

2001

Jeff Shipley v. The Industrial Commission of the State of Utah, C and W contracting Company and the Traveler's Insurance Company : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
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BRIGHAM YOUNG UNIVERSITY,
J. Reuben Clark Law School

JEFF SHIPLEY,
Plaintiff,

vs.

THE INDUSTRIAL COMMISSION
OF THE STATE OF UTAH,
C & W CONTRACTING COMPANY
and THE TRAVELER'S
INSURANCE COMPANY,

Defendants.

Case No.
13639

BRIEF OF PLAINTIFF

Appeal from Order of the Industrial Commission
of the State of Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

JEFF SHIPLEY,

Plaintiff,

vs.

THE INDUSTRIAL COMMISSION
OF THE STATE OF UTAH,
C & W CONTRACTING COMPANY
and THE TRAVELER'S
INSURANCE COMPANY,

Defendants.

Case No.
13639

BRIEF OF PLAINTIFF

NATURE OF THE CASE

This is a review of the proceedings before the Industrial Commission of Utah culminating in an order by the Commission awarding the Plaintiff a permanent partial disability of 50 percent.

STATEMENT OF FACTS AND DISPOSITION BELOW

The Plaintiff was employed by C & W Contracting Company on October 27, 1969 at which time he suffered a severe injury when a road grader fell off a set of jacks onto the Plaintiff who was lying underneath it attempting to repair the same (R. 80, 84). The Plaintiff suffered a fracture of the pelvis, i.e. the left iliac wing, a severe compression fracture of the entire fifth lumbar vertebrae, a remote fracture of L 2 and miscellaneous abrasions and contusions (R. 7, 127). The Plaintiff was initially hospitalized for thirty days (R. 5) and had numerous hospitalizations thereafter. On the 18th day of May, 1971, a surgical fusion was attempted of the L 4-L 5 and sacrum by Dr. Ward B. Studt, the orthopedic surgeon treating the Plaintiff from Grand Junction, Colorado. The fusion was not successful in that the vertebral bodies failed to fuse (R. 131). Plaintiff has continued to have numbness in his left leg, pain while working, walking or standing, with the worst pain occurring when sitting or riding in a car. He has difficulty sleeping and wears a back brace. He uses a cane except when he is in his home (R. 125, 195).

The Plaintiff's treating doctors, Dr. J. P. Muncey and Dr. W. B. Studt, both concluded that the Plaintiff is unemployable in any employment (R. 21, 174).

The Defendants conceded that the accident of October 27, 1969 was an industrial accident for which the Defendants were liable (R. 80). The Defendants, how-

ever, did not concede the extent of their liability. A hearing was held on July 12, 1972 at which time evidence was received from the Plaintiff. Subsequently a medical panel was presented a series of questions concerning the Plaintiff. In regard to permanent disability, the panel was only asked to evaluate what Plaintiff's permanent partial disability was, no mention being made of permanent total disability (R. 116). On January 30, 1973, the panel report was filed in which the panel found that the Plaintiff had numbness in his left leg, pain in working, walking, and standing, with the worst pain occurring when sitting or riding in a car. They found that he had difficulty in sleeping and that he wore a back brace and used a cane. They found that the Plaintiff had suffered fractures of the right transverse process of L 1, 2, 3 and 4, a significant fracture at L 5, severe arthritic changes in all areas of the back, a minor injury to T 9 and a compression fracture to T 10. The fusion which had previously been performed at L 4 L 5 was found to have not fused. They found that his forward bending was only 50 percent of normal and that other motions of the lumbar spine were 30 percent of normal. Plaintiff lacked touching the floor by 10 inches upon forward bending. Slight hypesthesia of the left foot was found and a 10 percent loss in dorsiflexion power of the left foot. Pain was found in the left side of the pelvis as a result of the forced motion of the right hip. Pain was noted in the low thoracic area and greater pain at the area of the attempted fusion. Other miscellaneous findings were noted in the report. The panel noted that the

fracture to L 5 was a severe crushing of the vertebrae. The panel concluded that the Plaintiff had a 50 percent permanent partial disability of his body as a whole as a proximate result of his accident of October 27, 1969. No contributing conditions were found to exist although a peripheral vascular disease was found to be in a concomitant status. The panel found that the extensive pain medication being taken by the Plaintiff was solely a result of the accident of October 27, 1969. The panel suggested that no further surgery would be of benefit (R. 124-132).

Plaintiff objected to the report insofar as it may be treated as a determination of permanent disability, but agreed that the report could be received as a finding by the panel as to the physical impairment only of the Plaintiff. Subsequently, a request was filed by the Plaintiff for a disability rating of the Plaintiff and accordingly it was agreed by all parties at a Pretrial that the Plaintiff would be examined by the Department of Employment Security and the Department of Rehabilitation Services. Plaintiff was then interviewed and evaluated by those two state agencies and a hearing was held on September 12, 1973. At that hearing Plaintiff called as witnesses Dr. Ward B. Studt who testified that his prior disability rating of 20 percent was given in the context of the Colorado practice, that is that in Colorado a 17 percent permanent disability is in fact a permanent total disability. He also stated his opinion that the Plaintiff was unemployable. (R. 174) Carl F. Crayne, a counselor supervisor for the Division of Rehabilitation

Services of the State of Utah was called as the next witness. He testified that after interviewing the Plaintiff and reviewing the pertinent medical records and occupational files that the Plaintiff was unemployable in any conceivable occupation, (R. 180) and that Shipley would work if he could. (R. 181) Lynn Greenwood, a vocational counselor for the Utah Department of Employment Security testified that from his interview and investigation it was his opinion that Plaintiff was unemployable in any conceivable occupation. (R. 186) Both Craync and Greenwood based their opinions upon the following:

- (a) Plaintiff's pain and limited mobility.
- (b) The Plaintiff's inability to ambulate and change positions without help.
- (c) The Plaintiff's inability to remain in one position for more than a short period of time;
- (d) His 7th Grade education;
- (e) His limited work ability;
- (f) His age; and
- (g) His economic impracticability of retraining himself.

The Plaintiff and his wife, Ina Ray Shipley, were then called as witnesses to testify concerning his condition. The Defendant called no witnesses and offered no independent evidence.

On November 30, 1973, the hearing examiner, Richard G. Sumsion, entered his Findings of Fact, Con-

clusions of Law and Interim Order, the material conclusions of which are as follows: That the Plaintiff's overall condition of unemployability was substantially contributed to by his industrial accident, but that the industrial accident was not of such significance as to impose liability upon the insurance carrier for permanent and total disability and accordingly found that the Plaintiff was entitled to 50 percent permanent partial disability benefits. The hearing examiner also found that the Defendants were obligated only to pay 50 percent of future medical expenses. Plaintiff timely filed a Motion for Review of the hearing examiner's Order and on February 21, 1974 the Industrial Commission entered an Amended Order affirming the hearing examiner's finding as to 50 percent permanent partial disability, but reversed the hearing examiner's Order that the Defendants pay only 50 percent of the medications and ordered that the Defendants were liable for the payment of all future medication expenses as well as affirming the prior Order of the Defendants' liability to pay all medical expenses, past and future.

RELIEF SOUGHT ON APPEAL

Plaintiff appeals from the Amended Order wherein it affirms the Order of the hearing examiner that the Plaintiff was entitled to benefits of a 50 percent permanent partial disability.

ARGUMENT

POINT I.

THE INDUSTRIAL COMMISSION'S FINDING THAT THE PLAINTIFF'S DISABILITY IS MERELY 50 PERCENT AND NOT A TOTAL PERMANENT DISABILITY IS NOT SUPPORTED BY THE EVIDENCE AND IS CONTRARY TO LAW, THE COMMISSION ACTING IN EXCESS OF ITS POWERS.

The Findings of Fact, Conclusions of Law and Order of the hearing examiner and the Commission were based on evidence presented by the Plaintiff. At no time did the Defendants present any evidence that the Plaintiff was employable. There simply was no dispute in the evidence as to Plaintiff's inability to be employed in any occupation.

The hearing examiner and the Commission, however, applied erroneous law to the undisputed facts in concluding that Plaintiff was not permanently disabled. The law in the State of Utah defines "permanent total disability" as not being limited to physical impairment. 35-1-67 Utah Code Annotated 1953, as amended, plainly speaks of "total disability" as affecting the applicant's ability to perform any work with which to support himself and his dependents. The statute recognizes that in each case the effect of a physical injury or illness will differ according to the abilities of the applicant, and does not require a construction of the statute whereby a certain physical impairment is necessary. In *Spring*

Canyon Coal Company vs. Industrial Commission, 74 Utah 103, 277 P. 206, the Court defined "permanent and total disability" as being the applicant's incapability of performing remunerative employment. In regard to his burden to prove that, the Court said that the applicant was not required to show that he was incapacitated from performing any and all kinds of work. He must, however, show that he has made an effort to procure the employment which he is able to perform assuming there are duties which he can perform without pain or suffering, or without unduly endangering his health, life or limb. This rule was followed in the cases of *United Park City Mines Company vs. Prescott*, 15 Utah 2d 410, 393 P.2d 800 (1964) and in *Morrison Knudsen Construction Company vs. Industrial Commission*, 18 Utah 2d 390, 424 P.2d 138. In the Park City case, the Court held that a 90 percent loss of bodily function and a certification by the Division of Vocational Rehabilitation that the applicant was not subject to rehabilitation constituted a total and permanent disablement. In *Morrison Knudsen*, the physical impairment was 70 percent accompanied by factors which made the applicant unable to engage in gainful employment, to wit: Low I.Q., age, limited job skills and a finding by the Vocational Rehabilitation Department that he could not be rehabilitated. A finding of permanent total disability was affirmed. These cases are consistent with the general rule, known as the "odd-lot" doctrine. This doctrine is explained in 2 Larson's Workmen's Compensation Law Sec. 5750 P. 83 as follows:

“Under the odd-lot doctrine, which is accepted in virtually every jurisdiction, total disability may be found in the case of workers who, while not altogether incapacitated for work, are so handicapped that they will not be employed regularly in any well-known branch of the labor market. The essence of the test is the probable dependability with which claimant can sell his services in a competitive market, undistorted by such factors as business booms, sympathy of a particular employer or friends, temporary good luck, or the subhuman efforts of the claimant to rise above his crippling handicaps.”

Defendants never presented any evidence that the Plaintiff is employable in any conceivable job or occupation. The Plaintiff went to extensive efforts to bring forth all of the relevant evidence pertaining to that issue. Both treating doctors, Dr. Ward B. Studt and Dr. J. P. Muncey, rendered their opinion that he was not employable. Carl F. Craync, counselor and supervisor for the Utah Division of Rehabilitation Services found that Plaintiff could not perform any gainful employment and that he would if he could. Lynn Greenwood, a vocational counselor for the Utah Department of Employment Security, found Plaintiff unemployable in any conceivable occupation. All of these opinions were based upon the physical impairment which the Plaintiff had received, especially the pain and limitation resulting in his inability to set, stand, or drive a vehicle for more than a short period of time coupled with his age, lack of education and lack of job skills. None of the doctors examining the Plaintiff, either on the medical panel or at the

behest of the Defendants have ever stated that the Plaintiff was employable. There being absolutely no evidence of his employability, that fact must be deemed proved by the Plaintiff. Especially is this true where the opinion of the Department of Rehabilitation which by statute is given the responsibility of determining employability and ability to be rehabilitated, reported unequivocally on two separate occasions that the Plaintiff was unemployable in any gainful occupation as a result of the industrial accident. (R. 115, 180)

A close examination of the Findings of Fact, Conclusions of Law and Order entered by the hearing examiner discloses that gross errors were made on Pages 4 and 5 in comparing the present case with the fact situation in *Caillet vs. Industrial Commission of Utah*, 90 Utah 8, 58 P.2d 760. The hearing examiner drew the conclusion that the injury to Mr. Caillet was more severe than the injury to Mr. Shipley. That may or may not be true. However, that is not the point. The reason the Plaintiff cited the Caillett case was for its legal holding which was initially recognized by the hearing examiner:

“Where the evidence conclusively shows that the employee is permanently and totally disabled from either securing or performing work of the general character that he was performing when injured, he by such evidence establishes a prima facie case, and in the absence of any showing that he is able to secure and perform work of a special nature not generally available, he is, as a matter of law, entitled to an award as and for permanent total disability.”

Having cited that as the true test, the hearing examiner then completely ignores it. In his Conclusions of Law stated on Page 5, he states as follows:

“... It is the opinion of the hearing examiner that the applicant's overall condition of unemployability was substantially contributed to by his industrial accident, but that the industrial accident was not of such significance as to impose liability upon the insurance carrier for permanent and total disability . . .”

The hearing examiner found that the Plaintiff was unemployable and totally disabled, and that the condition was substantially contributed to by the industrial accident. He then draws a conclusion that is not supported by the law of the State of Utah or any other jurisdiction in that he concludes that the Defendants can only be held liable for the physical impairment that they caused and not the contributing factors which result in total disability. Such a conclusion results in gross injustice to the workmen under the Workman's Compensation and runs counter to the letter and spirit of the Workman's Compensation Law. By this principle, if it were law, total disability liability would rarely or never occur. The statement of the examiner that “. . . the industrial accident was not of such significance as to impose liability . . .” is a conclusion which the law does not allow. Testimony at both hearings held in this case and the medical reports received all state that the unemployability of the Plaintiff directly resulted from the industrial accident. No where is there any evidence in the record that a cause

other than the accident precipitated the unemployability. What the hearing examiner apparently meant to do was arbitrarily limit the Defendant's liability to merely the proportion of disability arising from the physical impairment and to not assess the remaining impairment that arose in conjunction with the physical impairment by reason of age, pain, lack of ability to sit, lack of employment and lack of skill. If that were the law, the only time a person would be permanently disabled under the Workmen's Compensation Law would be when he was 100 percent physically disabled. It is clear from the statute and cases cited that the hearing examiner and the Commission acted arbitrarily and capriciously in making what appears to be a compromise not permitted by law and the undisputed facts here. The Plaintiff clearly established his prima facie case in the manner required in *Caillett vs. Industrial Commission of Utah*, supra, and the burden, therefore, fell upon the Defendants to prove the Plaintiff's employability. The Defendant did not even attempt to prove that fact. The medical panel found that the 50 percent physical impairment was a direct result of the industrial accident and found that there were no other contributing physical conditions. Therefore, Plaintiff submits that the finding of 50 percent permanent partial disability and its affirmance by the Industrial Commission was not supported by the facts, and that the application of law was erroneous and beyond the Commission's powers. Accordingly the said findings should be reversed and an Order entered directing the Industrial Commission to enter an Order

finding the Plaintiff totally and permanently disabled as a result of the industrial accident of October 27, 1969, and ordering benefits in accordance therewith.

Respectfully submitted this 31st day of May, 1974.

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