

1972

Inga-Lill Elton v. Utah State Retirement Board, An Agency of the State of Utah : Brief of Plaintiff-Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

INGA-LILL ELTON,

Plaintiff-Respondent,

vs.

UTAH STATE RETIREMENT
BOARD, an agency of the
State of Utah,

Defendant-Appellant.

Case No.
12809

Brief of Plaintiff-Respondent

Appeal from the District Court of Salt Lake County
awarding retirement benefits to plaintiff,
The Honorable Ferdinand Erickson, Presiding

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IN THE SUPREME COURT OF THE STATE OF UTAH

INGA-LILL ELTON,

Plaintiff-Respondent,

vs.

UTAH STATE RETIREMENT
BOARD, an agency of the
State of Utah,

Defendant-Appellant.

Case No.
12809

Brief of Plaintiff-Respondent

NATURE OF THE CASE

This is an action for benefits under the Judicial Retirement Act.

DISPOSITION IN THE LOWER COURT

The lower court awarded the Respondent, Mrs. Elton, the benefits provided by the Judicial Retirement Act.

RELIEF SOUGHT ON APPEAL

Mrs. Elton seeks affirmance of the decision of the lower court.

STATEMENT OF FACTS

Mrs. Elton does not accept the statement of facts proposed by the Appellant.

The Appellant has artfully singled out those facts which it believes support its position and has studiously avoided those facts which support the decision of the lower court.

It should not at this time require citation of authority for the proposition that on appeal the evidence is viewed in the light most favorable to the decision of the lower court, but if it does, see *Hardy v. Henricksen*, No. 12354, Supreme Court of the State of Utah, filed March 16, 1972.

As her Statement of Facts, Mrs. Elton submits the following:

Judge Leonard Elton was appointed to the bench of the Third Judicial District in 1966 after a distinguished career as a trial lawyer (R. 64). At that time he was in good health (R. 64, 119). There were no indications of physical impairment. He was not then and had not for many years been under medical care (R. 178).

On January 9, 1969, Judge Elton suffered a stroke (R. 79). He was hospitalized for a time and then returned to part-time employment. By the fall of 1969 he had resumed his judicial duties and was working full-time (R. 47, 55, 65, 81).

On January 1, 1970, he assumed the responsibilities of Presiding Judge. These responsibilities substantially increased his workload.

The Presiding Judge has general supervision over the functions of all 10 District Courts of the Third Judicial District. He presides over meetings of the District Judges. He supervises and controls calendar assignments, personnel problems, questions relating to the press and usually personally handles cases that involve constitutional issues, if they can be sensed initially, and cases of unusual public interest (R. 66).

From the time he resumed his full judicial duties until April 20, 1970, Judge Elton saw his doctor monthly without complaints or medical findings (R. 81). On April 21, 1970, he came to Dr. Dalrymple's office complaining of dizziness. He was clammy, unsteady in gait and had experienced nausea and vomiting (R. 81-82).

The events leading to the conditions of April 21, 1970, are significant:

On Monday, April 6, 1970, Judge Elton passed sentence upon Clark Ronnow on one count of misusing public funds and dismissed six other counts (Ex. P-2).

City officials through newspaper comments had attempted to tell Judge Elton what he ought to do in the Ronnow case and from the bench he told them that if they wanted to tell him what to do, they had better appear in court on the sentencing date (R. 68-69).

On Wednesday, April 15, Judge Elton started trial of Woodward v. Anderson, a 60-car freeway accident. Between April 6 and April 15, Judge Elton had had a full schedule of trials and hearings (Ex. P-2).

The Woodward case continued through Thursday, Friday and Monday, April 20 when the jury returned with its verdict at 9:11 p.m. (Ex. P-2).

The next day, on April 21, Judge Elton made a special visit to Dr. Dalrymple. As previously noted, the Judge was dizzy, clammy, unsteady and nauseated (R. 81, 82). Dr. Dalrymple believed he had suffered a stroke. (R. 88).

He stayed home ill the 21st and 22nd (Ex. P-4). On the 23rd he heard Motions in the Sunday Closing Law Case (Ex. P-2).

On Friday, April 24, Arbor Day, he heard extensive argument in the Sunday Closing Law Case (Ex. P-4).

On Monday, April 27, Judge Elton was again home ill (Ex. P-4). He saw Dr. Dalrymple on Tuesday. He was not good. The doctor insisted he stay home a week. (R. 88, 122).

Judge Elton stayed home April 28th, 29th and 30th and May 1st. The hearing in the Sunday Closing Law Case set for April 29, was postponed until May 6 (R. 122). His illness required him to postpone the announced date for decision. This resulted in several "nasty" telephone calls which really upset him (R. 125). On May 2 he again

saw Dr. Dalrymple. He was not well. He was unsteady and his speech was slurred (R. 55).

On Wednesday, May 6, Judge Elton heard final arguments in the Sunday Closing Law Case. On Monday, May 11 he started another jury case. On May 12 he ruled on the Sunday Closing Law Case, started a non-jury case and heard an annulment and divorce (Ex. P-3). He had a jury case scheduled for May 13 but died that morning.

ARGUMENT

POINT I.

THE DECISION OF THE LOWER COURT IS SUPPORTED BY COMPETENT EVIDENCE.

The defendant states as points that Judge Elton died as a result of disease and not as result of accident and that his stroke did not arise out of or occur in the course of his employment.

These are not legal points on appeal. They are statements of position and arguments against the finding of the lower court. The issue presented by this appeal is simply whether the findings of the lower court are supported by competent evidence. *Charlton v. Hackett*, 11 Utah 2d 389, 360 P.2d 176 (1961).

In this connection, the trial court was entitled to consider both the medical and the non-medical evidence and to apply that evidence under guidelines established by the decisions of this court and other persuasive authorities.

The finding complained of reads:

"Judge Elton was killed by accident arising out of or in the course of his employment" (R. 27).

There was an abundance of evidence to support this finding.

The persons who knew him best — his wife, his colleagues, his clerk, his bailiff and the lawyers who practiced before him — all bore witness to the deterioration of his health brought upon by the stresses of the highly sensitive cases handled by him during the last six weeks of his life.

His physician, Dr. Dalrymple, testified that Judge Elton suffered from vascular disease, resulting in insufficient blood supply to the brain, and that this condition was aggravated by the stresses of Judge Elton's employment and that these stresses were the principal factor in cutting short his life (R. 90-92).

In his report to the Retirement Board, Dr. Dalrymple said:

"It is my opinion that Judge Elton's cerebral thrombosis, which occurred on May 13, 1970, was of sudden onset and undoubtedly precipitated by the emotional tension which he underwent in the performance of his judicial duties." (Ex. P-1).

Mr. Harry J. Calton, Judge Elton's Bailiff described Judge Elton's health as "always good" (R. 46). He said the judge applied himself to his work diligently (R. 48).

In describing the public interest in the Ronnow Case and the Sunday Closing Law Case, Mr. Calton said:

“Well, it was immense. There was a terrible lot of interest. He had telephone calls and letters. I don’t know the nature of them because I didn’t read them. He was under a lot of pressure.” (R. 48).

Mr. Calton observed that while Judge Elton had these cases under consideration, he worked usually from 8:00 a.m. until 6:00 p.m. and took work home with him (R. 48). He worked a number of Saturdays (R. 49).

While the Sunday Closing Law Case was under consideration, Judge Elton had visitors in the office “all the time.” Every time he had a recess, it wasn’t a recess for him, according to Mr. Calton, as he had attorneys and civilian people in there putting pressure on him (R. 49). The judge became onery whereas he had been a “very gentle man” (R. 49). He looked tired (R. 49).

David J. Shewell, Judge Elton’s Clerk, recalled that the case of State of Utah v. Ronnow had been assigned to Judge Anderson (R. 56). He disqualified himself (R. 56). Judge Elton discussed the case with other judges but no one wanted it. He said he didn’t want it either but couldn’t make someone else take it, so he kept it (R. 57).

The Sunday Closing Law Case was also an unpopular case. Judge Elton did not feel he could assign it to someone else (R. 57).

Mr. Shewell recalls that during this case there were continual calls and quite a bit of mail and attorneys waiting for the judge as he recessed court (R. 58). Judge Elton was concerned (R. 58). He did a lot of reading (R. 58). He said he had been bothered at home and had considered unlisting his phone number (R. 59).

When Judge Elton read his decision from the bench, the courtroom was full. There was quite a bit of emotion in his voice (R. 59). He was under considerable strain but agreed to a television interview at noon.

When he came off the bench at noon his chambers were full of lights and cameras, and cords and microphones. He could not get to his desk. He returned to the courtroom and said he was not going in his chambers. Before lunch he did go back and read his decision for the reporters (R. 60). When he came back from lunch, he was choking. He appeared nervous.

While Judge Elton had the Sunday Closing Law Case under consideration, his speech was not clear and sharp, he fumbled for words which was not like him (R. 61).

Mr. Shewell recalled the freeway accident case. It involved 60 cars on a snow-slick road. They worked late at night; the case was a strain on the judge (R. 61, 62).

Harold Waldo, Jr., one of the principal attorneys in the Sunday Closing Case, testified that the case had "very great public interest." (R. 135). There was a hearing on

Arbor Day (April 24) by which a procedure for the handling of the case was agreed upon (R. 136). On May 6, the court heard arguments of counsel starting at 10:00 a.m., continuing until noon, resuming at 2:00 and continuing until 5:00 (R. 137). In the morning the Judge asked questions but as the afternoon proceeded the number of questions declined. He appeared to be fatigued, withdrawn and worried (R. 138). During the afternoon he interrupted counsel in the middle of a sentence to call a recess, abruptly (R. 138).

On the day he announced his decision (May 12) it was noteworthy that he was fatigued and seemed to be extremely tired. He ascended the bench slowly. He took considerable time to get to the chair. His voice was low and subdued, where he normally had a booming voice that carried very well. On this occasion it was difficult to hear him. He announced his decision in a few words and left the bench (R. 138-139).

Judge Elton was an independent-minded judge. He at no time gave the impression that it didn't matter because his decision would be reviewed. The constitutional point involved was particularly difficult (R. 141).

Mrs. Elton testified that Judge Elton always worked from about 8 until 5 and always brought files home (R. 120). After he became presiding judge he spent even more time and his lunch hours were often spent working (R. 121).

Judge Elton had many calls at home during the Ronnow case (R. 121), and during the Sunday Closing Case. He became markedly irritable in April (R. 122). When he went in for his check-up (April 20), Dr. Dalrymple told him to take it easy and rest a bit. The hearing was postponed to May 6 (R. 122).

On May 5 he had been studying but he couldn't remember what he was doing. He insisted that his children and his wife sit up with him until 3:00 a.m. because, he said, "I have lost my memory completely." (R. 123).

The following weekend he worked on the Sunday Closing Case (R. 123). He had promised the decision by Tuesday, having previously announced that he would make the decision earlier (R. 125).

On the 12th of May, Mrs. Elton met her husband for lunch, but she could not get into his chambers because it was full of cameras and newspaper men (R. 126). He said, "I am not going to do it." She said, "Leonard, just give a brief statement and get it over with," so he did (R. 126). Although he had planned to meet Mrs. Elton for lunch. He had lunch with an attorney and she picked him up that evening (R. 127). He had a stroke the following morning (R. 127).

Judge Elton was under no strain during the six weeks before his death other than his work (R. 128). He had no financial problems (R. 129), no marital problems (R. 127), no problems with the children (R. 129).

Dr. Dalrymple testified that from January 13, 1969, until his death Judge Elton was suffering from an underlying vascular disease (R. 86). When Dr. Dalrymple saw Judge Elton April 20, his condition was good (R. 50). On the 21st, Dr. Dalrymple was of the opinion that the judge had suffered another stroke (R. 88). He prescribed a week off.

He next saw Judge Elton on April 28. His condition was not much better. He changed his medication because he was becoming more irritable and hypersensitive and asked him to return on May 2nd (R. 88).

On that date he still didn't seem very well. He was unsteady, his speech was slurred. He asked him to return again in one week. On May 9 he had improved. On May 13 he was on the verge of death when Dr. Dalrymple saw him at the hospital. He died in a matter of minutes (R. 89).

From March until May, Judge Elton appeared to be under stress or tension (R. 189). Judge Elton acknowledged he was tired and under stress (R. 94). This stress in the opinion of the doctor aggravated the underlying disease and contributed to his death. In the opinion of the doctor, this aggravation was the principal factor in bringing about Judge Elton's death (R. 92).

Dr. Dalrymple said that Judge Elton had the potentiality for a stroke before April 21, 1970, but ". . . he had something happen between the 20th and 21st that caused it which I couldn't say precipitated it, but I know what happened." (R. 102).

Dr. Dalrymple said:

"Those people who work under a lot of pressure have a very high incidence of vascular disease: attorneys, doctors, high business executives and there are certain factors which make them more vulnerable to the disease of the arteries, but we don't know them." (R. 109).

The legal structure within which this evidence is to be considered is the Judicial Retirement Act which provides:

"Disability retirement compensation — Widows' pensions. — Any judge who has had ten years of service and who is retired on grounds of disability pursuant to Section 49-7-8(d) shall be entitled to the disability retirement compensation provided for in this act. Any judge, regardless of the years of service, whose disability arises out of or in the course of performance of his judicial duties and the widow of every judge who is killed by accident arising out of or in the course of his employment, wheresoever such injury occurred, shall be entitled to the disability retirement compensation or widows' pensions, respectively, provided for in this act." Section 49-7-4, U.C.A., 1953.

The Utah Workmen's Compensation Act employs language identical to that found in the Judges' Retirement Act. Several cases construing the Workmen's Compensation Act of Utah support Mrs. Elton's right to a widow's pension.

Powers v. Industrial Commission, 19 Utah 2d 140, 427 P.2d 740 (1967), involved a fireman who suffered a mild heart attack because of anxiety he experienced dur-

ing an alarm, but did not seek medical aid until six months later when he experienced similar pains. He claimed that a pre-existing heart ailment was aggravated by his duties as a fireman.

His doctor testified before the Commission that acute stress, strain, and emotional aggravation could have aggravated an underlying or pre-existing coronary artery difficulty. The Commission, however, denied compensation based on the report of a medical panel. The panel felt that the events of the evening of the fire showed no more emotional tension than that of many other fires that had been the usual part of his occupational duties for four years prior and that progression was a natural part of the course of coronary artery disease.

The Utah Supreme Court reversed, saying that the fact there is no direct evidence the plaintiff suffered greater anxiety and emotion than usual is not determinative whether an industrial accident occurred, that aggravation of a pre-existing disease by an industrial accident is compensable and that an internal failure brought about by exertion in the course of employment may be an accident within the meaning of the act.

In *Jones v. Calif. Packing Corp.*, 121 Utah 612, 244 P. 2d 530 (1952), a pea vinery supervisor worked long hours on several successive days. The work was not particularly strenuous physically but there was much mental stress. He became ill while at work, went home and died shortly thereafter as a result of a coronary occlusion. The Commission denied compensation.

The Supreme Court ruled that compensation should have been granted, saying:

"It is settled beyond question that a pre-existing disease or other disturbed condition or defect of the body, when aggravated or lighted up by an industrial accident, is compensable under the act, *Graybar Electric Co., Inc. v. Industrial Comm.*, 73 Utah 568, 276 P. 161; *Thomas D. Dee Memorial Hospital Ass'n. v. Industrial Comm.*, 104 Utah 61, 138 P.2d 233. And also that an internal failure brought about by exertion in the course of employment may be an accident within the meaning of Sec. 42-1-43, U.C.A., 1943, without the requirement that the injury result from some incident which happened suddenly and is identifiable at a definite time and place. *Robertson v. Industrial Comm.*, 109 Utah 25, 163 P.2d 331; *Thomas D. Dee Memorial Hospital Ass'n. v. Industrial Comm.*, *supra*; *Hammond v. Industrial Comm.*, 84 Utah 67, 34 P.2d 687; *Purity Biscuit Co. v. Industrial Comm.*, 115 Utah 1, 201 P.2d 961, 966. In the latter case, Mr. Justice Wade stated:

"* * * this court is definitely committed to the proposition that where an employee suffers an internal failure or breakdown which results from overexertion in the course of his employment that such is a compensable accident injury * * *" Citing cases." 244 P.2d at 642.

Several other jurisdictions have granted compensation in similar factual situations. In *Lumbermen's Mutual Casualty Co. v. Ind. Accid. Comm.*, 29 Cal. 2d 492, 175 P.2d 823 (1946), the California Supreme Court held that arterial hypertension and arterial apoplexy brought on by long working hours is a compensable injury. All rea-

sonable doubts whether an injury arose out of the employment are to be resolved in favor of the employee. The Court stated that a heart attack brought on by strain and overexertion incident to employment is a compensable injury though the condition existed previously and even though there was no traumatic injury. The Court also held that there is no requirement of unusual strain — only a casual connection between the strain of the employment and the injury suffered need be shown.

In *Fireman's Fund Indemnity Co. v. State Ind. Accid. Comm.*, 39 Cal. 2d 831, 250 P.2d 148 (1952), a compensation award was upheld by the Supreme Court where the claimant suffered a stroke. Shortly before he had worked 65 days for 11 hours per day in an atmosphere of strain and tension attempting to conclude contract negotiations.

The medical testimony showed that the long hours coupled with the tense and trying condition which surrounded them could have aggravated an existing hypertension which in turn could precipitate a cerebral vascular accident. The Court said it realized that the point of the stroke is reached through the cumulative effect of each day's strain and that it cannot be said that any one particular exposure to strain and tension was responsible. Despite no traumatic accident, the Court upheld the compensation award.

Hoage v. Royal Ind. Co., 90 F.2d 387 (D.C. Cir. 1937), held that an insurance adjuster who had worked long hours and worried over his work and, as a result,

suffered a heart attack, should not be denied compensation. Mental strain was deemed sufficient to justify the award.

In *Rathbun v. Taber Tank Lines*, 283 P.2d 966 (Mont. 1955), compensation was granted to the widow of a truck driver who died of a heart attack. He had worked long hours, did not get regular sleep, and was driving on icy roads. The evidence was deemed sufficient to show the driver suffered from an employment connected injury.

In *Schechter v. State Ins. Fund.*, 160 N.E. 2d 901 (N.Y. 1959), an attorney or an insurance company died from a heart attack. His workload had increased significantly in the weeks preceding his death. He was under constant strain. The Court of Appeals ruled that compensation should be granted if a claimant was under unusual strain by his employment despite the fact that the work performed by him which precipitated the heart failure is the same general type in which he is regularly involved. So long as unusual strain is placed on the claimant by his work so that his heart is affected, the requirements for compensation are met.

In *Klimas v. Trans Caribbean Airways, Inc.*, 176 N.E. 2d 714 (N.Y., 1961), compensation was granted an employee who died of a heart attack. Emotional strain over an excess repair bill for an aircraft of his employer caused his death. The New York high court ruled that the death was employment connected.

In *Little v. J. Korber & Co.*, 71 N.M. 294, 378 P.2d 119 (1963), Irving Little became emotionally upset at work as manager of a wholesale department of a hardware store. He died shortly after of a myocardial infarction due to arterio-sclerotic heart disease due to generalized arteriosclerosis. The trial court held that his death was caused by an accident arising out of and in the course of his employment. The Supreme Court of New Mexico affirmed, saying:

"* * * Where a case is tried by the court without a jury, the court is the sole judge of credibility of witnesses and weight to be given their testimony. * * *

"It has long been the rule that in determining whether evidence is sufficient to sustain the trial court's findings of fact, this court on appeal will consider only that evidence and inferences to be drawn therefrom which support the findings, and we will not consider any evidence unfavorable to the findings. The findings of the trial court will not be disturbed when they are supported by any substantial evidence and this court will not weight the evidence where conflicts exist. * * *"

The only other case in Utah construing the Judicial Retirement Act is the case styled *In the Matter of the Retirement of Horace C. Beck*, (Utah 3d Judicial District, Civil No. Misc. 4-64, 1969). In that case District Judge Bryant H. Croft said:

"Judge Beck, at 76, undoubtedly has been subject to 'the aging process.' The fact that a heart condition is sometimes caused, as Dr. Behrens noted, by an aging process should not, of itself, bar one from disability retirement compensation.

Under Utah law a judge is entitled to such compensation if his disability arises 'in the line of duty' or as a result of 'the performance of his duty.' Dr. Behrens' report stated that while he did not feel that Judge Beck's work as a judge is primarily responsible for the basic heart problem, he did believe that the work as a judge had certainly aggravated the condition and helped to precipitate congestive heart failure in the sense that increased physical activity and pressures of such a position do contribute to increase the work load of the heart. As a judge, this writer has difficulty in recognizing that the duties of a judge necessarily increases one's 'physical activity,' but the pressures and tensions present in the role of a judge is a matter of which this writer feels compelled to take judicial notice.

"Prior to becoming a judge, Judge Beck had enjoyed excellent health, had no prior indication of heart disease, and was and is a tall, thin man not burdened with the excess weight which prompts doctors to suggest reducing to avoid heart problems. Nothing is in the record to suggest that Judge Beck has at any time done anything, except to grow older graciously, in the performance of his duties as a judge, that could be construed as the causal responsibility for the heart condition that now compels his retirement. A disability that evolves from such ailments as a stroke or heart attack appears to me to be the end product of a gradual process hastened in its arrival time in some cases by the extra stresses and strains that required activities cause. In such cases the question as to whether such disability came in the line of duty cannot depend for its answer upon the timing of the heart attack that brings the disease to its disability climax. Whether it comes in the courtroom

or the bedroom, in chambers or in the kitchen, should make no difference in the conclusion to be reached.

"The heart, like the filament of the globe, works for thousands of hours, then suddenly, perhaps without even the flick of a switch, fails in its function. The cause, in the absence of evidence to the contrary, is not the last act of the moment preceding the attack, but in all probability is the summation of many elements contributing each in its own way over the years to the end result.

"When we are confronted with the necessity of determining the causal connection between disability brought on by heart disease and the performance of one's duty, an important element is, it seems to me, not so much what caused it, but rather what did not cause it. In Judge Beck's case, the only thing that seems certain is that we cannot say that his heart attack occurred as a result of some affirmative act on his part that had no connection with his duty as a judge and was of his own doing. We could not determine with any degree of medical certainty all of the factors that contributed to the ultimate result that occurred on March 16, 1969. Perhaps no one factor 'caused' it. That the tensions and pressures of the judge's duties could be and probably was a contributing factor seems evident from Dr. Behrens' report.

"Justice Oliver Wendell Holmes, Jr., stated that,

'The life of the law has not been logic; it has been experience.'

"Experience shows that heart failures come from the grinding of day-to-day living and working. When it finally fails from no more than a flick of the switch, it seems reasonable to believe that the tensions in the life of a judge over a span

of years preceding the attack constitute a contributing factor of more than de minimis proportions and, in turn, constitutes a causal connection between the resulting disability and the 'line of duty' and in Judge Beck's case, I so find.

"It is, therefore, my conclusion that Judge Horace C. Beck, because of physical illness, has become substantially and permanently incapacitated to perform the duties of his office, that as a consequence thereof, he is disabled and should be placed in a retirement status and his office be deemed vacant, and that Judge Beck became disabled in the line of duty, or as a result of the performance of his duty, and is entitled to the disability retirement compensation provided for in the Judges' Retirement Act."

Judge Beck's heart attack occurred at the Elks Lodge. His case was not appealed.

Appellant's Point I on cause of death is an argument as to the weight of the evidence and the permissible inferences therefrom. Such arguments are for trial courts, not appellate courts. The same arguments were made to Judge Erickson and were properly rejected by him.

Appellant's thesis seems to be that Judge Elton's underlying disease was not caused by his employment. We have never said it was. Our position has been and is that the stresses of his employment, acting upon his underlying disease, cut short his life.

The lives of all of us will end some day. To be killed is not to have one's life ended; it is to have one's life shortened. Even though Judge Elton may have died

from vascular disease at some point in time, if that point was accelerated by employment connected stress, he was killed by accident arising out of his employment as surely as the consumptive miner killed in a cave-in.

Justice Crockett noted the difference between heart attack cases and back cases in his concurring opinion in *Redman Warehousing Corp. v. Industrial Comm.*, 22 Utah 2d 398, 454 P.2d 283 (1969), a back case relied upon by the Appellant. He did not join in the court's comments about *Jones v. California Packing Corp.*, 121 Utah 612, 244 P.2d 530 (1952), and *Purity Biscuit Co. v. Industrial Comm.*, 115 Utah 1, 201 P.2d 961 (1949), saying:

"They are different from the instant case and speak for themselves."

Pintar v. Industrial Comm., 14 Utah 2d 276, 382 P. 2d 414 (1963), also relied upon by Appellant is another back injury case. It merely holds there was evidence to support the Commission's findings.

Carling v. Industrial Comm., 16 Utah 2d 260, 399 P.2d 202 (1965), a loss of hearing case cited by Appellant is actually against the Appellant's position. The court there expressly recognized that the term accident ". . . is not necessarily restricted to some single incident which happened suddenly at one particular time and does not preclude the possibility that due to exertion, stress or other repetitive cause, a climax might be reached in such manner as to properly fall within the definition of an accident . . ."

Nor do *Mellen v. Industrial Comm.*, 19 Utah 2d 373, 431 P.2d 798 (1967), or *Burton v. Industrial Comm.*, 13 Utah 2d 353, 374 P.2d 439 (1962), support Appellant. In *Mellen* the medical panel reported that Mellen's onset of pain while roofing was only symptomatic of a natural degenerative condition. The Commission denied compensation even though Mellen's personal physician thought that the onset was due to extra exertion on the roof. The court held only that the Order was based on competent evidence. In *Burton*, the medical panel found that Burton's myocardial infraction was not caused by exertion. The Commission so held. This court held the Commission did not act arbitrarily.

These cases are better authority for Mrs. Elton's position than for Appellant's. In this case we have medical testimony from Dr. Dalrymple that Judge Elton's death was due to the stresses of his work as a judge and a total absence of testimony to the contrary.

Dr. Roger M. Dalrymple was licensed to practice medicine in 1943 (R. 75). He has specialized in internal medicine for the past 23 years, having previously spent three years in the army in internal medicine, two years at the University of Utah and having been certified by the American Board of Internal Medicine in 1952 (R. 75). He is on the staff of St. Mark's Hospital and University Hospital and is Assistant Clinical Professor of Medicine at the University of Utah (R. 76).

The Appellant offered no evidence to rebut the testimony of Dr. Dalrymple. Indeed, Appellant offered no evidence at all in this case (R. 144).

Appellant's Point III relative to course of employment is wholly unsupported by relevant authorities. They all involve the question whether employees are covered while going to or from work or during lunch. None are heart attack or stroke cases.

The fact that the fatal stroke occurred at home rather than on the bench is irrelevant. Section 49-7-4, U.C.A., 1953, provides it applies ". . . wheresoever such injury occurred. . . ."

Appellant cites authorities to establish that it is irrelevant that death occurs on the job if there is no causal relation between the employment and the death. These same cases also establish the corollary, i.e., if there is a causal relationship between the employment and the death, the death arises out of the employment whether or not in the course of the employment in the sense of time and place. See all the authorities relied upon by Appellant under its Point III.

CONCLUSION

A judge does not unburden himself of the responsibilities of his office when he walks out of the courthouse. He takes his decisions home with him and frequently to bed with him. The fact that a decision has been reached does not remove this burden. The agony of decision is not so easily cast aside. Second thoughts and recurring doubts are part of the daily life of the conscientious judge.

The Utah State Retirement Act created the Retirement Board which administers the Judges' Retirement Fund. That Act provides:

"It is hereby declared to be the policy of the legislature that this act be liberally construed so that the benefits and protections as herein provided shall be extended as broadly as reasonably possible." Section 49-10-7, *supra*.

Mrs. Elton is entitled to her pension. The defendant should be required to pay her the compensation provided by law.

Respectfully submitted,

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ADDENDUM

NEWLY UNCOVERED CASES

The fact that Judge Elton's fatal attack occurred after he had made his decision in the Sunday Closing Law Case does not affect his widow's right to her pension. In Thompson v. American Casualty Co., 20 Utah 2d 418, 439 P.2d 276 (1968), the plaintiff was under considerable stress during the five weekdays but rested at home on Saturday and took a short drive to visit relatives. He was stricken that night after returning home during his sleep.

Even though a person has a diseased condition which would eventually result in his death, if an accident occurs which hastens his death, recovery can be had. Whitlock v. American Insurance Co., 21 Utah 2d 131, 442 P.2d 26 (1968).

Determination of cause of death is the exclusive prerogative of the factfinder. Id.

See also Dienes v. Safeco Life Ins. Co., 21 Utah 2d 147, 442 P.2d 468 (1968).