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Goodyear Tire and Rubber Company, and Hartford Accident and Indemnity Company v. The Industrial Commission of the State of Utah and Lee James Harris : Reply Brief of Plaintiffs

Utah Supreme Court

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In the Supreme Court of the State of Utah

GOODYEAR TIRE AND RUBBER COM-
PANY, a corporation, and HART-
FORD ACCIDENT AND INDEMNITY
COMPANY, a corporation,

Plaintiffs,

VS.

THE INDUSTRIAL COMMISSION OF
THE STATE OF UTAH and LEE
JAMES HARRIS,

Defendants.

PLAINTIFFS' REPLY BRIEF

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In the Supreme Court of the State of Utah

GOODYEAR TIRE AND RUBBER COM-
PANY, a corporation, and HART-
FORD ACCIDENT AND INDEMNITY
COMPANY, a corporation,

Plaintiffs,

vs.

Case No. 6250

THE INDUSTRIAL COMMISSION OF
THE STATE OF UTAH and LEE
JAMES HARRIS,

Defendants.

PLAINTIFFS' REPLY BRIEF

Counsel for defendants would have it appear that plaintiffs are attacking in this court the findings made by the Industrial Commission. Not only is such not our position, but we desire it clearly understood at the outset of this brief that plaintiffs do not question the established rule referred to by defendants that if there is substantial and competent evidence to support the findings of the Commission, that the court will not disturb such findings. It logically follows, therefore, that the cases cited and discussed by defendants to this effect

are beside the issue in this case. Simply stated, the issue is: Under the material undisputed facts of this case, was the Industrial Commission justified in concluding as a matter of law from such facts that the applicant was injured in an accident arising out of or in the course of his employment?

It is of course obvious that the ruling of the Industrial Commission that the accident to the applicant occurred while in the course of his employment is not a finding of fact but a conclusion of law from the facts, which conclusion we submit is contrary to law because not warranted by the facts. The only finding in the decision of the Industrial Commission as to how the accident occurred is the following:

“Being required to work overtime, the applicant rode a motor cycle owned by the Goodyear Tire & Rubber Company to his home for dinner, and was accidentally injured on the return trip, the motor cycle became unmanageable, left the road, and crashed into the side of a private residence.”

What the connection is between being required to work overtime and riding a motor cycle to his home to get dinner does not appear, because it obviously is the fact that he was injured not while working overtime and doing something for his employer, but while on an errand of his own.

There is therefore no dispute as to where the applicant was or what he was doing at the time of the accident.

Plaintiffs do not complain of any finding of fact made by the Commission, but do say most emphatically that the conclusion of law drawn by the Commission from such findings of fact is contrary to law and is not warranted by the evidence.

Counsel for defendants, in an effort to show that the applicant was considered by the employer to be on the payroll "up to the very instant of the injury," calls attention to what is attached to a letter (Item 7 of the record) and states, "This time sheet . . . apparently shows that \$3.28 is due applicant for ten and one-half hours—from '5-7 to 5-13-39'," and then follows this with the statement that "Presumably the ten and one-half hours is for the regular shift up to six-thirty o'clock and two and one-half hours overtime thereafter on May 8, 1939." Examination of this so-called "time sheet" (submitted as counsel says two months after the accident) does not indicate that the ten and one-half hours therein referred to was for work on the date of the accident, to-wit: May 8, 1939, but indicates only that there was due the applicant pay for ten and one-half hours from "5-7 to 5-13-39," undoubtedly the hours unpaid for for that period of six days, just as it is stated therein. It is evident that the record does not bear out the presumption, or rather, the pure conjecture engaged in by counsel, which if established as a fact rather than a mere surmise would be wholly immaterial to any issue involved in this case. We fail to see how such an unexecuted receipt would in any wise aid the case of the applicant, even if it showed that on the day of the accident he

had received credit for ten and one-half hours work, or even more.

As pointed out in our opening brief, the accident to the applicant happened away from the employer's premises, wholly disconnected from his business, and at a time when the employer had no control and direction over the applicant. At that time, he was performing no service for his employer and he was neither required nor directed to go home for his supper nor to use the employer's motor cycle for that purpose.

Defendants state in their brief that they do not challenge the well-established "going and coming rule." However, they seek to avoid its application to this case by reference to cases in which, due to the peculiar facts in each of them, such rule is not applicable. In the cases cited by defendants, the accident resulted from a risk or hazard which was necessarily or ordinarily or reasonably inherent or incident to the work of the employee, which is not the situation in the case at bar.

The case of *Cudahy Packing Company v. Ind. Com.*, 60 Utah 161, 207 P. 148, is easily distinguishable from the instant case. In that case the employee, in order to reach his place of employment, was obliged to cross the railroad tracks which bore so intimate a relation to the packing company's premises that it could hardly be treated as otherwise than as a part of the premises. The court said at page 170:

"Conceding that the weight of authority denies to an employee the right to compensation

for an injury received while on his way to or from his employment, the question here, in its final analysis, is: Did the particular facts surrounding this accident make this case an exception to the holdings of the courts?"

This court further said:

"It was customary, in fact absolutely necessary, for employees going to the plant to work to pass over and across these railroad tracks on the public road where the accident happened. No other means or way existed by which employees could get to the plant. * * * If there is liability for the injury under consideration, it must be founded upon the inferable fact that the danger incident to crossing this railroad track, by reason of its location and proximity to the packing plant, must be held to have been within the contemplation of the parties at the date of the employment."

The case of *Hobson v. Dept. of Labor and Industries*, (Wash.) 27 P. (2d) 1091, cited by defendants is likewise an exception to the general rule and so not in point, as is clearly demonstrated by the following syllabus therein:

"Death of watchman who was on duty 24 hours daily and who was required to furnish his own food, which was caused when speeder left track on way back from crossing where watchman went for supplies and mail, *held* compensable as 'arising in course of employment'."

The court said at page 1092:

"His contract of employment required him to furnish his own food supplies, and it was within

the contemplation of that contract that he call at the crossing for such supplies. So, too, it was one of his duties to call at that crossing for mail. The evidence is uncontradicted that he went to the crossing for both purposes. * * * The action of Hobson, procuring food supplies, was necessary to the proper performance of his work, and constituted no interruption of the course of the employment (twenty-four hours' duty daily as a watchman and general repairman). *Hill v. Department of Labor and Industries*, (Wash.) 24 P. (2d) 95. Hence, Hobson was engaged in the furtherance of the interests of his employer at the time of the fatal accident."

Obviously Hobson was in the course of his employment, and this case in no way assists in the determination of the instant case.

The case cited by defendants of *Chandler v. Ind. Com.*, 55 Utah 213, 184 P. 1020, sustains the position of the plaintiffs rather than that of the defendants.

In that case the duties of the employee required him to go from his home each morning to the garage and get his employer's delivery automobile, and drive it down to his employer's place of business, and to use it throughout the day in making deliveries of meat and groceries, and return it to the garage at night after his day's work was finished. When he was unable to make all the deliveries of the day, he would bring with him to his home such undelivered packages and make delivery of them on foot the following morning on his way to the garage to get the car.

It was alleged in the complaint, demurrer to which was sustained by the district court, that while Chandler was on his way to the garage to get the automobile to begin making deliveries required of him as aforesaid, and while actually making delivery of meat for his employer which was undelivered the evening before, he was attacked and bitten by a dog, resulting in hydrophobia, from which he died.

Inasmuch as it is perfectly clear that Chandler was performing a service for his employer at the time of the accident, the injury arose out of and in the course of his employment. Chandler's duties took and kept him on the streets, a risk necessarily incident to his employment, whether in the automobile or on foot, so that he used the streets in the regular course of his duties in making deliveries, the very service for which he was employed.

In the Chandler case the employee was performing service for his employer. In the instant case, Harris was on a mission wholly his own.

Defendants cite the case of *Twin Peaks Canning Co. v. Ind. Com.*, 57 Utah 589, 196 P. 853. That this case is not in point is apparent from the following quotation from the syllabus therein, showing that when an employee remains on the premises during working hours and moves about in an inactive period within reasonable limits, visiting with fellow employees, he does not leave the course of employment.

“Where 15 year old boy entering a freight elevator to return to his work from a floor visited during an interval of leisure was killed by the movement of the elevator when he turned on the power, previously shut off by himself as a joke on a companion who was coming up and failed to disengage the switch on the elevator when it stopped between the floors, an award under the Workmen’s Compensation Act was justified on the theory that the accident occurred ‘in the course of employment’.”

It is thus apparent from the foregoing that the accident occurred on the premises of the employer during a slack time, but still within the working hours of the employee. Though the court held that the employee, a child of but fourteen years of age, had not departed from the course of his employment because of what he did on the premises during a slack period, the court said:

“It is true that in some of its aspects this may be a borderline case, and if the deceased had been a man of mature years and experience we might have reached a different conclusion.”

The actual age of the deceased was fourteen years, ten months at the time of his death.

The sweeping dictum referred to by the defendants in that case, and quoted by them in their brief was not necessary to the decision of the case. As counsel well said, this is not a “going and coming” case, and is therefore of no help to the decision of the question before the court.

The case of *Utah Apex Mining Co. v. Ind. Com.*, 67 Utah 537, 248 P. 490, is not in point for the reason that the protection of law extends to a reasonable time and space for the employee to go to or leave the locality or zone of his work, and while he is in proximity in approaching or leaving the place of his employment by the only means of access thereto. In this case it is obvious that the employee was electrocuted on the premises of the employer within that reasonable time extended to employees to leave the zone of their work. No parallel exists between the facts of that case and the case under discussion.

What the case of *MacKay v. Department of Labor and Industries*, (Wash.) 44 P. (2d) 793, cited by defendants has to do with the present case is not clear. There the employee at the time of injury was performing a service for his employer necessary and incident to his employment. As stated by defendants, he had taken the broken parts of a caterpillar to a garage for repairs, and while at the garage he was injured. The distinction between the MacKay case and this case is that MacKay was at a place where his employment required him to be, and Harris, the applicant herein, was at a place of his own choosing, where his employment did not require him to be.

Where an injury results to an employee at a place where the employment neither required nor expected him to go, or in a place where his employment should not take him, it cannot be said to arise out of or in the course

of the employment. Therein lies the distinction between the above case and the case at bar.

The case of *Gilmore v. Ring Const. Co.*, (Mo.) 61 S. W. (2d) 764, cited by defendants is not in point for the defendants, but rather clearly sustains plaintiffs' position, as is shown by the following excerpt from the opinion in that case:

“He (the applicant) was doing what his foreman told him to do that is, to wait on the job for development as to weather conditions. Complainant was obeying his master's orders. He was as much in his line of duty as he would have been if pouring cement. Complainant was waiting at what may be inferred to be the accustomed place, that is, around the fire with other employees, on this December morning. Being around that fire and waiting was incident to his employment and while so situate an accident occurred within the meaning set out in the act.”

Defendants cite the case of *Michaux, et al., v. Gate City Orange, etc., Co.*, (N. C.) 172 S. E. 406, wherein a negro boy was injured while getting on his employer's truck. That case is not applicable for the reasons stated in the opinion as follows:

“Moreover his services were necessary to the proper and efficient distribution of the products of the employer. He was injured in attempting to climb upon the truck to which he had been assigned in the prosecution of the business of the owner. * * * The fact that previous to his injury he had been playing or scuffling or sparring with another boy does not preclude recovery

upon the facts disclosed by the record. Such facts bore no relation to his fall from the truck and the consequent death."

Defendants are in error when they state that the court in the above case "ignores the fact that he had left his employment for purposes of his own," because it is apparent from the facts that he was an assistant to the truck driver and therefore had to get on and off the truck, and that his place of employment was on the truck which he was getting on at the time of his injury.

Counsel for defendants have overlooked the point clearly recognized by the court that it was not the scuffle that caused the injury, but getting onto the truck, which he had a right to do and where he had a right to be.

Reference is made by defendants to the case of *Texas Indemnity Ins. Co. v. Clarke*, 50 S. W. (2d) 465, a Texas case. This case is distinguishable from the instant case because the compensation act in that state is much broader and more inclusive than ours, as is shown by the following excerpt from the opinion in that case:

"The Workmen's Compensation Law makes compensable all injuries, with exceptions not necessary to now notice, 'of every kind and character having to do with and originating in the work, business, trade or profession of the employer received by an employee while engaged in or about the furtherance of the affairs or business of his employer, whether upon the employer's premises or elsewhere. * * *', "

The holding in the above case is justified only because of the foregoing language of the Texas statute.

The above case is further distinguishable from the case under consideration because of the peculiar facts involved therein. The employee was away from home on a job. The company had no means of caring for its employees in the location of the work, and the applicant was injured while in an effort to secure a rooming place, none having been provided at the camp. Since the Texas act makes compensable all injuries originating in the work, the court said that securing a necessary rooming place was incidental to and necessary to his duty.

Reference is made by defendants to the case of *Industrial Com. v. Murphy*, (Ohio) 197 N. E. 505, involving an accident to an employee of an undertaker. That case is not applicable to the situation in the instant case, because there the employee was, in effect, on duty twenty-four hours a day, just as in the case of the watchman cited by defendants, hereinbefore referred to. The peculiar time and terms of employment of the undertaker's assistant are illustrated by the following quotation from the opinion in that case.

“It was necessary that he should at every moment of the day and night keep his employer aware of where he might be reached by telephone, and it was a part of his contract of employment that immediately upon receiving call he should repair at once to the funeral parlors or such other place as might be designated by his employer. It is obvious that defendant in error had no regular

hours of employment. * * * It seems clear to us that there are many differences between the case under consideration and what is commonly styled as 'coming and going case' where the employee has a fixed time to appear at his employer's place of residence. Up to the time the employee reaches such place he is his own master, can choose his own route, engage in such private enterprises as he sees fit, take as much time as is consistent with reaching his place of employment in the stipulated time, start when and from where he chooses, and, after he leaves his place of employment, go where he pleases, with no responsibility to advise his employer of his movements. In the instant case it is perfectly apparent that immediately upon receiving the telephone call it became the duty of the employee to go directly to his place of employment as rapidly and directly as he could."

We have carefully read and reviewed herein all of the cases cited by the defendants on this issue and it is obvious that none of them are applicable to the case at bar.

In the recent case of *Red Arrow Bonded Messenger Corp. v. Ind. Acc. Com.*, 103 P. (2d) 1004, a California case, a messenger boy, after delivering a message deviated from the direct route to his employer's office by going home to get some food, and after eating started back to the office and was injured en route. The court said:

"The petitioner contends that the deviation to procure a meal having been unauthorized and contrary to instructions, it can not be held to have been within the scope of his employment, and that

the injuries did not arise out of or in the course of his employment. We are in accord with the position taken by the petitioner. * * * The award is annulled.”

In the case of *Fidelity and Casualty Co. v. Ind. Acc. Com.*, 192 P. 166, the court said at page 167:

“The question for decision is tersely stated by counsel for petitioners as follows: ‘Should compensation be awarded to an employee who, purely for his own purposes, leaves his place of employment before his day’s work is finished and, several hours later, is injured upon the public streets when returning to his place of work?’”

The court quoted from the leading case of *Ocean Accident, etc., Co. v. Ind. Acc. Com.*, 173 Cal. 313, 159 P. 1041, and concluded its opinion with the following statement:

“The sole claimed purpose of his intended return to the garage was for the performance of duties at that place, which were such duties as were ordinarily performed by him when on duty at the garage. The conclusion necessarily follows that the employee’s injuries were not received at a time when he was performing service for his employer or acting within the course of his employment.

“The award is annulled.”

In the case of *Cal. Cas. Ind. Ex. v. Ind. Acc. Com.*, 213 P. 257, it appeared that the driver of a truck was killed while crossing the street after having obtained lunch in a place where his duties did not call him, the

employer permitting him to take his lunch where and when he desired. The court said at page 258:

“In the very broadest sense, of course, it is true that the injury to the decedent grew out of and was incidental to his employment, since it was necessary that he should return from the place where he lunched to the truck. The right to an award is not alone founded upon the fact that such is the case, but upon the fact that *the service the employee is rendering at the time of the injury grows out of and is incidental to the employment*. For instance, it is the rule that an employee going to and from his place of employment is not rendering any service, and begins to render such service only when he arrives at the place of his employment, and proceeds to use some instrumentality provided, by means of which he immediately places himself in a position to perform his task. *Ocean Accident, etc., Co. v. Ind. Acc. Comm.*, 173 Cal. 313, 322, 159 P. 1041, L. R. A. 1917B 336. It was not intended by the Compensation Act that the employer who comes within its provisions shall be the insurer of his employee at all times during the period of his employment.”

The court in that case then quoted with approval the following language from the case of *In re Betts*, 118 N. E. 551:

“We understand that all of these cases recognize and in effect hold that: ‘It is not enough for the applicant to say, “The accident would not have happened if I had not been engaged in that employment, or if I had not been at that particular place.” He must go further and must say, “The accident arose because of something I was

doing in the course of my employment, or because I was exposed by the nature of my employment to some particular danger.” ” ”

NO EVIDENCE OF PERMANENT INJURY

In answer to what was said in our opening brief with respect to there being no evidence whatever in the record of any permanent injury to the applicant, the defendants refer to the report of Dr. C. L. Shields, attending physician, of date May 18, 1939, (tr. 3) which, made out on the regular surgical report blank of the Industrial Commission, describes only the injuries and the treatment given, and which, in reply to the item No. 6 thereon, “Will any permanent injury or deformity result? If so, to what extent?” is followed by a question mark. Certainly this report, together with the fact that the applicant appeared in person before the Commission as counsel says, does not afford any evidence whatsoever, much less the required substantial evidence, of any permanent injury. The attending physician did not testify, and there is no basis whatever for the gratuitous finding that the applicant “now suffers some permanent partial loss of the use of his left leg below the knee.”

“An award must be based upon evidence which fairly proves the extent or percentage of disability; and where a preponderance of the evidence shows that the disability was not to the extent for which the award was granted, it must be reversed. Physicians’ opinions are ordinarily of great weight in determining an injured employee’s physical condition, and where the injury

or disability is of a character requiring professional skill to determine the extent thereof, the question must necessarily be determined by the testimony of expert medical witnesses. On the issue of the permanence of the disability, the evidence on which the conclusion is based that it was permanent should not be a mere conjecture or surmise, but the conclusion should be a legitimate one from competent evidence, although doubt as to the date of the employee's recovery will be resolved in his favor. Further an award for permanent total disability must be based on competent evidence, and cannot rest on conjecture or surmise, and the testimony must be such as to support the legitimate conclusion of such disability."

71 C. J. 1132.

"The award or judgment in compensation proceedings must conform to the evidence and be based on it; and an award made on a finding that is not sustained by the evidence is contrary to law."

71 C. J. 1188.

We prefaced our remarks herein with reference to the fact that the decision herein, if logically carried out would render the employer liable to third persons, with a statement that "discussion of the above point, while not strictly pertinent to the case at bar, is vital because an incorrect decision of the instant case" would produce absurd results. We did not ask this court for any ruling in advance on such a question, as counsel would interpret our remarks, but merely pointed out the incongruity of such a situation. Therefore defendants' comment

upon the "moot case" is wholly foreign to the issue herein.

CONCLUSION

In conclusion it is earnestly urged that the Industrial Commission erred in its conclusion as to the legal effect of the undisputed evidence in this case, and that it should have followed the law established by this Court in the case of *Fidelity Casualty Company v. Commission*, 79 Utah 189, 8 P. (2d) 617, and therefore the award herein of the Industrial Commission should be annulled and set aside.

Respectfully submitted,

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