1965

H. Aleen Baker v. Industrial Commission of Utah, W. L. Young Brokerage Company and the State Insurance Fund : Petitioner's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

H. ALEEN BAKER,
Petitioner,

— vs. —

INDUSTRIAL COMMISSION OF UTAH, W. L. YOUNG BROKERAGE COMPANY and the STATE INSURANCE FUND,
Respondents.

Case No. 10288

PETITIONER'S BRIEF

On Certiorari From Order of the Industrial Commission

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STATEMENT OF THE CASE

Petitioner claims workmen's compensation benefits through the State Insurance Fund as a result of an injury received in the course of employment at W. L. Young Brokerage Company on May 8, 1964. Liability was denied, and on July 30, 1964, petitioner made application for hearing to settle her claim. The claim was denied, petition for rehearing was denied and this review was taken.

RELIEF SOUGHT

Petitioner seeks a decision reversing the order of the Industrial Commission and directing that petitioner's claim for compensation be allowed.

STATEMENT OF FACTS

On May 8, 1964, petitioner was employed by W. L. Young Brokerage Company as a clerk-typist, earning $265.00 per month for an eight-hour day, five-day week.

About 4 p.m. on that day petitioner testified that she was filing papers in a filing cabinet and as she stooped over or raised up she felt a sudden sharp pain in her left hip and leg (R-10, lines 17-21). May 8, 1964, was a Friday. Petitioner reported back for work Monday morning and worked all week, though there was continuous pain (R-11, lines 19-25).

Peetitioner reported her injury to a Mr. Douglas Smith on May 12, 1964. He was a sales supervisor for the W. L. Young Brokerage Company and petitioner was subject to his control and supervision (R-12, lines 1-18).

On May 16, 1964, petitioner consulted N. R. Beck, M.D., and informed him that she felt a sharp pain in her back when she pulled out a filing drawer at work (R-2, item 1). Dr. Beck diagnosed petitioner's injury as a lumbar disc syndrome (R-2, item 2). Dr. Chester B. Powell examined petitioner on May 22, 1964, and he relates that his findings were consistent with disc herniation (R-4, Para. 2).

Petitioner remained unable to ambulate without severe pain and as a result, myelography was performed on May 27, 1964, which confirmed a large defect at T 11-12 and a small defect at L 5 S 1, with a chopping off of the S 1 nerve route. Petitioner underwent surgery on May 28 and both levels were explored through separate incisions, disclosing a disc extrusion at the lumbosacral level with a rather large anomalous vein in the lower thoracic region. (R-4, Par. 3 and 4)

The only scintilla of evidence, if evidence it be, that petitioner was not injured at work is contained in the employer's first report of injury, where it is stated: "*We are not positive that the injury occurred at work.*" (R-1, Para. 20) At R-1, paragraph 22, the employer states that the employee recently moved, and reported discomfort due to moving furniture. That is an unsworn statement, and petitioner could not cross-examine to test authenticity. Under oath, petitioner stated she moved about a month prior to May 8, 1964, and that all of her furniture was moved by a mover, and that she merely packed the dishes and knick-knacks, and that she did not injure herself in any way or do any heavy lifting. (R-18, lines 1-10) It should also be pointed out that the employer's first report of injury R-1, paragraph 17, states that date of injury was May 13, 1964, which is completely contrary to all the testimony and other exhibits contained in the record. Doctors Beck and Powell in their reports, R-2, paragraph 3, indicate that petitioner's back injury was not due to any pre-existing condition. Doctors Beck and Powell reported they were told by petitioner that she re-

ceived injury on May 8, 1964, while doing filing work. Petitioner also testified that way as did five other witnesses produced by petitioner at the hearing held on October 19, 1964.

ARGUMENT

POINT I.

THE FINDING OF THE COMMISSION THAT THE BACK AILMENT OF PETITIONER WAS NOT CAUSED BY ACCIDENT ARISING OUT OF OR IN THE COURSE OF EMPLOYMENT IS CAPRICIOUS, ARBITRARY AND NOT SUPPORTED BY THE RECORD.

The sole finding in the order denying compensation to petitioner is the statement of petitioner taken out of context where she testified: *"And I hadn't done anything out of the ordinary either at home or at work, or after work, to have caused it. Very definitely."* That is the finding in the order denying liability, 3rd paragraph, R-35.

That language taken from testimony of petitioner was a partial answer, and is found at R-18, lines 21-23, which was upon cross-examination of petitioner by Mr. Charles Welch. The full context of that particular question and answer at R-18, commencing line 18, is:

> "Q: Now I take it that you do not know exactly what caused this problem with your back?
>
> "A: No, I don't. Except that it occurred while I was filing in the office. And I hadn't done anything out of the ordinary either, at home or at work, or after work, to have caused it. Very definitely."

Petitioner submits that it is supercilious to take one lone phrase and deny liability. It is obvious that she testified in the same answer that the back injury occurred while she was filing in the office.

At the hearing petitioner testified on direct examination as to the events of May 8, 1964, as follows:

> "Q. Calling your attention to the 8th day of May, 1964 — the calendar will reflect that was a Friday — would you relate to these gentlemen what you did on that day?
>
> "A: Yes. I did my usual work, and then I thought that I had better get the filing done. Because Mr. Jensen, my boss, works on Saturday, and I like to have the papers in the drawers so that he could find them. First I filed in a little file that we have that is on wheels, has two drawers, and then I got into the bank file and was filing there, and as I stooped over, or raised — I can't remember exactly how it happened — I suddenly had a pain in my left hip and down my leg. And I rubbed it, and realized that our principal — who was in there, in Gordon's office — could see me, so I stopped rubbing, and waited and finished up my work, and went home at 5:00 o'clock. This happened around 4:00." (R-10, lines 11-25)

At R-12, lines 16-18 she testified that she had been filing and gotten the pain, that she noticed the principal could see her rubbing it and she quit and that the pain was quite severe.

At R-15, lines 13-17, again on cross-examination by Mr. Welch, petitioner testified:

> "Q: I heard you say that you received this pain as you stooped over, or raised up.
>
> "A: Yes.

"Q: Is that what happened?

"A: That's what happened."

In fairness to petitioner and in the spirit of the Workmen's Compensation Act that language should have been adopted as the finding by the Commission rather than the capricious, out-of-context language petitioner complains of. The objective of the act is to alleviate hardship on workers, *Spencer* v. *Industrial Commission*, 4 Utah 2nd 185, 290 Pac. 2nd 692, not to permit the Commission to toy with semantics and sentence structure of testimony that is very clear in context.

On cross-examination, petitioner testified at R-18, lines 11-17 that she had not had any previous pain or troubles with her back except that she fell downstairs approximately 19 years ago, and that Dr. Beck informed her that that couldn't be a causative factor.

On re-direct examination petitioner testified:

"Q: You didn't notice any pain on Friday, May 8th, until you were bending down, or getting up from a stooped position?

"A: It was while I was at the file, doing my work. I hadn't placed the papers in alphabetical position at that time. I was just filing them as they came up, so I was up and down.

"Q: Up and down?

"A: Yes.

"Q: And it happened during that time?

"A: Yes, that's right." (R-22, lines 9-18)

The entire testimony of petitioner stands for the proposition that she received the injury while raising up and down doing filing.

To further substantiate the fact of injury on May 8, 1964, while filing, petitioner produced at the hearing *Helen Morris,* who is a waitress in a cafe across the street from Young Brokerage Company (R-23, lines 5-15). She stated that on May 11, 1964, which was the Monday following the Friday injury, that she saw petitioner and noticed she was in pain. She asked her what was the matter and petitioner told her that she hurt her back on Friday while filing. (R-24, line 2-14)

Mrs. Phyllis Wright testified that she talked with petitioner on Saturday, May 9, and that petitioner told her she couldn't go out because of a severe pain in her back, and that she hurt her back at work. (R-25, 26)

Mrs. Phyllis Larsen testified that on Friday, May 16, 1964, she talked with petitioner and petitioner told her she was going to the hospital for a back operation and that she must have hurt her back when she was bending over filing at work. (R-27, 28)

Beverly Cudney testified that she had a date to go out with petitioner on May 12, 1964, which was Tuesday. Petitioner met Mrs. Cudney at 5:30 p.m. and petitioner appeared to be in pain. When she asked petitioner what was the matter, it was related to her that she hurt her back last Friday when she was filing. (R-29, 30)

Mrs. Gladys Timothy, plaintiff's sister, talked with petitioner on Friday, May 8, 1964, after work. Mrs.

Timothy testified that petitioner told her she had been filing and was stooping over and got a pain or kink in her back, and that in her entire life, she had never heard of any back complaints coming from petitioner before. (R-30-32)

The Commission, in its order denying recovery doesn't state that these five witnesses made statements that were dsbelieved, but rather they should have been accepted as tending to prove date of injury and injury in the course of employment. Supra, *Allen* v. *Industrial Commission* (Utah) 172, Pac. 2nd 669.

All of that is competent evidence. It is not rebutted. The language relied on by the Commission, by itself, is not at all what was testified to and it is so contrary and far afield, that minds of reasonable men would not differ as to the unfair conclusion and meaning placed thereon by the Commission.

In order to reverse the Commission, petitioner is aware that "*the record must disclose that there is material, substantial, competent, uncontradicted evidence to make a disregard of it justify the conclusion, as a matter of law, that the Industrial Commission arbitrarily and capriciously disregarded the evidence or unreasonably refused to believe such evidence.*" *Kent* v. *Industrial Commission,* 57 Pac. 2nd 744, citing *Kavalinakis* v. *Industrial Commission,* 67 Utah 174, 246 Pac. 698; *Gagos* v. *Industrial Commission* (Utah) 48 Pac. 2nd 449, 450.

This is such a case, but with one added facet of ca-

price - when the language the Commission relied upon to deny relief is placed back in context, it doesn't even say what they would lead us to believe it says.

The decision in *Holland* v. *Industrial Commission,* 5 Utah 2nd 105, 297 Pac. 2nd 230, sustaining an order denying relief for a ruptured disc revealed that after falling, Holland merely stated that he was shaken up, and none of the medical records or any other evidence revealed he claimed injury as a result of industrial accident. The record in the case at bar is entirely contrary to that record.

The case of *Hunter* v. *Industrial Commission,* 73 Ariz. 84, 237 Pac. 2nd 813, on the other hand, is squarely in point here. Pauline Hunter testified that she felt a sharp pain in her back while putting toys on a low shelf. She told others of her pain. The Commission denied relief because of some testimony of other employees who said they did not know of any accident suffered by petitioner, and because petitioner had indicated some uncertainty as to the exact cause of her pain.

The Arizona Court held the evidence was clear and uncontroverted that petitioner suffered an accident arising out of and in the course of her employment, as this court should rule here.

CONCLUSION

Petitioner was injured in the course of her employment and the record is barren of evidence to the contrary.

The matter should be sent back for evaluation of sums due petitioner for expenses, fees, compensation and percentage of disability.

Respectfully submitted,

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