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

Utah Supreme Court

Fabian, Clendenin, Moffat & Mabey; Attorneys for Respondents;

6242

In the Supreme Court of the State of Utah

TONY PECHARICH,
Applicant and Appellant,

vs.

THE INDUSTRIAL COMMISSION OF UTAH, and INDEPENDENT COAL AND COKE COMPANY, a corporation,
Defendants and Respondents.

No. 6242

Brief of Respondents

FABIAN, CLENDENIN, MOFFAT & MABEY,
Attorneys for Respondents.

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INTRODUCTION

Respondents will not attempt in this matter to make a statement of facts as such. Such a statement would result merely in duplication, inasmuch as the argument will consist almost solely of a summation of evidence. However, Respondents enter their protest again Appellant's alleged statement of facts being considered by the Court as such, and insist that it is nothing more nor less than a summary of certain parts of Appellant's case or evidence.

Seldom, if ever, have counsel for Respondents been before this Court on a matter wherein questions of law played so minor a part. The Industrial Commission had presented to it but one question of fact, namely: did the claimant's evidence show that his disability resulted from or was contributed to by his accident, or did Defendant's evidence show that there was no causal connection? The Commission found the latter, and under well established rules of law this Court is interested only in the question of whether or not such decision finds its support in competent evidence.

In attempting to avoid this limitation of the problem Appellant argues that medical opinion supporting Respondent Company's position may not be considered sufficient to overcome lay testimony as to the actual physiological effect of his injury. In other words, he claims that he was a well, strong man before the injury and that he suffered increasing disability following its date and that no amount of opinion evidence can overcome the necessary inferences from this fact. We answer the contention by waiving it, as we may properly do because Appellant argues from a premise not established by the record. The record contains definite competent evidence that claimant's condition was not that of a well man before the accident, and that there was no acceleration toward disability thereafter. Hence, the Commission was still confronted with the stated question, which it resolved, upon conflicting evidence, in favor of the employer. We conceive it our duty and substantially our sole duty to point out to this Court as concisely as possible the evidence in the record support-

ing the Commission's conclusion that Appellant's admitted disability has no causal connection with his admitted accident.

ARGUMENT

INDUSTRIAL COMMISSION DECISION SUPPORTED BY COMPETENT EVIDENCE

Appellant entered the employ of Respondent Company on or about October 15, 1936, (Defendants' Exhibit "E") being a little less than ten months prior to the accident in question, which occurred August 6, 1937. According to the mine foreman, George B. Jackson, it soon became apparent that he was unable to properly perform his work. The foreman thought at first it was because he was lazy, but found out afterwards that he was simply unable to do the job. This was apparent from the time he started to work until he was finally laid off about February 1, 1938. He was losing weight and this inability to perform his work was gradually becoming more pronounced, but significantly this decline and inability was no more marked or accelerated following the accident than before. (Tr. 60-3) (Method of Transcript reference same as Appellant's.) Apparently loss of weight had made itself evident even before claimant commenced work for Defendant Company. He testified that his normal weight was one hundred fifty pounds and upward. (2nd Tr. 33-4) Yet his employment card shows this weight as one hundred forty pounds at the time he came with the Defendant Company. (Defendants' Exhibit "E")

James Collins, a driver at the mine, formerly a face man, likewise testified as to claimant's existing disability prior to the accident. He walked slowly and with a limp and would leave his place of work earlier than the rest of the men in order to reach the man trip by the time they arrived. This condition existed before the accident, as well as after, and the witness could notice no difference in this respect. The shovel runners complained of his work and claimant himself complained of his inability to travel with much of a load. (3rd Tr. 53-58) In the face of this very definite and positive testimony by men in a position to know whereof they spoke, Appellant goes far in stating, as he does in his brief, that before the accident he "was an able-bodied and strong man."

Since Appellant's disability is admittedly caused by chronic hypertrophic arthritis of the spine, the testimony of these lay witnesses, showing a pre-existing and gradually developing disability, becomes most significant and it becomes even more significant when we examine the nature of his accident and resultant injury in the light of the medical testimony. As stated in his brief, claimant fell backward and struck his back on a rail. He received what Dr. Robinson described as a slight bruise or contusion. (Tr. 40 and 45) He returned to work at the end of a week, that is, August 13, 1937, and continued in his employment until early in February, 1938, when he was laid off by reason of slackening work and was not thereafter re-employed. (2nd Tr. 37) It is interesting to note how uniformly the doctors testifying in this case agreed that such an injury would

not, and even could not, cause, light up, or accelerate an arthritic condition of the spine such as afflicted claimant. This is the opinion of the Company doctors, Dr. Robinson (Tr. 41-2), Dr. Lindem (3rd Tr. 34, 37), the claimant's own family physician, Dr. Hubbard (Tr. 72, 79-81) and Doctors Richards and Tyree, (3rd Tr. 5, 7a, 8, 9, 17, 19, 20) appointed by the Commission to make an examination and report on its behalf at the request of attorneys representing the interested parties.

The only doctor who thought the accident accelerated the disease was Dr. Demman. (Tr. 89) He based his opinion on a hypothetical question which included the statement that claimant was healthy prior to the accident and he stated that the only way he could connect the condition with the injury was through the history of the case given him by claimant, (Tr. 90) which, it must be recalled, was a year and eight months after the accident. (Tr. 87) Significantly, Dr. Demman stated that whether the injury was of a mild or severe nature would affect his conclusion in this matter. (Tr. 92-3) We say significantly because testimony of the Commission's examining physician, Dr. Richards, shows most clearly circumstances under which trauma may or may not cause or accelerate osteoarthritis.

It is most difficult to pick out portions of Dr. Richards' testimony and thereby obtain the entire picture essential to an understanding of his conclusion in this matter. His statements and explanations, especially on cross-examination, are most enlightening. In brief, he states that this type of arthritis is slow in progress and

that claimant's case had undoubtedly been of some years standing with a gradual and constantly increasing disability. (3rd Tr. 9, 16) In order to charge an accident with an arthritic condition the accident must not only be of a severe or fracturing type, but it must directly injure the bony structure in which the arthritis develops. (3rd Tr. 10-12) This prerequisite he states is not found in the instant case, first, because the trauma was not severe and second, because the afflicted portion of claimant's spine, the forward or anterior, is one of the best protected portions of the body's bony structure, difficult of injury except by very severe trauma, of which injury there was here no evidence. (3rd Tr. 10, 11, 15).

Although Doctors Richards and Tyree were, upon stipulation of the parties, appointed by the Commission as its own examining physicians, Appellant attacks their findings on the basis that Dr. Richards is not an orthopedic surgeon. While he may not claim this as his specialty, he states: "Well, we have had in the office, the last time I looked up the figures, fourteen hundred forty cases of arthritis. I have seen quite a number of them since." Of this large number of cases he estimates that one-fourth involved the spine. (3rd Tr. 29) In view of this experience and earlier spine work as a bone specialist, Dr. Richards' qualifications and the weight to which his opinion is entitled seem rather definitely established. (3rd Tr. 11-12) Unfortunately, Dr. Tyree was out of town and therefore unavailable at the time of the final hearing. (3rd Tr. 29) But Dr. Richards testified "Dr. Tyree went over the case with me in detail, and agreed with everything that was said. He read the

letter and said he agreed with me 100%." (3rd Tr. 17) Since the Commission was requested to appoint for this examination an orthopedic surgeon, we may, without doing violence to the record, assume that Dr. Tyree was such.

Dr. Hubbard, who was the first doctor consulted by Appellant, following the termination of his employment with Respondent Company, testified at length as to Appellant's general condition, chargeable to and centering in arthritis of septic or toxic origin. (Tr. 72-4) It was some months after this consultation before he ever mentioned to Dr. Hubbard that he had received any sort of injury. (Tr. 71) Dr. Hubbard likewise clearly shows that this type of injury could have no causal connection with Appellant's condition. (Tr. 81)

The two chiropractors called by claimant testified that in their opinion there was causal connection between the claimant's disability and his accident. Other than the fact that this presents a conflict, we merely observe that according to these men arthritis is always the result of trauma and claimant's condition must have been caused by this or some other accident. Since they knew of no other accident they charged it to this. (Tr. 59; 3rd Tr. 48, 50) With their school of thought on this subject the Commission apparently did not agree.

It would appear significant that while Appellant testifies that his disability commenced in February, 1938, when his employment with Respondent Company ceased, he made no claim to the Commission or otherwise until

May, 1939, a year and three months later. It must also be kept in mind that Appellant continued in the same employment for six months after the accident and at the same job and pay. (Tr. 15) His explanation for delay in making claim is that he thought that he had rheumatism. With that we can not quarrel, and he probably still thinks the same, or at least should, since every doctor and chiropractor who testified stated that was and is his trouble. Hence, his change of attitude must be otherwise accounted for. Obviously someone suggested to him that the disability might be connected with an injury suffered by him back in August, 1937. In order to make a causal connection seem in the least plausible, it appeared imperative that the accident in question must have been of some substantial severity.

Appellant testified that he was knocked unconscious, that the man working near him, Jimmy Collins, revived him, and that the mine foreman, George Jackson, assisted him out of the mine. (Tr. 9-10) This story is positively contradicted by both Collins and Jackson. Collins testified that he did not even know Pecharich had suffered an accident until he came back to where Pecharich had been working, asked the shovel runner where the track man was and was informed that he got hurt and went home. (3rd Tr. 55, 58-9, 61-2) Jackson testified as follows:

> "A. All I know about it was, several days after he had been — after he was off — that they said he had fell or hurt himself. I didn't know it until I had to make out the report, the accident report.

Q. Did you have anything to do with getting him out of the mine or getting him to the doctor, or anything to do with him at the time of the accident?

A. No sir. I think he walked up.

Q. Did he ever report to you at any time that he was having any difficulty as a result of the accident, after he went back to work?

A. No sir." (Tr. 63)

Dr. Robinson said that as he recalled, Appellant had stated to him that the accident happened about eleven o'clock A. M., that he stopped work about an hour and a half later and then came out of the mine. (Tr. 38)

The foregoing discussion of the evidence has been largely confined to Respondents' case with the emphasis in relation to medical testimony on that of the non-Company doctors, since they cannot be charged with testifying in behalf or for the benefit of an employer. With conflicts this Court is not concerned, as it has stated in more than fifty of the Workmen's Compensation cases decided by it. We cite only two, one early, one late, to the effect that this Court can neither weigh nor review substantial competent evidence supporting findings of the Industrial Commission, since the Commissioners are the sole judges of the credibility of witnesses and weight of evidence.

Reteuna v. Ind. Com. 185 P. 535
55 Utah 258

Leventis v. Ind. Com. 35 P. (2d) 770
84 Utah 174

In fact, this Court has said that it may not in compensation cases direct what inference shall be drawn from the evidence, even when there is no conflict.

Parker v. Ind. Com. 5 P. (2d) 573
78 Utah 509

Appellant's brief has cited a number of cases which are in point only because they involve disability caused by arthritis, that is, in point because they deal with the same systemic disorder. The books are full of such cases. In fact the American Digest system devotes Section 1525 of its Workmen's Compensation topic entirely to such cases. Naturally these cases encompass various phases of legal learning applicable to arthritic disability, but there is no rule of law to be gleaned from them in any wise helpful to Appellant's position. The only Utah case is one in which this Court determines that the evidence is insufficient to support findings of the Industrial Commission that claimant was suffering from sacroiliac arthritis, resulting from accidental injury.

Maryland Casualty Co. v. Ind. Com.
278 P. 60, 74 Utah 170

For what it may be worth, we cite two of the cases from other jurisdictions. They have some value because they come from states in which, as in this, the findings of the Commission may not be questioned if supported by competent evidence. In the case of

Duchant v. Oliver Iron Mng. Co.
256 N. W. (Minn.) 905

the Court says, quoting from the syllabus:

"Evidence that employee's disability was due to progress of arthritic condition

of back and not to accident supported Industrial Commission's finding that employee was not entitled to compensation."

In the case of

Jackson v. Iowa Telephone Co., 179 N. W. (Iowa) 849, at page 851

the court says:

> "We said in the Hanson case, supra, at page 824 of 176 N. W. that there was 'some evidence sustaining the Industrial Commissioner's conclusion that the disease was lighted up or accelerated by the accidental slipping of the hammer from the chisel and striking complainant. * * * This being true, the courts may not interfere with such finding,' citing the Griffith case. Such is the situation here, except that the commissioner arrived at the opposite conclusion. The rule ought to be, and is, the same in either event. Any other rule would encourage litigants to bring the matter first before the arbitration committee, then to the Industrial Commissioner, then to the district court, then to the Supreme Court, for the determination of the credibility of the witnesses and the preponderance of the evidence, hoping that somewhere along the line a tribunal could be found that would differ, as the district court did, with the findings of the committee and commissioner, the tribunals established by law for the determination of such questions; so that instead of simplifying the procedure, and lessening litigation and expense, it would become more complicated and more expensive."

Appellant's brief rather specializes on Washington and Louisiana cases. These are in no sense helpful

since they are based on statutes entirely different from our own. As the Washington Court says in the case of

Johnston v. Dept. of Labor and Industries
2 P. (2d) 67

quoting from the syllabus:

> "On appeal to court from compensation award, court may determine questions of fact and modify or reverse award, in accordance with findings (Rem. Com. Stat. Supp. 1927, Sec. 7697)."

In Louisiana trial is by the court, not by Commission, and the Louisiana court says that the trial judge's conclusion in employer's liability case will be accepted where the evidence is evenly divided.

Baugh v. Scotland Lumber Co.
5 La. App. 348

INDUSTRIAL COMMISSION MAY HOLD HEARING BY REFEREE

Appellant attacks the jurisdiction of the Commission to appoint and conduct its hearing by referee. At the outset we remark that Appellant is now violating the well known rule of law prohibiting the raising on appeal of questions not presented below. In the case of

Ujevich v. Inspiration Cons. Copper Co., 33 P. (2d) 599,

the Arizona court says, quoting from the syllabus:

> "Objection for first time on appeal that Industrial Commission, after remand of case by Supreme Court, did not have a

formal hearing to determine matters required by mandate, held too late."

To the same effect we cite :

Benton Mining Co. v. Ind. Com.
151 N. E. (Ill.) 520

Schaefer v. Lowell-Krekeler Co.
49 S. W. (2d) (Mo.) 209

Utah does not seem to have passed upon this question in connection with Industrial Commission cases, but it is, of course, elementary as a principle applicable to appeals.

Malstrom v. Lund, 185 P. 1109,
55 Utah 353

Summit County v. Gustaveson,
54 P. 977, 18 Utah 351

Even the Utah Statute seems to contemplate that all questions shall be presented first to the Commission.

Revised Statutes of Utah, 1933, 42-1-24

The question of the right of the Commission to use examiners or referee was definitely passed on by this Court in the case of

Utah Copper Co. v. Ind. Com.
193 P. 24, 57 Utah 118

Certain sections of the statute referred to in the above case have been slightly modified but are still substantially the same. Compiled laws of Utah, 1917, Section 3100, and Laws of Utah, 1919, Section 3099 are now combined in Revised Statutes of Utah, 1933 as Section 42-2-5,

which was in turn amended in Laws of Utah 1939, at page 74. The Court, in the above case, also refers to Section 3149, Compiled Laws of Utah, 1917, which is now embodied in the Revised Statutes of Utah, 1933, Section 42-1-82.

It might also be well to keep in mind that this matter comes before this Court on certiorari and the scope of review must be considered. In the case of

Mill v. Brown, 88 P. 609
31 Utah 473,

the Court says, quoting from the syllabus:

> "While, on certiorari to review a judgment, the question of the judge's right to hold the office, whether by reason of the invalidity of the law under which he was chosen or appointed, or because of his want of the proper qualifications, cannot be considered, the question whether the law under which he acts, and on which the validity of his acts depends, is unconstitutional may be considered."

Appellant's brief gave to this question summary treatment and we believe it has been sufficiently covered herein.

In conclusion we submit that the decision of the Commission is amply supported by the record.

Respectfully submitted,

FABIAN, CLENDENIN, MOFFAT & MABEY,
Attorneys for Respondents.