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Mountain States Casing Service and/or State Insurance Fund v. Jerry L. McKean and/or Industrial Commission of Utah: Reply Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

20508

MOUNTAIN STATES CASING SERVICE and/or STATE INSURANCE FUND,

Defendants-Appellants,

-v-

JERRY L. McKEAN and/or INDUSTRIAL COMMISSION OF UTAH,

Applicant-Respondents.

Case No. 20508

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REPLY BRIEF

SUMMARY OF ARGUMENT

The Administrative Law Judge's conclusion that respondent's burn occurred within the "quasi-course of employment" is incorrect. Activities which come within the "quasi-course of employment" are activities that would not have been undertaken but for the compensable injury. A common example would be trips to the doctor for treatment. The respondent sustained the burns in question while he was working on his car, repairing a heater or cooking his meals, none of which, obviously, was necessitated by his industrial accident. Therefore, according to Professor Larson, because the injuries were not sustained in the "quasi-course of employment", they should be compensable only if the chain of causation leading from the industrial injury to the burn injury had not been broken by the injured employee's negligence. Simple common sense tells us that the respondent had to know he had no feeling in his right hand and fingers. Moreover,

the respondent testified at the evidentiary hearing that he knew of the loss of feeling in his hand. He was, therefore, negligent res ipsa locquitur in working around extremely hot equipment and surfaces without taking any protective measures. This negligence broke the chain of causation leading from the industrial accident to the burn injuries; therefore those injuries are not compensable.

ARGUMENT

POINT I

THE SUBSEQUENT INJURY TO THE RESPONDENT WAS NOT SUSTAINED IN THE "QUASI-COURSE OF EMPLOYMENT".

The respondent did not sustain the burn injuries with which we are here concerned while he was in the quasi-course of his employment. "Quasi-course of employment" is a theory developed by Professor Larson. Larson defines quasi-course of employment as follows:

> Activities undertaken by the employee following his injury which, although they take place outside the time and space limits of employment, would not be considered employment activities for usual purposes, are nevertheless related to employment in the sense that they are necessary, reasonable activities that would not have been undertaken but for the compensable injury. Larson, Vol. I, Section 13.11(d).

The Administrative Law Judge and the respondent completely ignore the language "that would not have been undertaken but for the compensable injury." Both misquote Larson as including activities which are merely "necessary and reasonable." They go on to point

out that cooking is a necessary and reasonable activity. This is not the standard to be applied when determining if an injury is sustained during the quasi-course of employment and should, therefore, be compensable.

The correct standard as described by Professor Larson requires that the activity be one that is necessitated by the industrial accident. As pointed out in appellant's brief, this includes such things as trips to the doctor to have the injury examined or treated. It clearly does not include working on cars, replacing heaters, or cooking. No stretch of the imagination could bring those activities into Larson's definition. The respondent's current injuries did not occur while he was engaged in the "quasi-course of employment", and, therefore, they are not compensable, irregardless of negligence, under this theory.

POINT II

THE CHAIN OF CAUSATION FROM THE PRIMARY INDUSTRIAL INJURY TO THE CURRENT INJURIES WAS BROKEN BY THE APPLICANT'S NEGLIGENCE.

Because the respondent did not incur his injuries during a quasi-course of employment activity, those injuries should not be compensable due to the fact that the applicant's negligent conduct caused the injuries.

Respondent states that Sullivan v. B & A Construction, Inc., 122 N.Y.S.2d 571, Rev'g. 307 N.Y. 161, 120 N.E.2d 694 (1954), is inapplicable to the instant case (Respondent's brief, p. 5). It is difficult to see how a case could be much more applicable. In Sullivan, an industrial injury caused the applicant's knee to

occasionally lock. Despite the fact that his knee tended to lock and despite the fact that he knew it tended to lock, the applicant continued to drive his car. While driving his automobile one day, the applicant's knee locked in such a manner as to deprive him of the use of his right leg. This resulted in an automobile accident wherein the applicant was injured. The Court denied compensation for those injuries on the basis that the applicant's own negligence, not the industrial injury, caused the accident.

In the instant case, though the respondent had no feeling in his hand and knew he had no feeling in his hand, he proceeded to work around and with hot objects. It was the applicant's negligence in working around hot objects and not the industrial injury which caused the burns to his hand.

Completely ignoring the facts of the case, the respondent states, "Mr. McKean had no prior knowledge as to the loss of feeling or use in his arm and hand" (Respondent's brief, p. 6). This denies not only common sense, but the facts as they were testified to in the administrative hearing. At the administrative hearing, the respondent testified that he knew that his hand and arm were numb:

> Q. Now you testified that from the time of your injury your right arm had been somewhat numb; is that true?
>
> A. Well, I ain't had--there ain't no feeling in half of my hand. There's a little bit of feeling in the other half.
>
> Q. So is it fair to say that from your elbow

to your thumb on that portion of your arm you are numb?

A. Pretty much from the incision where my arm got cut off to my thumb. That way I ain't got no sensation or feeling.

Q. And you obviously were aware of that from the date of your accident?

A. Not really. I knew there was some but I didn't know to what extent. I didn't know how, or anything much about it. Cause see when I moved to Idaho I'd just got it back on and it was just beginning to grow back and day by day this side of my hand here was getting a little bit more feeling in it further up.

Q. But you obviously knew you had sensation problems and didn't have good touch like in your left hand; is that true?

A. Yeah. Oh, yeah. Definitely.

Q. And you obviously had trouble holding onto things with your right hand?

A. I couldn't even use my right hand at all. Couldn't hold nothing. I can't hold onto nothing unless I put it in there with my left hand.

(R. 67-68). The respondent obviously knew he had no feeling in his hand. Indeed, it is difficult to imagine how he could not know. Both the respondent and the Administrative Law Judge make much of the fact that respondent's doctor told respondent that the feeling would return to his hand. This evidence is completely irrelevant. If a scar does not disappear, no patient would reasonably believe the scar was gone just because the doctor said it would disappear. Therefore, the optimism of the doctor should be ignored. The fact of the matter is the respondent's hand was

numb at the time of the burn. On direct examination the respondent testified:

> Q. Now the nature of those operations--What did they do to--Did they limit your sensation into your hand at all?
>
> A. Well, see, ever since I lost my arm, I ain't had no feelings. I didn't have no feeling in my hand. I think it was just last year they had to go in my leg and cut a nerve out of my leg and put in my arm, just to get some of the feeling back in parts of my arm.
>
> Q. You did not have that nerve in your arm, though, at the time of the burn?
>
> A. I don't think so. I--Even if I did, it takes months for it to grow a centimeter or an inch, so it would of took a year anyways, even if I would have had it in there for it to grow (inaudible portion) out here to where I can feel it. And that's if it would of took. Like right now after they put it in, I still don't got no feeling sensation in my thumb. All that's there is like when your foot goes to sleep, it tingles.

(R. 45, 46).

It is not clear whether the Administrative Law Judge found that the applicant was not negligent. In his Findings of Fact, the Judge talks about the "reasonableness" of the respondent's activities. He uses the terms "reasonable" and "necessary" when discussing both the quasi-course of employment issue and the negligence issue. Judge Allen never analyzes the elements of negligence. If the Findings and Conclusions can somehow be construed as finding that the respondent was not negligent, the findings are without support in the record and the Industrial Commission acted in excess of its powers in affirming that order. The evidence clearly establishes that respondent knew he suffered

a loss of feeling in his hand and, nevertheless, worked around extremely hot equipment and surfaces without taking any measures to protect his numb right hand. This was undeniably negligent on his part.

CONCLUSION

The only reasonable interpretation of Judge Allen's failure to discuss negligence is that he based his Order on the erroneous conclusion that respondent was engaged in a "quasi-course of employment" activity when he suffered the burns to his right hand. Quasi-course of employment activities are activities necessitated by the industrial accident. Clearly, neither working on a car, repairing a heater, or cooking is necessitated by an industrial accident. The respondent was not engaged in quasi-course of employment activities when he was burned; therefore those burns are not compensable, if caused by his own negligence. Based on the record, the respondent was negligent res ipsa locquitur. If Judge Allen's Findings and Conclusion can somehow be construed as finding that the respondent was not negligent, that finding is completely without support in the record.

Accordingly, appellant's requests that the Industrial Commission's Denial of Motion for Review ordering compensation for respondent's burn injury should be reversed.

Finally, to allow Judge Allen's decision to stand would unwisely extend workmen's compensation insurance benefits to a class of injuries not reasonably related to the original compensable accident. Judge Allen's decision, in this regard, has

far-reaching impact on employers and insurance carriers alike. If not reversed, the ruling could effectively transform workmen's compensation into broad line health insurance. This result is not consistent with the legislative intent or historical purpose of workmen's compensation. If such changes are needed, they should not be effected by the judiciary, but, rather, by legislative enactment.

DATED this 28th day of June, 1985.

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CERTIFICATE OF MAILING

I hereby certify that I mailed 4 true and exact copies of the foregoing Reply Brief, postage prepaid, this 28th day of June, 1985, to the following:

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