

1948

Winnetta J. Llewelyn v. The Industrial Commission of Utah, Clayton Investment Company, and United States Fidelity and Guaranty Company

Utah Supreme Court

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In the Supreme Court of the State of Utah

WINNETTA J. LLEWELYN, widow
of Isaiah J. Llewelyn, deceased,

Plaintiff and Appellant,

vs.

THE INDUSTRIAL COMMISSION
OF UTAH, CLAYTON INVEST-
MENT COMPANY, and UNITED
STATES FIDELITY AND GUAR-
ANTY COMPANY,

Defendants and Respondents.

BRIEF OF DEFENDANTS AND RESPONDENTS

FILED

EARL GROTH and ROBERT SPOONER,
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Attorneys for Defendants

AUG 20 1948

Clayton Investment Company and United
States Fidelity and Guaranty Company

CLERK, SUPREME COURT

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STATEMENT OF FACTS

(All italics, unless otherwise noted, are defendants')

It is deemed advisable to amplify, to a limited extent, the statement of facts relative to dependency set forth in plaintiff's brief.

The plaintiff obtained a decree of separate maintenance from the deceased in 1936 which ordered deceased to pay \$25.00 per month to plaintiff. The further details of that decree are not in evidence, and there is

nothing in the record to support the statement that the decree contained a finding that the plaintiff in 1936 was dependent upon deceased, although the matter is not properly relevant to this proceeding in any event. After the decree in 1936, plaintiff and deceased no longer lived together, and were not living together at the time of his death on March 27, 1947.

During the five years preceding death, plaintiff received no money of any kind from deceased, (Tr. 78), and during the six previous years received \$200 or \$225, which was all the money received during the period of separation (Tr. 78). After the separation in 1936, plaintiff maintained a home and worked off and on during that time in War Plants, laundries and other places at a salary apparently averaging about \$75 per month (Tr. 77). The oldest son was in the service, but during that time he made no allotment because, as plaintiff stated, (Tr. 79) "I was in War Work and didn't need it." After returning from the service in 1944, that son purchased groceries for the house (Tr. 79) and claimant lived with him thereafter (Tr. 80). The daughters from time to time bought groceries and things of that type (Tr. 79).

ARGUMENT

The sole question presented by plaintiff's brief is as to whether or not plaintiff was a "dependent" of the deceased workman, Isaiah J. Llewelyn, at the time of his death. We believe there is another question which merits

consideration, and that is as to whether or not the death was caused by injuries arising out of the course of employment, but for purposes of clarity that matter will be argued at a later point in this brief.

It is noted that the Industrial Commission (Tr. 12) found that plaintiff was not dependent upon deceased at the time of his accidental injury and death, and it is deemed advisable at the outset to briefly analyze the extent and nature of any review that may be made by the Supreme Court on that finding.

In *Kent vs. Industrial Commission*, 89 Utah 381, 57 P. 2d 724 (1936), the court stated at page 725:

“In the case of denial of compensation, the record must disclose that there is material, substantial, competent, uncontradicted evidence sufficient to make a disregard of it justify the conclusion, as a matter of law, that the Industrial Commission arbitrarily and capriciously disregarded the evidence or unreasonably refused to believe such evidence. See *Kavalinakis v. Ind. Commission*, 67 Utah 174, 246 P. 698, and *Gagos v. Industrial Commission (Utah)*, 48 P. (2d) 449, 450.”

That this rule is well settled is apparent in the recent case of *Woodburn vs. Industrial Commission*, 181 P. 2d 209 (Utah—1947), wherein the court cited with approval the *Kent* case, *supra*, and also stated at page 212:

“In *Lorange v. Industrial Commission*, 107 Utah 261, 153 P. 2d 272, 273, we quoted with

approval from *Kavalinakis v. Industrial Commission*, 67 Utah 174, 246 P. 698, as follows:

‘Unless therefore it can be said, upon the whole record, that the commission clearly acted arbitrarily or capriciously in making its findings and decision, this court is powerless to interfere. . . . It was not intended, . . . that this court, in matters of evidence, should to any extent substitute its judgment for the judgment of the commission.’ ”

It is also noted that dependency in the type of case here involved has been held to be a question of fact to be determined by the commission, not the reviewing court. See *Geo. A. Lowe Co. vs. Industrial Commission*, 56 Utah 519, 190 Pac. 934 (1920).

The applicable rules of law by which dependency in a case of this kind may be determined have been stated many times by this court. There is but one standard, and that is as to whether or not the alleged dependent has a reasonable expectation of continuing or future support and maintenance. In determining the “reasonable expectation” there are, of course, a number of factors to be given consideration, among which are the legal obligation to support, past contributions, action in anticipation of future contributions, and whether or not applicant has means of support in substitution for the anticipated contributions of deceased. Of all of these factors, logic and common sense would indicate that by far the strongest and most controlling is the record of past contribution. We cannot agree with the theory

advanced by plaintiff's brief that there are two criteria, "reasonable expectation" and "need plus legal duty", since the cases clearly indicate that need and legal duty are merely two of several factors which must be considered in determining reasonable expectation.

Applicable provisions from the controlling statute, 42-1-67 U.C.A. 1943, read as follows:

"The following persons shall be presumed to be wholly dependent for support upon a deceased employee:

(1) A wife upon a husband with whom she lives at the time of his death.

* * * *

In all other cases, the question of dependency, in whole or in part, shall be determined in accordance with the facts in each particular case existing at the time of the injury resulting in the death of such employee. . . ."

Since in the instant case plaintiff had not lived with deceased for eleven years, and was not living with him at time of death, subsection (1) is not applicable, and the case is controlled by the second quoted portion of the statute.

The standard by which dependency should be determined was laid down in the 1926 case of *Utah Apex Mining Co. v. Industrial Commission*, 66 Utah 529, 244 Pac. 656. There applicant wife and deceased husband were married at Blackfoot, Idaho, in 1918, and after intermittently living together for several months, she went

to her brother at Pocatello and worked at odd jobs until 1922 when she went to her mother at Morehead, Kansas. She remained there for about two years, supporting herself by canvassing, and returned to Price, Utah in 1924, continuing to support herself in the same manner up to her husband's death on May 12, 1924, which death was occasioned by an accident while employed by the Utah Apex Mining Company. She received no money from her husband during most of this period, but did keep track of him and stated that she would have gone back to live with him and demanded his support if he had been working. The order awarding compensation was reversed upon appeal.

The court stated, page 657 :

“* * * And the burden of establishing dependency was upon the applicant. Utah Apex Min. Co. vs. Ind. Com., 228 Pac. 1078, 64 Utah 221. It is plainly deducible from the statute itself that dependency is not presumed from or established by the existence of the legal relation of the wife to the husband, unless they are living together, and when, as in this case, they were not living together, dependency is not established unless something tending to show dependency, in addition to the legal duty of the husband, is shown.

“In 28 R.C.L. 771, it is said :

“*“The purpose of the statute is to provide the workman's dependent in future with something in substitution for what has been lost by the workman's death, and, consequently to establish dependency the applicant for compensation*

must show that he or she had reasonable grounds to anticipate future support from the decedent. This reasonable expectation of continuing or future support and maintenance seems to be the true criterion as to who are dependents.'

“And, at page 773:

“‘If the applicant for compensation is unaided by the statutory presumption of dependency, he must present proof of the fact. Among the principal indicia of the state of dependency may be mentioned the legal obligation of support; the fact that contributions have been made in the past; the fact that the applicant has taken some action in anticipation of future contributions, and the fact that the applicant has no means of support in substitution for the anticipated contributions of the deceased. It is not to be understood, of course, that all of these elements must be proven in any particular case; but it will be true in a great majority of cases, though there will be well defined exceptions, that contribution in the past is an essential, as it is the most cogent, evidentiary fact in the proof of dependency. The legal obligation of support, when considered alone, will rarely, if ever, establish a state of dependency, or give rise to a presumption that a person is a dependent; but it may very well strengthen a weak inference arising from small or irregular contributions, or it may aid a promise of future support. Where it appears that the legal obligation had been neglected by the deceased immediately prior to his death, the issue of dependency must be resolved ordinarily with reference to the duration of the period of non-support.’

“‘In cases where the employee upon whom the legal duty of support rests has deserted his de-

pendents, and has wrongfully evaded or neglected his obligation to them, it is a proper inquiry whether the facts and circumstances warrant the reasonable probability that the legal obligation would have been enforced in future. And it can easily be supposed that when such reasonable probability exists, a state of dependency, under the statute, might be found.

“In the case at bar, to establish her dependency upon deceased, it was incumbent upon the applicant to show not only that deceased owed her that legal duty of support, but that there was a reasonable expectation that the duty would be fulfilled; *in other words, that the legal obligation of support must be coupled with such other facts and circumstances as to warrant the reasonable probability that such obligation would be performed.*”

In the earlier case of *Utah-Apex Mining Co. vs. Industrial Commission*, 64 Utah 221, 228 Pac. 1078 (1924) the evidence showed that the deceased husband had left his wife and failed to support her from December 1918 until October, 1923, when the accident occurred which caused his death. The claimant wife not only had received no funds during this time from deceased, but was in necessitous circumstances and receiving alms from the county poor fund. The commission's award based upon a finding of dependency was annulled upon the ground that no dependency existed.

The court at page 1080, went to considerable length to discuss the matter of the financial condition of the

claimant and to point out that it has little if any bearing on the question of dependency :

“In Honnold, Workmen’s Comp. vol. 1, Sec. 70, p. 224, the author, discussing the question as to who are dependents, says :

‘It may be said in general terms that a “dependent” is one who looks to another for support, one dependent upon another for the ordinary necessities of life for a person of his class and position.’

“Further on, in the same section, at page 225, the author continues :

‘It follows that dependency does not depend on whether the alleged dependents could support themselves without decedent’s earnings, or so reduce their expenses that they would be supported independent of his earnings, but on whether they were in fact supported in whole or in part by such earnings under circumstances indicating an intent on the part of the deceased to furnish such support.’

“In Dosker’s Manual of Compensation Law, at page 194, the author, quoting from a Connecticut case, says :

‘A dependent under the act is not necessarily one to whom the contributions of the injured or deceased workman are necessary to his or her support. The test is whether the contributions were relied upon by the dependent for his or her means of living.’ ”

Plaintiff has cited in support of his position the case of McGarry vs. Industrial Commission, 63 Utah 81, 222 Pac. 592 (1923), and 64 Utah 592, 232 Pac. 1090 (1925). The case is readily distinguishable since it involved a deserted infant seven years old, and the *concealment* by the deceased father of his whereabouts, coupled with an actual dependency. This court in the Utah-Apex Mining Co. case of 1924, *supra*, distinguished the facts of the first McGarry decision in the opinion, and pointed out the unusual features of the McGarry case. Also in the Utah-Apex Mining Case of 1926, *supra*, the court again commented on the McGarry case as follows, page 659, Pacific Reporter:

“In this state of facts we are compelled to conclude that there was no proof, aside from the legal obligation of deceased, upon which to base the conclusion that there was a reasonable expectation of future support by the deceased. This conclusion is not opposed to what was said or decided in McGarry v. Ind. Com., which was twice before this court. 222 P. 592, 63 Utah, 81; 232 P. 1090, 64 Utah, 592, 39 A.L.R. 306. That case involved the claim of a minor child, seven years of age, whose father had deserted it, and left for parts unknown, and concealed his whereabouts and identity for two or three years and until his death. This court decided that it was further shown that the child was actually dependent; that the peculiar and exceptional circumstances present would support a finding that the child was a dependent of its father, within the meaning of the statute. *The actual dependency of the child, its lack of legal capacity to assert or waive its*

legal right to support from its father, and the conduct of the father in concealing himself to avoid his legal duty are features which clearly distinguish that case from the one under review. In Utah Apex Min. Co. v. Ind. Com., 228 P. 1078, 64 Utah, 221, the claim of a wife to be adjudged a dependent was denied. The parties had lived apart for four years, during which time the husband had made no contributions to his wife's support. She testified that her husband had left her, and that she did not expect him to come back or to support her or furnish her with any financial assistance. In each of the cases last cited there was present the legal obligation of support, and the ultimate test in each case was the probability of future support."

Plaintiff has also cited the case of Utah Fuel Company vs. Industrial Commission, 80 Utah 301, 15 P. (2nd) 297 (1932), and quotes from that opinion relative to the basis for dependency as being established solely upon a need plus a legal duty. The case does not involve the dependency of a wife legally separated from her husband, but minor children. Adherence to the rule of the previous Utah decisions was contained in the statement of the court at page 298 as follows:

"The decisions of the courts in this country and in England are practically unanimous in holding in cases where dependency rests on facts, not presumption, that a finding of dependency cannot rest alone on proof of relationship of the parties, but that, in addition thereto, there must be introduced in evidence some facts showing that the right to support has some practical value. *The minimum requirement is that there must be*

shown a reasonable probability that the obligation of the parent will be fulfilled. Glaze v. Hart, 225 Mo. App. 1205, 36 S.W. (2d) 684; Ocean Accident & Guarantee Corp. v. Industrial Commission, 32 Ariz. 54, 255 P. 598; Id., 34 Ariz. 175, 269 P. 77; Young v. Niddrie & Benhar Coal Co., Ltd., 603 B.W.C.C. 744. See cases cited in McGarry v. Industrial Commission, 63 Utah 81, 222 P. 592; Id., 64 Utah 592, 232 P. 1090, 39 A.L.R. 306. The rule is stated by Mr. Justice Cherry in Utah-Apex Mining Company v. Industrial Commission, 66 Utah 529, 244 P. 656, 657, as follows: 'In cases where the employee upon whom the legal duty of support rests has deserted his dependents, and has wrongfully evaded or neglected his obligation to them, it is a proper inquiry whether the facts and circumstances warrant the reasonable probability that the legal obligation would have been enforced in future. *And it can easily be supposed that when such reasonable probability exists, a state of dependency, under the statute, might be found.*' "

The case of Diaz vs. Industrial Commission, 80 Utah 77, 13 P. (2nd) 307 (1932) from which the plaintiff quotes at length has no relevancy to the facts of the case before the Commission. The court itself summarized the evidence to point out this distinction, at page 312:

"Here the parties lived together for eleven years, during all of which time the applicants looked to the deceased for support and maintenance, and were supported and maintained by him. When the deceased left Dividend and went to Butte, there is no substantial competent evidence to show nor to justify an inference that such family relation was not to continue or that

by mutual consent it was so changed that the deceased no longer was required to perform his legal and moral obligation to support the applicants, or that they no longer were to be supported by him, or no longer expected to receive support from him, and that they from thence on were required to shift for themselves without aid from the deceased. We do not see anything in the record to justify any such inference or conclusion. None such is justified, because the parties lived apart from each other for about a year and a half, about one year of which the deceased was in Butte. Further, the evidence shows that during the time he was in Butte he and his wife corresponded with each other, and that she received moneys from him, and, when he returned to Dividend, they visited each other, and on such occasions he also gave her money for the support of herself and of the minor child."

No other logical conclusion could be drawn from that evidence, but that there was a distinct probability of support and maintenance, and the court very carefully pointed out the contributions and close relationship of the parties which made this so. The mere fact that by a mutual arrangement of the parties there is at the instant of death a temporary separation with no active support should not deny compensation and a finding of dependency in and of itself. A husband may have left his family to establish a home elsewhere, as the court indicates, yet they may be dependent upon him. Why? Because under such circumstances they may anticipate the probability of future support. The very quotation

from page 311 set forth by plaintiff, citing from a Pennsylvania case, makes this clear.

“... Where the separation is merely for the mutual convenience of the parties, and the wife is dependent, and the obligation to support her is either recognized or performed, the mere fact that the husband, for any reason, fails to perform that duty for a time, does not deprive the wife of her status as a dependent....”

The decision also cites the case of *Merrill vs. Penasco Lumber Co.*, 204 Pac. 72 (1922), and plaintiff cites this case in her brief. It is the same type of case as the *Diaz* case, and falls within an entirely distinct category than that with which we are here concerned. These cases do not in any sense modify the rule established that the true criterion of dependency, absent statutory presumption, is the reasonable probability of future support.

In general, it is believed that the Utah decisions provide adequate authority for the proper determination of the question of dependency. It is deemed advisable, however, to comment briefly on the Pennsylvania decisions in plaintiff's brief, since they have been cited. The case *Urban v. Nanticoke City*, 169 Atl. 466 (Pa. 1933), is clearly distinguishable. There the wife had been confined to a mental hospital, supported by public authorities, for many years, and while no actual payment had been made for the eleven years prior to death, the decision very carefully pointed out that the wife had been paroled to her husband for varying periods during her overall stay in the hospital, that he visited his wife on

holidays during the period, that he had promised to pay the public authorities on several occasions when he had funds to do so, and that he had promised to take care of his wife whenever she was released. In view of these factors, the court viewed dependency as established.

In *Binkley vs. Stone & Webster Engineering Corporation*, 40 A. 2d 132 (Pa. 1944) the distinguishing factor, and the core of the decision, was stated at page 134:

“The conclusion of the board was: ‘Under the circumstances, she did all she could reasonably be expected to do. Her failure to receive payments on the support order was due to decedent’s evasion of his obligation and the *intentional concealment* of his whereabouts. *We can presume that had claimant known where her husband was employed legal process would have produced compliance with the order and payment of money to claimant.*’ ”

There is no factor of concealment whatsoever in the case before the court.

In *Dupree vs. Monroe Sand & Gravel Co.*, 18 So. 2d 845 (La. 1943), a wife was held not to be a dependent where there was an extended separation without contribution by her husband.

In considering the facts of the instant case against the background of applicable law, it is again noted that a decision of the Industrial Commission may not be disturbed unless the court finds that the Commission arbitrarily, and capriciously disregarded the evidence or un-

reasonably refused to believe competent, substantial, and material evidence.

It is impossible to see in the case a scintilla of evidence upon which any expectation of future support could be predicated. The parties had been separated for 11 years at the time of death and during that entire period plaintiff had received only \$200 or \$225, and had received nothing whatsoever during the last five years of that period. During at least the eight or nine years prior to death, deceased had been working at the same job for Clayton Investment Company in Salt Lake City, Utah (Tr. 29, 30). There was no concealment whatsoever.

The factor of past contribution, therefore, which as has been pointed out is one of the prime factors in considering the question of dependency, is almost completely lacking. It is true that there is a legal duty existant, but as the court above has indicated, this duty cannot itself create dependency. Moreover, that duty in this case is a narrow one since it is not the broad duty of a husband to support a wife, but that of a separate maintenance decree providing for the payment of only \$25.00 per month. The cases cited above consider the dependency of husband and wife, but the parties in this case were not husband and wife since separate maintenance is a specie of divorce.

The actual need of the plaintiff is itself and in many respects a matter of conjecture. At page 76 of the transcript appears the following:

“Q. Were you at the time of the death of Mr. Llewelyn dependent on him for your support and maintenance?

“A. Well, yes, I was. Of course, I worked all the time steady.”

And at page 77:

“Q. During the past thirteen years have you at anytime lived with your husband?

“A. No.

“Q. Have you been working during that time?

“A. Yes, I worked off and on all the time.”

This last answer is interesting in that an attempt was made to show that plaintiff had not worked for a few months prior to the date of death, yet this answer indicates that the employment during the years of separation had been sporadic and carries the clear implication that there were intervals when no work was performed. Again, as the courts above have pointed out, need alone cannot form the basis of creating a dependency. If that principle were established and dependency determined by the financial status of the alleged dependent, in cases where a family had sufficient means to continue living in the proper station of life, they could not be classed as dependents even though deceased had actually contributed regular and substantial amounts during his lifetime to their support. This is clearly not the law, and the courts have uniformly held to the contrary.

In conclusion, it is submitted that the Commission has given a fair and impartial consideration to all of the evidence before them, and has properly decided that no actual dependency existed. There is nothing in the record to indicate that the Commission arbitrarily and capriciously disregarded or unreasonably refused to believe any of the evidence, and the decision should be affirmed.

The determination of the existence of a casual connection between the accidental injury and the death of deceased.

At the outset of the brief, it was indicated that the defendant did not acquiesce in the finding that the injury sustained by the deceased was the actual cause of death, and the details of this protest were set forth in the answer to the petition for rehearing (Tr. 17). While we believe the finding must be sustained if there is competent and material evidence in the record to support it, whether or not there is conflict in that evidence, we also believe an examination of the medical testimony discloses that all of the *competent* evidence is to the contrary.

Statement of facts as to the causal connection between injury and death.

Isaiah J. Llewelyn, age 62, was employed by the Clayton Investment Company as a fireman at a heating plant of that company in Salt Lake City, Utah on December 1, 1946. (Tr. 28). On that date he jumped off an

elevation about two feet high, and onto a piece of coal lying on the floor below, injuring his left foot, which pained him on top of the instep and down the inside. (Tr. 32). He was removed to his room in the Wilson Hotel, and Dr. J. J. Galligan was called (Tr. 82). He was removed the same date to the Holy Cross Hospital, where an examination of the lower leg showed a severe sprained ankle and incomplete fracture of the heel bone called the os calcis, together with some stripping of the tips of the malleoli (Tr. 82). He remained in the hospital until January 27, 1947, and during this time was attended by Dr. Galligan who saw him nearly every day and sometimes twice a day (Tr. 82). Mrs. H. K. Coolican saw him in the hospital on December 10, and stated that the foot was swollen and discolored nearly to the knee (Tr. 33), and that substantially the same condition prevailed on December 27 (Tr. 34). Deceased was examined when he first went to the hospital, and at subsequent times, and in addition to the injury also had high blood pressure, an enlarged heart and a record of infection in his left leg one year prior to admission (Tr. 84), and hypertension (Tr. 90). Upon admission he had an enlarged and swollen ankle joint and lower leg with tenderness over the heel (Tr. 84).

Dr. Galligan treated the patient during the first hospitalization, and did not see him more than once or twice thereafter (Tr. 86). He testified that such a fracture is unusual (Tr. 88), and that emboli (which immediately caused the death) usually occur immediately after the

injury (Tr. 89). The period of hospitalization at that point was a normal period for injuries of that type (Tr. 91).

About January 25, 1947, deceased left the hospital and returned to the Wilson hotel (Tr. 35), transferring to his daughter's home on February 7, 1947 (Tr. 36), where he remained until March 11, 1947 (Tr. 106), on which date he returned to the hospital, and died there March 27, 1947. His daughter testified that the leg was swollen and discolored on February 7, and on February 9, pain traveled up his thigh (Tr. 38), moving into back on February 22 (Tr. 39). While he went to bed on February 7, he was up and around the house at intervals until February 22 (Tr. 48).

Dr. Bruce R. Pearson first saw deceased on February 26, 1947 (Tr. 105) at the request of Dr. Galligan and was the attending physician from that date until time of death. His examination disclosed acute congestive heart failure which was treated with digitalis, and when that was under control he found a severe infection of the urinary tract (Tr. 106). The heart condition was unquestionably of many years standing and the urinary infection had existed for approximately two or three years (Tr. 107). The patient was aware of the symptoms of these diseases, but as a layman did not appreciate the specific nature of his illness (Tr. 107).

Dr. Pearson stated that the immediate cause of death was recurrent pulmonary embolism of about 16 days duration (Tr. 119) due to chronic vascular disease

(Tr. 119), and this was one of the causes put down on the death certificate by him (Tr. 111). There had been a major embolism on March 15 and again on March 23 (Tr. 115). Dr. Pearson testified that pulmonary emboli are most commonly caused by infection, disease, nutritional causes and blood clotting (Tr. 112), and also that one of the least causes is traumatic injury (Tr. 120). If the cause is traumatic, the importance of the time element was clearly set forth at page 120 of the transcript:

“Q. And if from some traumatic injury pulmonary emboli is formed, how soon after the injury normally do these emboli reach the heart and cause death?

“A. The emboli—the vascular blood clot occurs immediately; that is, very much of a clot in an injured vessel occurs immediately following an injury, and if embolism is going to occur it will occur in most instances before the reparative process. That is scar tissue formation that takes place in the clots has had an opportunity to occur. That takes place quite rapidly, so that generally speaking from a traumatic injury we would expect any emboli phenomena to occur immediately. That is, within a period of a few days. Certainly within a period of three weeks ought to give anything that is going to occur, ample time to completely heal.”

And at page 122, 123 of the transcript:

“Q. When the emboli form, they hang on the inside of the vessel. They are not formed while moving, are they?

“A. No, but once an embolus is formed and then there is an inflammatory process sets up within 24 to 48 hours. They just don’t hang there and not do anything.

“Q. They would not be moving through the vessels until they had broken away?

“A. That is right. According to our concept of it, an embolus must break away and enter the circulatory system sometime within twenty-four to forty-eight hours after it is first formed. Otherwise it will be fixed and permanent to the vein by this inflammatory reaction.

“Q. You say it would be fixed and permanent?

“A. Yes.

“Q. It could be formed in a permanent status, and later on it might break loose?

“A. No, that is not the situation. When fibrous tissue sets in, the clot becomes an integral part of the vein wall.”

Dr. Pearson testified as to his opinion of the cause of death and its possible connection with the injury sustained. At page 119 of the transcript he stated:

“Q. In your opinion was the injury to the left foot which was an incomplete fracture of the os calcis and sprain of the left foot, was that, in your opinion, in any way the immediate cause of his death?

“A. I can’t see any connection whatsoever.

“Q. In other words, the injury to the patient’s left leg had no connection, direct or otherwise, to the immediate cause of death?

“A. In my opinion, definitely no.”

Again at page 108:

“Q. Now, doctor, from your original examination and your subsequent treatment and your care and consideration of Mr. Llewelyn's case, did you form an opinion as to what was the cause of death?

“A. I did.

“Q. What was your opinion?

“A. I felt that the generalized cardio-vascular renal disease was the principal cause of death, and that that was complicated by a long history of chronic alcoholism, malnutrition and infection of the urinary tract.”

Dr. Pearson also qualified the testimony of the family of deceased relative to the condition of the leg when deceased was taken to the hospital in March. He stated the leg was slightly trophic, without evidence of edema or swelling, and while stating there was discoloration, he deemed it to have come from old venous varicosities (Tr. 121). Also on February 27, there were pigmentary scars from ulcers on the shin, but no other discoloration (Tr. 124).

Dr. Leslie B. White was called as an expert witness by plaintiff and the major portion of his testimony was directed to qualification, with the exception of a hypothetical question and his answer (Tr. 69). He had never seen or treated the deceased (Tr. 60).

ARGUMENT

Based upon the medical testimony, there can be no doubt that the attending doctor, Pearson, was of the very definite and strong opinion that the injury did not cause or contribute to the death of deceased. The testimony of Dr. Galligan is not in conflict with this, particularly in view of the fact that he did not see the patient, except once or twice at the home of the daughter, after the release from the hospital from the first period of hospitalization on January 25, 1947.

Dr. White, however, did indicate a causal connection between the injury and death. The focus of inquiry, therefore, must center on the only hypothetical question asked, and the answer of Dr. White. The question and answer follow (Tr. 69) :

“Q. Doctor, I will ask you to assume the following facts to be true: That on the 1st of December, 1946, Mr. Llewelyn, a man of 62 years was in good health and he stumbled and fell and fractured the plantar aspect of the os calcis of the left foot. That Mr. Llewelyn was confined to his bed in a hospital from December 1, 1946 to January 25, 1947, and on this later date he was released from the hospital improved but still suffering extremely from a sore, swollen and very discolored left leg and foot. That Mr. Llewelyn could not stand with his foot lowered because of the extreme pain, and that he was unable to bear any weight on his leg and could only move about with the aid of crutches. That Mr. Llewelyn suffered no other injury, but on February 7, 1947, he was stricken with a pain in the calf of his

left leg; that this pain seemed to progress up the left leg into the thigh and from the thigh into the side, and finally lodging in his back on February 22, 1947; that after this later date Mr. Llewelyn was unable to get out of bed; that on or about March 14 the first of a series of emboli passed through Mr. Llewelyn's pulmonary veins and on March 27 Mr. Llewelyn died, and the diagnosis was recurrent pulmonary embolism of sixteen days duration. Now Doctor, based on your experience as a physician and surgeon, do you have an opinion as to the source and cause of the emboli that was the immediate cause of Mr. Llewelyn's death?"

(Discussion by Counsel)

"Q. Answer whether you have an opinion based on your experience.

"A. Yes.

"Q. What is your opinion, doctor?

"A. My opinion is that—from the hypothetical question quoted—that there had been some damage to the vessels to the foot or calf of the leg which formed a thrombosis in the great vessels of the leg, either the popliteal or femoral vein. The clot would not necessarily block the entire vein, but it lodged there free, and after a given length of time it was jarred loose and went into the general circulation and carried up through the heart to the lung, and that the pulmonary embolus was the immediate cause of death. There may have been other factors, I don't know."

It will be noted that the answer itself is very careful to limit itself to the hypothetical question, for the

Doctor says "from the hypothetical question quoted" and also "There may have been other factors, I don't know." The difficulty with the hypothetical question, however, is that it omits entirely the very factors which Dr. Pearson had listed as the cause of death. Dr. Pearson had testified that emboli are caused by a number of conditions, listing disease as the most frequent cause and traumatic injury as the most infrequent. All of the medical testimony indicates, however, that emboli are created by a specific cause, and apparently are not created by the body without that cause. The problem confronting Dr. White in the question was that of a man in "good health," who sustained an injury which produced symptoms of pain and discolor, and who died from an emboli. Under the question there was only one possible source for the emboli, and that was the injury. Nothing else was present which could have caused it. Dr. White does not in final analysis contradict the testimony of Dr. Pearson that an emboli usually occurs, when caused by injury, immediately thereafter and not to exceed three weeks. The testimony of Dr. White may well have viewed the injury as possibly causing death simply because the immediate cause of death was known and there was no other conceivable source for the immediate cause except that injury. Had the Doctor been properly advised and the question adequately framed to show that deceased was suffering from generalized cardio-vascular renal disease, complicated by a long history of chronic alcoholism, malnutrition and infection of the urinary tract, his answer might well have been identical with

that of Dr. Pearson. For these reasons it is submitted that there is in reality no competent contradiction of Dr. Pearson, and therefore no testimony upon which the finding of the Commission that the injury caused the death could be predicated.

In conclusion it is submitted that the decision of the Commission denying compensation should be affirmed, not only upon the ground that there was no dependency in this case, but upon the further ground that there was no casual connection between the injury and the death.

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