1956

Edward Lee Holland v. The Industrial Commission of Utah et al : Brief of Defendants

Utah Supreme Court

E. R. Callister; C. C. Parsons; A. D. Moffat; Calvin A. Behle;

No. 8412

IN THE SUPREME COURT
of the
STATE OF UTAH

EDWARD LEE HOLLAND,
Plaintiff,

— VS. —

THE INDUSTRIAL COMMISSION OF UTAH and COLUMBIA - GENEVA STEEL DIVISION, UNITED STATES STEEL CORPORATION,
Defendants.

BRIEF OF DEFENDANTS

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PRINTED IN U. S. A.—JOE R. BROWN PTG. CO., SALT LAKE CITY

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Cases Cited

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STATEMENT OF FACTS

Plaintiff's application for hearing to settle Industrial Accident Claim was filed with the Industrial Commission of Utah September 13, 1954. It is there alleged that on or about July 6, 1954 while employed at the Horse Canyon Coal Mine of Columbia-Geneva Steel Division of United States Steel Corporation plaintiff sustained a back injury as follows: " * * * was drilling through rock in roof of the mine. The drill broke and the drill jerked applicant violently upward." It is also alleged that plaintiff left work on July 21, 1954 and that his disability had continued to the date of the application.

Columbia-Geneva Steel Division denied liability and

hearing was held April 1, 1955. At such hearing the following facts were made to appear:

Some time in the early part of July, 1954, plaintiff was employed in defendant's coal mine at Horse Canyon. On the day of the alleged accident he was on a scaffold drilling; the drill broke and in some manner plaintiff lost his hold on the stoper and fell on his hands and knees, or hands and toes (R.20). In about thirty minutes Mine Foreman Wadleigh appeared at the scene and asked if plaintiff wanted to go to the hospital. Plaintiff refused and did not mention that his back hurt. (R. 45) Plaintiff continued to work at his regular job for the next week or two weeks. (R. 26) On July 24, 1954 he got in touch with Dr. William Ploss (R. 23). About July 26, he reported to the Clinic (Ex. 2). He was given some pain killer and eventually on August 7, 1954 admitted to the Utah Permanete Hospital (R. 52, Ex. 1).

Sometime between August 3rd and 7th plaintiff was terminated for unauthorized absence on August 3rd. In two separate conversations with his superiors as to the reason for such termination he was told the termination was for such unauthorized absence. On neither of these occasions did plaintiff so much as suggest that his absence was due to an industrial accident, a fall in the mine which injured his back. (R. 46, 61.) In the hospital records there is no indication that his difficulty had an origin as an industrial accident. (R. 55, 56.) Dr. Ploss is the doctor of the United Mine Workers Welfare Fund. Had the injury been claimed by the employee to have an industrial origin it would have been referred to

Dr. James K. McClintock and by him to the employer and to the Industrial Commission. Dr. McClintock testified:

Q. If the employee says it is industrial—

A. I will report it as such.

Q. You report it as such to the Commission.

A. That is correct.

(R. 55) and—

> "The first implication that I had as a possible industrial involvement was that involving the Industrial Hearing."

(R. 56)

The case was referred to Dr. Paul A. Pemberton, who on September 8, 1954 removed an intervertebral disc. (R. 56) Dr. Pemberton did not report the case to the Industrial Commission as an industrial case. (R. 59)

On September 13, 1954 the said application was filed with the Industrial Commission and hearing was held in due course. On June 21, 1955 decision was rendered denying compensation:

> "Applicant testified that he reported to Dr. Ploss that he got hurt in the mine. The hospital record does not corroborate this statement. Dr. Ploss, the Welfare Fund physician, works in the same hospital at Dragerton, that Dr. McClintock, the industrial surgeon for defendant, uses for industrial patients.
>
> "It can be reasonably assumed that the U.M.W.A. Welfare Fund and its medical staff will promptly refer all cases to Dr. McClintock

if they are reported as industrial cases. Surely the Welfare Fund is not seeking to increase an already heavy burden by voluntarily accepting industrial cases. In fact, the entire record negatives applicant's testimony to such an extent that his credibility is highly questionable."

Applicant did have a disc removed by Dr. Pemberton but we cannot find that the disc was the result of an accident arising out of or in the course of employment by defendant as alleged or at all.

Petition for rehearing was filed July 22, 1955, denied July 27, 1955, and this original proceeding began August 26, 1955 by filing a petition in this court for a Writ of Review. Nothing more appears until November 14, 1955, when this court issued, on its own motion, its "Citation for Dismissal returnable Nov. 21."

That the Commission did not afford credibility to plaintiff's testimony is, of course, apparent from the decision itself. Plaintiff was very certain that he had reported a back injury, sustained in the mine, to Dr. Ploss and to Mr. Wadleigh. Yet one of these witnesses denied that he had done so. And the records of the hospital corroborate, not the plaintiff, but Mr. Wadleigh.

Upon the occasion of his discharge plaintiff made no mention of having sustained an industrial accident. Plaintiff did not dispute this evidence nor explain why he had not at that time referred to such an accident. He would have done so had his trouble been due to such an accident.

POINTS

Plaintiff relies on two points:

1. That the Commission erred in its conclusion that plaintiff's injury and disability was not the result of an accident arising out of or in the course of his employment.

2. That the Commission abused its discretion in entering its decision denying an award to plaintiff, and that its decision and order were against the law and contrary to the evidence introduced, and that in reaching such decision, the said Commission did not regularly pursue its authority.

The two points will be here discussed in order.

Plaintiff's Point 1.

That the Commission erred in its conclusion that plaintiff's injury and disabilty was not the result of an accident arising out of or in the course of his employment.

It is true that plaintiff testified that he told Dr. Ploss that he had been hurt in the mine. But the Commission was not bound to accept this testimony as establishing the fact that he had made such a statement to Dr. Ploss or that the statement, if made, was true.

It is significant that Dr. Ploss did not record the case as an industrial accident; that it was not referred to Dr. McClintock, the industrial surgeon working in the

same hospital. Dr. McClintock testified clearly and positively that if the employee or Company reports the case as an industrial one, it is reported to defendant and to the Commission as such.

A. In other words, if it is reported to me as industrial, I report it as industrial. If the Company thinks it isn't we come down here.

Q. If the employee says it is industrial—

A. I will report it as such.
Q. You report it as such to the Commission?
A. That is correct.

Q. And that is the procedure which is followed at your hospital?

A. That is correct.

Q. What was the situation in this case?

A. I didn't see this man in a professional capacity until last month when I examined him and returned him to work. (R. 55)

And Mr. Wadleigh:

Q. If a man falls off a scaffold or jumps off a scaffold that high and then tells you that he hurt his back, that he has a stinging sensation and back pain, would you report that?

A. Yes.

Q. But you don't recall his mentioning that at all?

A. No, he was shook up, he told me. (R. 47)

and the same witness:

Q. When did you first hear that he was alleging a back injury as a result of that fall?

A. I don't recall when I first heard of the back being injured. When he was, after he had been away from work, he called me and I don't recall the date, and said that the Company had terminated him and asked me why. And I said I just supposed it was for unauthorized absence. And I asked him why he wasn't at work, and he told me that he was having some back trouble and that they were treating him like, for the same trouble that he had in the year past. * * *

Q. Did he tell you at that time that the back trouble he had, that he got it from the fall?

A. No.

Q. Did he ever indicate that was the reason?

A. I don't recall that, no.

Q. Did you ever recall his mentioning to you at all his back trouble being connected with the fall?

A. No. (R. 45, 46)

Mr. James Cassano, then Supervisor Industrial Relations, gave the termination notice. The termination was for extended, unauthorized absences and in discussing the cause with plaintiff—

Q. (Plaintiff) did not mention that he hurt his back in the mine at all to you, not at any time?

A No, not at any time. Not at any time. (R. 61)

Mr. Cassano attempted to find the cause of the absences before giving the termination notice. He could find nothing in the hospital records as to any sickness

at that time—he contacted Dr. Ploss.

> Q. Did Dr. Ploss indicate to you at all when you talked to him that Mr. Holland had claimed that he hurt his back in the mine?
>
> A. No. * * * (R. 63)

Surely a man who has been injured by a fall to the extent that he was prevented thereby from working would report it to his doctor, his foreman, or to the official who terminated him. A man who has been fired for failure to report for duty would naturally and surely attempt to justify his absence — and even more surely would he do so if such absence was due to an industrial injury sustained while on the very job from which he was discharged.

Plaintiff's Point 2.

That the Commission abused its discretion in entering its decision denying an award to the plaintiff, and that its decision and order were against the law and contrary to the evidence introduced and that in reaching such decision the said Commission did not regularly pursue its authority.

Here plaintiff seems to argue that the testimony of Dr. Ploss and Dr. Pemberton should be received.

The testimony of Dr. Ploss could add nothing to the record made before the Commission. It already clearly appears that had the alleged injury been considered in-

dustrial by the Company or by the employee himself it would have been reported as such and the hospital records would show that claim. And the uncontradicted fact is that it was not reported, nor do the records show it, as industrial (R. 55). These facts are not assumptions known only to Dr. Ploss; they are clearly established by undisputed evidence.

Dr. Pemberton did not see the plaintiff until September, 1954, and it must be assumed that had the case been considered as industrial he would have made the required report to the Commission.

The record is silent as to why Drs. Ploss and Pemberton were not called as witnesses. Plaintiff made no request that the matter be postponed or continued until these doctors could be called.

The statement of this court in *Nielson et al. v. Industrial Commission* (1917) 120 Utah 526, 236 P. 2d 346, is controlling here:

> "The principles announced in Woodburn v. Ind. Comm., 1947, 111 Utah 393, 181 P. 2d 209, seem controlling and we cannot say as a matter of law the evidence is susceptible of no other interpretation than that contended for by plaintiffs, — or that the findings of the Commission were arbitrary, capricious and unsupported by any substantial evidence."

The rule of law is clear as stated in *Kent v. Industrial Commission,* 89 Utah 381, 57 P. 2d 724:

> "In the case of denial of compensation, the record must disclose that there is material, substantial, competent, *uncontradicted* evidence sufficient to make a disregard of it justify the conclusion, as a matter of law, that the Commission arbitrarily and capriciously disregarded the evidence or unreasonably refused to believe such evidence.
>
> "When we are asked to overturn the findings and conclusions of the Commission denying compensation, it must be made clearly to appear that the Commission acted wholly without cause in rejecting or in refusing to believe or give effect to the evidence."

Plaintiffs' own witnesses testified that he complained of back trouble *before* the alleged accident.

Q. Did he complain about the, you say you didn't hear him complain about his back for a short time thereafter?

A. No, he'd say, "My back hurts me this morning," or maybe we'd sit down and eat our lunch and he'd get up and say, "My back is stiff, or back is hurting."

Q. When did he say this?

A. Well different time in the mine, you know.

Q. Oh, all the time?

A. Oh no, not all the time. Maybe a week or so you know, or something like that.

Q. You are speaking before, even before this?

A. Oh yes.

Q. Even before this he'd say this from time to time?

A. My back hurts me quite often too.

Q. And he'd say the same thing after he fell off?

A. Oh yes.

Q. You didn't notice any difference in what he complained about?

A. Not particularly, no. Not at the time. I only worked two days I believe after he got hurt.

Q. But even prior to that time, just like maybe you did a lot of times, he'd say, "My back hurts me."

A. Yes, * * *

Of course the Industrial Commission was entitled to credit this testimony and to hold that the accident, if it happened, was not the cause of any injury to plaintiff's back.

The Industrial Commission of Utah of course has had a long and wide experience with the operation and administration of medical plans, both industrial and nonindustrial. It knows from that experience, as must be apparent to all, that those in charge of a nonindustrial plan will not accept any case if there be a reasonable hope or justification for passing the burden to an industrial plan.

In particular the Commission is fully familiar with the operation and management of the Welfare and Re-

tirement Fund of the United Mine Workers of America and the procedure used by that organization when any industrial injury, actual or suspected, is involved. It is noteworthy that not only Dr. Ploss failed to consider the injury, if any, industrial, but that Dr. William A. Dorsey of the Denver office of that fund accepted plaintiff's application for medical services under that plan, (Ex. 2) and payments were made to and accepted by plaintiff.

From July 1, 1954 up to and including Dr. Pemberton's post-operative letter to Dr. Ploss (Ex. 2) there is no reference to an industrial accident or to any claim that the injury was due to such an accident. It is apparent that along the line somewhere some reference to an industrial accident would have been made had there been any foundation for such a claim or assertion.

Since the entire record refutes plaintiff's contention the Commission was at perfect liberty to question his credibility and enter findings contrary to his testimony.

CONCLUSION

There is evidence in the record sufficient to support the findings and conclusions of the Commission:

First: Plaintiff complained of back trouble before and after the accident.

Second: Plaintiff did not, to his doctors, to his foreman or to Company upon the occasion of his discharge, assert or claim that he had sustained an industrial accident.

Third: In spite of the practice of reporting all accidents as industrial claimed by the employee to be such, this accident was not reported as industrial to any doctor or to the Commission.

Fourth: Plaintiff's back difficulty was treated and considered by the Welfore Fund itself as nonindustrial.

Respectfully submitted,

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