1980

Michael Prows v. Industrial Commission of Utah, Bergin Brunswig Company, And Associated Indemnity Company : Reply Brief of Plaintiff-Appellant

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

MICHAEL PROWS, :

Plaintiff-Appellant, : Case No. 16456

vs. :

INDUSTRIAL COMMISSION OF UTAH, :
BERGIN BRUNSWIG COMPANY, AND
ASSOCIATED INDEMNITY COMPANY, :

Defendants-Respondents :

REPLY BRIEF OF PLAINTIFF-APPELLANT

AN APPEAL FROM THE ORDER OF THE DEFENDANT
DENYING WORKMEN'S COMPENSATION BENEFITS
TO THE PLAINTIFF

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NATURE OF THE CASE

This is an action brought by the Plaintiff-Apellant to obtain Workmen's Compensation benefits for injuries sustained while at work.

DISPOSITION OF CASE BY INDUSTRIAL COMMISSION

Following an evidentiary hearing held on January 4, 1979, the Industrial Commission denied any benefits to the Plaintiff-Appellant on the basis that his injuries sustained during work were not compensable Utah State law.

RELIEF ON APPEAL

Appellant seeks reversal of the Industrial Commission's order, and for an Order awarding him the benefits allowed by law.

STATEMENT OF FACTS

Plaintiff-Appellant relies upon his rendition of the facts stated in his earlier brief as supported by the factual statement of the Defendant.

ARGUMENT

POINT I

DEFENDANT HAS MISCONSTRUED THE FACTS AND PRESENT LAW

In any legal forum, the parties thereto are bound to disagree somewhat as to the facts and to inferences which can be drawn from such facts. However, Defendant has so stretched the facts herein that Plaintiff-Appellant feels impelled to reply to the most blatant misconstructions.

1. In its brief, Defendant continuously refers to Plaintiff-Appellant as the "aggressor" of the horseplay involved herein.

Such an assertion is mere wishful thinking. Defendant admits that Plaintiff-Appellant was performing his assigned duties when he was attacked by two fellow employees (Defendants Brief, pp. 3, 20). Two fellow employees flipped elastic bands at the Plaintiff-Appellant. (R. at 19, 36). One of the two "attackers" thereupon took an eighteen (18) inch piece of wood and rushed the Plaintiff-Appellant in a playful manner, pretendi

the stick was a sword. (R. at 19). In self defense, Plaintiff-Appellant grabbed the stick out of the fellow employees grasp. Plaintiff thereupon took one of the elastics and the wooden stick and attempted to flip the stick away "into the air". (R. at 30). The full cycle of the foregoing events probably took less than thirty (30) seconds. Nevertheless, Defendant argues that although attacked by fellow employees, although using only those items by which he was attacked, and although he only tried to flip those items away, somehow that chain of events transformed Plaintiff-Appellant into the "aggressor" and out of the realm of compensation benefits.

Such logic is an attempt to distort the facts from what really happened --- Plaintiff-Appellant was attacked while engaged in his work. In an attempt to flip away the sword and rubber band by which he had been attacked, he was injured. Such an injury, as described by earlier cases of this court, is clearly within the bounds of compensability.

2. Defendant asserts that Plaintiff-Appellant has not only failed to specify alleged errors in the Administrative Law Judge's Findings, Conclusions, and Order, but that Plaintiff-Appellant has somehow waived such objectives.

Aside from the fact that the Industrial Commission itself admitted in its Order Denying Review that the Findings, Conclusions, and Order were "not correct" (R. at 97), Plaintiff-Appellant very exhaustively treated each such error in his

"Motion for Review of Order" (R. at 89). Such Motion was not only strenuously made in the lower forum but is included as part of the record on appeal.

It seems rather incongruous to argue that even though the Industrial Commission admitted the errors, Plaintiff-Appellant has now waived them on appeal despite his reference to such admission and his reference to the record wherein he more adequately corrected the errors

The reference to the medical panel report is only indicative of the amount of care taken in the preparation of the Findings, Conclusions, and Order by the Administrative Law Judge.

3. Defendant's analysis of the landmark case of Twin Peaks Canning Co., et al v. Industrial Commission of Utah, 57 Utah 589, 196, Pac. 853 20 A.L.R. 872 (1921) is also misleading. Defendant asserts that the injury therein occured during activities of work. However, the injury occurred at a time when the "aggressor" had completely abandoned his work. As stated by the Court:

> "Neither the deceased nor Mitchell was required to perform any duties whatever on the second floor, nor was either required to go there for any purpose." 196 P. at 854

The Court also stated:

> "The accident thus occured as the result of what in the books is ordinarily denominated as practical joking, horseplay, or pranks." 196 P. at 855.

Despite Defendant's attempts to distinguish Twin Peaks from the present situation, despite Defendant's attempts to minimize the case's significance because of its age, despite Defendant's attempts to argue that the law should be different today than it was earlier, and despite Defendant's reference to the case law of other states and philosopichal treatises on theoretical propositions for Workmen's Compensation benefits, the law in Utah is still the same and Twin Peaks is totally on point.

To assert that Workman's Compensation benefits should be denied to Plaintiff herein who was attacked while working but to allege that the aggressor-deceased in Twin Peaks was properly awarded compensation lacks inconsistency at best. Furthermore, Defendant assails Plaintiff's citation of older cases but does not hesitate to refer itself to the Commercial Casualty case (1928), the Sullivan case (1932), the Pacific Employers case (1936) the Horn case (1940), etc. Plaintiff-Appellant asserts that the age of the case, although noteworthy, does not make the legal arguments therein obsolete, particularly when they have not been overturned. The Twin Peaks case has been specifically reaffirmed several times since its decision. See e.g. M & K Corporation v. Industrial Commission, 112 Utah 488, 189 P.2d 132 (Utah 1948).

4. Defendant's reference to case law of other states (as well as Plaintiff-Appellant's reference to such cases) must be viewed with guarded caution. The statutory prerequisites in other states often differ from that of the State of Utah. Even

as discussed in Twin Peaks:

> "In most of the states the statutes cover accidents 'arising out of and in the course of employment,' while our statute [cite omitted] covers all accidents 'arising out of or in the course of employment.' . . . It is important to keep the distinction in mind when the compensation cases from the various jurisdictions are considered." 196 P. at 856. (Emphasis added)

Thus, although interesting to note how other jurisdictions may have handled workmen's compensation claims, such decisions may be entirely inappropriate to Utah law for the reasons observed in Twin Peaks. Plaintiff-Appellant submits that the Utah case law is clear on the subject of accidents involving horseplay, and that what Defendant is really suggesting to this Court is that it overule nearly sixty years of precedent and to adopt the position of some other states whose statutory prerequisite are different than our own.

5. Defendant, in its brief, proposes this Court adopt the standard for "horseplay" cases proposed by Professor Arthur Larson in his treatise "Workmen's Compensation Law". Even if the Court were to adopt such a standard, the Plaintiff Appellant's injury would still fall within the bounds of compensation. Applying Professor Larson's test, the injury would have occurred as follows:

A. The extent and Seriousness of the Deviation. The Plaintiff-Appellant was engaged in his work at the time of the playful "attack" by his fellow employees. His only "deviation from that work was the normal response of self-defense to the

attack and in flipping away the objects which were directed towards him. Such a brief "deviation" from employment hardly qualifies as a serious departure from his assigned duties as to deny him Workmen's Compensation benefits.

B. Completeness of the Deviation. Plaintiff-Appellant has admitted that flipping rubber bands was not part of his assigned duties. As a result Defendant asserts Plaintiff-Appellant has admitted a complete abandonment of his work. Such is not the case. The "tools" of the horseplay were objects the employees worked with and provided by the employer; the horseplay itself was a normal occurrence at the warehouse, and the thirty-second deviation from work in the wake of an "attack" by fellow employees is hardly substantial under the circumstances. In retrospect, Plaintiff-Appellant can hardly imagine what more he could have done under the circumstances to merit compensation. Should he have ignored the flying rubber bands and sword attack or was he justified in defending himself and in shooting away the sword and rubber bands?

C. The Extent to Which the Practice of Horseplay Had Become an Accepted Part of Employment.

Despite Defendant's attempts to minimize the frequency of the rubber band fights, those who participated therein testified they occurred from "once a day or twice even" to "constantly" (R. at 22, 36). The supervisor testified he was not aware of their occurrence as frequently as that, but

was aware of their occurrence (R. at 46-48). An employer's ignorance of an activity is not proof that it doesn't exist.

Furthermore, the employer is charged with constructive knowledge that boys of youthful age are often involved in horseplay. As stated in Twin Peaks:

> "Every employer understands that, in case boys of immature years are employed, he is charged with notice of their natural propensities to congregate, to communicate, and to play with one another." 196 P. at 858.

Although Defendant argues that a boy of twenty-one years of age is no longer a boy, but a man of maturity and wisdom, Plaintiff-Appellant submits that there is no magic age at which one acquires those attributes and instantaneously casts aside his "natural propensities" for fun. The issue in this regard is one of degree, not whether he still retains all such propensities or has outgrown them all.

D. The Extent to Which the Nature of the Employment May be Expected to Include Some Such Horseplay.

Defendant argues in this respect that it was unforseeable to the employer that its employees "would flip elastics or other projectiles at each other". (Defendant's Brief, p. 17). This inconsistent statement follows just two pages in Defendant's brief from the readmission that the employment supervisor had "observed the elastic flipping" on several occasions. (Defendant's Brief, p. 15).

Thus, not only was such activity "foreseeable", the supervisor had specific knowledge that such activities existed.

Defendant quotes Professor Larson's hypothetical about young boys being hired to pick tomatoes and asserts that the employer should know that before long a tomatoe will be thrown.

Plaintiff-Appellant submits that playing young boys (or men as Defendant prefers to call them) in an environment of boxes held together by many rubber bands, that the employer should normally expect rubber band fights. Indeed, this case bears that expectation out.

CONCLUSION

The Workmen's Compensation statutes were enacted to limit the employers' liability towards multifarious employee lawsuits and to provide to employees a system of benefits for work-related injuries. To deny Plaintiff-Appellant such benefits in this case would not only be contrary to existing precedent but would contravene the policy of workmen's compensation laws itself.

RESPECTFULLY SUBMITTED this 11th day of January, 1980.

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CERTIFICATE OF MAILING

I hereby certify that on the 11th day of January, 1980, I mailed two true and correct copies of the above and foregoing Reply Brief of Plaintiff-Appellant, postage prepaid, to Stuart L. Poelman, 7th Floor Continental Bank Building, Salt Lake City, Utah, 84101.