

1979

Painter Motor Company and the State Insurance Fund v. Howard C. Ostler and the Industrial Commission of Utah : Brief of Plaintiffs

Utah Supreme Court

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Recommended Citation

Brief of Appellant, *Painter Motor v. Ostler*, No. 16598 (Utah Supreme Court, 1979).
https://digitalcommons.law.byu.edu/uofu_sc2/1863

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IN THE SUPREME COURT
OF THE STATE OF UTAH

PAINTER MOTOR COMPANY and the
STATE INSURANCE FUND,

Plaintiffs,

vs.

HOWARD C. OSTLER and the
INDUSTRIAL COMMISSION OF UTAH,

Defendants.

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Case No. 16598

WRIT OF REVIEW FROM AN ORDER OF THE
INDUSTRIAL COMMISSION OF UTAH

BRIEF OF PLAINTIFFS

M. David Eckersley
BLACK & MOORE
Attorney for Plaintiffs
500 Ten West Broadway Building
Salt Lake City, Utah 84101

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

FILED

SEP 17 1979

S. Rex Lewis
HOWARD, LEWIS & PETERSON
Attorney for Defendant
Ostler
P.O. Box 778
Provo, Utah 84601

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Assistant Attorney General
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Commission
State Capitol Building
Salt Lake City, Utah 84114

S. Rex Lewis
HOWARD, LEWIS & PETERSON
Attorney for Defendant
Ostler
P.O. Box 778
Provo, Utah 84601

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BRIEF OF PLAINTIFFS

STATEMENT OF THE NATURE OF THE CASE

Plaintiffs are seeking review of an Order of the Industrial Commission of Utah awarding workmen's compensation benefits to Howard C. Ostler for injuries received in the course and scope of his employment with Painter Motor Company, who is insured for the purpose of workmen's compensation by the State Insurance Fund.

DISPOSITION BY THE INDUSTRIAL COMMISSION

On March 14, 1978 Howard C. Ostler filed an application for workmen's compensation benefits wherein he alleged he was injured by accident while in the course and scope of his employment for Painter Motor Company on July 5, 1977. This application was subsequently amended to include an additional

claim for injuries received on March 4, 1977 as well. Following a formal hearing on July 26, 1978 and referral of Mr. Ostler to a medical panel, Administrative Law Judge Keith E. Sohm entered an Order on April 20, 1979, denying benefits. Mr. Ostler moved to have this Order reviewed by the Commission as a whole, who reversed the Administrative Law Judge and awarded benefits in an Order dated June 28, 1979.

RELIEF SOUGHT ON REVIEW

Plaintiffs are seeking to have the award of the Commission set aside and vacated.

FACTS

On March 4, 1977 Howard Ostler was employed by Painter Motor as a parts manager. On that day his duties included performing the drilling of holes in soffits to mount electrical boxes (R. 65-66). To do this he had to mount a ladder and lean in to the surface to be drilled, holding the drill up and away from his body. After performing this work for some period of time, Mr. Ostler noticed the gradual onset of back and shoulder pain which intensified as he continued working (R. 78). Arrangements were made to perform this work in a different manner, and Mr. Ostler continued working. Two days later he saw Dr. Birch in Nephi, Utah, who diagnosed his condition as bursitis. (R. 51, 67). He continued in his regular employment and lost no time from work.

On July 5, 1977 Mr. Ostler was involved in moving and loading boxes as a part of Painter Motor's general transfer of

the location of their business. After doing this throughout the morning, he again noticed the gradual onset of pain to his back, intensifying while he worked. (R. 78). He continued working and lost no time from the job from this complaint. He first saw Dr. Charles Smith, Jr., on August 21, 1977 for the back problem he felt had been brought on by the lifting. Mr. Ostler also testified that lifting boxes was a normal and usual occurrence in his job. (R. 76-77).

Prior to March 4, 1977 Mr. Ostler had an extensive history of previous back difficulties. From the time he was 16 until the age of 38, Mr. Ostler had recurring episodes of low back pain (R. 104). In 1968 he underwent two surgical procedures on his spine, a lumbar excision and fusion at the level of lumbar discs 2, 3 and 4, and a cervical disc excision and fusion at cervical discs 6 and 7 (R. 112, 104-105). Following these procedures he got along fairly well until 1977. The back pain which developed in 1977 was diagnosed as a degenerative disc condition which was treated surgically by extending his previous lumbar fusion one more disc. (R. 135). All of these surgeries were performed by Dr. Charles Smith, Jr.

ARGUMENTS

POINT I

THE EVENTS AS DESCRIBED BY DEFENDANT DO NOT CONSTITUTE AN "ACCIDENT" WITHIN THE MEANING OF THE WORKMEN'S COMPENSATION ACT.

The basic predicate for entitlement to workmen's compensation benefits is an injury by accident arising in the course and scope of employment. Utah Code Ann. §35-1-45 (1953).

This Court has repeatedly defined the term "accident" as "an unanticipated, unintended occurrence different from what would normally be expected to occur in the usual course of events." Church of Jesus Christ of Latter-Day Saints v. Industrial Comm'n., 590 P.2d 328, 330 (Utah 1979); Carling v. Industrial Comm'n., 16 Utah 2d 260, 399 P.2d 202 (1965). In the instant matter, Mr. Ostler's injury has not been shown to have been caused by such an accident. His testimony revealed that on two specific days in 1977 he developed symptoms of back pain while performing his normal work. On both occasions the pain came on gradually during the course of his work and intensified as the day wore on. He did not sustain any falls or traumatic contact with foreign objects, he merely became increasingly sore while working. He lost no time from work on either of these occasions and didn't miss any work until he underwent surgery for repair of a degenerative back condition which admittedly pre-dated both alleged "accidents."

All the medical testimony agreed that Mr. Ostler's work caused his back condition to become symptomatic and therefore precipitated the surgical repair and resultant physical impairment attendant to the lumbar fusion. However, it is clear from the medical records that the fusion itself was for a degenerative disc problem which pre-dated the industrial incident, (R. 96, 132) but which became symptomatic at work. This Court has previously noted that the performance of normal work duties causing an aggravation of a pre-existing

degenerative condition does not constitute an accident. In Redman Warehousing Corp. v. Industrial Comm'n., 22 Utah 2d 398, 454 P.2d 283 (1969), the Court held that a truck driver whose pre-existing back condition had been aggravated by performance of his usual duties had not sustained an injury by accident.

There is nothing in this record that shows any unusual event, or "accident," if you please, justifying compensability within the nature, intent or spirit of the workmen's compensation act. To conclude otherwise would insure every truck driver, every railroad engineer, every airplane pilot, and a lot of others, against a physiological malfunction or physical collapse of any of hundreds of human organs, completely unproven as to cause, but compensable only by virtue of the happenstance that the malfunction, collapse or injury occurred while the employee was on the job, and not home or elsewhere.

22 Utah 3d at 401.

The Court reached this result despite the medical panel's conclusion that the applicant's usual work had been the precipitating cause of his surgery and resultant disability.

In the very recent decision of Church of Jesus Christ of Latter-Day Saints v. Industrial Comm'n., supra, this Court annulled an award of the Commission after finding that the applicant's injury did not result from an accident. In that case, Ivan Thurman had suffered a herniated disc while at work simply by standing up after a rest period. This Court

indicated that such an injury was not the result of an accident. "Simply because the first onset of pain occurred during working hours, it does not follow that there is a compensable 'injury'." 590 P.2d at 330.

Similarly, it was held in Pintar v. Industrial Comm'n., 14 Utah 2d 276, 382 P.2d 414 (1963), that a back injury which developed over a period of time was not the result of an accident, with the Court noting that for an applicant to receive benefits it is

a prerequisite to compensation that his disability be shown to result, not as a gradual development because of the nature or conditions of his work, but from an identifiable accident or accidents in the course of the employment.

14 Utah 2d at 277.

In the instant case there is no question that Mr. Ostler's back pain came about as a result of his work. But there was nothing about the nature of his work when the symptoms began which was unusual, other than the fact that it caused pain not experienced before, and the condition from which he suffered (a degenerative disc) could be expected to eventually become symptomatic during the course of employment as the result of no unusual event, so there is no "unanticipated, unintended occurrence" sufficient to qualify as an accident. To hold otherwise would be to offer compensation coverage solely on the basis of the location of a worker when his degenerative

condition first began to bother him.

The plaintiffs submit that in the instant case the original Order of the Administrative Law Judge denying benefits for want of an accident was correct, and the subsequent reversal by the Commission was unsupported by the evidence. It is important to bear in mind, in this regard, that the medical panel's conclusion that the defendant suffered an "industrial injury" does not speak to the distinctly legal question of whether such an injury was caused by an accident, and regardless of their medical opinion of the precipitating cause of the applicant's present disability, the legal question of the existence of an accident must be determined in accord with the recognized common law definition of that term. See Redman Warehousing Corp. v. Industrial Comm'n., supra, at 402-03.

CONCLUSION

Mr. Ostler's degenerative back condition began bothering him while he was performing his usual work duties. The pain came on graually and then intensified. In the eight months following his first noticing this developing pain he did not miss a day from work, but ultimately his condition became so painful that he had to undergo a surgery which resulted in some permanent impairment. The plaintiffssubmit that this "injury" was not the result of any identifiable "accident," but rather was the result of the natural degenerative process which first manifested itself in symptoms while the defendant

was at work. Under this state of facts the award of the Industrial Commission is in excess of their jurisdiction and should be vacated by this Court.

DATED this _____ day of September, 1979.

BLACK & MOORE

M. David Eckersley
Attorney for Plaintiffs

CERTIFICATE OF MAILING

I hereby certify that two true and correct copies of the foregoing BRIEF OF PLAINTIFF were mailed to S. Rex Lewis, HOWARD, LEWIS & PETERSON, Attorney for Defendant Ostler, P.O. Box 778, Provo, Utah 84601 and Frank V. Nelson, Assistant Attorney General, State Capitol Building, Salt Lake City, Utah 84114, postage prepaid on this _____ day of September, 1979.
