1979

Norma Clark v. Interstate Homes, Inc. et al : Brief of Defendants

Utah Supreme Court

Mikel M. Boley; Attorney for Appellant;
M. David Eckersley; Frank V. Nelson; Attorneys for Defendants;

IN THE SUPREME COURT

OF THE STATE OF UTAH

NORMA CLARK,	:	
Plaintiff,	:	
vs.	:	Case No. 16337
INTERSTATE HOMES, INC., THE STATE INSURANCE FUND, and THE INDUSTRIAL COMMISSION OF UTAH,	:	
Defendants.	:	

WRIT OF REVIEW FROM A FINAL ORDER OF THE UTAH STATE INDUSTRIAL COMMISSION

BRIEF OF DEFENDANTS

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BRIEF OF DEFENDANTS

STATEMENT OF THE NATURE OF THE CASE

Plaintiff Norma Clark is seeking review of a final order of the Utah State Industrial Commission awarding her workmen's compensation benefits on the basis of 30% permanent partial disability.

DISPOSITION BY THE INDUSTRIAL COMMISSION

On November 3, 1977, plaintiff Norma Clark filed an application for workmen's compensation benefits with the Utah State Industrial Commission. Her claim was the subject of a formal hearing held on February 28, 1978 before Administrative Law Judge Keith E. Sohm. The medical aspects of the case were referred to a medical panel, the report of which was received on May 5, 1978. A further hearing was held on the plaintiff's objections to the medical panel report on August 11, 1978.

The Administrative Law Judge entered his Findings

of Fact, Conclusions of Law and Order on August 23, 1978. Following a timely Motion for Review by the plaintff, the Industrial Commission as a whole granted the Motion and entered an amended order on January 3, 1979, increasing the plaintiff's award. It is this Order of which the plaintiff seeks review.

RELIEF SOUGHT ON REVIEW

Defendants respectfully request that the Order of the Industrial Commission be affirmed.

STATEMENT OF FACTS

Norma Clark suffered an injury by accident in the course of her employment with Interstate Homes, Inc., on March 3, 1977. The State Insurance Fund, as the workmen's compensation insurance carrier for the plaintiff's employer, accepted liability for the accident and paid Mrs. Clark temporary total disability compensation until Janaury 11, 1978, in the amount of $4,916.17. The Fund also paid the plaintiff's medical expenses during that period, in the amount of $7,807.74.

The plaintiff was treated by numerous physicians for her back and leg difficulties. She underwent surgery in June of 1977, but did not gain relief from her pain. No treating physician could find any objective evidence of the physiological source of Ms. Clark's pain, and Dr. F. Jackson Millet reported that she could return to lighter duty work on October 25, 1977. (R. 42)

In an effort to resolve the question regarding the extent of the plaintiff's permanent disability, her case was brought to hearing and submitted to a medical panel. The panel found that she was suffering from a twenty (20)

per cent loss of bodily function which would be permanent. (R. 219). The plaintiff objected to this finding and at the hearing held on her objections Dr. Robert Lamb testified that he had recently discovered the apparent source of Ms. Clark's continuing pain. He indicated that he had diagnosed a condition known as adhesive arachnoiditis. (R. 185) He further indicated that he felt her disability rating should be more appropriately set as thirty-five (35) per cent. Dr. Lamb also testified that the plaintiff was physically able to return to many types of employment. (R. 189)

There was no disagreement between the two doctors concerning Ms. Clark's symptomology, but Dr. Lamb felt the objective finding of arachnoiditis justified a higher rating because it gave strong credence to the pain reported by the plaintiff. He did admit that he would agree with a twenty (20) per cent permanent impairment rating absent the finding of arachnoiditis. (R. 200)

The Administrative Law Judge found the applicant twenty-five (25) percent permanently disabled, and the Commission as a whole increased this figure to thirty (30) per cent.

ARGUMENT

POINT I - THE ORDER ENTERED BY THE INDUSTRIAL COMMISSION IS FULLY SUPPORTED BY THE EVIDENCE.

The plaintiff is seeking review of the Industrial Commission's determination regarding the extent of her permanent disability. It is fundamental that a determination of permanent disability is a factual question which is within the exclusive perogative of the Commission to resolve, and will not be

set aside on review unless there is no substantial evidence in the record upon which it can be supported. See Evans v. Industr. Comm'n, 28 Utah 2d 324, 502 P.2d 118 (1972); Wilstead v. Industrial Comm'n, 17 Utah 2d 214, 407 P.2d 692 (1965); Utah Code Ann. § 35-1-85 (1953).

In the instant case the plaintiff is claiming to be permanently and totally disabled because she is unable to return to her former employment. It is settled law in Utah that an injured worker is not totally disabled solely because of an inability to return to the same type of employment enjoyed prior to the injury. In Wilstead v. Industrial Comm'n, supra, this Court stated that

> Compensation during total disability does not necessarily mean until the employee is able to do his former work. If this were so, where there is the loss of a hand, or a foot, or other permanent partial disablement, the period of total disability could be indefinite because he may never be able to do the same work again. The fact that when plaintiff's doctors released him for work he was unable to reobtain his former job is no reason for concluding that his condition of total disability continued until he could do so.

17 Utah 2d at 217.

The plaintiff's own physician testified that she was physically able to be employed (R. 189) and the Commission accepted that opinion. Further, the percentage of disability found by the Commission does not justify a determination that the plaintiff is now permanently and totally disabled. In Silver King Coalition Mines Co. v. Industrial Comm'n, 92 Utah 511, 69 P.2d 608 (1937), this Court noted that our compensation system is designed to compensate for loss of bodily function or permanent physical impairment, not

economic or industrial disability.

> The compensation for permanent partial disability is measured either by the schedule or in proportion thereto and as deemed equitable on the loss of bodily functions alone, . . . But if the applicant claims total and permanent disability the issue is as to whether he is totally and permanently disabled industrially and economically. There is a twilight zone where one blends into the other. That is, the loss of bodily fuction may be so great as to leave one totally and permanentally disabled industrially. Thus a person with a 90 per cent loss of bodily fuction might be able to prove himself totally and permanently disabled. If so, he would take himself out of the class of applicants limited to recover (for permanent loss of bodily function) and put himself in the class where his compensation should be determined by his total lack of industrial or economical ability. But until that point is reached, the permanent partial disability is seemingly compensated for on loss of bodily function alone . . .

69 P.2d at 613.

In that case, the Court refused to set aside of a finding that an applicant who was seventy (70) per cent impaired was not totally disabled. The plaintiff's impairment in the instant case does not approximate a rating of such severity as to present a question concerning her ability to find some form of employment, and the only medical testimony concerning her physical ability to work was to the effect that she could.

In Crow v. Industrial Comm'n, 104 Utah 333, 140 P.2d 321 (1943), an applicant with a 25-30% permanent impairment sought reivew of the denial of the Commission to find him permanently and totally disabled. The Court found that based upon the rating and the testimony of the physicians that there were types of work the employee could perform, such a denial was not unreasonable. These are essentially the same

facts as presented by the instant case, and appellant would assert that there is nothing contained in the record to demand a different result in this case.

The record is totally devoid of any evidence reflecting on the applicant's inability to perform work other than manual labor, except for her own assertion that she didn't think she could handle a "desk" job "because I like to be on the move." (R. 204)

In short, there is no evidence to justify a finding of permanent and total disability. Indeed, the evidence presented was that the plaintiff was at most 35% disabled and w capable of returning to work.

The plaintiff's contention that the Commission was bound to accept Dr. Lamb's 35%, disability rating, instead of the 30% found by the Commission, is equally erroneous. Dr. Holbrook testified that at the time of his examination Ms. Clark had a 20% loss of bodily function. (R. 219) Dr. Lamb indicated that, although her symptoms didn't change, Ms. Clark was determined to have adhesive arachnoiditis subsequent to Dr. Holbrook's examination. Based upon this finding, Dr. Lamb gave his 35% disability rating. It is important to note that, if anything, Ms. Clark's physical impairment was reduced by this discovery, as it made her treatment more effective. (R. 197-98) Her symptoms and limitations were the same as when she was examined by Dr. Holbrook, and the only change was an objective finding which gave greater credence to her reports of pain. The difficult question presented to the Commission, therefore, was how to resolve the difference in

the two opinions of the physicians. It should be noted that neither physician expressly disagreed with the rating of the other (R. 200 and 194), becuase, in Dr. Holbrook's words

> Pain is really not very measurable, even experimentally. And what one person might find as evaluation in a patient where the main problem is pain, there may be much greater variation from one examiner to another, than for example if it's an amputation. That's the same to everybody. But the interpretation of an examiner, based on the main problem of pain, is going to vary. Of course there is more supporting evidence now of the degree of pain that she has than we had evidence of at the time that I saw her. (R. 195)

Given the fact that the discovery of arachnoiditis gave objective support for the subjective pain of the applicant, the Commission increased the rating suggested by Dr. Holbrook by 10%, but didn't conclude that his unwillingness to disagree with Dr. Lamb's report without doing futher tests and examining the evidence of arachnoiditis meant he would be in full agreement with that rating had those tests been performed. (R. 244) This resolution of the issue recognizes that the symptoms underlying the disability were unchanged, or possible improved, from the time of Dr. Holbrook's original examination.

It has been previously noted that in arriving at a disability rating the Industrial Commission is not bound to accept expert medical opinion on the subject, but can base its determination on the record as a whole. Silver King Coalition Mines Co. v. Industrial Comm'n, supra. The defendant submits that the Commission resolved the conflict in the testimony in harmony with the evidence and should be sustained on review.

Finally, the plaintiff complains of the refusal of

the Commission to order the Fund to pay for the applicant's attendance at a weight loss clinic. As authority for her contention that such an expense should be borne by the defendants, plaintiff asserts that it is covered by Utah Code Ann. § 35-1-81 (1953), which provides, in relevant part, that

> In addition to the compensation provided for in this title the employer or insurance carrier, or the commission of finance out of the state insurance fund, shall in ordinary cases also be required to pay such reasonable sum for medical, nurse and hospital services, and for medicines, and for such artificial means and applicances as may be necessary to treat the patient as in the judgment of the industrial commission may be just . . .

The simple answer to this assertion is that the award requested is not for "medical, nurse (or) hospital services" and even if it was, the Commission found that it would not be "just" to impose such costs on the defendants as there was nothing in the record to show that the plaintiff's weight problem was proximately caused by her industrial accident. (R. 255)

Any number of optional programs can have a theraputic affect on injured employees, as evidenced by the numerous requests submitted to the State Insurance Fund for construction of in-home Jaccuzzi pools, but the statutory scheme of compensation obligates the employer to pay for only those services which are "necessary" to treat for the industrial injury. There is nothing in the record to suggest that the expense of the weight loss program is "necessary" or that it was brought about by the accident. The Commission's Order denying that portion of the claim is neither unreasonable nor arbitrary.

CONCLUSION

Norma Clark's industrial injury resulted in a loss of bodily function which was primarily a result of back pain. While her treating physician admitted she could return to some type of employment, he felt she was 35% disabled. The defendants' submit that the Commission's finding that Ms. Clark was 30% disabled, when viewed in light of Dr. Holbrook's rating of a 20% impairment based on essentially the same symptoms, is an entirely reasonable resolution of the difficult proposition involved in rating impairments due to subjective symptoms such as pain. As there is nothing in the record to suggest that Ms. Clark isn't capable of returning to gainful employment, the defendants request that the Commission's action be affirmed.

DATED this_____day of June, 1979.

BLACK & MOORE

M. DAVID ECKERSLEY

MAILING CERTIFICATE

On this____day of June, 1979, I mailed two copies of the foregoing Brief to Mikel M. Boley, 3535 South 3200 West Salt Lake City, Utah 84119.

Secretary