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Meyer v. Shelley : Brief in Opposition to Certiorari

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

900591

IN THE SUPREME COURT OF UTAH
STATE OF UTAH

FRED MEYER and/or LIBERTY
MUTUAL INSURANCE COMPANY,

Petitioners/Appellants,

vs.

LILETH SHELLEY, THE EMPLOYERS
REINSURANCE FUND and THE UTAH
STATE INDUSTRIAL COMMISSION,

Respondents/Appellees.

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RESPONSE AND BRIEF IN
OPPOSITION TO
PETITION FOR WRIT OF
CERTIORARI

Docket No. 900591

Priority No. 13

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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Clerk, Supreme Court, Utah

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STATE OF UTAH

FRED MEYER and/or LIBERTY	:	
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Respondents/Appellees.	:	

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IN THE SUPREME COURT OF UTAH
STATE OF UTAH

FRED MEYER and/or LIBERTY MUTUAL INSURANCE COMPANY,	:	
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vs.	:	PETITION FOR WRIT OF CERTIORARI
LILETH SHELLEY, THE EMPLOYERS REINSURANCE FUND and THE UTAH STATE INDUSTRIAL COMMISSION,	:	Docket No. 900591
Respondents/Appellees.	:	Priority No. 13

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Lileth Shelley, Respondent herein, by and through counsel Phillip B. Shell, files this brief in opposition to the Petition for Writ of Certiorari previously filed by the Appellants herein.

QUESTIONS PRESENTED FOR REVIEW

Appellants present three issues for review: First, were Mrs. Shelley's complaints of pain medically sufficient to establish the sole etiology of her pre-existing condition; second, did the Court of Appeals err in modifying Allen v. Industrial Commission by making qualitative distinctions between types of pre-existing conditions in determining whether to apply the higher standard of legal causation; and third, does the Court of Appeals' decision

maintain the "clear and workable rule for future application of the Commission' as established in Allen v. Industrial Commission.

The Respondents oppose the granting of the Writ on all three issues, for the reasons set out hereinafter.

STATEMENT OF JURISDICTION AND OF NATURE OF PROCEEDINGS

Jurisdiction is proper in this Court pursuant to the provisions of Section 78-2-2(5), Utah Code Ann. (1953, as amended).

DETERMINATIVE PROVISIONS

The Respondent submits that there are no specific determinative constitutional provisions, statutes, ordinances, or rules in connection with this case.

STATEMENT OF FACTS

Respondent does not have any major disagreements with the facts as cited by the Appellants in their brief. However, it may be helpful to stress what Respondent deems to be important in the Court's consideration of the facts:

1. Respondent Lileth Shelley was 50 years old at the time of the 1985 industrial injury in question. At that time she had been employed by the Appellant for over 13 years as a warehouse worker (R. at 2, 33, 34).

2. The 1985 injury occurred while Mrs. Shelly was twisting

while on a ladder in lifting a 35 lb. box of shower curtains over the protective railing of the ladder (R. at 35, 36).

3. Mrs. Shelley had sustained two prior low back injuries, both occurred while on the job and while employed by the Appellant or its predecessor in interest. The first injury occurred in 1975 while she was lifting a 35 to 40 lb. case of shoes (R. at 62). The second low back injury occurred in 1978 when Mrs. Shelley was bending over a waist high case containing boxes of tightly packed underwear. As she was struggling to remove the boxes from the case, she felt her back pop (R. at 54).

4. The Respondent received medical treatment from Dr. Harold P. Hargreaves for each of the two prior injuries. She was also treated by Dr. Allred after the 1978 injury and wore a corset for about five months following this injury. She testified that after these injuries, she had occasional problems with her back (R. at 55, 306).

5. Mrs. Shelley's medical history shows no other prior or subsequent injuries to her back. The medical records further give no indication of any disease or back problem of any kind prior to the initial injury in 1975 (R. at 52, 52, 69, 71, 161, 162).

6. After the 1985 injury, Mrs. Shelley's treating physicians, Dr. S. William Allred, and Dr. J. Charles Rich, diagnosed Mrs. Shelley as having a pre-existing condition in 1985 of degenerative spondylolisthesis, a condition which is often started by trauma to

the back. This was attributed to the prior work injuries (R. at 102, 217, 270, 272).

7. Mrs. Shelley was rated by Dr. Allred as having a 25% whole body impairment with 12 1/2% due to the 1985 injury and 12 1/2% due to the pre-existing problem (R. at 102).

ARGUMENT

POINT I

A WRIT OF CERTIORARI SHOULD NOT BE GRANTED FOR THE PURPOSE OF REVIEWING THE DECISION OF THE COURT OF APPEALS AFFIRMING THE FACTUAL FINDINGS OF THE INDUSTRIAL COMMISSION

The Writ of Certiorari should not be granted to review the determination of the Court of Appeals that the factual findings of the Industrial Commission were not arbitrary nor capricious. Regardless of how the Appellants phrase the question in their petition, there was sufficient evidence before the Industrial Commission upon which to base its factual findings.

The Commission found that Mrs. Shelley's pre-existing condition was the result of prior industrial accidents incurred while employed by the same employer. They found no evidence in the record that any of Mrs. Shelley's back problems pre-dated or existed independent of her industrial injuries.

The Commission considered the evidence concerning the origin of the pre-existing condition in order to determine whether it was due to on-the-job injuries or non-industrial causes.

There is no evidence in the record to show that Mrs. Shelley suffers from any congenital back problem nor that she had any problems that pre-dated her first back injury in 1975.

At the evidentiary hearing, she testified that the first injury to her back occurred at work in 1975 (R. at 52). Mrs. Shelley also testified that she had not had a problem with her back prior to the 1975 injury (R. at 69). Her testimony does not reveal any back problems other than those ensuing after her three industrial injuries.

The medical records from the Respondent's treating physicians further support this. For example, in the records of Dr. Harold Hargreaves, M.D., an x-ray summary for a film taken in 1975 states "Lumbar spine normal." (R. at 162). His records do not reflect any complaints or treatment relating to the back prior to 1975, although the Respondent had seen him first in February of 1969 (R. at 161). The records of Dr. Kenneth Guymon mention a work injury to the back in May of 1978 and the 1975 back injury three years before (R. at 171). Although he treated various ills beginning in 1972, there is nothing in Dr. Guymon's records to suggest of prior back problems.

In a letter dated June 13, 1985, Dr. J. Charles Rich, M.D., Mrs. Shelley's neurologist, stated, "...the only episodes of back pain she has ever had (have) been those related not only with work but

with this same employer over the course of the last few years." (R. at 217).

Dr. Rich, in an operative report dated 7/23/85, stated, as to preoperative and post operative diagnoses, "L5-S1 disk herniation and degenerative spondylolisthesis." (R. at 270).

Degenerative spondylolisthesis is the slipping of one vertebra over another due to degenerative processes (ie. the result of trauma) rather than due to congenital defects.

Dr. William Allred, M.D., the treating orthopedic surgeon, stated in the 7/31/85 discharge summary of a finding of "L5-S1 central disc defect with a bilateral nerve root compression L4-5 and mild degenerative Pseudo-spondylolisthesis." (R. at 272). Further, Dr. Allred's 1987 Summary of Medical Record indicates a 50/50 apportionment between pre-existing conditions and the 1985 industrial injury. In responding to a question of aggravation he stated as follows:

10. Did the industrial injury aggravate the applicant's pre-existing condition? Please explain as necessary.

Yes. The patient had had two previous episodes of back pain of brief duration.

(R. at 102).

After the evidentiary hearing at the Industrial Commission, the Appellant hired Dr. David Beck to examine Mrs. Shelley for an independent medical examination. Dr. Beck, who saw the Respondent

only once, stated the opinion that the 1975 and 1978 injuries probably have no bearing on Mrs. Shelley's long-term problem. He apparently attributed the pre-existing portion of the back problem to other origins. However, this is only Dr. Beck's opinion and it is not supported by any explanation or evidence of any kind (R. at 293, 294).

The Commission, as stated in its final order, found no evidence in the record to show that any of Mrs. Shelley's back problems were due to congenital defects or anything pre-dating the first industrial injury of 1975. Rather, it found ample reasons for the factual conclusion that the pre-existing problems in Mrs. Shelley's back are due to the prior work injuries (R. at 334).

The findings of the Commission are supported by substantial evidence, are not arbitrary nor capricious, and were properly affirmed. The Court of Appeals by its affirmation did not depart from its accepted and usual course of judicial proceedings, nor did it sanction such a departure by the Industrial Commission as to call into exercise the Supreme Court's power of supervision.

POINT II

**THE WRIT OF CERTIORARI SHOULD NOT BE GRANTED BECAUSE THE DECISION
OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH
THE HOLDING IN ALLEN v. IND. COMM.**

The Appellants continue to urge that the principles adopted by the Court in Allen v. Industrial Commission, supra, do not support the conclusions reached by the Court of Appeals and the Industrial

Commission in this matter. However, Appellant's analysis is flawed and is incorrect.

In Allen this Court adopted a test which requires, in the context of legal causation, that a claimant with a pre-existing condition show that the injury resulted from extra exertion. A worker without a pre-existing condition does not have to meet the higher standard. The stated reason for the extra exertion requirement was to determine whether "the employee brings to the workplace a personal element of risk such as a pre-existing condition." Allen at 25. The Court stated that the adoption of a higher standard of legal causation in such a case would serve to "offset the pre-existing condition of the employee as a likely cause of the injury, thereby eliminating claims for impairment resulting from a personal risk rather than exertion at work." Allen at 25. (Emphasis added).

If the medical evidence shows that an injured worker's problems are directly related to the work injury in question, legal causation should not be defeated on the pretext of a pre-existing injury where it is established that such pre-existing injury was created in the same workplace in which the accident in question occurred. A worker does not bring any personal element of risk to the workplace where any so-called pre-existing conditions are the result of prior work injuries stemming from that same employment with the same employer.

Hence, where a worker brings no pre-existing injury to the workplace, but has a compensable injury (or injuries) on the job, and subsequently while on the job sustains an otherwise compensable injury to the same area of the body, he should not have to meet the higher legal standard to establish compensability, if the injury was incurred while working for the same employer. This is because the worker's increased risk of injury with respect to the later claim is attributable strictly to the hazards previously encountered at that same employment.

In such a situation, the purposes for invoking the higher legal causation standard do not apply. There is no reason to shelter the employer from liability for the last injury. The language and reasoning of Allen do not mandate a different conclusion, but in fact support it.

Appellants would argue that to allow the Court of Appeals' decision to stand would undermine one of the principal purposes of Allen; that Allen established a "clear and workable rule for future application by the Commission." Id. at 18. However, even if what Appellants claim were true, the Court of Appeals made the right determination.

The focus still remains upon whether a worker brings a personal risk to the workplace. It is true that employees with identical medical conditions may be treated in a greatly disparate manner depending upon the source, or sources, of their disabilities.

However, short of a totally socialized system where all disabled workers receive compensation, regardless of the cause of the disability, the purposes of the workers compensation system mandate that if the injury was caused by the workplace, compensation should be awarded. Physical conditions which pre-date the job are appropriately not the responsibility of the employer and its insurance carrier. The decision of the Court of Appeals does not change this and should not be disturbed.

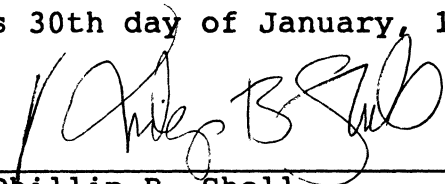
CONCLUSION

The record fully supports the action taken by the Industrial Commission. The Commission did not act arbitrarily or abuse its discretion in finding Mrs. Shelley's pre-existing condition to be job related. The Court of Appeals acted properly in affirming the action of the Commission.

The Court of Appeals was justified under the philosophy of the Allen decision to find that the higher legal standard of causation does not come into play when the worker brings no personal risk to the workplace, but suffers from a pre-existing job-related injury at the time of the final injury. This is sound policy.

This Court should deny the petition for writ of certiorari.

Respectfully submitted this 30th day of January, 1991.



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CERTIFICATE OF MAILING

I certify that four true and accurate copies of the foregoing brief were mailed, postage pre-paid, on the 30th day of January, 1991 to each of the following counsel of record:

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