1980

Harley R. Brundage v. IML Freight, Inc. et al : Brief of Defendant

Utah Supreme Court

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IN THE SUPREME COURT

OF THE STATE OF UTAH

HARLEY R. BRUNDAGE, :

Plaintiff, :

-vs- : Case No. 16972

IML FREIGHT, INC., SPECIAL FUND OF UTAH, and THE INDUSTRIAL COMMISSION OF UTAH, :

Defendants. :

BRIEF OF DEFENDANT THE INDUSTRIAL COMMISSION OF UTAH

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NATURE OF CASE

This is a Workmen's Compensation Act case in which plaintiff alleges that the impairment of 15 percent caused by an industrial accident and 15 percent from pre-existing causes, for a total of 30 percent physical impairment, makes him unemployable and therefore permanently and totally disabled pursuant to 35-1-67 U.C.A. 1953.

Disposition by the Industrial Commission

On January 24, 1980, an Administrative Law Judge entered an Order which granted certain benefits to plaintiff but denied the claim for permanent total disability benefits. (R. 528-535) Plaintiff timely filed a Motion for Review of that Order. (R.537-545) The Motion for Review was denied on a review by the Industrial Commission.

RELIEF SOUGHT ON APPEAL

Defendant Utah Industrial Commission respectfully ask that the decision of the Administrative Law Judge that was affirmed by a tie vote of the Industrial Commission be confirmed.

STATEMENT OF FACTS

In August of 1975 plaintiff injured his back while starting the motor on his fishing boat. (R. 107) Dr. Charles Rich, a neurosurgeon, in October of 1975, operated on plaintiff to remove intervertebral disc material at the L3-4 level in his back. (R. 109-110)

Plaintiff was released to return to work in October 1976. Thereafter, he was able to work regularly until June 18, 1977, when, in the course of his employment with IML Freight, Mr. Brundage injured his back. (R. 113) This time he was in Madison, Iowa unloading 50 pound bags of potatoes from his truck. In the process he twisted while bending to put the bag down. He immediately experienced severe pain in the lower back and into both legs. The next day the company flew him back to Salt Lake. (R. 113-116)

Upon plaintiff's return to Salt Lake, the company doctor referred him to orthopedic surgeon, Dr. A.F. Martin. Surgery was performed on August 1, 1977. (R. 117-118)

Following the surgery, and for more than four months, the plaintiff's condition improved considerably and he stated, "I felt better than I had for a long time."(R. 118) In December of 1977, while walking in his home, he caught his heel in a rug which caused his weight to suddently shift forward. He experienced an

immediate increase in his symptoms because of the rug incident which have been continuous to the present. (R. 119) The medical Panel report gave a 25 percent total physical impairment resulting from all causes, ten percent attributable to the industrial injury and 15 percent to pre-existing. (R. 510) The Administrative Law Judge raised it to a 30 percent physical impairment from all causes. 15 percent of that impairment the result of the non-industrial accident and 15 percent the result of the industrial accident. (R. 531)

Physicians who have either treated or consulted on Mr. Brundage's physical impairment agree that it would be wise for Mr. Brundage to go into other means of a livelihood than long haul driving. But there is substantial evidence, relied upon by the Administrative Law Judge, that the 25 percent or 30 percent impairment of the plaintiff is not such as to take him out of the labor market entirely but only out of the physical labor and long-haul driving.

Drs. Martin, McCallister and Rich all acknowledge that though it may not be easy, and surely not entirely comfortable the plaintiff is not so incapacitated as to leave him without the ability to do something other than long haul driving. (R. 65; 163-202)

ARGUMENT

POINT I.

THERE WAS SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT THE DETERMINATION OF THE INDUSTRIAL COMMISSION AND THE ADMINISTRATIVE LAW JUDGE THAT THE 30 PERCENT DISABILITY RATING OF THE CLAIMANT WAS NOT SUFFICIENT TO SUPPORT A FINDING THAT HE WAS SO HANDICAPPED AS TO BE UNABLE TO PERFORM OR OBTAIN ANY TYPE OF EMPLOYMENT.

As noted under the Statement of Facts a number of the doctors, Martin, McCallister and Rich, indicated that the claimant should not be excluded from the work force other than long haul driving. The Administrative Law Judge had ample justification from the record to conclude in his Findings of Fact:

Counsel for the applicant contends that the applicant is totally disabled and should receive compensation accordingly and, apparently, is receiving Social Security Disability Benefits. Applicant's counsel relies on the case of Beverly R. Buxton v. Industrial Commission, (Utah 1978), 587 P.2d 1. In that case the applicant was given a 55 percent loss of bodily function rating and after finding that there was no job opportunities available to the applicant with her physical disabilities found that she was permanently and totally disabled. The Commission takes notice of a recent case handed down by the Supreme Court which appears to be even more in point and that is the case of Norma Clark v. Interstate Homes, Inc., State Insurance Fund and the Industrial Commission of Utah, Case No. 16337 filed December 24, 1979. In this case the applicant was found to have a 30 percent permanent partial impairment and the applicant contended that she was permanently and totally disabled because she was unable to return to work. The Court noted that her doctor testified that she "could handle a sedentary type of work" and upheld, unanimously, the Commission's denying permanent total disability benefits.

It would appear to the Administrative Law Judge that the Supreme Court is saying that there must be some relationship between permanent partial impairment and permanent total dissability The Court has said that it is possible that a person with 50 or 55 percent permanent partial impairment may well be permanently and totally disabled and receive benefits accordingly. The Court has not said and probably never would say that a person with a 10 or 15 percent permanent partial impairment, even though there were no jobs available, would be permanently totally disabled And in that line of thinking the Court has looked at an incident where an applicant had a rating of 30 percent permanent partial impairment who claimed that she was unable to work but the Court refused to find that she was permanently and totally disabled. The Administrative Law Judge believes the Clark case is in point with the case we are attempting to resolve herein and cannot find that Mr. Brundage is permanently and totally disabled. We take Administrative notice of the literally dozens of brands of home products being sold out of the home wherein the seller can solicit by telephone, by mail or door to door and can work as long as he pleases either standing up or sitting down or moving about as may fit his particular case. There are home solicitatio

jobs and mailing jobs where the solicitor can work as long or as little as he pleases assuming any bodily position he chooses and shifting that position as frequently as need be. I assume we could take administrative notice in this electronic age of many bench jobs where an employee can stand or sit on a stool and do the hand and finger work within the capabilities of a normally intelligent individual such as Mr. Brundage was found to be by the rehabilitation counselor. The applicant's request for a finding that he is permanently and totally disabled is denied. We find, in accordance with the Panel's finding, that the applicant was temporarily totally disabled as a result of the industrial injury from June 18, 1977 to August 1, 1978, and that the applicant's condition stabilized on the latter date. We further find that the applicant was paid temporary total disability compensation from June 18, 1977 to September 14, 1978, which means that the defendants are entitled to credit against the permanent partial impairment for overpayment. We find further that in accordance with the Ortega, White, Christensen and Cragon Case that the State Second Injury Fund must pay one-half of the medical bills and temporary total disability compensation and that the defendant is entitled to a refund in accordance therewith. (R. 531-532) The record reveals such statements by the doctors as:

A.F. Martin, M.D.: Patient will be unable to do previous type of work. . .that of long haul driving. In order to become part of work force again, he will have to learn some other trade, but that will be difficult. His sitting and standing capacities are limited. (R. 202)

A.J.McCallister, M.D. . . .I suspect he is not going to be willing to return to his previous occupation as a line driver and probably should retire and seek some other line of work. (R. 214 and 217)

Boyd G. Holbrook, M.D.: I believe at the present time that the applicant is totally disabled as far as returning to his previous occupation is concerned. He might be able to find some sheltered special type of occupation consistent with his present activities.

In Clark v. Interstate Motor Homes, Inc., 604 P.2d 937 this court held that a 30 percent disability rating of the claimant was such that the evidence would not support a finding that the claimant was unable to perform or obtain any type of employment.

Surely there is enough evidence in the record that the medical profession felt the claimant could go into other lines

of work than that of long haul driver. Also see Johnson v. Industrial Commission 93 U. 493, 73 P.2d 1308 where claimants' doctor contended that he was totally and permanently disabled and this court ruled that the evidence did not compel a finding of total permanent disability.

POINT II.

CLAIMANTS DISABILITY PRIMARILY IS THE RESULT OF A SUBSEQUENT ACCIDENT TO THE INDUSTRIAL ACCIDENT.

Claimant had a spinal fusion from L-4 to the sacrum on August 1, 1977. He stated that before he tripped on the rug just before Christmas that his back was in good condition and that there was no particular problem. (R. 133) He reported to Dr. Rich that "he felt he was doing better following that procedure (Aug. 1, 1977 fusion) when around Christmas 1977, he caught his foot on his carpet at home and has not felt well since. (R. 163)

Dr. Martin (who performed the surgery) wrote to Dr. McCallister on August 22, 1977 ". . .and incredibly he (claimant) states that he hasn't felt better in years." (R. 191)

On September 27, 1977, Dr. Martin reported that claimant "continues to do very well. He has very little pain and takes no pain medication." (R. 192)

On November 14, 1977, Dr. Martin reported:

Mr. Brundage continues to do well. He is still very careful about any forward bending and doing no lifting at all. He moves well today. His straight leg raise comes to 90 degrees bilaterally but no significant pain.

Check films show early encorporation of his fusion mass from L-4 to the sacrum so, in general, I must say he is doing well.

I will check him again right after the first of the year and see what kind of shape he is in as far as returning to work. By that time I would be able to take flexion and extension films to see if his fusion is solid. (R. 193)

But after the trip in the rug in December, over four months after the operation, his condition had a dramatic change for the worse. (R. 208 & 517)

This accident at home occurred four months after surgery for the industrial accident. His condition had improved to better than before the industrial accident. Section 35-1-67 U.C.A. 1953, does not contemplate nor provide that subsequent injury to the industrial injury is compensable for permanent total disability.

CONCLUSION

The holding of the Industrial Commission should be affirmed.

DATED this 1st day of October, 1980.

Respectfully submitted,

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Assistant Attorney General