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

Utah Supreme Court

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

7709

In the
Supreme Court of the State of Utah

THELMA EDLUND,
Plaintiff,

vs.

THE INDUSTRIAL COMMISSION OF UTAH, THE STATE INSURANCE FUND, RAWLINGS, WALLACE, BLACK & ROBERTS,
Defendants.

Case No. 7709

DEFENDANTS' BRIEF

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STATEMENT OF FACTS

As Plaintiff's attorney stated in his brief, this case commenced by an application filed by Thelma Edlund with the Industrial Commission on September 1, 1950, in which she requested benefits under the Utah Occupational Disease Disability Law. She claimed that she had become disabled from work because of occupational arthritis in her fingers as the result of constant typing over a period of many years.

We agree with Plaintiff's attorney that applicant testified as he has indicated on pages 2 and 3 of his brief. Practically all of the testimony of the applicant regarding the pain and swelling in her fingers and the time when it started and regarding the use of her hands and fingers, both in her office work and in her own home, was such that it was exclusively within her own knowledge; it would be impossible to obtain evidence to the contrary even though some of her statements might not have been exactly correct.

The Justices of this Court and most members of the bar can appreciate applicant's testimony that legal work requires typing of several carbon copies and that such work requires that more force be applied by the typist's fingers to the keys of a manually operated typewriter than does ordinary typing. On the other hand, when applicant was being questioned about the use of her hands in her house work, it is quite apparent that she was attempting to minimize the importance of the tasks she performed around her home (R. 21 and 22). It is somewhat difficult to accept at 100% face value her statement that her oldest daughter did most of the house work from the time she was 8 years of age until she was 14 years of age, in a household of two adults and two children.

With respect to the three doctors who testified at the hearing, we do not feel that Plaintiff's brief contains a complete summarization of their testimony, but it refers particularly to the testimony which was most favorable to Plaintiff's case.

Dr. Robert D. Beech, a specialist in internal medicine, stated that in addition to the arthritis in the end joints of plaintiff's fingers, the only other conditions she had of any importance were moderate obesity and mild hypertension (R. 29). This doctor stated that medical science has not yet reached a definite conclusion as to what are the causes of osteoarthritis; but he said that age and injury have been thought to be two of the possibilities (R. 31). He mentioned Dr. Philip S. Hench, a man who has become famous because of his connection with the use of cortisone in the treatment of arthritis. Dr. Hench recently wrote an article in which he stated, in substance, that arthritis in the fingers is found less often in elderly typists and needleworkers than in people who do not use their hands and fingers to any great extent (R. 34 and 35).

Dr. Beech also testified that Mrs. Edlund's was the only case he had ever seen, in which the arthritis was claimed to have resulted from the work engaged in (R. 35). This thought becomes of some importance in our later discussion of the question of whether arthritis in the fingers is an occupational disease.

Dr. Beech also said that when a typist strikes the keys of a typewriter there would possibly be no more trauma than the force exerted on the heels of a person walking down the street (R. 37). On the same page is found Dr. Beech's affirmative answer to Plaintiff's attorney's question, that "osteoarthritis is what some of the specialists call a wear and tear type of arthritis."

Dr. Norman R. Beck, an orthopedic specialist, as stated in Plaintiff's brief, testified that osteoarthritis is considered

to be a degenerative disease, the cause of which is not definitely known (R. 46). For the most part it comes on with age; but some individuals have it at an earlier age than others. The lessening of the blood supply to the arthritic area seems to have something to do with it (R. 50).

ARGUMENT

POINT 1.

THE INDUSTRIAL COMMISSION WAS NOT COMPELLED TO FIND THAT APPLICANT'S ARTHRITIS WAS CAUSED BY EXPOSURE IN HER EMPLOYMENT.

Plaintiff's attorney, at pages 7, 8 and 10 of his brief, pointed out that the Industrial Commission did not find that Mrs. Edlund's work caused the arthritis in her finger joints but that the Referee "assumed" that it did. Plaintiff's attorney then argues that the evidence was such as to compel a finding that it did. In the third paragraph of the Referee's recommended Findings and Conclusions, which were adopted by the Commission as part of its Order of March 26, 1951, the Referee said:

> "Assuming a direct causal connection between the conditions under which her work was performed and the condition which developed, applicant must also establish (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,*" etc.

The Referee probably meant, "If we assume a direct causal connection, (without deciding whether there was such connection), for the purpose of going on to the next point, applicant still would not be entitled to compensation because of the other requirements of the Occupational Disease Law."

We think that Plaintiff's attorney was in error when he argued, at page 10 of his brief, that "a finding was mandatory that there was such a direct causal connection." The one point upon which all of the medical experts agreed was that nobody knows definitely what causes arthritis (R. 31 and 49). In the face of such medical opinions, why would it be arbitrary and capricious, as Plaintiff has argued, if a finding were made that applicant's typing work in her employment was not the cause of the arthritis in her fingers? Why would it not have been just as reasonable to expect arthritis to have developed in the next higher joints in her fingers, as in the end joints, if the typing was what caused the arthritis? Both the end joint and the second joint of each finger receives a certain amount of jolt or jar when the finger hits a typewriter key.

Dr. McQuarrie, applicant's family physician, a general practitioner, not an internist or orthopedic specialist, in answering a question about causation, (R. 42), said:

> "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."

POINT 2.

APPLICANT'S CONDITION OF ARTHRITIS IN HER FINGERS DOES NOT COME WITHIN THE NECESSARY REQUIREMENTS OF SECTION 28 OF THE UTAH OCCUPATIONAL DISEASE LAW.

Before we get into a discussion of Section 28, we shall call attention to some of the fundamental provisions of the Occupational Disease Law, which is found at Title 42, Chapter 1a of the Utah Code Annotated.

Section 42-1a-13, subsection (a) provides:

> "There is imposed upon every employer a liability for the payment of compensation to every employee who becomes totally disabled by reason of an occupational disease * * *."

Section 42-1a-27 reads as follows:

> "The occupational diseases hereinafter defined shall be deemed to arise out of the employment, only if there is a direct causal connection between the conditions under which the work is performed and the occupational disease, and which can be seen to have followed as a natural incident of the work as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as the proximate cause, and which does not come from a hazard to which workmen would have been equally exposed outside of the employment. The disease must be incidental to the character of the business and not independent of the relation of employer and employee. The disease need not have been foreseen or expected but after its contraction it 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."

Section 42-1a-28 reads:

"For the purpose of this act only the diseases enumerated in this section shall be deemed to be occupational diseases:"

(The first 27 subsections list anthrax, glanders and various metallic poisonings and other disorders caused by contact with chemical and other substances. Then comes subsection 28, which was enacted by the 1949 Legislature.)

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 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."

Plaintiff's attorney, at pages 16 and 19 of his brief, has taken vigorous exception to the Industrial Commission's conclusion that "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." He argues that all that is needed is that the six requirements specified in subsection 28 of Section 28, as above quoted, shall exist in the case. Apparently he does not realize that among the two unnumbered provisions and the six numbered requirements of subsection 28 above quoted are three provisions which definitely support the Industrial Commission's conclusion.

We call attention to the first provision, that the disease must "directly arise as *a natural incident* of the exposure occasioned by the employment." Also point numbered 2 requires that the disease was "*a natural incident* of the work." and point numbered 5 requires that the disease is "*incidental to the character of the business.*"

With respect to the meaning of words and phrases found in the occupational disease law and other parts of the Utah Code, the following provisions are applicable:

Section 88-2-11, Utah Code Annotated, 1943:

"Words and phrases are to be construed according to the context and the approved usage of the language; but technical words and phrases, and such others as have acquired a peculiar and appropriate meaning in law, or are defined by statute, are to

be construed according to such peculiar and appropriate meaning or definition."

So far as we have been able to ascertain, the words, "natural," "incident" and "incidental" are not technical words and have not acquired a peculiar legal meaning. Therefore we have gone to Webster's dictionary to determine what is the approved usage of those words. We find that the word, "natural" means "in accordance with or due to the conditions, events or circumstances of the case; in line with normal experience." "Natural" also means "truly representing or expressing one's nature, etc." "Natural" has the synonyms, "common," "ordinary," "regular" and "usual."

The word "incident" means "that which happens or takes place; an event; occurrence." Another meaning is "that which happens aside from the main design; subordinate action." Also "liable to happen; apt to occur; hence naturally happening or appertaining, especially as a subordinate or subsidiary feature."

The word, "incidental" means "happening as a chance or undesigned feature of something; liable to happen or follow as a chance feature or incident."

Applying these definitions to the statutory provisions we are here discussing, it appears that a disease which "directly arises as a natural incident of the exposure occasioned by the employment" must be one which is a common event in that employment or occupation. A disease which is "incidental to the character of the business" is one which is liable to happen or apt to occur in the particular business.

Is the disease of osteoarthritis of the fingers one which "normally, commonly, ordinarily, regularly or usually occurs" among stenographers in law offices? Is this disease "liable to happen or apt to occur" with very many women who do typing work as part of the duties of their employment? The answer to each of these questions very obviously is "No."

There is no evidence in the record which even remotely tended to prove that finger arthritis is commonly or often found among people who do typing work, either in law offices or any other employments. Dr. Beech testified that he had treated a great many cases of orteoarthritis, but Mrs. Edlund was the first one he had ever seen who claimed that it was associated with her work (R. 35 and 36).

It appears that the Industrial Commission's decision was entirely correct, wherein it held that:

> "The legislature clearly intended to make compensable only those diseases which can be recognized as commonly associated with a particular employment.
>
> * * * * *
>
> "The best evidence that such a risk exists would be a statistical demonstration that the incidence of the disease is significantly higher in the occupation under consideration than in others."

At page 17 of his brief, Plaintiff's attorney argues that it would be difficult for Plaintiff to prove "that the disease from which she suffered was one which was commonly associated with her employment." He further argues that, because of that difficulty, she should therefore not be re-

quired to make such proof. That kind of an argument is not properly addressed to the Supreme Court, or to the Industrial Commission. It was the Utah Legislature which made the requirement found in Section 42-1a-28, subsection 28, 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:*"

Plaintiff's attorney goes on to argue that "the burden of showing common association or that the disease was a customary or usual result of the employment would be insurmountable." We fully agree with that statement insofar as it applies to Plaintiff's claim; and that is a decisive reason why Plaintiff does not have any valid claim under the occupational disease law.

The Supreme Court has already recognized the necessity for any disease, for which compensation is claimed under the occupational disease law, to be one which is found quite often in a particular industry or occupation. In the first case under this law which came before this Court, *Uta-Carbon Coal Co.* vs. *Ind. Comm.*, 104 Utah 567, 140 Pac. (2nd) 649, the Court's opinion, at pages 574 and 575, reads as follows:

> "Section 42-1a-27, U. C. A. 1943, provides that:
>
> "The occupational diseases hereinafter defined shall be deemed to arise out of the employment, only if there is a direct causal connection between the conditions under which the work is performed and the occupational disease, and which can be seen to have followed as a natural incident of the work as the result of the exposure occasioned by the employ-

ment, and which can be fairly traced to the employment as the proximate cause, and which does not come from a hazard to which workmen would have been equally exposed outside of the employment. The disease must be incidental to the character of the business and not independent of the relation of employer and employee. The disease need not have been foreseen or expected but after its contraction it 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."

"It is well known that silicosis is an occupational disease. As has been said in *Argonaut Min. Co.* vs. *Industrial Commission,* 21 Cal. App. 2d 942, 79 P. 2d 216, at page 219:

" 'It (silicosis) is prevalent among employees in mines, potteries, stone and slate factories * * * where the air is permeated with minute particles of stone, quartz, slate, or metal dust which is inhaled to the detriment of the tissues, glands and lungs. Some men appear to be immune to the disease, but a large proportion of those who are engaged in such pursuits are susceptible to silicosis. The incurring and development of this disease depends somewhat upon the constitution of the employee and upon the conditions under which he works. The course of the disease may be rapid or gradual, sometimes extending over a period of several years before the victim is finally disabled for the performance of manual labor'."

As Plaintiff's attorney has indicated in his brief, Plaintiff's claim is one without precedent. We also, have been unable to find any case, from this or any other state, in which a similar factual and legal situation was involved. The case cited in Plaintiff's brief: *Simpson Logging Co.* vs.

Dept. of Labor & Industries, 32 Wash. 2d 472, 202 P. 2d 448, is not particularly helpful, because of the dissimilarity of the laws of the states of Utah and Washington. The provision of the Washington law involved in the Simpson case is very short, as follows:

> "Within the contemplation of this act, 'occupational disease' means such disease or infection as arises naturally and proximately out of extrahazardous employment." (Chapter 235, 1941 Laws.)

There is one paragraph which may be helpful in the consideration of the case at bar, found in 58 American Jurisprudence at page 749, (§ 246), which reads as follows:

> "Certain diseases and infirmities which develop gradually and imperceptibly as a result of engaging in particular employments and which are generally known and understood to be usual incidents or hazards thereof, are distinguished from those having a traumatic origin, or otherwise developing suddenly and unexpectedly, by the terms 'occupational,' and 'industrial.' If the disease is not a customary or natural result of the profession or industry, per se, but is the consequence of some extrinsic condition or independent agency, the disease or injury cannot be imputed to the occupation or industry, and is in no accurate sense an occupational or industrial disease."

CONCLUSION

For the reasons herein set forth, the decision of the Industrial Commission should be affirmed by this Court.

Respectfully submitted,

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