

1940

# Tony Pecharich v. The Industrial Commission of Utah and The Independent Coal & Coke Company : Brief of Appellant

Utah Supreme Court

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Gaylen S. Young; Attorney for Applicant;

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No. 6242

In  
The Supreme Court  
of the  
State of Utah

TONY PECHARICH,  
Applicant and Appellant,  
vs.

THE INDUSTRIAL COMMISSION  
OF UTAH and THE INDEPENDENT  
COAL & COKE COMPANY, a Cor-  
poration,  
Defendants and Respondents.

BRIEF OF APPELLANT

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TONY PECHARICH,  
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BRIEF OF APPELLANT

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STATEMENT OF FACTS

Since there were three hearings in this matter it will be necessary when referring to the transcript in this brief to designate which transcript is referred to. Therefore, when the term of "Tr." is used it is understood that the transcript of the first hearing is referred to and when the term "2nd Tr." is used it is understood that it refers to the tran-

script of the second hearing and when the term "3rd Tr." is used it is understood that it refers to the transcript of the third hearing.

Tony Pecharich was a track layer for the Independent Coal & Coke Company. He used some kind of an instrument called a rail bender to bend the tracks. (Tr. 7).

On August 6, 1937 about 11:30 A. M. of said day, about one year after he started to work for said coal company, he was engaged on a track attempting to bend a rail with the rail bender when the rail crystalized and broke. He had his whole weight in use at the time of the breaking of the rail, which caused him to fall backwards upon the rail. His spine, from the buttocks to the neck, came into contact with said rail. He was in the mine at the time and his light went out. The man who was helping him jumped and pulled him to the side and asked him if he got hurt. He was dazed and temporarily knocked unconscious. Some water was given him and after some little while the mine foreman took him outside the mine. (Tr. 6, 9, and 10).

He told the mine foreman that he believed he could make it to his house, which was 3 or 4 blocks away. He was not able to see the doctor until about 5:00 o'clock that evening. He was taken to Dr. Roy W. Robinson, the company doctor, who examined the applicant and found his back bruised and tender in the lumbar sacral region. He strapped up applicant's back, after which applicant was taken home. (Tr. 11, 38 and 39).

The applicant from that time continued to suffer with pains in his back, both in the lower and

upper part. After about a week, namely on August 13, 1937, Mr. Pecharich returned to work on the advice of Dr. Robinson. However, he continued to suffer with pain and found it hard for him to carry on his work. He received some assistance, but the foreman from time to time complained about his not being able to do the work and on or about February 1, 1938 he was discharged by the defendant company. The applicant has never been well since the accident. (Tr. 27 and 2d Tr. 9, 10, 16, 17, 23, 24 and 27). After this Dr. J. C. Hubbard attended him and treated him for rheumatism. The applicant was told that he was suffering from rheumatism, but owing to the fact that he had an impression that rheumatism was not compensible he did not make application for compensation before the Industrial Commission immediately. It seemed that Dr. Hubbard could not find out the real cause of the continued suffering of the applicant. He sent the applicant to Salt Lake where he was examined by doctors, but it was not until the spring of 1939 that any X-rays were taken. The applicant was advised some time before to get X-rays, but he did not have any money to pay for them. Finally, however, through the efforts of Dr. Harrow, at Salt Lake, the defendant company agreed to stand the expense of X-rays. It was after the X-rays were taken and it was discovered that the applicant was suffering from hypertrophic osteo arthritis of the dorsal and lumbar spine that the applicant made application to the Industrial Commission for compensation. The date of the application was May 26, 1939. About the same time the applicant called on and was examined by Dr. A. K. Bramwell, a chiropractor at Price and Dr. George

A. Wilson, a chiropractor at Salt Lake City. These two chiropractors found that he was suffering from a sub-luxation of the spine caused by trauma. Both of these chiropractors testified that in their opinion the applicant's present condition is a result of the injury sustained. (Tr. 55 and 3rd Tr. 45). There were also X-rays taken to ascertain the condition of one of the applicant's elbows and knees. These did not show any evidence of arthritis in those joints.

The employment by the defendant company was admitted. It was also admitted that the injury took place and that the wages of the applicant were an amount sufficient to entitle him to maximum compensation if the case is compensable. There is no dispute about the fact that the applicant had four minor children at the time of the accident.

The hearings were not had before the commissioners or any of them, but were had before what is called by the commission in their decision an "examiner." The commission found that applicant is, and has been, suffering from hypertrophic osteo arthritis of the dorsal and lumbar spine and has since February 4, 1938 been totally disabled as a result of said arthritis. They further found that the disability was not caused and that the cause thereof was not proximately contributed to by the accident. On January 25, 1940 the commission denied applicant's claim for compensation and within 30 days thereafter a motion for rehearing was made on behalf of the applicant, but on February 26, 1940 said motion was denied by said commission.



STATEMENT OF ERRORS UPON WHICH  
APPLICANT RELIES FOR A REVERSAL  
OF THE DECISION AND JUDGMENT OF  
THE INDUSTRIAL COMMISSION:

1.

That the commission erred in denying applicant's application for compensation.

2.

That the commission erred in deciding that said arthritis was not caused or proximately contributed to by the accident.

3.

That the commission exceeded its authority and had no power to appoint an examiner to hear the evidence.

4.

That the so-called examiner had no authority to administer oaths.

5.

That all of said hearings before said examiner were void and of no effect because of lack of jurisdiction.

6.

That said commission erred in denying applicant's motion for rehearing.

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ARGUMENT

Errors listed as one and two will be discussed together.

The applicant claims that the Industrial Commission in denying compensation acted arbitrarily and capriciously and that its decision is a result of surmise. It is the writer's purpose to show this

Court that reasonable men, if doubts are resolved in favor of applicant, could not differ on the question that the accident if not causing the applicant's present disability, at least lighted up and aggravated an arthritic condition which previously existed.

Is there any substantial evidence to show that the accident did not cause or aggravate the disease other than opinion evidence? One can search the record and he will find none. Dr. Ralph Richards seems to be quite positive in his own opinion that the accident had nothing to do with the applicant's present condition. This, however, is only his opinion. The physical facts to the eyes of any layman show that he is in error. One may testify that this paper is black. He may be an expert on paper and through some error or misconception still testify that this paper is black when in truth and in fact it is white. The physical facts from all of the surrounding circumstances may prove the error of such a statement. Dr. Richards is not a bone specialist and he so admitted, although he has had many bone cases as any general practitioner would. At the same time he has not specialized in the bone.

Is there any substantial evidence to show that the accident did cause or aggravate the disease other than opinion evidence? The transcripts are filled with such evidence. Tony Pecharich testified that he was well before the accident. Josephine Pecharich, his wife, testified that outside of the time he had flu and was sick a little bit in 1918 that he has never been sick. That prior to the accident he had never suffered from any pains in the back and that before the accident he never suffered

from rheumatism. Mary Palady and John Palady testified to the same affect. (Tr. 68 and 70). Charles Bezyack, who has known the applicant for 15 years, said that prior to the accident, to his knowledge, that Tony Pecharich never had rheumatism and that he was well and a hard worker and that before that time he never complained of his health. (Tr. 97). Joe Kochevar said that he has known the applicant for 10 years and that prior to August 6, 1937 he was in good health. (Tr. 101). Mark Patrick testified that before the accident the applicant's health was good. (2d Tr. 8). Mrs. Millie Pascual testified that she knew the applicant for three years and that before the accident he was engaged in hard work and was a fairly stout man and that she often wished her husband was as stout as he was. (2d Tr. 22).

All of these witnesses also testified that ever since the accident Mr. Pecharich has not been well, that he has been suffering and has continued to go down hill physically. There is no substantial evidence from any of the other witnesses that the applicant was not in good health before the accident. Mr. James Collins, who at the time of the hearing and at the time of the accident was an employee of the defendant company, testified that Mr. Pecharich was slower than the rest of them in his walking and that when he sat down to work he put his legs under him. He said he thought that was peculiar because *he* did not do it. (3rd Tr. 56 and 57). This could not be considered very substantial evidence for the reason that Collins is an employee of the defendant company and could have easily been mistaken concerning the time when he saw him walk and sit. No doubt when he saw this it was after the accident when he came back on the job. Dr. Hubbard said something about the fact that he treated him for rheumatism before the

accident, but on further examination it was brought out that he had the impression the accident happened in September, 1938 instead of 1937. He also testified that he took out Mr. Pecharich's teeth, but he, no doubt, is in error on this point because of the fact that Mr. Pecharich testified that he was in Nevada at the time his teeth were taken out in 1935. (Tr. 72 and 106). The evidence shows that the illness and pain of the applicant has been continuous since the accident. The defendant company has not shown any other thing that has caused his present condition.

A case which seems to the writer to be in point on this question is

Andreason et al. v. Industrial Commission  
et al., reported in 100 P. (2d) 202

and decided by the Supreme Court of Utah on March 13, 1940. In that case the applicant had been suffering from a disease which came on while he was employed by the Colorado By-Products Company. This Court reversed the Industrial Commission's denying of compensation on the theory that it was affirmatively shown that the applicant had no outside contacts with diseased animals or diseased matter and that since he was working for a company where those contacts might have been had that the presumption was that the disease was caused while in the course of his employment.

The writer does not think that this Court will sustain a rule that all the defendant has to do is to get a doctor to testify positively that in his opinion the accident had nothing to do with the applicant's present condition, in order to be entitled to a denial of compensation; not when the glaring and outstanding facts show otherwise.

A case interesting on this point is one entitled  
 Wroten v. Woodley Petroleum Company  
 decided in the State of Louisiana in  
 1929 and reported at 124 So. 542:

Plaintiff was injured June 18, 1928 by falling  
 a distance of about eight feet. He bruised his side,  
 back and right shoulder and continued to suffer  
 pain. Compensation was paid to August 1, 1928.  
 It was later discovered that plaintiff had arthritis  
 and the court looked as to the state of plaintiff's  
 health before the accident.

The following was said by the Court on page  
 543:

"We realize that the mere fact that a work-  
 man has sustained an injury which pro-  
 duces immediate disability is found some  
 time after the accident to be afflicted with  
 a disease, which may have resulted from  
 the accident, does not raise any presump-  
 tion that the accident caused the disease;  
 however, when, in addition to the circum-  
 stances stated, it is shown that the work-  
 man was in good health prior to the  
 accident without any symptoms of dis-  
 ease, and that the illness or pain immedi-  
 ately following the accident had been con-  
 tinuous, *we think the presumption should  
 be that the accident caused the disease, and  
 that the workman is entitled to compen-  
 sation for the resulting disability.*"

The judgment was affirmed.

Another Louisiana case

Patrick v. Grayson & Yeary et al, decided  
 in 1930 and reported at 127 So. 116,

the plaintiff was injured by a strain when attempting to crank an engine. The Court held that an arthritic condition had been accelerated and plaintiff was entitled to compensation for disability partly caused by the arthritis.

As to when a witness may not be disbelieved or disregarded is set forth in the case of

Rukavina et al v. Industrial Commission,  
decided in the Supreme Court of Utah  
in 1936 and reported at 248 P., page  
1103.

On page 1106 the Court states as follows:

“The contention made is in the affirmative, but that the commission arbitrarily disbelieved and disregarded such testimony, especially the testimony of the mother and of one of the children. It may readily be conceded that on a trial of issues of fact the commission, like any other trier of fact, whether court or jury, is the sole judge of the facts, and the credibility of the witnesses, and the weight to be given their testimony; still, like a court or jury, the commission is required to take as true undisputed or uncontradicted testimony or evidence, *if not opposed to probabilities or common knowledge, or not contrary to natural or physical law, or inherently improbable, or inconsistent with facts and circumstances in evidence, or contradictory in itself, or the witness from whom comes the testimony impeached or otherwise discredited, or the testimony comes from those indirectly interested, and from the nature of things it is impossible to secure opposing testimony, as where a witness testifies that a person made a statement or declaration*

not in the presence of anyone except the witness and since deceased. If one of these, or an equivalent, is made to appear, of course the testimony of a witness may not be disbelieved or disregarded. In other words, the commission may not, any more than a court or jury, arbitrarily or capriciously disbelieve or disregard testimony or evidence."

In the case of

Milford Copper Co. of Utah, et al. v. Industrial Commission et al., decided in the Supreme Court of Utah in 1922 and reported at 210 P., page 993, 61 Utah 37,

the term "substantial evidence" is defined on page 994 as follows:

"By 'substantial evidence' is not meant that which goes beyond a mere 'scintilla of evidence,' since evidence may go beyond a mere scintilla and yet not be substantial evidence. Substantial evidence must possess something of substance and relevant consequence and not consist of vague, uncertain, or irrelevant matter, not carrying the quality of proof or having fitness to induce conviction. Substantial evidence is such that reasonable men may fairly differ as to whether it establishes plaintiff's case, and, if all reasonable men must conclude that it does not establish such case, then it is not substantial evidence."

This case was one where the deceased was hurt by being jerked down the incline of a stope. He at once became sick and became progressively worse until he died some time later. The physicians testified that he died from pneumonia and

that this rarely develops in a short time from trauma. Their testimony was further that it was not impossible for it to do so. In sustaining the award of the Industrial Commission the Supreme Court said:

“From the evidence disclosed by the record here no just inference can be drawn but that an injury from accident either was the sole cause of lobar pneumonia or that it so accelerated that disease that ultimately death ensued. Upon either theory claimants were legally entitled to an award.”

In the case of

Roussel v. Colonial Sugar Co., Louisiana  
(1933); 147 So. 75,

plaintiff suffered from a fall on June 11, 1930 resulting in a fracture of the left wing of the sacrum and an injury to the lumbar spine. He was treated and paid compensation until November 18, 1930, when he was pronounced cured and ordered to return to work. He was given light work and performed that work until May 2, 1931. He learned that he was going to be laid off with others in the plant. On May 25, 1931 he made application for compensation. On April 30, 1931 X-rays were taken and it was found that the plaintiff had hypertrophic arthritis of the spine. The defendant's medical testimony was to the effect that when plaintiff returned to work in November, 1930 he was completely healed. The Court held that the

“preponderance of the evidence shows that the arthritis was the result of the injury and, therefore, plaintiff is entitled to recover.”



The lay evidence showed plaintiff was well before the accident but since the accident he constantly complained of pain and ill health.

In the case of

Behan v. John B. Honor Co., Ltd., et al.

(Louisiana, 1918); 78 So. 589,

plaintiff injured himself by falling into a river upon some wooden piling. The defense was that the disability of plaintiff was not caused by the accident but was the result of a disease that was in his system before the accident. There was evidence that the plaintiff after the accident was suffering from locomotor ataxia and medical evidence was that

“an accident such as the one on which this suit is founded could not, of itself, have produced that disability. But it also appears from the expert testimony that the one and only disease that does cause locomotor ataxia can remain dormant and undiscovered in the human system a very long time.” . . . There is no proof in this case that the plaintiff would be now or ever disabled by locomotor ataxia if the accident he complains of had not happened. On the contrary, until the accident he was apparently in ordinary sound health,” . . . “The injuries he suffered by the accident, and the immediate change in his physical condition, leave no reasonable doubt that the accident superinduced, and was the proximate cause of, the disability of which he complains.”

Judgment for the plaintiff was sustained.

In the case of

Gable v. State Commission, decided in West Virginia in 1932, reported 162 S. E. 314,

compensation was refused by the State Compensation Commission on the ground that the applicant's disability was not caused by the injury.

February 6, 1931 the applicant was pinned under a load of coal. His sons lifted it off of him and after lying down for a while he resumed, and continued his work for about 30 days when he became unable to work longer. It is the evidence that, while he worked after the injury he was unable to do as much work as formerly a month or more after the accident. X-rays were taken and it was found that there were no bones fractured in shoulder or back where he claimed to be suffering but that he was suffering from arthritis. The doctor found no external marks of injury in March following accident. One doctor (the company physician) testified that the injury could cause arthritis.

The Court remarked that the applicant was able bodied before the accident, had been working for the company for six years without the loss of a day on account of sickness.

The Court held the applicant was entitled to all reasonable inferences in his favor and reversed the commission.

In the case of

Sunnyside Mining Co. v. Industrial Commission et al, 151 N. E., 238 Supreme Court of Ill (1926),

the applicant was injured by being pushed against the side of a wall by a car in a mine. There was some question in the case whether or not there had been an accident at all. The mine clerk testified that the applicant had said he was off from work a short while because of rheumatism and had not mentioned an accident. The commission, however,

held that he had an accident and awarded compensation. The doctor testified that in his opinion applicant had a long standing arthritic condition all up and down his spine and further that it was not due to trauma. However, the Supreme Court sustained the award on the ground there was sufficient evidence that the injury aggravated the condition.

In the case of

Hanlon v. Gulf Refining Co. et al, Penn.  
(1934), 175 Atl. 724,

plaintiff injured his knee by falling. It was found he was suffering from arthritis after the accident and he became totally disabled. There was very little, if any, medical testimony. The Court said,

“However, in cases of this character, proof of the relation of cause and effect as to the accident and *the bodily condition does not depend entirely upon professional testimony, whether of fact or of opinion,*”

. . . . Quoting Baldrige the Court said: “Taking into consideration the plaintiff’s condition before and after the accident, his claim was strengthened by the natural sequence of events.”

Judgment for plaintiff was affirmed.

In the case of

Bryant v. Department of Labor and Industries, Supreme Court of Washington (1933), 22 Pacific (2d) 667,

the plaintiff was injured on November 25, 1930. He was paid compensation from time to time up to the early part of 1931. In that year, after complete examination by three doctors appointed by the board, they recommended that the claimant had already received adequate compensation for any disability resulting from his injury. They dis-

covered an arthritic condition of the spine, but reported that it was not caused by the injury.

On January 11, 1932 the Department of Labor and Industries refused to make any additional award. It seems that there had been six doctors who testified that the arthritis was not due to the injury. Two doctors, however, testified that the arthritic condition in the spine, appellant never having suffered such pains prior to injury, was due to the injury. An appeal was taken to the Superior Court. This Court reversed the board's ruling and allowed additional awards. An appeal was taken to the Supreme Court. The Supreme Court commented on the fact that one of the doctors testified that "when the arthritic condition was strictly local and not general in the bony joints of the body, he did not consider it caused by focal infection, but that his personal opinion was that it was due to the injury."

The Supreme Court held that the Superior Court was

"warranted in accepting the evidence of a few expert witnesses as to the cause and degree of disability as against several."

The judgment of the Superior Court was affirmed.

In the case of

Ray v. Department of Labor and Industries,  
Supreme Court of Washington,  
(1934), 33 Pac. (2d) 375,

the plaintiff was injured February 13, 1933 in the region of the right hip. He was granted compensation from February 19, 1933 to May 10, 1933. On the last named date the claim was closed by the

board. The Superior Court reversed the board and an appeal was made to the Supreme Court.

The Supreme Court said that there is but

“one question presented upon the appeal, and that is whether Ray’s disability was due to the injury or a pre-existing arthritic condition, and this is purely a question of fact. The evidence shows that, at the time he sustained the injury, he had an arthritic condition which was dormant or latent, and that the injury caused this to become lighted up and made active.”

The Court further said:

“The fact that the claimant, at the time of the injury, had an arthritic condition which was dormant and inactive, would not justify the refusal of compensation. If that condition was lighted up and made active by the injury, then the condition was the result of the injury, and not of the previous arthritic condition.”

The judgment of the Superior Court was affirmed.

In the case of

Brittain v. Department of Labor and Industries, Supreme Court of Washington (1934), 35 P. (2d) 49,

on November 7, 1930 the plaintiff was injured, but got better and his case was closed on December 30, 1930.

On April 2, 1932 he received another injury. He appealed to the Department for compensation. Some compensation was granted but the case later closed on the theory that he had a pre-existing con-

dition of osteo-arthritis to which, it was claimed, his present condition resulted. The Superior Court then had a hearing and reversed the Department, whereupon the board appealed to the Supreme Court.

The Court said in its opinion, among other things:

“The appellant seems to have relied almost exclusively upon the reported testimony of its assistant medical adviser to the effect that respondent had the pre-existing disease of arthritis, which, in his opinion, was the cause of respondent’s disability. His conclusion rested largely on an examination he claims to have made of which he says that the arthritis was caused by infected tonsils, pyorrhea, and enlarged postate, which induced infection of the gland. *His testimony and conclusions were essentially and directly contrary to all the other testimony.*

The record shows that respondent weighed about 180 pounds. He testified that he was forty-five years of age, had worked hard all his life, the last six years as a logger — bucking logs in the woods — and before that had been a farmer; that prior to his first injury he never had a pain in his back, nor suffered from rheumatism in any part of his body; that he had never had any disease, nor been confined in the hospital; that after his injuries, especially the second one, he got worse and soon was unable to do a good day’s work, even in his garden, and that one hip and leg became weak, and that

such disability was caused by his accidental injuries.”

The judgment of the Superior Court was affirmed.

In the case of

McQuire v. Department of Labor and Industries, Supreme Court of Washington (1934), 38 P. (2d) 266,

the plaintiff was injured by some sort of strain while working with a 125-lb. jack-hammer. At the time he had an immediate pain in the upper lumbar vertebrae. He said that is the only trouble he had.

The claimant was sent by the Department to physicians to be examined, and these physicians reported that claimant had an arthritic condition of the spine. Their testimony was in effect that his present condition had nothing to do with the injury. After the reports were in, the joint board sustained the action of the Department in closing the claim. It was appealed to the Superior Court, which sustained the Department's decision. The evidence showed that the arthritis was progressively getting worse. The following is taken from the case:

“Prior to the accident, the claimant had engaged in the hardest kind of manual labor, such as pushing a wheelbarrow filled with cement up an incline, which work he did without suffering any pain or inconvenience. He was, even though fifty-two years of age, robust and vigorous. As to his previous condition, the claimant is supported, not only by the testimony of his wife, but by the testimony of two disinterested witnesses. The medical testimony, so far as it touches the question, is



that, if the claimant's arthritis had been active, manual labor would have caused him to suffer pain in his back.

The medical testimony offered by the claimant was to the effect that, prior to the accident, the arthritic condition was dormant or inactive, and that it was lighted up and made active by the accident. The physicians generally seem to agree that in many persons of the age of the claimant there is an arthritic condition which causes no inconvenience until something happens which causes it to become active. Five or six doctors who had examined the claimant, either by report to the Department or testimony before an examiner, gave it as their opinion that the claimant's condition was the result of the prior arthritic condition, and that had it not been for that condition his disability would have been for a comparatively brief period of time. None of these doctors, however, express any opinion upon the vital question of fact in the case, and that is, whether the arthritic condition prior to the accident was active or inactive. In answering questions as to the extent of the partial permanent disability resulting solely from the injury, had there been no pre-existing arthritis, the doctors necessarily, not only passed upon a question of fact, but upon a question of law. Without knowing their opinion on the matter of whether the arthritis was active or inactive prior to the injury, their reports and testimony do not reach the real question in the case. We find no evidence in the case bearing upon the ques-



tion, which overcomes the evidence offered by the claimant, from which it would seem to irresistibly follow that the arthritic condition prior to the accident was dormant or inactive."

The judgment of the Superior Court was reversed and the cause remanded to that Court to overrule the order of the joint board of the Department and to allow the claim.

In the case of

Oklahoma Gas & Electric Company, et al.  
v. Slocum, Supreme Court Oklahoma:  
(1932), 15 P. (2d) 29,

the applicant was injured on April 29, 1930 by stepping off a barrel with a 75-lb. steam valve. He had the steam valve on his shoulder and walked down sort of a stair made of barrels, each stair being waist high. When he stepped on to the cement floor from the last barrel he noticed a pull or strain of his left thigh. He continued work that day and until 12:00 noon the following day.

There was considerable testimony to the affect that the applicant did not claim to be hurt, claiming that the pain began in the night. He was hospitalized for 66 days and was later awarded considerable compensation. There were a great number of doctors who testified that he had arthritis in the left hip caused by infection unrelated to trauma. One doctor, however, testified that he attributed the cause of Slocum's disability to infectious arthritis occasioned by trauma resultant from the act of walking down the barrel stairway.

The Supreme Court sustained the award of the Industrial Commission.

In the case of

Consolidated Coal Co. of St. Louis v. Industrial Commission et al., Supreme Court of Ill. (1924), 142 N. E. 498, applicant was well before the accident which occurred on January 29, 1921. When pushing a coal car he fell in such a manner as to strike his spine on a bumper. Radiographs showed osteo-arthritis of the spine and the physicians testified that the condition was of several years standing, and that trauma might excite a dormant diseased condition.

Judgment for applicant affirmed.

According to the case of

Carlson v. E. H. Shelson & Co. et al., decided in the Supreme Court of Michigan, 1933 and reported at 251 N. E. 369,

the defendant has to show by competent testimony that the applicant after the compensible injury is no longer incapacitated. In that case plaintiff's arm was struck by a board and it was injured. He went back to work after being paid compensation and was later laid off work. He made application for further compensation to the Department of Labor and Industry. Compensation was denied. It developed that he had arthritis in the region of the elbow. The Supreme Court reversed the Department of Labor and Industries saying:

“We do not believe that there is any testimony showing that plaintiff is no longer incapacitated as a result of his original injury.”

Since Dr. Richards' opinion was that there was

no evidence to show that his present condition was a result of the injury, the case of

Perry Coal Company v. Industrial Commission et al., Supreme Court of Ill. (1928), reported 163 N. E. 681,

is an interesting case to show that lay testimony sometimes overcomes that of medical testimony. Plaintiff was injured by falling on a tie. Doctor contended there was no evidence of injury. The Court said:

“The testimony of Roberts as to his injury and as to his inability to work since October 18, 1924, is not overcome by the testimony of the witnesses . . . that their examination disclosed no physical evidence of an injury.”

Examination showed the applicant had hypertrophic osteo-arthritis, with fixation of all his lumbar vertebrae. The applicant was doing his work before the accident but was totally disabled after the accident. The Court sustained the award for the applicant with this statement:

“The diseased physical condition of the employee is immaterial where the accidental injury is the proximate cause of his physical condition.”

Medicine is not an exact science, and even under those conditions, to get the best results some sort of process of elimination should be used. For instance in order to prove that a condition existing is a traumatic arthritis it is necessary that several joints of the body be X-rayed as well as the part involved. (3rd Tr. 24).

X-rays of the elbow and knee were taken and all the testimony shows that there is no arthritic condition there.

It is admitted that the most frequent cause of hypertrophic arthritis is not infection but trauma. (3d Tr. 18). Is it not probable that the trauma caused the increase of symptoms in this case?

If the decision of the Industrial Commission is a result of surmise it should be reversed. That is the holding of the Court on numerous occasions. What is the meaning of the word "surmise." Webster's dictionary states it as follows: "To imagine without certain knowledge; to infer on slight grounds; to suppose or conjecture." Should not the applicant be given the benefit of any doubts? The report of the referee referred to as No. 25 in the documents will be found a statement which is interesting in this respect. He states in the last paragraph of his report, "*I am frankly in some doubt about the matter. However, I think I should be inclined to a denial were I called upon to make the decision myself.*" Thus it appears clearly, that so far as those recommendations are concerned the referee is giving not the plaintiff but the defendant the benefit of the doubt.

Again I call the Court's attention to the fact that before the accident Mr. Pecharich was an able bodied and strong man. After the accident he could not do the work properly. (Tr. 13 and 14). He worked regularly before the accident and was healthy for about 25 years. (Tr. 24, 25, 26, 27, 42, 47, 68, 69, 97, 101 and 102; 2d Tr. 7, 8, 21, 22, 27 and 34). He was very seldom out of work since 1912. He did hard physical labor and had never been sick except in 1918 when he was out of work about eight days because of flu. (Tr. 27). He never had rheumatism in his life before the accident. (Tr. 27, 68 and 107). Charles Bezyack, who had been secretary of the Austrian Lodge, said

that he has known the applicant for fifteen years and he never had rheumatism before August 6, 1937 and that he did not report through the Lodge, while he was secretary, which was at least during the year 1937, that Pecharich had rheumatism. (Tr. 96, 97 and 98). Dr. A. R. Demman testified that in his opinion the injury was the cause of applicant's present condition and that even though he had osteo-arthritis before the accident that the accident aggravated it. (Tr. 90). Dr. George A. Wilson and Dr. A. K. Bramwell testified to practically the same thing as stated above. Dr. Martin C. Linden, witness for the defendant, testified that

"If the trauma had been great enough, it is possible and most probable that a severe injury to the spine, without the presence of arthritis deformans, might cause it." (3rd Tr. 37 and 38).

There is no dispute about the fact that applicant received an injury to the spine of sufficient force to require it to be taped and to cause bruises and contusions.

There is no dispute about the fact that there was a subluxation of the vertebrae, in the atlas region, in the region of the fourth lumbar and in the region of the sacrum. (2d Tr. 45, 46 and 48).

Errors numbered 3, 4 and 5 are similar, therefore, they will be discussed together.

Section 42-1-11 of Compiled Laws of Utah,  
1933,

provides that the commission may employ "examiners." Upon reading that section it can be readily seen that it refers to the administrative work and not to the judicial work of the commission.

If they have power to appoint a third party to sit in a hearing for them it would no doubt come

under Section 42-1-29 of said compiled laws. That section provides that the commission shall have power to appoint agents for the "purpose of making any investigation with regard to any employment or place of employment." It does not provide for these agents to take evidence as referees in compensation hearings. Even though such authority was given by that section it does not appear from the files and records in this case either that such appointment was made by the commission by "an order in writing" as provided in said section, or that the referee before proceeding with the evidence was "sworn well and truly to hear and determine the facts" as provided in Section 104-27-7 of said compiled laws. The commissioners themselves and the judges have to be properly sworn to well and truly perform their duties. Why should a less obligation be placed upon the referee or examiner. He certainly could not carry much weight in attempting to deliver oaths. He had no authority to administer oaths as he did in this case. (Tr. 67 and 86).

Is not there a reason for the rule adopted by the Supreme Court that the Industrial Commission shall be triers of the facts? Is not this reason that they are, as in the case of any trial court, better able to get at the truth than would be the Supreme Court? The Supreme Court has only the written evidence before it while the triers of the facts can see and hear the witnesses, notice the tone of their voices, their gesticulations, expressions and demeanor upon the witness stand. In the case at bar none of the commissioners saw or heard a single witness. They were not in near as favorable situation to try the facts as is the Supreme Court. There were three of them as against five in the Supreme Court and then only two of those participated because Commissioner Knerr was ill. Then too, the

Supreme Court has the advantages of counsels' briefs whereas the Industrial Commission had none. It never was contemplated by the legislature that the Industrial Commission should delegate an examiner or referee to try its cases. It certainly did not contemplate cases being tried by an agent not under oath.

Thus it appears that the commission acted without authority in attempting to delegate its powers to a third party, its decision was capricious and as a result of surmise, there is no substantial evidence to support the decision, the great weight of evidence indicates compensation should be awarded and it should have granted applicant's motion for new trial.

Hence the applicant submits that the decision of the Industrial Commission denying compensation should be reversed.

Respectfully submitted,

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