

1979

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

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

INTERSTATE ELECTRIC COMPANY and)
HOME INSURANCE COMPANY,)

Plaintiffs,)

vs.)

INDUSTRIAL COMMISSION OF UTAH)
and MICHAEL E. INSKEEP,)

Case No. 15791

Defendants.)

PLAINTIFFS' REPLY BRIEF

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

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PLAINTIFFS' REPLY BRIEF

ARGUMENT

POINT I

THE 48-HOUR PERIOD WITHIN WHICH AN EMPLOYEE, CLAIMING TO HAVE SUFFERED INJURY IN THE SERVICE OF HIS EMPLOYER, MUST GIVE NOTICE TO HIS EMPLOYER OF THE TIME AND PLACE WHERE THE ACCIDENT AND INJURY OCCURRED AND THE NATURE OF THE SAME BEGINS TO RUN WHEN THE EMPLOYEE FIRST GAINS KNOWLEDGE OF THE ACCIDENT AND INJURY.

Defendant Inskeep claims that the 48-hour notice period set forth in Section 35-1-99, Utah Code Annotated (1953), as amended, should run from the time the employee first gains knowledge that he may have a compensable injury arising out of the accident. In support of his claim, he cites the case of Salt Lake City vs. Industrial Commission, 104 Utah 436, 140 P.2d

644 (1943). However, the Salt Lake City case clearly does not stand for such a proposition. In fact, a careful reading of the Salt Lake City case reveals that the Court there refused to define an injury as one that is compensable, as suggested by defendant Inskeep. There, the defendant, while playing handball in the course of his employment with plaintiff Salt Lake City, was struck in the eye by a handball. Although the injury ostensibly healed, his vision later began to become impaired. Approximately 14 months after the accident, he sought medical help and was informed that his eye would have to be removed because it had developed a sarcoma of the choroid. The defendant filed a claim with the Industrial Commission, and it held that his injury, including the loss of his eye as a result of the sarcoma, was compensable. The plaintiff, Salt Lake City, filed a petition for writ of review, wherein it alleged that the defendant's claim was barred because he failed to give it notice of the accident and injury within one year from the date of the accident. The court held that Salt Lake City had received notice of the accident and injury through the defendant's supervisor, who was playing handball with him at the time of the accident and injury. Salt Lake City then argued that the notice given was insufficient. In response, the court stated:

In so contending it (Salt Lake City) urges that the statute uses the term "injury" to mean an injury which has resulted from a disability which will entitle the employee to

compensation. Under such a construction of the section the employee would be required, within a year from the date of the accident, to give his employer notice of the accident and also notice that this accident had resulted in an injury which had caused a compensable disability. Often accidental injuries do not result in disability within a year. It thus becomes evident that what the City is really contending is that Section 42-1-92 limits compensation to those accidental injuries which result within a year in disability. Those injuries which do not result in loss of work, require medical attention, etc., until more than a year after the date of the accident would, under this construction, be excluded from the scope of the Act.

This section, however, cannot be so construed. We find no cases, and none are cited, which have given such a construction to statutes requiring the employee to give the employer notice of the accident and injury within a prescribed period of time. But quite to the contrary the cases uniformly hold that such statutes were designed to give the employer an opportunity to make an early investigation of the circumstances surrounding the alleged accident and to insure him the opportunity of giving prompt and proper medical care where it is deemed necessary. Such statutes also protect employers against fraudulent claims and give them an opportunity to remedy defects so as to prevent similar accidents in the future. (Cases cited)

We have held that the Industrial Act must be liberally construed and that by such construction we should attempt to effectuate its beneficial and humane objects. (Case cited) We therefore will not construe this provision, which was obviously designed to protect employers by requiring prompt notice of injuries and accidents, as a limitation on the scope and coverage of the Act. The plain language of the Act requires only notice of the "accident and injury." (Emphasis added)

In the Salt Lake City case, the plaintiff, Salt Lake City, asked the Court to define the term "injury", for Workmen's Compensation purposes, to mean an injury which has resulted in a disability which will entitle an employee to compensation. The Court refused to accede to its request, and such refusal resulted in a holding that an injured employee need not, within one year, notify his employer that his injury may be compensable as well as notify it of the accident and the injury itself.

In the case at bar, defendant Inskeep has asked the Court to define the term "injury" as a compensable injury. His requested definition is clearly similar to that proposed by Salt Lake City in the Salt Lake City case. Here, as there, the Court should reject such a definition for the following reasons.

First, in the Salt Lake City case, the Court refused to accept Salt Lake City's requested definition of the term "injury" because such would not effectuate the beneficent and humane objects of the Industrial Act. In the case at bar, were defendant Inskeep's requested similar definition of the term "injury" accepted by the Court, an injured employee would not have to report an accident and injury until such time as, in his mind, it became compensable. As a practical matter, such realization could occur at any time after the occurrence of an accident and injury, and the employee would

then merely have to notify his employer of the accident and injury or report to it for medical treatment within 48 hours of such realization, provided that his claim was not otherwise barred. Of course, such could effectively thwart the purpose and intent of Section 35-1-99 and the beneficent and humane objects of the Workmen's Compensation Act, inasmuch as it could possibly deny an injured employee the benefit of prompt and competent medical care and may also effectively prevent his employer from making early investigation so as to foreclose fraudulent claims and from remedying any defects or problems that may have caused or contributed to the employee's accident and injury. Further, it would effectively gut the 48-hour notice requirement contained in Section 35-1-99 inasmuch as the employee could decide, as a practical matter, the time at which the 48-hour notice period could commence.

The case at bar illustrates the disservice which could result to workingmen generally were the 48-hour notice period to commence when an injured employee decides that his injury is compensable. Defendant Inskip, at page 3 of his brief, states that he "testified that initially he felt his back was strained and that he could continue to work given medication and self-imposed exercise." At page 5 of his brief, we learn that, not only did he take self-imposed exercise, but he "took Bufferin pursuant to prior instructions

received from Dr. Carson as a remedy to a prior strain." Consequently, he concludes that, inasmuch as he treated himself, he received medical treatment within 48 hours of the accident and injury. It is respectfully submitted that the 48-hour notice period was designed, among other purposes, to reduce and eventually erradicate such self-treatment. Had defendant Inskeep reported the accident and injury to plaintiff Interstate Electric Company or reported to it for medical treatment as soon as he knew he had strained his back, he likely would have been told to leave work and immediately seek licensed medical advice. Instead, he elected, having consulted with himself, to continue to work for another week, certainly aggravating the sprain and damage which occurred to his back as a result of the accident. Consequently, through his failure to notify plaintiff Interstate Electric Company of his accident and injury or report to it for medical treatment with 48 hours of the accident and injury, defendant Inskeep probably aggravated his injuries. Had he thought that he would lose 15% of any award which he may ultimately receive as a result of his accident and injury if he did not so report, he probably would have reported his accident and injury to plaintiff Interstate Electric Company immediately, thereby minimizing the aggravation and damage that occurred before he was told by Dr. Beck to cease working, and minimizing the prejudice that probably resulted to plaintiff Interstate Electric Company through payment of avoidable medical expenses.

Hence, the 48-hour notice requirement and attendant reduction of award for failure of an injured employee to comply with it was instituted by the Legislature in part in an attempt to encourage an injured employee to seek early medical help and enable employers to mitigate the expense and damages of injuries which otherwise might be aggravated or avoided. If the 48-hour notice period is deemed to commence, as is suggested by defendant Inskeep, when an employee first realizes that a compensable injury might arise from an accident, employees generally may be without sufficient motivation to help themselves or allow their employers to help them under circumstances wherein the injured employee takes it upon himself to diagnose and treat his own injury or continue to work notwithstanding it.

Second, even if it is assumed, arguendo, that the 48-hour notice period runs, as suggested by defendant Inskeep, from the time an employee first realizes that he may have a compensable injury arising out of an accident, he offered, at the hearing of this matter, no evidence as to when he first knew that his injury was compensable. Clearly, the burden of proof in this regard was his, according to the case of Wherritt vs. Industrial Commission, 100 Utah 68, 110 P.2d 374 (1941), quoted in plaintiffs' initial brief filed in this matter. Also, at the hearing of this matter, he offered no testimony or other evidence which could indicate that such burden was met. Further, at page 3 of his brief,

defendant Inskeep states that on September 9, 1976, he requested that his wife obtain an appointment from Dr. Beck. As a result, he concludes that "he may have gained knowledge on or about September 9, 1976 that a compensable injury was possible in this matter . . ." (Emphasis added)

Consequently, defendant Inskeep admits that he does not know when he first gained knowledge that his injury may be compensable or whether such knowledge came to him within 48 hours of the time he reported the accident and injury to his supervisor.

POINT II

DEFENDANT INSKEEP HAS NOT SHOWN THAT HIS FAILURE TO NOTIFY PLAINTIFF INTERSTATE ELECTRIC COMPANY OF THE ACCIDENT AND INJURY OR TO REPORT TO IT FOR MEDICAL TREATMENT WITHIN 48 HOURS OF THE OCCURRENCE OF THE ACCIDENT AND INJURY WAS NOT INTENDED TO MISLEAD OR PREJUDICE PLAINTIFF INTERSTATE ELECTRIC COMPANY AND DID NOT IN FACT MISLEAD OR PREJUDICE IT.

Defendant Inskeep claims that, upon failure of an injured employee to notify his employer of an accident and injury or report to his employer for medical treatment within 48 hours of the accident and injury, the employer must show that such delay was prejudicial before the statutory provision for a 15% reduction in benefits becomes operable. In support of his claim, he argues that the facts which may indicate such prejudice are solely within the knowledge of the employer. However, it is clear that many of such facts are solely within the knowledge of the employee. For

example, an injured employee may know whether there were any witnesses to the accident which resulted in his injury. Were the employer unable to locate and interview such witnesses, it is possible that it could be prejudiced in its defense of a claim; especially so were the claim of a fraudulent nature. However, in such an instance, the knowledge of such prejudice would be solely within the province of the employee. As another example, an injured employee may know, through consultation with his treating physician, that, had he seen his physician or other medical personnel within the 48-hour notice rather than after it, or had he not worked under circumstances wherein medically he should not have, the aggravation of his injuries would have been substantially less. The employer may not have access to such information and, consequently, could be prejudiced through payment of medical expenses which could have been otherwise mitigated. However, such knowledge may be exclusively within the province of the employee.

In an attempt to further support his claim that plaintiff Interstate Electric Company has the burden of showing that it was prejudiced through his failure to notify it of the accident and injury or report to it for medical treatment within 48 hours of the accident and injury, defendant Inskeep cites the cases of Prager v. Lakeridge Theater, 484 P.2d 404 (Colo. App. 1971), Fukuda v. Peerless Roofing Company, Ltd., 523 P.2d 832 (Hawaii 1974), and Phillips v. Helms, Inc., 439 P.2d 119 (Kan. 1968).

The Prager case cannot be found at the cited location or in the cited volume. Consequently, while it has probably been miscited through inadvertence, it does not lend weight to the contention of defendant Inskeep under circumstances where it cannot be read. In the Fukuda case, also cited by defendant Inskeep, the Supreme Court of Hawaii held that, once an injured employee has demonstrated a satisfactory reason explaining his failure to report as required by statute, the burden of showing that such delay resulted in prejudice to the employer shifts to the employer. However, the statute upon which the court's holding is based differs from Section 35-1-99. Further, even if the Hawaiian court's construction of its own statute were given weight in the case at bar, defendant Inskeep failed, during the course of the hearing of this matter, to offer evidence indicating that he had satisfactory reasons for his failure to report the accident and injury to plaintiff Interstate Electric Company or report to it for medical treatment within 48 hours of the occurrence of the accident and injury.

Nor does the case of Phillips v. Helms', Inc. lend support to defendant Inskeep's contention that plaintiff Interstate Electric Company has the burden of showing that it was prejudiced through his failure to notify it of the accident and injury or report to it within 48 hours of the accident and injury. There, while the court held that the employer had the burden of showing that it was prejudiced by

the injured employee's failure to give timely notice of his accident and injury, its holding was based upon a Kansas statute which specifically placed such a burden upon the employer. Inasmuch as Section 35-1-99 contains no provision for the allocation of the burden of proof with regard to the prejudice which may result to an employer as a result of an employee's failure to timely notify it of his accident and injury or report to it for medical treatment, the Phillips case is clearly not persuasive or in point.

Section 35-1-99 provides that, under circumstances where an injured employee fails to notify his employer of the accident and injury or report to it for medical treatment within 48 hours, the compensation otherwise provided him by the Workmen's Compensation Act shall not be reduced 15% unless (1) his employer was not mislead or prejudiced by such failure, and (2) such employee did not intend to mislead or prejudice his employer in making a defense.

Defendant Inskeep claims that plaintiff Interstate Electric Company has the burden of showing that it was prejudiced in order for the statutory provision for a 15% reduction in benefits to become operable. As indicated earlier in the plaintiff's initial brief, the burden of proof in that regard is, according to the general rule, upon the employee.

However, even if it is assumed, arguendo, that such burden is upon plaintiff Interstate Electric Company

and that it has failed to meet it, the burden of showing that he did not intend to mislead or prejudice plaintiff Interstate Electric Company in its defense is upon defendant Inskeep. Clearly, no one but him could know whether his failure to comply with the notice requirements of Section 35-1-99 was or was not intended to mislead or prejudice plaintiff Interstate Electric Company in its defense. Further, according to the general rule, as indicated in plaintiffs' initial brief, such burden is upon defendant Inskeep. Notwithstanding, defendant Inskeep did not raise or discuss the issue in his brief. The reason for such failure is clear -- there is no evidence in the record which indicates or even intimates that defendant Inskeep has even tried to meet his burden in this regard, much less actually meet it. Consequently, even if it is assumed that plaintiff Interstate Electric Company must shoulder the burden of showing that it was prejudiced by the failure of defendant Inskeep to comply with the notice requirements of Section 35-1-99, and that it had failed to meet such burden, defendant Inskeep must, in order to avoid a 15% reduction in benefits, show that he did not intend to mislead or prejudice plaintiff Interstate Electric Company through such failure. The statutory language of Section 35-1-99 is clear -- in order for an employee, who has failed to notify his employer of his accident and injury or report to it for medical treatment within the prescribed period, to avoid a 15% reduction in

benefits, it must be shown that his employer was not in fact prejudiced thereby and that the injured employee did not intend to mislead or prejudice his employer in making a defense.

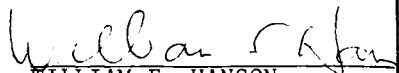
Consequently, since defendant Inskeep has failed to offer evidence which would indicate that he did not intend to mislead or prejudice plaintiff Interstate Electric Company through his failure to comply with the notice requirements of Section 35-1-99, his award, according to its terms, must be reduced 15%.

SUMMARY

It is respectfully submitted that the 48-hour period within which defendant Inskeep was required to notify plaintiff Interstate Electric Company or report to it for medical treat began to run upon the occurrence of his accident and injury. Inasmuch as defendant Inskeep failed to comply with such statutory provisions, he must show, in order to avoid a 15% reduction in the benefits to which he would otherwise be entitled, (1) that plaintiff Interstate Electric Company was not prejudiced by such failure, and (2) that he did not intend to mislead or prejudice plaintiff Interstate Electric Company in its defense. He has failed to meet either such burden and consequently, the award of the Industrial Commission must be vacated insofar as it fails to reduce the award of defendant Inskeep by 15%, as provided by Section 35-1-99,

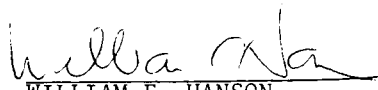
RESPECTFULLY SUBMITTED this 5th day of January, 1979.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I mailed, postage prepaid, two (2) copies of the foregoing Plaintiffs' Brief to A. Wally Sandack, attorney for defendant Inskeep, 370 East 500 South, Salt Lake City, Utah 84111, and to Robert B. Hansen, attorney for defendant Industrial Commission of Utah, 236 State Capitol, Salt Lake City, Utah 84114, on this 5th day of January, 1979.


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