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Willie M. Salas v. The Industrial Commission of Utah, Eaton Metal Products Company, and the State Insurance Fund : Brief of Appellant

Utah Supreme Court

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James R. Black; Robert D. Moore; Attorneys for Defendant-Respondent.

IN THE SUPREME COURT OF THE STATE OF UTAH

WILLIE M. SALAS,

Plaintiff,

vs.

THE INDUSTRIAL COMMISSION OF UTAH, EATON METAL PRODUCTS COMPANY, AND THE STATE INSURANCE FUND,

Defendants.

SUPREME COURT
NO. 14493

APPELLANT'S BRIEF

Appeal from the Industrial Commission of Utah

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STATEMENT OF THE NATURE OF THE CASE

Plaintiff appeals the decision of the Industrial Commission of Utah denying him a fifteen percent increase in his workmen's compensation based on the employer's alleged failure to comply with the law to maintain a safe place of work.

DISPOSITION IN THE INDUSTRIAL COMMISSION

Plaintiff appealed the hearing decision of the Administrative Law Judge to deny said increased compensation to the Board of Review of the Industrial Commission. The Board of Review affirmed the decision of the Administrative Law Judge.

RELIEF SOUGHT ON APPEAL

Appellant asks that the decision of the Industrial Commission be annulled and that this court rule as a matter of law that appellant is entitled to said fifteen percent increased compensation. Alternatively, if this Court finds

that appellant has been denied a fiar hearing and due process of law in the administrative hearing process, appellant asks that respondent's decision be annulled and the case be remanded for entry of a new decision in accordance with the findings of the Court.

STATEMENT OF FACTS

Plaintiff was totally and permanently disabled in an industrial accident on June 11, 1973, while employed by Eaton Metal Products Company. Plaintiff was found to be entitled to workmen's compensation benefits in the amount of $79.00 per week for himself, his wife, and his five children. The issue on appeal is solely concerned with whether plaintiff is entitled to a fifteen percent increase in benefits.

ARGUMENT

POINT I

PLAINTIFF IS ENTITLED TO FIFTEEN PERCENT INCREASED COMPENSATION AS A MATTER OF LAW BECAUSE UNCONTROVERTED EVIDENCE ESTABLISHED THAT THE EMPLOYER FAILED TO HAVE IN EFFECT ANY SAFETY PROGRAM.

Finding of Fact No. 13 states:

> No evidence was adduced at the hearing of any failure of defendant Eaton Metal Products Company to comply with any safety law or order of the commission pertaining to the premises of defendant or the safety of its employees. R..217 (Emphasis added)

It is not true that "no evidence" supports plaintiff's contention. First, there is a letter dated October 20, 1974, from Mr. Sam Mulliner who investigated the accident.

R. 164-6. He stated,

> 1. A safety program was not in effect at this place of employment.
> 2. Supervision was very lax in areas of safety.
> R. 165

Second, there is a report on Mr. Mulliner's special investigation dated June 22, 1973, from Mr. Martell Ellis, Administrator of the Utah Occupational Safety and Health Administration to Mr. Steve Lee of Eaton Metal Products. R.9-10, Mr. Ellis stated,

> 1. Unsafe work habits by workmen contributed to or caused the support boom to fall.
> 2. One support is not adequate to support a crane boom of the size being repaired in your yard.
> R. 9

Third, there is Mr. Sam Mulliner's accident investigation report, indicating that action taken to correct conditions cousing the accident were "instructions issued in safe work habits." R.6. Fourth, Mr. Bob Lemon, a welder at Eaton Metal, testified that he considered the work area in question unsafe "[b]ecause every time a truck or something would go by, it would shake it [the crane boom]." R. 110. Fifth, additional testimony concerning notice to the supervisor of the unsafe condition that caused the accident was excluded merely because it was hearsay. R. 108 This evidence was improperly excluded. Ogden Iron Works v. Industrial Commission, 102 U. 492, 132 P. 2d 376 (1942) and Hackford v. Industrial Commission, 11 U. 2d 312, 358 P.2d 899 (1961).

Although evidence controverting the above might convince the Administrative Law Judge and might support a

finding of fact contrary to plaintiff's position, the finding that there was "no evidence" supporting plaintiff's position is clearly arbitrary and is not supported by substantial evidence.

Eaton Metal was required to have a safety program in effect by Section 35-1-12, Utah Code Annotated (1953):

> No employer shall construct or occupy or maintain any place of employment that is not safe, or require or knowingly permit any employee to be in any employment or place of employment which is not safe, or fail to provide and use safety devices and safeguards, or fail to obey and follow orders of the commission or to adopt and use methods and processes reasonably adequate to render such employment and place of employment safe, and no employer shall fail or neglect to do every other thing reasonsably necessary to protect the life, health, safety and welfare of his employees. Where injury is caused by the willful failure of an employer to comply with the law or any lawful order of the industrial commission, compensation as provided for in this title shall be increased fifteen per cent, except in case of injury resulting in death.

The record shows that a safety program was not in effect. R. 165. This evidence is uncontroverted. Defendant is likely to argue that the above section is a statment of general law that cannot be a basis for a finding that plaintiff's injury was cause by the employer's willful failure to comply with the law. Plaintiff replies that when the incontroverted evidence establishes that the employer failed to have in effect any safety program at all, the court should rule as a matter of law that the employer willfully failed to comply with the law and that compensation shall be increased fifteen percent.

The cases that might seem to require the conclusion

that a violation of a particular and specific rule or order of the Industrial Commission as well as a finding that the employer had knowledge of said rule or order are distinguishable from the instant case. In Park Utah Mining Co. v. Industrial Commission, 62 U. 421, 220 P. 389 (1923), the Industrial Commission found that the employer had violated a particular rule of the Commission. The record also showed, however, that the employer used a different method to attain the safety objective, a method the employer considered better. The court concluded,

> Whether the method employed was the best that could or should have been adopted is immaterial; but, in any event, it negatives any willful intent on the part of the superintendent, or the other officers of the company, to willfully do any act or omit to do any act with a reckless disregard for the safety of the employees.
> 220 P. at 390.

Here plaintiff submits that the failure to have any safety program in effect shows by itself a willful omission on the part of the employer with a reckless disregard for the safety of the employees. The employer was not following what he considered to be a better safety technique; rather he had no safety program at all and left his employees to take their chances.

Western Clay and Metals Co. v. Industrial Commission, 70 U. 279, 259 P 927 (1927), a case that depends of Park Utah Mining Co., Supra, cites in pertinent part the following from the earlier case:

> There is nothing in the findings or in the evidence before the Commission to indicate or suggest that the plaintiff mining company or its superintendent

> was acting in disregard of the safety of its employees, or to indicate a willingness on the part of the superintendent to inflict injury upon the employees.
> 220 P. at 390.

That is not true in the instant case, where the record uncontrovertedly shows the employer did not have a safety program in effect. While it may be unfair to imply actual knowledge of a specific rule as the above cases indicate (although plaintiff suggests that holding may have outlived its time), it is a different situation entirely here where there is a general failure to have any safety program in effect.

ARGUMENT

POINT II

PLAINTIFF WAS DENIED DUE PROCESS OF LAW BECAUSE HE DID NOT HAVE ACCESS TO THE RECORD OF HIS ORIGINAL HEARING TO PREPARE HIS APPEAL TO THE BOARD OF REVIEW.

In his Petition for Review to the Industrial Commission plaintiff requested twenty days to review the record to determine the need for additional evidence or argument. R. 215. Access to the record of proceedings is an essential element for the preparation of an appeal, whether criminal, civil, or administrative. Griffin v. Illinois, 351 U.S. 12 (1956) and Mayer v. Chicago, 404 U.S. 189 (1971). Particularly in this case plaintiff's hands wer tied without the record because he had new counsel at this point in the proceedings, and said counsel had not been present at the hearing. Without the transcript to determine what had transpired

at the hearing, counsel could not prepare any argument or submit any additional evidence. Therefore plaintiff was denied this essential element of due process of law to which he was entitled.

ARGUMENT

POINT III

PLAINTIFF WAS DENIED A FULL AND FAIR HEARING BECAUSE A CONTINUED HEARING OF RELEVANT TESTIMONY WAS DELAYED SO LONG THAT HIS WITNESS LEFT THE JURISDICTION.

In plaintiff's hearing the Administrative Law Judge agreed with plaintiff's counsel that the hearing should be continued so that testimony by the safety inspector, Mr. Sam Mulliner, might be received. R. 183-4. The Administrative Law Judge failed and refused to schedule the continued hearing requested repeatedly in a timely and proper fashion. R. 184. Not only did the Administrative Law Judge fail and refuse to schedule the continued hearing for what was obviously relevant, if not crucial testimony, but he in effect deprived plaintiff of the opportunity to obtain that testimony because the witness moved from the jurisdiction during the period that the Administrative Law Judge failed and refused to schedule the continued hearing. Plaintiff has no income or resources to allow him to pay the expense of obtaining the departed witness's testimony. His only income is his workmen's compensation of $79.00 per week to support his wife, his five children, and himself.

The safety testimony would have been and is crucial to plaintiff's claim because it could have substantially

strengthened his case for the increase in his compensation. A letter from the witness in question was made part of the record in lieu of the testimony, but it is not an adequate substitute. R. 184-5, 194-6.

The Administrative Law Judge's decision was rendered after considerable delay over a year later on November 28, 1975, without testimony from the safety inspector, although his original report and the subsequent letter from his were introduced in evidence. The omission was thus a denial of plaintiff's right to a full and fair hearing and thus to due process.

The Utah Supreme Court spoke to this issue in Utah Gas Service Co. v. Mountain Fuel Supply Co., 18 U. 2d 316, 422 P. 2d 530 at 532 (1967):

> In proceedings before an administrative agency, a party is entitled to be treated with fairness and to have opportunity to prepare and present his case and his contentions with respect thereto and to have adjudication in conformity with law.

The New Mexico Supreme Court has considered these issues of fairness in administrative hearings and would also substantiate plaintiff's claim to a full hearing and to a record for his appeal. The denial of a continuance to receive relevant evidence was found to have prevented a full and fair hearing in Transcontinental Bus System v. State Corporation System, 241 P.2d 829 (1953).

Further in the Matter of Miller, 542 P.2d 1182 (1975), the same court found that an agency must examine both sides of a controversy in order to protect fairly the interests and rights of all who are involved. When relevant evidence

is denied admission by the agency, then the decision is arbitrary and denies fundamental fairness to the parties. Ibid, at 1185.

Plaintiff in this case was treated unfairly because he was effectively denied the opportunity to complete his case when the agreed upon continued hearing was delayed so long that his witness was no longer available to testify. In view of his financial situation it is really no remedy to remand this case for testimony by this witness unless it is done at the expense of the Industrial Commission, whose actions resulted in the breach of plaintiff's right to be given a fair chance to present his case.

CONCLUSION

Therefore it is appropriate that this court rule as a matter of law that plaintiff is entitled to a fifteen percent increase in his workmen's compensation pursuant to Section 35-1-12, Utah Code Annotated (1953). In the alternative the record establishes that plaintiff has been denied a fair hearing on this issue and the case should be remanded to the Industrial Commission to proceed in accordance with this court's opinion.

DATED this 7th day of September 1976.

Respectfully submitted,

Michael Shepard
Attorney for Plaintiff-
Appellant

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I mailed a copy of the foregoing Appellant's Brief to Robert D. Moore, Ten West Broadway, Suite 400, Salt Lake City, Utah 84101, on this 17 day of September, 1976.

Jean Milner