2000

Willie M. Salas v. The Industrial Commission of Utah, Eaton Metal Products Company, and the State Insurance Fund : Brief of Respondent

Utah Supreme Court

Michael Shepard; Utah Legal Services, Inc.; Attorneys for Plaintiff-Appellant.
James R. Black; Robert D. Moore; Attorneys for Defendant-Respondent.

UTAH SUPREME COURT

BRIEF

DOCKET NO. 14493 R

OF THE STATE OF UTAH

WILLIE M. SALAS,

Plaintiff,

vs.

THE INDUSTRIAL COMMISSION OF UTAH, EATON METAL PRODUCTS COMPANY, AND THE STATE INSURANCE FUND,

Defendants,

SUPREME COURT
NO. 14493

DEFENDANT'S ~~RESPONDENT'S~~ BRIEF

Appeal from the Industrial Commission of Utah

JAMES R. BLACK
ROBERT D. MOORE
Ten West Broadway, Suite 400
Salt Lake City, Utah 84101

Attorneys for Defendant-Respondent

MICHAEL SHEPARD
Utah Legal Services, Inc.
216 East Fifth South
Salt Lake City, Utah 84111

Attorneys for Plaintiff-Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

WILLIE M. SALAS, Plaintiff, vs. THE INDUSTRIAL COMMISSION OF UTAH, EATON METAL PRODUCTS COMPANY, AND THE STATE INSURANCE FUND, Defendants,	:	SUPREME COURT NO. 14493

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JAMES R. BLACK
ROBERT D. MOORE
Ten West Broadway, Suite 400
Salt Lake City, Utah 84101

Attorneys for Defendant-Respondent

MICHAEL SHEPARD
Utah Legal Services, Inc.
216 East Fifth South
Salt Lake City, Utah 84111

Attorneys for Plaintiff-Appellant

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RESPONDENT'S BRIEF

NATURE OF THE CASE

Plaintiff alleged a willful failure on the part of Defendant "to comply with the law or any lawful order of the Industrial Commission" and therefore claimed entitlement to a 15% increase in his Workman's Compensation benefits as allowed by U. C. A., 1953, §35-1-12.

DISPOSITION BY THE INDUSTRIAL COMMISSION

The Administrative Law Judge denied the additional benefits as claimed. The Plaintiff timely filed a Motion For Review with the Industrial Commission. The Industrial Commission affirmed the decision of the Administrative Law Judge.

RELIEF SOUGHT ON APPEAL

Defendants respectfully ask that the decision denying the increased benefits be affirmed by this Court.

FACTS

Plaintiff was totally and permanently incapacitated in a most tragic industrial accident which occurred on June 11, 1973. At that time he was employed by Defendant, Eaton Metal Products Company. The accident occurred when the boom of a crane which was under repair slipped from a metal support that had been placed under it and struck Plaintiff. His injuries resulted in paraplegia. Other pertinent facts will be brought out in the arguments that follow.

ARGUMENT

POINT I

PLAINTIFF IS NOT ENTITLED TO FIFTEEN PERCENT INCREASE IN HIS COMPENSATION BECAUSE PLAINTIFF HAS NOT PRESENTED SUFFICIENT EVIDENCE TO SUPPORT A FINDING OF A WILLFUL FAILURE OF DEFENDANT TO COMPLY WITH THE LAW OR ANY LAWFUL ORDER OF THE INDUSTRIAL COMMISSION.

Plaintiff has claimed that Defendant was at the time of the accident and injury in issue in violation of U. C. A., 1953, §35-1-12. For the convenience of the Court, that section is set forth below:

> No employer shall construct or occupy or maintain any place of employment that is not safe, or require or knowingly permit any employee to be in any employment or place of employment which is not safe, or fail to provide and use safety devices and safeguards, or fail to obey and follow orders of the commission or to adopt and use methods and processes reasonably adequate to render such employment and place of employment safe, and no employer shall fail or neglect to do every other thing reasonably necessary

> to protect the life, health, safety and welfare of his employees. Where injury is caused by the willful failure of an employer to comply with the law or any lawful order of the industrial commission, compensation as provided for in this title shall be increased fifteen percent, except in case of injury resulting in death. (Emphasis added)

The crux of a determination of a breach of the above statute requires first that there be a failure of the employer 1) "to obey a law",or 2) "any lawful order of the Industrial Commission", and 3) that failure must be "willful".

Plaintiff makes no claim that Defendant failed to obey any lawful order of the Industrial Commission and the record is void of evidence of any such breach.

Plaintiff does claim that there is evidence to support its claim that Defendant "willfully" failed to have a safety program in effect and presumably that said "willful" failure caused the unfortunate accident to Mr. Salas (See Applicant's brief at pages 3 and 4).

The real basis of any claim for a 15% increase in benefits depends on a determination of what constitutes willfulness on the part of an employer. This Court long ago made that determination. In the cases of Western Clay & Metals Company v. Industrial Commission, 70 Utah 279, 259 Pac. 279 (Utah 1927) and Utah Mining Company v. Industrial Commission, 62 Utah 421, 220 Pac. 389 (Utah 1923). In both of those cases, the Industrial Commission made a determination that there had been a willful violation by the employer of general safety orders

enacted by the Commission.

In Park Utah, supra., the Court explained its decision in reversing the Industrial Commission in the following terms:

> "It should be stated that there is no evidence in the record that any notice had been given, or suggestion made, to the plaintiff mining company that the method employed by it was not satisfactory to the Commission, or that the Commission considered the method employed as less likely to accomplish the purpose for which the order had been issued. In fact, it is not shown that the mining company had any actual knowledge of the existence of this general order." (Emphasis added) (62 U. 421 at 424)

Not only did Defendant employer herein not have notice of any order of the Commission, there is no evidence one existed. The Court went on to further define willfulness:

> "The authorities, however, are agreed that negligence alone, or even gross negligence, is not sufficeint to constitute "willful failure" or "serious failure" to comply with the requirements of the statute or orders of the Commission. There is nothing in the findings or in the evidence before the Commission to indicate or suggest that the plaintiff mining company or its superintendent was acting in disregard of the safety of its employes, or to indicate a willingness on the part of the superintendent to inflict injury upon the employes." (Emphasis added) (62 U. 421 at 425)

The Court amplified that definition in Western Clay Metals, supra., by citing with approval the standards for "willfulness" of several other jurisdictions:

> "In Wick v. Gunn, 66 Okla. 316, 169 Pac. 1087, 4 A.L.R. 107, the term "wilful failure," as used in the Workmen's Compensation Act, as applied to the conduct of an employee, was held to mean, not merely voluntary and intentional, but to carry with it the idea of premeditation, obstinacy, and intentional wrong doing."
>
> "In Bersch v. Morris & Co., 106 Kan. 800, 189 P. 934, 9 A. L. R. 1374, the court said that the meaning

> of the words "willful failure" is not necessarily fulfilled by voluntary and intentional omission, but includes the element of intractableness, the headstrong disposition to act by the rule of contradiction."
>
> "In Nashville, C. & St. L. Ry. Co. v. Wright, 147 Tenn. 619, 250 S. W. 903, the words were interpreted to mean something more than negligence and carrying the idea of deliberation and intentional wrongdoing." (Emphasis added)

A review of the record shows that the above criteria are most certainly not supported by the evidence produced by Plaintiff in the record.

Mr. Steven Lee, Division Manager at Defendant, Eaton Metals, was aware that the boom which fell and struck Plaintiff had been propped up so the internals could be taken out for repair. (R. 66 & 70) The company conducted periodic safety meetings (R. 71). He felt in his own mind that the metal support under the boom was adequate and safe while the maintenance was being done and that it wasn't hazardous to anyone. (R. 72) He received no notice from anyone that a hazard existed there. (R. 73)

Mr. Lee was also of the opinion that Plaintiff was a good worker who had had no problems with him or anyone else at Eaton. (R. 73-74)

Elfego Aguilar was the next to testify. Mr. Aginlar is a good friend of the Plaintiff and is in fact married to Plaintiff's cousin. He saw the boom fall the Friday before the injury to Plaintiff when the brake drum broke down. The first time he saw the boom propped up by the pipe support was the morning of the accident the following Monday. (R. 86-88) There is no evidence that Mr. Aguilar gave notice to anyone in

authority that the boom support was insufficient and hazardous.

Bob Lemon was a welder at Eaton and sometime operator of the crane in question. He was also the Union Steward at Eaton (R. 91) He affirmed that the crane broke down while he was operating it the Friday before the accident and that it had fallen. (R. 94) He stated that on a few occasions before there had been problems of different sorts with that particular crane. (R. 96-99) He told his supervisor Dutch the preceeding Friday that the crane was unsafe in its present condition and Dutch said he would have it fixed. (R. 102) As promised by Dutch, maintenance was in the process of correcting the problem with the crane when Plaintiff was injured. (R. 115)

Each time there was a problem with the crane it was reported to maintenance and the problem was corrected. At the time of the accident the boom was propped up while they were waiting for parts. (R. 99) When Mr. Lemon went to work on the Monday morning of the accident he stated he felt the area was unsafe, but he took no action to notify or warn anyone. (R. 107, 120)

Plaintiff's witness Steven Carlson saw the boom sitting on the pipe for the first time, as did the others, on the morning of the accident. (R. 124) He never made any comments to his supervisor, Dutch, about any hazard he may have sensed. (R. 133)

An accident inspection report of Sam Mulliner's made in his official capacity as a State Safety Inspector for the

Utah Occupational Safety and Health Division, was properly introduced into evidence by Defendant as an exception to the hearsay rule under the Utah Rules of Evidence Sections 63 (15), Reports and Findings of Public Officials; 63 (16), Filed Reports, Made by People Exclusively Authorized; and 64 (17) Content of Official Record. (R. 154-157) That report described the accident and stated there was no violation of a standard.

> "33. Describe accident - A crane boom being repaired was blocked up at one end with a 3" pipe support. The pipe support was on a 1" piece of steel plating. The victam (sic) and other workman were removing plate hook from steel plate under the boom. The support slipped when the plate was lifted with a pry bar. The boom fell, striking victam (sic).
>
> x x x
>
> 35. Did a violation of a standard cause or contribute to this accident. - Yes (No)" (Emphasis added - circle around "No" in original report)

Additional evidence from Mr. Mulliner was introduced into evidence in the form of a letter dated October 20, 1974. (R. 164-66) Said letter was introduced over the objection of the Defendant on the ground that it was hearsay procured by Plaintiff's counsel by a letter apparently sent to Mr. Mulliner propounding questions not introduced into evidence. It was considered along with all of the other evidence by the Administrative Law Judge in denying the Plaintiff's claim for increased benefits. In any event, all that Mr. Mulliner adds to the evidence is that supervision was lax and a safety program was

not in effect. (R. 164-166) Section 35-1-12, U. C. A. , 1953 does not give any specifics for a safety program and does not in fact require a specific safety plan. Apparently, the statute leaves it to the Industrial Commission to promulgate such standards rules and regulations for a particular place of business and the industry as a whole in the state as in its discretion the Commission deems proper. No such safety plan appears in the record.

Plaintiff makes a point in his brief at Page 3 that testimony of notice to the employer of an unsafe condition was wrongly excluded because it was hearsay. The issue really isn't the admissibility of the hearsay evidence. Instead, the issue is whether a finding of fact in favor of Plainiff can be based on hearsay alone. There is no other evidence of notice to the employer or of a lack of a safety program at Eaton, for that matter other than hearsay evidence. There must be a "residuum of evidence, legal and competent in a Court of law, to support a claim before an award can be made, and the finding cannot be based wholly upon hearsay evidence". Ogden Iron Works v. Industrial Commission, 102 U. 492, at 498, 132 P2d 276 (1942). See also Garfield Smelting Co. v. Industrial Commission, 53 U. 133, 178 P. 57.

All of the evidence on those two points that Plaintiff would introduce was and is hearsay. In fact, all of the legally competent evidence on those two issues directly contradicts any indication of prior notice to the employer of a hazard and the lack of a safety program. (See the summaries of the witnesses'

testimony hereinabove)

Even taking all of the evidence into consideration, both hearsay and competent evidence, the record firmly and without doubt supports the decision of the Administrative Law Judge that: "On this state of the record it is concluded that claimant has not established a willful failure of his employer to comply with the law or a lawful order of the Commission..." (R. 210-211)

It is further obvious that there is nothing in the record that any act or omission, if any, on the part of Defendant gave rise to "...the idea of premeditation, obstinancy, and intentional wrong doing" or that such acts or omissions, if any, included "...the element of intractableness, the headstrong disposition to act by the rule of contradiction" or that said acts or omissions, if any, carried "...the idea of deliberation". Park Utah Mining, supra.

The burden is upon the Plaintiff in this appeal to show that the Industrial Commission was capricious and arbitrary in its denial of Plaintiff's application. That burden is succinctly explained in Long v. Western States Refining Company et al, 14 Utah 2d 398, 384 P2d, 1015 (Utah 1963) at 384 P2d 1016:

> "We do not question the principle advocated that the Commission should resolve doubts in favor of coverage of the employee to effectuate the purposes of the act by providing compensation for injuries suffered in employment; nor that had the Commission been disposed to so find, there is a basis in the evidence upon which it could have determined that

> Mr. Long suffered an accidental injury in the course of his employment which resulted in his death. Nevertheless, our statute, Sec. 35-1-85, U.C.A. 1953, grants the Commission the prerogative of finding the facts. When it has denied the application for compensation and a reversal is sought, the applicant, as the moving party, has the burden of showing that the evidence is such that a finding in her favor is the only reasonable finding that could be made, so that the Commission's refusal to so find was capricious and arbitrary. Reflection upon the evidence recited above will show clearly that this is not the situation here, and that there is ample justification therein for the Commission's refusal to believe that there was an industrial accident." (Emphasis added)

The case at bar differs from the above only in that there is no basis in the evidence to support Plaintiff's claim of "willfulness" and therefore, the only reasonable position the Industrial Commission could have taken was a denial.

ARGUMENT

POINT II

PLAINTIFF WAS NOT DENIED ACCESS TO THE RECORD IN PREPARATION OF HIS MOTION FOR REVIEW OF THE ADMINISTRATIVE LAW JUDGE'S DENIAL OF HIS APPLICATION.

In Point II of his brief Plaintiff asserts that he was not given the 20 days he requested to review the record and transcript of the hearing. (Appellant's brief at pages 6-7) That simply is not true. His request was made December 12, 1975. (R. 215) The Denial of Claimant's Petition For Review was not entered until January 27, 1976. (R. 217) Forty-six days had passed during which it appears no attempt was made by Plaintiff to request the reporter to prepare a transcript.

The Industrial Commission file, being a public record was open to Plaintiff any time during that period. It is not the duty of Defendant to supply a transcript of the hearing to Plaintiff, nor is it the duty of the Commission or the reporter to supply the transcript to Plaintiff when he doesn't take the necessary step to order it.

Further, even if this proved to be error on the part of the Industrial Commission it would create no difference in the state of the record. Plaintiff still would not have been able to support his claim for a 15% increase in his benefits. It would be at most harmless error.

ARGUMENT

POINT III

PLAINTIFF WAS NOT DENIED A FULL AND FAIR HEARING.

At Page 7 in Plaintiff's brief is the accusation that the Administrative Law Judge "failed and refused to schedule the continued hearing" during which time a crucial witness, Sam Mulliner, left the jurisdiction and his testimony was therefore lost. A review of the record will show the falacy of this contention.

The hearing on this matter was originally scheduled for September 5, 1974, but pursuant to a telephone call of Plaintiff's counsel, the matter was actually heard August 7, 1974. (R. 24-25)

In the original notice, both Defendant and Plaintiff were advised:

> "Cases must be prepared before the hearing. All necessary witnesses, ... must be ready at the hearing..."
>
> "Single hearings are favored, and the policy of the Commission is against continuances, changes, or further hearings." (R. 24)

Plaintiff was aware of these policies and certainly availed himself of the subpoena power. No less than nine subpoenas were served at the behest of Plaintiff. (R. 29-45) Sam Mulliner was not among those subpoened though his report was of public record and his identity easily discernible. However, in order to be more than fair, the Administrative Law Judge did grant a continuance so that Plaintiff could secure Mr. Mulliner as a witness.

On October 29, 1974, counsel for Plaintiff sent a letter to the Administrative Law Judge in which he included a letter from Mr. Sam Mulliner dated October 20, 1974, in which Mr. Mulliner refers to a letter of inquiry from counsel for Plaintiff of October 11, 1974. (R. 162-166) Mr. Mulliner's letter was admitted into evidence and considered.

Also in the letter of Plaintiff's counsel of October 29, 1974, Plaintiff rested his case:

> "With the inclusion of this report, the employee, Willie M. Salas, will rest his case with all the evidence that is in the record at the present time." (R. 163)

No recitation of law is necessary in light of these facts. There is no evidence that Plaintiff was denied a Full and Fair Hearing. There is no indication that Mr. Mulliner was within the jurisdiction of the Commission at the time of the original hearing and thereafter. No indication was ever given to the Administrative Law Judge that he was about to leave the jurisdiction so that a continued hearing could be scheduled more rapidly. Two and one half months is not unusual nor an inordinant length of time to wait a scheduling of the continued hearing. That hearing certainly had to take its place in the regular turn of scheduling barring unusual circumstances which were never presented to the Administrative Law Judge. While he was in the jurisdiction, Mr. Mulliner's deposition could have been taken to preserve his testimony, but no effort was made in that direction. Again, it is not the responsibility of either Defendants or the Commission to procure and produce witnesses and evidence for Plaintiff. Most importantly, Plaintiff rested his case on October 29, 1974. (R. 163)

One final point, if Mr. Mulliner's oral testimony comported with his official report and his letter, there would still be no evidence to support the claim of "willfulness". (See Argument Point I)

Plaintiff was indeed given a Full and Fair Hearing. He had every opportunity to present his entire claim.

CONCLUSION

The claimant has failed to present evidence which could support his claim that Defendant, Eaton Metals, willfully failed to comply with the law or any lawful order of the Industrial Commission. The Plaintiff was not denied due process of law and did receive a full and fair hearing. Therefore, the order of the Industrial Commission of Utah denying a 15% increase in the benefits to Plaintiff should be affirmed.

DATED this 19th day of November, 1976.

RESPECTFULLY SUBMITTED,

James R. Black

JAMES R. BLACK
Attorney for Defendant
Respondent

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I mailed a copy of the foregoing Respondent's Brief to Michael Shepard, 216 East Fifth South, Salt Lake City, Utah 84111, on this 22nd day of November 1976.

James R. Black