1978

Interstate Electric Company and Home Insurance Company v. Industrial Commission of Utah and Michael E. Inskeep : Brief of Defendant

Utah Supreme Court

Hanson, Russon, Hanson & Dunn; William F. Hanson; Attorney for Plaintiffs;
A. Wally Sandack; Robert B. Hansen; Attorneys for Defendants;

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IN THE SUPREME COURT

OF THE STATE OF UTAH

INTERSTATE ELECTRIC COMPANY and HOME INUSRANCE COMPANY,

Plaintiffs,

vs.

INDUSTRIAL COMMISSION OF UTAH and MICHAEL E. INSKEEP,

Defendants.

Case No. 15791

BRIEF OF DEFENDANT MICHAEL E. INSKEEP

REVIEW OF FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF THE INDUSTRIAL COMMISSION OF UTAH

HANSON, RUSSON, HANSON & DUNN
WILLIAM F. HANSON
702 Kearns Building
Salt Lake City, Utah 84101
Attorney for Plaintiffs

ROGER D. SANDACK
370 East 500 South
Salt Lake City, Utah 84111
Attorney for Defendant Inskeep

ROBERT B. HANSEN
236 State Capitol Building
Salt Lake City, Utah 84114
Attorney for Defendant Industrial Commission of Utah

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370 East 500 South
Salt Lake City, Utah 84111
Attorney for Defendant Inskeep

ROBERT B. HANSEN
236 State Capitol Building
Salt Lake City, Utah 84114
Attorney for Defendant Industrial
Commission of Utah

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NATURE OF CASE

This is a review of the Findings of Fact, Conclusions of Law and Order of the Industrial Commission of Utah, awarding to Defendant Michael E. Inskeep full medical, temporary total and permanent partial disability benefits provided by law.

DISPOSITION BY INDUSTRIAL COMMISSION OF UTAH

The Industrial Commission of Utah denied Plaintiff's Motion for Review and affirmed the Order of the Administrative Law Judge that Claimant's benefits should not be reduced by 15 percent pursuant to Section 35-1-99 Utah Code Annotated (1953, as amended).

RELIEF SOUGHT BY DEFENDANT MICHAEL INSKEEP

Defendant Michael Inskeep seeks to affirm the award of the Industrial Commission of Utah in full together with interest from the date of the award.

STATEMENT OF FACTS

Defendant Michael Inskeep adopts the statement of facts as recited by the Plaintiff in its brief.

ARGUMENT
POINT I

THE INDUSTRIAL COMMISSION OF UTAH DID NOT ERR IN FAILING TO REDUCE THE AWARD OF MICHAEL INSKEEP PURSUANT TO THE PROVISIONS OF SECTION 35-1-99, UTAH CODE ANNOTATED (1953) AS AMENDED

Section 35-1-99, Utah Code Annotated, states in part as follows:

> When an employee claiming to have suffered an injury in the service of his employer fails to give notice to his employer of the time and place where the accident and injury occurred, and the nature of the same within 48 hours, when possible, or fails to report for medical treatment within said time, the compensation provided for herein shall be reduced 15 percent;...; and no defect or inaccuracy therein shall subject the claimant to such reduction, if there was no intention to mislead or prejudice the employer in making his defense, and the employer was not, in fact, so mislead or prejudiced thereby. (Emphasis added)

Unlike the three year statute of limitations provided in §35-1-100, U.C.A. the 48 hour notice period should run from a time when the employee first gains knowledge that he may have a compensable injury arising out of the accident. Salt Lake City v. Industrial Commission, 140 P.2d 644 (1943).

It is uncontroverted by all of the evidence that the accident occurred. Claimant testified that initially he felt his back was strained and that he could continue to work given medication and self-imposed exercise. It was not until approximately Thursday, September 9, 1976 that he requested his wife to obtain an appointment from Dr. Beck. Accordingly, he may have gained knowledge on or about September 9, 1976 that a compensable injury was possible in this matter and accordingly informed his supervisor and the company the very next morning, Friday, September 10, 1976.

Thus, there is every reason to believe that claimant fully satisfied the 48 hour notice period provided under the statute by giving notice within 48 hours of the time he realized a compensable injury occurred and by seeking professional medical aid within the 48 hour period.

POINT II

NO EVIDENCE OF INTENTION TO MISLEAD OR PREJUDICE THE EMPLOYER EXISTS

§35-1-99, Utah Code Annotated provides that the claimant's compensation shall not be subject to reduction "if there was no intention to mislead or prejudice the employer in making his defense, and the employer was not, in fact, so mislead or prejudiced thereby." The Administrative Law Judge specifically found:

> "There has been no showing of prejudice towards Interstate Electric by the one day delay, and this writer feels that no amount of extrapolation of the record will reveal such prejudice as to justify this harsh result." (R. 203)

Plaintiff implies that it is the burden of the claimant to show that the employer was not prejudiced by the delay in notification. If the Statute was interpreted as Plaintiff contends, it would be unlikely if not impossible for a claimant to prove facts solely within the knowledge of his employer. Obviously, the employer must initially raise some evidence of prejudice in the defense of its contentions before those facts may be at issue. Prager v. Lakeridge Theatre, 484 P.2d 404 (Colo. App. 1971); Fukuda v. Peerless Roofing Company, Ltd., 523 P.2d 832 (Haw. 1974).

Plaintiff argues that the record in the case at bar contains no indication that Defendant had ever attempted to show that the Plaintiff, Interstate Electric Company, was not prejudiced by a delay in its investigation or by improper medical attention. Indeed, the case at bar and the record does reveal that the nature of the accident, to wit: slipping on a scaffold, is not susceptible to independent investigation which would have granted the employer any more evidence had it been notified immediately after the accident than it had when the employer was in fact notified some three days later. In addition, there has been no showing that the medical

treatment provided by Dr. Beck (and first requested within the 48 hour period, September 9, 1976) was not adequate or that claimant's condition was in any manner worsened by such medical treatment. Indeed, claimant testified that he exercised and took Bufferin pursuant to prior instructions received from Dr. Carson as a remedy to a prior strain. Accordingly, claimant did receive medical treatment, having had knowledge of proper care from a prior injury; he did seek medical treatment within 48 hours of the original accident; and, could show no prejudice to the employer either with respect to the medical treatment provided or with respect to the employer's inability to gain factual evidence respecting this incident.

Defendant agrees that the purpose of the notice statute is to provide quick medical relief so that no aggravation of the injury occurrs as a result of improper medical treatment and so that the employer will not be prejudiced in the gathering of certain facts relative to a defense of his position or denial of an accident. It is Defendant's contention that once he has established a prima facia claim to compensation, which the Administrative Law Judge found and the uncontroverted facts support, then it is incumbent upon the employer to raise facts of any prejudice in order to induce a 15 percent reduction of benefits pursuant to Section 35-1-99 U.C.A. Phillips v. Helm's Inc. 439 P.2d 119 (Kan. 1968).

It is submitted that such a construction is consistant with this Court's statement in Salt Lake City v. Industrial Commission:

> "We have held that the Industrial Act must be liberally construed and that by such construction we should attempt to effectuate its beneficent and humane objects." 140 P.2d at 646

CONCLUSION

Claimant seeks affirmance of the award rendered by the Administrative Law Judge as affirmed by the Industrial Commission, granting claimant medical, temporary total and permanent partial disability benefits pursuant to the workman's compensation statutes of the State of Utah without reduction.

Claimant further contends that due to the delay caused since February 27, 1978, the date of the award, Plaintiffs have received the benefits of retaining moneys rightfully belonging to claimant and medical providers, including 85 percent of the award for all medical and disability benefits which are not at issue in the case at bar. Plaintiffs should not be allowed to benefit from their own delay and refusal to pay. Accordingly, claimant requests interest from the date of the award, until paid, at the legal rate of interest on all funds retained by Plaintiff.

Respectfully submitted this 11th day of July, 1978.

ROGER D. SANDACK
Attorney for Claimant
370 East Fifth South
Salt Lake City, Utah

CERTIFICATE OF SERVICE

I hereby certify that I mailed, postage prepaid, two copies of the foregoing Brief of Defendant Michael E. Inskeep to Hanson, Russon, Hanson & Dunn, William F. Hanson, 702 Kearns Building, Salt Lake City, Utah 84101, Attorney for Plaintiffs, and to Robert B. Hansen, 236 State Capitol Building, Salt Lake City, Utah 84114, Attorney for Defendant Industrial Commission of Utah this 21st day of July, 1978.

ROGER D. SANDACK
Attorney for Defendant
Michael E. Inskeep