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James H. Powers v. Industrial Commission of Utah & Salt Lake City Corporation : Appellant's Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

JAMES H. POWERS,

Plaintiff & ~~Appellant,~~

vs.

INDUSTRIAL COMMISSION OF UTAH & SALT LAKE CITY CORPORATION,

Defendants & Respondents.

Case No. 10587

APPELLANT'S BRIEF

Appeal from Order of The Industrial Commission of the State of Utah

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CASES CITED

STATUTES CITED

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PRELIMINARY STATEMENT

The parties will be referred to as below.

STATEMENT OF THE KIND OF CASE

This is a claim before the Industrial Commission of the State of Utah for disability by reason of a heart condition claimed to have been aggravated while performing the duties of a fireman for Salt Lake City Corporation.

DISPOSITION IN THE INDUSTRIAL COMMISSION

The matter was heard by the Industrial Commission and referred to a Medical Panel. The Medical Panel filed its report with the Industrial Commission, finding that the incident of September 25, 1963, did not aggravate a pre-existing heart ailment. The Industrial Commissoin adopted the report and denied plaintiff's claim.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks reversal of the order of the Industrial Commission.

STATEMENT OF FACTS

Plaintiff filed a claim with the Industrial Commission on July 23, 1964, for a disability incurred while responding to a fire call at No. 4 Fire Station on September 25, 1963. (R. 1). The claim filed by plaintiff stated that the incident happened on April 7, 1964. However, this was amended to September 25, 1963. (R. 15). Plaintiff alleged that the *disability started* on April 7, 1964.

Plaintiff testified that he is 33 years of age; that he served in the Army from 1954 to 1958; having received physical examinations yearly and a thorough physical examination when he was discharged.

He testified that he was employed by the Salt Lake City Fire Department on August 16, 1959, and worked continuously from that time until April 7, 1964. (R. 33-36). Prior to September 25, 1963, he had never experienced severe chest pains or complaints of that nature. (R. 35). He had always been active in sports. (R. 35). He testified that during the time he worked for the Fire Department he was employed as a combat fireman; that at the time of the incident in question, he was on the swing shift which involved filling in at various fire stations for men off duty or sick. He would work a 24-hour shift and then be off 24 hours. He would work three shifts and then have three days off. The usual shift would start at 9:00 A.M. The firemen would do their housework, go on inspection, have a drill period in the afternoon, and respond to any fire calls which they received. (R-37-38). Usually when on duty, plaintiff would go to bed at approximately 10:30 P.M. (R. 38).

On the occasion in question, he had performed a routine day and had gone to sleep at approximately 10:30 P.M. at Fire Station No. 4. They received a call at 1:39 A.M. to 1135 East on First South. Plaintiff testified that when the call came in, there was anxiety and that when he got out of bed he felt weak. He quickly dressed and ran to the tailboard on the fire truck. (R. 38-39). He testified that he immediately got out of bed and that they had to clear the fire station in 10 or 20 seconds; that he rushed to the back of the truck; that he felt nervous and excited. As the truck

pulled out of the fire station, plaintiff had severe pains just above his diaphragm, and extending upward into his shoulder. He described the pain as a burning sensation. About two blocks farther down I Street, when the truck was beginning to turn onto South Temple, plaintiff put his arm through a leather strap and held onto the bar, at which time he slumped and lost consciousness until the truck reached its destination. One of his fellow employees informed the captain at that time that plaintiff was ill. At the scene of the fire he sat down on the tailboard and described the pain as so severe that it made him want to retch. He was taken back to the fire station in the car of Captain Donaldson and spent the balance of the night at the station. He did not desire to return home that night in order to avoid causing worry to his wife. (R. 40-41).

Plaintiff described the alarm procedure and how the men are awakened; that overhead lights will come on about a second before a gong starts ringing. This is described as a loud gong. When he responds to a fire in this fashion at night he definitely feels excitement and tension.

Plaintiff continued to perform his duties as a fireman following the incident of September 25, 1963, until March 16, 1964, when he went to see Dr. Null. Plaintiff testified that following September 25, 1963, he continued to have the chest pains that he had noticed in the early morning of September 25, although the pains were not as severe as they were on that night.

(R. 42). He testified that he had at least one of these chest pains a day, described as a pulling and burning sensation, atlhough not as severe as on September 25.

While under Dr. Null's care, on April 7, 1964, plaintiff passed out and was taken to the St. Mark's Hospital. He remained there until April 12, 1964. He has been completely disabled since April 7, 1964. (R. 44).

Since April 7, 1964, plaintiff has continued to have the same pains, although more frequently than before, testifying that on some days he will have three of these attacks.

Plaintiff testified that when he first went to work for the Fire Department, he was given a physical examination, and thereafter received yearly physical examinations from the Fire Department, the last one being in June or July of 1963. (R. 46-47).

Plaintiff's wife testified that prior to September 25, 1963, her husband never made any complaints of chest pain; that he had no unusual complaints except for hemorrhoids; that he was an active man. She testified that after September 25, 1963, he made complaints about chest pain, and there were occasions when she noticed plaintiff hunching over, apparently in pain. She noticed these complaints almost every day and increasing in frequency with the passage of time. (R. 68-70).

Dr. Clyde F. Null, a local physician, specializing

in internal medicine with a subspecialty in cardiovascular disease, testified that plaintiff came to him for treatment on March 16, 1964, at which time he gave him an examination and made a detailed cardiovascular evaluation. Dr. Null diagnosed plaintiff as being afflicted with an atherosclerotic heart disease, commonly called hardening of the arteries, with an associated severe anginal syndrome, plus an electrocardiographic abnormality designated as Wolf-Parkinson-White syndrome. (R. 18). Following the initial visit, Dr. Null also established that plaintiff had a high blood fat level. (R. 19). Dr. Null stated that plaintiff complained of pain which began in the chest, primarily behind the breastbone, radiating into the neck and into the left shoulder and ulnar aspect of the left arm, which pain is fairly characteristic of insufficient blood supply to the heart muscle itself. Dr. Null testified that Mr. Powers, after the first examination, continued to have increasing amounts of distress in the form of pain and limitation, culminating in the episode of April 7, 1964, when he collapsed. Dr. Null testified that Mr. Powers is unable to perform ordinary work; he cannot climb stairs; and he cannot perform ordinary activity without the development of severe pain. (R. 21). The Wolf-Parkinson-White syndrome is unrelated to any type of chest pain, this being a congenital condition which affects the rhythm of the heart beat. This is usually a nondisabling condition and is not related to the atherosclerotic heart disease. (R. 20-21). Dr. Null testified that acute changes in the heart from this

particular disease are almost always brought about by acute strenuous exercise, acute emotional upsets, and rarely, by overeating. Chronic stress and chronic anxiety tend to greatly accentuate the symptoms in this particular disorder and do indeed aggravate the condition and make it worse. (R. 24).

Dr. Null was given a hypothetical question—assuming the facts of the incident of September 25, 1963, the lack of complaints prior thereto, and the complaints described by plaintiff thereafter, together with the examination conducted by Dr. Null and the subsequent course of Mr. Powers' condition. Based on this hypothetical question, Dr. Null was asked the following question: (R. 26).

> "Now I'll ask you whether you have an opinion as to whether or not the incident that I have described on September 25, 1963, aggravated or precipitated the condition which you later found to exist in regard to Mr. Powers' heart and arteries?"

The doctor answered as follows:

> "A. Well, certainly—as we have indicated previously—acute stress, strain, emotional aggravation and sudden abrupt exercise, maximum effort, these could easily have precipitated an occlusion of a coronary artery, or could easily have greatly aggravated any underlying or pre-existing coronary artery difficulty, or atherosclerosis. The fact that the man developed pain at that time is very strong evidence that he very likely did indeed aggravate the underlying heart

disease, which must have been present prior to the development of his pain. Because of the way the disease comes about. I would believe that the situation that you described did indeed aggravate or precipitate the pain factor that we now have, yes."

Following the hearing of January 18, 1965, in which the evidence of plaintiff, plaintiff's wife, and Dr. Null, among others, was taken, the Industrial Commission referred the matter to a Medical Panel, with Dr. L. E. Viko as the chairman. (R. 74). The Commission directed the Panel in part as follows:

"The Panel has no jurisdiction to make a finding on the occurrence of an accident. Therefore, in the Panel report just preceding the findings and conclusions, the following language should be used; assuming but not deciding that applicant had an accident as alleged the Panel finds, etc."

The Medical Panel rendered its first report on March 18, 1965. (R. 86). The Panel concludes with the following: (R. 87).

"In view of the fact that the Panel finds no evidence of a myocardial infarction from the episode of September, 1963, and even granting that an attack of angina pectoris may have been precipitated by the occupational events of that evening, the Panel finds it hard to accept the idea that the occupational events of that evening and the attack of that evening were sufficient to aggravate pre-existing coronary-artery disease to the point of progressive and disabling

heart disease. The subsequent events after September, 1963, may reasonably be explained as part of the natural course of coronary artery disease."

In arriving at this conclusion, the Panel states in part: (R. 87).

"It is recognized, of course, that emotional or physical strain may precipitate angina pectoris in a man with pre-existing arteriosclerotic heart disease. The emotional and physical strain of response to the fire might have been such a precipitating factor for an anginal attack, but also other physical and emotional factors in his life, such as the worry about the illness and possible malignant disease in his wife, could equally well be such precipitating factors."

It is interesting to note that the Panel obtained its speculation concerning possible worry on the part of Mr. Powers concerning illness and possible malignant disease in his wife from his testimony at R. 42, where he testified concerning pains which he experienced following the incident of September 25, 1963.

"A. Yes, I did. But I noticed that I started having these pains around my heart more often, and the pain wasn't near so severe as that night, and I couldn't understand why it was. I thought I may have pulled a muscle or something across my chest, because I played handball and everything all the time. And my wife, at that particular time she was having some female trouble, and the doctor didn't know whether it was nonmalignant or malignant or what not, and I was

worrying about this. She kept after me to go in to see a doctor and get a physical checkup, but I told her that I just had one in June I think, or July, on the Fire Department, and I really didn't think there was too much to worry about. But I was worried over her, and having the both of us in the hospital at the same time, and not knowing what was going to happen, so I just put off my examination until she got out of the hospital with her operation."

Plaintiff filed objections to the Panel report, (R. 91-93), and a further hearing was held by the Industrial Commission. The Medical Panel, in its report, admitted that:

"In view of subsequent events, it is reasonable to assume that this eposide of September, 1963, was an anginal attack."

Dr. Viko admitted at R. 110 of the hearing of August 20, 1965:

"A. If you assume that he had that night an extreme degree of excitement, and if you assume that he had no other worry at that time, then it's entirely reasonable to assume that that situation precipitated an attack of angina. And again assuming that he had one, which we haven't proof of except by a description of the subsequent events."

Also, he answered the following question:

"Q. Now in your report did you assume that Mr. Powers was telling the truth when he stated that he had no attacks or symptoms before the night of the fire call on September 25, 1963, and

that he thereafter had frequent attacks, especially whenever he tried to do any physical exercise, up until he went to see Dr. Null in March of 1964?

"A. Regarding the first part of the question —that he had had no trouble before that night —since the Panel had nothing to contradict that, we assumed that as a fact. And we did accept the statement that he continued to have pain thereafter."

In addition, at this hearing, both Mr. and Mrs. Powers testified concerning the so-called worry about the illness and possible malignant disease in his wife. Mrs. Powers testified that her doctor had diagnosed her condition as a small tumor in her uterus and that "you don't have to worry about it being malignant." That she planned at some time in the future to have an operation to have it removed. (R. 116).

Mr. Powers testified as follows at R. 121:

"Q. My question is were you worried about that at the time of this incident at all?

"A. I was aware of it, but I can't say that I worried about it. Because at that particular time I was worrying about nothing but going to the fire.

"Q. Did you even have your wife in mind at the time you were running to the fire?

"A. No, I certainly didn't."

The Panel submitted another report under date of October 5, 1965. (R. 125). The Panel stated in part as follows:

"Under date of March 18, 1965, this Panel submitted to you its opinion regarding the above-named case. This opinion was to the effect that in view of the fact that Mr. Powers was not examined between the episode of September, 1963, and March, 1964, the Panel had no certain means of knowing his heart condition after this alleged accident. By description, however, and subsequent events, it appears that Mr. Powers had that night at least an anginal attack. The Panel cannot exclude the possibility that he had a myocardial infarction, but the fact that he did not consult a doctor for six months makes this seem highly improbable to the Panel * * * The Panel found it hard to accept the idea that the occupational events of that evening and the attack of that evening was sufficient to aggravate pre-existing coronary heart disease to the point of progressing and disabling heart disease. The Panel felt that it was more probable in view of subsequent events that the progression was a natural part of the course of coronary artery disease. The Panel felt that the records seemed to show that the events of that evening entailed no more emotional tension than that in many other fires that had been the usual part of his occupational duties in the past four years."

The Panel adopted the original conclusion, and plaintiff thereafter filed objections to the second Panel report. (R. 129-130). In lieu of holding another hearing, plaintiff submitted the matter to the Commission with a written argument. (R. 132-134). The Commission rendered its order on February 16, 1966, in which it denied the claim of plaintiff. Part of the final paragraph of the order states as follows: (R. 138).

"The heart ailment was not reported for six months after the alleged incident. There was no unusual exertion or unusual emotional stress on the date the alleged accident occurred. In our opinion, the incident of April 7, 1964, did not aggravate a pre-existing heart ailment; if any there was, and it surely would not result in damage to a normal heart.

"It is therefore ordered that the claim be denied."

Plaintiff filed a petition for a rehearing (R. 139), which was denied by the Industrial Commission on March 3, 1966. (R. 140). Plaintiff thereafter filed his petition for Writ of Certiorari to appeal the order of the Industrial Commission denying his claim.

POINT I

THE DENIAL OF PLAINTIFF'S CLAIM WAS CONTRARY TO THE UNDISPUTED EVIDENCE.

The Industrial Commission states in the final paragraph of its order:

"The heart ailment was not reported for six months after the alleged incident. There was no unusual exertion or unusual emotional stress on the date the alleged accident occurred. In our opinion, the incident of April 7, 1964, did not aggravate a pre-existing heart ailment; if any there was, and it surely would not result in damage to a normal heart."

The foregoing language is as much opposed to the undisputed evidence in the record as the statement that the incident occurred on April 7, 1964. The record shows that the incident happened on September 25, 1963, and plaintiff specifically amended his claim to so show. (R. 15). Not only is the foregoing statement contrary to the evidence, but it is also contrary to the law, when it relies on the statement that the incident would not result in damage to a normal heart. It is obvious and unnecessary to cite authorities to the effect that industrial accident claimants need not prove that the accident in question would have injured normal parts of the body. The only thing that the claimant need show was that he was in fact injured on the job and was caused a disability. The foregoing statement of the Industrial Commission flies directly in the face of the specific language of Section 35-1-60, Utah Code Annotated, 1953, speaking of a disability

> " * * * on account of any accident or injury or death, in any way contracted, sustained, *aggravated* or incurred by such employee in the course of or because of or arising out of his employment," (Italics ours).

The foregoing language by the Industrial Commission is typical of the manner in which both the Medical Panel and the Industrial Commission have disregarded and ignored the undisputed facts of this case. In addition,the quoted portion of the order by the Industrial Commission is also fallacious in relying on the so-called unusual exertion test which has been

abolished in the State of Utah. The case of *Purity Biscuit Company, et al., v. Industrial Commission, et al.*, (1949), 115 Utah 1, 201 P.2d 961, did away with the unusual strain test in Industrial Commission cases in Utah. Since this case, the law in Utah has been concerned with the simple proposition as to whether or not the exertion, whether it be unusual exertion, or ordinary exertion caused the injury in question. However, the Utah Industrial Commission has completely ignored this case and the cases following it, when it states in its order that it is relying on the fact that there was no unusual exertion or unusual emotional stress on the date of the alleged accident. The Medical Panel fell into the same error which the Industrial Commission adopted when it stated in its letter of October 5, 1965, at **R. 125:**

> "The Panel felt that the records seemed to show that the events of that evening entailed no more emotional tension than that in many other fires that had been the usual part of his occupational duties in the past four years."

The evidence is undisputed that at the time of the incident in question, James Powers, being subjected to a fire call in the early hours of the morning was subjected to exertion and emotional stress, and that he suffered a severe pain in his chest and shoulders. It is undisputed that Powers had not experienced such pain prior to September 25, 1963. It is undisputed that thereafter, Powers periodically experienced recurrences of these chest pains although not as severe,

until the time he sought the medical help of Dr. N. The Chairman of the Medical Panel, Dr. Viko, R. 100, even agreed as follows:

> "If you assume that he had that night an extreme degree of excitement, and if you assume that he had no other worry at that time, then it's entirely reasonable to assume that that situation precipitated an attack of angina. And again assuming that he had one, which we haven't proof of except by a description of the subsequent events."

Dr. Viko agreed when questioned as to the history relied on that the Panel assumed that Powers was telling the truth when he stated that he had no attacks or symptoms before the night of the fire call on September 25, 1963, and that he thereafter had frequent attacks. In answer to this question at R. 111 Dr. Viko stated:

> "Regarding the first part of the question—that he had had no trouble before that night—since the Panel had nothing to contradict that, we assumed that as a fact. And we did accept the statement that he continued to have pain thereafter."

It is obvious that if the Panel accepted these undisputed facts as testified to by Mr. Powers and his wife, that the following statement by the Panel in its report of October 5, 1965, R. 125, is unsupported by evidence:

"The Panel felt that it was more probable in view of subsequent events that the progression was a natural part of the course of coronary artery disease."

If the panel felt that the progression of the coronary artery disease was a natural progression, then it had to disregard the undisputed evidence of the severe attack which Mr. Powers experienced on the night of September 25, 1963, the fact that he had had no prior attacks, and the fact that he had subsequent attacks with increasing frequency. It is submitted that in view of the confusion and the unsupported speculations of the Medical Panel in this case that the clear and convincing evidence of Dr. Null stands unchallenged and unaffected.

In its original report of March 19, 1965, the Medical Panel even went so far as to speculate that worry about the illness and possible malignant disease in his wife could equally well have been a precipitating factor along with the emotional and physical strain of the fire call in question. The Panel based this speculation on some evidence by Mr. Powers that after the incident in question one reason why he did not seek medical aid was that his wife was seeing a doctor about some female trouble, and that he was worried about her. However, in the subsequent hearing, Mr. Powers testified that he was not worried at the time of the incident in question about his wife's condition; and his wife testified that the doctor had told her that there was little to worry about concerning the possible malig-

nancy of the tumor. This illustrates the ends to which the Medical Panel has gone to defeat Mr. Powers' claim.

Dr. Null in his testimony showed no hesitancy or uncertainty concerning the obvious conclusion of the effect of the fire call on Mr. Powers' underlying condition, when he stated at page R. 26:

> "Well, certainly—as we have indicated previously, acute stress, strain, emotional aggravation and sudden abrupt exercise, maximum effort, these could easily have precipitated an occlusion of a coronary artery, or could easily have greatly aggravated any underlying or pre-existing coronary artery difficulty or atherosclerosis. The fact that the man developed pain at that time is very strong evidence that he very likely did indeed aggravate the underlying heart disease, which must have been present prior to the development of his pain. Because of the way the disease comes about. I would believe that the situation you described did indeed aggravate or precipitate the pain factor that we now have, yes."

Another factor which seemed to affect the conclusion of the Medical Panel was the fact that Powers did not seek medical aid for some six months after the incident; however, there is not one iota of evidence disputing the fact that Powers had complaints dating from the incident and increasing in frequency until he sought medical assistance. As a matter of fact, Dr. Viko specifically agrees that the Medical Panel accepted this as fact. How can the Medical Panel accept this

fact on one hand and then at the same time state that because he did not seek medical assistance for some six months after the incident, they do not believe that the heart condition was aggravated by the incident in question? The fallacy of the conclusion of the Medical Panel is obvious.

The Medical Panel and the Industrial Commission not only have disregarded the undisputed evidence, but they have completely ignored the fundamental philosophy and purpose of the Workmen's Compensation Statutes in Utah. The recent case of ***Baker v. The Industrial Commission of Utah, et al.,*** (1965) 17 Utah 2d 141, 405 P.2d 613, has reaffirmed the liberal philosophy of the Workmen's Compensation Statutes, where the court stated:

> "In accordance with the purpose of the Industrial Compensation Act to alleviate hardships upon workers and their families, the facts and inferences therefrom constituting a worker's right to recover are liberally construed."

The case at bar clearly demonstrates the injustice of giving lip service to such pronouncements by the Supreme Court and then ignoring them. The claimant in the ***Baker*** case was a clerk-typist who felt a sudden sharp pain in her left hip and leg as she stooped over or raised up. She did not report this incident until the Tuesday after the Friday of the incident. The court in the ***Baker*** case held that the Commission could not ignore undisputed evidence and reversed the denial of compensation. Certainly had the Medical Panel in the

case at bar reviewed the *Baker* case, it would have stated in loud language that the stooping over and raising up was not an unusual exertion but something that Aleen Baker did every working day of her life. The Industrial Commission has ignored the clear recent pronouncement of the *Baker* case.

The case of *Jones, et al., v. California Packing Corporation,* (1952) 121 Utah 612, 244 P.2d 640, is a case similar in principle to the case at bar. It involved death from coronary occlusion occurring after exertion on the job by the husband of claimant. After stating the well-settled principle which has been ignored by the Industrial Commission in the case at bar that:

> "It is settled beyond question that a pre-existing disease or other disturbed condition or defect of the body when aggravated or lighted up by an industrial accident is compensable under the Act, * * * "

the court proceeds in that case to examine the medical evidence in the record. The plaintiffs called two doctors who each testified positively that it was their opinion that this occlusion and death resulted from the exertion and fatigue caused by the work under the circumstances described just prior to Jones's death. The opposing evidence was given by a doctor who was given the hypothetical question and answered as follows:

> "I can't answer the question yes or no because I don't think the medical literature from my own opinion or anybody else's opinion can say dog-

matically this is a definite cause, because the medical literature is full of statements that there is some relationship between effort and coronary thrombosis; and the literature is full of statements to the effect that apparently effort has no relationship to coronary thrombosis. * * * *My own opinion is that it possibly is related in this particular case,* but I don't think you can dogmatically say that it is a cause and effect or it has no effect."

The evidence was positive on one side and inconclusive on the other, with the result that the Industrial Commission was bound, so the Supreme Court held, to accept the evidence of the plaintiffs.

Likewise, in the case at bar, the evidence produced on behalf of the plaintiff is clear, direct, and positive. The evidence adduced by the Medical Panel, which was accepted by the Industrial Commission, is inconclusive, speculative, and in derogation of the very facts which Dr. Viko stated that the Panel accepted as being true. Certainly a conclusion that is not based on evidence and logic is just as inconclusive as the opposing testimony in the *Jones* case, and therefore we cite the *Jones* case as direct and compelling authority in favor of reversing the Industrial Commission in the case at bar. Not only is the report of the Medical Panel not in accordance with the evidence and illogical, but it is also filled with misconceptions of the law in Utah, such as the necessity to show an unusual strain and the fact that aggravations of prior existing injuries are not compensable. The Industrial Commission per-

petuated these errors and adopted these misconceptions of the law. Such an order, in justice, cannot stand.

CONCLUSION

We respectfully submit that the order of the Industrial Commission denying plaintiff's claim should be reversed and plaintiff's claim granted.

Respectfully submitted,

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