trial judge, gets into the process of settlement which, up to now, I thought was something to be encouraged, he is making a judicial determination rather than presiding over a compromise or a settlement conference.

Isn't this --

MR. SMITH: Yes, Your Honor, that's probably the heart of what I'm saying. But insurer in these other cases, Your Honor, have come up to what's known as a judicial determination and then they settle for a figure something less.

I mean, a jury came in with a $30,000 award or a remittitur of $19,000 award --

Q Well, I am talking about cases that go on every day in every courthouse in the country. To dispose of cases without trial by having the parties come in to the judge's

chambers and the lawyers have discussions back and forth, and they finally reach a settlement figure.

Now, that's a common practice, as you know, of course.

MR. SMITH: Yes, Mr. Chief Justice.

Q And it is certainly one to be encouraged, isn't it?

MR. SMITH: I certainly feel that way, Mr. Chief Justice, and that's why I feel very strongly about this point.

Q But your argument, though, is that that can be reopened, after both parties have agreed to it, and months or years pass, one party can come in and challenge the agreement, the settlement agreement, and bring on a new trial all over again.

MR. SMITH: No, Your Honor, Mr. Chief Justice, I didn't mean to relate anything of that nature. I feel that once it was entered into and -- as a matter of fact, in this case, the judge went on the bench and had the parties accept the figure and then signed a consent judgment for the amount, which --

Q Isn't that done in the settlement of every case?

MR. SMITH: Well, not necessarily, Your Honor, sometimes -- a precipe, I suppose it would be; certainly close to the same thing as a consent judgment.

Q Well, suppose, in this instance, two lawyers

had sat down and written out a compromise agreement, and they exchanged releases, or whatever, without taking consent judgment. You wouldn't be here, would you?

MR. SMITH: If the two lawyers had done it alone, Mr. Justice Brennan?

Q Yes.

MR. SMITH: No, I think the --

Q In other words, it would have been a compromise agreement.

MR. SMITH: Yes, Mr. Justice --

Q Would you say this was not a compromise agreement but, rather, it was something that Judge Youngdahl suggested as an amount by which the case should be disposed of, and it took the form, then, of a consent judgment. Is that it?

MR. SMITH: That is correct.

Q And you say a consent judgment is not a compromise agreement for purposes of this statute.

MR. SMITH: That is correct, Mr. Justice Brennan.

Q Well, how do you -- I guess we've all been parties to these things, but sometimes it takes the form of a defense judgment and some kind of exchange of releases. Really, what difference is there between the two? Actually?

MR. SMITH: Well, I don't think a consent judgment could be reopened. I would --

Q No, no, I'm not suggesting that. No. The issue

here is whether there was a compromise for the purposes of the statute, isn't that it?

And it just didn't take the form of an agreement between counsel, of a sort that we're familiar with, where they exchange leases and that sort of thing.

MR. SMITH: That is correct. It was a settlement, but I think that most all these cases, Mr. Justice Brennan, are really settlements. All the New York cases cited by my opposing counsel involve settlements.

Q A compromise in the real sense.

MR. SMITH: Yes, but --

Q Here, is this the way this thing is done in the District, that you enter consent judgments in these things instead of settlement agreements?

MR. SMITH: Ordinarily it would be an express agreement, Mr. Justice Brennan, signed by both parties, saying that the settlement is dismissed, and usually they don't even put the figure down.

Q Yes. Yes.

MR. SMITH: In this case we did have a person that had a history of mental illness, and, as a matter of fact, this was one of the reasons that Judge Youngdahl wanted a --

Q Well, I --

MR. SMITH: -- thought a judgment should be entered.

Q It's quite a long while since I used to do this

sort of thing, both as a trial judge and as a practicing lawyer, but where we had infant cases, and that sort of thing, we used this procedure. It was a necessity because of the nature of the plaintiff in the case, and the judgment was more protection.

Now, is that what this situation was?

MR. SMITH: Basically, yes.

Q Well, I must say I never regarded those infant settlements as any less compromises or settlements because we had to take this form to enter them.

MR. SMITH: Well, I think this word "compromise" has been rather --"settlements" has been rather abused in the interpretations under this Act, both in New York and here, because what I never could understand on these other decisions, they'd reach a judicial valuation by a judgment and then they would settle it for a lesser figure.

Well, there was no way the insurance carrier was going to recoup what he had lost. And one of the cases cited by the other side, in New York, involved a settlement of $45,000 and the other party wouldn't -- the insurance carrier wouldn't sign a consent -- no, the other side said they were going to appeal unless they took $600 off the judgment. On a $45,000 judgment, dropping it $600 seems very strange, and yet the insurance carrier wouldn't consent, although it was found to be a judicial valuation; they felt that they hadn't

been prejudiced by accepting the lesser amount.

Q As Justice Marshall suggested, that's the case where all the facts are in, the case has been completely tried.

MR. SMITH: Well, I agree with that, Your Honor, but what I'm arguing is I don't -- for the purpose of encouraging settlement, I don't think that it's necessary in every instance to know every fact of a case. I think that it -- what I'm arguing here, of course, is to encourage the idea of settlements.

Now, the parties here were willing to settle, the third party, the insurance carrier of the workmen's compensation is the only one who objected to the settlement in this instance.

Q Would you concede that if this case had been tried, all the evidence had come in, there was always the possibility that the claimant may get nothing at all?

MR. SMITH: I felt very strongly that way, Your Honor. There was -- I did not start this suit, I was the one who settled it before Judge Youngdahl; but, as a matter of fact, there were seven subcontractors on the site and the original suit only sued one of these people. And in conferences I had with other counsel, they told me that they felt -- in fact, they had in their pretrial statement, that they were going to produce evidence to show that the party that was sued wasn't even involved in the accident. And this is part of the reason that encouraged me to want to settle the claim.

I felt very strongly that this man was going to get nothing.

Q Who took the initiative for the meetings in Judge Youngdahl's chambers?

MR. SMITH: Judge Youngdahl did, Mr. Justice Stewart. He called us into the chambers and he has quite a reputation in the District of Columbia for encouraging settlements.

[Laughter.]

And he was quite forceful, I will say.

Q He did take the initiative. And so --

MR. SMITH: Very definitely.

Q -- at least there is that significant distinction between the circumstances here and a settlement worked out by counsel with no participation by a judge at all, because there the initiative has to come from one of the lawyers or the other, and here the initiative came from the judge. Is that right?

MR. SMITH: Yes.

Q And he had before him, he had the pleadings and he had a deposition of the plaintiff, and he had a schedule of the special damages, is that right?

MR. SMITH: Yes. That was in the pretrial statement, gives the theory of defense, gives the facts that we all agree on as what -- and that, of course, is part of the court record

in CA-1895-63, which is in the U. S. District Court down here.

Q You could have had a jury trial in that case, I think you said?

MR. SMITH: Yes, Mr. Justice Brennan.

Q Was it Judge Youngdahl also who suggested this form of reflecting the settlement rather than the --

MR. SMITH: The consent judgment?

Q Yes.

MR. SMITH: I can't rightfully recall who suggested that. The three of us were in chambers together, and --

Q Well, may I ask this: was there any suggestion that that form might avoid the effect of the compromise provision in the --

MR. SMITH: No, Mr. Justice Brennan. It definitely was on the subject of this man's mental illness.

Q Entirely?

MR. SMITH: Yes, yes, sir.

Q Had you demanded a jury trial?

MR. SMITH: There was a jury trial demand made by the counsel who filed it, and I was prepared to go forward with a jury that morning.

Q So that you knew what the jury might settle -- had the power to award damages rather than the judge?

MR. SMITH: Oh, very definitely, Mr. Justice White. But I also knew there was a very strong possibility they were

going to award him, you know, nothing, if you're on a fault basis of liability showing negligence.

Q So you settled?

MR. SMITH: [Laughing] Yes, I certainly did.

Q But you didn't compromise?

MR. SMITH: I certainly did not.

[Laughter.]

Q Since we've gotten off into some practical things about who initiated the discussion, is it not, as a practical matter, that it would often happen that one lawyer wanted to have a settlement discussion but he doesn't want to be the one to initiate it, so he asks the judge if he won't do it. The judge then sets it in motion.

MR. SMITH: I have never personally had that experience, but in this particular case, even though --

Q Well, Judge Youngdahl didn't bother with that procedure, did he?

MR. SMITH: No, Mr. Justice Burger, as a matter of fact, opposing counsel was on the floor above me in my building, and I never even met him until the morning that we were down there. And we did not discuss it. I was in the case just about four weeks prior to that.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Gregg.

ORAL ARGUMENT OF JAMES C. GREGG, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. GREGG: Mr. Chief Justice, and may it please the Court:

The question, I think, is adequately phrased. With respect to what transpired in Judge Youngdahl's chambers, the only evidence on that point that is in the record is contained in the testimony of Mr. Mahoney, who was the lawyer representing the defendant in the third-party action. His testimony starts on page 31 of the transcript of proceedings, and, as he said, on page 32, with respect to the conference before Judge Youngdahl: "As I recall, it was done in his usual manner. That he discussed the settlement with both of us first and then, I believe, I left the room, the settlement was discussed with you, meaning counsel, and then I was called back in and you left the room and our figures were discussed then. As a result of the conference, an agreement was reached at $5,000."

This is the testimony of Mr. Mahoney, a witness offered by counsel for the petitioner during the workmen's compensation proceeding.

Mr. Mahoney was further examined with respect to the question as to why it was that a consent judgment was entered in this case as distinguished from the usual procedure of just filing a precipe entering the case as settled and dismissed.

I was questioning him about that, and I said: "You've had several cases come up for trial before Judge Youngdahl, have you not?"

He said, "Yes, sir."

"And there were of course occasions when a consent judgment was entered into as a result of a conference in chambers'

"Answer: That's correct.

"Question: Primarily where the plaintiff is an infant?"

He nods his head yes.

"Question: Otherwise, generally speaking, a precipe is merely filed, entering the case as settled and dismissed with prejudice?

"That's true.

"Question: Was there any discussion between the plaintiff's lawyer and the judge that this consent judgment was necessary in order to eliminate the workmen's compensation carrier's interest in the case or to provide a means of avoiding the settlement provisions under workmen's compensation Act?"

According to Mr. Mahoney, the answer was no.

"Question: Then why was it that with an adult plaintiff a consent judgment was entered into in this case when there had been no real trial on the merits?

"Answer: For the protection of all concerned, it was

felt that this consent judgment should be entered into.

"Question: For the protection meaning the protection against the ramifications of the Workmen's Compensation Act?

"Answer: No. All concerned, which would be the plaintiff and the attorneys involved."

Mr. McClanahan had had several lawyers and had been under psychiatric care.

"Question: You are implying then that perhaps Mr. McClanahan would not have abided by the settlement without a consent judgment?

"No, sir; I don't imply that.

"Question: But there was no trial on the merits?

"Answer: No trial on the merits.

"Question: No testimony was offered?

"That's correct.

"No jury was empaneled?

"That's correct.

"No verdict was rendered."

So the question here is whether a discussion of this nature in the conference of a judge prior to the start of a trial constitutes, as the Court has indicated, a judicial evaluation of the case as distinguished from a settlement, a judgment that merely affirms and ratifies a settlement that had previously been entered into between the parties.

This is not a particularly novel question. In Bell

vs. O'Hearne they cite Marlin vs. Cardillo, and I am quoting: "The Court of Appeals for the District of Columbia Circuit held that a settlement between a claimant and a third party entered into without the consent and agreement of the employer or the insurance carrier followed by the entry of a judgment in the agreed amount, barred the claimant from recovering any deficiency benefits under the Act.

"The Marlin case is likewise distinguishable from the instance case, Bell vs. O'Hearne, for there the settlement of the plaintiff's claim was reached before the court had established the amount of the third party's liability and reduced it to judgment."

In Bell vs. O'Hearne, the Court in the Fourth Circuit said, page 780 of 284 Fed 2d: "As we construe the statute," meaning the specific provision of the Longshoremen's Act that we're dealing with here, "a recovery of deficiency compensation is barred only where the injured employee or his beneficiaries in case of death have compromised the third party claim or where a judgment in the third party action has been entered as a result of a settlement or a compromise."

The uncontradicted evidence in this case before the Commission and upon which both the trial court and the United States Court of Appeals for the District of Columbia acted, was that this was a settlement that was entered into and that the judgment in this case was entered into merely and solely

for the purpose of confirming the settlement that the parties had previously reached.

Q Well, you do have this statement that the $5,000 figure was Judge Youngdahl's determination. I'm looking at page 32 of the Appendix. The witness says, "I don't know whether I was asked what I evaluated the case at, but I know at some time during the discussion Judge Youngdahl felt that the case was worth $5,000." And that was the amount of the consent judgment?

MR. GREGG: Yes, sir.

Q So there was that much indication.

MR. GREGG: Yes, sir. In other words, it's not as clearly --

Q So there was a determination of a valuation, at least, by a man who is a United States district judge?

MR. GREGG: Yes, sir. In other words, in this case it's not as clearly one way or the other, as some cases are. But it would seem to me that when a judge is evaluating a case for settlement purposes, he is considering a lot of things that he's not considering as a trier of the fact. He's considering the odds of recovery, jury verdict ranges, and matters of that nature.

It is purely and simply a compromise that's the only real way that we can dispose of the case without having additional proceedings follow, motions, appeals, and so forth.

Now the Banks vs. Chicago Grain Trimmers Association case, which is the most recent opinion of this Court dealing with this subject, involved, as Justice Marshall indicated, a case that had gone to trial, the evidence had been offered and introduced, and it involved the question as to whether an order of remittitur constituted a judicial determination. It hardly seems worth mentioning that an order of remittitur would be a judicial determination made by a trier based upon facts, testimony, and evidence that was before it.

We submit to the Your Honors that the case that we have here is distinguishable, and we rely primarily upon the reasoning employed by the United States Court of Appeals for the District of Columbia.

Thank you.

MR. CHIEF JUSTICE BURGER: Do you have anything more, counsel?

REBUTTAL ARGUMENT OF JOHN LOUIS SMITH, JR.,

ON BEHALF OF THE PETITIONER

MR. SMITH: Your Honor, there's one thing that I wanted to mention when I was standing before and I forgot was that yesterday when I was researching these New York cases, cited by Mr. Gregg, I checked the New York statute, and I noticed that they've changed their statute, and I felt the Court should be aware of this, because, really, it's in McKinney's Consolidated Laws of New York, 64 Workmen's Compensation Law,

Section 1549, the Pocket Supplement. And they had the same or similar language in their compromise statement, and then they added onto it: However, written approval of the carrier need not be obtained if the employee or his dependents obtain a compromise order from a justice of the court, in which the third party action was pending. The papers upon an application to compromise and settle such a claim shall consist of the petition, the affidavit of the attorney, and the affidavit of a physician or more -- more than one physician if necessary.

And it spells out basically what should be in this information, and really did not provide an awful lot more information that was available in this case to Judge Youngdahl.

Then copies of this, or when a judge arrives at a determination, copies of this are served on the carrier and if the carrier feels as if that's not enough, then they can come in and challenge it, because they have to produce evidence that it's not a fair settlement.

And I believe that this was done in New York by the Legislature there to encourage settlements and discourage this idea of a party who's really not a party to frustrating settlements.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Smith. Thank you, Mr. Gregg. The case is submitted.

[Whereupon, at 2:25 p.m., the case was submitted.