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

Utah Supreme Court

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

No. 6192

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.

PLAINTIFFS' REPLY BRIEF

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PLAINTIFFS' REPLY BRIEF

Defendant Olga Lassen Hansen is the only defendant who has filed a brief herein. Apparently she makes four contentions:

I. That the plaintiffs did not withdraw their stipulation that Marius Hansen was injured March 17, 1938 while in the course of his employment.

II. That the employer's reports of injury (Tr. 1 and 2) and certain letters from plaintiffs' attorneys are evidence that Marius Hansen was injured March 17, 1938 while in the course of employment.

III. That the testimony of Esther Peterson is barred by the provisions of Section 104-49-2 (3), Revised Statutes of Utah 1933.

IV. That plaintiffs could not withdraw from their stipulation.

We shall discuss the propositions in their order.

I.

The record answers contention number I in a very positive manner. At the first hearing in Ogden June 5, 1939 on page 4, 1 T. (we have heretofore designated the two transcripts of evidence as 1 T. and 2 T.) the following occurs:

> "Commissioner Knerr: * * * Are you willing to admit that on March 17, 1938 the deceased herein was injured by reason of an accident arising out of or in the course of his employment while employed by the Sperry Flour Company?"
>
> "Mr. Olmstead: We will so admit."

Counsel apparently contend that because the word "admit" was used the matter was not a stipulation and not so understood by the parties. However, with refer-

ence to this contention we find (2 T. 25) the following by Mr. Olmstead:

> "But in view of what I know now it becomes necessary for me to withdraw from that *stipulation* and to advise the parties that we are making an issue on the question of whether or not Mr. Hansen was engaged in—Mr. Hansen was in fact injured in the course of his employment. I state that into the record at this time so that the other parties may be able to meet the issue."

Thereupon the Commission continued the case for twenty-four hours. The parties were given definite warning that the matter was continued for twenty-four hours in order that the parties might meet the issue. Mr. Olmstead clearly indicated that the stipulation he was referring to was the one that he had entered into by his admission heretofore set forth. To say that because it was characterized as an admission in one place and a stipulation in another it thereby cannot be classified as a stipulation is merely quibbling. Mr. Olmstead clearly indicated that he regarded his admission as a stipulation and that he was withdrawing from it. It makes no difference what it was characterized. The fact of the matter is that the plaintiffs notified everyone that they would not now concede that Mr. Hansen was injured on March 17th by an accident arising out of or in the course of his employment. The parties were put upon notice of this fact. No one objected to it and the Commission permitted withdrawal from the stipulation by continuing the case to receive the evidence controverting it, and on the

following day by receiving the evidence that showed the admission or stipulation, call it what you will, to be untrue.

Before Mr. Olmstead withdrew from the stipulation he advised the Commission and the parties that he had a subpoena for a witness who would testify that Mr. Hansen was not in the course of his employment but on an undertaking of his own at the time of his injury; that he was not injured on March 17th but on March 20th, three days after the date he claims to have been injured. (2 T. 23, 24, 25)

He clearly stated that at the first hearing and up to that time plaintiffs had been laboring under the impression that the injury occurred on March 17th in the course of Mr. Hansen's employment "and at that time it was *stipulated* between the parties that Mr. Hansen was injured on that date in the course of his employment", but that now it was necessary to withdraw from that stipulation. The only place in the record where Mr. Olmstead agreed that Mr. Hansen was injured on March 17, 1938, while in the course of his employment is the admission (1 T. 4), so that it is perfectly obvious and apparent that what he was referring to as a stipulation was that admission.

While the Commissioner did not formally rule that the stipulation might be withdrawn, he continued the case until two o'clock of the following day in order to allow the introduction of the evidence showing the stipulation to be untrue, and on the following day such evidence was

admitted and received. So that the parties had ample warning that there was now no evidence in the record on this vital question, and on the following day they appeared with their attorney, and at that time neither the parties nor their attorney made any objection to the withdrawal from the stipulation or to the introduction of the evidence showing it to have been improvident.

In the case of *Brink v. Industrial Commission,* 15 N. E. (2d) 491, cited by us in our original brief, there was no formal ruling on the withdrawal of the stipulation, but the court treated the stipulation as though it had been withdrawn because the Commission proceeded to hear the evidence exactly as it did in this case. 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."

There can be no question that the plaintiffs made an issue of the contention and denied that Marius Hansen was injured March 17, 1938, by reason of an accident arising out of or in the course of his employment, presented positive evidence to show that he was not so injured, which evidence is all there is in the record on that point.

II.

It is obvious from the statement of Mr. Olmstead at the last hearing that up to that time everyone had been laboring under the impression that Marius Hansen was

injured March 17, 1938 while in the course of his employment. Of course the only way that they could get such an impression would be from Mr. Hansen himself, since none of them knew of the facts except as related by him. Counsel seem to contend, although rather half-heartedly, that the employer's reports of the injury and the letters from the plaintiffs' attorneys are evidence that Mr. Hansen was injured March 17th while in the course of his employment. In the first place there isn't a word in these documents that indicates that Mr. Hansen was in the course of his employment. Secondly, as already indicated, the employer and his attorneys were at all times until the last hearing, laboring under the misapprehension as to the facts, which misapprehension was later corrected by withdrawal from the stipulation, as already indicated. Thirdly, neither Mr. Hickman who made the first report of injury, nor Mr. Hohl who made the final report, could bind the plaintiffs by any statements of theirs; and fourthly, none of those documents are evidence.

This court said in the case of *Roberts v. Industrial Commission,* 93 Pac. (2d) 494, a very recent case, August 15, 1939:

> "Apparently it was thought that so long as evidence upon that question was on file in the office of the Industrial Commission in the form or reports by Roberts as a hotel proprietor, it was unnecessary to introduce those reports in evidence; that they could be 'judicially noticed' and attached to the record. If such was the thought it was an error. Each record of trial under this law should

> be kept in and of itself. *Each element necessary to sustain an order by the tribunal or commission under this law should be supported by testimony, exhibits, or stipulation introduced at the hearing. The rule is no different than that in industrial accidents.*" (Italics added).

Even if the reports and letters were part of the record they are not evidence, as we have already pointed out. As a matter of fact this court has squarely held that even the payment of compensation does not preclude the employer from denying liability later.

In *Taggert v. Industrial Commission of Utah,* 79 Utah 598, 12 Pac. (2d) 356, at page 602 of the Utah reports this court said:

> "The applicant contends that the carrier acknowledged that Taggert met with an accident and it does not lie in its mouth later to deny that Taggert met with an accident which caused his death. * * * This contention is untenable."

This, of course, must be the rule. The employer and the insurance carrier, relying upon the employee's statement, make their reports and pay compensation. Later it is discovered that the employee's statements are untrue. Certainly the law does not permit him to gain an advantage by his deception.

There are certain letters and reports of Dr. Root relied on in the record. But Dr. Root testified that the only information he had was received from Mr. Hansen. (2 T. 12, 13)

The testimony of Miss Peterson is very significant. March 17, 1938 was on a Thursday. On either Thursday or Friday, March 17 or 18, 1938, Miss Peterson rode with Mr. Hansen from Centerfield to Richfield. This was after the alleged injury of March 17th which Mr. Hansen said occurred as he was proceeding south of Payson at 10:30 A. M. So when he saw Miss Peterson it was after the time of his alleged accident and she says that she didn't notice any disability and he did not complain of any, nor did he on the following Sunday when she was riding with him in the evening on the way to Gunnison, and it was not until that occasion when they did have an accident and he received a terrible jolt that he complained of pain in his stomach.

He spent that night, Sunday night, (2 T. 29, 30) in Gunnison, returning to Ogden the next day. His son stated that he saw his father at Ogden the day after the accident (1 T. 21), and that it was either Sunday or Monday. (1 T. 27) Obviously it was Monday because, as we have seen, Sunday he was in Gunnison. This is a very material bit of evidence, because the son could only have learned of the accident from his father, so that obviously the father had told him on Monday that the accident had happened the previous day, which is the day testified to by Miss Peterson.

As we have already stated, even had there been evidence of an accident on the 17th there is nothing in the record to show that it was that accident, instead of the one on the 20th, that was responsible for his injury. The

inference is that it was not since he complained of no disability until after the accident of the 20th. He did not see Dr. Root until Wednesday, March 23rd, at which time Dr. Root stated that he was in a serious condition and in no condition to drive an automobile. He was not in this condition prior to the accident of March 20th.

III.

Counsel contend that under the provisions of 104-49-2 (3), Revised Statutes of Utah 1933, the testimony of Miss Peterson was incompetent. This provision of the statute has absolutely no application whatever to this case. Miss Peterson is not a party to the controversy, is not interested therein, and is not claiming anything from anyone.

IV.

We have examined the cases cited by the defendant. Many of them sustain the very point that we are arguing for, namely, that the Commission had a discretionary power to permit the withdrawal of the stipulation. Others are not in point at all. Either no application for withdrawal was made, or made for the first time on appeal. Still others simply do not contain the language quoted as coming therefrom.

Counsel say that because they were present for the first time at the last hearing they could have had no knowledge of the previous state of the record. There was

only one reason for the continuance of the case and that was for the reception and admission of the testimony of the plaintiffs controverting the contention that Marius Hansen was injured in the course of his employment March 17, 1938. That was why the hearing was continued until the following day. Up to that time the applicants had not been represented by counsel. But when the hearing was continued for the above stated purpose they appeared with counsel. It must be perfectly obvious that the reason counsel was employed was to meet the changed conditions. Else why employ counsel at that stage of the proceedings? If counsel's clients failed to appraise them of the situation that cannot change the record. In fact counsel almost concede that their arguments are not very meritorious. On page 14 of their brief they say:

> "If the contention of the plaintiffs, that the Commission had to permit the withdrawal of their stipulation, be accepted by this court as the law, then this court should return the whole matter to the Industrial Commission for an entire rehearing."

Here counsel not only recognize that our so-called admission was a stipulation but that the withdrawal of the stipulation withdrew all evidence from which the Commission could make a finding. Of course, we all know that all this court can do is either affirm or set aside the order of the Commission. Counsel likewise contend that no real reason was given to justify the withdrawal of the stipulation. The best reason in the world was that it was untrue, and this was clearly pointed out.

The contention is also made that because we paid compensation without objection we admitted our liability. We have also answered this contention.

There is absolutely no evidence in the record to sustain the finding of the Commission that Marius Hansen was injured March 17, 1938, or any other time, by an accident arising out of or in the course of his employment. The award of the Commission should be set aside.

Respectfully submitted,

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