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Lorenzo Vernal Ewell v. The Industrial Commission of the State of Utah, Byron Ewell et al : Brief of Plaintiff

Utah Supreme Court

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**IN THE SUPREME COURT
of the
STATE OF UTAH**

LORENZO VERNAL EWELL,

Plaintiff,

vs.

THE INDUSTRIAL COMMISSION
OF THE STATE OF UTAH,
BYRON EWELL, doing business as
ASSOCIATED CONSTRUCTION
COMPANY and THE STATE
INSURANCE FUND,

Defendants.

BRIEF OF PLAINTIFF

**WRIT OF REVIEW FROM THE INDUSTRIAL COMMISSION
OF THE STATE OF UTAH**

FILED

JUL 25 1961

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Case No.
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BRIEF OF PLAINTIFF

PRELIMINARY STATEMENT

Plaintiff herein will be referred to throughout as plaintiff; The Industrial Commission will be referred to as commission, and Byron Ewell and The State Insurance Fund as defendants.

All italics are ours.

STATEMENT OF FACTS

This matter comes before this court on a Petition for Writ of Certiorari filed by plaintiff on or about the 18th day of September, 1950. Plaintiff's application for workmen's compensation was heard by The Industrial Commission on the 22nd day of November, 1950 and on the 5th day of March, 1951 The Industrial Commission made its decision and denied a portion of plaintiff's claim, namely, all medical expense incurred in the removal of the pterygium growth on plaintiff's left eye, and compensation for the period of time which he was disabled following the surgical operation on said growth.

The commission in its Findings of Fact and Conclusions of Law found that plaintiff received a flash from a welders torch on May 29, 1950, while in the course of his employment and that the flash caused a severe inflammation and blister in plaintiff's eye. It further found that the inflammation caused was not successfully reduced until July 21, 1950. Plaintiff's eye was operated on by Dr. Berman on the 29th day of July, 1950 at the Holy Cross Hospital in Salt Lake City (R. 16). The operation consisted of transplanting the pterygium to a portion of the eye where it would grow without affecting the sight (R. 13). Pterygium is a growth of the conjunctival tissue caused by irritation of the eye, such as results from dust, wind and sand striking the eyeball. It is traumatic in its nature (R. 13).

A pterygium had been removed from plaintiff's right eye in 1948 and at that time the pterygium in the left eye was noted but it was not of sufficient size to necessitate an operation (R. 13). Dr. Berman did not see plaintiff between August of 1948 and July of 1950 (R. 13). The condition that was present in plaintiff's eye in 1948 was one which would not disappear without medical treatment, but the pterygium present at that time was not affecting plaintiff's clear vision. By July 14, 1950, the pterygium had increased in size until it was beginning to encroach on the cornea of the left eye (R. 15). At the time Dr. Berman examined plaintiff, the eye was inflamed and it was his opinion that surgical correction was necessary (R. 15).

The doctor stated that a pterygium might not progress, but would remain stationary unless the eye itself was irritated and an aggravation resulted. He was further of the opinion that the pterygium in plaintiff's eye had been aggravated by the flash from the welding machine on May 29, 1950 (R. 16).

As to the rate of progress and growth of the pterygium, Dr. Berman stated that anything coming in contact with the pterygium would make it grow faster and encroach on the cornea, but if nothing aggravated it or irritated it, it could remain stationary for years (R. 18). It was his opinion that if dust or other fine materials were being blown into the eye, that that would have a tendency to cause the pterygium to grow (R. 18). He was unable to state whether or not the pterygium

would have grown to the extent found in July, 1950 as a result solely of sand and dust striking the eyeball. He was of the opinion that continuous exposure to dust, etc., for approximately two years could possibly cause the pterygium to increase in size and that such possibility was present, even though there had been no flash burn (R. 21, 22).

Plaintiff and his wife were both sworn and testified. Plaintiff testified that he was a steam shovel operator and at said occupation dust and dirt were constantly blowing off the shovel and into his face and eyes (R. 23). Since 1948, after the operation by Dr. Berman on his right eye, plaintiff had worked as a shovel operator. He had not been bothered with any eye trouble. The first eye difficulty he had was after receiving the flash burn (R. 23, 24, 25). After the flash burn, plaintiff's eye burned and smarted. The condition got worse every day after the first injury on May 29 (R. 26) and by July 12th plaintiff could no longer continue with his employment. Plaintiff remained off the job from July 12th until September 9, 1950 (R. 28).

Plaintiff's wife, Flossy E. Ewell, testified that between August of 1948 and May of 1950, plaintiff had no trouble with his eyes, but that since May 29, 1950, plaintiff had had continuous trouble. She observed on his eyeball small blisters, his face and eye were swollen after the flash burn (R. 29). Between the 29th of May and July 12th, the left eye was continuously inflamed, with the lids swollen and the ball of the eye red (R. 30).

The rate of growth of the pterygium in the left eye was impossible to discover because plaintiff was not examined between the 1948 operation and July 14, 1950. However, any irritation of the eye would cause the pterygium to grow. The commission found that the plaintiff had been working during the two years between the first eye operation and the second, under conditions conducive to the pterygium growth, but because the evidence did not support a finding that the irritation caused by the flash accelerated the growth, they denied compensation for the operation and the disability between July 21st and September 9, 1950.

Plaintiff filed his Application for Rehearing within the time allowed by law and said application was by the Commission denied on April 23, 1951.

SUMMARY OF ARGUMENT

POINT I.

THE PTERYGIUM IN PLAINTIFF'S LEFT EYE WAS THE RESULT OF A COMPENSABLE INDUSTRIAL ACCIDENT.

ARGUMENT

POINT I.

THE PTERYGIUM IN PLAINTIFF'S LEFT EYE WAS THE RESULT OF A COMPENSABLE INDUSTRIAL ACCIDENT.

The Findings of Fact by the commission contain the following language:

“* * * Applicant’s right eye was operated in 1948, and he was then told that the left eye would sooner or later have to be operated.”

And at a later point the opinion again states:

“* * * The probabilities are that surgery would have been necessary whether or not the flash incident had taken place.”

From these statements plaintiff deduces that The Industrial Commission believed and so found that the only effect a flash burn on plaintiff’s left eye had, was to aggravate the pre-existing condition of the eye and since plaintiff could not present evidence that the burn caused the pterygium to increase its rate of growth, he could not recover for the surgical operation.

The commission awarded plaintiff workmen’s compensation for one week beginning July 14th and ending July 21st, it found that plaintiff suffered a compensable accident, but refused to allow plaintiff the expense of the medical treatment which included the operation performed on July 29th. By refusing to allow plaintiff compensation for the disability which occurred between July 21st and September 9th, the commission has attempted to delineate between that portion of plaintiff’s condition which was directly attributable to the flash burn and the disability resulting from the condition present in his eye on the date of the flash burn.

Plaintiff submits that the commission has overlooked material facts which would require a decision in his

favor and an award of the full medical expenses incurred by him, as well as the compensation for the total time which he was disabled.

The eye condition from which plaintiff suffered and which necessitated the surgical operation was caused by either one or two forces acting separately or together: (a) Plaintiff's eye condition may have been caused by the impact of dust and sand on his eyeball between August of 1948 and May 29, 1950; (b) The condition may have been caused by the flash burn which occurred on May 29, 1950; or (c) It may have been caused in part by the sand and dust particles striking the eyeball and in part by the flash burn which occurred on May 29, 1950.

In respect to the various causes, it is plaintiff's position that regardless of whether (a), (b) or (c) caused the disability which required the surgical operation, he is entitled to full compensation for all disability which he has suffered.

Each and everyone of the causes of the damage to plaintiff's eye arose out of or in the course of his employment and any disability caused by the individual cause or by the causes combined and concurring would result in a compensable accident to plaintiff.

It was, at the time of the commission hearing and is now, plaintiff's position that the flash burn on May 29, 1950, accelerated the pterygium in plaintiff's eye and

directly necessitated all of the medical treatment which he received. But even assuming that The Industrial Commission correctly views and understands the law applicable to plaintiff's claim, still under the only evidence presented, plaintiff's eye condition and the pterygium existing in his left eye were aggravated by the flash burn of May 29th.

Dr. Berman in stating his opinion concerning the flash burn and the cause of the pterygium said (R. 16):

“I don't think it would solely attribute to that. I think the flash had aggravated the condition of the pterygium itself or inflammation.”

No other medical evidence was presented before the Commission.

Dr. Berman's testimony when considered with the testimony of plaintiff and his wife to the effect that during the two years immediately preceding May 29th, plaintiff had had no trouble with his left eye, would conclusively show that the flash burn irritated and aggravated plaintiff's eye and was the only irritant or aggravation of which he was conscious. The commission finds that pterygia are caused by irritation of the tissues of the eyes.

The commission found that plaintiff while on the job during the two years immediately preceding his operation was exposed to conditions conducive to the growth of the pterygium. Those conditions were the

wind, dirt and dust in which he worked while operating the power shovel. There was no evidence that the irritating condition conducive to the growth of the pterygium existed at any other place in plaintiff's environment. The commission without any evidence indulges in a presumption that plaintiff was subjected to the same dust and dirt outside of his employment after the 1948 operation. The only reason that the commission could possibly have in creating and relying upon such a nonexistent presumption is for the purpose of defeating plaintiff's claim on some effective ground.

Since 1922 it has been the law of this state that an injured workman is entitled to compensation not only for the disability which directly flowed from an on the job injury, but was also entitled to a compensation for any disability resulting from an aggravation or acceleration of a diseased bodily condition existing at the time when the injury was received. This principle was clearly set forth and discussed at length in *Pinyon Queen Mining Co., et al. v. Industrial Commission of Utah*, 59 Utah 402, 204 P. 323. The decision sets forth the liberal and humane principles of law which should govern plaintiff's petition in the present case.

In the *Pinyon Queen* case the workman had within his body a latent syphilitic condition which in no way arose out of or was incurred in the course of his employment. While on the job the workman received an injury to his arm and it was stated and admitted that if the workman had not been infected with the disease of

syphilis, the injury to his arm would have fully recovered within a period of six weeks. With the disease present, the total disability extended to more than ten weeks. The commission awarded compensation for the full ten weeks disability, even though they found that the syphilitic condition prolonged his disability period.

This Court in its opinion discussed at length whether or not compensation was required for resulting incapacity where there was an existing disease aggravated by accidental injury. It quoted from many cases from text and treatise and finally arrived at the conclusion that the commission had properly awarded full compensation for all disability, whether the disability directly flowed from the injury or was a result of a combining between the injury and the latent disease condition. The *Pinyon Queen* case has many authorities quoted therein and has been followed and reaffirmed by this Court on many occasions since its inception.

In cases such as *Graybar Electric Co., Inc. v. Industrial Commission of Utah, et al.*, 73 Utah 568, 276 P. 161, 162 this Court set forth its understanding of the principle in the following language:

“It is no longer an open question in this state that, other necessary conditions being present, a pre-existing disease or other disturbed condition of the physical structure of the body, when aggravated or lighted up by an accident, is compensable under the act. *Tintic Milling Co. v. Industrial Commission*, *supra*. The real point, however, is

whether or not the strain from lifting which, it is alleged, caused or lighted up the sacroiliac condition, was an accident."

It has applied the principle in such cases as *Hammond v. Industrial Commission*, 84 Utah 67, 34 P. 2d 687. There death was caused by exertion and strain acting upon a diseased circulatory system. No attempt was made in either the *Graybar* or *Hammond* cases to separate the portion of the cause of death attributable to the immediate accidental injury and that portion which was attributable to the latent disease of the injured workman.

In *Cherdran Const. Co. v. Simpkins*, 61 Utah 493, 214 P. 593, there was again presented to this court the problem of whether or not latent physical conditions upon which accidental injury acted to cause death should in any way affect the amount of the award. Again this court reaffirmed the principles set forth in the *Pinyon Queen* case and found that the total result was compensable under our Utah Workmen's Compensation Law.

See also *Gerber v. Industrial Commission*, 91 Utah 479, 64 P. 2d 1281.

In the light of the foregoing authorities, which have clearly set forth the principle that even in cases where the accidental injury combines with a disease, which was in no way connected with the applicant's employment, full compensation should be awarded, it is inconceivable that a proper interpretation of the Workmen's Com-

pensation Laws of the State of Utah would deny compensation for disability caused by two compensable accidental injuries.

The evidence shows without dispute that the flash burn on plaintiff's left eye aggravated the condition of the eye, causing it to be inflamed and irritated. The only other irritative condition on which there was evidence was also an on the job type of injury, namely, dust and sand blown into plaintiff's eye.

It is respectfully submitted that the decision which The Industrial Commission has made is contrary to the undisputed substantial evidence presented at the hearings, is arbitrary and capricious and unlawfully defeats plaintiff in his substantial rights under Workmen's Compensation Laws. The decision nullifies and destroys the liberal humane purposes which workmen's compensation was designed to accomplish. The injustice of the commission's decision can only be appreciated when the size of the award which they have refused to make is viewed in the light of the limited economic means of plaintiff. Vindication of the liberal humane purposes of Workmen's Compensation legislation demands that this court determine that the commission has acted in excess of its powers and plaintiff is entitled to an award of compensation for the time which he was disabled and for the medical expenses which he incurred in the removal of the pterygium from his left eye.

CONCLUSION

It is respectfully submitted that this court should determine that the decision of The Industrial Commission is in excess of its powers and that plaintiff is entitled to an award of full compensation for the time which he was disabled between July 21, 1950, and September 9, 1950, and for the medical expenses incurred by him in the surgical removal of the pterygium on his left eye.

Respectfully submitted,

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Received copies of the within Brief of
Appellant this day of July, A. D. 1951.

THE INDUSTRIAL COMMISSION
OF THE STATE OF UTAH

By

THE STATE INSURANCE FUND

By