1982

Steaven R. Hester v. South Ogden City and State Insurance Fund : Brief of Defendant

Utah Supreme Court

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James R. Black; Black and Moore;

IN THE SUPREME COURT OF UTAH

STEAVEN R. HESTER, Plaintiff, vs. SOUTH OGDEN CITY and UTAH STATE INSURANCE FUND Defendants.	:	Case No. 18220

BRIEF OF DEFENDANT

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NATURE OF THE CASE

This is a workmen's compensation case involving an employee of South Ogden City.

DISPOSITION BY THE INDUSTRIAL COMMISSION

The Administrative Law Judge entered Findings of Fact, Conclusions of Law and Order which granted benefits to the applicant for a knee injury that he allegedly suffered on June 5th, 1978, but denied any benefits related to a hip injury that plaintiff alleged occured more than a year later as a result of the original industrial accident. A Motion for Review of the Order of the Administrative Law Judge as to the denial of benefits for the hip was timely filed, which motion was denied by the Industrial Commission on December 24, 1981. The Industrial Commission affirmed the order of the Administrative Law Judge in pertinent part.

RELIEF SOUGHT ON APPEAL

It is respectfully submitted that the Order, as affirmed

by the Industrial Commission, should be upheld by the Supreme Court.

FACTS

While defendant does not specifically disagree with plaintiff's factual statement, the statement contains only those facts that the plaintiff wishes to present in support of his appeal. Therefore, it is necessary that certain facts be supplied that require emphasis which is not given in plaintiff's brief.

On June 5, 1978 while in the course of his employment, with defendant South Ogden City, plaintiff was injured in an industrial accident. Then the garbage truck on which he was working made contact with his left knee causing a hyperextension injury. (R. 1,3,4,14) His primary medical care was undertaken by Dr. Fred F. Brewer, who diagnosed a pre-patella bursitis septic. (R.3) Because of continuing complaints and difficulties, Doctor Brewer performed surgeries on the left knee on July 18, 1978 (R. 3, 15), October 17, 1978, (R. 5, 16) and March 5, 1979.

Following the third surgery on the knee, his treating physician felt that his condition was significantly improving and in fact, found that the left knee condition had stabilized no later than in August of 1979. (R. 46, 87, 95, 232, 286-287, 289,)

The first complaint of any hip problems or difficulties occured in an office visit with Doctor Brewer by plaintiff on June 7, 1979. (R. 33, 221, 287, 303) That complaint was one year and 2 days following the alleged industrial event.

It should be noted that the Statement of Facts as it follows from here is intended to give those facts which support the decision of the Administrative Law Judge and the Industrial Commission of Utah. It is acknowledged that the opinion of the treating physician, Dr. Brewer, is that there is an indirect connection between the knee injury and the hip difficulties of the plaintiff due to gait changes resulting from his favoring his left leg. (R. 285) Two surgeries have in fact been performed on the left hip condition: 1. September 4, 1979 (R. 16, 46) and 2. On March 24, 1981. (R. 290).

Doctor Brewer has made the following comments during the course and progress of plaintiff's hip problem:

1. September 3, 1979 - ".... At the hip, the range of motion is normal, but there is considerable pain with the rotation articularly. I can elicit no definite snapping sensation but the tenderness is well-localized to greater trochanter." (R. 188)

2. September 4, 1979 - Operative report - "..... Trochanteric Bursa was visualized and most of the bursal tissue removed for diagnostic purposes. The bursa did not appear grossly abnormal..." (R. 194, 303)

3. From Hearing transcript - "....

   Q. (by Mr. Black) Doctor, let me go on to the snapping hip problem. That sort of problem you see fairly often in your practice, is that correct?

   A. It's not a rarity. It's not a common occurance either.

   Q. Sometimes that occurs with or without trauma, is that correct?

   A. Yes.

Q. Sometimes it just occurs on a developmental basis without having any other physiological problem, isn't that correct?

A. There are occasions when I have no reasonable explaination why it occured." (R. 52)

4. St. Benedict's Hospital records, by Doctor Brewe dated 3-23-82 - ".... In recent months, he has redeveloped pain about the hip and would still appear to be disabled, although this is difficult to evaluate at (sic) this patient is certainly not particularly intelligent and and (sic) as well, appears to be interested in continuing disability and remuneration for the same.

A number of objective studies have been conducted including X-rays and EMGs, all of which report no abnormal findings. (R. 189, 207, 209,)

The plaintiff was referred for consultation and treatment to Doctor John M. Bender in the latter part of 1979. Doctor Bender has stated the following:

1. April 14, 1980 - "... Steaven has no definate neurologic loss in left lower extremity or elsewhere. Electromyography performed 12-12-79 is normal. Though he describes numbness, there are no objective signs of sensory or motor loss or reflex abnormalities". (R. 183)

Following the initial evidentiary hearing of October 2, 1980, the applicant was referred to a Medical Panel comprised of Dr. Charles M. Swindler, an orthopedic surgeon, and Dr. Richard S. Iverson, a neuro-psychiatrist. Doctor Swindler was the panel chairman and in conjunction with Doctor Iverson, prepared a report of his examination dated December 30, 1980. In pertinent part the report stated the following concerning their examination:

". . . . On physical examination we are confronted with

a healthy appearing young white male, who on gross inspection in the office, walked with a profound cog-wheel type of limp in the entire left lower extremity. He walked as if he had a totally stiff knee and furthermore, in the erect walking attitude he listed his entire vertebral column markedly to the left and somewhat forward. At the time of the initial examination, the man was wearing western boots. During the process of disrobing for the examination, he appeared to have great difficulty removing the boot on the left lower extremity - presumably this was due to the supposed stiff left knee. On the other hand, when it came time to remove his jeans, he very actively flexed his left hip and his left knee to their full range of flexion. When asked to sit on the examining table, he maintained his knee in an extended attitude and furthermore he maintained his left foot in some varus and adduction. When standing the man complained of intense pain in the left leg to a point where he would not bear full weight on the left lower extremity, even in the standing attitude. However, when asked to walk across the room with the arms extended and the eyes shut he would bear weight evenly on both lower extremities and in point of fact, at one point he stumbled slightly, thereby upsetting his sense of erect balance but from the objective point of view, he recovered his balance quickly and with great alacrity as far as the left extremity is concerned. As far as ambulation is concerned the patient had a very normal heel gait but he stated that the hip pain "tore him up" so that he could not perform a toe gait. Additionally the patient was unable to perform a tandum gait because he stated that his "left hip was too weak".

In the standing erect attitude, the man was noted to have full range of motion of the entire vertebral column in all planes. There was noted, as far as the low back examination is concerned, no muscle spasm; there was no guarding; there was no local tenderness, either superficial or deep in character. Indeed, the man was able to flex forward and bring the finger tips to the floor. He could get on and off the examining table without any apparent difficulty; on the other hand, when asked to turn and twist on the examining table he complained bitterly of pain and stiffness in his left hip. Again he would state that "my hip is coming out of the joint and is becoming unraveled."

In the supine attitude on the examining table, the right lower extremity as well as the low back appeared to

be normal in all respects. Passively, as far as motion in the left hip was concerned here, by means of confusion, there was noted full symmetrical motion in all planes as compared with the opposite extremity. The patient violently resisted the passive manipulation of the straight leg raising sign and when asked to voluntarily perform the flexion of the left hip in the supine position he presented a typical cog-wheel type of rigidity.

In the sitting attitude on the examining table, the man was found to have both actively and passivel full flexion of the affected left hip. Indeed, he could in the sitting attitude, flex forward and bring the chin to the knees without apparent difficulty

Examination of the left knee both in the supine attitude and in the sitting was quite inconsistent. At one point the man would contend that he was unable to either extend his left knee to his maximum physiologic range or to flex the left knee and yet, with manuvers of distraction during the physical examination, the left knee was noted to flex very freely to 45 degrees and to extend to 180 degrees. The sciatic stretch sign bilaterally was negative. Muscle power evaluation in both feet was normal and all muscle component levels. Knee jerk and ankle jerk reflexes were brisk and equal bilaterally.

There was only a questionable suggestion of uniform atrophy of the left lower extremity - this is in spite of the fact that the patient stated that he was unable to use this limb for the past several months. . . .

Assuming but not deciding that the applicant was involved in the events as alleged, we find the following information to be germaine to the problem presented to us:

I. Are the applicant's medical problems of the left hip attributed to the left knee injury of June 5, 1978?

The problems of the left hip are not attributable or related to the left knee injury. This observation is based on the medical history; the clinical findings; the results of the x-ray examination and the specific lack of demonstrable organic pathology to confirm a casual relationship.

II. What is the applicant's total permanent disability rating based upon the combined left knee and left hip injuries?

We do not find objective evidence of an increment of total permanent disability as it would be related to the left knee and the left hip. This observation is based on the lack of demonstrable pathology, i.e. no radiographic evidence of injury; no clinical findings of diminished range of motion of the respective joints in question; no clinical sign of atrophy or muscle power loss and/or gross skeletal deformity . . .

* * * * * * * * * * * * * * * * *

VI. What is the overall percentage of permanent disability of this applicant including both physical and psychologic factors?

There is no permanent disability factor involved as we see this patient.

* * * * * * * * * * * * * * * * *

XII. Absent any pre-existing condition, what effect, if any, would the accident have had regarding his psychiatric impairment?

Clinical examination and evaluation of this patient's mental status by this board, particularly the neuro-psychiatric member failed to demonstrate any true presently existing psychiatric disease.

* * * * * * * * * * * * * * * * * * *

XV. Which, if any, of Mr. Hester's present complaints are causally related to the industrial injury and which, if any, are unrelated and to what extent does each category contribute to his present impairment?

The subjective complaints, as they refer to the left thigh and the left hip are, in the opinion of the panel, unrelated to

the industrial accident in question but on the other hand as of this examination appear to be the major cause of the patient' present alleged impairment.

* * * * * * * * * * * * * * * * *

XVII. What is the percentage of permanent physical impairment if any, attributable to the industrial injury of June 5, 1978?

The medical panel is unable to demonstrate any impairment of physical function of the musculo-skeletal system attributable to the industrial injury on June 5, 1978.

* * * * * * * * * * * * * * * * *

XX. What medical treatments, if any, including medication, will be reasonably required in treating Mr. Hester as a result of the industrial injury of June 5, 1978 in the foreseeable future?

As a result of this examination the medical panel feels that maximum medical benefit has been obtained and that no further specific treatment including medication is indicated. Certainly, there is no indication for any corrective surgery. There is no indication for the use of a physical appliance, such as a brace. There is no demonstrable evidence of a neuro-psychiatric disease and therefore, there is no indication for any specific neuro-psychiatric medication. Physical therapy and muscle re-education exercises have in the past been outlined by competent physicians and these modalities of management the patient refused to accept. Physical therapy, now, is no clinically indicated. (R. 244-250) (Emphasis Added)

After submission of the above findings by the Medical Panel to the parties, the plaintiff in a timely fashion objected to those findings on January 28, 1981. (R. 254) At the time of the hearing on June 12, 1981, on the plaintiff's objections, Dr. Charles M. Swindler, panel Chairman, appeared in support of the medical panel report (R. 258). Following the laying of the foundation for the admission of the Medical Panel Report, the Administrative Law Judge admitted the report subject to the cross-examination of counsel for plaintiff. (R. 264) Doctor Swindler confirmed that the panel could find no permanent impairment that they could relate to the industrial injury. (R. 264) Doctor Swindler also affirmed that it was highly speculative that the hip problems were related to non-use of the hip as a result of the knee. (R. 268-269, 277)

Following Doctor Swindler's testimony the treating physician was called by the plaintiff and testified in support of his opinion that the hip problem was indeed caused indirectly by the gait and abnormal use of the left leg over a period of time. He further assigned specific percentages of impairment to both the knee and hip. (R. 278-314)

At the conclusion of Doctor Brewer's testimony, Doctor Swindler was recalled as a witness. He was asked if any of the testimony he had heard or any additional records that he may have examined had changed his opinion as to the causal relationship of the hip problems to the industrial accident. His reply was that nothing that had taken place had changed the opinions expressed in the Medical Panel Report and during his testimony. (R. 314)

Based upon the above evidence the Administrative Law Judge entered his Findings of Fact, Conclusions of Law and Order on October 29, 1981. The specific findings of fact in support of the Administrative Law Judge's decision to deny benefits for the left hip difficulties, were very specific and are as follows:

> "The applicant was referred to a Medical Panel for an examination and report. The panel report is hereby incorporated by reference. The panel found that as a result of the accident of June 5, 1978, that the applicant had suffered no permanent physical impairment to said left knee and that there is no causal relationship between the accident of June 5, 1978, and the hip surgery of September 1979. . . .
>
> The Administrative Law Judge further finds that the applicant is not entitled to permanent physical disability compensation for either of the hip operations nor is he entitled to temporary total disability compensation for the periods that he was recouperating due to the hip surgery. (R. 357)".

Consistent with the above Findings of Fact, the Administrative Law Judge denied benefits for the left hip difficulties. (R. 357-358)

Thereafter, the plaintiff timely filed a Motion for Review of the Administrative Law Judge's Order (R. 367) accompanied by a Memorandum of Points and Authorities (R. 360-366). On December 28, 1981 the Industrial Commission after performing it's statutorily required review of the entire record affirmed the Administrative Law Judge's decision. (R. 369-370).

ARGUMENT

POINT I

THE SUPREME COURT IS PRECLUDED FROM WEIGHING EVIDENCE AND/OR REVIEWING FINDINGS OF FACT OF THE INDUSTRIAL COMMISSION.

§37-1-85, Utah Code Annotated, 1953, states in part:

> The findings and conclusions of the commission on questions of fact shall be conclusive and final and shall not be subject to review; such questions of fact shall include ultimate facts and the findings and conclusions of the commission.

As can be seen from the foregoing, the Supreme Court is without authority to disturb factual conclusions of the Industrial Commission.

The issue of weighing conflicting evidence is left with the Industrial Commission. Russell v. Industrial Commission, 43 P2d 1069, (1953) states in part, at 1072 and 1073:

> By express statutory provisions and by a long line of decisions of this court we are precluded from weighing conflicting evidence and making findings of fact. That is the providence of the commission. The duties of this court are limited to a determination of questions of law. We may interfere with the commission's findings of fact in those cases where an award is granted without support of competent evidence, and likewise, where an award is denied against uncontradicted evidence without any reasonable basis for disbelieving the same. In such cases a question of law is presented for determination; otherwise, the findings of the commission must be affirmed. . .
>
> When any one of two or more inferences may reasonably be drawn from the evidence, this court is not authorized to direct which inference must be drawn, and, likewise, when, as in the instant case, it is somewhat of a speculation as to where or how the deceased recieved the injury complained of, this court is precluded from directing an award.

Case law has continually sustained this position taken by the Court and the legislature. See Wilson et al v. Industrial Commission, 108 p2d 519, (1940); Jones v. Ogden Auto Body, Sup Ct No. 17853 (Utah April 24, 1982); Clinger v. Industrial Commission, 571 p2d 1328 (Utah 1977); Savage v. Industrial Commission, 565 p2d 782 (Utah 1977).

A cursory examination of the facts in the instant case reveals conflict between two qualified experts. The plaintiff contends that because Dr. Swindler deferred to the treating physician actual periods of temporary total disability, that he likewise deferred the primary issue of the causal relationship of the hip problems to the industrial accident. (Plaintiff's brief pp. 6-9). That simply is not the case. Dr. Swindler clearly stated his opinion that the hip problems were totally unrelated.

POINT II

THE INDUSTRIAL COMMISSION IS NOT COMPELLED TO ACCEPT THE TESTIMONY OF PLAINTIFF'S TREATING PHYSICIAN

As stated above, the Industrial Commission must be sustained unless it acted arbitrarily. The evidence indicates, however, that substantial conflict existed between Plaintiff's position and other substantive evidence before the Commission. As a result, Plaintiff seems to argue that the Commission must accept his testimony and evidence.

Kent v. Industrial Commission, 57 P2d 725, (1936), while factually different from the case at bar, contains the following language:

> Recently, in the case of Gagos v. Industrial Commission, supra, this court held, referring to the Industrial Commission, that: "The fact finder is not always required to believe the uncontradicted evidence of a witness," because there may be infirmities, not revealed by the record which caused the evidence to fail to carry conviction of its truth to the Commission, and that under such circumstances the commission was not required to find in accordance with such evidence.

It is important to note that the Commission may disregard even uncontroverted evidence of a witness. This goes further than the case at bar since the evidence of Plaintiff is, certainly, not "uncontradicted".

Lorange v. Industrial Commission, 153 P2d 272, 273, (1944), states:

> We cannot say from our review of the whole record that the Commission is bound to accept the testimony of plaintiff as to the cause of his eye injury to the exclusion of all the other testimony and record evidence. The testimony in the case is in conflict, it involves discrepancies, . . . but the fact remains that in the ultimate the evidence does not require a contrary finding. We are also unable to say that the Commission's decision is the result of capricious or arbitrary action, which we would be required to determine before setting its order aside. It was said by Mr. Justice Frick in Kavalinakis v. Ind. Comm., 67 Utah 174, 246 p. 698: "Unless therefore it can be said, upon the whole record, that the commission clearly acted arbitrarily or capriciously in making its findings and decision, this court is powerless to interfere. Such is the manifest purpose and intent of the Workmen's Compensation Act, where it has been made reasonably clear that the commission had misconstrued or misapplied the provisions of the act, this court has never hesitated to point out the error and to correct the same. It was not intended, however, that this court, in matters of evidence, should to any extent substitute its judgment for the judgment of the commission." (Emphasis added).

Plaintiff's position here is similar to that taken by plaintiff in Vause v. Industrial Commission, 17 Utah 2d. 217, 407 P2d 1006, (1965). There plaintiff's appeal was based "upon

his own testimony and evidence adduced on his behalf." The court said there:

> The weakness in Plaintiff's position is one not uncommon in appeals to this court: of becoming so absorbed in his own contentions and so preoccupied with the assumed righteousness of his own case that he is unable or unwilling to give proper consideration to the countervailing evidence.
>
> . . . Our statutory and decisionaly law require us to look at the evidence in the light most favorable to the Commission's finding, and it is the obligation of the parties involved to so present the matter to the court.
>
> . . . This court cannot properly reverse the Commission and compel an award unless there is credible evidence without substantial contradiction which points so clearly and persuasively in plaintiff's favor that failure to so find would justify the conclusion that the Commission acted capriciously, arbitrarily or unreasonably in disregarding or refusing to believe the evidence. (Emphasis added)

At this juncture, one should refer to the case of Mellen v. Industrial Commission, 19 Utah 2d 373, 431 P2d 798, (1967). There an award was denied plaintiff, who suffered a heart problem which "could have occurred while the man was asleep or otherwise, on or off the job". The court cites, approvingly, language from another case, Purity Biscuit Co., v. Industrial Commission, 115 Utah 2d 1, 201 P2d 961, (1949), which follows in part:

> In this type of case we are dealing with situations involving death or disability which situations may, due to a functional failure, occur by reason of the work or may be purely coincidental with it. Where the death or disability occurs under such circumstances as to present prima facie doubt as whether it was caused by exertion incidental to the work, or an event which occurred only in the duration of the work and in regard to which the work furnished no material or efficient concurring or cooperating cause, then, before a favorable

> award is made, it should appear by clear and convincing evidence that the exertion in pursuance of the work was at least an efficient cooperating cause of the disability or death. The commission should have clear and convincing proof that the exertion done as a part of the work, whether ordinary or extraordinary, was a factor which materially contributed to or caused the death or disability. Unless the commission requires clear and convincing proof that the disability was employment connected, that is, materially contributed to by the work performed, we may open wide the door to compensating nonemployment connected death or disabilites which the act was not intended to cover. This rule I suppose is primarily one of guidance for the commission. It would seem that unless no reasonable mind could say that the evidence was clear and convincing, the commission could not be overturned for arbitrariness. (Emphasis added).

Given this standard of proof, the Plaintiff did not sustain his burden in this case. The remainder of Mellen contains language which is highly informative as to the case at bar. It is, however, repetitive and will not be cited for that reason, except as to the following:

> The fallacy which underlies plaintiff's attack on the Commission's finding is that they improperly attempt to focus consideration of the issues exclusively upon their own view of the evidence and theories of the case. While some aspects of the statistical data and medical theories harmonize with their contention, others fail to do so . . . (Emphasis added).

It is respectfully submitted that the same "fallacy" underlies the case presently at bar.

As further support for the above contention, it should be emphasized that the Commission is not bound by the opinions of expert witnesses:

"We have no disagreement with the plaintiff's argument that it would be unjust and impermissible for the Commission to obdurately ignore clear, credible and uncontradicted evidence so that its action is arbitrary and unreasonable. Yet (sic) is not necessarily bound to accept the opinions of any witness or witnesses, expert or otherwise as to what its determination should be. If it were so, it should be obvious that this would turn the prerogative entirely over to the expert witness and would relieve the Commission of both its prerogative and its responsibility. This would be especially true in a case like this where it would seem that the question as to the degree of plaintiff's disability, both as to the percentage and the permanency thereof, and how it compares to specific disabilities listed in the statute, is not a problem in mathematics which can be determined with absolute certainty, but involves the exercise of some judgment upon which reasonable minds might vary in their conclusions.

To be considered in connection with the foregoing is the fact that the burden rested upon the plaintiff to prove the extent of his disability by evidence which persuades the Commission in accordance with his contention. In that connection it is to be had in mind that there was not only the evidence upon which the plaintiff relies concerning his unemployability, but also the evidence, which he seems to ignore, of the medical panel which rated his disability at 50 percent, which the Commission elected to believe and adopt as its finding. It is not open to question that if the Commission had chosen to make its findings in accordance with the plaintiff's evidence, that award would be sustained. But upon this review it is our duty to survey the total evidence in the light most favorable to the Commission's determination: and to assume that it believed those aspects of the evidence which support its award; and we cannot properly reverse when there is a reasonable basis therein to support the findings and award as made. Shipley v. C & W Contracting Company, 528 P2d 153 (Utah 1974) (Emphasis added).

CONCLUSION

As can be seen from the foregoing facts and argument, substantive facts exist to justify the findings reached by the Industrial Commission in this case. The Commission did not act arbitrarily or capricously. The Commission simply chose to accept the opinion of one expert over the opinion of the treating physician. It is respectfully submitted that the Court should sustain the Industrial Commission's Order.

DATED THIS 20 Day of July, 1982.

BLACK & MOORE

James R. Black

JAMES R. BLACK
Counsel for Defendants

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the following BRIEF OF DEFENDANT has been served upon Plaintiff by mailing a copy thereof to it's counsel:

James R. Hasenyager
MARQUARDT, HASENYAGER & CUSTEN
Attorney for Plaintiff
635 25th Street
Ogden, Utah 84401

Postage pre-paid this 21st day of July, 1982.

BY Annette Snelgrove