1979

# Douglas L. Schmidt v. Industrial Commission of Utah et al : Brief of Plaintiff

Utah Supreme Court


Stuart L. Poelman; Robert B. Hansen; Attorney for Defendants;

IN THE SUPREME COURT

OF THE STATE OF UTAH

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DOUGLAS L. SCHMIDT, :

Plaintiff, :

vs. : Case No.

THE INDUSTRIAL COMMISSION OF UTAH, KENWAY ENGINEERING and INDUSTRIAL INDEMNITY, :

Defendants. :

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# BRIEF OF PLAINTIFF

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Appeal from Order of the Industrial Commission of the State of Utah

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IN THE SUPREME COURT

OF THE STATE OF UTAH

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DOUGLAS L. SCHMIDT, :

Plaintiff, :

Case No. 16097

vs. :

THE INDUSTRIAL COMMISSION OF UTAH, KENWAY ENGINEERING and INDUSTRIAL INDEMNITY, :

Defendants. :

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# BRIEF OF PLAINTIFF

## NATURE OF THE CASE

This is a review of the proceedings before the Industrial Commission of Utah culminating in an order by the Commission denying Workmen's Compensation Benefits for Douglas L. Schmidt.

## STATEMENT OF FACTS

## AND DISPOSITION BELOW

The plaintiff was a 21 year old man with a history of Scheuermann's Disease, which resulted in extreme pain in the back (T10). This condition extended over a period of time and into 1975 as evidenced by the plaintiff's testimony (T10), the medical records and particularly the x-rays (T54-59 and T76-102). This condition centered around the central area of his back (T9). From 1975 to the time he commenced working for Kenway Engineering, he had no difficulty or problem with his back (T11).

At Kenway Engineering he was employed as a rough-cut sawman. As such he would cut steel to specified lengths. The steel to be cut would vary in weight everywhere from a matter of ounches to "a couple hundred pounds." For the heavier pieces an overhead crane was provided. However, it was not always available. When the overhead crane was being used by someone else, it was necessary to move the heavy items without mechanical assistance, either by lifting the steel by himself or with the assistance of someone else, when he was able to get someone to assist him (T11 and 12). In December of 1976 the plaintiff slipped while attempting to adjust a piece of steel and stumbled backward, catching his knee on the underside of the saw table. The blow to the knee was especially painful (T13). A few days later, he was aware of "a little bit of stiffness" in his back, but did not know exactly when the stiffness commenced (T14 and 15).

In addition to the specific incident outlined, it was quite a regular occurrence for someone helping the plaintiff to drop an end of steel causing a jar to the plaintiff as he carried the other end of the steel (T15). The plaintiff was unable, however, to recall any particular date on which this occurred, although he did state, "That could happen to either person quite regular." (T15) In February, 1977, the plaintiff was having such significant problems with his back that he went to see a doctor because of the pain (T15 and 1). When asked how long he had the pain he stated:

> "Well, through January, the latter part of December. In January is when it really got to the point where it was really getting sore and just increasing." (T15 & 16)

X-rays of the low back at that time showed not only a spondylolysis, but also a possible appendicolith. Because of the possibility of a rupture of the appendix with the presence of the appendicolith, additional x-ray studies were recommended (T16, 17 and 59). The additional x-ray studies were made and the plaintiff was referred to Dr. William Dunford for an appendectomy. He then returned to work. However, in June the back pain had reached a point that he again sought out his doctor who referred him first to Dr. Gene Smith and then to Dr. Gordon Affleck who, in turn, performed a laminectomy and fusion of L5 S1 level on July 19, 1977 (T19, 20, 21 and 84).

The plaintiff filed an application for Workmen's Compensation benefits, which was denied by letter dated July 7, 1977 (T62). Thereafter, on November 30, 1977, the plaintiff filed an Application for Hearing (T2). A hearing was held March 16, 1978, following which

the Administrative Law Judge entered Findings of Fact, Conclusions of Law and Order denying the application (T70, 71 and 72). Plaintiff filed a Motion for Review requesting time to provide the additional medical records of the treating physicians and to review the transcript of the hearing in order to support a memorandum in support of his Motion for Review. The Industrial Commission granted the Motion for Review to the extent of allowing additional time (T103, 104). Thereafter memorandums in support of the motion and in opposition to it were filed and on September 25, 1978, the Industrial Commission denied the plaintiff's Motion for Review and affirmed the Findings of Fact, Conclusions of Law and Order of the Administrative Law Judge.

## RELIEF SOUGHT ON APPEAL

The plaintiff seeks an order of the court directing a reversal of the order of the Industrial Commission denying benefits to the plaintiff; or in the alternative, an order remanding the matter to the Industrial Commission with instructions to submit the matter to a Medical Panel for review and report. In the latter event, plaintiff also seeks advisory instructions with regard to the merits of the cause so as to alleviate the necessity of a possible subsequent appeal.

## ARGUMENT

### POINT 1.

THERE WAS AN ACCIDENT IN THE COURSE OF EMPLOYMENT WITHIN THE MEANING OF THE WORKMEN'S COMPENSATION LAWS.

A. THERE WAS A SPECIFIC INCIDENT FROM WHICH THE PROBLEM DATED.

The evidence is clear that during the month of December the plaintiff was involved in a traumatic injury in which a piece of steel slipped off the saw, causing him to stumble backwards. At that time he caught his knee on the underside of the saw table. That knee injury, according to the plaintiff, was a particularly painful injury, although not resulting in serious damage (T10, line 20 and 21). As a matter of medical and psychological fact, a severe pain will completely wash out a less severe pain at any given moment as far as perception is concerned; and at that moment, the extremely painful injury to the knee blocked out all other sensation being experienced by the plaintiff.

As a further consideration in this light, it should be noted from the plaintiff's history of Scheuermann's Disease, he had lived for years with pain in the back. Thus, a sharp temporary twinge in the back would not be a matter which he would necessarily register psychologically. There is a very definite medical issue as to whether or not the December incident caused the injury for which the plaintiff was subsequently treated by Dr. Affleck.

It should be noted that there is no contradicting testimony before the Commission. It is from this time in December that the plaintiff began to experience continuing and increasing problems with his back. At the time he reported the subsequent injury to his knee a few days after the incident above described, the plaintiff was experiencing a little bit of stiffness in the back (T14). In answer to the question, "How long had you had back pain," the plaintiff answered:

"Well, through January, the latter part of December. In January is when it actually got to the point where it was really getting sore and just increasing." (T15)

The plaintiff's testimony is amply supported and corroborated by the notes of the doctor and there being no contradicting testimony of any kind, the Commission does not have the right nor the authority to reject, disbelieve or disregard the testimony before it. Jones v. California Packing Corporation, 244 P.2d 640, 121 Utah 612 (1952).

In addition to the support provided by the mandate in Jones v. California Packing Corporation above and the corroboration of the plaintiff's testimony by the doctors' medical records, the plaintiff's own frank responses to the cross-examination of the defendants' attorney add strong support to his veracity and the accuracy of his account of events. Although, as he admits in answer to Mr. Poelman's question, he cannot relate the onset of the back pain to the particular event in question or to any other event for that matter (T37), it is clear from his testimony that from the end of December through January and into February, his back was becoming progressively worse. Whereas, he was having no difficulty with his back prior to commencement of his work and prior to December.

Even if this matter were not submitted to a Medical Panel, it is the position of the plaintiff that the medical evidence now before the Commission being as it is uncontradicted, supports an industrial accident.

The Administrative Law Judge analogizes this case with that of Pintar v. The Industrial Commission of Utah, 382 P.2d 414, 14 Utah 2d 276 (1963) and Redman v. Industrial Commission, 454 P.2d 283,

22 Utah 2d 398 (1960). It is to be pointed out that both of these cases are distinguishable in that both involve conflicting testimony. In the Pintar case at page 415 of the Pacific 2d Reporter, the Supreme Court pointed out that the company doctor, Dr. B. J. Larsen and also the Medical Panel, concluded that the Applicant's condition did not result from and was not connected with the employment.

In the present case, both Dr. Burton and Dr. Affleck make repeated references to a back sprain and to back strain. Dorland's Illustrated Medical Dictionary, Twenty-Fifth Edition, W. B. Saunders, Philladelphia, London and Toronto, defines a sprain as follows:

> "A joint injury in which some of the fibers of supporting ligament are ruptured, but the continuity of the ligament remains intact." (emphasis added)

The same authority defines a strain as follows:

> "1. To overexercise; to use in an extreme and harmful degree. 2. To filter or subject to colation. 3. An overstretching or overexertion of some part of of musculature. 4. Excessive effort or undue exercise . . . ."

Thus, both conditions could result from a trauma-type circumstances. In Exhibit D6, which was submitted at the time of the hearing by counsel for the defendants, Dr. Burton makes reference to the x-rays and suggests surgery may be required to stabilize the low back problem and then states: "I definitely consider this to be an industrial injury." (T63)

Dr. Affleck, in turn, in his report to Kenway Engineering of June 30, 1977, (which report is contained in his office records and was submitted to the Commission after the date of hearing pursuant

to requested reservation of the right to submit such records, requested at the time of the hearing), Dr. Affleck, in response to question 2, noted that the patient has a "lumbar sprain superimposed on a spondylolysis." In response to question 3, a question which read, "In your opinion, is present trouble due to any pre-existing condition? If so, what?", the doctor answered, "Spondylolysis may have been pre-existing. Difficult to know." (T80) At the time of the hearing, the x-ray records were, in fact, received; and it is interesting to note because of the history of Scheuermann's Disease there is an unusually profuse history of back x-rays.

At the hearing there was a question raised as to whether or not the x-rays were complete. For this reason, all of the South Davis Medical Center x-rays received with the report from Dr. Burton were attached to the plaintiff's memorandum in support of his Motion for Review and are now a part of the record. The Administrative Law Judge points out in the first paragraph of page 2 of the Findings of Fact, Conclusions of Law and Order that there were no office records to show the purpose of the plaintiff's first visit to Dr. Burton in February (T71). These records, which we requested an opportunity to submit, were subsequently submitted. It is to be noted in Dr. Burton's handwritten notes (T94) for the visit of February 7, 1977, the plaintiff was complaining of "recurrent, lumbo sacral strain with pain spasms, lumbago-like;" and on February 19, that the patient complained of "low back pain aggravated by work;" and then noted the plaintiff's history of Scheuermann's Disease. Further, on June 6, 1977, the doctor began his notation with the words, "back

problem again," (e.a.), then continued, "has had appendix removed recently-see x-rays re: appendicolith" and then continues to discuss persistent low back pain.

Referring to the x-ray report of the x-ray taken 2/17/77 at the request of Dr. Burton, the x-rays were of the lumbo sacral spine (T99). However, in reading the x-rays, it is noted, "there is a lcm opaque density in the right pelvis that could possibly be an appendicolith." It was recommended further study be made because of the danger of such a condition. Accordingly, on 3/12/77 a supine abdomen x-ray was taken which resulted in a conclusion of "probable appendicolith" and recommended a barium enema study (T100).

Thus, it is clear, as the plaintiff testified at the hearing (T16, 17 & 18), the plaintiff went to the doctor for back pain. In x-raying the back, an appendicolith was noted; and because of the danger of this condition, an appendectomy was scheduled and performed, thus delaying further treatment of the back.

Counsel for the defendants attempted to further cloud the matter by pointing out that the Applicant had indicated "February" on his application for the date on which his injury occurred, rather than December, with continuing increase in the problem during the month of January to early February. This was explained by the plaintiff in that he was instructed to enter the date of February by the defendant's safety engineer (T32).

It is thus clear and uncontradicted that there was an incident in December from the date of which the plaintiff's back

began to bother him, which problem gradually worsened to the point that he sought medical attention in February.

B. EVEN ABSENT THE IDENTIFIABLE INCIDENT, THE INJURY IS DIRECTLY ATTRIBUTABLE TO THE EMPLOYEE'S WORK AND IS THUS COMPENSABLE.

Aside from the incident discussed in Point I. A. above, there were a number of occasions on which the plaintiff suffered a jarring to his back. This would occur whenever someone assisting him in the moving of a piece of steel dropped his end of the steel before the plaintiff let go of the steel, thus resulting in a jarrin to the plaintiff. This occurred on a "quite regular basis." (T15)

In the case of Purity Biscuit Company v. Industrial Commis 155 Utah 1, 201 P.2d 961 (1941), this court found, at page 963 of th Pacific Reporter, it was unnecessary in that case to discuss or expr any opinion on the question of whether or not the decedent's spine might have been aggravated by the bending and lifting which he was required to do in his work or whether such a fact would tend to susta an award. In the Purity Biscuit case the court held that regardless of the cause for the applicant's back having deteriorated to its condition at the time of the incident involved, there was, in fact, a point in time at which a very slight movement, not at all extra-ordinary or excessive in line with the plaintiff's work, caused the weakened back to slip, resulting in a protrusion of a disc against t spinal column.

It is apparent from the medical records of Dr. Affleck and Dr. Burton that both doctors felt the plaintiff's problem resulted f

the lifting and straining of the plaintiff's employment. At page 1 of the transcript, Dr. Burton's report stated, "low back syndrome from heavy lifting. The work with lifting and straining produced these symptoms. No problems recognized before." Dr. Gene Smith stated in his report, (T66), "lumbar back strain." Dr. Affleck reported, (T68), "patient has lumbar strain superimposed on spondylolysis. Spondylolysis may have been pre-existing, difficult to know." Dr. Burton, in his report dated June 8, 1977, (T63), stated, "I definitely consider this to be an industrial injury."

It is submitted that the issue reserved in the Purity Biscuit case, supra page 10, has, in fact, been delved into by the court in subsequent cases. In the matter of Jones v. California Packing Company, supra, the court stated at page 642 of the Pacific Reporter:

> "It is settled beyond question . . . that an internal failure brought about by exertion in the course of employment may be an accident within the meaning of Section 42-1-43 UCA 1943 without the requirement that the injury resulted from some incident which happened suddenly and is identifiable at a definite time and place." (e.a.)

The court cited in support of its conclusion, Robertson v. Industrial Commission, 109 Utah 25, 163 P.2d 331 (1945); Thomas D. Memorial Hospital Association v. Industrial Commission, 104 Utah 61, 138 P.2d 233 (1943); Hammond v. Industrial Commission, 84 Utah 67, 34 P.2d 687 (1934); and Purity Biscuit Company v. Industrial Commission, supra. This position was again restated in the case of Powers v. Industrial Commission of Utah, 19 Utah 2d 140, 427 P.2d 740 (1967), which, in turn, relied upon Jones v. California Packing Corporation, supra.

In 1972 the court decided the case of Elton v. Utah State Retirement Board, 28 Utah 2d 368, 503 P.2d 137 (1972). Noting that the Workmen's Compensation Act and the Judge's Retirement Act had identical language, the court analogized from Workmen's Compensation to the Judge's Retirement Act and adopted the statement of Powers v. The Industrial Commission, supra, to the effect that:

> "An aggravation of a pre-existing disease by an industrial accident is compensable and that an internal failure brought about by exertion in the course of employment may be an accident within the meaning of the Workmen's Compensation Act."

In Judge Elton's case, it was pointed out in the facts that at the time he was appointed to the bench in 1966 he was

> "in good health; there were no indications of physical impairment. He was not then and had not for many years been under medical care."

In January of 1969 Judge Elton suffered a stroke. He thereafter returned to his judicial duties on a full time basis in the Fall of 1969 and in January 1970 assumed the responsibilities of presiding Judge for the Third Judicial District, which duties he performed through April and into May of 1970. There was substantial testimony from Judge Elton's wife, his colleagues and others as to the

> "deterioration of his health brought upon by the stresses of the highly sensitive cases handled by him during the last six months of his life. His physician testified that Judge Elton suffered from vascular disease resulting in insufficient blood supply to the brain and that this condition was aggravated by the stresses of Judge Elton's employment and that these stresses were the principal factor in cutting short his life."

The plaintiff in the present action did not call as witnesses his treating physicians. This is a matter of practice be-

the Industrial Commission where customarily the records of the treating physicians are requested and submitted to the Medical Panel and the treating physicians are only called to testify in the event of a dispute between the plaintiff and the Medical Panel Report. The medical records were submitted, however, and pursuant to its practice, the Industrial Commission was obligated to consider those medical records in reaching its decision.

The line of cases just discussed deal directly with the problems of industrial induced heart attack. There is no basis, however, for distinguishing between one type of internal deterioration and another. Thus, a deterioration of the back brought about by stress brought upon the back by repeated lifting and jarring would be as compensable as injury brought about by physical and emotional stress on the cardio vascular system. It is, therefore, submitted that there is a direct analogy between the heart cases and the case of a back deteriorating in the process of heavy lifting and jarring.

Due to the history of Scheuermann's Disease, there is an extensive history of back x-rays on the plaintiff. In the Elton case, supra, it was pointed out that Judge Elton was in good health at the time he assumed the bench. In this regard, the plaintiff's history of x-rays is enlightening. On September 22, 1970 the x-ray report noted, "lower lumbar spine and sacrum are unremarkable." (T56) On May 7, 1973 the x-ray report stated, "there is no evidence of recent injury . . . . Through the study there is no indication of disc disease." (T54) On January 16, 1974, the report showed only

that there was a mild scoliosis convexed to the right and centered at L2-3 level (T56, back of page). On September 5, 1975 the x-ray report noted, "No abnormalities in curvature are demonstrated. The Sl joints are unremarkable." (e.a.) (T57, back of page).

Throughout all of the x-rays taken prior to December, 1976 (T55-57), the references are to the thoracic spine and to Ll. The x-ray of February 17, 1977 identifies a spondylolysis at the right L5 Sl pars (T59). This was confirmed by tomography of the lumbar spine conducted June 10, 1977 after the plaintiff had recovered from his appendectomy. The x-ray report at T58 concludes, "confirmation of spondylolysis left side in lumbar spine at pars interarticularsis of L5." Thus, throughout the entire history of x-rays, no spondylol was identified until after the back became symptomatic in December, January and February of 1976 and 1977. Dr. Affleck was unable to say whether or not the spondylolysis pre-existed or not. This may, in fact, be a case of traumaticly induced spondylolysis. Even if the spondylolysis had existed and been identified prior to December, 1976, it was totallyasymptomatic and the law is clear from the cases cited above that the aggravation or lighting up of such a condition is sufficient to require compensation pursuant to the Workmen's Compensation laws.

POINT II.

THE INDUSTRIAL COMMISSION ERRED IN FAILING TO REFER THE MEDICAL ISSUES TO A MEDICAL PANEL.

Where a medical issue is involved as in the present case, the matter must be submitted to a Medical Panel for review and a

medical report. Section 35-1-77, Utah Code Annotated 1953, as amended, states:

> "Upon the filing of a claim for compensation for injury by accident, or for death, arising out of or in the course of employment, and where the employer or insurance carrier denies liability, the commission shall refer the medical aspects of the case to a medical panel appointed by the commission and having the qualifications generally applicable to the medical panel set forth in Section 35-2-56, Utah Code Annotated 1953, as amended." (e.a.)

This section does not give the Commission an option to refer the matter to a Medical Panel, but says rather that they "shall refer the medical aspects of the case to a medical panel . . . ." (e.a.)

The title of the Act as originally passed by the Legislature in Chapter 52 of Laws of Utah 1951 stated:

> "An act providing for the appointment of a medical panel with reference to total permanent disability and death cases arising from occupational disease." (e.a.)

The section originally referred to occupational disease only. It was amended in 1955, Chapter 57 of Laws of Utah 1955 so as to refer to "death arising out of or in the course of employment, . . . ." The title to that amendment reads:

> "An act amending section . . . 35-1-77 . . . relating to Workmen's Compensation, providing for increased benefits and for a medical panel." (e.a.)

There can be no question as to the intent of the Legislature that the Commission be required to submit such cases to a medical panel. The case should be remanded for this purpose regardless of the court's ruling on Point I. of plaintiff's brief.

In the interest of justice and so as to prevent protracted and unnecessary litigation and delay in arriving at justice in a case

of this nature, the court should set down guidelines on determinatio of Point I. above for application by the Commission after the report of the Medical Panel has been made available to it. LeGrand Johnson Corp. v. Peterson, 18 Utah 2d 260, 420 P.2d 615 (1966).

POINT III.

THE INDUSTRIAL COMMISSION ERRED IN SUSTAINING THE DEFENDAN OBJECTIONS TO THE REPORT OF THE TREATING PHYSICIAN.

The plaintiff offered in evidence a report of Dr. Gordon Affleck which was not received. Section 35-1-88, Utah Code Annotated 1953, as amended, specifically provides:

> "Neither the commission nor its hearing examiner shall be bound by the usual common law or statutory rules of evidence, or by any technical or formal rules of procedure, other than as herein provided or as adopted by the commission pursuant to this act . . . .
>
> The commission may receive as evidence and use as proof of any fact in dispute all evidence deemed material and relevant, including but not limited to the following:
>
> . . . .
>
> (b) reports of attending or examining physicians or pathologists.
>
> . . . ."

The exhibit rejected by the Administrative Law Judge, thou not the only corroboration of the plaintiff's testimony, does add further support to that testimony and further corroboration to the position of the plaintiff and should have been received into evidenc

## CONCLUSION

This court has repeatedly recognized the interest of the worker to be protected by the Workmen's Compensation Act. On page 642 of the Pacific Reporter in Jones v. California Packing Company, supra, page 6, the court stated:

> "This court has repeatedly held that the Workmen's Compensation Act should be liberally construed to effectuate its purposes and where there is doubt, it should be resolved in favor of coverage of the employee."

The plaintiff here should have the benefit of any doubt should doubt exist.

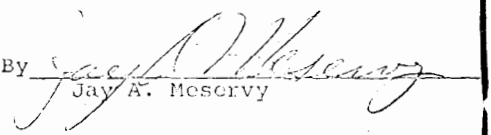
Mr. Schmidt had no record or history of back problem at L5 S1 level prior to the heavy work for the defendant Kenway Engineering. He had one specific incidence from which time, although he cannot and will not state that he recognized or registered a pain at that particular moment, his back did, in fact, thereafter bother him. This aggravation continued to progress until finally it forced him to seek medical attention. It is the position of the plaintiff that a Medical Panel may well find that the incident in December caused and was the origin of the problem. It is the position of the plaintiff further that absent such a finding the Medical Panel may very well determine, as both of the plaintiff's treating physicians have determined, that the jarring and lifting on the job resulted in the deterioration of the plaintiff's back, thus necessitating the operation and the disability. The deterioration of the back is analogous to the deterioration of the cardio vascular system, both being internal portions of the body which can and in this instance

the back did deteriorate as a result of the activities involved in the employment. Under the law, the plaintiff is entitled to compensation benefits for the period of time he was disabled as a result of the injury and for a submission of the matter to the Medical Panel for determination of the extent, if any, of permanent partial disability.

Should the court feel the evidence as to the accident is not sufficient without the assistance of a Medical Panel, then that issue as well should be submitted to the Medical Panel for an evaluation and report.

Respectfully Submitted,

VERHAAREN & MESERVY

By 
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