

1951

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

Utah Supreme Court

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

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In the  
**Supreme Court of the State of Utah**

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LORENZO VERNAL EWELL,

*Plaintiff,*

vs.

THE INDUSTRIAL COMMISSION OF  
UTAH, BYRON EWELL, doing busi-  
ness as ASSOCIATED CONSTRUC-  
TION COMPANY and THE STATE  
INSURANCE FUND,

*Defendants.*

Case No.  
7700

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**DEFENDANTS' BRIEF**

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**FILED**

AUG 14 1951

CLINTON D. VERNON,  
*Attorney General,*

F. A. TROTTIER,  
*Attorneys for Defendants.*

Clerk, Supreme Court, Utah

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## DEFENDANTS' BRIEF

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### STATEMENT OF FACTS

The statement of facts contained in Plaintiff's Brief is substantially correct, except the references to the testimony of Dr. Harry Berman.

Lorenzo V. Ewell, the applicant and plaintiff, filed his application with the Industrial Commission on September 19, 1950, in which he requested compensation for an in-

dustrial accidental injury. He designated May 29, 1950, as the date of the accident and he specified the accidental injury as being caused by a flash from a welding machine getting into his eyes.

In the hearing held by the Industrial Commission on November 22, 1950, Dr. Berman testified that he was first consulted by Mr. Ewell in April, 1948, for treatment of chronic sinusitis with nasal polyps in both sides of his nose. Dr Berman next saw him on August 12, 1948. At that time Mr. Ewell had a condition called pterygium in both eyes. Pterygium is a patch of thickened conjunctiva extending over part of the cornea. In 1948 the pterygium in the right eye was worse than the one in the left eye. The doctor operated on the right eye at that time. The doctor also told him that sooner or later he would have to have the pterygium in the left eye operated on.

Mr. Ewell testified that on May 29, 1950, he got a flash in his eyes from a welder's torch and his eyes were irritated and inflamed from then until July 21, 1950. However, he did not lose any time from work until he went to Dr. Berman's office on July 14, 1950. That was the first time Dr. Berman saw him since he removed the pterygium from Mr. Ewell's right eye in 1948.

Plaintiff's brief has correctly stated that the Industrial Commission found that Mr. Ewell was disabled from work for one week from July 14, 1950 to July 21, 1950, because of inflammation in his eyes resulting from the flash burn; also the Commission found and concluded that his accident was not the cause of the pterygium in Mr. Ewell's left eye, which Dr. Berman operated on July 29, 1950.

## ARGUMENT

## POINT I.

THE INDUSTRIAL COMMISSION WAS NOT LEGALLY REQUIRED TO HOLD THAT THE SURGICAL REMOVAL OF THE PTERYGIUM IN APPLICANT'S LEFT EYE WAS COMPENSABLE.

After reading the brief of plaintiff's attorney, it is not quite clear to us whether he is trying to prove a case under the workmen's compensation law or the occupational disease law. The one and only numbered point in his argument, (p. 5), states that "the pterygium in plaintiff's left eye was the result of a compensable industrial accident." He also specified the electric flash from the welder's torch as being the industrial accident responsible for his eye trouble. However, on page 7 of his brief, he argues that the pterygium may have been caused by the impact of dust and sand on plaintiff's eye ball between August, 1948 and May 29, 1950, or by the flash burn on May 29, 1950, or partly by each of those factors.

The first of the above mentioned alternatives would be an argument for applying the occupational disease law to this case. But if Mr. Ewell's eye trouble were definitely proved to have been caused by constant irritation from substances to which he was exposed by his employment, it could not come under the workmen's compensation law. The workmen's compensation law deals with accidents. An accident occurs in a very short period of time. On the other hand, an occupational disease is caused by exposure to harmful

substances over a considerable period of time. Has applicant's attorney changed his theory of the case between pages 5 and 7 of his brief?

We are not willing to concede that an applicant has the right to make a claim before the Industrial Commission for disability claimed to have resulted from an industrial accident, and end up in the Supreme Court claiming benefits under the occupational disease law. But, for the sake of argument, if he does have the legal right to switch his position by starting out with one kind of claim and ending up with the other kind or a combination of the two, we do not think the record will support plaintiff's challenge of the Industrial Commission's decision.

The argument contained in plaintiff's brief might have been properly directed to the Industrial Commission after its bearing of this claim and before it rendered its decision. In other words, the points which plaintiff's attorney has attempted to make might have been addressed to the Industrial Commission in an effort to persuade the commission to arrive at certain findings and conclusions from the evidence in the record. But most of the argument in the brief is not properly addressed to the Supreme Court.

Plaintiff's argument amounts substantially to the proposition that inasmuch as there was medical evidence that the pterygium in applicant's left eye *could have been* aggravated by the electric flash on May 29, 1950, or by continual irritation from wind and dust in his employment for a period of almost two years, the Industrial Commission was thereby required, as a matter of law, to find that such was the fact and award compensation to him for the operation.

Plaintiff's attorney apparently has overlooked the legislative demarcation between the powers and functions of the Industrial Commission and the Supreme Court in workmen's compensation and occupational disease cases. Section 42-1-79 of the workmen's compensation law provides:

"The findings and conclusions of the commission on questions of fact shall be conclusive and final and shall not be subject to review; such questions of fact shall include ultimate facts and the findings and conclusions of the commission."

Substantially the same provision is found in Section 42-1a-40 of the occupational disease law.

In the case of *Crane vs. Industrial Commission*, 97 Utah 244, 92 Pac. (2nd) 722, the facts were that on April 4, 1938, Mr. Crane fell while he was at work in his employer's mine and injured his back and knee. He continued to work until May 7th, on which date his leg was red and swollen and ached considerably. He was examined by a doctor on May 10th and his knee was found to be seriously infected. On May 14th a core was taken from his knee. After a hearing, the Industrial Commission denied his claim for compensation; and the Supreme Court sustained the commission's decision. In its decision, the Supreme Court quoted the following language from the *Kent* and *Parker* cases:

*Kent vs. Industrial Commission*, 89 Utah 381, 57 Pac. (2nd) 724.

"In the case of denial of compensation, the record must disclose that there is material, substantial, competent, uncontradicted evidence sufficient to make a disregard of its justify the conclusion, as a



matter of law, that the Industrial Commission arbitrarily and capriciously disregarded the evidence or unreasonably refused to believe such evidence.

\* \* \* When we are asked to overturn the findings and conclusions of the commission denying compensation, it must be made clearly to appear that the commission acted wholly without cause in rejecting or in refusing to believe or give effect to the evidence. It is not intended by the Workmen's Compensation Act (Rev. St. 1933, 42-1-1 et seq.) that this court, in matters of evidence, should to any extent substitute the judgment of the court upon factual matters for the judgment of the commission."

*Parker vs. Industrial Commission*, 78 Utah 509, 5 Pac. (2nd) 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."

In the case of *Hutchings vs. Industrial Commission*, 96 Utah 399, 87 Pac. (2nd) 11, toward the end of the court's opinion is found the following:

"The question before the court is whether the Industrial Commission, upon the record before it, was required as a matter of law to award compensation. In *Globe Grain & Milling Company vs. Industrial Commission*, 57 Utah 192, 193 Pac. 642, 643, we stated the rule applicable here in the following language:

"This court has repeatedly held that it will not weigh the evidence, but will examine the same for the purpose only of determining whether there is any substantial competent evidence to sustain the find-

ings or to support the award made by the commission. \* \* \* If there is such evidence the findings will be sustained.”

“And so it has been held in numerous cases that the decision of the Industrial Commission will not be disturbed where the evidence was such that the Commission could reasonably find or conclude that the death or disability of the employee was not the result of accidental injury arising out of or in the course of employment.”

In the case of *Holbrook vs. Industrial Commission*, 92 Utah 251, 67 Pac. (2nd) 224, Eugene Holbrook, a night watchman employed at the Wright Store in Ogden, died June 30, 1936, from malignant endocarditis and generalized septicemia. His widow applied for compensation, claiming that his death was the result of an accidental injury suffered March 9, 1936, when he fell down a flight of stairs at his employer's premises. The medical expert who testified before the Industrial Commission on behalf of the applicant, was not very definite or clear in his opinion with respect to causative connection between the accident and the death. In sustaining the Industrial Commission's decision denying the claim, the Supreme Court used the following language:

“While the testimony in this case certainly would have supported an award—in fact seems to point rather decidedly that the fall aggravated a pre-existing condition—yet, that question was for the commission. The failure of the commission to arrive at such conclusion, but to an opposite one that the accident did not cause or contribute to decedent's death, is not arbitrary. The commission, as in the case of *Norris vs. Industrial Commission*, 90 Utah 256, 61 Pac. (2nd) 413, has concluded that the

evidence of such connection was not satisfactorily established. In that case there were conflicting opinions of doctors. Here there was one doctor as a witness and he himself furnishes conflicting opinions. He evidently was not very positive as to the real cause of the death. Under the rule in the Norris case, the finding of the commission was not arbitrary. See also *O'Brien vs. Industrial Commission*, 90 Utah 266, 61 Pac. (2nd) 418, as to the effect of the testimony of 'probable cause.' Other cases in which this court considered the matter of opinion evidence in industrial cases are:

*Parker vs. Industrial Commission*, 78 Utah 509,  
5 Pac. (2nd) 573;

*Stanley vs. Industrial Commission*, 79 Utah  
228, 8 Pac. (2nd) 770;

*Russell vs. Industrial Commission*, 86 Utah 306,  
43 Pac. (2nd) 1069."

Dr. Berman told Mr. Ewell in 1948 that the pterygium which he then had in his left eye would eventually have to be operated on (R. 18). Dr. Berman also testified that that condition would not clear up without medical treatment (R. 14). He also testified that from the last time he saw it in 1948 until the next time he saw it in July, 1950, the pterygium had increased to the point where it needed surgical treatment (R. 15).

Dr Berman testified that the electric flash of May 29, 1950, could have aggravated the pterygium or increased its rate of growth. He also said that a pterygium's growth can progress or can remain stationary for a while (R. 21). Everything is possible in medicine (R. 21).

That kind of evidence certainly would not compel the Industrial Commission, as a matter of law, to come to the

conclusion that the electric flash of May 29, 1950, was responsible for requiring the surgery on the pterygium in Mr. Ewell's left eye, which was performed on July 29, 1950.

Even if it were legal and proper for plaintiff to attempt to make this case a dual proceeding under both the workmen's compensation law and the occupational disease law, we have shown that there is no legal basis upon which the Industrial Commission might be reversed because of its refusal to find a connection between the flash of May 29, 1950, and the pterygium operation. Then the possibilities of any application of the occupational disease law to the circumstances of this case must be considered on their own merits. Section 42-1a-28 of the occupational disease law lists 28 occupational diseases which are compensable. The first 27 mentioned, refer to metallic poisonings and other specific disorders which are known to result from exposure to harmful substances used or existing in various industries. None of these 27 could apply to Mr. Ewell's case. Subsection 28 was added to this section by the 1949 Legislature. It contains the only possibility of any provision of the occupational disease law applying to this case. But subsection 28 is limited to those cases in which *all* of its provisions exist.

We quote:

Section 42-1a-28, subsection 28.

Such other diseases or injuries to health which directly arise as a natural incident of the exposure occasioned by the employment, *provided, however*, that such a disease or injury to health shall be compensable only in those instances where it is shown by the employee or his dependents that all of the following named circumstances were present: (1) a

direct causal connection between the conditions under which the work is performed and the disease or injury to health; (2) the disease or injury to health can be seen to have followed as a natural incident of the work as a result of the exposure occasioned by the employment; (3) the disease or injury to health can be fairly traced to the employment as the proximate cause; (4) the disease or injury to health is not of a character to which the employee may have had substantial exposure outside of the employment; (5) the disease or injury to health is incidental to the character of the business and not independent of the relation of the employer and the employee; and (6) the disease or injury to health must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a natural consequence, though it need not have been foreseen or expected before discovery. No disease or injury to health shall be found compensable where it is of a character to which the general public is commonly exposed.

All six of those provisions were not proved in this case. In fact, applicant and his attorney made no attempt to prove a case before the Industrial Commission under this section. They made no reference to the occupational disease law in the proceedings before the Industrial Commission or in their brief which was recently filed in this Court. The testimony did contain a few casual remarks about some of Mr. Ewell's work at times being in dusty atmosphere. Also Dr. Berman observed that wind and dust could irritate a pterygium and increase its rate of growth. Dr Berman made the general statement that "anything which comes in contact with a pterygium makes it grow faster and encroach on the cornea" (R. 18).

Wind and dust were only some of the elements which might have irritated and aggravated applicant's pterygium. Wind and dust which he contacted outside of his employment would have caused such irritation and aggravation the same as that in his employment.

There was no evidence in this case that the condition of pterygium is "incidental to the character of the business" in which Mr. Ewell was engaged, as is required by the fifth provision of subsection 28, which we have heretofore quoted.

Even if all of our foregoing arguments relating to the occupational disease law were held to not apply to this case, and if the Court should hold that all of the requirements of subsection 28 of Section 42-1a-28 had been satisfied with respect to aggravation of the pterygium in plaintiff's left eye by substances in his employment, it would then be necessary that a determination be made of the proportionate causation of plaintiff's trouble, as provided by Section 42-1a-51 of the occupational disease law.

Before concluding this brief, we feel impelled to observe that the remarks of plaintiff's attorney on page 12 of his brief, regarding plaintiff's economic means are entirely improper and are not in accordance with this Court's rules or the statute relating to review proceedings such as this. There is no evidence whatever in the record as to what plaintiff's financial condition is or was, except the fact that his wages were \$100.00 per week on May 29, 1950 (R. 5, 9 and 10).

## CONCLUSION

In view of the evidence and the law governing this case, it appears that the Industrial Commission's decision awarded all of the compensation benefits to which applicant was entitled. Therefore the Commission's decision should be affirmed.

Respectfully submitted,

CLINTON D. VERNON,  
*Attorney General,*

F. A. TROTTIER,  
*Attorneys for Defendants.*