1989

Robert Wallenmeyer v. Industrial Comm. of Utah, Valley cargo and continental Insurance : Brief of Appellant

Utah Court of Appeals

COURT OF APPEALS

STATE OF UTAH

ROBERT WALLENMEYER

Applicant-Appellant,

vs.

INDUSTRIAL COMMISSION OF UTAH, VALLEY CARGO AND CONTINENTAL INSURANCE,

Defendants-Respondents.

BRIEF OF APPELLANTS
Priority No. 6

Case No. 890561-CA

APPEAL FROM THE INDUSTRIAL COMMISSION OF UTAH

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I.

JURISDICTION

This Court has jurisdiction pursuant to Utah Code Ann. §78-2a-3(2)(a).

II.

NATURE OF PROCEEDINGS

Applicant has petitioned this Court for the review of the Industrial Commission's Orders denying Applicant's Motions for Review.

III.

STATEMENT OF ISSUE

Does the evidence support the Industrial Commission's finding that the applicant's injury did not arise out of and in the course of his employment?

IV.

DETERMINATIVE STATUTES

Utah Code Ann. §35-1-45 is determinative:

> Each employee mentioned in Section 35-1-43 who is injured and the dependents of each such employee who is killed, by accident arising out of and in the course of his employment, wherever such injury occurred, if the accident was not purposely self-inflicted, shall be paid compensation for loss sustained on account of the injury or death, and such amount for medical, nurse, and hospital services and medicines, and, in case of death, such amount of funeral expenses, as provided in this chapter.

V.

STATEMENT OF THE CASE

1. Wallenmeyer was a dock worker for Valley Cargo. (Hearing p. 9)

2. While playing hackey sack on November 4, 1988 Wallenmeyer fell on his left wrist. (Hearing p. 9,10)

3. The employer does not use a hackey sack in any way in its business. (Hearing 20,21)

4. Wallenmeyer claimed that the employer allowed employees to play hackey sack at work. (Hearing p. 21,22)

5. Wallenmeyer lied to his employer and the insurance adjustor by not telling them he injured himself playing hackey sack. Instead he told them he tripped over a wire on the dock. Not until the insurance adjustor confronted him about playing hackey sack did he tell the true story. (Hearing 21-24)

5. Wallenmeyer lied because he knew he wasn't supposed to be playing hackey sack at work. (Hearing p. 24)

6. The employer has told its employees not to play hackey sack at work. (Hearing p.29)

7. The employer has taken hackey sacks away from employees caught playing hackey sacks at work. (Hearing p. 30)

VI.

SUMMARY OF ARGUMENT

Wallenmeyer's injury did not arise out of his employment duties. Instead he argues that since the injury occurred during the course of his employment, compensability may be based on the horseplay rule announced in Prows v. Industrial Commission, 610 P.2d 1362 (Utah 1980).

The version of U.C.A. §35-1-45 under which Prows was decided has since been amended to require that the injury arise out of and in the course of employment. Since playing hackey sack did not arise out of the employment, Wallenmeyer's claim must be denied.

Even applying the Prows test under the old statute, playing hackey sack represented a serious and complete deviation prohibited by the employer and not to be expected in the freight business. Wallenmeyer's horse play was not compensable.

VII.

ARGUMENT

POINT I
SINCE THE ACCIDENT DID NOT ARISE OUT OF THE EMPLOYMENT, IT IS NOT COMPENSABLE

Prior to the 1988 amendment to U.C.A. §35-1-45, a compensable accident had to arise out of or in the course of employment. "Arise out of" required the accident to have its origin in the employment. "In the course of" required that the accident occur during the time of employment. Utah Apex Mining Co. v. Industrial Commission, 248 P. 490 (Utah 1926) The use of the disjunctive "or" rather than the conjunctive "and" required a more liberal interpretation of a compensable accident. Chandler v. Industrial Commission, 184 P. 1020 (Utah 1919) If either requirement could be satisfied, the accident would be compensable. Tavey v. Industrial Commission, 150 P.2d 379 (Utah 1944)

This liberal interpretation allowed horseplay (which never arises out of the employment) to be considered compensable if the deviation from the course of employment was not substantial. Prows announced a four part test to determine whether the deviation from the course of employment was substantial. Since U.C.A. §35-1-45 has been amended to use the conjunctive "and", horseplay must both arise out of and in the course of the employment. Since horseplay never arises out of the employment, it cannot be compensable under the version of U.C.A. §35-1-45 which governs this case. Wallenmeyer's injury is not compensable.

POINT II

SINCE PLAYING HACKEY SACK REPRESENTED A SERIOUS AND COMPLETE DEVIATION PROHIBITED AND NOT TO BE EXPERTED BY THE EMPLOYER, IT IS NOT COMPENSABLE

Assuming that the "arise out of" prong of the 1988 version of U.C.A. §35-1-45 need not be satisfied in this case, the question becomes whether the horseplay represented a substantial deviation justifying a denial of compensation. Under Prows, this depends on:

1. The extent and seriousness of the deviation,
2. The completeness of the deviation,
3. The extent to which the practice of horseplay had become an accepted part of the employment, and
4. The extent to which the nature of the employment may be expected to include some such horseplay.

The Administrative Law Judge found and the Industrial Commission agreed that:

1. Since Wallenmeyer was not performing any active work duties at the time and the activity did not evolve from the work duties, there was a serious deviation from the course of the employment.
2. Since Wallenmeyer completely abandoned all his concentration from the employment to the horseplay, the deviation from the course of employment was complete.
3. Although Wallenmeyer claimed that playing hackey sack was an accepted part of the employment, his conduct showed otherwise. He lied about the injury to his employer to avoid disclosing that he

had been playing hackey sack. In addition, the employer had forbidden this type of activity. Playing hackey sack had not become an accepted part of the employment.

4. Although the nature of the work would lead to some slack time, hackey sack would not be considered the type of horseplay expected during slack time in that type of employment.

Wallenmeyer has failed to show that the evidence does not support these factual findings of the Administrative Law Judge and the Industrial Commission. A review of the record compels the factual conclusion reached by the Administrative Law Judge and the Industrial Commission. Applying the Prows test to these facts mandates the conclusion that playing hackey sack represented a substantial deviation from the course of the employment justifying a denial of benefits.

VIII.

STATEMENT OF RELIEF SOUGHT

The decision of the Industrial Commission should be affirmed.

DATED this 2d day of March, 1990.

SNOW, CHRISTENSEN & MARTINEAU

By _____
Henry K. Chai II

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CERTIFICATE OF MAILING
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Counsel for Appellants hereby certifies that four true and correct copies of the Brief of Appellants was mailed by first-class mail, postage prepaid, to the following:

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DATED this 2nd day of March, 1990.

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