

1976

# Kriste A. Pitkin v. Preston's Incorporated and the Industrial Commission of Utah : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

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KRISTE A. PITKIN, \*

Plaintiff and \*

Appellant, \*

vs. \*

Case No. 14500

PRESTON'S INCORPORATED and \*

THE INDUSTRIAL COMMISSION OF \*

UTAH, \*

Defendants and \*

Respondents, \*

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BRIEF OF RESPONDENT

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Appeal from the Industrial Commission of Utah  
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**FILED**

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Clerk, Supreme Court, Utah

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

ERISTE A. PITKIN,  
Plaintiff and  
Appellant,

\*

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vs.

Case No. 14588

\*

PRESTON'S INCORPORATED and  
THE INDUSTRIAL COMMISSION OF  
UTAH,

\*

\*

Defendants and  
Respondents,

\*

BRIEF OF RESPONDENT

STATEMENT OF NATURE OF THE CASE

The Appellant is appealing from an order of the Industrial Commission denying compensation to Appellant, under Workmen's Compensation Provisions of the Utah Code Annotated.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the order of the Industrial Commission and a determination of disability suffered by Appellant. Respondent resists the reversal.

STATEMENT OF FACTS

The Claimant and Appellant was a 23 year old female employed by the Defendant, Preston's Inc., owners and operators of a cafe

in Logan, Utah, owned by the Defendant. The Claimant's name is also the  
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Greyhound Bus Depot for the Logan Utah area.

The Preston's Inc. first acquired Dick's Cafe and Greyhound Bus Depot on December 14, 1973, and the Plaintiff-Appellant was an employee at that time. Workmen's Compensation Insurance was not obtained by the Corporation at the time through an oversight of management. (Tr. 80)

On November 20th of 1974, the Claimant filed a Claim for Compensation alleging that on September 19, 1974, she sustained an injury that occurred "over a period of time of working, caused by lifting freight." On January 31, 1974, the Claimant filed an Amended Application for a hearing alleging that she sustained an injury on September 28, 1974, which "occurred from lifting freight" (File) The Defendant answered the Complaint denying each allegation of the claim.

The evidence introduced by the Applicant is to the effect that on or about the 28th day of August, 1974, Applicant first stated that she noticed the pain. (Tr. 11).

She states as follows:

Q. All right. Did you incur an injury of any kind that day while employed?

A. I can't be sure. I do remember the pain, and I remember limping."

Q. You can't be sure of what?

A. That it was August 28th. It could have been the day before.

Through various questions, her attorney was able to guide her into testifying that she felt pain, which radiated down the back of her leg while working. (Tr.13)

The accident was never reported as such to the management, and therefore, an investigation of the alleged accident was never made by the management. The Claimant worked without interruption, the day of the claimed accident and continuously thereafter until she was terminated in December. (Tr. 14) The Claimant first saw a physician concerning her alleged accident on September 5, 1974, seeking aid for a blood clot and a cold and as an incidental matter asked the doctor to check her leg. The doctor diagnosed the problem as an "early disc." (Tr. 16) Still the Applicant continued to work for the corporation until December 19, 1974.

The cross examination of the Applicant brought out inconsistencies of the Applicant's position in this case that she sustained an injury on August 28th.

Applicant states that the Corporation has her daily employment records, but she then concedes that she wrote daily hours worked in a book and then destroyed them herself. There was no record of the Applicant working on the day in question. (Tr. 21) Her only retort to the destruction of the records was that if the Corporation thought that the records were so important, they should have told her so.

Applicant claims that she made no complaints of back pains

prior to the alleged date of the injury September 19th or September 23th or August 28th. (Tr. 27) After much discussion, Applicant finally admitted to the Referee that she had back pains from lifting many months prior to the alleged injury. (Tr. 53) Her co-workers and her witnesses substantiated her admission as to prior back pains. (Tr.64) "Nothing serious"(Tr.53). The back aches I could tolerate,.....put on Ben Gay.....(Tr.55). The applicant worked a total of 55 hours the week of the alleged injury and the following weeks, she worked 41 and 59 hours respect

The Applicant admitted that she made a false statement of her weight to an insurance company for the purpose of obtaining insurance. She reported her weight at 150 lbs. instead of the actual 190 lbs. The company promptly denied coverage. The Applicant has been grossly overweight all her life notwithstanding advice of physicians to lose weight both before and after this claimed injury. (Tr.35).

The Applicant's testimony of the accident itself creates a picture of confusion.

(Tr. 12)

Q. Did you incur an injury of any kind that day while employed.

A. I can't be sure. I do remember the pain and remember limping.

After further prompting, she stated that she "was lifting freight and I did notice pain." But she went to the doctor for a cold. (Tr.13) On cross examination she admitted that she didn't



know the date of the injury. (Tr.29). She can't remember what she was doing at the time of the injury, but she lifted freight both before and after the claimed injury.(Tr. 29 & 30) The Applicant can't remember lifting any particular item of freight, or where she was, other than at work. (Tr.47 & 48). The Applicant does remember that she fell down the stairs at her home in November following the claimed injury and before the notice was filed with the Industrial Commission. Her physician substantiates her admission stating that she sustained , "an acute flexion again." (Tr. 34 & 35). She used crutches after this fall. (Tr. 68)

Heather Hardy, a witness for the Applicant, testified that she did not know of the claimed injury although they worked together daily before and after the date of the claimed injury until the Applicant went to Doctor Hirst. She did mention the fact of a pain in her leg and that she was limping "about a week after I returned from a trip home to California the first of August." (Tr.67)

Patrick H. Preston, the President of the Defendant's Corporation, testified that he had never received notice from the Applicant of a time and a place of the accident. He further testified that the Corporation had no records to show that the Applicant had worked the date claimed by her, although she did work that week. He testified on several occasions having conversations with Mrs. Pitkin concerning her weight and posture.

Dr. Hirst's report indicates that the onset of pain spanned a period of three and one-half months. Treatment was recommended.

A later fall at the home caused an acute flexion and then surgery was recommended for Mrs. Pitkin.

The Petitioner now seeks to charge her injuries to Defendant as an industrial "accident".

ARGUMENT

ISSUE NO. 1

THE INDUSTRIAL COMMISSION DID NOT ACT ARBITRARILY IN CONSIDERING THE TESTIMONIES OF THE WITNESSES.

The Appellant states in her brief that there is substantial credible and uncontradicted evidence in the record that the Plaintiff sustained a compensable industrial accident.

It is the law as announced by this Court in many cases that the Industrial Commission may not act arbitrary or capriciously in making findings concerning whether or not an injury falls within the purview of the statute. Baker vs. Industrial Commission, 17 Utah 2d 141, 405 P. 2d 613. However, on the other hand, the Industrial Commission acts as a finder of facts and are the sole judges of the credibility of the witnesses to weigh the evidence the facts and their decision is final if there is any substantial evidence to sustain it. See Chief Consolidated Mining Co. vs. Industrial Commission 70 Utah 33, 260 P. 2d 277, Board of Education of Salt Lake City vs. Industrial Commission 83 Utah 356, 27 P. 2d 805, where the Court said that on a conflict of material and competent evidence justifying finding for either party the decision made by the Commission will not be disturbed and in such cases, credibility of the witness and the weight to be given by their testimony.

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mony is one of fact for the Commission. See also Park Utah Consolidated Mines vs. Industrial Commission 84 Utah, 481 P. 2d 979, Johnson vs. Industrial Commission 86 Utah 261, 42 P. 2d 996, where the Court said "Where the Commission has made its findings and conclusions and denied compensation, it is not for the Court to disturb them, unless it appears from the record that the Commission has disregarded competent evidence, substantial in character, and uncontradicted without reasonable basis therefore."

The Commission having found as an ultimate fact that the Applicant did not suffer any injury by accident arising out of or in the course of her employment and there being evidence in the record from which the Commission could have found either affirmatively or negatively upon the ultimate issue of fact, this Court may not disturb the finding of the Commission.

In this case, the records show that the Appellant for some period of time prior to the alleged injury suffered from backaches which appeared to be a common complaint among the employees and that the Appellant was as described by her physician, as a "moderately obese woman weighing 190 lbs., and prone to poor posture." Further reviewing the evidence with respect to the relation to the back problem caused from an industrial accident, the Appellant at various times in the hearing, stated as follows:

Q. All right. Did you incur an injury of any kind that date while employed?

(Tr. 12)

Q. Do you know what day that was on?

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A. I really can't be sure. (Tr. 13)

Q. Did you tell him at that time you were injured?

A. Yes. I told him I was going to the doctor. (Tr. 41)

At an employee's party, the Appellant claims she gave notice to the owners. (Tr. 42)

Q. All right. When did you tell somebody about your injury and who did you tell?

A. For one, we had an employees party on September 5th. Pat was there, so was his wife, and the manager. I told him then that Dr. Hirst said I had a ruptured disc. (Tr. 41 & 42)

Q. Did you at that time tell anybody about the accident, or the injury?

A. Yes. I told Earl before I was going to the doctor. And when I come back, I told him what the doctor said about me not being able to lift freight anymore. (Tr. 42)

Q. Now did you ever notify Mr. Preston of the time and the place of that accident? The date and the time?

A. No, I didn't. Because at the time I didn't think it was my back. (Tr. 46)

Q. I don't care about Dr. Steele. I'm saying did you ever tell Halverson, at the time of the accident: "I hurt my back at such a date, on the time and place."?

A. No, I didn't. Not right at the time, no. (Tr. 46)

Q. And you have never described to this Hearing Examiner <sup>was</sup> time of day, what you were doing, or anything else, have you?

A. No. (Tr. 46 & 47)

A. No. I can't remember. Most of the business down there is freight.

Q. So you don't remember what you were doing at the time, or the place?

A. I was working.

Q. But you don't remember where you were working?

A. I was working on Greyhound.

Q. All right. You say that you felt the pain in you back?

A. Uh-huh.

Q. What were you doing at the time you felt this pain in your back?

A. Lifting freight.

Q. What freight?

A. I can't remember what freight.

Q. How much did it weigh?

A. I can't remember that either. I can't remember one piece that I did pick up, because we were doing that constantly.

Q. So what you're testifying--What your testimony really boils down to is that it isn't like where you cut your finger at a specific time, and you say: "I cut my finger in the kitchen preparing lunch."? Your testimony is that at some time during this period of time you were lifting freight, and you hurt your back; is that right?

A. Yes. (Tr. 47-48)

THE WITNESS: Oh, I can't really be sure. But like if I'd like sit down, go over to the counter top and sit down, and then get up, I couldn't hardly walk. It was really bad.

THE REFEREE: Do you remember what you were doing? That is, what time of day, and what you might have been doing, when you first felt this pain?

THE WITNESS: Oh, I really don't know. I was working ten hours on the day shift at the time, and I really can't remember lifting up one certain thing and doing it.

THE REFEREE: Now in the year or so before, while you were handling the freight, did you ever have any problems at all from that?

THE WITNESS: No.

THE REFEREE: No back aches?

THE WITNESS: Oh, we all did once in awhile. We'd have----- Oh, you know. I don't know. We would just get tired from doing it. Evelyn had had back problems. (Tr. 50 & 51)

At that juncture, the witness admitted for the first time that she had had prior back problems. This was followed by examination at Tr. 54.

Q. So the facts are that you did have some back problems, even though you called it a back ache, prior to the time of this injury? Isn't that right?

A. Yes, I'd get little small back aches. I think everybody does once in a while.

She stated as follows:

Q. Now in June and July of 1974, had you ever heard employees complain about their backs?

A. We all complained a little bit.

Q. Including Kriste then, I take it?

A. Sure. We would all feel pretty beat at the end of the shift, after lifting freight. (Tr. 63)

Q. All right. Now in the month of August, did Kriste as far as you know, change any of her habits as far as working during that period of time?

A. No. We would all be working pretty long shifts during the summer.

Q. Do you recall anything that she specifically said to you during that month?

A. No.

Q. Concerning her back I mean?

A. Not until after she had talked to Dr. Hirst.

Q. I see. So that was the first time that you heard anything concerning her back, was when she talked to Dr. Hirst?

A. Well, we had discussed leg pain, but we didn't know it was her back. (Tr 65 & 66)

The evidence further shows that although Miss Hardy noticed the Appellant limping, at no time did the Appellant speak to Heather Hardy that she hurt her back working.

Q. Then she didn't say she hurt it working, did she?

A. No. We didn't know it was her back.

Q. She didn't say she hurt it at home then?

A. No.

Q. She gave you no explanation of where this pain came from, as far as the injury, or the source of the injury? .

A. No.

Q. When did she first tell you that she hurt it working?

A. She never really did.

Q. So this is the first time you have ever heard that this injury occurring as a result of employment at Dick's Cafe then?

A. No. Because after she had gone to the doctor, and they had decided that it was her back, and it could be from lifting freight. She hadn't been doing any other strenuous activity, or lifting anything, so---(Tr. 67)

Relating to the subsequent fall sustained by the Appellant the following questions were ensued:

Q. Did you also see it after? (The limp)

A. After she fell?

Q. Yes.

A. She was on crutches for awhile after she fell.

Q. On crutches did she work?

A. Yes

Q. She continued to work even after that?

A. Yes.

Q. Did you ever see her on crutches prior to that fall?

A. No.

Q. ~~What was the fall?~~



A. At her apartment. (Tr. 68)

The point of the entire testimony is that notwithstanding a claimed injury by the Appellant, the further question comes up whether or not the claimed injury was sustained as a result of an industrial accident and weighing the evidence as the Commission had the obligation to do, it appears that there is a lack of credible evidence showing an industrial accident as required by the statute. A possible injury, yes. An industrial accident, no. The Industrial Commission so found and their findings should be sustained by this Court. A back injury in an industrial accident situation is similar to another well known offense in a criminal situation. It is easy to allege and most difficult to disprove.

## ISSUE II

APPELLANT'S FAILURE TO PROMPTLY REPORT THE INJURY DOES BAR COMPENSATION.

Section 35-1-99 U.C.A. The State said when an employee claiming to have suffered an injury in the service of the employer, fails to give notice of the accident and injury incurred and the nature of the same within 48 hours or fails to report for medical treatment within said time, the compensation provided shall be reduced by 15%. Notice of the actions is not given within one year from the date of the accident, the right of compensation shall be barred. Such is the law.

Defendant's point in raising the question of notice is not whether or not the action should be barred, but as collateral evidence tending to disprove the fact that an industrial injury

occurred as alleged by the Appellant. The testimony of the Plaintiff is to the effect that she gave notice within five (5) days of the accident to the employer. However, a careful reading of her language indicates that she complained of a bad back during this period of time, but none of her testimony specified when, where, and the causation of the claimed injury. Certainly, under any construction, a conversation by an employee to her employer stating that she had a back injury does not fall within the pre-notice of notice, particularly in view of this individual, who was a moderately obese woman, weighing 190 lbs., poor posture, standing 5'6" high and who had complained during the course of her employment of back aches.

### ISSUE III

THE INDUSTRIAL COMMISSION DID NOT ERROR IN FINDING THAT AS A MATTER OF LAW THAT APPLICANT DID NOT SUSTAIN AN INDUSTRIAL INJURY BY ACCIDENT IN THE COURSE OF HER EMPLOYMENT.

The Applicant in her initial filing of a claim with the Industrial Commission stated that she had sustained an injury which occurred, "Over a period of time of working, caused by lifting freight." Two things are significant in this statement. (1) The statement over a period of time, which notes not an industrial accident, but the fact that the claimant due to her overweight condition, poor posture, prior medical problems, overtaxed the ability of her body to withstand the pressures and thus, over a period of time ruptured a disc in her back. (2) The origination

of this phrase, "lifting freight" was not as a result of the injury, but as a result of a conversation with a physician.

Q. Then she didn't say she hurt is working, did she?

A. No. We didn't know it was her back?

Q. She didn't say she hurt it a home then?

A. No.

Q. She gave you no explanation of where this pain came from, as far as the injury, or source of injury?

A. No.

Q. When did she first tell you that she hurt it working?

A. She never really did.

Q. So this is the first time you have ever heard that this injury occurred as a result of employment at Dick's Cafe ~~then~~?

A. No. Because after she had gone to the doctor, and they had decided that it was her back, and it could be from lifting the freight. She hadn't been doing any other strenuous activity, or lifting anything, so---

Q. She had a child, didn't she?

A. Yes. But lifting 30 or 40 pounds is nothing compared to the freight you're lifting in the freight room.

Q. Are you aware that she had a fall--

A. Yes.

Q. ---down some stairs?

A. Yes. That was quite awhile after she had already been to the doctor. (Tr. 67)

Pintar vs. Industrial Commission of Utah 14 Utah 2d 276, 382 P. 2d 414, where Plaintiff identified two separate injuries to his back doing mine work, was hospitalized for four days, and again hurt his back because a drilling machine pushed him against the wall for which he received medical attention, but continued to work. The Industrial Commission refused to grant an award of compensation.

The case indicates that there was credible evidence upon which either an award or denial of award could be predicated, and therefore, the Court said, "It is, therefore, a pre-requisite to compensation that his disability be shown as a result, not as a gradual development because of the nature or condition of his work, but from an identifiable accident or accidents in the course of the employment. There being substantial evidence to support the Commission's finding to the contrary, no basis exists upon which this Court could rule that it's denial of compensation was capricious or arbitrary accordingly, it's order is affirmed." A second case pertinent to this inquiry is the case of Residential and Commercial Construction Company vs. Eskelson, filed December, 1974, as Filing No. in this Court 13230. Again, this Court stated that "The hearing examiner and the Commission concluded that Eskelson had suffered an accidental injury and was entitled to compensation ....." Plaintiff has failed to show that the Commission was arbitrary or capricious and we are in the opinion that the decision of the Commission was abased upon credible evidence. See

22 Utah 2d 398, 454 P. 2d 283, where the Court said, "For ought we know from this record, there may have been any number of reasons why the rupture occurred when and where it did. Based upon circumstances quite foreign to the Claimant's employment. In other words, there is complete absence of competent proof here to show any finding with respect to the cause of the rupture saved by guess work. In other words, the Claimant has not met the burden of proving an accident in the course of the employment that caused the injury of which he complains, which burden is his." Compensation was denied and that the view was upheld by this Court.

The Appellant faces two problems in this case:

1. Assuming for her benefit that there is, in fact, an injury to her back she must first prove an accident.
2. That the accident occurred during the course of her employment.

Coupled with these two problems, is the problem of her credibility. She lied to an insurance company concerning her weight for purposes of becoming insured and the trial transcript is replete with inconsistencies and alterations and changes in her testimony. The Defendant relies heavily on the case of Baker vs. Industrial Commission previously cited in this brief, in which the secretary claimed the back injury from working.

Her testimony was to the effect that she was filing papers in the bottom drawer of a filing cabinet and she felt a sudden sharp

pain in her left hip and leg as she stooped down or raised up. Hence, an identifiable injury during the course of her employment. She consulted a physician and her testimony was substantiated by four friends and a completely disinterested waitress. The Court said citing other cases, "As authority to support the principle that we affirm the Commission on contradictory evidence, if there is substantial competent evidence to sustain it, but otherwise, where there is uncontroverted evidence supported by corroborating and there is no good reason to believe there is perjury or incredibility, in which latter event any attack thereon must at least be supported by the record and by accurate findings of fact. It is difficult to disagree with the Commission but we believe and hold that here we have such a case, in which we must disagree with the Commission on the record and on principle." The case cited by the Defendant does not and cannot parallel this case for these reasons:

1. This case does not involve substantial competent evidence.
2. This case does not involve uncontroverted evidence.
3. This case does not have corroborating evidence.

Therefore, the holding of the Baker case was upon a fact situation, wholly different from the case presented before the Court at this time. The Court is directed to the testimony of Heather Hardy. Commencing at page 53 of the Transcript, where it appears that Heather Hardy is an apparent friend of the Appellant, who worked with her for three months preceding the claimed injury, stated that through June and July of 1974, she heard Krista com

plain of back aches while working long shifts during the summer. That Kriste never specifically said anything to her concerning her claimed injury. But she did notice the Appellant limping and she would sit down and couldn't stand straight after sitting awhile. There was no claim of the injury during employment. There also was no claim of the injury occurring at home nor an explanation where the pain came from. (Tr. 67) Until the Appellant went to the doctor, "They decided that it was her back and it could be from lifting freight.

The referee questions the witness concerning this point and the witness stated that after the Appellant went to the doctor, they thought she had a crushed disc and she probably acquired it by the freight. (Tr. 71) Such testimony separates this case from the Baker case and makes the Baker case stand apart from the fact situation of this case.


#### C O N C L U S I O N

The Industrial Commission has, as required by statute, heard at least a portion of the case of the Appellant, has had the opportunity to confront the witnesses, observe their demeanor, observe personally their testimony, and has had occasion to review the testimony and the conflicts contained therein. It has had occasion to weigh the testimonies of the parties as it relates to the finding of an injury cause by an accident during the course of employment.

The record could be interpreted to prove evidence tending to show such

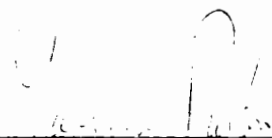
an accident during employment and on the other hand, the record demonstrates the absence of such accident during the course of employment, notwithstanding, an apparent injury. The Commission made a finding based upon the evidence, which finding can be substantiated by the record. The Supreme Court's role is not as a finder of fact, but as a determiner as to whether or not the Commission has correctly applied the law to the facts found. In this case, it appears that the Commission elected to disregard certain testimony given by the witness, as being substantial credible and competent and elected to view other evidence given by the Appellant and treat that evidence as substantial, credible and competent and there is no abuse of discretion by the Industrial Commission in electing that course of conduct. This Court in the Baker case stated its reluctance to disagree with the Commission and only did so, upon a finding that the record was barren of any credible evidence to support the Commission's finding. This Court has said many times that where the evidence is conflicting as whether or not there was an accident during the course of employment, the Supreme Court will not interfere with the judgment of the Industrial Commission.

Respectfully submitted this 5<sup>th</sup> day of August, 1976, which is uncontradicted.

  
George M. Preston  
Attorney for Respondent



I hereby certify that I mailed eleven (11) copies of the foregoing brief of respondent to the Utah Supreme Court of Utah, two (2) copies to the Industrial Commission of Utah, and two (2) copies to Gordon J. Low, Attorney for Plaintiff, this 5th day of August, 1976.

  
\_\_\_\_\_  
George W. Preston