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Colita Williams and Mae Williams, Dependents of Earl Rae Williams, Deceased v. the Industrial Commission of Utah, Mesa Drillers and Employers Casualty Company : Defendant's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

COLITA WILLIAMS and MAE WILLIAMS,
Dependants of EARL RAE WILLIAMS, Deceased,

Plaintiffs

vs.

THE INDUSTRIAL COMMISSION OF UTAH, MESA DRILLERS and EMPLOYERS CASUALTY COMPANY

Defendants

Case No.
10273

DEFENDANTS' BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS—*continued*

CASES CITED

STATUTES CITED

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DISPOSITION SOUGHT BY DEFENDANTS

The Industrial Commission of the State of Utah, Mesa Drillers, and Employers Casualty Company seek that the Utah Supreme Court confirm the Order and Findings of the Industrial Commission denying Plaintiffs' Claim for death benefits (R 153, 154) and further affirming the Order denying a rehearing of the Industrial Commission on November 4, 1964 (R 158).

STATEMENT OF FACTS

Decedent was employed by Mesa Drillers near Blanding, Utah, on or about July 3, 1957. At this time a commercial mud mix know as Northern Mud was used containing a My-lo-jel preservation. My-lo-jel preservative contained paraformaldehyde which when dissolved in water released a toxic formaldehyde. (R. 4, 23)

Formaldehyde, depending on concentration, can cause irritations to the mucous membranes and may, when exposure is extreme, cause chronic bronchitis and may lead to pneumonia. However, for such a condition to exist, it would be necessary for an individual to have been exposed to such a degree that he would not voluntarily stand by and allow the exposure to continue. Or in other words, the material is sufficiently irritating, that anyone capable of doing so would immediately leave the area. The only conditions under which severe effects are likely to occur would be if the individual were confined in such a way that he could not escape or if he were overcome and could not escape. (R. 144, 145).

The basic facts of the alleged exposure and accident relied on by Plaintiffs were largely related by a Mr. Earl B. Clark and by a Mr. LeRoy Ramey. The testimony of Earl B. Clark and LeRoy Ramey go into great detail concerning the manner in which the deceased was required to work in closed shed, mixing the Northern Mud material, how he was exposed to the dust of the mixture, how the dust was irritating to the skin of the deceased, how Earl Clark kicked the sides off the shed in order to make for better ventilation for the deceased and how Earl Clark washed the powder residue of the mix off

of the deceased. (R 68, 69, 70, 71, 84, 85, 86, 80, 73).

The driller on the job, Buster Copeland, provided a signed statement in which he indicated that Williams had worekd for the Company for approximately three weeks. During the last week Williams worked he had the ful and was sick. Copeland noticed that he was taiknng pills every day. On the last day he worked, Copeland noticed that he was sick, and on the way in from work he vomited. At no time while Williams worked for Mesa Drillers did he ever complain of anything on the job causing him to get sick. (R 138)

Copeland, as foreman, first knew of Williams being sick in the hospital the day after hospitalization occurred. The foreman also saw Williams at his house several days afterwards and Williams said nothing about being made ill on the job. (R 139).

The alleged exposure evidently occurred on July 3, 1957. The parties returned to work on July 4th and 5th, and returning home from work on July 5th, Williams became ill, (R 138) and was that evening admitted to the hospital (R 97). Williams was examined in the hospital by Dr. Charles Massion. When Dr. Massion was asked about any reference to exposure to a chemical substance, he could not remember any reference being made by Williams (R 7).

Decedent was released from the hospital on July 9, 1957, and begun a journey with his wife to his home in Texas. In route at Levelland, Texas, the Decedent died and Dr. Barnes, the attending physician attributed death to a coronary occlusion (R 35).

In interpreting the testimony given, the Industrial

Commission undoubtedly weighed the testimony given by LeRoy Ramey, Earl B. Clark and one of the Plaintiffs, Colita Williams. Mr. Ramey testified to many of the details of the exposure and accident. The exposure and accident exidently all occured on July 3rd 1957 (R 65-83). The daily drilling report from Mesa Drilling Company for the 1st, 2nd, 3rd, 4th and 5th days of July bears the signatures of the various men who worekd on the job and the number of hours worked on the respective days. The work record shows that LeRoy Ramey did not work on July 3rd when he testified he was there and saw the details of the accident. It also shows that the Decedent, Mr. Earl Williams, did work on the 4th of July and so did Mr. Ramey, and yet there is no testimony adduced as to anything that happened on the 4th of July, and the parties, in fact, testify that they did not work on the 4th of July. The work record shows that they worked eight hours (R 140, 141) and Defendant's exhibit 1).

Mr. Clark testified that he was a former husband of Mrs. Colita Williams (R 89).

Based on the record accumulated by the Industrial Commission, on the Medical Panel's report, the hearing on the Medical Panel's Report, and a rehearing, the Commission entered its order on September 23, 1964.

The Defendants allege that the evidence adduced in the trial is sufficient to sustain the findings of the Industrial Commission, that the Industrial Commission did not act arbitrarily and capriciously, and did not exceed any of its powers. The Defendants further allege that the findings of the Medical Panel were based upon supposition and upon questionable testimony of LeRoy Ramey who

according to the work record was not even present, Earl Clark, former husband of the Plaintiff, and the Plaintiff herself, whose only contact with the accident was what the deceased allegedly told her about what accurred. It is interesting to note that those things the deceased allegedly told his wife about the occurrence of the accident were never repeated by the deceased to the doctors who attended him.

In the Plaintiffs argument it is pointed out that certain findings and conclusions could have been drawn by the Commission. The Defendants admit that it would have been possible to arrive at the conclusions and findings as set forth by the Plaintiffs if the Commission were to accept all of the evidence adduced by the Plaintiffs in the case, and if the Commission were to ignore all of the evidence by the Defendants. The Commission is entitled to base its conclusions on acceptable evidence from disinterested parties, and in so doing, is in no way being arbitrary or capricious.

ARGUMENT

POINT I

THE COMMISSION WAS NOT IN ERROR IN REJECTING THE MEDICAL PANEL'S REPORT.

On March 25, 1960, the Industrial Commission wrote to M. Blaine Peterson, offering to submit the matter to a Medical Panel, if the parties could stipulate on the facts (R 14). No stipulation was actually made on the facts, and together with other documents submitted to the medical panel, was an unsigned statement made by the Plaintiff, Calita Williams, wife of the deceased. The unsigned statement is extraordinarily detailed and de-

scriptive, particularly from one who does not purport to have been anywhere near the ecene where the accident or exposure took place. Among other things, the statement stated: "He was overcome by the poisonous fumes almost to the extent of unconsciousness. He was removed from the small building by the other workers at the location. The following day was a holiday, the 4th of July. Mr. Williams was at home all day and was ill. He complained of chest pains and difficulty in breathing, and he stated that it was this powder and the poisonous fumes therefrom that was causing the trouble. On July 5th he reported to the location but could not work due to the chest pains and difficulty in breathing. That afternoon he went to the hospital at Cortez. This was Friday that he was admitted to the hospital and he stayed until Tuesday, July 9th. He was attended by Dr. Massion. He left the hospital at Cortez on July 9th. He was not able to return to work and still complained of pains in his chest and difficulty in breathing." (R 15)

It would have been entirely proper for the medical panel to give an apinon such as was given based on the purported facts. But even the medical panel in its report in the second paragraph states:

> "It is to be noted that the only description of the alleged injury is contained in your file in an unsigned statement, presumably obtained by from the widow by an attorney representing her. This was undated. There was a briefer statement of alleged injury in the application for hearing signed by the widow about a year and a half after the alleged accident." (R 37)

In the last paragraph of the same report, the Medical Panel states,

> "It is to be emphasized that the opinion of the panel is largely based upon and acceptance of the unsigned statement that there was an exposure to paraformaldehyde and that such exposure was in sufficient degree to result in pneumonitis." (R 39).

Title 35-1-77 Utah Code Annotated 1953 as Ameneded, states . . . . . .

> "And the Commission may base its findings and decisions on the report of the Panel but shall not be bound by such report if there is other substantial conflicting evidence in the case which supports a contrary finding by the Commission. . . ."

In this case it is true that Earl Clark and LeRoy Ramey testified to substantially the same material as was originally testified to the Plaintiff Mrs. Colita Williams, and upon which the Medical Panel based its report. However, a serious cloud is thrown over the testimony of Mrs. Williams in that it was impossible for her to be present at the time of the exposure, and the work record shows that LeRoy Ramey was not on the job at all on the day of the exposure, and that Earl Clark is a former husband of Mrs. Williams. It is submitted that is is within the discretion of the commission to select that evidence which is the most credible and to use that evidence in arriving at its decision. It is further noteworthy that the medical panel itself based its decision on three probabilities and selected what was *in the opinion,* in the light of the evidence submitted (being the unsigned statement of Mrs. Williams) that one of these probabilities was the most likely.

The Medical report of the panel could only be sustained if the Commission found that the facts as related by the

Plaintiff Mrs. Williams were substantially correct. The manner and form of such evidence did not warrant such credibility.

POINT II

THE COMMISSION WAS NOT IN ERROR IN FINDING THAT THERE WAS NOT A SCINTILLA OF COMPETENT EVIDENCE OF EXPOSURE TO PARAFORMALDEHYDE.

The question is not whether there was an exposure to paraformaldehyde, but whether there was a sufficient exposure to paraformaldehyde for a sufficient length of time and in sufficient quantities to cause a chemically induced pneumonia which could lead to the deceased's death. Again, the entire basis of the testimony submitted by the Plaintiffs and in behalf of the Plaintiffs was by witnesses who are seriously subject to question in their credibility as has been formerly set forth. It is interesting to note that Dr. Massion of Cortez, who treated the patient for a period of one week, was never advised by the patient that he considered his illness a result of a chemical exposure. Neither did the doctors seen in Clovis, New Mexico, or in Levelland, Texas, receive any such indication from the deceased. (R 7, 8, 9, 13, 126)

A letter to the Medical Panel from Dr. E. D. Barnes stated that he saw Mr. Williams on July 14th, 1957, when he gave a history of having had a sereve pain toward the anterior part of the chest, radiating down the left arm on July 4th, 1957 . . . (R 126). No statement was made by the deceased to Dr. Barnes of a chemical exposure.

Dr. Alan K. Done, upon being questioned concerning paraformaldehyde, stated:

". . this of course would depend upon the concentration. But it is intensely irritating, and would irritate all mucous membrances—including those of the respiratory tract, the throat, the eyes, the nose—and would be extremely uncomforable. And acutely so. Above and beyond this, it can leave residual damage—in terms of damage to the tracheal bronchial tree, chronic bronchitis. It can lead to pneumonia, but usually does this only under circumstances where the exposure is truly overwhelming, or is chronic and repeated. (R 144)

Q - As a matter of a hypothetical question, Doctor, from your experience—and from what research you may have done—do you have an opinoion as to whether or not a person would be capable of remaining in a condition of exposure to formaldehyde gas a sufficient duration, and remain conscious, to receive acute effects as you have just indicated? (R 144)

A - Yes. To receive sufficient exposure to have resulted in say pneumonia, I think it would have been necessary for the individual to have been exposed to such a degree that he would not voluntarily stand by and allow it to continue. In other words this material is sufficiently irritating that anyone who was capable of doing so would, I'm sure, immediately leave the area. It is extremely irritating. *So that hypothetically the only conditions under which this is likely to occur would be if the individual were confined in such a way that he could not escape, or he were overcome.* (R 144, 145)

Q - . . Wouldn't his reaction to the gas itself be of such a violent nature that he could not endure it for long enough time to receive damage there-

from?

A - From a single acute exposure, yes. Damage can occur from lower exposure over a longer period of time, and intermittent.

Q - Now as a result of your research on this, did did you check medical records back over a period of time to determine if there had been any previous occurences of pneumonitis chemically induced by this particular chemical?

A - I reviewed the medical and industrial health literature going back 40 years, as well as is possible to do so with the indices that are available at the present time, and found no similar case reported in the medical literature.

Q - Referring back to your previous answers before that one, would a single exposure—as a hypothetical, or directly related to this case— would an exposure of say an hour to an hour and a half or possibly two hours' duration be as a single instance, in your opinion, be sufficient to induce chemically a pneumonitis?

A - It could be. It would depend entirely upon the concentration of formaldehyde in the atmosphere.

Q - With such a concentration, would the individual not be driven from the area before that occurred but for the fact that say he was unconscious, or was such that he could not escape the enclosure?

A - Such a concentration, in my opinion, would be intolerable. (R 146, 147)

The Defendants respectfully submit that even if the testimony taken from Clark and Ramey is given full credibility, it does not show exposure to paraformaldehyde in a harmful concentration for a period of one and

one-half hours. Dr. Done's testimony was to the effect that such exposure would be so irritating that the recipient could not stand such an exposure and would not permit it unless he were unconscious.

POINT III

THE COMMISSION WAS NOT IN ERROR IN FINDING THAT THERE WAS NO COMPETENT MEDICAL EVIDECE THAT EXPOSURE, IF ANY, CAUSED OR CONTRIBUTED TO THE DEATH OF EARL RAE WILLIAMS.

Dr. Massion of Cortez, Colorado, who attended the deceased in the hospital and thereafter, stated: "I do not remember if at the time he made any statement with regard to having inhaled any material while at work. I did not enter any comments he may have made at this time in the hospital record." (R 7). It is interesting to note that one of the important factors a in treating a patient is in obtaining as full and complete medical history as is possible and particularly the causes or apparent causes of the illness being treated. It is logical to assume that since the history of this illness was not noted as being due to a chemical exposure, that is was felt to be due to a bacterial infection by the doctor and by Mr. Williams himself.

Dr. Massion proceeds: "I have been requested by Mrs. Williams and one of her attorneys to state an opinion with regard as to whether her husband's death was caused by poisonous fumes or substances. I am unable to state such an opinion since I have had no experience prior to this with industrial poisons. It would be obvious to me

that Mr. Williams underwent the usual course in evolution of a bacterial lung infection. In view of the fact that his fever rose to 104 degree, there must have been such an infection present. I am unable to deny or confirm that an inhaled toxin or poison would have aggravated or perhaps initiated this process. I, however, failed to see any connection between possible poisoning and eventual cause of death." (R 9).

Contrary to opinion of counsel for the Plaintiffs, it would appear that this statement of Dr. Massion indicates that he had no knowledge whatsoever of industrial chemical poisoning and that it was his opinion that even had there been some chemical poisoning, that this was a bacterial pneumonia condition.

The only other doctor to treat the deceased was Dr. E. D. Barnes of Levelland, Texas, who advised . . . . "he gave a history of having had severe pain over the anterior part of the chest radiating down the left arm on July 4th, 1957." (R 35). This is completely contrary to anything reported by the Plaintiffs. Dr. Barnes stated that the medical history that he had obtained was typical of a coronary occulsion and this was his reason for attributing Mr. Williams' death to that cause. (R 35)

The Medical Panel's report stated that "it is a legal, rather than a medical, matter to determine whether the statements contained are admissable evidence. The Panel must proceed with a medical opinion based upon the assumption that these statements are acceptable in evidence. The Panel further reports, "the data is so sketchy for this interval between his seeing Dr. Massion on July 9th and his death on July 14th, that it is not possible for

the panel to express a positive opinion as to the final cause of death. There are three possibilities:

(1) These had an acute exacerbation of an incompletely resolved pulmonary process, perhaps aggravated or incited by the fatigue of the long automobile trip.

(2) That he had myocardial infarction based upon coronary thrombosis and that this was independent of the preceding pulmonary illness.

(3) That he had a myocardial infarction which was precipitated or aggravated by the preceding pulmonary illness.

It appears to the Panel that of these three possibilities, the first is more probable—namely that his death was a result of an aggravation of the previous pulmonary condition." (R 39)

POINT IV

THE COMMISSION DID NOT ACT IN A CAPRICIOUS, ARBITRARY AND UNUSUAL MANNER.

The Plaintiffs, in attacking the Industrial Commission, for being negative and for having expressed that the medical evidence pending in the case is negative, failed to recognize that as of the date of those letters, February 24th, 1960, and March 25th, 1960, there was no evidence whatsoever in the file of the commission except the medical report from Cortez, Colorado, and a death certificate.

Plaintiffs allege that the rehearing held August 12, 1964, did not produce any new experts, nor any new evidence. The record shows the introduction of evidence from Dr. Alan K. Done, who although he was consulted

by the medical panel, did not previously testify, and who provided substantial new evidence and convincing evidence concerning the toxic effects of paraformaldehyde as set forth in Point II herein.

It was the intention of the Defendants to bring to the hearing a Dr. J. F. Osterritter, Medical Director of the Celanese Corporation of America, manufacturers of paraformaldehyde. A letter from Dr. Osterritter is included in the file (R 114) in which Dr. Osterritter states: "....the inhalation of formaldehyde vapor causes smarting of the eyes, nose and throat and is irritating so that a person exposed will not long tolerate it and will leave the area. If a person is capoble of remaining in an area where there is formaldehyde vapor present, then the concentration is not likely to be high enough to cause any acute effects . . . The only time a chemical pneumonitis or pneumonia is likely to occur is when an individual comes into contact with a very high concentration of formoldehyde; then there would be much coughing, choking and watering of the eyes. Unless the working conditions in the case in question were such that very high concentrations of formaldehyde were produced, the case that you described should not develop pneumonia or a heart condition." (R 114).

The conclusions of Dr. J. F. Osterritter, M. D. were much the same of those of Dr. Alan K. Done, adduced in the rehearing and as quoted in Point II of this Brief.

In addition, there was introduced into evidence the work an drilling record of the area which unequivocably demonstrated that the deceased and his crew had worked on July 4th 1957. It further established this, not-

withstanding the fact that the three witness who testified for the Plaintiff, Earl Clark LeRoy Ramey and Colita Williams testified that the crew did not work on July 4th. The record further demonstrated that on July 3rd, 1957, when the alleged exposure took place, LeRoy Ramey did not report to work, and could not have been present at the time of the exposure.

The Commission did not base its decision on hear say evidence, because the employer's record is not heresay, nor is the testimony of Dr. Alan R. K. Done or of the medical panel. The Plaintiff in stating that the Commission must base its decision on some type of reasonably substantial proof ignores the fact that it is the Plaintiff who must establish her case by a reasonably substantial proof, as the burden of proof is upon the Applicant to establish her claim for compensation. Higbey vs. industrial Commission, 75 Utah 361, 285 Pacific 306; Bingham Mines vs. Alsop 59 Utah 306 203 Pacific 644.

Where the Industrial Commission is driven to surmise or conjecture, the injured person or his dependents cannot recover compensation benefits. The factfinder is not bound to adopt the theory of the applicant, even if there is some evidence to support it. Sugar vs. Industrial Commission 94 Utah 56, 75 Pacific 2nd 311.

Surmise, conjecture, guess or speculation is not sufficient to justify a finding in behalf of the applicant. Higbey vs. Industrial Commission 75 Utah 361 285 Pacific 306.

If there were no other testimony than that submitted by the Plaintiffs, and if there were no reasonable alternatives, to the conclusions arrived at by' the Plaintiffs,

and if the medical testimony were not speculative on the occurrence of certain facts and certain conditions, it is conceivable that the industrial Commission could have held for the Plaintiffs.

In Pintar vs. Industrial Commission of Utah and Geneva Steel Division of U.S. Steel Corporation, 14 Utah 2nd 276, 382 Pacific 2nd 414, the Court states on p. 415, "the difficulty with Plaintiff's position is that there is other evidence which supports the view adopted by the Commission, whose perogative it is to determine the facts."

In Burton vs. Industrial Commission 13 Utah 2nd, 353 274 Pacific 2nd, 439 this Court said on page 554, "In order to reverse the findings and order made, the Plaintiff must show that there is such credible, uncontradicted evidence in her favor that the Commission's refusal to so find was capricious and arbitrary. See also Morris vs. Industrial Commission 90 Utah 56, 61 Pacific 2nd 415. "The Commission could reasonable disbelieve the Plaintiff's story that his physical problems where the result of the incident described by him."

CONCLUSION - We respectfully submit that the proceeding of the Industrial Commission were properly conducted and that the Commisison reached the proper conclusion and result from the evidence there presented. The decision and order of the Commission should be affirmed.

Respectfully submitted,
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