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Joan Harrison v. Industrial Commission of Utah et al : Brief of Respondents

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

JOAN HARRISON, WIDOW OF :
WILLIAM G. HARRISON, DECEASED :
:
Plaintiff-Appellant, : District Court No. 9-75-6507
:
vs. :
:
THE INDUSTRIAL COMMISSION OF : Supreme Court No. 15401
UTAH, BILL G. HARRISON MINING :
COMPANY, and STATE INSURANCE :
FUND, :
:
Defendants-Respondents. :

BRIEF OF RESPONDENTS

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FUND, :

Defendants-Respondents. :

District Court No. 9-75-6507

Supreme Court No. 15401

BRIEF OF RESPONDENTS

NATURE OF THE CASE

This matter represents an appeal from an Industrial Commission ruling which denied benefits to the widow of a miner who had made a claim pursuant to the occupational disease and disability laws of Utah.

DISPOSITION BELOW

The Administrative Law Judge denied the claim of Joan Harrison, widow of William G. Harrison. A Motion to Review was filed with the Industrial Commission and the Commission affirmed the decision of the Administrative Law Judge. The matter was brought before the Supreme Court by Petition for Writ of Review filed by Mrs. Harrison.

RELIEF SOUGHT ON APPEAL

Respondent requests the Supreme Court affirm the

STATEMENT OF FACTS

William G. Harrison had been a uranium miner since 1945. (R. 19-20). On August 29, 1975, he filed an occupational disease claim alleging disability as a result of silicosis and cancer caused by prolonged exposure to "rock dust and diesel smoke". (R. 1, 63). Before Mr. Harrison could undergo medical examination, he died November 6, 1975.

Mr. Harrison had been a smoker since the age of fourteen, at a rate of from one to one and one half packs per day. (R. 23, 33, 40). He was rated, medically, as a heavy smoker. (R. 41).

The final diagnosis, given in an autopsy report (R. 60-62) states:

1. CARCINOMIA, SMALL CELL CARCINOMA, RIGHT UPPER LOBE WITH LYMPHATIC PERMEATION, RIGHT LOBE AND RIGHT LOWER LOBE (WHO 2B)
2. PULMONARY FIBROSIS WITH EMPHYSEMA, MODERATE.
3. SILICOTIC FOCI, ALL LOBES OF THE LUNG.
4. PULMONARY EDEMA.
5. REGIONAL LYMPH NODE METASTASIS, EXTENSIVE.

Other medical records, throughout the Court's record, expand this analysis. (R. 70, 72, 76, 77).

A medical panel was convened to review the records of Mr. Harrison and a report was submitted which concluded as

follows:

Percentage

(1) Specific causes of death:

- a. Occupational Disease
(if any) None
Name of occupational disease--
Probably Silicosis Grade I, (?
early Grade II), of itself not
disabling.
- b. Other diseases 100%
Name of such diseases--Small
cell lung carcinoma right upper
lobe with regional metastases;
and complications from cancer
chemotherapy; and history of
prolonged cigarette smoking;
with chronic bronchitis and
emphysema.
- c. Other contributing factors .
Description of such factors--
It is recognized that the
decedent did have relatively
mild silicosis in degree of
itself, not disabling.

TOTAL 100%

The chairman of the panel was Dr. Elmer M. Kilpatrick.

Dr. Kilpatrick testified that all of the panel members met as a group and reviewed the records of Mr. Harrison, (R. 133). Further, the entire panel agreed with the result. (R. 132).

The panel's report was dated May 8, 1976. (R. 86).

On June 7, 1976, an objection to said report was filed by Mrs. Harrison alleging that Dr. Kilpatrick was "prejudice and biased and thereby unable to fairly evaluate claims involving lung cancer allegedly from uranium mining".

A hearing on the objection was held January 26, 1976 (R. 96). At that time Dr. Elmer M. Kilpatrick was called to testify in support of the panel's report. (R. 99). Dr. Victor E. Archer was called on behalf of Mrs. Harrison. (R. 112). A letter addressed to R. S. Ferguson of the State Compensation Insurance Fund in Denver, Colorado, was admitted on Motion of Mrs. Harrison (R. 138-140) which allegedly displayed the bias of Dr. Kilpatrick.

Despite the allegations of the objection to the report of the medical panel, no example of bias or prejudice, on the part of Dr. Kilpatrick, was offered other than the letter and testimony contained in the record.

ARGUMENT

At the outset it should be understood that this matter is, in reality, nothing more than a conflict between the views of the two doctors who testified at the hearing. In fact, the Objection to Medical Panel Report and to Medical Panel is nothing more than an objection to Dr. Kilpatrick. No objection is made to the other members of the panel, even though they agreed with the results contained in the report.

In this regard, Dr. Kilpatrick testified that the panel was aware of the work done by Dr. Archer and considered that medical information in reaching the conclusions contained

POINT I

THE ORDER OF THE INDUSTRIAL COMMISSION WAS BASED ON SUBSTANTIAL EVIDENCE AND SHOULD, THEREFORE, BE AFFIRMED.

The Supreme Court has often stated that where there is any substantial evidence on the record to support the findings of the Industrial Commission, a reviewing court cannot do otherwise but affirm the judgment of the Commission. Amalgamated Sugar Co. v. Industrial Commission, 56 U. 80, 189 P.69, (1920).

When there is conflict of material facts and competent evidence which might justify a finding either way, a finding by the Commission will not be disturbed, and, in such cases, the credibility of witnesses and weight of evidence are questions of fact to be left to the Commission. Board of Education of Salt Lake City v. Industrial Commission, 83 U. 256, 27 P.2d 805, (1933).

The main issue in the case at bar was clearly stated by the Administrative Law Judge when he said:

So it appears here that we have two diametrically opposed opinions from very fine medical doctors, authorities in their field. Cross-examination disclosed that Dr. Kilpatrick generally held that cigarette smoking was the most common cause of the lung cancer causing death in cases where the deceased or disabled individual was a long-time cigarette smoker and that Dr. Archer on the other hand generally ruled that the cause of death was from cancer due to uranium exposure. On cross-examination, Dr. Archer noted that there had been very few cases, if any, out of some twenty

heard in Utah where he had testified differently than that his opinion was that the cause of death was uranium exposure. Dr. Archer acknowledged that there was a heavier incident of smoking among miners [sic] among the general population and that he could only recall about one case out of twenty or thirty where a miner had died of carcinoma of the lung where there wasn't a history of smoking. The doctor further acknowledged that recent studies convinced him that the role of cigarette smoking is somewhat larger than he had originally thought. (R. 143)

In appellant's brief it is said, at page 4:

Dr. Kilpatrick testified that in lung cancer cases, if there is a showing of smoking, he will rule against the appellant no matter what other facts exist, i.e., extent of exposure, type of cancer cells, or any other conceivable facts. (R. 138-140).

No reading of the record can find such a dogmatic statement attributable to Dr. Kilpatrick. His testimony was rather different. At R. 101 we read the following:

(By Mr. Wilcox) Q It is your opinion is it not, Dr. Kilpatrick -- from what you have stated in other hearings before this, on this matter of lung cancer in uranium miners -- that if an Applicant claims to have lung cancer caused by uranium employment, and is also a smoker, that you would in all cases of that type find no connection between the uranium mining and his cancer?

(By Dr. Kilpatrick) A No, I wouldn't say that. I think that we'd have to still say that no one knows an exact single cause for cancer.

Q All right. But isn't it a fact that in your opinion, if an Applicant for lung-cancer benefits is a smoker, as far as you're concerned you're always going to find that the Applicant is not entitled to benefits?

A I can't say it that dogmatically. The thing is that you have to recognize many other potential carcinogens. And, when you would single out smoking, that is not true.

One need only read the letter which was admitted to evidence, on motion of Mrs. Harrison, to understand the position of Dr. Kilpatrick. In part it states:

. . . As far as Lung Cancer In Uranium Miners is concerned, I am aware that there is some increase in the incidence of this disorder in Uranium Miners, as compared to the general population. It may be that isotope exposure to uranium may be a co-carcinogen in the production of lung cancer, but the consideration of this feature is so mixed up with other concurrent etiologies, that a dogmatic statement cannot be made with exact relationships as to lung cancer being an exact result from radon exposure. It becomes apparent to me, and to the other members of the Medical Panel of Physicians, that in consideration of Uranium Induced lung Cancer, the issue becomes one of probability VS improbability in the causal relationships. All other potential factors pertaining to etiology must be considered in the total analysis of any given case.

. . . In an attempt to up-date understanding in the matter of causal relationships to Uranium Exposure in Uranium Miners I have studied the literature on the subject; discussed it with oncologists, pathologists, cancer chemotherapists, X-ray Therapy experts, immunologists, and Mine Safety Experts. The studies of Dr. Victor E. Archer, of the National Institute for Occupational Safety and Health, Western Area Occupational Laboratory, and his publications, influences the thinking of the experts who say "yes" to the questions related to -- "Is a dogmatic causal relationship between etiology of exposure to uranium in mines, in the production of lung cancer?".

It is not meant that the work of Dr. Archer be belittled. I am of the opinion that no other such study in the world can come up to the magnitude of the work done for adding to the

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general knowledge related to production of lung cancer. On the other hand, in the end analysis of a given lung cancer, in a Uranium Miner, considering the multitude of variables concerning etiology, the end result remains that we do not know for certain the nature of the cause, and must say that "a co-carcinogen effect may exist from isotope exposure, but the present knowledge does not warrant a dogmatic statement that it does."

In the correspondence, pertaining to the three cases you referred to this office for review, (Bucher; Nicols; and Church), I find at the end of the letters of opinion from Dr. Archer, statements to the effect: -- "The above opinions with respect to the relationship of occupational and lung cancer in the case of (-----) are my own personal opinions, and are not those of the Surgeon General or of the Public Health Service. In no way do I represent either in stating my attitude and opinions on this matter". I was surprised to see this statement in print.

Furthermore there is no tag of identity in a given cancer from a Uranium miner. Cell types are the same, Uranium Miner, smoker, or in an idiopathic lung cancer. Also in considering therapy for a Uranium Miner, there is no different specific treatment for this cancer category.

Certainly, in any given lung cancer, in a Uranium Miner, potentials for the effects in production of the cancer from isotopes must be considered, but not to the exclusion of all other potentials. Probability is to be differentiated from improbability, and these words are the key to analysis. . . (R. 139-140)

Dr. Archer himself testified that no dogmatic statements can be made with regard to causation of cancer. (R. 118). If it is to be ruled that Dr. Kilpatrick's opinion is dogmatic, it must be done by inference. If inference is allowed to play such a role, then it must be remembered that Dr. Archer

testified that he could not remember any cases in Utah where he had testified that a cause of death was other than the result of uranium exposure. (R. 121). Certainly such testimony is inferential of a "dogmatic" view opposite to that attributed to Dr. Kilpatrick.

At this juncture it should be obvious that, in the words cited, supra, "we have two diametrically opposed opinions from very fine medical doctors".

In point of fact, this Court is not unaware of the dichotomy of opinion prevalent in this case. Some of the same medical experts appeared in Garner v. Hecla Mining Co., 19 U. 2d 367, 431 P.2d 794, (1967). There, plaintiffs urged that exposure to radon gas accounted for the higher average incidence of lung cancer in uranium miners. The Industrial Commission disagreed and denied recovery to the widow and children (Plaintiffs). Plaintiffs garnered their evidence from, among other sources, Dr. Victor E. Archer.

The Supreme Court, in upholding the Industrial Commission, said, at 371:

The fallacy which underlies plaintiffs' attack on the Commission's findings is that they improperly attempt to focus consideration of the issues exclusively upon their own view of the evidence and theories of the case. While some aspects of the statistical data and medical theories harmonize with their contentions, others

fail to do so. For instance, Dr. Saccomanno, the pathologist called by them, acknowledged the well known but unfortunate uncertainty as to the cause of cancer. He readily admitted that, in any given individual, "there are a great many unknown factors as to what might cause cancer" and that "... it could be concluded that the radon gas alone didn't cause the problem incident to the death, but it's merely based on a statistical study of a given number of cases."

Consistent with the foregoing and corroborating the existence of unknown factors and uncertainty as to causation, is the report of the medical panel to which this case was referred for reexamination: "We cannot confirm that the lung carcinoma was caused by exposure to uranium mining occupation." There is thus a reasonable basis in the evidence for the refusal of the Commission to find in accordance with the plaintiffs' contention. Upon the principles states above it is our duty to affirm the decision. [footnotes omitted]

It is respectfully submitted, that the Industrial Commission had before it substantial evidence sufficient to sustain the conclusion of the Administrative Law Judge when he said:

The Administrative Law Judge after considering all of the evidence, testimony of the parties and the file herein and further noting that three doctors made the investigation that led to the decision of the medical panel, finds that the deceased, Bill G. Harrison, did not die as the result of an occupational disease.

POINT II

THE OPINION OF MEDICAL EXPERTS DOES NOT AMOUNT TO BIAS OR PREJUDICE IN THE LEGAL SENSE.

Appellant's brief takes the position that the medical panel sits as judge of medical evidence. (page 6). The inference is made that the decision of the panel is final with regard to medical evidence. The conclusion which appellant wishes to reach is that the "judge" in the instant case was "biased."

For reasons which will be discussed, *infra*, the assumptions made by appellant are very far from accurate. However, accepting the position of appellant, *arguendo*, does not help her.

With regard to disqualification of a judge for bias or prejudice, such bias or prejudice must be for or against a party. 46 Am. Jur. 2d 198, §167, Judges, states, "The words 'bias' and 'prejudice' refer to the mental attitude or disposition of the judge toward a party to the litigation, and not to any views that he may entertain regarding the subject matter involved". §168, 46 Am. Jur. 2d 200, adds, "Bias or prejudice does not refer to any views a judge may entertain toward the subject matter involved in the case" . . . "The fact that a judge has strong feelings about the type of litigation involved does not make him biased or prejudice".

It can be seen from the foregoing that "bias" and "prejudice" are terms of art with a specific legal connotation which is more narrow than those terms convey in a popular sense.

When this knowledge is applied to the "medical judge" in the present case, we see that Dr. Kilpatrick may hold a particular view with regard to the subject matter of this case. His view would be that smoking was more probably the cause of cancer than was exposure to radon daughters. The subject matter would be the causation of lung cancer in uranium miners. Such a view cannot reasonably be construed to be a bias which would go toward a party. No suggestion has been made that Dr. Kilpatrick had any feeling toward any of the claimants personally. In other words, no bias or prejudice has been shown which would be sufficient to disqualify Dr. Kilpatrick if he were actually sitting as a judge.

POINT III

OBJECTION TO COMPOSITION OF THE MEDICAL PANEL WAS NOT TIMELY FILED.

Continuing, arguendo, the acceptance of plaintiffs position as stated above, it is obvious that Dr. Kilpatrick's presence on the panel was apparent to appellants on October 10, 1975, (R. 6) when a letter was sent to Mr. Harrison, before his demise, indicating that the panel had been appointed by the Industrial Commission and he was to appear before it. This is not a panel whose membership changes each time it considers a case. Dr. Kilpatrick's membership thereon was a well known fact. The panel report was dated May 8, 1976. (R. 86). From October 10, 1975, to May 8, 1976, no objection to Dr. Kilpatrick's presence was forthcoming.

Continuing the analogy of disqualification of a judge, it is generally held that an application for disqualification must be filed at the earliest opportunity. This rule is most strictly applied against a party who, having knowledge of facts which might constitute grounds for disqualification, does not seek a disqualification until after an unfavorable ruling has been made. Re Union Leader Corp., 292 F.2d 381, (1961); Cominetti v. Pacific Mut. Life Ins. Co., 139 P. 2d 930, (1943); State ex rel. Lefebvre v. Clifford, 118 P. 41, (1911).

Ignoring the lack of bias in the legal sense, discussed above, it is obvious that appellant should have made the objection to Dr. Kilpatrick long before the medical panel report was submitted. Appellant admits in her brief that Dr. Kilpatrick's views were known to her. The letter which is used to establish the allegation was dated August 22, 1975. (R. 138). The case of Barney A. Statcup v. Atlas Minerals, et al, File No. 1A1286-00-7, Case No. 1-73-2215, cited by appellant was heard by the Industrial Commission in May of 1975.

Can, therefore, appellant contend that she did not know the position of Dr. Kilpatrick until after the unfavorable medical report? Obviously, such a position is untenable and the objection should have been filed at an earlier time.

POINT IV

THE MEDICAL PANEL DOES NOT, IN FACT, SIT AS JUDGE OF MEDICAL ISSUES. THE PANEL REPORT IS, PURSUANT TO §35-1-77, UCA,

1953, ONLY CONSIDERED AS EVIDENCE IN THE CASE TO THE EXTENT IT IS SUPPORTED BY TESTIMONY.

Pursuant to §35-1-77, UCA, 1953, it has been held, in denying workmen's compensation benefits to a claimant, that the Industrial Commission did not err in considering the report of a medical panel along with other evidence. Such reports do not encroach upon the authority of the Commission to make findings of fact and conclusions. Jensen v. U.S. Fuel Co., 18 U. 2d 414, 424 P.2d 440, (1969).

Relating back to Point I, supra, the panel report, the testimony of Dr. Kilpatrick, supported by other members of the panel, and that of Dr. Archer were all before the Commission to be weighed in arriving at their decision. Each item was considered. The panel did not act as judge with regard to ultimate medical issues. The Industrial Commission so acts and appellant concedes this in her brief, at page 7:

Appellant recognizes and agrees that the report of the medical board is not conclusive and is evidence to be considered by the Commission in arriving at a decision.

The Garner case, supra, addresses this same issue when it says, at 19 U. 2d 370:

Under our statutes and long established decisional law there are insuperable obstacles to the granting of the relief sought by plaintiffs on this appeal: it was their burden to show affirmatively and to so persuade the Commission that Mr. Garner's death resulted from a disease caused by his occupation. It is the

prerogative of the Commission, and not of any medical panel, to judge the credibility of the evidence, and upon the basis of the whole evidence to determine the facts. The plaintiffs having failed to so persuade the Commission, it is the duty of this court to survey the evidence in the light most favorable to the findings and order; and we cannot reverse and compel an award unless there is credible evidence without substantial contradiction which points so clearly and persuasively in plaintiffs' favor that failure to so find must be regarded as capricious and arbitrary. Conversely, if there is any reasonable basis in the evidence, or from the lack of evidence, which will justify the refusal to so find, we must affirm. [footnotes omitted, emphasis added]

Given all of the foregoing, it is obvious that the statements in appellant's brief, with regard to an analogy between the panel and judges, is completely without foundation. The quotation cited above also sustains the position of respondent taken in Point I of this brief.

CONCLUSION

In Summary, it is obvious that the Industrial Commission had before it all of the available medical reports, opinions and evidence. Based on the record a choice was made by the Administrative Law Judge and was sustained by the Commission. It is important to note that neither of the two principle experts were as dogmatic in their view as alleged by appellant. Both conceded the relevancy of many factors with regard to causation of cancer, including exposure to radon daughters and smoking.

It is asserted that no bias existed in a legal sense. It is, further, asserted that no bias tainted the

decision, whether it existed in a legal sense or in any other sense.

form. Appellant admits this fact implicitly when she states in her brief, at page 7, ". . . In effect her medical claim has been examined by two impartial examiners and one very biased examiner . . ." It cannot logically be asserted that bias, even if it did exist, tainted the decision herein. Any bias, legal or other, is cleared when one admits that disinterested, impartial examiners agreed with the result.

DATED and respectfully submitted this _____ day of January, 1978.

GREGORY C DIAMOND

MAILING CERTIFICATE

I hereby certify that two copies of the following document were mailed to W. Brent Wilcox and William J. Armstrong, at 600 Deseret Plaza Building, Salt Lake City, Utah 84111, and to The Industrial Commission of Utah, 350 East 500 South, Salt Lake City, Utah 84111, postage prepaid this 10th day of January, 1978.

Laura Blanch