

1986

# Ida Joyce Wilson v. Industrial Commission of Utah, Workmen's Compensation Division : Brief of Respondent

Utah Supreme Court

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1986 21013

IN THE SUPREME COURT OF THE STATE OF UTAH

IDA JOYCE WILSON,	:	Industrial Commission
	:	No. 85000166
Appellant/Plaintiff,	:	Utah Supreme Court
	:	No. 21013
vs.	:	
THE INDUSTRIAL COMMISSION OF	:	Priority No. 6
UTAH, WORKMEN'S COMPENSATION	:	
DIVISION,	:	
Respondents/Defendants.	:	

BRIEF OF RESPONDENTS

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NOV 26

Clerk, Supreme Court, Utah

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DIVISION,	:	
Respondents/Defendants.	:	

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BRIEF OF RESPONDENTS

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STATEMENT OF ISSUE PRESENTED ON APPEAL

1. Was the Industrial Commission correct in concluding that the applicant, Ida Joyce Wilson, did not sustain back injuries as a result of a compensable industrial accident which allegedly occurred on September 7, 1984?

STATEMENT OF THE CASE

Nature of the Case

A Petition for Writ of Review was filed by the plaintiff, Ida Joyce Wilson for review of an Order of the Industrial Commission holding that Mrs. Wilson did not sustain injuries as a result of a compensable industrial accident on September 7, 1984, and thereby denying her claim for benefits.

DISPOSITION BY THE INDUSTRIAL COMMISSION

A hearing was held on June 13, 1985 before the Industrial Commission Administrative Law Judge Janet L. Moffitt on Ida Joyce

Wilson's application for workmen's compensation benefits. On September 17, 1985 an Order was entered by Judge Moffitt denying Mrs. Wilson's claim for benefits.

A Motion for Review was filed by Ida Joyce Wilson on October 2, 1985. On October 23, 1985 the Industrial Commission denied the Motion for Review, and the Administrative Law Judge's Order was affirmed.

#### STATEMENT OF FACTS

In September of 1984 Mrs. Ida Joyce Wilson was employed as a cook for the Utah State School for the Deaf and Blind. At that time she had held that position of employment for two years. (R 17) On September 7, 1984 the Utah State School for the Deaf and Blind was sponsoring a cookout for the staff, teachers, and others associated with the school. Mrs. Wilson, along with a co-worker, Barbara Dalpias, and their supervisor, Mr. Richard Cobb, went to Mrs. Dalpias's home to pick up a large portable grill which was to be used for the cookout. (R 18) Mrs. Cobb wheeled the portable grill from Mrs. Dalpias's shed to the back of a State truck which had been backed up next to the curb. (R 18) Mrs. Wilson claims that once the grill had been wheeled to the back of the truck, Mr. Cobb ordered Mrs. Wilson to take hold of the left handle of the grill while he had hold of the right handle. Mrs. Wilson alleges that she and Mr. Cobb lifted the grill into the back of the truck, thereby sustaining injuries to her back. (R 19, 20, 23) It is Mr. Cobb's and Mrs. Dalpias's contention that Mr. Cobb alone lifted the grill into the truck

while Mrs. Dalpias and Mrs. Wilson were on either side of the grill so as to steady it so it wouldn't tip over. (R 140-143; exhibits D-7 and D-8)

On September 20, 1984, Mrs. Wilson sought medical treatment from Dr. Richard Barton. She was also treated by Dr. Bruce Sorenson. No mention was made to either of these treating physicians of the possible industrial nature of her problems until December of 1984. (R 40 and 147). Mrs. Wilson stated that the reason she did not promptly tell Dr. Barton about lifting the grill was because she was not certain whether that was the cause of her problem. (R 46) It was not until December of 1984 that Mrs. Wilson reached the conclusion that her back was injured by allegedly lifting the grill. (R 60)

This was not the first incident in which Mrs. Wilson has had problems with her lower back. In 1978, while working as a laborer at a potatoe processing plant, she complained of cervical and low back pain, and was treated by one Dr. West on five separate occasions. X-rays disclosed a severe lumbar C-curve to the left with rotation. (R 51 and 147) In May of 1982, while working as a grill cook at the Mill Stream Restaurant, Mrs. Wilson was also treated for severe lower back pains. In 1984, Mrs. Wilson told Dr. Barton that her present condition first bothered her on May 28, 1982. (R 57 and 147)

In the "Initial Report" to the Public Employees Health Program which was signed by Dr. Barton on September 26, 1984, it is stated that the incident of injury is "not known." (R 123;



exhibit D-4) In an "Application for Treatment" form completed by Mrs. Wilson for Dr. Barton on September 20, 1984, the following questions and answers appear:

Question: How did this condition develop? (What caused it? How did it start?)

Answer: Car wreck 17 years ago. A job which required heavy lifting 9 years ago.

Question: When was the first time you were aware of this problem?

Answer: 6 years ago.

Question: Have you ever had this problem or similar problems before? If yes, please explain.

Answer: Yes, after the car wreck.

Question: Any accidents, falls, etc. that might have caused your problem?

Answer: Heavy lifting 9 years ago.

(R 130-131; exhibit D-4.)

#### SUMMARY OF ARGUMENT

Ida Joyce Wilson alleges that she sustained injuries to her back during the course of employment, while lifting a portable grill on September 7, 1984. It is respondents contention that although Mrs. Wilson is suffering from back problems, these injuries were not the result of a compensable accident. In examining the entire record, there is much evidence which contradicts Mrs. Wilson's allegations. Further, the Administrative Law

Judge concluded that Mrs. Wilson's testimony was not convincing nor credible.

A decision of the Industrial Commission may not be overturned unless said decision is arbitrary or capricious, wholly without cause, or without any substantial evidence to support it. Because the order of the Industrial Commission was not arbitrary or capricious, the Supreme Court is powerless to direct an award of compensation benefits. Therefore, the decision of the Industrial Commission which denied benefits to Mrs. Wilson, must be affirmed.

### ARGUMENT

#### POINT I

THE INDUSTRIAL COMMISSION'S DECISION WHICH DENIED WORKMEN'S COMPENSATION BENEFITS TO IDA JOYCE WILSON WAS NOT ARBITRARY OR CAPRICIOUS, WHOLLY WITHOUT CAUSE, OR WITHOUT ANY SUBSTANTIAL EVIDENCE TO SUPPORT IT; AND THEREFORE THE ORDER OF THE INDUSTRIAL COMMISSION MAY NOT BE OVERTURNED.

The appellant in the case at bar, Ida Joyce Wilson, contends that the Industrial Commission erred in concluding that she did not sustain injuries as a result of a compensable industrial accident. Mrs. Wilson has petitioned this Court to review the Commission's Order denying her workmen's compensation benefits.

The standard of review which has been utilized by this Court in Industrial Commission cases is stringent and there are numerous cases which have articulated the power or scope of review which the Utah Supreme Court possesses with regard to decisions handed down by the Industrial Commission. One such case which clearly

sets forth the proper standard is Kaiser Steel Corporation v. Monfredi, 631 P.2d 888 (Utah 1981). In Kaiser, the Court stated:

Under any of these standards . . . it is apparent that this Courts' function in reviewing Commission findings of fact is a strictly limited one in which the question is not whether the Court agrees with the Commission's findings or whether they are supported by the preponderance of evidence. Instead, the reviewing court's inquiry is whether the Commission's findings are "arbitrary or capricious," or "wholly without cause" or contrary to the "one [inevitable] conclusion from the evidence" or without "any substantial evidence" to support them. Only then should the Commissions findings be displaced.

631 P.2d at 890.

In Kaiser, the Court also cited with approval Kavalinakis v. Industrial Commission, 67 Utah 174, 181-82, 184, 246 P 698, 700, 701 (1926):

What we hold is that in case . . . we are asked to overturn the findings and conclusions of the commission which appear to be in conflict with or contrary to the evidence, it must be clearly made to appear to us that the commission acted arbitrarily or capriciously and wholly without cause in rejecting or refusing to give effect to the evidence . . . Any other conclusion would make this court merely a reviewing court with power to weight the probative effect of the evidence . . . Unless therefore it can be said, upon the whole record, that the Commission clearly acted arbitrarily or capriciously in making its findings and decision, this court is powerless to interfere. Such is the manifest purpose and intent of the Workmen's Compensation Act . . . It was not intended, . . . that this Court, in matters of evidence, should to any extent substitute its judgment for the judgment of the commission.

631 P.2d at 889

Norris v. Industrial Commission, 90 Utah 256, 61 P.2d 413, (1936) is another case which was concerned with the scope of review which the Supreme Court may exercise over a decision handed down by the Industrial Commission. Norris was also cited with approval in the Kaiser opinion.

In Norris, the applicant appealed from an order of the Industrial Commission which denied her benefits. The applicant based her appeal upon the contention that the uncontradicted testimony clearly showed that her husband died as a result of injuries incurred while in the course of employment, and that the decision of the Industrial Commission was contrary to and not sustained by any substantial evidence.

In its' opinion affirming the order of the Industrial Commission, the Utah Supreme Court stated:

Again, therefore, we have the old case of a conflict of evidence which it is for the commission to resolve. It may be well to sum up the principles laid down in a number of previous cases regarding the jurisdiction of this court over awards and orders of the commission.

The Legislature has, in effect, said: "The Commission is the final arbiter of the facts. If there is error in judgment or conclusions of or from facts, it must be the Commission's error and remain there. We give the Supreme Court the right to speak only by warrant of law in compensation cases when it speaks in reference to errors of law alleged to have been made by the Commission." . . .

Where the matter presented on appeal is the question of whether the commission should have in law arrived at a conclusion of fact different from that at which it did arrive

from the evidence, a question of law is presented only when it is claimed that the commission could only arrive at one conclusion from the evidence, and that it found contrary to that inevitable conclusion. But in order to reverse the commission in this regard it must appear at least that (a) the evidence is uncontradicted, and (b) there is nothing in the record which is intrinsically discrediting to the uncontradicted testimony and (c) that the uncontradicted evidence is not wholly that of interested witnesses or, if the uncontradicted evidence is wholly or partly from others than interested witnesses, that the record shows no bias or prejudice on the part of such other witnesses, and (d) the uncontradicted evidence is such as to carry a measure of conviction to the reasonable mind and sustain the burden of proof, and (e) precludes any other explanation or hypothesis as being more or equally as reasonable, and (f) there is nothing in the record which would indicate that the presence of the witnesses gave the commission such an advantage over the court in aid to its conclusions that the conclusions should for that reason not be disturbed.

If the commission should decide against the uncontradicted evidence under those conditions, its decision would as a matter of law be arbitrary and capricious, which is another way of saying that it would be unreasonable.

61 P.2d at 415.

Elsewhere in the Norris case, the Court said:

A reading of the record convinces us that the commission might well have found that the death was caused by the accident [and therefore be compensable]. We are not prepared to say that the record does not show that the more probable cause of [death was the work related injury rather than some independent cause], but it is not our province to measure the relative probabilities. That is for the commission.

61 P.2d at 414.

Accordingly, applying the above cited authority to the case at bar, the Supreme Court is powerless to overturn the Industrial Commissions order unless it can be said that based upon the entire record, the Industrial Commission clearly acted arbitrarily and capriciously in denying the Wilson workmen's compensation benefits. To determine whether or not the Commission acted arbitrarily and capriciously, we may refer to the Norris decision wherein the Court stated that in a situation such as the one in the case at bar, a reviewable question of law is presented only when it is claimed that the commission could arrive at only one conclusion from the evidence, and that if found contrary to that inevitable conclusion.

Assuming that Ida Wilson did make the contention that based upon the evidence the commission could have reached only one inevitable conclusion, and failed to reach that conclusion, there are certain criteria which must be met in order to conclude that the decision was arbitrary and capricious, thereby allowing a reversal of the commissions order.

This "test," as set forth in Norris, for determining whether or not a decision is arbitrary and capricious is set forth in the conjunctive such that each of the six criteria must be met to warrant a reversal of the order. 61 P.2d at 415. The first two criteria which Norris refers to is that the evidence is uncontradicted and that there is nothing in the record which is intrinsically discrediting to the uncontradicted testimony.

Applying this "test" to the case at bar, it is clear that the Industrial Commission did not act arbitrarily and capriciously in reaching their conclusion. In examining the entire record, it is readily apparent that there is a great deal of evidence which is contradictory. Mrs. Wilson claims that she incurred her back injury while lifting a portable grill into the back of a truck. (R 19, 20, 23) This evidence is contradicted by the statements of Mr. Richard Cobb and Mrs. Barbara Dalpias, wherein they both contend that Mrs. Wilson did not lift the grill into the truck, but rather it was Mr. Cobb, alone, who lifted the grill, while Mrs. Wilson and Mrs. Dalpias merely steadied it to ensure that the grill would not tip over. (R 140-143; exhibits D-7 and D-8) Mrs. Wilson alleges that the Administrative Law Judge improperly considered these written statements of Mr. Cobb and Mrs. Dalpias because said statements were unsupported by oral testimony. It is respondent's contention that these statements were properly considered because of the fact that Mr. Helgesen, counsel for Mrs. Wilson, stipulated to the admission of Mrs. Dalpias' statement.

(Mr. Helgesen)

Question: I have a statement, Mrs. Wilson, that appears to be from Barbara Dalpias. And you understand she is not here, and she has had problems getting here?

Answer: Uh-huh.

Mr. Helgesen: So the statement may be entered in the record.

Question: I have some questions about that. It appears that she is saying that you didn't help lift that grill.

Does that make sense to you?

Answer: She is saying that I didn't help lift the grill? Did I hear you correctly, Mr. Helgesen? Did she say that I did not help lift the grill?

Mr. Helgesen: I think it would be best, your Honor, if we stipulated to the admission of this, and have it marked as an exhibit. May we do that?

The Court: Surely.

Mr. Helgesen: Then I can question from that:

The Court: You bet.

Mr. Silvester: Fine.

(R 26-27)

Because the admissibility of Mrs. Dalpiaz' statement was stipulated to, it was certainly proper for the Administrative Law Judge to consider her statement in weighing the evidence. Further, because said statement was admissible evidence, it may be used to corroborate the statement of Mr. Cobb which also contradicted Mrs. Wilson's testimony. Pursuant to U.C.A. § 35-1-88 (1953), the Industrial Commission is not bound by the usual common law or statutory rules of evidence:

35-1-88. Rules of evidence and procedure before commission and hearing examiner--Admissible evidence.--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 make its investigation in such manner as in its judgment is best calculated to ascertain the substantial rights of the parties and to carry out justly the spirit of the Workmen's Compensation 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:

(a) Depositions and sworn testimony presented in open hearings.

(b) Reports of attending or examining physicians, or of pathologists.

(c) Reports of investigators appointed by the commission.

(d) Reports of employers, including copies of time sheets, book accounts or other records.

(e) Hospital records in the case of an injured or diseased employee.

There is an abundance of case law interpreting this statute.

This Court has long recognized the considerable differences that exist between court trials and proceedings before administrative agencies, and that the technical rules of evidence need not be applied in the latter. The Court has also held that hearsay evidence is admissible in proceedings before the Industrial Commission . . . . However, a finding of fact cannot be based solely on hearsay evidence, but must be "supported by a residuum of legal evidence competent in a court of law."

Sandy State Bank v. Brimhall, 636 P.2d 481, 486 (Utah 1981). See also Hackford v. Industrial Commission, 11 U.2d 312, 358 P.2d 899 (1961); Yacht Club v. Liquor Control Commission, 681 P.2d 1224 (Utah 1984).

Accordingly, because Mrs. Dalpiaz's statement is legal evidence which is competent in a court of law, and it makes substantially the same averments as Mr. Cobbs statement, it may be used to support Mr. Cobbs statement, and it was proper for the Industrial Commission to consider such evidence in making its findings.

Thus, because the statements of Mr. Cobb and Mrs. Dalpiaz are in direct contradiction to Mrs. Wilson's testimony, the first criteria of the Norris "test" has not been met, and as this "test" is set forth in the conjunctive, there is no need to examine the remaining 5 criteria.

It should also be noted that the various reports of attending and examining physicians contain much information which is contradictory to the testimony of Mrs. Wilson. While Mrs. Wilson contends that she incurred back injuries while lifting a portable grill within the course of employment, the various reports and records appear to indicate otherwise.

As previously mentioned in the statement of facts, in the "Initial Report" to the Public Employees Health Program which was signed by Dr. Barton, it was stated that the incident of injury is "not known". (R 123; exhibit D-4) Further, in an "Application for Treatment" form, Mrs. Wilson stated that her back condition developed from "a car wreck 17 years ago; and a job which required heavy lifting nine years ago." She also stated in this form, that the heavy lifting nine years ago may have caused her back problems. (R 130-131; exhibit D-4)

Thus, when the entire record is considered, and the numerous contradictions are revealed, it is clear that the Industrial Commission's decision was not arbitrary and capricious, or wholly without cause. Accordingly, the decision is not subject to reversal.

A. THE INDUSTRIAL COMMISSION ARE THE SOLE JUDGES OF THE CREDIBILITY OF WITNESSES AND ARE NOT REQUIRED TO BELIEVE UNCONTRADICTED TESTIMONY UNLESS THERE IS NOTHING IN THE RECORD WHICH IS INTRINSICALLY DISCREDITING TO THE TESTIMONY.

In Chief Consolidated Mining Company v. Industrial Commission of Utah, 260 P 271, 274 Utah 1927), the Supreme Court of Utah stated:

[T]his court, in cases arising under the Industrial Act, has uniformly held that the Industrial Commission are the sole judges of the credibility of the witnesses, the weight of the evidence, and the facts . . .

In denying compensation to Mrs. Wilson, the Industrial Commission stated that the Applicant's explanation of why she did not mention the incident (the alleged accident) to her physicians was not convincing. "The applicant's testimony was not credible." (R 148)

Because the Administrative Law Judge was present at the hearing and therefore in a position to observe the applicant's demeanor, she was in a much better position than this Court to evaluate the credibility, or lack thereof, of the Applicant. Thus, in accordance with Chief Consolidated Mining Company, it is

within the sole province of the Industrial Commission to assess a witness's credibility in reaching its conclusion.

This issue of credibility may also be tied into the aforementioned Norris "test" in determining whether or not the Industrial Commission acted arbitrarily and capriciously. The second criteria of the Norris "test" states that a decision may be arbitrary and capricious if "there is nothing in the record which is intrinsically discrediting to the uncontradicted testimony."

Although there is a plethora of contradiction in the record, let us assume for one moment that Mrs. Wilson's testimony was uncontradicted. In order for this Court to reverse the Industrial Commission's order, it must appear that there is nothing in the record which is intrinsically discrediting to Mrs. Wilson's testimony. This is clearly not the case. In determining whether or not there was anything discrediting to Mrs. Wilson's testimony, the Commission looked at the facts and circumstances, and determined that Mrs. Wilson's testimony lacked credibility. Mrs. Wilson alleges that she was injured on September 7, 1984, yet she did not mention to anyone the alleged accident until December 4, 1984. (R 40) In the Findings of Fact, Conclusions of Law, and Order, it is stated:

First, the Applicant did not report any sort of industrial involvement to her treating physicians until sometime in December of 1984. The Administrative Law Judge finds it very difficult to believe that had the incident occurred as described by the Applicant, she would not have made mention of it to at least her treating physicians immediately upon receiving treatment. The Applicants

explanation of why she did not mention the incident to her physicians was not convincing.

(R 148)

Thus, because Mrs. Wilson was not convincing or credible, her testimony was intrinsically discrediting, and therefore the Industrial Commissions decision was not arbitrary or capricious.

A case which further supports respondent's position is Russell v. Industrial Commission, 43 P.2d 1069 (Utah 1935) wherein this Court stated:

In the instant case there is no direct evidence as to when, how, or where Mr. Russell received the blister on his toe. He may have received the injury while he was working at the mill, but he may, so far as the evidence discloses, have received it elsewhere. When any one of two or more inferences may reasonably be drawn from the evidence, this court is not authorized to direct which inference must be drawn, and, likewise, when, as in the instant case, it is somewhat of a speculation as to where or how the deceased received the injury complained of, this court is precluded from directing an award. To entitle the plaintiff to prevail upon this review the evidence must be such that the only reasonable inference permissible is that Mr. Russen received an accidental injury growing out of or in the course of his employment and that such injury resulted in his death. The evidence before us does not measure up to that standard. The commission may well have entertained grave doubt as to when and where Mr. Russell received the blister on his toe.

43 P.2d at 1073.

The Russell holding may be applied to the case at bar. Mrs. Wilson may have received her injury as she alleges, but, so far as the evidence discloses, she may have received it elsewhere. As in Russell, the cause of Mrs. Wilson's injury is

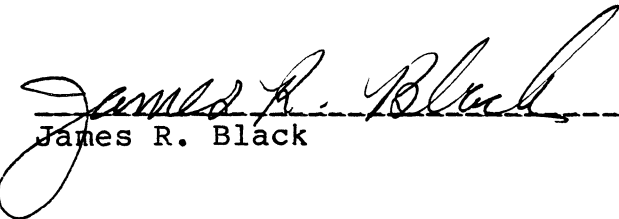
speculative, and there is more than one inference which may be drawn from the evidence. Accordingly, this Court is precluded from directed an award.

CONCLUSION

In denying compensation benefits to Mrs. Wilson, the Industrial Commission did not act arbitrarily and capriciously, wholly without cause, or contrary to the one inevitable conclusion from the evidence. Rather, the record is full of contradictory evidence such that there is not one inevitable conclusion to be drawn. And, inasmuch as it is not within the province of this Court to measure the relative probabilities, respondent's herein respectfully request that the Utah Supreme Court affirm the order of the Industrial Commission which denied benefits to Ida Joyce Wilson.

DATED this 10 day of November, 1986.

BLACK & MOORE

  
James R. Black

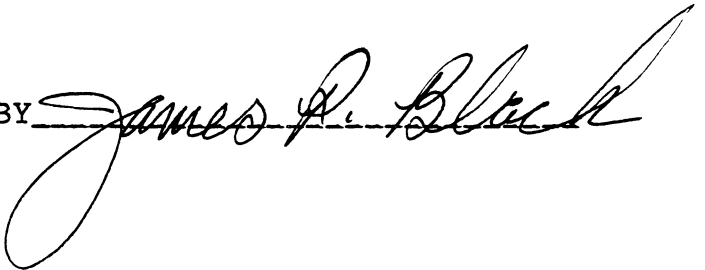
CERTIFICATE OF MAILING

I hereby certify that four true and correct copies of the above and foregoing Respondent's Brief, was mailed, postage paid, on the 10 day of November, 1986, to the following:

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A handwritten signature in cursive script, appearing to read "James P. Black", written over a horizontal line.