2016

Alberto Mondragon, Petitioner/Appellee v., Utah Labor Commission; Jp's Landscaping and/or Auto Owners Insurance, Respondents/Appellants

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

Alberto Mondragon, Petitioner/Appellee vs. Utah Labor Commission; JP's Landscaping and/or Auto Owners Insurance, Respondents/Appellants.	Utah Court of Appeals Case No. 20150898 Utah Labor Commission Case No. 12-0664

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

ARGUMENT

I. The Labor Commission's award lacks evidentiary support and cannot be upheld.

The award to Mondragon is premised upon factual findings pertaining to the alleged mechanism of injury that lack credible evidentiary support in the record. Such unsupported findings cannot sustain an award of benefits.[1] In its Response, the Labor Commission (hereinafter the "LC" as it pertains to its response to JP's appeal) asserts that there is no dispute regarding the "operative facts" upon which the award was based—namely, that "the force of the wheelbarrow caused [Mondragon's] right knee to twist and pop."[2] To the contrary, as thoroughly disputed in JP's opening brief,[3] there is actually a complete absence of evidentiary support for a "twisting" mechanism, as the Commission found in issuing its first remand.[4] Although the Commission did speculate that "even though Mr. Mondragon did not twist his right knee between the wheelbarrow handles, he *may* have twisted or damaged his right knee in another way," no evidentiary support for such speculation has ever been identified in the record.[5]

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[1] Utah Code Ann. § 63G-4-403(4)(g); *Martinez v. Media-Paymaster Plus*, 2007 UT 42, ¶ 35, 164 P.3d 384.
[2] Appellee's Br. pp. 9, 12.
[3] Br. of Appellants, pp. 16–18.
[4] R. at 144.
[5] *Id.* (emphasis added). The LC, both in its statements of fact and argument, misleadingly asserts that the medical records support a finding of industrial causation of Mondragon's knee injury, and therefore, that the Commission's award is supported by the medical evidence. To the contrary, the medical opinions in evidence are based upon Mondragon's recounting of the twisting mechanism that was later proved to be false. *See e.g.,* R. 220 at 30, 52. As argued in JP's opening Brief, because the medical records are based upon the assumed occurrence of Mondragon's false accident theory, their conclusions lack

In any event, the Commission's award to Mondragon was not based upon a twisting mechanism. The award was ultimately based upon the Commission's own theory that Mondragon's knee was subjected to "significant stress" as a result of the wheelbarrow tipping.[6] Like the disproved twisting mechanism, this "significant stress" theory lacks evidentiary support. After assuming that Mondragon must have been "confused" in asserting the impossible caught-between-the-handles mechanism,[7] the ALJ proceeded to find, without identifying any evidentiary basis therefor, that Mondragon "use[d] his legs and body to try and keep control of the wheel barrow and when the heavy load tipped he and the wheel barrow [were] jerked and tousled."[8] Building upon the ALJ's finding, and likewise without identifying any evidentiary support, the Commission expanded that Mondragon's knee "was subject to stress while the fully loaded wheelbarrow tipped over."[9]

On referral, the Medical Panel took the ALJ and Commission's assumptions regarding the mechanism and ran with them. In conducting its own improper

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foundation and cannot be characterized to support an alternative accident theory that the medical providers did not themselves consider.

[6] R. at 203–04.

[7] As detailed in JP's opening brief, the Commission's assumption of Mondragon's confusion is wholly improper as it is, at minimum, as equally logical as the competing inference that his false story was a product of intentional fabrication. As held in *Spring Canyon Coal Co.*, the Commission's arbitrary choice of the inference of confusion in order to award benefits is improper. 201 P. 173, 175 (Utah 1921). Without adopting the inference of confusion, the Commission could not have reached the alternative accident theory under which benefits were awarded. However, because the LC failed to respond to JP's arguments on this point, JP's stands on its prior briefing.

[8] R. at 118.

[9] R. at 144.

"investigation" of the facts,[10] the Panel added new, and more dramatic, details to the hypothetical mechanism. The Panel opined that Mondragon "tried to plant his feet to stabilize the wheelbarrow," and that in "trying to hold the wheelbarrow from tipping . . . he straightened or bent his knee under considerable abnormal stress."[11] Characterizing its assumed findings as a "violent stressful motion type injury," the Panel found that the same caused Mondragon's injury. On review of the ALJ's summary adoption of the Panel's opinions, the Commission concluded that the findings of "significant stress" to Mondragon's knee, and the Panel's finding of medical causation based thereupon, justified the award of benefits.[12]

The entire basis for the Commission's award is that, notwithstanding Mondragon's actual allegations, his knee was subjected to "significant stress" when he attempted to control or stop the wheelbarrow from tipping. Neither Mondragon's own testimony, nor his in-court demonstration, indicated that Mondragon attempted in any manner or with any level of exertion to stop the wheelbarrow from tipping over, or that any "stress" to his knee was caused by the incident.[13] Mondragon unequivocally testified that his injury occurred when his knee was caught and twisted between the handles of the tipping wheelbarrow.[14] Mondragon's testimony and evidence was devoid of support for a finding

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[10] As opposed to being bound by the Commission's factual findings as required by the ALJ's referral. R. at 149.
[11] R. at 152.
[12] R. at 203–04.
[13] R. 221 at 14–15, 19–28.
[14] R. 221 at 24.

that his knee was exposed to significant force or stress at any point other than that of his false allegations regarding the twisting wheelbarrow handles.

The LC makes much of the Panel's opinion that its *assumed* mechanism of injury is consistent with an injury such as Mondragon's, and that individuals sustaining this type of injury may report feeling that they have been struck in the knee. Importantly, Mondragon never asserted that he felt as though he was struck in the knee, but above and below the knee.[15] Indeed, he reported at his first medical appointment that there was no impact to the knee.[16] Regardless, the Panel's opinions about what injuries can possibly result from the kind of stress imposed upon a knee while trying to keep a wheelbarrow from tipping are wholly irrelevant where there is no evidentiary support for a finding that Mondragon's knee was actually subjected to such stress. Because the Panel's opinions are based upon an unsupported mechanism of injury, they have no evidentiary value and were improperly relied upon.

The factual findings upon which the Commission's award of benefits is based are premised only upon the ALJ, Medical Panel, and Commission's assumptions that such "significant stress" upon Mondragon's knee existed. No evidentiary support for such a finding exists in the record. A reasonable mind cannot accept assumptions and inferences that conflict with Mondragon's own allegations as being adequate to support an award of benefits. The award of benefits to Mondragon must therefore be overturned.

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[15] R. 221 at 24.
[16] R. 220 at 30.

II. Liberal construction of the Act does not justify the Commission's award of benefits.

A claimant has the burden of proving each element of his claim to establish an entitlement to the workers' compensation benefits sought.[17] The LC does not dispute that Utah law holds unrepresented claimants to the "same standard of knowledge and practice as any qualified member of the bar."[18] Nonetheless, the LC cursorily argues that Mondragon's choice to pursue his claim pro se, in combination with the policy of "liberal construction" of the Workers' Compensation Act should excuse Mondragon's failure to prove his claim, as well as the Commission's improper advocacy on his behalf.

The LC cites no authority, and JP's can locate none, supporting the proposition that a claimant may be excused from his burden of proving each element of his claim simply due to his choice to appear pro se. Further, the policy of "liberal-construction" of the Act does nothing to justify the Commission's improper award. The rule, as cited in *Heaton,* states that "it is the duty of the courts and the commission to construe the Workers' Compensation Act liberally and in favor of employee coverage when statutory terms reasonably admit of such a construction."[19]

Here the LC does not ask for a liberal construction of the language of the Act—at least, it makes no argument elucidating what "liberal construction" is reasonable in this instance to sustain the award of benefits. Instead, the LC effectively asks this Court to approve the Commission's liberal construction of the facts of Mondragon's claim, under

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[17] *See, e.g.,* Utah Code Ann. § 34A-2-417.
[18] *State v. Burdick*, 2014 UT App 34, ¶ 25, 320 P.3d 55.
[19] *Heaton v. Second Injury Fund*, 796 P.2d 676, 679 (Utah 1990) (emphasis added).

which benefits were awarded.[20] There is no rule requiring, or even allowing such a policy of liberally construing a claimant's facts in order to enter an award of benefits on the merits of a claim.[21] Such a policy would work substantial unfairness to defending parties, and would equate to a policy of depriving respondents of their due process rights to defend against a claimant's actual allegations.

This issue was addressed by former Chief Justice Wolfe, wherein he noted the important distinction between liberal construction of the statute, and the Commission's duty to find the facts.[22] He clarified that the duty

> pertains not to questions of fact but to questions of law. . . . The very phrase 'liberally construed' does not fit a factual situation. The rule that pertains in respect to a factual situation is that the applicant has the burden of proof in establishing his case. If, after all the facts are considered, the Commission finds the scales in balance, the situation is left in equipoise and the applicant cannot recover.[23]

At minimum, the Commission liberally construed Mondragon's allegations in characterizing them as the ultimate "significant stress" theory upon which it awarded

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[20] It is difficult to characterize the Commission's "fact finding" as simply a liberal construction of Mondragon's allegations. As discussed throughout this Reply and in JP's opening brief, the Commission ignored Mondragon's central and unchanging allegation after it was disproved, and proceeded to invent a new theory not asserted by Mondragon, which it deemed plausible, and awarded benefits based thereupon.

[21] The Utah Supreme Court recently addressed this policy of liberal construction/benefit-of-the-doubt presumption in *Jex v. Utah Labor Comm'n*, 2013 UT 40, ¶¶ 52–57, 306 P.3d 799, wherein it clarified that the policy has been generally overstated, and only applies in the "rare case," at the "back end of the litigation" after the law has been applied to the facts and "a dead heat without an apparent winner" is presented. In those rare cases, where a "close question" exists on the applicability of a statutory provision, an attempt at a liberal construction of statutory language may be made, where reasonable.

[22] *Jones v. California Packing Corp.*, 244 P.2d 640, 649 (Utah 1952) (Wolfe, dissenting opinion; abrogated on other grounds).

[23] *Id.*

benefits. The foregoing doctrine does not allow such machinations, and indeed, this Court's own precedent prohibits it, as discussed below.

III. Benefits were awarded to Mondragon under a theory that he neither asserted nor supported.

In its Order awarding benefits, the Commission asserted that it did not "impermissibly raise[] an alternative theory of the accident because the underlying circumstances of the accident were contained in the record."[24] The LC asserts the same argument, and argues further that the "broader mechanism of injury" upon which the Commission relied is "generally consistent" with the "general theory" of Mondragon's claim.[25] Assuming arguendo that the Commission did actually rely upon a theory that, although not specifically alleged by Mondragon, is generally consistent with the evidence and the general circumstances of Mondragon's claim (as opposed to being an alternative and unsupported mechanism), an award based upon such a mechanism is prohibited.

In *Acosta*, the ALJ concluded that the exact mechanism of injury pled by Acosta (a "single lift of an eight pound baby") was insufficient to sustain an award of benefits.[26] The ALJ then proceeded to find that the "totality of the circumstances" demonstrated by the evidentiary record showed that Acosta had actually engaged in a *broader mechanism of injury* whereby she was required to lift five babies over 40 times per day, among other activities, and that this broader theory of Acosta's claim justified an award.[27] Noting the due process concerns raised by such sua sponte advocacy by the Commission, this Court

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[24] R. at 203.
[25] Appellee's Br., pp. 14–15.
[26] *Acosta v. Labor Comm'n*, 2002 UT App 67, ¶ 31, 44 P.3d 819.
[27] *Id.*

held that it was "improper" for the Commission "to raise other theories . . . to justify an award of benefits" that were not pled or raised by Acosta herself.[28] Finding that Acosta asserted only the "single lift" theory, which theory failed to sustain an award, this Court affirmed the denial of benefits.[29]

Notwithstanding the LC's attempt to draw some vague semantic difference between what was held improper in *Acosta* and what occurred before the Commission in this case, *Acosta* squarely held that whether supported by the underlying evidence or not, the Commission cannot assert an alternative mechanism on behalf of a worker in order to award benefits.[30] The LC argues that the Commission's award is justified because it only "reduced [the] detail" of Mondragon's claim, backing off of the specific twisting-handle allegations that were shown to be false. The LC argues that because the evidence generally demonstrates that Mondragon was using a wheelbarrow, and that the wheelbarrow tipped over, that it was proper for the ALJ, Commission, and Medical Panel to fill in the specific details, with no support from Mondragon himself, opining as to how such an injury *could possibly have occurred*, and to base an award upon that supposition.

The ALJ's improper actions in *Acosta* were, for all intents and purposes, identical to the Commission's characterization of its own actions here. Upon finding that Acosta's more specific allegation of a single lift as the cause of her injury could not support an award, the ALJ backed away from that specific allegation, and considered the more

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[28] *Id.* at ¶¶ 31–33.
[29] *Id.*
[30] *Id.*

general theory of the exertions involved in Acosta's workday.[31] Just as the LC argues here, the evidentiary record in Acosta fully supported the general "40 lifts" theory adopted by the *Acosta* ALJ. Nonetheless, this Court held that whether supported by the record or not, the ALJ or Commission cannot take it upon themselves to modify a claimant's allegations to justify an award of benefits.

In doing precisely what this Court held to be improper in *Acosta*, the Commission improperly stepped into Mondragon's shoes in advocating on his behalf and denied JP's their due process rights of defending against the specific allegations upon which benefits were awarded.[32] Just as Acosta was held to the only theory of accident that she raised, Mondragon must be held to the single, specific, and unchanging theory upon which he relied in this case. Because Mondragon's allegations were shown to be false, his claim must be denied.

CONCLUSION

The Commission's award of benefits to Mondragon cannot be sustained. The factual finding regarding Mondragon's alleged accident, upon which the award was premised, is devoid of factual support and contrary to Mondragon's own allegations. The Commission's sua sponte assertion of an alternative accident theory on behalf of

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[31] *Id.* at ¶ 31.

[32] As detailed in JP's opening Brief, even more egregious is that the ultimate "significant stress" theory of Mondragon's accident which the Commission adopted was wholly devoid of medical support prior to the Commission's referral to the Medical Panel. Therefore, not only did the Commission improperly raise the alternative accident mechanism on Mondragon's behalf, it also improperly relied upon the Medical Panel to create the only medical support for that theory through its referral to the Panel. Again, the LC declined to respond to JP's arguments on this point, so JP's stands on its prior briefing.

Mondragon was wholly improper, and deprived JP's of its due process right of defense against the same. The award is a product of the Commission's improper actions taken after Mondragon's failure to prove his claim. It should be overturned. JP's respectfully requests the same.

DATED this 15 day of May, 2016

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CERTIFICATE OF COMPLIANCE

Attorney for Appellees, Cody G. Kesler, certifies that this REPLY BRIEF OF APPELLANTS complies with the requirements of Utah Rules of Appellate Procedure 24(f)(1) and 27.

1. This Brief contains a total of 2,639 words, excluding portions of the Brief exempted by the aforementioned rules.

2. This Brief complies with the typeface requirements and has been prepared using a proportionally spaced typeface in Microsoft Word 2013 in size 13 Times New Roman font.

DATED this 15TH day of MARCH, 2016.

RICHARDS BRANDT MILLER NELSON

Cody G. Kesler

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of this REPLY BRIEF OF APPELLANTS were served on this 15 day of March, 2016 on the following:

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