1940

General Mills, Inc. and Zurich General Accident and Liability and Insurance Company, Ltd v. Industrial Commission of Utah and Olga Lassen Hansen : Brief of Appellant

Utah Supreme Court

DeVine, Howell, and Stein, Neil R. Olmstead, and Shirley P. Jones; attorneys for the plaintiffs.

In the Supreme Court
of the State of Utah

GENERAL MILLS, INC., a corporation of the State of Delaware, doing business under the trade name of SPERRY FLOUR COMPANY, Western Division of General Mills, Inc., and ZURICH GENERAL ACCIDENT AND LIABILITY INSURANCE COMPANY, LIMITED,

Plaintiffs,

vs.

INDUSTRIAL COMMISSION OF UTAH and OLGA LASSEN HANSEN,

Defendants.

No. 6192

PLAINTIFFS' BRIEF

STATEMENT OF THE CASE.

This is an original proceeding in this court for the purpose of reviewing an award made by the Industrial Commission of the State of Utah against these plaintiffs

and in favor of Olga Lassen Hansen, and the findings and conclusions of said Commission upon which said award is predicated dated August 18, 1938, in the matter designated by said Commission as claim No. 4133. After petition for rehearing had been filed within the time prescribed by law by the plaintiffs herein, and after the same had been denied, plaintiffs herein, within due time, applied to this court for the issuance of a writ of certiorari which was issued by this court, and to which writ return has been made to this court.

The case involves the question of whether or not Marius Hansen died as the result of injuries arising out of or in the course of his employment. It is the contention of plaintiffs herein that there is no evidence to support the findings of the Commission that Marius Hansen was injured while in the course of his employment, or that he died as the result of any injuries which he incurred during the course of his employment, or which arose out of his employment, and that there is no evidence to support the award of the Commission.

STATEMENT OF FACTS.

The hearings in this matter occurred on three different dates, June 5, 1939 at Ogden, and July 26 and July 27, 1939 at Salt Lake City, Utah. The reports of the hearings are numbered 22 and 30 in the certificate of the Industrial Commission to this court, and for purposes of convenience and to avoid confusion we will refer to number 22 as 1-T and number 30 as 2-T, since the pages

of the hearings are numbered from 1 to 34 and 1 to 31 respectively.

On the first two named dates Mrs. Hansen was represented by herself and her son Raymond L. Hansen, and on the third day she was represented by Attorney Dan B. Shields. At the first hearing the attorneys for the plaintiffs herein admitted that on March 17, 1938 Marius Hansen, the deceased, was injured by reason of an accident arising out of or in the course of his employment while employed by the Sperry Flour Company. (1-T 3). This was in accordance with the widow's contention in her application for compensation, which was that her husband was "driving south of Payson, Utah, on highway No. 91 when rounding a curve in the road struck an icy place on the road, causing car to leave highway and throwing Mr. Hansen against the steering wheel and windshield".

Prior to the submission of the case, however, plaintiffs learned that this statement was not a fact, and at the hearing on July 26th plaintiffs' attorneys announced that they had in their possession signed statements showing that Mr. Hansen was injured not in the course of his employment but while on an undertaking of his own, and that in view of that fact, which had just been learned, it was necessary to withdraw from the stipulation and to advise the parties that the plaintiffs were now making an issue of the question of whether or not Mr. Hansen was in fact injured in the course of his employment. (2-T 23, 24, 25). Thereupon the Commission continued the case

until the following afternoon, at which time Mrs. Hansen appeared represented by Attorney Dan B. Shields. (2-T 25, 26). There was no objection by anyone to the withdrawal of the stipulation, no contention that it would embarrass Mrs. Hansen or adversely affect her interests in any way, and while the Commission did not affirmatively allow the withdrawal of the stipulation it permitted it by continuing the case and allowing the introduction of testimony which showed the stipulation to concede facts which were actually untrue. Neither Mrs. Hansen nor her attorney objected to the withdrawal of the stipulation or to the reception of the evidence which showed the stipulation to be a mistake and inadvertence.

It is not disputed that Marius Hansen was an employee of the plaintiffs, that General Mills, Inc., (Sperry Flour Company) was at all times herein concerned an employer under the workmen's compensation law of the State of Utah, or that if Marius Hansen was injured in the course of employment he would be entitled to compensation, or that if he died as a result of injuries arising out of or in the course of his employment his dependents would be entitled to compensation. It was contended by Mrs. Hansen, the widow, that Marius Hansen was injured in the course of his employment on the 17th day of March, 1938 near Payson, Utah, on highway No. 91. (1-T 2). March 17, 1938 came on a Thursday. That Marius Hansen sometime in March sustained serious injuries is not contested. On the 23rd day of March, 1938, which was on Wednesday of the week following the

17th, Marius Hansen consulted Dr. F. K. Root at Salt Lake City, Utah. Dr. Root stated that his condition was very serious, that he "was in great shock and very sick and looked like a very sick man, and as I recall he had evidence of internal bleeding", decidely weak, that he would be unable to operate an automobile, drive a car or conduct sales meetings or attend to business. (2-T 3). And yet on the preceding Sunday, which was March 20th, three days after the 17th, he showed no evidence of any injury and was out riding in an automobile, and driving the same, in the evening with a young lady near Sigurd, Utah. (2-T 29, 30).

After Marius Hansen consulted Dr. Root on March 23, 1938 he was in the hospital in Salt Lake City for some weeks, was discharged from the hospital, and on May 27th Dr. Root submitted his report to the Industrial Commission stating that the patient was completely cured, would be able to resume work on June 1, 1938, and was capable of doing the same work as before the accident. (Exhibit I, Entry 27 of the record herein.) Mr. Hansen applied to the Sperry Flour Company for reinstatement but was refused reinstatement, not for any reasons connected with the accident, but because the company discharged him for the reason that his work was not satisfactory. (1-T 31, 32)

Mrs. Hansen contended that her husband never recovered from his illness, and in February 1939 he consulted Dr. Root again and Dr. Root sent him to the hospital, and on April 4th operated on him and on April 18th

he died. (2-T 10). Dr. Root gave as his opinion that Mr. Hansen died as the result of injuries he sustained in March 1938. He did not know how or where Mr. Hansen was injured except from information he received from Mr. Hansen. (2-T 12, 13). The only evidence in the record that Mr. Hansen was injured near Payson, Utah, on March 17, 1938 is the stipulation heretofore referred to which was later withdrawn. There is, however, positive evidence that on Sunday, March 20th, he was well, able to drive his car, and that he was driving in the evening of that day with a young lady, going from Richfield to Gunnison, Utah, that just as they were entering Sigurd they had a serious accident, namely, a head-on collision with another automobile, in which Mr. Hansen received a terrible jolt, as a result of which he complained of a terrible lump in his stomach and pain in his chest. That on either Thursday or Friday prior to the collision on March 20, 1938, the young lady rode with him from Centerfield, Utah to Richfield, Utah, and that he did not complain of any disability at that time and that the first time he complained of any injury or pain was after the collision Sunday night. (2-T 27 to 30).

There is another significant statement in the record which shows that the accident did not happen on March 17th but happened on March 20th. The deceased's son, Raymond L. Hansen, stated that he saw his father at Ogden, Utah, the day after the accident (1-T 21) and that it was either Sunday or Monday. (1-T 27). It could not have been Sunday because Marius Hansen was in south-

ern Utah on that day and spent Sunday night in Gunnison. (2-T 30). The only information Raymond Hansen had of the accident was from his father, so it is obvious the father told him on Monday, the 21st, that the accident had happened the previous day.

Upon this state of the record the Industrial Commission found, finding No. 1, page 31 of the record: "On March 17, 1938, while in the course of his employment by the defendant Sperry Flour Company, as salesman, Marius Hansen, suffered accidental injury in the following manner: While driving south of Payson, Utah, on Highway No. 91 when rounding a curve in the road struck an icy place causing car to leave highway throwing Mr. Hansen against steering wheel and windshield, causing injuries from which he died April 18, 1939."

STATEMENT OF ERRORS.

There is no evidence whatever in the record that Mr. Hansen was injured while in the course of his employment either on March 17, 1938 or March 20, 1938. There is no evidence whatever in the record that Mr. Hansen was injured near Payson, Utah, while in the course of his employment. There is positive evidence in the record that he was injured near Sigurd, Utah, on March 20th in the evening, and there is no evidence whatever that at the time and place he was in the course of his employment or that the accident arose out of his employment. There is no evidence in the record that he died as a result of injuries incurred on March 17, 1938

near Payson, Utah. There is no way by which Dr. Root could testify how he sustained the injuries from which he died. If he died as a result of injuries sustained in an accident it was the accident of March 20, 1938, for which these plaintiffs are not responsible.

ARGUMENT.

It is a universal rule that a stipulation which is entered into by mistake or inadvertance may be withdrawn, and that it is within the sound discretion of the court to permit the withdrawal of such a stipulation provided the other party is not thereby placed at a disadvantage. In the case at bar the stipulation was withdrawn without objection from anyone. The Commission accepted the withdrawal of the stipulation by adjourning the case to permit the introduction of testimony which showed the stipulation to be untrue, and did permit the introduction of such testimony. This testimony was not objected to by anyone and is the only positive evidence in the record as to the time, place and circumstance of any injury to Mr. Hansen.

A few of the cases discussing the question of the withdrawal of stipulations such as we have in the case at bar are as follows:

Volker-Skowcroft Lumber Co., et al., v. Vance, 36 Utah 348, 103 Pac. 970, wherein this court at page 361, 362 of the Utah report states that a stipulation such as we have in the case at bar is not conclusive of the facts therein recited, and that if it could be regarded as con-

clusive the parties could be relieved of it by showing proper grounds for its withdrawal or retraction.

In the case of *Deseret Savings Bank v. Walker,* 78 Utah 241, 2 Pac. (2d) 609, this court refused to allow the withdrawal from a stipulation because the defendant "made no application to the trial court for permission to withdraw his stipulation, and before the trial court made no effort to repudiate it nor to be relieved from it on the ground of misapprehension or mistake." Obviously had proper application for withdrawal of the stipulation been made the ruling, in view of the language used, would have been different. This court quoted 20 Encyclopedia of Pleading and Practice, pages 657 and 658 to sustain its position, but at page 664 of the same authority is the announcement of the rule that stipulations should be withdrawn if they were entered into under misapprehension or mistake and stipulated facts which are untrue.

In the case of *Cole v. State Compensation Commissioner,* 173 S. E. 263, a West Virginia case, the employee stipulated that his case could be submitted on a record previously made, which record had already been determined by the court to be insufficient. Later, and before the case was finally decided, the employee realized the mistake he had made and asked the Commission to set aside the stipulation. The Commission refused to do so and denied his claim for compensation. The Supreme Court reversed the Commission and held that the stipulation should have been set aside, and that it was an

abuse of discretion under the facts for the Commission to refuse to set it aside.

Other courts under circumstances such as we have here have held that it would be an abuse of discretion to refuse to set aside a stipulation.

The Supreme Court of Idaho in the case of *Koepl v. Ruppert,* 158 Pac. 319, says:

> "It is within the sound judicial discretion of a trial court, for good cause shown and in the furtherance of justice, to relieve parties from stipulations which they have entered into in the course of judicial proceedings, *and it is its duty to do so when enforcement thereof would be inequitable, and when, as in this case, all parties to this action will, by vacating the stipulation, be placed in exactly the same condition they were in before it was made.*" (Italics added).

Likewise the Supreme Court of Nebraska in *Butler v. Chamberlain,* 92 N. W. 154, held that it was an abuse of discretion for the court to refuse to set aside a stipulation. The court said:

> "In the light of that affidavit the stipulation was improvidently made and should be set aside, since it does not appear that to do so would work any injustice to the defendant."

In *Brink v. Industrial Commission,* 15 N. E. (2d) 491, the parties stipulated that the employee came under the compensation act. As a matter of fact he was engaged in inter-state commerce. A motion was made to avoid the stipulation. The Commission made no ruling on the

motion, the same as did the Commission in the case at bar, but proceeded to hear the cause as though the motion had been allowed. It was contended that this was error, but the Supreme Court of Illinois said:

> "Courts may, in the exercise of a sound judicial discretion and in the furtherance of justice relieve parties from stipulations which they have entered into in the course of judicial proceedings, and that discretion will not be interfered with except where manifest abuse of it is disclosed."

It will be noted that in that case the court treated the withdrawal of the stipulation as though it had been allowed, although the Commission made no formal ruling to that effect. In that case the Commission proceeded exactly as it did in this case, made no formal ruling but continued with the case as though the motion had been granted.

Also announcing and approving the general rule allowing the withdrawal of stipulations are:

Payton v. Rogers, 285 N. W. 873;
Stevenson v. Hazard, 277 Pac. 450;
People v. Sameniego, 5 Pac. (2d) 653;
Staley v. State, 79 Pac. (2d) 818;
Vandeventer v. State, 79 Pac. (2d) 1032.

In fact there is no dissent from the rule that stipulations entered into through mistake or inadvertance may be retracted, and many courts hold that under circum-

stance such as we have in the case at bar it would be an abuse of discretion to deny motions to withdraw from such stipulations.

Thus there is no evidence whatever in the record that Mr. Hansen was injured on March 17, 1938, near Payson, Utah, or any place else, by reason of any accident arising out of or in the course of his employment. There is, however, positive evidence that on that day and the following days up to Sunday, March 20th, he was suffering from no disabilities. He was injuried on March 20th in the evening while on an enterprise of his own, and there is no evidence whatever that at that time and place he was in the course of his employment, or that his injuries arose out of or in the course of his employment. There is inferential testimony from the son of Mr. Hansen that Mr. Hansen on Monday, March 21st, told him that he had been injured the preceding day. Dr. Root had no means of knowing except by the statements of the deceased how, when, or where he was injured, so any assumptions of his that Mr. Hansen died as a result of the injuries incurred on March 17, 1938 are entirely incompetent, being based as they are on hearsay testimony.

> *Z. C. M. I. v. Industrial Commission,*
> 70 Utah 549, 262 Pac. 99, and cases
> cited therein.

Even had the stipulation not been withdrawn, and even had Mr. Hansen been injured on March 17, 1938, there still remains in the record the undisputed evidence that he was also injured on March 20th, and it was im-

possible for Dr. Root or anyone else to state which accident caused the injuries from which he died, although the weight of the evidence favors the accident of March 20th since up to that time he had made no complaint of being injured and had carried on his affairs and business without manifesting any signs of distress, while after March 20th and on March 23rd Dr. Root states that he was in such condition as a result of his injuries that he was unable to work and was a very sick man. So all the evidence in the case points to the accident of March 20th as the cause of his injuries, and there is not one syllable in the record to show that these plaintiffs were in any wise legally liable for compensation for those injuries.

The award of the Commission should be annulled.

Respectfully submitted,

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