1979

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

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 - Appellant	*	
-vs-	*	Supreme Court No. 16337
INTERSTATE HOMES, INC., and STATE INSURANCE FUND, and INDUSTRIAL COMMISSION OF UTAH,	*	
Defendants - Respondents.	*	
	*	

Appeal taken from the Industrial Commission of Utah, the Honorable Keith E. Sohm, Administrative Law Judge, presiding.

BRIEF OF APPELLANT

Mikel M. Boley, Esquire
Attorney for Appellant
3535 South 3200 Wets
Salt Laek City, Utah 84119

M. David Eckersley, Esquire
Attorney for Respondents
Suite 500
Ten West Broadway
Salt Lake City, Utah 84101

and

Frank V. Nelson
Assistant Attorney General
State Capitol Building
Salt Lake City, Utah 84114

IN THE SUPREME COURT OF THE STATE OF UTAH

****

NORMA CLARK,

Plaintiff - Appellant

-vs-

INTERSTATE HOMES, INC., and STATE INSURANCE FUND, and INDUSTRIAL COMMISSION OF UTAH,

Defendants - Respondents.

Supreme Court No. 16337

Appeal taken from the Industrial Commission of Utah, the Honorable Keith E. Sohm, Administrative Law Judge, presiding.

BRIEF OF APPELLANT

Mikel M. Boley, Esquire
Attorney for Appellant
3535 South 3200 Wets
Salt Laek City, Utah 84119

M. David Eckersley, Esquire
Attorney for Respondents
Suite 500
Ten West Broadway
Salt Lake City, Utah 84101

and

Frank V. Nelson
Assistant Attorney General
State Capitol Building
Salt Lake City, Utah 84114

TABLE OF CONTENTS

STATUTES CITED

SECONDARY AUTHORITIES CITED

NATURE OF THE CASE

Plaintiff, Norma Clark, filed an action before the industrial commission of the State of Utah for disability compensation pursuant to Utah Law.

DISPOSITION OF THE LOWER COURT

The matter was heard initially on February 28, 1978. A re-hearing was held August 11, 1978. An additional petition was later made for certain benefits to aid appellant in losing weight. The Lower Court gave to plaintiff a 30 percent permanent partial disability rating and denied plaintiff's petition for a weight loss clinic.

RELIEF SOUGHT ON APPEAL

That the Supreme Court reverse the industrial commission and award to appellant a total permanent disability rating or, in the alternative, that the Supreme Court at least increase the permanent partial disability rating to 35 percent. And that the Supreme Court order the defendants to pay for a weight loss clinic for plaintiff.

STATEMENT OF THE FACTS

On March 3, 1977, while employed by Interstate Homes, Inc., appellant suffered an industrial accident. Said accident was duly reported to her employer, and she was thereafter taken to the emergency ward of the L.D.S. Hospital. She received treatment as an outpatient at L.D.S. Hospital and

was eventually referred to a medical clinic where she was treated by Dr. F. Jackson Millet. On Monday, March 21, 1977, appellant returned to her place of employment, worked that week and the following Monday. On the following Monday, March 28, 1977, she was instructed by Dr. Millet not to return to work. (T. 83) She has not worked since. In June of 1977, Dr. Millet perform an operation upon appellant which the doctor described as an "excision of the disc." (T. 177) In the months following the operation, appellant contracted phlebitis in her right leg, which still persists. (T. 114 and 118)

Appellant's medical progress has been described as "atypical" by several physicians, there being little improvement of her condition. (T. 179) February 28, 1978, was the date of the initial hearing before the industrial commission, which was presided over by Keith E. Sohm, Administrative Law Judge. Thereafter, a medical panel was appointed, with Dr. Boyd Holbrook being the single member of the panel. Dr. Holbrook made his findings to the commission. Pursuant to said findings, Judge Sohm awarded to plaintiff a 20 percent permanent partial disability rating. As a result of an objection by appellant, a subsequent hearing was held August 11, 1978. At said hearing Dr. Holbrook testified as to his findings; Dr. Robert H. Lamb, appellant's physician testified; and Norma Clark testified.

As a result of testimony received at the August 11, 1978 hearing, the disability rating was increased from 20 percent to a 25 percent permanent partial rating. Subsequently, in response to appellant's Motion for Review, the entire commission increased the disability rating an additional five percent to a 30 percent rating.

In January, 1979, pursuant to the written reports and requests of three treating physicians, and pursuant to a petition of appellant, the industrial commission was asked to award appellant fees necessary to enroll her in a Schick Weight Loss Clinic. The Administrative Law Judge denied this petition.

ARGUMENT

POINT I

THE LOWER COURT ERRED IN NOT AWARDING A PERMANENT TOTAL DISABILITY

At the hearings held, and as substantiated by the medical reports submitted to the industrial commission, appellant has had problems with her leg, with her back and with phlebitis. These facts have been substantiated both by the medical panel's physician and by Dr. Robert Lamb. At the present time and as testified at the initial hearing before the commission, appellant cannot sit for any prolonged time, cannot stand for long, and is unable to go back to work. (T. 88) During the week following the accident when appellant tried to return to work, she experienced great pain. (T. 83) Although appellant's physical condition was somewhat improved from the date of the first hearing to the second hearing of August 11, 1978, appellant is still in constant pain, which is substantiated by Dr. Robert Lamb. (T.187) Both Dr. Holbrook (T. 182) and Dr. Lamb (T. 189) state that Norma Clark is unable to return to manual labor.

Certain subjective factors should also be emphasized at this point. Appellant has an eighth grade education (T. 202), has performed only physical labor in the past (T. 203), has received no job training, and has performed no desk jobs. (T. 203)

Section 35-1-67 UCA (1953), refers to "permanent total disability" but fails to specifically define said term. One must look to the previous section which defines "partial disability compensation". Section 35-1-66 UCA (1953), begins as follows, "Where the injury causes partial disability for work... (emphasis added). It would seem that by implication that where partial disability compensation is based upon an applicant's partial disability for work that permanent disability should also be as to total disability for work. In this case, Norma Clark is totally disabled from performing any work for which she is trained. Other jurisdictions have specifically dealt with the problem presented in this case and have defined the term of permanent total disability in such a manner as to favor Mrs. Clark.

In Larsen, The Law of Workmen's Compensation, Volume 2, Matthew Bender, N.Y., N.Y. (1976), it is stated that "total disability in workmen's compensation law need not be interpreted as utter and abject helplessness." Id. at 10-107. Larsen talks about a doctrine know as "the odd lot" doctrine. He states as follows:

> "Under the odd lot doctrine, which is accepted in virtually every jurisdiction, total disability may be found in the case of workers who, while not altogether incapacitated for work, are so handicapped that they will not be employed regularly in any well known branch of the labor market. Id, at 10-109."

The primary question in determining whether total disability may exist in any given case under the so-called "odd lot theory" is whether a worker's

personal problems or incapacity would stop him from any further gainful employment. A couple of cases from nearby jurisdictions are helpful to the case at hand.

In Rapp v. Hale, 170 Neb. 620, 103 N.W. 2nd 851 (1960), the injured worker was 25 years of age, had one year of high school, and had received no training in any field other than manual labor. Following the injury the worker had continuous pain and had been unable to engage in any kind of gainful employment. One of the examining doctors placed his percentage of total bodily disability at 15 percent while the same doctor and two others indicated that the plaintiff would never be able to return to any heavy manual labor, which is what he did prior to the accident. In that case, despite only fifteen percent permanent disability rating, the Nebraska Supreme Court overruled the lower court in awarding permanent total disability. The Court indicated that the term "total disability" didn't mean absolute helplessness. Id. at 856 of N.W. 2nd. The Court went on to state:

> A workman, who, solely because of his injury, is unable to perform or to obtain any substantial amount of labor, either in his particular line of work, or in any other for which he would be fitted except for the injury, is totally disabled within the meaning of the workmen's compensation law. Id.

The applicant in the Rapp case was very similar to Norma Clark. In that case the claimant was younger than Mrs. Clark, had a lower disability rating, and yet the Nebraska Supreme Court gave him a permanent total disability award. As in the Rapp Case, Mrs. Clark has a limited education, has received no training for anything other than manual labor, and has performed no sedentary types of employment.

In Mansfield v. Caplener Brothers, Or. App., 500 P. 2nd 1221 (1972), a truck driver who had driven truck for twenty three years fell from a truck and injured his leg and back. In that case the claimint could neither stand nor sit for any length of time nor could he walk without swelling developing in his leg and pain in his back and leg. The Oregon appellate court indicated that in order for one to be considered disabled, he did not have to be utterly and completely helpless. The court felt that under the circumstances of claimant's eighth grade education, statements by other witnesses that claimant would probably never work again, and of claimant's limited intellectual resources, that he fit within the so-called "odd lot" category and that the burden was then on the employer to show that employment was available to the claimant. Since the employer failed to do so, and since the claimant was not employable, the court considered him permanently and totally disabled. The court made a statement which is very applicable to the case at hand:

> Many persons with claimant's physical disabilities could still work. Claimant cannot because the disabilities are combined with a lack of education and training, and with what the Circuit Court termed "basic mental inadequacies." Id. at 1224 of P. 2d.

The pain has never left Mrs. Clark since March 3, 1977. Because of her inability to stand, sit, or walk for any length of time combined with her limited educaton, there are no jobs available to Mrs. Clark. Both Dr. Holbrook and Dr. Lamb indicated at the August 11, 1978 hearing that appellant was unable to engage in manual labor. Therefore, from a practical

standpoint, Norma Clark is totally and completely disabled to engaged in employable activities. Perhaps, after some training, pursuant to Section 35-1-68 USC (1953), claimant will be able to engage herself in employable activities. However, at the present time she cannot and should be awarded a permanent total disability rating.

POINT II.

THE LOWER COURT ERRED BY NOT GRANTING A HIGHER DISABILITY RATING

In supplement to the previous point and not as a substitute therefor, appellant petitions the Court for an order increasing the disability rating from 30 percent as awarded by the industrial commission to 35 percent, pursuant to the facts presented on August 11, 1978.

After the initial hearing, the industrial commission appointed Dr. Boyd Holbrook as a single member medical panel. After a single examination and reference to the file and records available, Dr. Holbrook gave to applicant a permanent partial disability rating of 20 percent. After the appropriate motions were made, the administrative law judge increased the permanent partial rating to 25 percent. Subsequently, upon motion to the entire commission, the disability rating was increased to 30 percent. Although a 30 percent rating is closer to the rating which should have been provided, it still fails to provide applicant the rating which she deserves and which is supported by the evidence. The important factor to note here

is that Dr. Holbrook did not have all of the records and evidence available prior to making his report. In particular, Dr. Holbrook did not have a current myelogram.

Both Dr. Robert Lamb, applicant's personal physician, and Dr. Holbrook testified on a subsequent hearing of August 11, 1978. The qualifications of each were stipulated to. (T. 177)

Dr. Lamb testified that since Dr. Holbrook's report, certain aspects of Mrs. Clark's condition had come to light. Specifically, he testified as to the results of a myelogram given on 5-25-78, which had "findings consistent and diagnostic of adhesive arachnoiditis." (T. 185) Dr. Lamb went on to testify that applicant should be given a 35 percent permanent partial disability rating. He testified that his rating was determined with the aid of the above-mentioned myelogram and in conjunction with Dr. Dennis Thoen, who had examined applicant on at least one prior occasion. (T. 36-38)

On the August 11th hearing, Dr. Holbrook was shown the 5-25-78 myelogram results. On Page 180 of the transcript, Dr. Holbrook indicated that he was not qualified to speak of new findings but could only testify as to the evidence before him when he examined Mrs. Clark and the documents presented to him at that time. (Also see T. 178) It should be noted that in the report to the industrial commission presented by Dr. Holbrook, he indicated that after diligent search he was unable to find a myelogram and x-ray performed at L.D.S. Hospital. (T. 219) When examined, Dr. Holbrook testified that if appellant, in fact, had adhesive arachnoiditis, it was

likely in some manner related to the accident and resulting treatment. (T. 123) He also testified that if appellant, in fact, had phlebitis, it, too, was a result of the accident and treatment. (T. 184)

Dr. Lamb's report should be accepted as conclusive upon this Court. His report and his testimony were based upon more complete and current evidence and medical findings. Dr. Lamb's testimony was never contradicted by the defendants. The only one qualified to contradict Dr. Lamb, Dr. Holbrook, stated that he could only speak as to what he had before him and could not testify as to additional facts. Defendants failed at any future date by way of letter, affidavit or otherwise from Dr. Holbrook to contradict the findings of Dr. Lamb. In fact, at the August 11 hearing, Dr. Holbrook stated that he could not disagree with the findings of Dr. Lamb, and that the myelogram findings help explain some of the otherwise unexplained symptoms of Mrs. Clark. (T. 194-95)

Although the law judge and the commission have increased the degree of disability from 20 percent to 30 percent, it should be once again increased to 35 percent, since the testimony and evidence of Dr. Lamb remains uncontradicted.

POINT III

THE LOWER COURT ERRED IN NOT AWARDING APPELLANT FEES FOR WEIGHT LOSS CLINIC

On the date of the accident, Norma Clark's approximate weight was 155 pounds. (T. 93) As of August 8, 1978, she had increased her weight to 170 pounds. (T. 252) Her weight as of January 5, 1979, was 195 pounds. (T. 252)

In January of 1979, at least three of the physicians treating appellant recommended a weight loss program through the Schick Center. Dr. Robert Lamb recommended in writing to the industrial commission on letter dated January 11, 1979, that appellant be advised to lose weight, since her excess weight will cause further problems with her back. He specifically prescribed the Schick Center. (T. 251) Dr. David L. McCann indicates that Mrs. Clark has experienced about a 35 pound weight gain during his care of her and that such weight gain was possibly aggravated by an anti-depressant medication which he was giving her. He also indicated and agreed with Dr. Lamb that orthopedic problems are aggravated by her weight gain and joined with Dr. Lamb in recommending the Schick Center. (T. 248) Dr. Joseph A. Conrad, an expert in internal medicine and pulmonary medicine wrote a letter to the industrial commission dated January 6, 1979. (T. 252) He indicates that appellant's weight gain has resulted in persistant ankle swelling and indicates that a weight loss program would be in her best medical interest. He agrees with Dr. Lamb's recommendation for a weight loss program at the Schick Center. Despite three separate physicians indicating that a weight loss program was in her best interest and that the weight gain problems she is having are as a result at least partially of the accident in question, the law judge denied the request to have the defendant pay for her Schick Weight Loss Clinic. It is appellant's contention that this is wrong and should be granted according to Utah Law.

Utah Code Annotated Section 35-1-81 (1953), indicates that "the employer ...shall also be required to pay such reasonable sums for medical, nurse and hospital services...as may be necessary to treat the patient as in the judgment of the industrial commission may be just." In the estimate of three qualified physicians involved in three different areas of medicine, it would be just and would greatly aid appellant medically. Even though the treatment sought is not specifically performed by either a doctor or nurse or in a medical setting, the three physicians are of a common belief that it would benefit appellant's health and well being. The weight increase is obviously due to the accident and/or resulting treatment and should be covered by applicant's former employer.

It is submitted that the uniqueness of the request is the reason for its being denied by the law judge. However, it is clearly related to the medical treatment and has been specifically prescribed by three different physicians. This uniqueness should not preclude the Court from granting to appellant the treatment she needs and is entitled to.

CONCLUSION

Mrs. Clark should be given a permanent total disability rating. She also should be granted the fees necessary to enroll her in the Schick Weight Loss Clinic. The evidence is clear in showing that from an employment standpoint, she is completely disabled.

In the event the Court finds that she is not permanently disabled, the permanent partial disability rating should be increased from 30 percent to 35 percent, to comport with the evidence given on the most recent hearing.

Respectfully submitted,

Mikel M. Boley

Mikel M. Boley
Attorney for Plaintiff and Appellant
3535 South 3200 West
Salt Lake City, Utah 84119

CERTIFICATE

On the 21 day of May, 1979, I personally delivered to the below-named attorneys two copies each of Appellant's Brief:

M. David Eckersley, Esquire
Attorney for Respondents
Suite 500
Ten West Broadway
Salt Lake City, Utah 84101

Frank V. Nelson
Assistant Attorney General
State Capitol Building
Salt Lake City, Utah 84114

Mikel M Boley

Mikel M. Boley