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

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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|---------------------------------|------------------------------|
| 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 APPELLANT

APPEAL FROM THE DECISION OF THE INDUSTRIAL COMMISSION
FOR THE STATE OF UTAH
HONORABLE KEITH SOHM, ADMINISTRATIVE LAW JUDGE

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| COMPANY, and STATE INSURANCE) | |
| FUND,) | |
| Defendants-Respondents.) | |

BRIEF OF APPELLANT

NATURE OF CASE

This matter involves a claim, filed pursuant to the Utah Occupational Disease Disability Law, §§35-2-1 of the Utah Code Ann. (1953), as amended, by the dependents of William G. Harrison, deceased; who alleged that the decedent died on November 6, 1975, as a result of the occupational diseases of Silicosis and Cancer contracted by him because of prolonged exposure to silicon dioxide dust and uranium radon in the course of his employment.

DISPOSITION AT COMMISSION HEARING

On July 8, 1977, Administrative Law Judge Keith E. Sohm, denied the claim of Joan Harrison, widow of William G.

G. Harrison did not die of complication incident to his employment or of an occupational disease.

On July 18, 1977, Appellant filed with the Industrial Commission of Utah a Motion for Review and Reversal of the Commission's decision denying benefits. That Motion was denied by the Commission in an Order dated August 9, 1977.

On September 2, a Petition for Writ of Review was filed on behalf of the plaintiffs, and a Writ of Review was issued on September 8, 1977.

Counsel stipulated for an extension of time to file the brief by November 28, 1977, and it was so ordered by Justice Hall on October 26, 1977.

RELIEF SOUGHT

Appellant respectfully requests a reversal of the decision of the Industrial Commission, and a finding in favor of the Appellant; or, in the alternative, a full review of plaintiff's claim at the Commission level with a different medical panel.

STATEMENT OF FACTS

On August 29, 1975, William G. Harrison, self-employed, filed an occupational disease claim with the Industrial Commission of Utah. Harrison asserted that he had contracted the occupational diseases of Silicosis and Cancer as a result of prolonged exposure to harmful quantities

of silicon dioxide dust and Rodon daughters in the course of his employment as a uranium miner since 1945. His last employment was self-employment wherein he was covered by the State Insurance Fund.

Before Mr. Harrison could undergo scheduled testing at Holy Cross Hospital, he died on November 6, 1975, and a claim on behalf of his dependants was filed with the Industrial Commission of Utah on November 13, 1975. (R.17A).

Mr. Harrison has a history of uranium mining from 1945 to May 16, 1975. (R.19-20). He also smoked approximately one package of cigarettes per day since he was fourteen years old. (R.33).

On May 8, 1975, a medical panel composed of Drs. Elmer M. Kilpatrick, Charles D. Behrens and Laurence G. Christensen met and reviewed the autopsy report, performed at the request of the State Insurance Fund and Industrial Commission, medical records and X-rays of the deceased. The panel unanimously reported that Mr. Harrison did not die of an occupational disease, but rather from a disease identified as small-cell lung carcinoma with metastases, with complications from cancer chemotherapy; and a history of prolonged cigarette smoking with chronic bronchitis and emphysema. (R.86).

On June 7, 1976, Joan Harrison, the widow of the deceased filed an objection to the medical panel report and to the medical panel itself. (R.88). She objected to the

Chairman of the medical panel, Dr. Elmer Kilpatrick as being prejudiced and partial against cigarette smokers. She also objected to the medical panel report because the report failed to find that Silicosis contributed to the disability and death of Mr. Harrison, and that the report erred in including that the lung carcinoma was not an occupational disease obtained from continued exposure to radiation. (R.89).

On January 26, 1977, a hearing was held on the objections to the medical panel and its report. Exhibit C-1 was entered on behalf of the appellant, being a letter written by Dr. Kilpatrick to the Colorado State Compensation Insurance Fund. This letter was offered to establish Dr. Kilpatrick's espoused prejudice and bias against smoking uranium miners. 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). At the hearing testimony of Dr. Victor E. Archer was also heard. Dr. Archer was employed by the U.S. Public Health Service and is a leading research doctor in this field and has conducted long-term studies of cancer in uranium miners since 1955. Mr. Harrison was one such miner. Dr. Archer testified that Mr. Harrison's death was caused by small-cell undifferentiated cancer and that this most probably resulted from a prolonged exposure, over 5,500 working-level months, to radiation exposure. Dr.

Archer further testified that the smoking played some role in Mr. Harrison's death, but it was his opinion that the radon exposure, "...was the most important factor in the development of his lung cancer." (R.112 through 119).

Appellant's application was subsequently denied without benefits, as was her Motion for Review.

It is important to note, that subsequent to these proceedings, Dr. Elmer Kilpatrick was replaced on the medical panel that reviews respiratory cancer cases at the request of Counsel for the Utah Industrial Commission and as a result of the continuing objections and complaints of attorney W. Brent Wilcox. Counsel for the Fund has in several other cases stated that Dr. Kilpatrick was biased against smoking miners.

It is from the Commissions's denial of applicant's request for a second review by a new medical panel that this appeal is taken.

ARGUMENT

I. APPELLANT'S STATUTORY RIGHTS HAVE BEEN DENIED IN THAT HER CLAIM WAS DEPRIVED OF PROPER REVIEW BY A MEDICAL PANEL CONSISTING OF NOT LESS THAN THREE IMPARTIAL EXAMINERS.

Appellant's application to the Industrial Commission involved an assertion of disability because of Silicosis and Cancer. In applications of this nature, Section 35-1-77 of the Utah Code Ann. (1951), as amended, requires that the Commission refer all such cases to a medical panel. This panel is to be composed of examiners who are qualified under

the provisions of Section 35-2-56 of the Utah Code Ann. (1953), as amended.

Subsection (2) of §35-2-56, provides in pertinent part:

...Where a claim for compensation based upon partial permanent disability due to an occupational disease is filed with the Commission, the Commission shall appoint an impartial medical panel to consist of not less than three physicians specializing in the treatment of the disease or condition involved in the claim... (Emphasis added)

It is clear from the record, exhibits, and the subsequent replacement of Dr. Kilpatrick, that he was strongly biased against the claims of uranium miners who smoked. To him a smoking uranium miner could not recover benefits. His mind was made up in advance of receiving any of the facts regarding a particular claim. In the case of Barney A. Stalco vs. Atlas Minerals and the State Insurance Fund, File No 1A1286-00-7, Case No. 1-73-2215, Dr. Kilpatrick testified under oath that in all cases where the miner had a history of smoking, he would disregard all other facts or circumstance and recommend that the claim be denied. That attitude is grossly unfair to the appellant and does not fit the statutory definitions of an impartial medical examiner. The medical panel sits as the judge of the medical evidence, reviewing it and submitting their opinion to the Commission. They are required by statute to review that evidence impartially and without preconceived bias. While a judge may have a prior

notion can not be so strong as to preclude fair consideration of all the other facts and circumstances. Haslam vs. Morrison, 113 Utah 14, 190 P.2d 520 (1958); Rugenstein vs. Ottenheimer, 78 Or. 371, 152 P.215 (1915); and State ex rel. Barnard vs. Board of Education, 19 Wash. 8, 52 P.317 (1898). Appellant asserts that she has been deprived of her statutory right to a medical panel consisting of not less than three impartial examiners. In effect her medical claim has been examined by two impartial examiners and one very biased examiner, the Chairman no less. It has been clearly established that Dr. Kilpatrick in lung cancer cases made the decision for the panel.

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. As a practical matter, in almost all cases, the Commission adopts their medical panel report and disregards independent opinions such as Dr. Archer in this case. However, Appellant is entitled under the statutes of this state to have that evidence formulated by an impartial panel of not less than three members. She has been deprived of that right.

The rule in Utah was stated by this Court in Jensen vs. United States Fuel Co., 18 Utah 2d 414, 424 P.2d 440 (1967):

We recognize the value and the usefulness of an impartial medical panel to make an independent medical examination and diagnosis of such cases. We are also in accord with the position of the plaintiff that it is

not the panel's prerogative to encroach upon the authority vested in the Commission to make the findings of fact in rendering the decision on the application. Its proper purpose is limited to medical examination and diagnosis, the evidence of which is to be considered by the Commission in arriving at its decision. 242 P.2d, at 422.

In Boardman vs. The Industrial Accident Commission: California, 140 C.A. 2d 273, 295 P.2d 465 (1956), the medical examiner held an improper conference with the witness for the claimant. The workman's compensation statute in California prohibits such conferences. The Court had this to say regarding the medical examiner's report:

The rule expressed in section [10823] is a salutary one, and one which should be enforced strictly. A report based, even in a small part, on its evaluation is so tainted so as to destroy its value. The Commission erred in not granting the motion to strike it from the records and in basing its decision, even in part, upon it, 295 P.2d, at 467.

The Court also stated that even if the medical examiner would have come to the same decision regardless of what the other expert had to say, it would not consider his report.

Applicant contends that the circumstances here are analogous to those of Jensen. Here the statutory requirement of three impartial medical examiners has been violated. The medical report was tainted by the admitted biases of Dr. Kilpatrick. That report was relied upon by the Commission in reaching its decision to deny the application of appellant. As in Jensen, the medical report was tainted and the Industrial Commission of Utah should not have based its decision in any

part upon that report and should have convened a new panel as requested, or should have based its decision upon Dr. Archer's testimony.

Therefore, Appellant respectfully requests that her application be examined by a new medical panel, and the Industrial Commission render its decision on that panel's medical report.

II. THE FINDINGS AND CONCLUSION OF THE INDUSTRIAL COMMISSION ARE NOT SUPPORTED BY CREDIBLE, COMPETENT, AND SUBSTANTIAL EVIDENCE, AND ARE FURTHER, CONTRARY TO THE EVIDENCE IN THE RECORD AND THEREFORE, THE DECISION OF THE COMMISSION IS ERRONEOUS AND SHOULD BE REVERSED.

It is well established that Findings of Fact and Conclusions of Law of the Industrial Commission of Utah are binding upon this Court, if there is credible, competent, and substantial evidence to support those findings and conclusions. See, Evans vs. Industrial Commission, 28 Utah 2d 324, 502 P.2d 118 (1972); Whitmore vs. Calavo Growers of Cal., 28 Utah 2d 165, 499 P.2d 849 (1972); and Utah Packers, Inc., vs. The Industrial Commission, 24 Utah 2d 230, 469 P.2d 500 (1970).

As appellant has asserted in her first argument, above, the medical report was so tainted by the bias of Dr. Kilpatrick that it does not constitute competent evidence upon which the Commission could base its Findings and Conclusion.

In addition to the medical report, the Commission

heard the testimony of Dr. Kilpatrick, regarding his bias and regarding his opinion on the causation of Mr. Harrison's death, and the testimony of Dr. Victor E. Archer. The testimony of Dr. Kilpatrick cannot form the basis of the Commission's Findings or Conclusions because of his bias, while the testimony of Dr. Archer is contrary to the findings of the Commission.

The Court should take cognizance of the credentials of Dr. Archer. This man is not a professional witness, but rather, a fine medical researcher in the field of Cancer in uranium miner. Since 1955 he has conducted long-range studies regarding the causative factors and in fact Mr. Harrison was a part of the study. In contract, Dr. Kilpatrick's knowledge of this area is based on secondary sources as he has indicated in Exhibit C-1 of the hearing held on January 26, 1977. Dr. Archer is an expert in the field of cancer in uranium miners, and particularly as to the man, Bill Harrison.

Dr. Archer concluded as is set forth in the Commission's Findings that he was of the opinion that it is highly probably that radon exposure was the most important factor in the development of Harrison's lung cancer.

Summarizing, the only evidence to support the findings and conclusions of the Commission are that which is

tainted by the espoused bias and partiality of Dr. Kilpatrick. The remaining evidence is contrary to the findings and conclusion of the Commission and it is for this reason that Appellant requests the reversal of the Commission's Order.

CONCLUSION

Appellant respectfully submits that her right to a three member impartial medical panel, pursuant to Section 35-2-56, was violated here. It would be travesty of justice to allow Appellant Joan Harrison and her three dependents to go without compensation on the basis of a biased medical report.

Appellant further submits that the Commission's Finding and Conclusions are contrary to the evidence and, therefore, that its Order should be reversed.

DATED this ^{28th} day of November, 1977.

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that on the 28th day of November, 1977, two true and correct copies of the foregoing brief of Appellant were mailed, postage prepaid to:

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