1979

Donald O. Martinson v. The Industrial Commission of Utah et al : Brief of Defendants

Utah Supreme Court

IN THE SUPREME COURT

OF THE STATE OF UTAH

DONALD O. MARTINSON, :

Plaintiff, :

vs. : Case No. 16345

THE INDUSTRIAL COMMISSION OF UTAH, W-M INSURANCE AGENCY, INC., and THE STATE INSURANCE FUND, :

Defendants. :

BRIEF OF DEFENDANTS

Writ of Review from an Order of the Industrial Commission of Utah

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TABLE OF CONTENTS

CASES CITED

STATUTES CITED

AURHORITIES CITED

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DONALD O. MARTINSON,	:	
Plaintiff,	:	
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BRIEF OF DEFENDANTS

STATEMENT OF THE NATURE OF THE CASE

Donald O. Martinson filed a claim for compensation with the Industrial Commission of Utah alleging that he was entitled to workman's compensation benefits as the result of injuries received in an accident occurring on November 21, 1976. Liability for benefits was denied by the compensation insurance carrier on the basis that the injuries were not received while Mr. Martinson was in the course and scope of his employment with W-M Insurance Agency, Inc.

DISPOSITION BY THE INDUSTRIAL COMMISSION

Following a formal hearing held on June 9, 1978, Administrative Law Judge Keith E. Sohm entered Findings of Fact, Conclusions of Law and an Order denying Mr. Martinson's claim and dismissing his application. Mr. Martinson made a

timely Motion for Review with the Industrial Commission as a whole, and on February 8, 1979, the Commission entered an Order affirming the ruling of the Administrative Law Judge.

RELIEF SOUGHT ON APPEAL

Defendants respectfully request that the Order of the Industrial Commission be affirmed and the claim of the plaintiff dismissed.

STATEMENT OF FACTS

Defendants submit the following statement of facts as additions and exceptions to those recited by plaintiff.

Approximately a week prior to the grand opening of the Kimball Art Center in Park City, Utah, Mr. Martinson received an invitation from Mr. Robert Williams to attend that opening and stay as his guest with himself and his wife at their condominium in Park City. (R. 23-24, 41-42, 51) Mr. and Mrs. Williams were friends of Mr. Martinson and had entertained him previously at their Park City condominium. (R. 23, 41-42) Mr. Williams was also an unsalaried member of the Board of Directors of the Kimball Art Center. (42)

On the day of the grand opening, Saturday, November 20, 1976, Mr. Martinson arrived in Park City at approximately 2:00 o'clock in the afternoon (R. 21A) and met Mr. Williams at the Center. Due to the opening the manager of the Center was busy and unable to supply Mr. Martinson with all of the information he desired that day (R. 40-41) concerning the inventory on hand for the opening exhibition, in which Mr. Martinson was interested to verify that all the inventory

was adequately insured.

Mr. Martinson spent Saturday evening dining and socializing with Mr. and Mrs. Williams and stayed at their condominium that night. He arose late the next morning and spent the afternoon discussing the Art Center account and other matters of mutual interest with Mr. Williams. Mr. Martinson was drinking during these discussions and prior to his departure back to Salt Lake at approximately 5:30 o'clock that evening. Shortly before leaving he telephoned Mr. Donald R. Hurst in Salt Lake to report to him that he was increasing the coverage on the Art Center account.

While driving back to Salt Lake City, Mr. Martinson was involved in an automobile accident. At the time of his hospitalization, over two hours after the accident, Mr. Martinson was found to have a blood alcohol level of .18 per cent. (R. 177-78)

The Administrative Law Judge made the following Findings of Fact:

1. Mr. Martinson was not directed to attend the Park City opening by his employer; (R. 200)

2. Mr. Martinson had no ability to appraise art objects and the changes in coverage which were made on the Art Center's policy were made solely on the basis of reports made by the Art Center and could have been made from his office; (R. 200)

3. The trip made by Mr. Martinson, when viewed in light of the testimony as a whole, was primarily social in nature. (R. 201-02)

It should further be noted that Donald Hurst testified that the call he received from Mr. Martinson was regarded only as courtesy because Mr. Martinson had authority to place the business under binder without making any request or giving any notice to Hurst. (R. 63)

ARGUMENT AND AUTHORITY

POINT I - THERE IS AMPLE EVIDENCE IN THE RECORD TO SUPPORT THE INDUSTRIAL COMMISSION'S ORDER DENYING BENEFITS TO PLAINTIFF.

In reviewing a decision of the Industrial Commission, this Court must take notice of the long established principles regarding the proper scope of such review. By statute, this Court is vested with jurisdiction to review Commission action and to set aside such action, "but only upon the following grounds: (1) That the commission acted without or in excess of its powers; (2) That the findings of fact do not support the award." Utah Code Ann. § 35-1-84 (1953). With regard to factual issues raised before the Commission, Utah Code Ann. § 35-1-85 (1953) provides that:

> 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.

This Court has repeatedly emphasized that the findings of fact made by the Commission are not subject to review and action based on those findings cannot be disturbed on review unless they were made in disregard of substantial and uncontradicted evidence to the contrary and are totally without reasonable basis in the record. See Batchelor v. Industrial Comm'n, 86 Utah 261, 42 P.2d 966 (1953); Commission of Finance v. Industrial Comm'n, 121 Utah 83, 239 P.2d

185 (1952); Vause v. Industrial Comm'n, 17 Utah 2d 217, 407 P.2d 1006 (1965); Evans v. Industrial Comm'n, 28 Utah 2d 324, 502 P.2d 118 (1972). The Court has also acknowledged that in cases where the evidence is susceptible to different conclusions, the Court will not weigh the evidence and draw its own conclusions but will abide by those of the Commission even if the Court might not have arrived at the same result. Board of Education v. Industrial Comm'n, 102 Utah 504, 132 P.2d 381 (1942); Peterson v. Industrial Comm'n, 102 Utah 175, 129 P.2d 563 (1942).

In Milkovich v. Industrial Comm'n, 91 Utah 498, 64 P.2d 1290 (1937), the Court reiterated what must be reflected in the Commission record before it could set aside findings of fact entered by the Commission. It was noted that to reverse the findings on strength strenght of contrary testimony before the Commission, it must appear at least that:

> (a) the evidence is uncontradicted, and (b) there is nothing in the record which is intrinsically discrediting to the uncontradicted testimony and (c) that the uncontradicted evidence is not wholly that of interested witnesses or, if the uncontradicted evidence is wholly or partly from others than interested witnesses, that the record shows no bias or prejudice on the part of such other witnesses, and (d) the uncontradicted evidence is such as to carry a mearsure of conviction to the reasonable mind and sustain the burden of proof, and (e) precludes any other explanation or hypothesis as being more or equally as reasonable, and (f) there is nothing in the record which would indicate that the presence of the witnesses gave the commission such an advantage over the court in aid to its conclusions that the conclusions should for that

reason not be disturbed.

64 P.2d at 1292. See also, Norris v. Industrial Comm'n, 90 Utah 256, 61 P.2d 413 (1936).

In the case at bar, primarily on the basis of the applicant's own testimony, the Administrative Law Judge who heard that evidence and had an opportunity to evaluate the demeanor and credibility of the witnesses, found that Mr. Martinson was not acting within the course and scope of his employment at the time of the accident. This conclusion resulted from the findings that Mr. Martinson was invited to Park City by a long-time firend and former employer to stay at his condominium; that much of what transpired while Mr. Martinson was in Park City was social in nature and not realted to his employment (of which the evidence concerning alcohol consumption was merely some corroboration); that he was not directed to Park City by his employer; and that the limited job related activities performed while on the trip could have been accomplished without making the journey.

The evidence in the record supporting these findings is substantial. Mr. Martinson testified as to his friendship and previous social dealings with Mr. Williams (R. 41-42), his social activities on Saturday and Sunday, including drinking, (R. 53, 55, 68-69) his inability to appraise art objects and need to rely on records of the Art Center (40-41, 50-51), the fact of his invitation by Mr. Williams (R. 51), and the fact that his employer had not specifically asked or directed him to attent the grand opening

(R. 38)

Based upon this evidence the Administrative Law Judge, after citing Prof. Larson's treatise on the effect of dual purpose trips and the tests to be utilized in determing whether such trips are properly considered as within the course and scope of employment, indicated that he found Mr. Martinson's trip not to be within his employment duties and, therefore, his accident not compensable. (R. 201-202)

The rule as expressed by Prof. Larson, and as quoted by the hearing officer, is as follows:

> The basic dual-purpose rule, accepted by the great majority of jurisdictions, may be summarized as follows: when a trip serves both business and personal purposes, it is a personal trip if the trip would have been made in spite of the failure or absence of the business purpose and would have been dropped in the event of failure of the private purpose, though the business errand remained undone; it is a business trip if a trip of this kind would have been made in spite of the failure or absence of the private purpose, because the service to be performed for the employer would have caused the journey to be made by someone even if it had not coincided with the employee's personal journey.

IA. Larson, Workman's Compensation § 18.12 at 4-228 (1978).

The Administrative Law Judge found that "(t)aking the testimony as a whole it is obvious that to quite an extent the intent of the trip was social." (R. 201) In this proceeding, the plaintiff is not atacking the adoption of the rule as announced by Prof. Larson, but is arguing that there should have been no finding that Mr. Martinson's trip had a primarily social purpose. This question of fact was resolved by the Commission against the plaintiff and, as

demonstrated in the above cited authority, is not open to review in these proceedings. In fact, a strong argument could be made that an award of compensation would have to be set aside on review.

In the case of Board Education v. Industrial Comm'n, 102 Utah 504, 132 P.2d 381 (1942), this Court annulled an award made by the Industrial Commission where the evidence regarding course and scope of employment was of a similar quality with that presented here. In that case, an employee of the Logan City Board of Education had made application for benefits as a result of an automobile accident he suffered while returning to Logan from Brigham City. The testimony showed that he had gone to Brigham City to deliver a lecture on recreation and participate in a basketball game. The employee testified that as the recreational director for the Board of Education he conducted these types of activities frequently, and when he had asked his supervisor about how often and when he should do so he was instructed to use his own judgment.

On this set of facts the Court set aside his award, holding that absent more direct proof that his duties required his attendance in Brigham City there was no competent evidence upon which to base an award. This result was reached despite the Court's acknowledgment that the findings of the Commission should be presumed correct and not reviewed unless they were clearly without reasonable basis. In the present case, where there is no direct evidence that the plaintiff was requested or expected to attend the

Park City affair, other than the plaintiff's own assumption that he should, the same result might be mandated even if the Commission had made findings favoring the plaintiff's application.

While plaintiff has drawn particular attention to those portions of the Administrative Law Judge's opinion which concern the effect of Mr. Martinson's intoxication at the time of the accident, it should be noted that the first reason given for the denial of benefits, and one which is a sufficient legal basis, was that the whole trip was outside of the course and scope of employment regardless of Mr. Martinson's state of intoxication at the time he sustained his injuries. The fact of his drinking while in Park City is merely some evidence of the trip's social, as opposed to business, motivation. This is especially revealing in light of Mr. Martinson's own recognition that they had diminished abilities as an employee when drinking and that it had been previously pointed out to him that it would be best if he refrained from drinking while working. (R. 36,56).

The record as a whole is certainly susceptible to the interpretation that Mr. Martinson was invited by a long standing acquaintance and friend to meet with him on one of his infrequent visits from out of state; that the occasion of the opening of the Art Center, while being the focus of the meeting, was basically a social affair which occupied the resident manager's time and attention to such a degree that transaction of any real business was impractical; and that the little business done on the trip could have been

accomplished in another manner and didn't require Mr. Martinson attendance on the weekend in question. The plaintiff is arguing that these conclusions are wrong, but is failing to recognize that if there is evidence to support them that this Court cannot set them aside.

In considering this matter, it would be wise to bear in mind the admonition expressed in Evans v. Industrial Comm'n, 28 Utah 2d 324, 502 P.2d 118 (1972):

> This type of case, where an employee is injured and no doubt needs help, and where society might, if possible, under existing law, furnish help, --taxes the emotions of people in the judicial department. It suggests an urgence to overrule administrative agencies charged with processing these claims, so as to provide relief without statutory sanction, to which we cannot succumb.
>
> We conclude here that however sincerely someone else may differ on evidence that justifies the Commission's conclusion, we must affirm.

28 Utah 2d at 326.

Given the substantial evidence supporting the Commission's findings, defendants would submit that the factual conflicts resolved by that body are not properly subject to review and the order based on those findings should be affirmed.

POINT II - EVEN ASSUMING THAT PLAINTIFF HAD BEEN IN THE COURSE AND SOCPE OF HIS EMPLOYEMNT WHEN IN PARK CITY, HIS SUBSEQUENT CONDUCT CONSTITUTED A MATERIAL DEVIATION FROM EMPLOYMENT, PRECLUDING COMPENSATION.

Even if it were to be assumed that Mr. Martinson's trip was within his course of employment when it began, it is fundamental that an employee can, by voluntarily participating in activities which unjustifiably increase the hazards associated with his employment, forfeit the protections of

workman's compensation. Such conduct by the employee constitutes a deviation from his course of employment. As the New York Court of Appeals noted in Pasquel v. Coverly, 4 N.Y. 2d 28, 148 N.E.2d 399, 901 (1958):

> An accident does not arise 'out of' an employment when it has been occasioned by some merely personal indulgence or gratification. Departure from the course of employment does not always depend entirely on whether an employee, in making a business trip, was on the route to or from the place where the business was to be transacted. It may also consist in deviation from the procedure which would normally be followed in accomplishing the business errand, where the death or disability has been the consequence of the deviation. Thus if an employee were sent on a mission which would ordinarily be accomplished in some simple and safe manner, but nevertheless undertook to perform it in some extraordinary and hazardous fashion, there is little doubt that an accident would not be compensable if it arose from the bizarre and dangerous manner of performance which the employee had selected. Thus, for instance, if an employee were sent on an errand requiring him to cross a bridge that could have been done in perfect safety, but instead, the employee chose for his amusement to cross by walking across a grider of some uncompleted nearby bridge from which he fell into the river, recovery in Workman's Compensation would not be available. Such an accident would not have arisen 'out of' the employment, even though, at the time, the employee might have been on the direct route to or from the place of transaction of the employer's business.

In the case at issue, Mr. Martinson's excessive consumption of alcohol was a purely personal activity which rendered his subsequent return trip to Salt Lake extraordinarily hazardous and which constituted a material deviation from his course of employment. The evidence offered at the time of hearing demonstrates that Mr. Martinson's level of blood alcohol over three hours after the time of his last drink was in excess of twice the legal presumption of intoxication set forth in Utah Code Ann. § 41-6-44 (3) (1953), as noted by the Administrative Law Judge.

In voluntarily incapacitating himself in this manner, the applicant's actions increased immeasurably the danger involved in his trip back to his place of residence, both to himself and others, and it would be wholly inconsistent with sound public policy for this Court to find his employer liable for the all too foreseeable result of such a personal decision.

Prof. Larson, in his treatise on compensation law, has noted that "if the incidents of the deviation itself are operative in producing the accident, this in itself will weigh heavily on the side on non-compensability, . . ." IA. Larson, Workman's Compensation Law § 19.61 at 4-263 (1972). Larson goes on to note that

> (i)n the prolific category of deviations involving drinking, the fact that drinking usually combined with driving, in itself added a notorious hazard and has undoubtedly been a factor in some denials of compensation, whether specifically mentioned or not.

IA. Larson, supra, at 4-264. For a Utah case dealing with a deviation from employment involving socializing and drinking, see Morley v. Industrial Commission, 23 Utah 2d 212, 459 P.2d 212 (1969). In that case, this Court rejected the applicant's contention that his actions had been merely an accommodation to a prospective customer and held that his activities, though tangetially related to an employment purpose, were a clear deviation from his duties and not compensable. See also, Price v. Shorewood Motors, Inc., 214 Wis. 64, 251 N.W. 244 (1933).

The plaintiff has urged that Utah's compensation scheme contemplates only one effect to be given to an

employee's consumption of alcohol, namely the 15% reduction in benefits specified in Utah Code Ann. § 35-1-14 (1953). Defendants would urge that this statutory penalty is only operative when it has been shown that the employee was acting within the course and scope of his employment, and that in making that threshold decision the fact finder is free to utilize all criteria which have been developed for gauging "course and scope," including noting types of conduct which manifest such extreme deviation from employment duties that the nexus between job activity and injury is too attenuated to invoke any compensation coverage.

In the circumstances of the present case, defendants submit that it would not be arbitrary and capricious for the Commission to rest its denial upon a finding that the plaintiff had, through purely personal decisions regarding how he would conduct himself, so drastically increased the hazards of his travel as to constitute a deviation from employment sufficient to remove himself from the protections afforded employees, including those of section 35-1-14.

CONCLUSION

The basic contention of the plaintiff in this proceeding is that the Commission made erroneous factual determinations when evaluating the evidence presented to them. The authority cited herein demonstrates that this Court should not and will not review such decisions by weighing the evidence to determine how the Court would have resolved those issues, but will presume those findings to be correct if there is any reasonable basis upon which they might rest. Defendants submit that there is substantial evidence to support the

findings and conclusions of the Commission and that they should therefore be affirmed.

DATED this_____day of May, 1979.

BLACK & MOORE

M. DAVID ECKERSLEY

MAILING CERTIFICATE

On this____day of May, 1979, I mailed a copy of the foregoing Brief to Kent Shearer, MOCK, SHEARER & CARLING, Attorney for Plaintiff, 1000 Continental Bank Bldg., Salt Lake City, Utah 84101.

Secretary