1979

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

Utah Supreme Court

M. David Eckersley; Attorney for Defendants;
Kent Shearer; Attorney for Plaintiff;

IN THE SUPREME COURT

OF THE STATE OF UTAH

DONALD O. MARTINSON, :

Plaintiff-Appellant, :

vs. : Case No. 16345

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

Defendants-Respondents. :

BRIEF OF APPELLANT

Writ of Review from the Order of the Industrial Commission of Utah, Honorable Keith E. Sohm, Administrative Law Judge

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STATEMENT OF NATURE OF CASE

This is an application by plaintiff Donald O. Martinson to determine his entitlement to workmen's compensation benefits arising out of a November 21, 1976 motor vehicular collision.

DISPOSITION IN THE INDUSTRIAL COMMISSION

After a hearing on liability only, Honorable Keith E. Sohm, Administrative Law Judge, entered Findings of Fact, Conclusions of Law and Order denying plaintiff's entitlement and dismissing his petition. (R. 199-206). Thereafter, the Commission denied plaintiff's Motion for Review. (R. 209-10).

RELIEF SOUGHT ON APPEAL

Plaintiff Martinson seeks reversal of the Administrative Law Judge's Order and the Commission's denial, and direction of an Order establishing his entitlement to such workmen's compensation benefits as are established following review by a medical panel.

STATEMENT OF FACTS

A summary of undisputed facts follows:

At all times here pertinent, Martinson--in the liability insurance business since 1949--was a vice president, director and employee, paid on a commission basis, of W-M Insurance Agency, Inc., Salt Lake City. He earned $48,173.20 in 1976. He was primarily engaged in production, for which he received 60%--and W-M 40%--of commissions upon premiums generated and renewed. (R. 2, 19-20, 26,30).

W-M asked Martinson to spend mornings in the office to attend to details on his accounts. Afternoons, he generally was out calling on old business and creating new. Also, he occasionally worked on business accounts on weekends. Himself a resident of Salt Lake City, Martinson had no territorial limits on insurance solicitation; and, in fact had a customer as far away as Mesa, Arizona. (R. 19-21).

One such customer--for which Martinson made his sole out-of-town trip in November, 1976--was Kimball Art Center, Park City. An unsalaried Center sponsor and director was Bob Williams President of Arthur G. Rubin and Company, a Los Angeles insurance agency. Martinson during 1966-69 had worked for Williams and was a friend, so the latter, who placed the Center insurance, did so with W-M through Martinson, resulting, of course, in the standard 40%-60% premium split. (R. 20-22, 41-42, 46, 63).

The policy issued was a Fireman's Fund M X P or portfolio policy. It covered both the Center's construction phase and the art exhibition thereafter. (R. 20-21A, 60).

The Center's opening for exhibition occurred on Saturd

November 20, 1976. For the event, a large number of art objects--such as paintings, sculptures and crafts--had been assembled on the site. (R. 21).

Earlier in the week, Williams had called Martinson from Los Angeles and requested the latter to come to Park City to make a complete inspection of the display in order to assure that the insurance coverage was adequate. Also, he invited Martinson on the 20th to be an overnight guest of his wife and him at his Park City condominium. The Williams arrived in Park City the 18th or 19th. (R. 20-21, 24, 41, 51-52).

Although Martinson does not pretend to appraise art values, it is usual for an agent personally to examine large displays at insured museums. (R. 41, 49, 51). W-M's president was aware of Martinson's trip to Park City for that purpose, did not object, and--in Martinson's characterization--"if I had said I wasn't going, he would have gone right through the ceiling." (R. 38-39).

On the 20th, Martinson drove to Park City alone, taking his Kimball Art Center insurance file, a change of clothes and a kit to stay the night. (R. 41, 51-52). He arrived in Park City between noon and two p.m., and met Williams. (R. 21A). They looked over the Center items, which involved getting a final list of everything that had come in from all over the country before display. (R. 21). Although the staff had recorded almost, but not everything, such records had not previously been communicated to Martinson. Also the manager was busy, because of the many persons in attendance. (R. 40). Therefore, the compilation was not completed until Sunday, the 21st. Williams got records on

the 20th, and likely the 21st. (R. 22-23). On the 21st, the two went over the records from late in the morning until 4:30 or 4:45 p.m., at which time they reconciled a $55,000 insurance shortage. (R. 24).

On Sunday, the 21st, Williams further gave Martinson a lead on possible Utah insurance business with National Lead. (R. 47-48). After he returned to work following the collision, Martinson pursued, without avail, that lead. (R. 53-54).

The $55,000 deficiency having been confirmed, Martinson called from Williams' condominium to Donald O. Hurst at the latter's Salt Lake residence. Hurst was resident vice president and manager of Firemen's Fund (which had issued the M X P or portfolio policy). They arranged for a binder for the $55,000 additional coverage, effective as of (if not before) the call. W-M earned a premium for such additional coverage. (R. 24-25, 39-40, 52, 57, 61-62).

Business completed, Martinson left the Williams' condominium at 5:00 or 5:30 p.m. to drive back to Salt Lake. (R. 26). As he approached the Parley's Summit incline, he was driving his car at a speed of 60 to 70 mph, slowing to 50 to 60 mph at the crest of the incline. It was going into dusk. The weather was clear. The road was dry. There was no traffic. (R. 31-32).

As Martinson traversed the crest, he saw directly ahead of him--30 to 60 seconds distant--a truck in his lane, going much more slowly than he. He did not know how stable his automobile would be were he to execute a quick turn; he feared he would roll. He determined it would be safer to go into the back of the truck, which he did. Although he thinks he applied the brakes, the

investigating officer was of the opinion he did not. (R. 26, 32).

* *

Martinson's blood sample, taken at 8:36 p.m., November 21, contained .18% alcohol by weight. (R. 7, 63-64, 177-78). Martinson and Williams had consumed spirituous beverage during their afternoon conference, but Martinson cannot recall the quantity although he characterized it as "social drinking," and "over a long period of time." (R. 53, 55, 69). He had nothing to drink after leaving Williams and until the collision. (R. 69-70).

The principals did not consider Martinson to be alcoholically impaired as he left to come home. Hurst, who has known Martinson socially for 40 years and who has seen him drink, said, "I had no idea that he had had a drink, or was partying. As far as I was concerned, he was calling on business, and I knew that he was attending the opening of that Kimball Art Center." (R. 62). Martinson himself had "a very clear recollection of leaving the condominium, driving down the freeway, and noticing that it was a beautiful day. I didn't feel like I was drunk, or that I couldn't handle a car." (R. 55). Williams, after the fact, told Martinson, "'Had we thought,' (that is he and his wife) 'that you were too intoxicated to drive, we would have asked you to stay over.'" (R. 33).

In the course of his business, approximately 30% of Martinson's customer and potential customer contacts involve drinking to varying degrees. (R. 57, 70). W-M Insurance had no hard and fast rules about tippling while producing. Martinson did suggest to a fellow employee that it would be best if he

would abstain at lunch. The employee agreed. It was pointed out that such drinking was something that was inhibiting his work. (R. 35-36). Previously, Martinson had counseled with a physician regarding a depressive reaction to imbibing. He had received no prior drunk driving citations. (R. 34-35).

* *

As a result of the collision, Martinson suffered extensive injuries, missed a great deal of work, has undergone repeated and prolonged hospital and outpatient treatment, and has incurred extensive obligations. (R. 5-6, 8-10, 27-30, 71-176). As previously noted, no medical panel evaluation was had before the Commission.

ARGUMENT

POINT I

ABSENT INTOXICATION, PLAINTIFF'S COLLISION AROSE OUT OF OR IN THE COURSE OF HIS EMPLOYMENT.

Clearly Martinson's .18% blood alcohol count, as well as the drinking activity productive thereof, was central to the Administrative Law Judge's rationale and decision--both of which were adopted, without comment, by the Commission. The imbibing is mentioned, usually in multiples, on no less than four of the five full pages of the Findings, Conclusions and Order. (R. 200, 202-04). It is a fair conclusion that--had everything else been exactly as it was, but non-alcoholic instead of spirituous beverages consumed--Martinson would have been held entitled to compensation.

The undisputed facts dictate such a result.

First, the nature of the trip. Plaintiff was a valuable employee to W-M, Inc., for instance, its income, based up-

Martinson's production, was 40% of commissions he generated, or $32,115.47 (Martinson's 60% being $48,173.20).

Far from being tied to a desk or to explicit instructions, Martinson's sales activities took him from the office on afternoons and occasionally on weekends. They took him as far away as Mesa, Arizona.

So, it was both natural and proper, when a preexisting policy holder--Williams for Kimball Art Center--asked him to come to Park City to inspect and inventory exhibits in order to update the coverage under that very policy, that Martinson would do so. Not only had Martinson and W-M reaped financial returns from the original policy; they would do so again directly from any increase in coverage, and indirectly from the good will attendant to assiduous servicing of insurance accounts.

Therefore, while W-M may not explicitly have directed Martinson's trip, W-M naturally did not object thereto, and "would have gone right through the ceiling" had Martinson refused to go.

Second, the necessity of the trip. Martinson's Park City activities produced a binder, effective November 21 for the $55,000 additional Center exhibits.

The Administrative Law Judge is confused as to the nature of an insurance binder. He recites that, when Martinson called the Fireman Fund's Hurst, he "asked for additional coverage." (R. 200, emphasis supplied).

To the contrary, Martinson obtained additional coverage, effective immediately. Said Hurst, "Well the binder was placed as of that minute, so far as I was concerned." (R. 62A).

The fact that the binder was oral gives rise to no distinction. Black's Law Dictionary (Fourth Edition), p. 213 defines the term:

> BINDER. The memorandum of an agreement for insurance, intended to give temporary protection pending investigation of the risk and issuance of a formal policy. Seiderman v. Herman Perla Inc., 268 N.Y. 188, 197 N.E. 190, 191.
>
> A verbal contract of insurance in praesenti, of which the insurance agent makes a memorandum, temporary in its nature, Norwich Union Fire Ins. Society v. Dalton, Tex. Civ.App., 175 S.W. 459, 460; thus constituting a short method of issuing a temporary policy to continue until execution of the formal one, Sherri v. National Surety Co., 243 N.Y. 266, 153 N.E. 70, 71. Carew, Shaw & Bernasconi v. General Casualty Co. of America, 189 Wash. 329, 65 P.2d 689, 695.

Assume, for a moment, that Martinson had not gone to Park City, that he and Williams had not assembled, inspected and compiled records, and that a binder in consequence had not been placed. Assume, further, that a casualty had destroyed the additional $55,000 in art objects on the night of November 21-22. In that event, Kimball Art Center would have absorbed the additional loss and W-M most likely would have lost a customer alienated by the inattentiveness of W-M's services.

Likewise, it was a business necessity for Martinson to work on the 21st, for all records were not available until then.

It follows that Martinson's Park City activities were compelled by business considerations, authorized in the charact[illegible] of insurance enterprises, and distinctly necessary. In every way, they met the test of Ford Motor Company v. Industrial Commission, 64 Utah 425, 231 Pac 432 (1924). Martinson's promotion of W-M's business was not remote. It was real and directly facili-

tated W-M's financial interests.

POINT II

UNDER THE UTAH STATUTE, INTOXICATION REDUCES, BUT DOES NOT ELIMINATE, COMPENSATION.

Workmen's Compensation laws vary from state to state. In consequence, the impact of intoxication in one jurisdiction can be quite different than that in another, 81 Am. Jur. 2d, Workmen's Compensation Sec. 234, pp. 886-87.

Effective July 1, 1921, the Utah result of intoxication has been governed by Laws of Utah 1921, Chap. 67. As now codified 35-1-14, UCA 1953, it reads:

> Penalty for failure to use safety device.-- Where injury is caused by the willful failure of the employee to use safety devices where provided by the employer, or from the employee's willful failure to obey any order or reasonable rule adopted by the employer for the safety of the employee, or from the intoxication of the employee, compensation provided for herein shall be reduced fifteen per cent, except in case of injury resulting in death. (Emphasis supplied.)

The legislature having so mandated, decisions from states without a comparable statute are more misleading than helpful. Conversely, those from jurisdictions which have adopted a similar scheme have great persuasive weight. Two such entities are Wisconsin (15% reduction) and Colorado (50% reduction).

In Gimbel Bros. v. Industrial Commission, 229 Wis. 296, 282 N.W. 78 (1938), a delivery truck driver dropped off merchandise at a customer's tavern. He then partook of the tavern's alcoholic liquid wares until he became staggering, vomiting drunk. Nonetheless, the driver continued his deliveries

and, while so occupied, lost control of the truck, and collided with a lamp post. The Wisconsin Supreme Court held the facts did not preclude an 85% recovery. It said at 282 N.W. 80:

> If it had been the intention of the legislature to penalize employees who violated any law either willfully or otherwise while in the course of their employment, they would have so provided. As the Compensation Act now provides, the only penalty visited on employees where injury results from their intoxication is a reduction of 15% from the amount they would otherwise be entitled to.

In Electric Mutual Life Ins. Co. v. Industrial Commission, 154 Colo. 491, 391 P.2d 677 (1964), a General Electric Company technician was in a one-car accident returning from an out-of-town trip. He had a .195% alcohol blood level. The Colorado Supreme Court held the facts did not preclude a 50% recovery. It said at 391 P2d 679:

> The only effect that intoxication could have in this case would be to reduce his benefits by 50%; it had nothing to do with the question as to whether the employee sustained injuries arising out of and in the course of his employment.

Undoubtedly the evidence justified a finding that--at the time of his accident--Martinson was intoxicated. His .18% blood alcohol level was .08% higher than the criminal level, 41-6-44.2 UCA 1953. It was .10% higher than the present--and .03% higher than the pre-1967--presumptive level, 41-6-44, 1953. Therefore--although there was contrary evidence--the fact finder's determination of drunkenness cannot here be attacked.

What can, and should be, assaulted is the Administrative Law Judge's and the Commission's cavalier disregard of

35-1-14. Although cited to both (R. 195, 211), neither dealt with it. Here, it is controlling.

Morley v. Industrial Commission, 23 U.2d 212, 459 P2d 212 (1969), cited by the Administrative Law Judge, is not--nor does it pretend to be--a 35-1-14 decision. In that matter, unlike this, facts in contravention of the claimant's recital both were elicited and compelling. There, unlike here, the facts demonstrated an all-inclusive private purpose.

At one point, the Administrative Law Judge opined, "We can easily infer that his (Martinson's) boss did not encourage him to drink with his clientel but would and probably did discourage said actions." The inference is at odds with the total evidence. (R. 35-36, 57, 70). But--even if the inference is accepted--it would constitute nothing more than a "reasonable rule for the safety of the employee," which also is specified by 35-1-14 and which could be no more than a ground additional to intoxication for a 15% reduction.

The Legislature, not the Commission, draws Utah's Workmen's Compensation policy. The Commission cannot properly ignor the mandate of 35-1-14.

CONCLUSION

The trip from which Martinson was returning at the time of his collision was a necessary business one. A finding of intoxication will reduce, but not preclude, compensation. The case should be remanded to the Commission for reference to a medical panel, and for such further proceedings as are appropriate.

Respectfully submitted,

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CERTIFICATE OF DELIVERY

I certify that I personally delivered two copies of the foregoing to:

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DATED this 30th day of April, 1979.

Kent Shearer