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Benner J. Carling v. Industrial Commission of Utah and Consolidated Western Steel Division, United States Steel Corporation : Brief of Respondent

Utah Supreme Court

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SUPREME COURT
OF THE
STATE OF UTAH

BENNER J. CARLING,
Petitioner,

vs.

INDUSTRIAL COMMISSION OF UTAH and CONSOLIDATED WESTERN STEEL DIVISION, UNITED STATES STEEL CORPORATION,
Respondents.

Case No. 10177

BRIEF OF RESPONDENTS

REVIEW OF ORDER OF THE INDUSTRIAL COMMISSION OF UTAH

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STATEMENT OF THE KIND OF CASE

This is a proceeding before the Industrial Commission of the State of Utah for "acoustic trauma" claimed to have been sustained by petitioner as the result of an industrial accident in the course of his employment with respondent Consolidated Western Steel Division of United States Steel Corporation.

DISPOSITION BY THE INDUSTRIAL COMMISSION OF UTAH

The Industrial Commission of Utah found that the hearing loss of Petitioner was not caused by a single incident as claimed by Petitioner and denied workmen's compensation benefits.

RELIEF SOUGHT IN THIS PROCEEDING

Petitioner seeks a determination by this court that the order of the Industrial Commission is not lawful.

STATEMENT OF FACTS

Rule 75 (t) (2) amended November 15, 1955 and January 1, 1962 in sample outline of brief provides under Title "Statement of Facts":

> "The statement should be a concise but complete statement of the material facts. They should be stated, not merely as the appellant contends them to be, but viewed, as they must on appeal, favorable to the verdict of the jury (or the finding of the court)."

The "Statement of Facts" contained in Petitioner's brief does not comply with this general admonition in that it recites only "facts" as appellant contends them to be, eliminating all reference to relevant controverting evidence.

For this reason, we deem it necessary to re-state the facts as follows:

1. *Petitioner's general employment record.*

In 1941 Petitioner accepted employment as a welder helper with Pacific States Pipe Company at Ironton, Utah. He shortly thereafter obtained extensive vocational training in "pipe fabricating" and "welding" at Provo, Utah (Ex. 11, R. 192). Having thus been trained, he obtained employment with Midwest at Geneva, Utah as a pipe fabricator in 1942. This employment continued until he became employed as a "welder" for United States Steel Corporation in the open hearth department at Geneva (Ex. 11, R. 192). He was employed by numerous contracting and industrial firms over the years and at the time of the claimed incident, he was employed as a pipefitter performing steel erection work at Consolidated Western Steel Division of the United States Steel Corporation at Geneva, Utah (R. 3, 21-23).

2. *Type of work actually being performed at the time of the claimed incident.*

In the initial claim filed with the Industrial Commission, Petitioner stated (R. 2):

> "Using an air chipping gun to vibrate and pack sand in pipe (4 inch). Noise from this caused injury."

The pipe involved was 4 inches in diameter and 21 feet long (R. 128, 135). The pipes were stood on end against a scaffolding and sand poured in from the top to facilitate subsequent bending of the pipe. An air hammer was operated against each pipe as it was being filled with sand to vibrate and compact the sand into the pipe. This is a standard method used in the pipe bending process (R.

123-143). Photographs demonstrating this process are contained in Exhibit 11 at record page 191. Petitioner testified that he had been operating the air hammer against the pipes for from 20 to 25 minutes at the time of the claimed incident (R. 147).

3. *Employment of petitioner subsequent to claimed injury.*

In the initial claim, Petitioner admits that he was not required to leave work because of his claimed injury (R. 2). He continued his employment with Consolidated Westtern Steel Division until July of 1962 (R. 38, 157). He then became employed by P. & L. Company as a welder and continued in that employment until April of 1963 when he sustained a back injury which caused his unemployment (R. 38, 158). His employment following the claimed industrial accident continued to be "in a noisy place" (R. 28).

4. *The claim of Petitioner.*

On June 7, 1962, Petitioner filed with the Industrial Commission of Utah his application to Settle Industrial Accident Claim (R. 2). His claim was that on August 31, 1960, more than twenty-one months prior thereto, he sustained injury arising out of or in the course of his employment. He claims that while he was in the course of operating the air chipping gun against the pipe, the "general noise around the place", including that made by machines and trains, became "muffled". He testified that he then went straight to and advised his foreman that "I have had something happen. I can't hear" (R. 148). He then pro-

ceeded back to the job and exchanged places with the man on the top of the scaffold. Petititoner then poured the sand into the pipes and his helper performed the function of "beating the pipe" with the air hammer (R. 148).

Petitioner admitted in his discussions with examining physician Voorhees that he had sustained some hearing loss prior to 1945-46 and that his mother had had a hearing problem (R. 168-9). He did not disclose these facts to his own physician, Dr. Gray, at the time of Dr. Gray's examination although these factors might well have affected his diagnosis, particularly in view of the lack of objective standards and the fact that the study of hearing loss is not "a pure science" (R. 90, 92).

5. *Petitioner's hearing problems.*

The evidence demonstrating that Petitioner has sustained a hearing loss is uncontroverted. His hearing loss had commenced many years prior to the claimed industrial accident. Exhibit 1 (R. 163) demonstrates that Petitioner was found to have a 9% hearing loss on August 29, 1946. Exhibit 2 (R. 165) demonstrates that a 6.8% hearing loss was noted on January 1, 1947 and that he had been rejected by the "Department" on January 7, 1946. Petitioner had been advised of his hearing loss in the 1945-46 period. It had not been obvious to him and he was "surprised" to discover that some loss in fact existed. He ultimately was employed despite his hearing loss (R. 168).

No further audiograms were performed upon Petitioner until shortly after the claimed industrial accident (R. 122). An audiogram performed on September 6, 1960

demonstrated a 32% hearing loss (R. 20). Numerous other audiograms were performed between that date and October 17, 1961 which generally demonstrate that Petitioner's hearing gradually deteriorated following the claimed industrial accident (R. 6-18).

6. *Effect of noise upon hearing.*

Extreme noise can cause hearing loss. The following statements appear in Exhibit 9:

"* * *

"The effect of noise on hearing is a function of both exposure time and noise intensity. As noise intensity increases, the amount of daily exposure a person can stand without impairing hearing must necessarily decrease.

"The graph on page 162 gives levels in the 8 frequency bands and exposure times which should not be exceeded if the average person is not to receive some degree of hearing loss from long time exposure, say 25 years, to these noise levels. For noises containing discernable discrete frequencies such as a generator whine, the noise level values of these curves must be reduced by approximately 10 db as the ear is more sensitive to single tone noise than to broad band noise.

"To illustrate use of these curves, a person could stand on a street corner exposed to 80 db overall noise 8 hours a day, 5 days a week for 25 years without auditory injury, but might well receive some hearing loss from two hours' use of a pneumatic riveting gun (where noise levels may reach 100 db to 110 db in the high frequency octave bands) repeated each working day for 25 years."

The graph referred to at page 162 demonstrates that the safe level is over 100 db for daily 30 minute exposures over a 25 year period and that the maximum recommended overall noise level for any singe exposure is 140 db (R. 189).

Dr. Larsen listed the general threshhold level at 85 db (R. 117). Dr. Voorhees in his report stated:

> "Much is unknown about any safe amount of noise exposure, but in the revised Guide For Conservation of Hearing in Noise published by the American Academy of Opthamology and Otolaryngology in 1957, it is stated, 'if the sound energy of the noise is distributed more or less evenly through the eight octave bands and if a person is to be exposed to this noise regularly for many hours a day, five days a week for many years, then; if the noise level in either the 300-600 cycle band or the 600-1200 band at 85 db, the initiation of noise exposure control and tests of hearing is advisable.' "

Dr. Gray, testifying for the Petitioner, admitted that hearing loss due to noise usually resulted from "a more prolonged exposure" (R. 70). He testified further that traumatic sound in industry "is stated to be over 100 decibels, and frequently in the range of 125 decibels of sound pressure" (R. 96).

7. *Noise level and duration at the time of the claimed industrial accident.*

Petitioner testified that he operated an air gun against the pipes involved only after they had become filled with sand. He testified that he had been engaged in this ac-

tivity for only from 20 to 25 minutes at the time of the claimed incident (R. 145, 147). When being interviewed by Dr. Voorhees, he stated that he had been hammering for from 15 to 20 minutes prior to the claimed incident (R. 167). He did not offer any evidence of any sudden or extreme noise.

Prior to the time of the hearing, the employer retained Leland K. Irvine, an admitted expert specializing in accoustical engineering, to recreate to the extent possible the precise circumstances involved at the time of the alleged incident and to determine noise intensity (R. 122-3). The same type pipe was used and filled with sand in a similar manner. A similar air gun then was used to vibrate the sand in the pipes. Tests were taken to indicate noise levels when the pipes were empty, when they were 1/3 full, when they were 1/2 full and when they were completely filled (R. 125, 126, 135). Since Petitioner admittedly operated the air hammer against the pipe only when full, those particular readings more nearly approximate the actual condition existing at the time of the alleged incident (R. 145).

The sound pressure level measurements indicated sounds well distributed in eight octave bands ranging from 20-75 to 4800-9600 frequency cycles per second. When the pipe was full of sand, the situation which existed when Petitioner was vibrating the pipe, all of the octave bands were below 90 and all but two of the octave bands were 80 or below. The tests indicated that, even with the pipe empty, a condition not experienced by Petitioner, the

sound did not reach 110 db in any frequency cycle or octave band (R. 162). As is indicated above, these levels are below tolerance levels for brief exposures of 15 to 25 minutes duration. For example, Dr. Gray, Petitioner's own witness, listed tolerance levels at "over 100 decibels and frequently in the range of 125 decibels" (R. 96).

In interpreting Mr. Irvine's report, Dr. Voorhees noted that "it appears that the noise distribution by the type of action in which Mr. Carling was engaged was quite diffuse throughout the octave bands" (R. 169). As is noted above, tolerance levels are higher under these conditions than where fewer octave bands are present (R. 190).

8. *The medical evidence.*

At the beginning of the hearing, the parties stipulated that all medical reports would be received in evidence and that either party would have the right, even if another hearing was required, to cross examine any doctor rendering such reports (R. 55). However, neither party elected to call doctors who filed medical reports for cross examination pursuant to such stipulation.

A. *Dr. Dean W. Gray.*

Dr. Gray filed a medical report in which he noted that there was no history of hearing loss prior to the alleged injury (R. 188). Much of his testimony at the hearing is quoted in Appellant's Brief. Despite this long quotation, the most critical testimony was omitted; i.e. that testimony most favorable to the finding of the commission below. Although Dr. Gray initially testified that in his opinion

Petitioner's loss of hearing was due to acoustic trauma, he admitted on cross examination that Petitioner's condition may be a "chronic progressive hearing loss, referred to frequently as presbycusis" (R. 70), that his "first and initial thought" was that any "acoustic trauma" resulted from a "long exposure" (R. 71), that Petioner's condition may have resulted from a "hereditary nerve loss" (R. 91), and that his ultimate diagnosis was based in "substantial part" upon Petitioner's own statements (R. 85).

B. *Dr. Boyd J. Larsen*:

Dr. Cornell, a physician working under the direction of Dr. Larsen, the staff physician for the employer, could find no physical evidence of injury, aside from Petitioner's subjective symptoms. He, therefore, advised Petitioner that his condition was non-industrial and that he should employ his own physician (R. 4). Dr. Ostler was suggested to him (R. 107). His referral to Dr. Ostler was as a non-industrial patient (R. 107). Dr. Larsen expressed his opinion as follows (R. 114-115):

> "Q. Well, are you able to state that it could not have been caused by the exposure to the noise of the hammer, if Mr. Carling in fact was exposed to such noise?
>
> "A. I could express an opinion to this effect. That there was one incident in which he was using the air hammer for a relatively short period of time, and I would not feel that this one incident has caused his hearing condition as it is today.
>
> "Q. And was this your opinion when he first visited you?

"A. Yes. For this reason he was advised to seek his own medical care, because of previous hearing loss that our records indicated that he had."

Dr. Larsen also testified that there had been a "deterioration of his hearing" following the claimed incident (R. 119).

C. *Dr. D. E. Ostler*:

Dr. Ostler, the private physician to whom Petitioner was referred as a non-industrial patient, stated in his report (R. 5):

"His loss, as you will note, has been mainly on the high tones, in other words, it is a nerve deafness, which could have come from exposure to loud noises, some toxic condition, or could be hereditary.

"My oipinion is that it is probably the result of prolonged exposure to loud noises."

D. *Report of medical panel comprised of R. Mowatt Muirhead, Dr. James Cleary and Dr. Bryce Fairbanks*:

The report of the panel was filed on December 5, 1962 (R. 28). Objection thereto was duly filed by Petitioner. The panel found (R. 28):

"Patient states that in 1952 he had a hearing test given at Geneva Steel, pre-employment, at which time he was told that he had a high tone loss but was employable. This might account for a preliminary loss of five to ten per cent. The panel feels that his employment in the noisy place would contribute to hearing loss that is on a progressive basis, and following this injury in August, 1960, the

hearing did not return to a serviceable level. The panel feels that the hearing loss noted by Dr. Ostler in October, 1960, could be considered to be the loss that this person has suffered, namely 35.4%.

"The patient has continued to work in a noisy place and it is noted that his hearing has continued to fall over the year in which Dr. Ostler saw this patient, and a hearing examination done in this office showed a further loss to about 51% as of October, 1962."

The same medical panel made a supplemental report under date of August 17, 1963 (R. 194) to which Petitioner did not object.

E. *Report of Dr. Richard L. Voorhees*:

In his report, Dr. Voorhees stated in part (R. 167-9):

"I am again impressed by the marked progression of the hearing loss in both ears. This is an interesting point, since usually hearing losses caused by loud noise are what is characteristically defined as acoustic trauma, happens suddenly and does not become worse thereafter. However, this man has shown progressive hearing loss since the date of the first audiogram following his supposed burst of loud noise exposure.

"* * *

"I am sure that there is no way to definitely determine the entire etiology of this man's condition, but I can't help feeling that there is something else behind the progression of his hearing loss. One must consider that this man's mother had hearing loss and there may be some congenital element to his problem. In addition to this, he has undoubtedly some element of presbycusis. This is usually slow

in its progression, but I suppose it could be said that it is operating here.

"* * *

"A few further thoughts on the probable nature of this hearing loss; ordinarily with noise induced hearing loss the high frequencies go first. This is commonly known. However, to produce loss in the lower frequencies as demonstrated by Mr. Carling, it is usually necessary to be in a continuous loud noise atmosphere of somewhat considerable intensity for a longer period of time."

ARGUMENT

POINT I.

THE COMMISSION DID NOT ACT ARBITRARILY, CAPRICIOUSLY OR UNREASONABLY IN DENYING WORKMEN'S COMPENSATION BENEFITS TO PETITIONER FOR AN ALLEGED INDUSTRIAL INJURY ON AUGUST 31, 1960.

The scope of review in a case such as this where a claimant appeals from a finding of the Industrial Commission is well settled. The judicial power on review in such cases was articulated by Justice Wolfe in the case of *Woodburn* v. *Industrial Commission,* 111 Utah 393, 181 P. 2d 209 (1947):

> "The extent of review by this court in this type of case is: Did the Commission act without or in excess of its powers in denying compensation to the plaintiff? Section 42-1-78, U. C. A. 1943.

> "The test applicable to this type of case to determine whether or not the commission acted without or in excess of its powers has been clearly crystalized by previous opinion and was stated as follows in *Kent* v. *Industrial Commission,* 89 Utah 381, 57 P. 2d 724, 725: 'In the case of denial of compensation, the record must disclose that there is material, substantial, competent, uncontradicted evidence sufficient to make a disregard of it justify the conclusion as a matter of law, that the Industrial Commission arbitrarily and capriciously disregarded the evidence or unreasonably refused to believe such evidence.' In *Lorange* v. *Industrial Commission,* 107 Utah 261, 153 P. 2d 272, 273, we quoted with approval from *Kavalinakis* v. *Industrial Commission,* 67 Utah 174, 246 P. 698, as follows: 'Unless therefore it can be said, upon the whole record, that the Commission clearly acted arbitrarily or capriciously in making its findings and decisions, this court is powerless to interfere. * * * It was not intended, * * * that this court, in matters of evidence, should to any extent substitute its judgment for the judgment of the Commission.' "

In his brief, Petitioner contends that the uncontradicted evidence supports the proposition that the claimant suffered an accidental injury while using an air gun in the course of his employment resulting in a permanent partial hearing disability, citing very selective portions of the record. To support this argument, Petitioner claims in his brief that the only evidence on this matter is the testimony of the Petitioner and Dr. Gray, his physician. This contention is wholly without support in the record. However, even assuming arguendo that their testimony does make

this point, there is considerable competent contradictory evidence. The following evidence, including medical reports which were admitted into evidence by the stipulation of the parties, (R. 55) is illustrative:

A. As is demonstrated in this brief in the Statement of Facts under heading "Noise Level and Duration at Time of Claimed Industrial Accident", Petitioner testified that he operated the air gun against the pipes only after they had become filled with sand. The noise intensity generated by this conduct was determined by an acoustical engineer who recreated, to the extent possible, these precise conditions. The test performed by the acoustical engineer demonstrated that the sound vibrations were fairly well distributed over all 8 octave bands and that noise intensity was well below 80 decibels in 6 of the octave bands and below 90 decibels in the other two.

As is pointed out in the Statement of Facts in this brief under heading "Effect of Noise Upon Hearing", such decibel levels are well below threshhold tolerance levels for brief exposure. Dr. Gray, Petitioner's own expert witness, listed tolerance levels for traumatic sound in industry as "over 100 decibels, and in the frequency range of 125 decibels of sound pressure". Such evidence demonstrates that as a physical and a medical proposition, it is extremely unlikely, if not wholly impossible, that the use of the air hammer against the pipes when full of sand caused the acoustic trauma claimed by Petitioner.

B. Dr. Boyd J. Larsen, employer's physician, testified that there was no physicial evidence of injury, aside

from Petitioner's subjective symptoms (R. 4). Dr. Larsen also testified that Petitioner had suffered a prior hearing loss, that the deterioration of his hearing continued after the claimed incident and that in his opinion the use of the air hammer for a relatively short period of time did not cause the acoustic trauma claimed (R. 114-15, 119).

C. Dr. D. E. Ostler, a private physician who treated Petitioner as a non-industrial patient, stated in his report that in his opinion Petitioner's condition "is probably the result of prolonged exposure to loud noises" (R. 5).

D. The medical panel, R. Mowatt Muirhead, James Cleary and Bryce Fairbanks, reported a prior hearing loss and a continuation of hearing degeneration after the claimed incident. In the opinion of the panel, "employment in the noisy place would contribute to hearing loss that is on a progressive basis" (R. 28).

E. In medical report, Dr. Richard L. Voorhees stressed the "marked progression of hearing loss in both ears", noted that Petitioner's "mother had a hearing loss and there may be some congenital element to his problem", that Petitioner "has undoubtedly some element of presbycusis * * * and that it is operating here" and that hearing loss of the kind demonstrated by Petitioner usually results from "a continuous loud noise atmosphere of somewhat considerable intensity for a long period of time" (R. 194).

In addition to this contradictory evidence, there is considerable doubt as to the credibility of Petitioner's medical

testimony as presented by Dr. Gray. It is true that Dr. Gray initially testified that Petitioner's condition resulted from "acoustic trauma" (R. 71). However, the following admissions made by Dr. Gray robbed his opinion of much of its credence:

1) Petitioner's condition could be the result of either a "chronic progressive hearing loss, referred to frequently as prebycusis", or to an acoustic trauma. His opinion that the condition resulted from acoustic trauma, rather than presbycusis, was based upon Petitioner's personal history as related to him by Petitioner (R. 70).

2) Dr. Gray's "first and initial thought" was that any acoustic trauma resulted from a "long exposure". He later changed that opinion because of the statements made to him by Petitioner (R. 71).

3) Acoustic trauma usually occurs from prolonged exposure (R. 70-1, 93).

4) The determination of the cause of hearing loss is not a "pure science". Petitioner's condition may have resulted from a hereditary progressive condition. Dr. Gray's diagnosis was based in "substantial part" upon Petitioner's statements to him (R. 85, 91, 92).

5) Noise which causes trauma in industry is usually over 100 decibels and frequently in the range of 125 decibels (R. 96). (Note that the noise generated by operating an air hammer against a full pipe is substantially below those levels.) (R. 162).

6) Petitioner had admitted to him that he had been employed in the past "around loud noise" (R. 93).

7) If Petitioner had had a prior hearing loss and if his mother had suffered a hearing loss, "this would introduce this possibility of having inherited a propensity or a hereditary progressive hearing loss" (R. 90) and Petitioner's condition may have been due to a "hereditary nerve loss" (R. 91).

Thus it is seen that once Dr. Gray was presented with the actual facts, rather than those which claimant had alleged to be true, his opinion wavered. He admittedly relied in "substantial part" upon the history given to him by claimant, (R. 85) which was critical in his diagnosis since it alone led to the conclusion that there had been an abrupt hearing loss on the date of the alleged incident.

It is respectfully submitted that inasmuch as Dr. Gray's diagnosis is based in "substantial part" on the self serving statements of the claimant who has a pecuniary interest in the outcome of this case, the Commission was justified in disregarding portions of Dr. Gray's testimony. It has long been the rule in this state that the Commission may refuse to believe evidence when it derives solely from an interested witness. *Smith* v. *Industrial Commission,* 104 Utah 318, 140 P. 2d 314 (1943). Afortiori, the Commission would be justified in disbelieving Petitioner's testimony, and that of his doctor derived in substantial part from claimant's statements when, in addition, such testimony is contradicted and controverted by other competent and authoritative evidence.

Not only is the testimony of Dr. Gray put in question by virtue of his reliance upon statements of claimant, but similarly the statements of the claimant himself are subject to serious questions of credibility. The trier of fact has the prerogative of judging credibility of the witnesses and the weight to be given the evidence. *Page* v. *Federal Security Insurance Company*, 8 U. 2d 226, 332 P. 2d 666 (1958). In the case at bar the Commission has exercised that prerogative properly since the claimant's testimony may well be jaundiced by bias, prejudice and self-interest and since, contrary to the allegations of Petitioner in his brief, there is substantial, competent contradictory evidence.

The Commission might properly have questioned the claimant's credibility in light of the fact that claimant misstated his health history to Dr. Gray. When Dr. Gray asked him if he had had previous hearing loss, he replied that he had not (R. 84). This statement proved to be contrary to the truth and is thus an indication of the veracity of the claimant's other statements. (See Exhibits 1 and 2, R. 163-4, indicating prior hearing loss and Petitioner's admission to Dr. Voorhees that he was aware of the prior hearing loss R. 168).

Even assuming for purposes of argument that Petitioner was conscious of a marked change in his hearing on the day in question, this fact, standing alone, certainly would not have supported a finding by the Commission of the occurrence of an industrial accident. We have searched the record in vain for *any* evidence that the decibel level

of the noise at the time of the claimed hearing loss was of sufficient intensity and duration to have caused traumatic injury. Construing the evidence most favorably to Petitioner, at best, there would be a showing *only* that a hearing loss occurred on the job without any evidence whatsoever that noise, or any other employment related factor, caused such loss. This complete failure of proof upon the necessary element of causation apparently prompted the following comment by the referee during the course of the hearing (R. 114) :

> "I might point out, gentlemen, that the Commission still has to determine — before we pay any attention to any of this testimony — whether there actually was excessive exposure to noise. We haven't determined that yet. The panel has no authority to make that kind of a decision. That is for the Commission, so the panel report always assumes, but not decides."

No evidence of "excessive exposure to noise" was presented at the hearing. The only evidence on this subject indicated affirmatively that there was no "excessive exposure to noise". Under these circumstances, and since Petitioner makes no claim of occupational disease (R. 2, 59). Petitioner failed to meet the following test recently enunciated by this court in *Pintar* v. *The Industrial Commission of the State of Utah, et al.,* 14 Utah 2d 276, 382 P. 2d 414 (1963) :

> "It is therefore a prerequisite to compensation that his disability be shown to result not as a gradual development because of the nature or conditions of his work, but from an identifiable accident or

> accidents in the course of his employment. There being substantial evidence to support the Commission's finding to the contrary, no basis exists upon which this court could rule that its denial of compensation was capricious or arbitrary."

In *Purity Biscuit Company* v. *Industrial Commission,* 115 Utah 1, 201 P. 2d 961 (1949), relied upon by Petitioner in his Petition for Rehearing (R. 207) and in his brief (brief 25) this court in opinion by Justice Wade quoted with approval the following language of Mr. Chief Justice Wolfe in *Dee Memorial Hospital Association* v. *Industrial Commission,* 104 Utah 61, 138 P. 2d 233 (1943):

> "* * * I conclude that it is necessary that the claimant establish some connection between the injury and the employment before compensation will be allowed. The mere fact that the employee becomes ill on the premises of the employer will not suffice. The employer should not be charged with internal failures not contributed to nor caused by the employment nor occurring in pursuit thereof nor in any way employment-connected. * * *"

In *Tedesco* v. *Industrial Commission,* 86 Utah 501, 46 P. 2d 670 (1935), a decedent suffered "peritonitis" due to a perforated ulcer. He was a strong, healthy athletic man, 34 years old, had had no physical disability and had manifest no distress after eating nor complained of stomach trouble. While working in a powder magazine, he attempted to lift a 50 pound case of powder which had been stuck to the floor. In jerking it loose, he was stricken by a severe pain in the abdomen. He reported this experience to fellow employees and obtained medical treatment, but died some

time later. In sustaining a denial of workmen's compensation benefits, this court stated:

> "For applicant to establish a case it was necessary to show a causal connection between the alleged accident and the resulting injury, if any, and the duodenal ulcer, its perforation of the bowel, and the resulting peritonitis. The record fails to disclose any causal connection between the alleged accidental injury and the peritonitis causing death. To certain hypothetical questions, assuming some matters not in evidence, whereby it was attempted to show that there was a connection between a strangulated hernia and the perforated duodenal ulcer, the answer was that 'it was possible', while it was also stated that no such connection was found to exist. There is no direct evidence in the record that the alleged injury caused a hernia. There is no evidence in the record, if it be inferred that such hernia existed, that there was any connection between such hernia and the duodenal ulcer, its perforation of the duodenum, or the death of deceased.
>
> "The ultimate and controlling findings of the Commission are in harmony with the competent evidence submitted. No cause for disturbing the findings of the Commission is shown. The order denying compensation is therefore affirmed."

Similarly, here the record fails to disclose any causal connection between the alleged accidental injury and the hearing loss sustained. On the contrary, the competent evidence set forth above demonstrates affirmatively that no causal connection existed.

The record in this case may be summarized briefly as follows:

A. The evidence as to whether or not Petitioner sustained an abrupt hearing loss is in conflict. The only evidence indicating an abrupt hearing loss was derived from the person with a pecuniary interest in the case.

B. The evidence relating to the cause of the hearing loss is in conflict.

C. The record contains no evidence whatsoever of any "excessive exposure to noise". On the contrary, the evidence on this subject demonstrates that the noise level was well under limits of safety.

We submit that the record clearly demonstrates the propriety of the order of the Commission denying benefits to Petitioner, that in so doing, the Commission did not act arbitrarily, capriciously or unreasonably and that its order should be affirmed by this court.

POINT II.

THE COMMISSION DID NOT ERR BY "PREVENTING OR DISSUADING" PETITIONER FROM INTRODUCING ADDITIONAL EVIDENCE.

In Point II of Petitioner's Brief (brief pages 21, 22) he suggests that Petitioner was dissuaded at the hearing from producing supplemental evidence corroborating Petitioner's testimony that he observed a difference in his hearing immediately following the claimed industrial accident. Petitioner cites record pages 71 and 72 in support of this

claim. We fail to find anything at those pages of the transcript, or at any other place, supporting this claim. Petitioner may have had reference to the colloquy between the referee and counsel for Petitioner relating to the sound studies made by the acoustical engineer at record pages 119, 120, 121, 122 and 131. The record there demonstrates that counsel for Petitioner was objecting to introduction into evidence of the sound studies performed by the acoustical engineer. Counsel for Petitioner offered to call additional witnesses to demonstrate the marked change in hearing of the claimant. After some discussion, the referee concluded, "I don't think I need anything like that" (R. 121). Counsel for Petitioner then responded "All right. I'll accept the Commissioner's statement" (R. 121). The colloquy with respect to the same evidence was resumed at record page 131. There counsel for Petitioner renewed his objections stating: "I am trying to — of course they have got tests here, which I think are completely unreliable. It is my duty to —."

The referee responded: "Then you can put on your witnesses" (R. 131).

The general rule applicable where a claim is made on appeal that the trier of the facts erroneously excluded evidence is stated in 4A C. J. S., Appeal and Error, Section 712 at page 551 as follows:

> "To present an alleged error in the exclusion of evidence, the record must show that it was offered and excluded, the purpose for which it was offered, that it was material and relevant, the ground urged against its admission in the absence of a showing

> that only a general objection was made, the grounds of objection to its exclusion, and the grounds on which it was excluded;"

We submit that none of these tests are satisfied. Petitioner offered no evidence, despite the fact that he was invited to do so by the Commission (R. 131). No evidence was excluded by the Commission. No objection was made by Petitioner to any exclusion which he assumed. On the contrary, Petitioner acquiesced in any assumed exclusion of evidence by saying "All right. I'll accept the Commissioner's statement" (R. 121) and by failing to accept the invitation of the referee to "put on witnesses" (R. 131).

In addition, even assuming arguendo that the Commission had excluded additional evidence duly and properly offered which would corroborate Petitioner's claim of sudden hearing loss, such exclusion would not be prejudicial upon the record of this case. The basis for the decision below was that Petitioner had failed to prove that an incident during his employment had caused his hearing loss (R. 200-201). Thus, the basic deficiency in Petitioner's case was his failure to show a causal relationship between the incident claimed to have occurred and the hearing loss which developed. As perceived by the Commission, such a causal relationship is a vital prerequisite to recover under the Workmen's Compensation laws of the State of Utah. See *Purity Biscuit Company* v. *Industrial Commission,* 115 Utah 1, 201 P. 2d 961 (1949); *Tedesco* v. *Industrial Commission,* 86 Utah 501, 46 P. 2d 670 (1935).

It is respectfully submitted that the Commission did not in any way prevent or dissuade the Petitioner from

introducing evidence, but, as found by the Commission (R. 200) that "there is no competent evidence in the record to support the single incident as the cause of hearing loss", and that the order of the Commission should be affirmed.

POINT III.

EVEN THOUGH A HEARING DISABILITY MIGHT BE A COMPENSABLE TYPE OF ACCIDENTAL INJURY PURSUANT TO TITLE 35, CHAPTER 1 OF UTAH CODE ANNOTATED, 1953, AS AMENDED, THE FACTS OF THIS CASE DO NOT ESTABLISH AN ACCIDENTAL INJURY.

The Industrial Commission found that "There is no competent evidence in the record to support the single incident as the cause of hearing loss" (R. 200).

The statute provides that "* * * The findings and conclusions of the Commission on questions of fact shall be conclusive and final and shall not be subject to review; * * *." 35-1-85 U. C. A. 1953.

This court has on numerous occasions interpreted this statute and held that if there is competent evidence of substantial character to sustain the findings of the Commission, they will not be disturbed. One of the more recent decisions of the court so holding is that of *Edlund* v. *Industrial Commission,* 122 Utah 238, 248 P. 2d 365 (1952).

We have heretofore set forth herein the evidence upon which the above finding was made and respectfully submit

that it is competent and of substantial character and that the finding should not be disturbed.

CONCLUSION

We submit that the evidence in the record relating to an industrial accident is in substantial controversy, that the record contains no evidence whatsoever of any causal connection between the Petitioner's hearing loss and any phase of his employment with Respondent, that the order of the Commission denying workmen's compensation benefits to the Petitioner is not arbitrary, capricious or unreasonable and that it should be affirmed by this court.

Respectfully submitted,

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