

1987

Lanier Brugh, Inc v. Bernice Steward : Reply Brief

Utah Court of Appeals

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Recommended Citation

Reply Brief, *Lanier Brugh, Inc v. Steward*, No. 870418 (Utah Court of Appeals, 1987).
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870418-CA

IN THE COURT OF APPEALS OF THE STATE OF UTAH

LANIER BRUGH, INC., AND/OR	:	Court of Appeals:
WORKERS' COMPENSATION FUND	:	#870418CA
OF UTAH,	:	
	:	Industrial Commission:
Defendants/Appellants,	:	#86000198
	:	
vs.	:	Administrative Law Judge:
	:	Judge Richard G. Sumsion
BERNICE STEWARD, Widow of	:	
DALE STEWARD, Deceased, and	:	Argument Priority: #6
INDUSTRIAL COMMISSION OF UTAH,	:	
	:	APPEAL
Applicant/Respondents.	:	

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POINT I

THE INDUSTRIAL COMMISSION ACTED ARBITRARILY AND CAPRICIOUSLY IN CONCLUDING THAT THE DECEDENT HAD NO PREEXISTING CONDITION.

It is Appellant Workers' Compensation Fund of Utah's position that the Industrial Commission of Utah acted arbitrarily and capriciously in concluding that Mr. Dale Steward had no preexisting condition predisposing him to heart failure. That is, it is the Fund's contention that evidence in the record clearly indicates that Mr. Steward had a preexisting condition which substantially increased his risk of sustaining a heart attack.

At page 8 of Respondent's Brief, it is set forth that the decedent had no pre-existing heart condition or other preexisting conditions and therefore the "any exertion" standard of Allen may be used to establish legal causation.

[T]he Administrative Law Judge in this matter found that the decedent, Dale Steward, had no "previously diagnosed heart condition." This finding is not controverted in any of the evidence before the Commission. The Fund refers to various "risk" factors but the fact remains that Mr. Steward had never previously been diagnosed as

having heart problems and no medical examination before or after his death indicated the presence of preexisting heart disease.

While Respondent relies heavily upon the fact that Mr. Steward was never previously diagnosed as having heart problems, this is not fatal to Appellant's claim that there was a preexisting condition. As set forth in Appellant's principal brief, the preexisting condition of which Allen speaks need not be patent nor "previously diagnosed." See Justice Zimmerman's concurring opinion in Holloway v. Industrial Commission, 729 P.2d 31, 32 (Utah 1986) wherein it is stated:

With respect to the focus of this case on remand-whether Holloway had a preexisting condition-I would observe that the preexisting condition of which Allen speaks need not be patent; in fact, it need not have been known or knowable to anyone before the injury. The sole question is whether the worker came to the work place with a condition that increased his risk of injury. If he did and that condition contributed to the injury, then Allen's higher standard of legal causation comes into play so as to place that worker on the same footing as one who did not come to work with a preexisting condition. (emphasis added)

It is Appellant Fund's contention that the record clearly indicates that Mr. Steward did in fact have a preexisting condition which increased his risk of injury.

As indicated in Appellant's principal brief, on November 18, 1985, Dr. Peter Heilbrun set forth, "In retrospect, it makes me wonder if some of [Dale Steward's] recent neck and shoulder pain was possibly myocardial in origin." (Appellants Principal Brief; R.135)

Respondent maintains that this statement by Dr. Heilbrun "appears to have been simply a question, [and that] other

evidence from Dr. Heilbrun adequately supports the finding of the Administrative Law Judge." (Respondent's Brief page 8) Respondent Steward then cites a letter written by Dr. Heilbrun, dated July 25, 1986 wherein it is stated that "[Mr. Steward] had no prior history of cardiac disease, thus his death should be considered to be an industrial-related [sic] cardiac event." (Respondent's Brief page 9)

It is the Fund's belief that Dr. Heilbrun's statement amounts to much more than "simply a question." Rather, it rises to the level of being a calculated opinion that very possibly Mr. Steward had a preexisting heart condition. Further, inasmuch as this opinion was iterated within one week of decedent's death, it appears to be much more credible than the July 25, 1986 statement of Dr. Heilbrun. This is especially so in light of the fact that the July 25, 1986 letter appears to be a statement prepared at the widow's request and suggestion. In this light, Dr. Heilbrun wrote yet another letter to the claimant on the same date, July 25, 1986, and stated:

I am enclosing the following letter. Please read through it and advise me if you feel it satisfactorily explains my thoughts on the industrially related nature of Dale's heart attack. (R.244)

Dr. Heilbrun's statement of November 18, 1985, taken in conjunction with the risk factors possessed by the decedent as discussed in Appellants principal brief at page 8 (36 year cigarette smoking habit, amphetamine use, emphysema, obesity), as well as Dr. Perry's statement, clearly show that the decedent had a preexisting heart condition which substantially increased his

risk of injury. Dr. Perry set forth:

In terms of medical probability it is most likely that [Dale Steward] experienced a fatal cardiac arrhythmia while driving, lost consciousness a few seconds later thus losing control of the vehicle and having the accident as reported. It is possible that his dextroamphetamine was related to his death because it may worsen arrhythmias in susceptible [sic] individuals. (R.111)

Regarding this statement by Dr. Perry, Respondent Steward states that "Dr. Perry made no other conclusion with regard to preexisting heart disease in Mr. Steward and there was thus no substantial medical evidence before the Administrative Law Judge to indicate that Mr. Steward had any heart condition." (Respondent's Brief page 10)

It is the Fund's position that Dr. Perry's statement is tantamount to substantial medical evidence of a preexisting condition. Specifically, Dr. Perry has impliedly stated that Mr. Steward had a preexisting heart condition. This is evidenced by Dr. Perry referring to Mr. Steward as being a "susceptible individual." Appellant posits that Mr. Steward was susceptible because he had a preexisting heart condition.

Accordingly, inasmuch as there is a lack of substantial evidence in the record to support a finding that Mr. Steward had no preexisting heart condition, this finding must be reversed to properly reflect the evidence in the record indicating the presence of a preexisting condition.

Further, inasmuch as Mr. Steward had a history of amphetamine treatment for narcolepsy, this also was a "...preexisting condition that increased his risk of injury." Holloway, supra.

Thus, because a preexisting condition was brought to the workplace by Mr. Steward, the unusual exertion standard of Allen should be applied.

POINT II

THE INDUSTRIAL COMMISSION ACTED ARBITRARILY AND CAPRICIOUSLY IN CONCLUDING THAT THE DECEDENT STEWARD EXPERIENCED UNUSUAL EXERTION.

In support of her contention that Mr. Steward experienced unusual exertion while undertaking his employment duties, Respondent states that "the facts in this proceeding establish that Mr. Steward experienced exertion greater than that undertaken in normal everyday life..." (Respondent's Brief at 12)

The Commission found that the Administrative Law Judge was justified in finding that the decedent was driving under unusually stressful circumstances due to the fact his departure was delayed, he had to drive on snow covered roads, and he had little or no rest in between the trip to Denver and the return trip to Salt Lake City. (R.287)

As set forth in Appellant's principal brief, it is the Fund's belief that these aforementioned industrial factors do not amount to an exertion greater than that put forth in non-employment life. Moreover, it is Appellants position that the industrial factors certainly did not "contribute something substantial" to the risk already faced, and therefore per Allen, legal causation is lacking. From a purely logical standpoint, where there are other risk factors present (36 years of smoking, 1 1/2 packs of cigarettes a day, amphetamine use, emphysema, obesity), even in

the absence of the work stress factor, it would seem that adding one more factor (fatigue) is not a substantial contribution so as to conclude that the work activities caused the injury. Because the facts do not support a finding of unusual exertion, the finding of legal causation can not stand.

POINT III

THE INDUSTRIAL COMMISSION ACTED ARBITRARILY AND CAPRICIOUSLY IN CONCLUDING THAT MEDICAL CAUSATION WAS ESTABLISHED AND BY NOT SUBMITTING THE MEDICAL CAUSATION ISSUE TO A MEDICAL PANEL.

While it is true, as stated by Respondent at page 14 of her Brief, that Respondent has established that Mr. Steward was fatigued immediately prior to suffering his fatal heart attack, this does not amount to a showing of medical causation. Respondent states that "It is significant that the Fund's physician, Dr. Perry, apparently was not presented with information about the stress and fatigue factors, since nowhere in his letter does he mention Mr. Steward's schedule, his lack of sleep, or the effects on him of the adverse weather conditions he experienced while driving to Denver." (Respondents Brief page 14)

Appellant believes that this conclusory statement by Respondent is overly presumptuous. That is to say, just because Dr. Perry did not refer to certain factors certainly does not mean that the factors were not considered. Rather, it merely indicates that Dr. Perry did not believe that industrial stress factors - if any - played a part in causing Steward's death. Moreover, perhaps the reason for Dr. Perry not referring to any adverse weather is because the police report indicated that the road was dry and

there were no adverse weather conditions. (R.99,100)

Further, in concluding that Steward's death was caused by the stress conditions surrounding his workplace, the Administrative Law Judge took judicial notice of a chart allegedly constituting "consensus medical opinion that stress, fatigue and stimulants are all common precipitating causes of cardiac arrhythmia." (R.287)

While Appellants have contended in their principal brief that it was error for the Administrative Law Judge to take judicial notice of the chart to establish medical causation, Respondent maintain's that Rule 201 of the Utah Rules of Evidence permits her to do so.

Specifically, Respondent sets forth as follows:

Rule 201 of the Utah Rules of Evidence provides that a court may take judicial notice of adjudicative facts "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." (Rule 201)(b)(2)

* * *

Although Rule 201 provides a mechanism for the Fund to be heard with regard to the Administrative Law Judge's taking of judicial notice, the Fund made no request to be heard and should not be allowed to complain at this stage of the proceedings that it could not object to the material.

(Respondent's Brief at page 15-16)

It is the Fund's position that Rule 201 does not encompass taking judicial notice of the chart referred to by the Administrative Law Judge. In the Findings of Fact, Conclusions of Law and Order, Judge Sumsion stated, "The Administrative Law Judge has not made any extensive research of medical literature relative to the causes of cardiac arrhythmias. He has reviewed, however, a

commentary on cardiac arrhythmia's..." (R.272) The commentary reviewed by the Judge has a copyright date of 1968.

The Fund believes that the twenty year old commentary on cardiac arrhythmia's is a source whose accuracy can reasonably be questioned, and therefore, the chart does not fall within the ambit of Rule 201.

Further, Respondents argument that the Fund should be precluded from objecting to the chart at this late stage of the proceedings is misplaced.

The Fund first received notice of Judge Sumsion's reliance on the chart in his Findings of Fact, Conclusions of Law and Order which was entered on May 28, 1987.

On June 12, 1987, at its first opportunity, the Fund, in its Motion for Review, alleged error on the part of Judge Sumsion for taking judicial notice of the chart.

In further support of its position that judicial notice was properly taken, Respondent cites the 1921 Utah case of North Beck Mining Company v. Industrial Commission of Utah, 58 Utah 486, 200 P.111 (1921).

North Beck Mining is clearly distinguishable from the case at bar. While the situation at hand involves an internal failure injury and the highly technical issue concerning the medical cause of the internal failure, North Beck was concerned with the degree of impairment of an employee who had lost use of his hand. While medical expertise is required to determine the medical cause of an internal injury, no such expertise is required to take notice that

a miner who has lost use of his hand has incurred a substantial impairment.

Respondent further states that "[e]ven if this court disregarded Dr. Heilbrun's opinion and determined that the Administrative Law Judge improperly took judicial notice of the reference material, Mrs. Steward has provided sufficient evidence to establish medical causation." (Respondents Brief at page 19) Respondent makes this statement and is then silent as to what other sufficient evidence has been provided to establish medical causation. Appellant is aware of no such evidence.

Respondent further relies upon the Colorado case of Industrial Commission v. Havens, 314 P.2d 698 (1957). Havens is distinguishable from the case at bar inasmuch as there was very strong circumstantial evidence indicating a causal relationship between the injury to Havens and his work.

Inasmuch as Mr. Steward had a preexisting condition as well as other risk factors, no such circumstantial evidence is present in this matter. Moreover, in Havens the facts were completely undisputed whereas in the present situation, there are factual disputes such as the weather conditions in which the decedent was driving. The Fund believes that the Colorado case of Industrial Commission v. Hesler, 370 P.2d 428 (Colo. 1962) is more representative of the case at bar than is Havens. In Hesler, the court set forth as follows:

[1] In fatal "heart" cases the claimant must show that an accident or overexertion proximately caused the death of the employee. In the instant case the record fails to disclose an accident in the "slip and fall" sense of

that word, and for that reason alone is distinguishable from Industrial Commission of Colorado v. Havens, 136 Colo. 111, 314 P.2d 698, where deceased suffered a blow from a handcar, and Marotte v. State Compensation Insurance Fund, 145 Colo, 99,357 P.2d 915, where the employee suffered a non-fatal heart attack shortly after an automobile accident. Being unable to show any such "accident", it devolved upon this claimant to establish overexertion.

370 P.2d at 431

Finally, the Fund is of the firm belief that error was committed by not referring the medical causation issue to a medical panel. While Section 35-1-77, Utah Cod Annotated (1953, as amended) contains discretionary language allowing the Commission to refer matters to a medical panel, Respondents believe, as set forth in its principal brief, that this discretion was abused. Moreover, the Industrial Commission's own Rules and Regulations indicate that the medical causation issue must be referred to a medical pane. Workers Compensation Rule 1.2.33 sets forth, in part, as follows:

1.2.33 GUIDELINES FOR UTILIZATION OF MEDICAL PANEL

(a) A panel will be utilized where:

2. In the opinion of the Commission the medical issues are so intertwined with the events that a determination of whether an accident has occurred cannot be made without first resolving medical consideration. (emphasis added)

Inasmuch as the medical issue of causation herein is closely tied to the events surrounding the injury/death, it is necessary that the issue by submitted to a medical panel.

CONCLUSION

Because the findings of the Industrial Commission are not supported by the record, the findings are arbitrary and capricious, and the Order of the Industrial Commission must be overturned and compensation benefits denied. In the alternative, the issue of medical causation should be submitted to a medical panel.

DATED this 22 day of April, 1988.

/s/
James R. Black

/s/
Kevin M. McDonough

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the above and foregoing Reply Brief, was mailed, postage paid, on the 22 day of April, 1988, to the following:

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