2002

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

Utah Supreme Court

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20508

IN THE SUPREME COURT OF THE STATE OF UTAH.

MOUNTAIN STATES CASING SERVICE and/or STATE INSURANCE FUND,

Defendants/Appellants,

-vs-

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

Applicant/Respondents.

BRIEF OF APPLICANT/RESPONDENT

Supreme Court No. 20508

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RELIEF SOUGHT ON APPEAL

Respondent respectfully requests that the Industrial Commission's denial of appellant's Motion for Review be affirmed.

STATEMENT OF FACTS

Respondents accept the statements of the case and of the facts presented by the Appellants' Brief.

SUMMARY OF ARGUMENT

The Administrative Law Judge's finding that respondent, Jerry McKean's, burn injury occurred within the "quasi-course of employment" is proper and his injury is therefore compensable.

Respondent McKean's injury is compensable also on the basis that the subsequent burn injury was a direct and natural result of the primary injury to Mr. McKean's arm.

ARGUMENT

POINT I

THE SUBSEQUENT INJURY TO THE APPLICANT WAS A RESULT OF THE PRIMARY INDUSTRIAL ACCIDENT AND WAS SUSTAINED DURING THE "QUASI-COURSE OF EMPLOYMENT."

Appellants contend that the Administrative Law Judge based his Findings of Fact, Conclusions of Law and Order solely upon the basis of Professor Larson's analysis of the "quasi-course of employment" concept. Appellants further contend that the concept of "quasi-course of employment" is not a part of Utah law and that even if such a concept was a part of Utah law it was misapplied in the instant case.

The Administrative Law Judge did not base his Findings of Fact and Conclusions of Law solely upon the theory of "quasi-course of employment" as put forth by Professor Larson in his treatise of workman's compensation. The theory of "quasi-course of employment" was only one basis for the Administrative Law Judge's Findings. The Administrative Law Judge had also found that the applicant was not negligent in his conduct and, therefore, there was no break in the chain of causation, thus finding that the subsequent injury was directly related to the primary injury. Thus, even if it is found that the Administrative Law Judge committed error in finding that Mr. McKean's injuries

were a result of "quasi-course of employment," his decision would still stand since there was also a finding that the subsequent injury was a result of the industrial injury and was not based on any negligence of Mr. McKean.

Appellants contend that there is no Utah case law that show that Utah has adopted Professor Larson's theory of "quasi-course of employment." Appellants, however, have failed to show any Utah cases that specifically reject the concept of "quasi-course of employment."

Professor Larson defined his concept of "quasi-course of employment" as follows:

> Activities undertaken by the employee following upon 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 the employment in the sense that they are necessary reasonable activities that would not have been undertaken but for the compensable injury. Larson, Volume I, Section 13.11(d).

An injury arising out of a quasi-course activity does not break the causal chain by mere negligence of the applicant. The chain may only be broken by the intentional conduct of the applicant which would be regarded as expressly and impliedly prohibited by the employer. Thus, under the quasi-course of employment concept, more than mere negligence must be shown on the part of the applicant to establish that the causal chain had been broken.

Appellants would contend that the quasi-course of employment

test should not be applied in the instant case and would argue that a stricter test should be applied, providing that mere negligence is sufficient to break the causal chain where an injury did not arise out of the quasi-course of employment.

The Administrative Law Judge found that the activities of Mr. McKean were necessary and reasonable and, thus, did not break the chain of causation under the quasi-course employment test. (R.100). The activities undertaken by Mr. McKean were necessary and were daily activities. Cooking, repairing an automobile and repairing a steam radiator for heating purposes are all necessary and reasonable activities supporting the quasi-course of employment theory.

POINT II

THE CHAIN OF CAUSATION FROM THE PRIMARY INDUSTRIAL INJURY WAS NOT BROKEN BY APPLICANT'S CONDUCT.

Appellants are correct in stating the general rule for compensation for injuries that are the result of an aggravation of the original industrial injury. It is well settled that any injury arising as a natural result of the primary injury is compensable. Professor Larson has stated:

> When the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent, intervening cause attributable to claimant's own intentional conduct. Larson, Volume I, Section 13.

Under Professor Larson's analysis, any injury arising out of

a quasi-course of activity will not be deemed broken by mere negligence. However, an injury that does not arise out of a quasi-course of employment activity may be deemed to be the result of a broken chain of causation where the applicant is negligent misconduct.

Appellants contend that Mr. McKean is not entitled to compensation for his subsequent burn injury, due to negligence on his part. Appellants contend that since Mr. McKean was experiencing numbness in his right arm and hand he was aware that he had no feeling in that arm and hand and, therefore, should have taken reasonable precautions against further injury.

Appellants cite to the cases of Randolph v. E. I. Du Pont De Nemours Co., 130 N.J.L. 353, 33 A.2d 301 (1943) and Sullivan v. B. & A. Construction Inc., 122 N.Y.S.2d 571, rev'g 307 N.Y. 161, 120 N.E.2d 694 (1954), to illustrate that compensation will not be allowed to an applicant if negligence is shown on his part. At page nine of appellants' brief they contend that the Sullivan case is applicable to the present fact situation. The Sullivan case dealt with a claimant whose right knee occasionally locked, rendering his leg useless. In the Sullivan case, the claimant's right knee locked while driving an automobile, he was unable to apply his brakes, and an accident occurred. The court in that case found that the claimant's injuries were not compensable due to his negligence since he had knowledge of his condition from simlar experiences in the past. The Sullivan case

is not applicable to the present fact situation however. Mr. McKean had no prior knowledge as to the loss of feeling or use in his arm and hand. Mr. McKean had never burned his hand prior to his injury of April 6. In fact, Mr. McKean testified that his doctor had informed him that his feeling would slowly begin to return to his arm and he further testified that he did in fact have some feeling in the arm. Thus, based on the statements made by his doctor and by his prior experiences in the use of his hand and arm, Mr. McKean believed that he could proceed to use his arm in daily activities. Since Mr. McKean did have some feeling in his arm and hand, he felt there would be no serious threat to damaging the arm and hand further.

Thus, the fact situations in the present case are more closely related to those in the Randolph case. In the Randolph case the claimant had an eye injury and was required to wear dark glasses. He fell down the stairs of his home late at night because his vision was impaired due to the dark glasses. The aggravation of his eye injury resulting from the fall was held to be a natural consequence of the original industrial injury and was thus compensable.

In supporting this decision, the court in Sullivan stated that "if a reasonably prudent person innocently aggravates the harmful effect of the original injury, the original wrongful cause continues to the end, and accomplishes the final result." Randolph v. E. E. Du Pont De Nemours Co., 130 N.J.L. 353, 33 A.2d

302 (1943). Mr. McKean's injuries were the result of a loss of feeling in his arm and hand which was a consequence of his primary industrial injury. Thus, under the Randolph analysis, the chain of causation is not broken in the present case.

Mr. McKean's conduct was not unreasonable in light of his previous knowledge as to his condition and thus any conduct on the part of Mr. McKean contributing to the injury cannot be considered to be negligent. In Dutton v. Industrial Commission of Arizona, 140 Ariz. 448, 682 P.2d 453 (1984), the test for allowing compensation for consequences arising out of an industrial injury was put forth.

> First, a direct causal relationship must be estabilised between the initial industrial injury and the subsequent condition. Second, when the claimant's conduct contributes to the incident causing the subsequent injury, his conduct must have been reasonable in light of his knowledge of his previous physical condition. 682 P.2d at t 456.

Both elements of the above test are satisfied in the present case. As has been pointed out above, if it had not been for the original industrial accident, Mr. McKean would not have lost the feeling in his arm and hand and would have been able to prevent any subsequent burn injuries to his hand. Furthermore, Mr. McKean had some feeling in his arm and hand, and was told by his doctor that the feeling would slowly return to the injured area of his arm and hand. Mr. McKean had never burned his arm and hand prior to the April 6 incident. Thus his conduct was reasonable based on his past experiences.

Appellants cite to the cases of Fruehauf Trailer Company v. Industrial Commission, 16 Utah 2d 95, 396 P.2d 409 (1964) and Perchelli v. Utah State Industrial Commission, 25 Utah 2d 58, 475 P.2d 835 (1970), as establishing the Utah position in compensation for subsequent injuries arising out of an industrial injury. Respondents do not dispute the findings of the Supreme court in Fruehauf and Perchelli. In fact, the Fruehauf and Perchelli cases support respondents position. In Fruehauf it was stated that "an aggravating cause which flares up a previous injury need not be the result of an accident which is independently employment connected." 396 P.2d at 410. This is clearly applicable to the present case. Appellants would argue that the present case is distinguishable from Fruehauf and Perchelli in that Mr. McKean was negligent in failing to put protection on his right arm and hand. However, Mr. McKean acted as a reasonable and prudent person would under similar circumstances. It is not common for individuals to wear heat-resistent gloves while working on cars nor while cooking. Therefore, Mr. McKean's failure to wear protective coverings on his arm and hand cannot be considered to be rash.

Mr. McKean's activities were considered to be reasonable and necessary daily activities. His conduct in participating in those activities cannot be considered to be negligent. Each was an activity that was necessary. It is unrealistic to expect that the applicant should refrain from participating in the above activities. It is also unreasonable in light of his knowledge at

the time to have expected him to wear heat resistent gloves while participating in his daily activities. Mr. McKean acted as a reasonable and prudent person would have under similar circumstances. It is unlikely that Mr. McKean would have received the burn injury if he had not received his on-the-job injury. Thus, the State Insurance Fund and Mr. McKean's employer should be held liable for all expenses incurred by Mr. McKean for treatment of the burn injury to his right arm and hand. "Where a worker suffers an on-the-job injury and thereafter the condition resulting from that injury is worsened by an off-the-job injury, the compensation insurance carrier should be required to afford worker's compensation benefits for the worsened condition if the worker shows that the on-the-job injury is a material contributing cause of the worsened condition. Grable v. Weyerhaeuser, 55 Or.App. 627, 639 P.2d 677, 678 (1982). Mr. McKean would not have burned his arm and hand had it not been for the original industrial accident and his conduct was not negligent in light of his knowledge at that time.

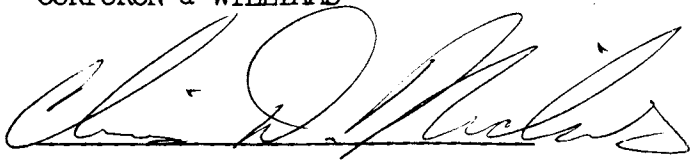
CONCLUSION

Mr. McKean's burn injury is compensable because it was a natural consequence of the original industrial injury and was not the result of Mr. McKean's own negligent conduct.

Based on the foregoing, the Industrial Commission's denial of appellant's Motion for Review should be upheld.

RESPECTFULLY SUBMITTED THIS 28 day of May, 1985.

CORPORON & WILLIAMS



CHRIS D. NICHOLS
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CERTIFICATE OF MAILING

I hereby certify that I am employed in the offices of Corporon and Williams, attorneys for Applicant/Respondents herein; that I served the attached Brief of Applicant/Respondent by placing a true and correct copy thereof in an envelope addressed to:

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and depositing the same, sealed, with first-class postage prepaid thereon, in the United States mail at Salt Lake City, Utah, on the 28th day of May, 1985.

Teresa Bigum

Secretary