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Albert P. Nielson and Ben H. Davis, et al v. Industrial Commission of Utah et al : Defendants' Brief

Utah Supreme Court

Clinton D. Vernon; F. A. Trottier; Attorneys for Defendants;

In the
Supreme Court of the State of Utah

ALBERT P. NIELSON and BEN H. DAVIS, a co-partnership, doing business as DAVIS NIELSON CONSTRUCTION COMPANY, and CONTINENTAL CASUALTY COMPANY, a corporation,

Plaintiffs,

vs.

INDUSTRIAL COMMISSION OF UTAH, KEITH F. HUBBARD, WESTERN ASBESTOS COMPANY, a corporation, and THE STATE INSURANCE FUND,

Defendants.

Case No.
7684

DEFENDANTS' BRIEF

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ARROW PRESS, SALT LAKE

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CITATIONS

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INTRODUCTORY STATEMENT

We agree with the first sentence contained in Plaintiffs' Brief, but the second sentence is not entirely correct. It will save time if we briefly state our understanding of the

issues. Keith F. Hubbard, the injured employee involved in this case, had two separate accidents, the first one on October 24, 1949, while employed by the defendant, Western Asbestos Company at the salt works near Saltair. That employer carried its workmen's compensation insurance in the State Insurance Fund.

Mr. Hubbard had his second accident on July 18, 1950 while employed by Davis Nielson Construction Company, wha were building the Ben Albert Apartments on 5th East Street in Salt Lake City. The Continental Casualty Company was the workmen's compensation insurance carrier for that employer. After this second accident Mr. Hubbard lost several months work and was surgically operated by Doctor Boyd Holbrook on November 20, 1950 for the removal of a herniated intervertebral disc from the lumbosacral interspace. All the parties to this case have agreed that Keith Hubbard is entitled to compensation for the period of his disability following his accident of July 18, 1950 and for the medical and hospital expenses of his operation. The question before the Commission was which insurance carrier was legally liable for payment of those amounts.

After hearing the testimony, the Industrial Commission rendered its decision that the second accident, (July 18, 1950), was responsible for Mr. Hubbard's disability and operation. The Commission therefore made an award against Nielson and Davis and their insurer, Continental Casualty Company.

STATEMENT OF FACTS

The first accident, (October 24, 1949), happened when Mr. Hubbard and some fellow workers were engaged in

lifting absestos sheets from a hoist. These sheets were hoisted three at a time up to the fifth floor of the building on which they were working. Mr. Hubbard and the foreman, Mr. Rice, grabbed hold of one bundle of sheets and were pulling on them when Hubbard felt a pain in the lower part of his back. He sat down and relaxed a few minutes until the pain was gone (R. 24). He continued to work the rest of the day without noticing any definite pain; but when he went to work the next day his back was sore and it was also sore the following two or three mornings. A few days later, (there is some discrepancy about the exact date), Hubbard went to see Dr. W. A. Robinson about his back. The doctor diagnosed his injury as muscular strain in the low back region, gave him some heat treatment and taped the back. The doctor saw him about three or four times and Mr. Hubbard was no longer in need of further treatment. At R. 31 is found part of Hubbard's testimony as follows:

> "Q. Now, will you tell us about the pain in the back? What was the later condition of the back with respect to the part of the back in which you received this pain?
>
> "A. After the doctor had taped me up the pain was gone, and there was no pain after it was taped up. There was no muscle strain.
>
> "Q. Did you have any pain in the back from that time until July 18, 1950?
>
> "A. Not that I can recall; there was no continuous pain.
>
> "Q. Did you have any trouble at all in either of your legs during that period?
>
> "A. No, sir."

He also stated that he did not lose any work from October 24, 1949 until July, 1950 because of the pain in his back (R. 32).

The accident of July 18, 1950 occurred while Mr. Hubbard was carrying a heavy wooden form, with another man on the other end of it and a third man on the side helping to balance it. The form was about 9 feet by 13 feet and weighed between 300 and 350 pounds. The man in front tripped and fell. Hubbard got the full weight of the form on his hands. Immediately he felt a very sharp pain in his back. He said it was more severe and lasted longer than the pain he had felt at his previous accident. He had to keep hold of the form for two or three minutes until they could get more help (R. 27). After the accident the pain in his back continued and kept getting worse from that date until November 20, 1950 (R. 28 and 32). As the result of this accident and the pain it caused, Mr. Hubbard began to lose time from his work about two weeks later. Then commencing September 1, 1950, he became continuously disabled from work until several months after his operation.

ARGUMENT

POINT 1.

THE INDUSTRIAL COMMISSION DID NOT COMMIT ANY ERROR IN HOLDING THAT NIELSON & DAVIS AND THEIR INSURANCE CARRIER WERE LIABLE FOR COMPENSATION IN THIS CASE.

Section 42-1-79 of the Utah Workmen's Compensation Law provides that

> "The findings and conclusions of the Commission on questions of fact shall be conclusive and final and shall not be subject to review."

Therefore, in order for the plaintiffs in this certiorari proceeding to be entitled to have the Supreme Court annul the Industrial Commission's decision, it would be necessary to show that the evidence was such as to compel the Commission, as a matter of law; to hold differently to what it actually held. In other words, the Commission's decision must stand unless the Court holds that there was no competent evidence to support the Commission's decision. The Court has stated this so many times that it needs no citations here. However, we would like to quote one paragraph from the Court's opinion in the case of *Parker* vs. *Ind. Comm.*, 78 Utah 509, 5 Pac. (2d) 573.

> "This court is not authorized to weigh conflicting evidence, nor is it authorized to direct which one of two or more reasonable inferences must be drawn from evidence which is not in conflict. That is the peculiar province of the Industrial Commission."

Plaintiffs' brief cites the case of *Continental Casualty Company* vs. *Industrial Commission,* 63 Utah 59, 221 Pac. 852, which was decided by the Supreme Court of Utah in December 1923; and plaintiffs' attorneys have relied almost exclusively upon that case as support for their argument. Briefly the facts in that case were: On July 22, 1922 Aaron Sabey was injured in the Royal Coal mine by a slab of rock falling and striking him on the right shoulder. After a period of disability he returned to work in the mine on Sept. 8, 1922, working continuously until Dec. 4, 1922, when

he was again injured. On this latter occasion he threw a lever forward to start the fan at the mine entrance; i jerked his right shoulder and his arm became paralyzed a the time. There were different insurance companies carry ing the employer's workmen's compensation insurance a the time of the July accident and the December occurrence The Utah Supreme Court held that the December inciden was a recurrence of the July injury and the earlier insuranc carrier must pay for the December injury. At page 12 o Plaintiffs' brief is a quotation from the Court's decisio that

> "Incapacity, which is caused or aggravated b a second injury, received while the employee is suf fering from another injury which he had receive in his employment, is the result of the first injury."

In the paragraph of the Court's opinion immediatel preceding that quotation, is a quotation from Honnold tha

> "When there are two accidents the questio whether the disability should be attributed to th first or second accident depends on the circum stances of the particular case."

In this same case, in the paragraph following the on quoted by Plaintiffs' attorneys, the Court further said

> "In the instant case the evidence is witho conflict to the effect that the second accident wa a recurrence of the first injury."

On year after the foregoing Continental Casualty cas was decided, the Utah Supreme Court rendered a decisio in a case which involved circumstances which were qui

similar to our present case. It was *Aetna Life Insurance Company* vs. *Industrial Commission*, 64 Utah 415, 231 Pac. 442. Russell Worthen was in the employ of Westinghouse Electric & Manufacturing Company. In May 1923 he was lifting a 100 pound box and felt a pain in his right groin region. He became faint and nauseated and he told a fellow employee he had injured himself. From then until Feb. 16, 1924 he suffered pain whenever he was required to exert himself. But during that period of time he continued working without losing any time. On Feb. 16, 1924 while he was pulling a lorry or motor car weighing 600 or 700 pounds he felt a sudden and severe pain in his right groin and became faint and sick. He testified that this strain or exertion was twice as great as the incident of May 1923 and the pain was much more severe in the later accident. After this 1924 accident he was examined by a doctor, who found a right inguinal hernia, which disabled Worthen and necessitated a surgical operation. The doctor testified that Worthen had evidently received a strain at the first accident sufficient to produce pain, but he could not say whether he strained the internal ring.

The same employer was involved in both of these accidents, but the Aetna was the workmen's compensation insurance carrier in May 1923; and the Travelers' Insurance Company was the insurance carrier in February 1924. The Industrial Commission awarded compensation against the first insurance carrier, but this award was annulled by the Supreme Court. The Court held that the later accident was the one for which Worthen was entitled to compensation benefits and the Travelers' Ins. Co. must pay for it. In the

Court's opinion, at page 420 is found the following reasoning:

> "The first accident did not produce a hernia It did not result in disability. It merely produced a pain. * * * Admittedly, the first accident alone did not result in a compensable injury. The second accident was sufficient in itself to cause the hernia * * * From the undisputed evidence there is but one conclusion permissable, and that is that the proximate cause of the injury was the second accident."

We feel that this case contains the law points which apply to Mr. Hubbard's two accidents. Hubbard's first accident (Oct. 1949) did not produce a herniated intervertebral disc which disabled him or required surgery. He did not lose any time from his work on account of that accident. Hubbard's second accident (July 1950) involved a much more severe and painful injury than the one in 1949. The pain from this later accident continued constantly from the time of the accident until after he was surgically operated on November 20, 1950. He was unable to work most of the time between this later accident and the operation.

At page 13 of their brief, Plaintiffs' attorneys have cited the case of *Continental Casualty Company* vs. *Industrial Commission,* 75 Utah 220, 284 Pac. 313, which deals with a situation very much different from that presented by the facts in the case at bar. In that case the injured employee first suffered an accident in the course of his employment on May 13, 1928 by tripping and falling down one or two steps. He severely wrenched his left leg in the

region of the hip and socket joint. Three days later while he was walking from his home to catch a street car on his way to work he slipped and fell because of the weakened and painful condition of his leg and hip joint. In this fall he fractured his left leg. The Utah Supreme Court sustained the Industrial Commission's award of compensation against the employer and its insurance carrier for the disability resulting from the fractured leg. The Court's prevailing opinion quoted the following rule from 70 Corpus Juris:

> "In determining whether the physical harm sustained by the employee was the consequence of the accident or the injury, the controlling question is the continuity of the chain of causation and the absence of an intervening independent agency."

Another case cited in Plaintiffs' brief was *Head Drilling Company* vs. *Industrial Accident Commission,* 177 Cal. 194, 170 Pac. 157, which also involved facts having little similarity to those in the case at bar. That case involved an industrial accident on Feb. 24, 1916, in which the employee's left leg was badly fractured and had to be in a cast for several months. On April 15, 1916, at his home during his convalescence he struck his foot against a table or chair and twisted his leg so that broken portions of the fibula separated. The Industrial Accident Commission found that "the evidence is insufficient to show that the separation was due to any substantial independent intervening cause * * * and the separation was instead a proximate and natural result of the original injury." The California court sustained this finding. Number 2 of the syllabus of the Court's decision reads as follows:

> "Whether a subsequent incident or accident i the proximate cause of a further disability followin it, or an independent intervening cause, is a questio of fact for the Industrial Accident Commission whose conclusion must be sustained by the courts whenever there is any evidence in the record t sustain such conclusion on any reasonable theory."

At page 10 of their brief, Plaintiffs' attorneys call at tention to the fourth paragraph of the Referee's finding "that the condition resulting from applicant's injury o October 24, 1949 was aggravated, an extrusion precipitated and the process accelerated by his injury of July 18, 1950. This finding is supported by the testimony of Dr. Holbrook (page 14 second hearing) and is not in conflict with Dr. Ossman's testimony." They then state that they could find no such testimony on page 14 of the second hearing. Their difficulty apparently was caused by the fact that the reporter's original transcripts had sheet sizes and page numbering somewhat different than the transcript now in the record before the Court. Page 14 of the second hearing is found at page 43 of the reporter's complete transcript now in the Court's possession, and is marked as page 59 of the record. Doctor Holbrook there said

> "It would be my opinion under all the circumstances that the process of degeneration of the intervertebral disc began at the time of the original injury and it was further aggravated by the second injury."

It would probably not serve any useful purpose to review the entire medical evidence in the record, but we shall refer briefly to the following:

Dr. Robinson stated that since Hubbard was symptom free from November 1949 to his second accident on July 18, 1950, he did not believe that Mr. Hubbard sustained a ruptured disc in his October 1949 accident (R. 52). With a herniated disc they usually have pain in one leg or the other (R. 54).

Dr. Holbrook and Dr Ossman stated that degeneration of an intervertebral disc can be caused by normal wear and tear, or from repeated traumas or from one injury (R. 64, 65, 67 and 69). Dr. Ossman also stated that a disc may degenerate and thereafter heal without having a herniation and not need a surgical operation (R. 68).

CONCLUSION

The award of the Industrial Commission should be affirmed.

Respectfully submitted,

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