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Thelma Edlund v. The Industrial Commission of Utah et al : Brief of Plaintiffs

Utah Supreme Court

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

THELMA EDLUND,

Plaintiff,

— vs. —

**THE INDUSTRIAL COMMISSION
OF THE STATE OF UTAH, THE
STATE INSURANCE FUND,
AND RAWLINGS, WALLACE,
BLACK & ROBERTS,**

Defendants.

BRIEF OF PLAINTIFF

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

FILED DWIGHT L. KING,
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AUG 3 - 1951

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— vs. —

THE INDUSTRIAL COMMISSION
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AND RAWLINGS, WALLACE,
BLACK & ROBERTS,

Defendants.

Case No. 7709

BRIEF OF PLAINTIFF

PRELIMINARY STATEMENT

Plaintiff herein will be referred to as plaintiff, The Industrial Commission will be referred to as the commission and the other defendants as defendants.

All italics are ours.

This matter comes before the Court on Petition for Writ of Certiorari filed by plaintiff on June 7, 1951, on

which there was a return by the commission on June 29, 1951. It arises out of plaintiff's application for workmen's compensation, which application was numbered O. D. 90 by the commission and which was filed on the 30th of August, 1950. The Industrial Commission hearing was held on February 7, 1951, and its decision was dated March 26, 1951, application for rehearing was denied May 16, 1951.

STATEMENT OF FACTS

Plaintiff for over seventeen years preceding October 15, 1950, was a legal typist and stenographer. She had worked for a number of law firms and since 1944 had been employed by the law firm of Rawlings, Wallace, Black & Roberts (R. 10, 11, 12, 13, 14).

In 1947 plaintiff noticed some pain in the end joints of her fingers as she typed. The pain was not so severe as to be disabling, but all of the fingers with the exception of the thumb on the left hand became swollen (R. 14).

Plaintiff was working a five and a half day week and during four hours of each day she was typing constantly (R. 13). The thumb of the left hand was not in any way used by plaintiff in her typing work, and it was the only digit in which there was no swelling and no soreness. In each of the other eight fingers and thumb there was a swelling, soreness and a bony nodular growth, which increased in size from 1948 on (R. 15, 16).

The legal work which plaintiff performed over the seventeen years required the typing of large numbers of carbon copies and as a consequence the force with which plaintiff necessarily struck the keys of the typewriter was greater than would normally be the case in an ordinary typing operation (R. 13, 14). The only place where there was any soreness, swelling or nodular growth on plaintiff's hands or other joints of her body was at the end joint of the nine fingers of her hands. No other joint of plaintiff's hand was in any way sore or involved in nodular growth. The shock caused to the hands by typing operations travels through the end of the fingers and into the first joint of each finger. The place where the nodules on the right thumb appeared was at the point where plaintiff's right thumb struck the space bar as she used it in typing (R. 15 and 24). Plaintiff had never had any rheumatism, stiffness of the joints or other similar pains or ailments during the seventeen years she worked as a legal stenographer. The nodules or bony growths on the end joints of plaintiff's nine fingers first appeared in 1948 (R. 16). In 1949 plaintiff consulted a physician concerning her hands. Pain in the fingers continued to increase in intensity and seemed to be more severe at the end of a lot of typing. The only times that plaintiff was relieved from pain in her fingers was during her vacation when she was not working (R. 17). The aggravation and increase in the intensity of the pain continued until plaintiff was forced to quit her work on October 15, 1950 (R. 17, 18). Since plaintiff ceased her employment she has noticed that her fingers are not

nearly as painful as they were and that the nodulations have not increased in size. The soreness and tenderness on pressure on the end joints of plaintiff's fingers has also decreased in its intensity (R. 12 and 23).

Three doctors appeared as witnesses, two for plaintiff and one for defendants. There is no real conflict in their testimony. Dr. Beech testified that he found no abnormal conditions in plaintiff except the end joints of her fingers, which showed on x-ray the bony growths and narrowing of the joint space at the distal joint on nine of plaintiff's ten fingers. He diagnosed the condition as osteoarthritis, a disease involving the cartilage on the joint on the ends of plaintiff's fingers (R. 31). Dr. Beech stated that the causes of the disease are not known, but two causes are rather well accepted. They are age and injury (R. 31). Plaintiff was the first patient Dr. Beech had ever seen whose complaint was primarily osteoarthritis, although he had observed the condition in a number of other persons. He stated frankly that there was no authority who claims to know the cause of plaintiff's arthritic condition. However, it is well accepted that injury may cause a deformity of the fingers similar in appearance to the deformity of plaintiff's fingers. He was definite that trauma is considered one of the primary causes of the disease (R. 33). For example, the growth which results from the fingers being struck by a baseball (R. 36). He also testified that typing can be considered a form of trauma. He was somewhat surprised that the type of disease found in plaintiff's fingers was

not seen more often in typists. There was no doubt that the nodulation or arthritis in plaintiff's fingers could be caused by the direct trauma resulting from the striking of the typewriter keys (R. 37).

Dr. L. Gurr McQuarrie, plaintiff's general physician and surgeon, who treated the condition of plaintiff's hands for approximately two years, stated his opinion concerning the condition of plaintiff's hands. He said (R. 42):

"A. Yes, my opinion is that the type of work she does and the stress and strain would definitely be a causative factor in the development of the osteoarthritis; not the total cause but the contributing cause of it."

Dr. Norman R. Beck, a specialist in orthopedic surgery, testifying on behalf of plaintiff stated that osteoarthritis is considered to be a degenerative disease, the etiology is not definitely known. It causes a degeneration of the cartilage in the joint and overgrowth of the bone adjacent to it (R. 46). Several factors contribute to development of osteoarthritis, one being heredity. Trauma is another causative factor which may cause arthritis to develop in an individual at a younger age than would otherwise be the fact (R. 46).

In regard to the heredity of plaintiff, she testified that many of her relatives have lived their full three

score and ten years and no one in her family that she knew of had ever been afflicted with arthritis, rheumatism or arthritic conditions of their joints (R. 48, 49).

Concerning the types of trauma which could be a cause of arthritis, Dr. Beck stated as follows (R. 49, 50):

“A. Well, nobody knows definitely what causes arthritis. Trauma sometimes is a cause, severe trauma is mentioned as a possibility; repeated minor insults to a joint; normal use, and wear and tear. My personal feelings, as I mentioned before, if they had a predisposition. If it is not in a person’s heredity then you definitely rule out that fact. Repeated trauma, minor traumas and insults conceivably could result in arthritis at an earlier age.”

The x-rays of plaintiff’s hands showed a definite nodular growth on all of her fingers and on her right thumb, but there was no nodular growth shown on the left thumb.

Plaintiff’s claim is presented under *Sec. 42-1a-28, Utah Code Annotated, 1943*, as amended by *Laws of 1949, Senate Bill 288*, which was approved and in effect March 5, 1949. Subsection (28) of Section 28 was added by the amendment of 1949. It reads as follows:

“(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 to 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 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."

The commission in its Findings of Fact and Conclusions of Law, while not finding that there was a direct causal connection between the conditions under which plaintiff worked and her physical condition, assumed

such causal relationship (R. 56). The commission then stated that it was the applicant's burden to establish (R. 56):

“* * * (1) that 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, (2) the disease or injury to health is incidental to the *character of the business* and not independent of the relation of employer and employee, (3) the disease or injury to health must appear to have had its origin in a work connected with the employment and to have flowed from that source as a natural consequence although it need not have been foreseen before discovery and (4) that the disease or injury to health for which she seeks compensation is not of a character to which the general public is commonly exposed.”

It then states, apparently as a conclusion of law, that the legislature only intended to make compensable those diseases which could be recognized as commonly associated with a particular employment, citing as an example silicosis (R. 56).

As final grounds for denying plaintiff the benefit of the occupational disease act, the referee states as follows (R. 57):

“It is the referee's opinion, and he so finds, that the disease for which compensation is claimed is not an occupational disease. It is not the customary and usual result in the typing occupation.”

SUMMARY OF ARGUMENT

POINT I.

THE COMMISSION ERRONEOUSLY MISCONSTRUED THE MEANING AND PURPOSE OF SECTION 42-1a-28 (28) AND UNLAWFULLY DENIED PLAINTIFF HER DISABILITY COMPENSATION.

(1) WAS THERE A DIRECT CAUSAL CONNECTION BETWEEN THE CONDITION UNDER WHICH PLAINTIFF'S WORK WAS PERFORMED AND THE DISEASE OR INJURY TO HER HEALTH?

(2) THE DISEASE AND INJURY TO HEALTH CAN BE SEEN TO HAVE FOLLOWED AS A NATURAL INCIDENT OF THE WORK AS A RESULT OF EXPOSURE OCCASIONED BY THE EMPLOYMENT.

(3) THE DISEASE OR INJURY TO HEALTH CAN BE FAIRLY TRACED TO THE EMPLOYMENT AS A 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 EMPLOYER AND EMPLOYEE.

(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.

ARGUMENT

POINT I.

THE COMMISSION ERRONEOUSLY MISCONSTRUED THE MEANING AND PURPOSE OF SECTION 42-1a-28 (28) AND UNLAWFULLY DENIED PLAINTIFF HER DISABILITY COMPENSATION.

Plaintiff's appeal is a case of first impression under Subsection (28) of Sec. 42-1a-28. Plaintiff's research has failed to reveal any similar section which has been interpreted in any neighboring jurisdictions. Such help as can be found must be supplied strictly by analogy.

By taking each of the numbered requirements in subsection (28) and applying the requirement to the evidence in plaintiff's action, plaintiff will attempt to demonstrate that she qualifies under each and every provision.

(1) WAS THERE A DIRECT CAUSAL CONNECTION BETWEEN THE CONDITION UNDER WHICH PLAINTIFF'S WORK WAS PERFORMED AND THE DISEASE OR INJURY TO HER HEALTH?

The question above must be answered in the affirmative. The commission while not finding that there was a direct causal connection, assumed that such direct causal connection existed. Under the evidence a finding was mandatory that there was such a direct causal connection. Any other finding would be contrary to all of the evidence which was presented. Dr. Beech, who was produced by the defendant, Insurance Fund, and for whose testimony that organization vouches, stated that in his opinion such a causal connection would exist. A finding that no causal connection existed in the face of the evidence that the only joints in plaintiff's whole body which were affected by the arthritis were the eight end joints of plaintiff's fingers and the thumb of her right hand, would be arbitrary and capricious. The joints affected were the

only joints subjected to the repeated traumatic injury caused by the striking of the fingers and thumb against the keys of the typewriter. If the arthritic condition stems from some other cause, why is it that no other joint in plaintiff's hands was affected? There are two other joints in the same fingers in which the single joint is affected.

(2) THE DISEASE AND INJURY TO HEALTH CAN BE SEEN TO HAVE FOLLOWED AS A NATURAL INCIDENT OF THE WORK AS RESULT OF EXPOSURE OCCASIONED BY THE EMPLOYMENT.

Under the present facts it is difficult to see exactly how the second requirement differs materially from the first requirement. Of course, having a causal connection and being the kind of ailment which is a result of the shock and traumatic injury to plaintiff's fingers, acting through the state of her health and the tissues, bones, tendons and muscles of her fingers, the disease with which she is afflicted could only be a natural incident of the work to which she was exposed by her employment. The word "natural" has no different legal meaning than its use in the vernacular. *Black's Law Dictionary*, Third Edition, p. 1222.

(3) THE DISEASE OR INJURY TO HEALTH CAN BE FAIRLY TRACED TO THE EMPLOYMENT AS A PROXIMATE CAUSE.

It will be recalled that the only times when plaintiff did not have aggravation of the condition of her fingers and the only times when she did not have pain in her fingers were when she was not engaged in the

usual work of her employment, namely, typing. As far as proximate cause is concerned, there was no intervening agency of any kind which occurred between the incident or injury, namely, the traumatic impact of plaintiff's fingers against the typewriter keys, and the disease from which she suffered. The force applied to the hands of her fingers traveled only to the first joint of her fingers and there caused the abnormal and diseased condition of the tissues and joints. A more direct close proximate causation situation could hardly be imagined. When the words *proximate cause* are used, it is assumed that the legislature intended those words to mean the same as they normally mean in our legal vocabulary. We have long accepted *proximate cause* as meaning that cause, which in a natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred. *Black's Law Dictionary*, Third Edition, p. 1457. We recognize proximate cause as the efficient cause, the producing cause, the one that necessarily sets the other causes in operation.

(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.

Considerable testimony was elicited, both by plaintiff and defendants, concerning plaintiff's activities and the possibility that ringing out washcloths or dish towels might in some way contribute to or affect the condition of plaintiff's hands. All attempts to show that outside

factors enter in any way into the picture of causation failed. The nature of plaintiff's injuries and the places on her fingers which are affected, for all practical purposes, eliminates any kind of normal activity as a causative factor. There is no household work which results in force being applied to the ends of a person's fingers; there is no outside engagement of any kind in which plaintiff was involved which could possibly affect only the end joints of plaintiff's fingers. Activities such as using a broom or dusting or washing dishes, require the use of all of the joints in the fingers and hands.

(5) THE DISEASE OR INJURY TO HEALTH IS INCIDENTAL TO THE CHARACTER OF THE BUSINESS AND NOT INDEPENDENT OF THE RELATION OF EMPLOYER AND EMPLOYEE.

Plaintiff's employment as a legal stenographer required the devotion of at least four hours per day to continuous typing. This activity was on manual operating typewriters and in the work a great many extra carbon copies were necessary. All of these facts are very material. They explain, perhaps, why arthritis developed in plaintiff's hands, while many other typists do not become afflicted with the disease. In the typing of carbons, it is necessary that an extra amount of force be used in striking the keys. This force, which the medical profession recognizes as trauma and which Dr. Beech described as repeated insults to the end joints of plaintiff's fingers, all were incidental to the character of the business and were dependent on the relation of employer and employee. No other place, except in her employment as a

typist, was plaintiff exposed to this type of injury. This is not the situation which this court discussed in *Tavey v. Industrial Commission of Utah*, 106 Utah 489, 150 P. 2d 379, where the employee's dizziness had no connection and was entirely independent of the relation of employer and employee. Here all of the detrimental injurious effects flow from the basic cause of plaintiff's condition, namely, the typing activity in which she engaged while on the job.

(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.

The origin of plaintiff's disease was, of course, a risk connected with her employment. There was always the risk that some person employed in typing by defendants, because of the repeated traumatic injury caused by striking the typewriter keys, might incur the disease of arthritis. It is not necessary that this particular disease or condition have been foreseen, and perhaps if plaintiff's case were the first time that arthritis of the fingers was caused by typing, such a result could not have been foreseen, but as requirement No. 2 states, foreseeability is not necessary. The risk being present, regardless of whether it was known or unknown, if the disease flowed from the risk as a natural consequence, then it is compensable.

Subsection 28 states that no disease or injury to health shall be found compensable where it is of a character to which the general public is commonly exposed. Regarding this particular requirement, it is, of course, only a small group of the public who would in any way be exposed to the kind of disease from which plaintiff suffers, and an even smaller percentage of the typists who were exposed would incur the disease which afflicted plaintiff. The general public is not commonly typing four hours a day in an employment which requires the making of large number of carbon copies.

It is difficult to conceive of a diseased condition which more fully conforms to the requirements of Subsection (28) than does plaintiff's condition. The Industrial Commission, however, thought that an additional requirement was tacked on to the language of Subsection (28). It concluded that before plaintiff could recover, the disease must also be a recognized occupational disease, such as silicosis. This conclusion, plaintiff submits, is obviously erroneous. Section 42-1a-28 lists a number of occupational diseases. Perhaps the list is not exhaustive, but if it is not, it was intended to be as exhaustive as was possible at the time the law was drawn. Subsection (28) is the catchall section. It, plaintiff submits, was intended to provide compensation for diseases and injuries to health which were not recognized as occupational diseases, but which nevertheless grew out of the occupation in which the injured employee was working.

Subsection (28) does not say "such other *occupational* diseases or injuries to health which directly arise," etc. It says "such other diseases or injuries to health which directly arise," etc. If the legislature intended to still limit compensation to known recognized occupational diseases, the logical, common sense way to accomplish that end would be to add to the list of diseases contained in Section 28.

When the legislature left out the modifying word "occupational" in Subsection (28), it, plaintiff submits, opened the benefits for all diseases or injuries to health that could meet the qualifications set down and numbered (1) to (6) in the subsection.

As a conclusion of law the commission states as follows what it considers to be the legislature's intention:

"The legislature clearly intended to make compensable only those diseases which can be recognized as commonly associated with a particular employment, as silicosis is associated with metal mining."

If such were the intention of the legislature, subsection (28) is a most clumsy way of accomplishing that end. The diseases which can be recognized as commonly associated with a particular employment are listed in the other subsections of Section 28. By subsection (28) the legislature, plaintiff submits, intended to broaden and expand the types of diseases and injuries to health for which compensation should be paid. The conclusion

of law quoted would defeat any such intention. It would place upon a claimant the great and probably insurmountable burden of proving that the disease from which she suffered was one which was commonly associated with her employment. How great an incident of the disease would be necessary before it became commonly associated with an employment? Where would the claimant find statistics to show the frequency with which arthritis occurred among typists employed four hours a day in constant typing where large numbers of carbon copies were required? Certainly the right to compensation which was granted in subsection (28) would mean very little to any employee if such is the requirement. The right, plaintiff submits, would be a myth and an illusion. The burden of showing common association or that the disease was a customary or usual result of the employment would be insurmountable and unbearable.

The State of Washington has a unique provision, but somewhat analogous to subsection (28). Their statute provides for occupational disease benefits for all diseases or infections which arise naturally and proximately out of the extra-hazardous employment in which the employee was engaged. No specific occupational diseases are listed.

The Washington Supreme Court in *Simpson Logging Co. v. Department of Labor and Industries*, 32 Wash. 2d 472, 202 P. 2d 448, interpreted the meaning of the act. The employee had incurred the disease of asthma from

breathing dust, smoke and fumes which accumulated at the place where he tended a certain paper machine in the plant of his employer. The Washington Department of Labor and Industry awarded plaintiff compensation. The employer appealed on two grounds: (a) That the claimant was not suffering from asthma; and (b) that asthma was not a compensable occupational disease under the Workmen's Compensation Act of Washington. The Supreme Court ruled that the evidence was sufficient as to the nature of his ailment and then discussed the question of whether or not asthma could be considered as the type of injury for which the occupational disease benefits were intended. In the discussion of the law the following principles were set forth at page 452:

“The intent of the legislature must be drawn from the language used in the present statute. Decisions interpreting dissimilar statutes or the common law can be of little assistance to us. There is nothing in the language of the present statute, defining occupational disease as, ‘occupational disease’ means such disease or infection as arises naturally and proximately out of extra-hazardous employment,” that would warrant reading into it the tests of the Seattle Can Co. case. The legislature is presumed to have been familiar with the meaning of “proximate cause” as used by the courts, and that being so, when they are defined as an occupational disease those diseases or infections as arise naturally and proximately out of extra-hazardous employment, it would follow that they meant that the condition of the extra-hazardous employment must be the proximate cause of the disease for which claim for compensa-

tion is made, and that the cause must be proximate in the sense that there existed no intervening independent and sufficient cause for the disease, so that the disease would not have been contracted but for the condition existing in the extra-hazardous employment. Under the present act no disease can be held not to be an occupational disease as a matter of law where it has been proved that the conditions of the extra-hazardous employment in which the claimant was employed naturally and proximately produced the disease and that but for the exposure to such conditions the disease would not have been contracted."

The Industrial Commission in its conclusion in the present case is attempting to say that unless the injury to health or disease from which an employee suffers is a recognized occupational disease or is one which is commonly and usually found in the occupation in which plaintiff was working, no compensation can be awarded. Why such an interpretation is made, it is impossible to understand. No part of the language of Subsection (28) will stand such an interpretation. In line with the liberal humane purposes of occupational disease acts and workmen's compensation generally, the exact opposite interpretation of subsection (28) should be required. The language of the section shows an intent on the part of the legislature to provide compensation for the numerous diseases and afflictions which were neither known or commonly recognized occupational diseases. The only

thing they thought should be the requirement is that the disease or injury to health flowed directly, naturally and proximately from the employment in which the employee was engaged.

What could be more just and equitable than to require the industry which was the cause of the disease to bear the burden and loss caused by the disease.

We have long ago recognized that justice requires the spreading of the cost of injury incurred in an industry. Only the industry can pass the loss on and distribute it among large numbers of people. Should it make any difference whether the particular injury is a recognized occupational disease or only one which arises so infrequently as not to be commonly recognized as occupational? Plaintiff submits that the legislature intended to cover all diseases and injuries to health that arise naturally and proximately out of the injured employee's work, and this court should promote and not defeat this humane equitable purpose.

Plaintiff submits that the result reached by the Washington Court in the *Simpson Logging Co.* case is the liberal humane interpretation that this court should adopt. It should announce that under our act "no disease can be held not to be an occupational disease as a matter of law where it has been proved that the conditions of the * * * employment in which the claimant was employed naturally and proximately produced the disease."

CONCLUSION

Plaintiff respectfully submits 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 disability which she has suffered as a result of the arthritic condition of the fingers of her hands.

Respectfully submitted,

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