

1948

Silver King Coalition Mines Company and Continental Casualty Company v. Industrial Commission of Utah and Susan J. Mitchell : Brief of Defendants

Utah Supreme Court

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In the
SUPREME COURT
of the
STATE OF UTAH

SILVER KING COALITION MINES
COMPANY, a corporation, and CON-
TINENTAL CASUALTY COM-
PANY, a corporation,

Plaintiffs,

vs.

INDUSTRIAL COMMISSION OF
UTAH and SUSAN J. MITCHELL,
mother of Lester A. Mitchell, deceased,

Defendants.

Case No.
7171

DEFENDANTS' BRIEF

FILED

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SEP 27 1948

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DEFENDANTS' BRIEF

STATEMENT OF FACTS

The Defendants feel that the Plaintiffs' Statement of Facts contained in their Brief on file herein sufficiently presents the basic facts of this case necessary to an understanding of the issues involved. The Defendants, therefore, have no additional statements of fact to make at this time. Defendants do, however, feel that

the facts already before the Court do need some amplification and further interpretation, but in order to avoid duplications said facts will be referred to in the Defendants' argument.

QUESTIONS TO BE CONSIDERED

QUESTION No. 1

Was the Industrial Commission's decision supported by the evidence or did the commission exceed its powers by arbitrarily and capriciously disregarding uncontradicted evidence?

QUESTION No. II

Did the Commission abuse its discretion in refusing an autopsy in this case?

QUESTION No. III

Was the award in conformance with the occupational disease law of the State of Utah?

ARGUMENTS

WAS THE INDUSTRIAL COMMISSION'S DECISION SUPPORTED BY THE EVIDENCE OR DID THE COMMISSION EXCEED ITS POWERS BY ARBITRARILY AND CAPRICIOUSLY DISREGARDING UNCONTRADICTED EVIDENCE?

The Defendants hardly feel it necessary to point out to this Court with any high degree of elaboration the numerous rulings which this honorable body and the Supreme Courts of all other states have handed down

relative to the respective duties of the Industrial Commission and the Supreme Courts in relation to those cases which are decided by industrial commissions. The Defendants desire, therefore, only to briefly and summarily refer to the law of this state on that issue. Our Supreme Court is limited to a determination of whether or not said commission has exceeded its powers in relation to the facts or has disregarded some provision of law in the making or denying of an award, or whether or not the commission in the decision in question has arbitrarily or capriciously disregarded uncontradicted evidence.

(See *Utah Consolidated Mining Company vs. Industrial Commission*, 66 Utah 173, 240 Pac. 440 and *Kelly vs. Industrial Commission*, 80 Utah 73, 12 Pac. (2d) 1112).

If the commission's findings are supported by the evidence and if any inference may be reasonably drawn from the evidence presented to support said findings, our Supreme Court has no authority to upset the Industrial Commission's decision.

(See *Park Utah Consolidated Mines vs. Industrial Commission*, 84 Utah 481, 36 Pac. (2d) 979; *Russell vs. Industrial Commission*, 86 Utah 306, 43 Pac. (2d) 1069; *Woodburn vs. Industrial Commission*, Utah, 181 Pac. (2d) 209).

The Supreme Court does not weigh conflicting evidence nor determine which witnesses are to be believed nor can it in any way substitute its own judgment for that of the commission.

(See *Parker vs. Industrial Commission*, 78 Utah 509, 5 Pac. (2d) 573; *Bain vs. Industrial Commission*, 58 Utah 370, 199 Pac. 666; *Ostler vs. Industrial Commission*, 84 Utah 428, 36 Pac. (2d) 95; *Tintic Standard Mining Company vs. Industrial Commission*, 100 Utah 96, 110 Pac. (2d) 367; *Norris vs. Industrial Commission*, 90 Utah 256, 61 Pac. (2d) 413).

The Industrial Commission is the final arbiter of the facts and conflicts in the testimony and has the right to weigh the testimony of the various witnesses and to test their credibility.

(See *Milkovich vs. Industrial Commission*, 91 Utah 498, 64 Pac. (2d) 1290; *Chief Consolidated Mining Company vs. Industrial Commission*, 70 Utah 333, 260 Pac. 271; *Norris vs. Industrial Commission*, *supra*; *Kent vs. Industrial Commission*, 89 Utah 381, 57 Pac. (2d) 724; *Sugar vs. Industrial Commission*, 94 Utah 56, 75 Pac. (2d) 3117).

Innumerable other cases could be referred to to support the rules given above relative to the respective duties of the Supreme Court and the Industrial Commission, but to cite further cases would be merely cumulative rather than informative.

The Defendants submit that the testimony taken in this case at the hearing before the Industrial Commission contains considerable evidence supporting the decision of the commission to the effect that the deceased contracted silicosis, an occupational disease arising out of and in the course of his employment, and as a result of his exposure to silicon dioxide dust while employed

by the Silver King Coalition Mines at Park City, Utah, which silicosis, an occupational disease, caused the death of said Lester A. Mitchell, deceased.

Silicosis, under Utah law, is defined in Section 42-1a-29 U.C.A., 1943 as follows:

“For the purpose of this act ‘silicosis’ is defined as a chronic disease of the lungs caused by the prolonged inhalation of silicon dioxide dust (SiO_2) characterized by small discrete nodules of fibrous tissue similarly disseminated throughout both lungs, causing a characteristic X-ray pattern, and by variable clinical manifestations.”

The Defendants desire herewith to point out the evidence supporting the fact of death having been caused by silicosis in the case now before the Court. Dr. William R. Wherritt had known the deceased since the deceased was born and had treated him over that period of time for various ailments at various times. It was not until December 9, 1946 that Dr. Wherritt had any cause to examine the deceased for any matters related to his last illness or the illness which is now in issue before this body. At that time the deceased was given a physical examination. Dr. Wherritt found the deceased short of breath, found a rasping cough, and dilated heart with prominent decompensation, and determined that he was unable to work further. (Tr. 23). Dr. Wherritt took no X-ray pictures because he does no X-ray work, but he did refer him to Dr. L. E. Viko of the Intermountain Clinic in Salt Lake City, Utah. Dr. Wherritt treated the deceased until he died and signed the death certificate. He gave the immediate cause of death as congestive heart

failure due to silicosis. Apparently, he found no tuberculosis. (Tr. 24). Dr. Wherritt was unable to give the degree of silicosis but did emphasize that the heart trouble which was the immediate cause of death was due to the silicosis from which the deceased was also suffering at that time. He explained that silicosis caused the heart trouble. The condition of the lungs due to silicosis made it so the deceased could not expand nor could he get sufficient oxygen into his lungs. He became short of breath and would sometimes have to stop work from sheer exhaustion. This condition was what affected his heart and caused the heart trouble from which he died. Dr. Wherritt also explained on cross examination that even though he could not state the degree of silicosis suffered by the deceased, the effect of the silicosis would be in proportion to its advancement. If it were a mild case of silicosis it would not have much effect on the heart but as the silicosis advanced in severity its effect on the heart would become greater; but that silicosis definitely did have effect upon the heart for the reasons stated (Tr. 25 and 26).

Dr. L. E. Viko of the Intermountain Clinic in Salt Lake City is no doubt considered one of the best heart specialists in the State of Utah. At the instance of Dr. Wherritt the deceased was examined by Dr. Viko on December 17, 1946. Dr. Viko found the deceased suffering from silicosis and cor pulmonale due to chronic lung disease. Cor pulmonale, as defined by Dr. Viko, means "heart disease due to chronic lung disease." (Tr. 30-34 and 35). Dr. Viko found "a moderately severe" case

of silicosis with the deceased; that the silicosis was severe enough to cause disablement; that the silicosis plus the heart disease made the deceased totally disabled; that the heart disease of the deceased was caused by the silicosis and its complications, and that the silicosis was an important factor and an essential cause in the production of the heart disease which was the final cause of death ('Tr. 31-32-33 and 36). Dr. Viko had X-ray pictures taken and the results of his examination were verified by the pictures. In other words, the X-ray also disclosed silicosis and heart disease. Dr. Viko was very definite in his conclusions that silicosis was a contributing factor to the deceased's death even though the heart condition might have been classed as the chief cause of death. ('Tr. 31 and 32). Again it might be pointed out that Dr. Viko is a very noted heart specialist and that his testimony now relates to matters about which he should be very well advised. He was placed under strenuous cross examination and verified the matters which have here been called to the Court's attention. As with Dr. Wherritt, he also made the point which seems very simple and reasonable; namely, that a slight degree of silicosis is bound to effect breathing and the use of the lungs in a slight degree, but the fact remains it does affect the heart by making breathing more difficult and the functioning of the heart in connection with the lungs more difficult. For the same reason a severe case of silicosis would affect the breathing and the use of the lungs to a much greater degree and would put much greater strain on the heart; but

again the fact remains that the heart is affected in these cases. (Tr. 35).

Dr. Paul S. Richards was used by the Plaintiffs in this case as one of their witnesses. His testimony is very completely reported in the Plaintiffs' Brief and the Defendants therefore refrain from any extensive review of the same testimony. Dr. Richards seems to be personally of the opinion that the deceased had a moderate amount of silicosis. He had never personally seen the deceased but based his decision upon examining the X-rays taken by Dr. Viko. It is clear from his testimony that he was at all times in doubt when called upon to make definite statements. He seemed also to be of the personal opinion that the heart trouble of the deceased could not have been caused by the degree of silicosis suffered by the deceased. He did spend a lot of time, however, explaining that there are two fields of thought, one that silicosis affects the heart and another that silicosis does not affect the heart and that he, himself, was inclined to believe with the latter group. Dr. Richards admitted that where a doctor is able to contact a patient personally he is in a much better position to determine the nature of the patient's ailments, and that had he had an opportunity to have seen the patient personally he would be in a much better position to advise as to whether or not he had silicosis. (Tr. 42). Dr. Richards further advised that if he knew that a patient had been exposed to dangerous dusts and should see other symptoms related to silicosis and knew the man's history, then "you could interpret into these films (X-ray

pictures of the deceased) that he has silicosis''. (Tr. 42). It might be pointed out to the Court that Drs. Wherrit and Viko had personal contact with the deceased, knew his history, observed him while alive and that there is evidence of exposure to silicon dioxide dust. The deceased had a long history of work underground at the Silver King Coalition Mines. (Tr. 38). These doctors who had the contact which Dr. Richards stated was advisable hesitated in no way whatsoever to state that the deceased had silicosis and that it contributed to his final cause of death. Dr. Richards finally, after much examination, admitted that he did not know the cause of death in the case of Lester A. Mitchell, deceased. (Tr. 45).

DID THE COMMISSION ABUSE ITS DISCRETION IN REFUSING AN AUTOPSY IN THIS CASE?

Our State law does provide for the ordering of an autopsy in those cases where "in the opinion of the commission it is necessary to accurately and scientifically ascertain the cause of death''. (42-1a-47, U.C.A., 1943). It is conceded that the commission refused to order the autopsy in this case partly out of deference to the wishes of the deceased's family but primarily because at no time did it appear to the commission that the cause of death could not be otherwise determined. The facts which must be depended upon by the commission to rule on the cause of death are so closely related to this particular issue that the Defendants feel that a decision on that question would more or less automatically decide

the issue in this particular problem. In other words, if the commission properly acted within its powers in deciding that silicosis was the cause of death, then a decision that no autopsy was necessary would also be proper because we must then say that a decision as to the cause of death needed no autopsy. The Defendants also desire to point out that Dr. Viko stated that no autopsy was necessary to determine the type of heart trouble suffered by the deceased; that no autopsy was needed to determine if silicosis was there or that one had contributed to the other. Dr. Viko did say that an autopsy would settle the question of degree to which the silicosis in the deceased's lungs had advanced but he did not advise it as necessary. (Tr. 36). We submit that the granting or the failure to grant an order for an autopsy is purely discretionary with the commission and whether the right to such an autopsy was properly or improperly denied in this case will be automatically determined in the issue of whether or not there was sufficient evidence to support the decision and the award of the commission.

WAS THE AWARD IN CONFORMANCE WITH THE OCCUPATIONAL DISEASE LAW OF THE STATE OF UTAH?

The matter of dependency in this case related to a mother depending on her son, the deceased herein, and it is a case where dependency is not presumed but must be determined from the facts (See Section 42-1-67, U.C.A., 1943). Evidence was taken in the case before the Court

to determine dependency and Commissioner Egan of the Industrial Commission led the inquiry to make such determination. The evidence shows that the mother's dependency on the son in most all respects, namely, for food, taxes, maintenance of the home and their persons, and in most all other ways, was testified to. The only exception to a case of complete dependency was that the mother, as applicant, owned the home and was on relief getting about enough money to pay for part of the clothing that she needed. The deceased son was the only person giving support to the applicant and after the son's death social security was paid to the mother. Dependency is not a question of complete dependency and is not determined by whether or not the dependent person gets every cent needed for his or her support from the person depended upon but whether or not there is any dependency in fact, whether or not an obligation exists (which is recognized by our statute) and whether or not this dependency existed at the time of death and was needed to maintain the claimant in her station in life.

(See *Hancock vs. Industrial Commission*, 58 Utah 192, 198 Pac. 169; *Park Utah Consolidated Mines vs. Industrial Commission*, *supra*; *Rigby vs. Industrial Commission*, 75 Utah 454, 286 Pac. 628).

As in other compensation cases, dependency is a question of fact and it is up to the Industrial Commission to determine that fact. There is certainly sufficient evidence to warrant such a finding and unless said decision or finding appears to your honorable body to be

arbitrary and capricious, the commission's decision should stand.

(See *Rigby vs. Industrial Commission*, *supra*;
Utah Fuel Company vs. Industrial Commission,
80 Utah 301, 15 Pac. (2d) 297).

It is unfortunate that the decision of the commission failed to contain concise words showing definitely a finding of dependency but certainly such words would add nothing material. Certainly the plaintiffs cannot claim surprise or injury because dependency would have to be an issue in this case. The applicant appeared in the capacity of a dependent; the case had to either be heard, or denied on that very issue. The commission took steps as disclosed by the record, to determine the question of dependency and the mere fact that the application was not denied and that an award was made, is in and of itself, especially in view of these facts, a finding of dependency. It is conceded that even though an implication of dependency is not the best substitute for an actual finding, the Defendants contend that the requirement of the law has been met.

The Plaintiff objects further to the manner in which the decision was worded. The Plaintiff apparently fears that in case of death or re-marriage, the award remains as is regardless of any other contingency that might happen. Defendants desire to submit that this manner of making awards has been going on for some time; that as yet no trouble has arisen and that a study of Section 42-1a-33 should reveal that the statute protects the Plain-

tiff against any of these contingencies arising. This section provides that immediately upon these contingencies arising, the beneficiary shall be entitled to receive one-third of the benefits remaining unpaid. Defendants fail to see where any particular wording or failure to insert some particular wording would cancel the effect of this statute.

CONCLUSION

In conclusion it is submitted that the decision of the commission awarding compensation to the mother of the deceased should be affirmed for the reasons herein stated.

Respectfully submitted,

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