1987

Sisco Hilte and Zurich American Insurance Company v. Lester Wayne Smith, The Industrial Commission of Utah : Reply Brief

Utah Court of Appeals

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

SISCO HILTE and ZURICH AMERICAN INSURANCE COMPANY,

Plaintiffs/Appellants, Case No. 870592-CA

vs.

LESTER WAYNE SMITH and THE INDUSTRIAL COMMISSION OF UTAH, (Case Priority No. 6)

Defendants/Respondents.

REPLY BRIEF OF PLAINTIFFS/APPELLANTS SISCO HILTE and ZURICH AMERICAN INSURANCE COMPANY

PETITION FOR REVIEW FROM DENIAL OF PLAINTIFFS/APPELLANTS' MOTION FOR REVIEW OF ORDER OF THE INDUSTRIAL COMMISSION OF UTAH

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RESPONSE TO STATEMENT OF FACTS

The Statement of Facts contained in Plaintiffs/Appellants' original brief is accurate and fairly stated according to the Record. The Statement of Facts propounded by defendant Smith is accurate to the extent it reflects the procedural sequence of events leading to this appeal. However, Smith's characterization of the lifting incident and previous back injury which allegedly gave rise to an industrial accident goes beyond the evidence and reasonable inferences.

Smith characterizes his lifting incident as "carrying objects." (Smith's Brief at 10.) However, the Record clearly demonstrates that Smith's alleged accident arises out of circumstances in which Smith merely lifted a steel plate one and a half feet to his waist. (R. at 7, 17, 41 and 291.) After lifting the plate to his waist, Smith put it down. Id. In addition, Smith intimates that the lifting incident was awkward because he lifted the plate with one hand, using his other hand for stability. (Smith's Brief at 11.) The Record demonstrates that "[h]e [Smith] got his hands underneath the plate . . . as he lifted on the plate." (Emphasis added.) (R. at 281) Finally, although Smith now admits suffering a prior back injury, which he did not previously acknowledge, the Record demonstrates that Smith suffered a serious back injury in 1980. (R. at 121-31 and 283.)

SUMMARY OF ARGUMENT

"[T]he law must define what kind of exertion satisfies the test of arising out of the employment." Larson, Workmen's Compensation § 38-83(a) at 7-273 (1986). Accordingly, the Industrial Commission's "legal" determination in this case is fully reviewable, without deference to the Industrial Commission.

Smith's lifting incident does not involve exertion greater than nonemployment activities and did not contribute anything substantial to the risks Smith already faced in nonemployment life.

ARGUMENT

POINT I

THE INDUSTRIAL COMMISSION'S DETERMINATION OF WHAT CONSTITUTES LEGAL CAUSATION IS FULLY REVIEWABLE BY THIS COURT.

Smith mistakenly assumes that the Industrial Commission's decision was factual and thus, misapplies the applicable standard of review. Because the instant case hinges on the legal determination of what exertion is necessary to satisfy the legal causation test set forth in Allen v. Industrial Commission, 729 P.2d 15, 20 (Utah 1986), the Industrial Commission's legal decision can "be reviewed by this Court with no deference to the Commission." Giles v. Industrial

Commission, 692 P.2d 743, 745 (Utah 1984). See also Griffith v. Industrial Commission, 82 Utah Adv. Rep. 53, 54 (Utah App. 1988). Smith's cited authorities refer only to the "findings and conclusions of the Commission on questions of fact" and are inapplicable to the legal determination upon which the instant case was based.

POINT II

SMITH'S LIFTING INCIDENT DID NOT CONTRIBUTE ANYTHING SUBSTANTIAL TO THE RISK SMITH ALREADY FACED IN NONEMPLOYMENT LIFE.

In Allen v. Industrial Commission, 729 P. 2d 15, 26 (Utah 1986), the Utah Supreme Court declared that to constitute extraordinary or unusual exertion, "the precipitating exertion must be compared with the usual wear and tear and exertions of nonemployment life . . . ." To satisfy this legal causation requirement, the Utah Supreme Court requires that Smith's lifting incident contribute "something substantial to increase the risk [Smith] already faced . . . because of his [preexisting] back condition." Allen, 729 P.2d at 26.

A. Smith's Injury Occurred While Lifting, Not Carrying.

Smith contends that the size, density and weight of the steel plate in the instant case made it awkward to lift. (Smith's Brief at 10.) Smith also characterizes his alleged accident as one which involved "carrying objects." However,

Smith ignores the fact that the alleged industrial accident did not arise out of any "carrying" type of exertion. Rather, Smith merely lifted a fifty pound steel plate one and a half feet to his waist. (R. at 7, 17 and 41.) The issue, therefore, is whether lifting a 50-pound steel plate one and a half feet constitutes extraordinary exertion which contributed something substantial to increase the risk Smith already faced in non-employment life because of his preexisting back condition.

B. The American Roofing Case Is Inapplicable To The Instant Case.

Smith relies on the case of American Roofing Company v. Industrial Commission, 80 Utah Adv. Rep. 15, 17 (Utah App. 1988), to support the contention that he suffered an industrial accident. The American Roofing decision is inapplicable to the facts of the instant case for the reason that the applicant in American Roofing was lifting a 30 pound bucket which "snagged" on something when the applicant, Green attempted to unload it from his truck. Both the Industrial Commission and this Court concluded that "the weight alone did not make the . . . exertion unusual or extraordinary." Id. at 17. Rather, this Court determined that:

> Evidence of the weight, together with the manner [lifting while leaning over the bed of the truck] in which Green lifted the bucket and the fact that the bucket snagged, combined to characterize Green's

> action as unusual or extraordinary under the Allen definition. (Emphasis added).

Id. at 17.

Smith's lifting incident is not comparable to the facts in American Roofing and cannot be considered extraordinary or unusual. In American Roofing, the fact that the bucket being lifted snagged and the unusual manner in which Smith lifted the bucket were significant factors this court considered in making the determination of "unusual or extraordinary exertion." In the instant case there are no such unusual lifting factors. The Record clearly demonstrates that Smith simply lifted a steel plate from knee level to his waist and set it back down. (R. at 7, 17, 41 and 291.)

C. Smith's Lifting Required No More Exertion Than Carrying Luggage, Changing Tires And Carrying Garbage Cans To The Street.

Smith contends that although persons may lift 50-pound objects in nonemployment life, Smith's lifting incident is in "no way similar to or comparable with lifting baggage, taking garbage cans to the street, or lifting children, groceries or tires." (Smith's Brief at 11.) Smith's contention is flawed for several reasons.

In the instant case, neither Smith, Judge Moffat nor the Industrial Commission state any reason why Smith's lifting incident differs from or requires more exertion than "the

typical activities and nonemployment exertions" enumerated in Allen. Indeed, the Commission mistakenly concluded that Smith's lifting incident was awkward because it involved lifting with one hand instead of "with two hands as would be done in the Allen list of lifting activities . . . ." (Record at 306.) Significantly, the Record demonstrates that Smith held the steel plate in both hands (R. at 16). In addition, the Allen list of lifting activities includes a one hand lifting task (lifting and carrying luggage). Allen, 729 P.2d at 26. Based on these incorrect assumptions, the Commission improperly determined that Smith suffered a compensable accident, legally caused by an unusual and extraordinary exertion.

D. The Allen Legal Causation Test Does Not Require That The Nonemployment Activity Be Done On A Regular Basis.

Smith also attempts to advance the unsupported allegation that "it is ludicrous to suggest that the average person totes groceries or any other items weighing 50 pounds on a regular basis." (Smith's Brief at 12.) Smith mistakenly assumes that lifting 50 pounds must take place on a regular basis to be a recognized nonemployment activity. However, the Allen test sets forth no such requirement. For example, people do not take full garbage cans to the street, lift and carry baggage for travel or change flat tires on a "regular basis" in non

employment life. Yet, the Allen court enumerates these as typical activities.

POINT III

SMITH'S ALLEGED INJURY COULD EASILY HAVE BEEN TRIGGERED BY LESS EXERTIVE NONEMPLOYMENT ACTIVITIES.

Because Smith suffered a serious back injury in 1980, he was subject to possible reinjury from typical nonemployment activities. It is critical to note the Medical Panel's conclusion concerning the weight involved in Smith's lifting incident and what was necessary to trigger the 1986 back injury: "It is quite reasonable to think that a weight much less than 50 pounds could trigger recurring symptoms . . . ." (R. at 189.)

It appears that Smith's personal nonemployment activities and habits contributed to his back injury. The Record reveals that Smith "smokes rather heavily, approximately one pack per day." (R. at 226.) Smith has smoked a pack of cigarettes a day for 25 years. (R. at 283.) Several authorities confirm that smoking represents a risk factor for low back injury:

> Smoking seems to represent a risk factor, this may be due in part to chronic cough, possibly because of the association of increased intradiscal pressure with coughing.

Kolodny, A. Lewis, M.D. and Tendler, Jacob, M.D., Osteoarthritis XII: Management of Low Back Pain, 34 MMJ 1093, 1095 (Nov. 1985). See also Frymoyer, J.W.; Newberg, A.; Pope, M.H.; Wilder, D.G.; Clements, J. and MacPherson, B. Spine Radiographs in Patients with Low Back Pain. An Epidemiologic Study in Men. J Bone Joint Surg (Am) 66(7) 1048-55 (1984).

After Smith's 1980 injury, he reported that his back injury symptoms were worse with coughing. (R. at 94). It is very likely that Smith's smoking has resulted in increased coughing, which in turn increased intradiscal pressure, hastening degeneration of his already weakened and injured back.

Based on the Medical Panel Letter, and the risk factors brought by Smith to the workplace, it is reasonable to conclude that a typical nonemployment exertion could easily have triggered Smith's back injury. Under these circumstances, it is apparent that Smith's employment did not contribute anything substantial to increase the risks Smith already faced in nonemployment life.

CONCLUSION

Based on the foregoing, plaintiffs/appellants Sisco Hilte and Zurich American Insurance Company respectfully request this

Court to reverse the Commission's decision and award in all respects.

DATED this 1st day of July, 1988.

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CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of July, 1988, I caused four true and correct copies of the foregoing Reply Brief of Plaintiffs/Appellants' Motion for Review of Order of the Industrial Commission of Utah to be mailed first class, postage prepaid, to the following parties of record:

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