

2001

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

Utah Supreme Court

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Recommended Citation

Reply Brief, *Salas v. The Industrial Commission of Utah*, No. 14493.00 (Utah Supreme Court, 2001).
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UTAH SUPREME COURT

BRIEF

14493 P

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

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13 JUN 1977

Plaintiff's
APPELLANT'S REPLY BRIEF

BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School

Appeal from the Industrial Commission of Utah

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FILED

MAR 11 1977

Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

WILLIE M. SALAS,

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vs.

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Appeal from the Industrial Commission of Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

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SUPREME COURT
No. 14493

APPELLANT'S REPLY BRIEF

ARGUMENT

POINT I

THE INDUSTRIAL COMMISSION FAILED TO REVIEW THE
ENTIRE RECORD MADE IN THIS CASE, THUS VIOLATING
SECTION 35-1-82.54, U.C.A.

Section 35-1-82.54, Utah Code Annotated 1953, as amended,
provides in pertinent part:

The Commission... shall review the entire
record made in said case...
(emphasis added)

The Reporter's Certificate shows that the transcript was not
prepared until March 8, 1976 (R.135), that is, after the review
by the Industrial Commission on January 27, 1976, and after the
filing of the appeal to this Court on February 26, 1976. Respon-
dent simply did not comply with the statute and denied appellant's
Petition for Review without the hearing evidence before it. Yet
respondent purports to base the Denial of Claimant's Petition for
Review on insufficient evidence, stating (R.217):

The Commission does not believe there is
sufficient evidence to sustain the allegation
of the employers willful negligence in this

case, and therefore, the additional 15% compensation should be denied. (emphasis added)

Respondent acted arbitrarily and in excess of its powers when it made its decision without reviewing the evidence.

ARGUMENT

POINT II

NO FAILURE OF APPELLANT'S CAUSED HIM NOT TO GAIN ACCESS TO THE RECORD.

Respondent argues that, if appellant did not have access to the record and transcript of the hearing, it was through his own failure. Respondent's Brief, 10-11. Respondent admits, however, that appellant made a request to have 20 days to review the record when it was available. Respondent's Brief, 10. Appellant was not advised when the record was prepared, even though the Commission has no published regulations requiring appellant to take further steps to obtain a transcript, such as appellant directly requesting the reporter to prepare a transcript or appellant otherwise "ordering" it. Appellant made a formal request to respondent for a reasonable opportunity to review the record when prepared; that request was ignored. The reason is clearly that no transcript was prepared for the review (see Point I). The issue is whether or not that denies appellant a fair opportunity to present his case, pursuant to the administrative review provisions of Chapter 1 of Title 35, Utah Code Annotated 1953, as amended, and the due process clauses of the Utah Constitution and of the United States.

ARGUMENT

POINT III

THE STANDARD OF "WILLFULNESS" ARGUED FOR BY RESPONDENT SHOULD NOT BE ADOPTED.

Respondent's Brief (at 4-5) argues that the Utah Supreme Court long ago adopted a standard of "willfulness" in Western Clay and Metals Co. v. Industrial Commission, 70 U. 279, 259 P. 927 (1927), by citing with approval the standards of several other jurisdictions. This standard would require proof of "premeditation, obstinacy, and intentional wrong doing" by the employer for the injured employee to win increased compensation. The standard is impossible, practically speaking, and, what is more important, it is faulty.

The cases cited with approval by this Court in Western Clay and Metals Co. v. Industrial Commission, supra, were not discussing "willfulness" in the context of a provision for increased compensation based on the "willfulness" of an employer in failing to do certain things. Rather, those cases all applied "willful" to the injured worker's failure to utilize safety appliances, under a section where such a "willful" failure by the injured worker would have barred him from receiving any compensation whatsoever: Wick v. Gunn, 169 P. 1087 at 1087-8 (Okla. 1917).

Applying this standard of "willfulness" to the employer, as well as the injured worker, is improper because of the presumption in favor of those workers for whose protection the act was passed. Wick v. Gunn, supra, at 1090, and Long v. Western

States Refining Co., 14 U. 2d 398, 384 P. 2d 1015 (1963).

The standard of "willfulness" is accordingly made quite high-purposely and explicitly - in relation to the injured worker. But in relation to the employer it should be correspondingly lower. This Court should not perpetuate a standard that was taken from one section of the act and applied to a different section without discussion or acknowledgment of the issues raised here.

Simply put, appellant argues that the standard of "willfulness" is different here and that an employer's failure to have any safety program in effect should be a sufficiently willful failure to entitle the injured worker to 15% increased compensation as a matter of law.

ARGUMENT

POINT IV-

RESPONDENT'S STATEMENTS OF FACTS DO NOT ALL REFLECT THE RECORD ACCURATELY.

Respondent's Brief (at 5) states, "The company conducted periodic safety meetings (R.71)." The record indicates that Mr. Steve Lee, Division Manager at defendant, Eaton Metals, testified as follows(at R.71):

- Q. Did you ever instruct your production superintendent or anyone else, to talk to these workmen about the work habits that would be necessary in working around that boom while it was up on that pipe?
- A. We have periodical safety meetings.
- Q. That wasn't my question. Did you ever instruct them?
- A. I did not.

Q. Do you know, of your own knowledge, whether any safety meeting was held about the time of the accident in connection with that boom?

A. I do not.
(Emphasis added)

Note that Mr. Lee mentioned periodic safety meetings in an unresponsive answer and put his statement in the present tense. All he actually testified to was that periodic safety meetings were being held at the time of the hearing over a year after the accident. Then in response to the third question quoted, he admitted he did not know of any safety meeting held in connection with the boom about the time of the accident.

Respondent's Brief (at 6) states, "When Mr. Lemon went to work on the Monday morning of the accident he stated he felt the area was unsafe, but he took no action to notify or warn anyone. (R. 107,120)." The record indicates that Mr. Lemon testified as follows (at R.107):

Q. Now on the day that Willie was injured. And you came out and saw this boom on this pipe, did you talk to Dutch or anybody else out there as to that being an unsafe area for people to work in?

A. Not that day.

Q. Did you prior to that time?

A. We had asked him to weld it up.


Respondent's Brief (at 6) states that Plaintiff's witness, Steven Carlson, "never made any comments to his supervisor, Dutch, about any hazard he may have sensed, (R.133)." This is true as far as it goes, but Mr. Carlson also testified that he had commented about the possible hazard to Mr. Lemon who he understood to have some supervisory authority over him. (R.132-134).

CONCLUSION

For the reasons set forth above as well as in appellant's Brief, appellant asks this Court to grant relief as requested.

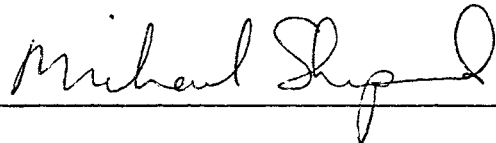
DATED this 11th day of March, 1977.

Respectfully submitted,


MICHAEL SHEPARD
Attorney for Plaintiff-Appellant

CERTIFICATE OF SERVICE

I hereby certify that I hand delivered 2 copies of the foregoing Appellant's Reply Brief to James R. Black, Ten West Broadway, Suite 400, Salt Lake City, Utah, this 11th day of March 1977.



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