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James H. Powers v. Industrial Commission of Utah & Salt Lake City Corporation : Defendant and Respondent Salt Lake City's Petition For Rehearing and Supporting 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

DEFENDANT AND RESPONDENT SALT LAKE CITY'S PETITION FOR REHEARING AND SUPPORTING BRIEF

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

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DEFENDANT AND RESPONDENT SALT LAKE CITY'S PETITION FOR REHEARING

The respondent Salt Lake City Corporation respectfully petitions this court for rehearing in the above entitled action and alleges that the court in its majority opinion filed on May 10, 1967, erred on the following points:

1. This court has usurped the function of the Utah Industrial Commission and has substituted its judgment for that of the Commission contrary to law.

2. The order of the Industrial Commission was supported by competent evidence and should have been sustained.

3. The court erred in holding that the decision of the Industrial Commission was arbitrary and not based upon the evidence.

4. This court has set a serious precedent with respect to internal bodily failures asserted as the basis for workmen's compensation benefits contrary to the law of this state prior to this decision.

WHEREFORE, defendant - respondent Salt Lake City Corporation, a self-insurer under the Workmen's Compensation Act of this state, prays that this action be reheard by this Honorable Court, and that the foregoing errors of this court be corrected in the interest of law and justice.

Respectfully submitted,

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BRIEF IN SUPPORT OF PETITION FOR REHEARING

STATEMENT OF FACTS

The facts in this case are accurately set forth in the majority and dissenting opinions of the court. Reference to such facts will be made in the following argument.

ARGUMENT

POINT I

THE MAJORITY OPINION OF THE COURT IN THIS CASE HAS USURPED THE FUNCTION OF THE UTAH INDUSTRIAL COMMISSION BY SUBSTITUTING ITS JUDGMENT FOR THAT OF THE COMMISSION CONTRARY TO LAW.

The majority opinion in this appeal, in accordance with the contention of the plaintiff-appellant in its brief on appeal, has held that the Industrial Commission applied the "unusual strain" test in this case contrary to previous decisions of this court and that the court was only concerned with whether or not "an ordinary exertion as contrasted to an unusual exertion caused the injury in question." The "injury in question" constituted disability resulting from arteriosclerotic heart disease which admittedly existed prior to the date of the alleged industrial accident.

What the majority opinion of this court has failed

to recognize is that the medical panel report of Doctors Viko, Erschler and Crockett, upon which the Industrial Commission based its findings and order in this case, was entirely consistent with the foregoing principles. Thus, in its original and second reports the medical panel concluded that, *even assuming that Mr. Powers suffered an attack of angina pectoris which was precipitated by his occupational activities of responding to a fire alarm on the night in question,* it could not find that such an attack would be sufficient to aggravate his pre-existing coronary artery disease to the point of disability six months later. The medical panel concluded that his disability was the result of the natural course of his pre-existing coronary artery disease. The question before the Industrial Commission was whether or not Mr. Powers' disability was the result of occupational aggravation of his existing heart disease on September 25, 1963, or the natural progress of the disease. It was immaterial, so far as the medical panel's opinion was concerned, whether the anginal attack, which the medical panel accepted as having occurred, resulted from ordinary or unusual exertion—*the medical panel was of the opinion that such an attack was not sufficient to aggravate pre-existing coronary artery disease to the point of total disability.*

Admittedly the medical opinion of Doctor Null was in conflict with that of the medical panel, but the resolution of such conflict is the exclusive province of the Industrial Commission and not the Supreme Court. As pointed out in the dissenting opinion, Section 35-

1-85, Utah Code Annotated 1953, expressly provides that the commission's findings on questions of fact shall be conclusive and final and shall not be subject to review. The Industrial Commission in this case held that the occupational events of the day in question did not aggravate the pre-existing heart ailment of the appellant. The ordinary nature of the appellant's activities on the night in question were mentioned by both the medical panel and the Industrial Commission in evaluating the causal relationship between the episode on September 25, 1963, and the onset of disability six months later. By its decision in the case, this court has abandoned its pronouncement in *Purity Biscuit Company v. Industrial Commission,* 115 U. 1, 201 P.2d 961, that in cases where disease or internal failure causes, or is, the injury there must be a causal connection between the employment and the injury. In effect, the bare majority of this court has changed the statutory requirement that an employee's internal failure must arise "in the course of his employment" to a mere finding that such occurred in the duration of his employment. It was this very possibility to which Justice Wolfe directed his concurring opinion in the *Purity Biscuit Company* case wherein he stated that the problem of the Industrial Commission in those cases "where the disability or death occurs by an internal failure contemporaneous with exertion attendant upon the work or soon thereafter, is to determine whether the exertion was a causative factor of the death or injury or merely coincidental with the employment." He then

came to the very problem here involved when he stated at page 970 of 201 P.2d Reporter:

> "Where the exertion is comparatively mild and of a kind of work the employee has been doing and disability or death results, then it would appear to me that the proof that it was a material contributory factor to death or disability should be clear and convincing. The more mild the exertion, the more likely that the internal failure was merely coincidental."

It is submitted that on the basis of the time which elapsed between the anginal attack in this case and the resulting disability (six months), the admitted pre-existence of a deteriorating heart and arterial disease, the extensive family history of heart failure in the appellant's immediate family, and the admitted anxiety of the appellant during the time in question over his wife's health, together with the mild nature of his occupational activities on the night of the alleged accident, the evidence sustained the Industrial Commission's findings and order that the appellant's internal failure, if any, on the night of September 25, 1963, was merely coincidental with his employment.

This court's majority opinion has clearly invaded the statutory province of the Industrial Commission and, in doing so, has necessarily classified as arbitrary the dedicated actions of the members of that commission, as well as eminently respected medical authorities in order to justify its interference in matters with which it has no legal jurisdiction. The substitution of the judgment of the members of this court for that of the

Industrial Commission on such matters is nothing less than judicial usurpation of power which is as unjustified in state appellate courts as it is in the federal judiciary.

POINT II

THE ORDER OF THE INDUSTRIAL COMMISSION WAS SUPPORTED BY COMPETENT EVIDENCE AND SHOULD HAVE BEEN SUSTAINED.

The petitioner incorporates herein the argument set forth under Point I. In addition, it should be pointed out that the majority opinion accepted Dr. Null's testimony as competent upon the very same questions which it claims are incompetently and arbitrarily answered by the highly respected medical panel in this case. If the opinion of Dr. Null, who never examined the appellant until long after the claimed accident and therefore based his conclusion upon the medical history of the patient as did the medical panel, is considered competent evidence by this court, then most certainly the opinion of the medical panel upon the identical questions is also competent evidence and the Industrial Commission's order based upon such evidence should be sustained. This court has long held that the findings of the Industrial Commission on conflicting medical testimony could not be disturbed on appeal even though the Supreme Court might have come to a different conclusion. *Campbell v. Eagle and Blue Bell Mining Company*, 64 U. 430, 231 P. 620.

POINT III

This court on many occasions has held that a finding of arbitrariness on the part of the Industrial Commission cannot be made by the Supreme Court unless it appears from the record that the Industrial Commission has *disregarded uncontradicted* evidence, substantial in character. ***Batchelor v. Industrial Commission,*** 86 U. 261, 42 P.2d 996; ***Banks v. Industrial Commission,*** 74 U. 166, 278 P. 58; ***Harness v. Industrial Commission,*** 81 U. 276, 17 P.2d 277; ***Milkovich v. Industrial Commission,*** 91 U. 498, 64 P.2d 1290; ***Norris v. Industrial Commission,*** 90 U. 256, 61 P.2d 413. Thus, in the ***Milkovich*** case, the court stated as follows in headnote 3:

> "Supreme Court will ordinarily reverse conclusion of Industrial Commission as arbitrary only where evidence is uncontradicted, * * *."

The importance of the Commission's disregarding uncontradicted evidence in order for the Supreme Court to find that it acted arbitrary or capriciously is graphically detailed in the following statement of the court in the ***Norris*** case (page 415 of 61 P.2d Reporter):

> "Where the matter presented on appeal is the question of whether the commission should have in law arrived at a conclusion of fact different from that at which it did arrive from the evidence, a question of law is presented only when it is claimed that the commission could only arrive at one conclusion from the evidence, and that it found contrary to that inevitable conclusion. But in order to reverse the commission

in this regard it must appear at least that (a) *the evidence is uncontradicted,* and (b) there is nothing in the record which is intrinsically discrediting to the *uncontradicted testimony* and (c) that the *uncontradicted evidence* is not wholly that of interested witnesses or, if the *uncontradicted evidence* is wholly or partly from others than interested witnesses, that the record shows no bias or prejudice on the part of such other witnesses, and (d) the *uncontradicted evidence* is such as to carry a measure of conviction to the reasonable mind and sustain the burden of proof, and (e) precludes any other explanation or hypothesis as being more or equally as reasonable, and (f) there is nothing in the record which would indicate that the presence of the witnesses gave the commission such an advantage over the court in aid to its conclusions that the conclusions should for that reason not be disturbed.

> *"If the commission should decide against the uncontradicted evidence under those conditions, its decision would as a matter of law be arbitrary and capricious, which is another way of saying that it would be unreasonable."* (Emphasis added.)

In the ***Banks*** case the court had a factual situation in many ways similar to this case with the exception that the evidence supported a finding of overexertion by the employee followed by his death eleven days later from angina pectoris or coronary occlusion. Two doctors were of the opinion that the decedent's condition was brought about by the heavy lifting he had engaged in on his work and two doctors were of the opinion that

the alleged strain or overexertion was not connected with and did not contribute to the employee's death. A fifth doctor declined to say whether the overexertion or strain was a contributory cause in the case. In sustaining the Industrial Commission's denial of compensation, this court held as follows:

> "The evidence that the employee was subjected to a strain or overexertion was uncontradicted, but that it resulted in a physical injury to the employee was positively contradicted by the opinion evidence of two doctors, and also rendered improbable by the testimony of a fellow workman who was present at the time and observed the deceased employee, but saw or heard nothing to indicate that he had been injured. We cannot say upon this record that, in denying the claim, the Industrial Commission acted arbitrarily or capriciously, or without sufficient cause rejected uncontradicted evidence."

Certainly, the facts in the instant case warrant affirmance of the Commission's order and should not be found to be arbitrary in view of the *Banks* case.

By reason of the foregoing authorities it is submitted that the majority opinion has erred in holding the order of the Industrial Commission to be arbitrary when based upon admitted contradictory medical evidence as to the causal connection between the appellant's disability and the occupational events to which he attributes his disability.

POINT IV

THE COURT HAS SET A SERIOUS PRECEDENT WITH RESPECT TO INTERNAL BODILY FAILURES ASSERTED AS THE BASIS FOR WORKMEN'S COMPENSATION BENEFITS CONTRARY TO THE LAW OF THIS STATE PRIOR TO THIS DECISION.

The majority opinion in this case casts serious doubt upon the legality or efficacy of a medical panel study and report as required by Section 35-1-77, Utah Code Annotated 1953, as amended. Indeed this decision which has found the Industral Commission's order arbitrary when such order was based upon the medical panel report, could be forcefully argued for the proposition that the Commission acts arbitrarily in any case in which it adopts a medical panel report whose conclusions conflict with the medical evidence offered by an applicant for workmen's compensation benefits. Such a legal result is patently wrong and constitutes further encroachment by this court upon the statutory prerogatives of the commission. Furthermore, it is submitted that such a result is contrary to all the legal precedents enumerated under Points I, II and III of this brief and will establish a precedent contrary to the statutory and decisional law of this state prior to this case.

CONCLUSION

In order that this court may avoid the unjustified substitution of its own judgment for that of the Industrial Commission on matters which are exclusively within the province of the latter, this petition for rehearing should be granted and the order of the Industrial Commission should be affirmed.

Respectfully submitted,

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