1965

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

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. [illegible]

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Af[illegible]

BRIEF OF RESPONDE[illegible]
INDUSTRIAL COMMISSION OF U[illegible]

On Certiorari From Order of the Industrial Commission

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TABLE OF CONTENTS

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Case No. 10288

BRIEF OF RESPONDENT
INDUSTRIAL COMMISSION OF UTAH

STATEMENT OF THE CASE

The petitioner H. Aleen Baker has sought review by certiorari from a decision of the Industrial Commission denying her compensation pursuant to her claim for injuries allegedly sustained during the course of her employment.

DISPOSITION BELOW

On August 9, 1964, the petitioner applied for a hearing upon her claim for workmen's compensation (R. 5). She alleged that on the 8th of May, 1964, while filing papers, she sustained a ruptured disc (R. 5). On October 19, 1964, a hearing was held upon the application before the Industrial Commission's referee (R. 8). Subsequently, on the

25th of November, 1964, the Industrial Commission entered its order finding that the petitioner's claimed ailment was not caused by an accident arising out of the course of her employment (R. 34). On December 6, 1964, a petition for rehearing was filed, and on December 9, 1964, it was denied (R. 35, 36).

RELIEF SOUGHT ON APPEAL

The respondent Industrial Commission submits the court should sustain its order denying the petitioner workmen's compensation coverage. It should be noted that neither the employer nor the State Insurance Fund, who was the insurance carrier, has been served in this appeal.

STATEMENT OF FACTS

The respondent accepts the petitioner's Statement of Facts as set out in her brief, except that the respondent desires to call to the court's attention the following facts concerning the alleged injury.

Petitioner testified on cross-examination at the time of the hearing before the Industrial Commission (R. 18):

> "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."

On the day of the alleged injury she did not call the matter to her employer's attention and spent the week-end at home without consulting a physician (R. 20). Thereafter she returned to work the Monday following the Friday when the alleged accident was supposed to have occurred

and worked that day without informing her employer of the alleged injury. Not until the following day did she mention to her employer that she was suffering any back pain. She testified: "I believe I told Mr. Douglas Smith." (R. 12.) She further testified that she believed she told him the Tuesday following the alleged accident. The petitioner had changed residences and moved personal belongings approximately one month prior to the accident (R. 17). There was no evidence offered of any slip, fall or unusual exertion (R. 34). Based on the above, the Commission ruled that the ruptured disc was not the result of any activity of the petitioner's employment.

ARGUMENT

POINT I.

THE COMMISSION WAS NOT OBLIGED TO BELIEVE THE PETITIONER'S STATEMENT AS TO THE ALLEGED INJURY AND THE EVIDENCE IS SUFFICIENT TO SUBSTANTIATE THE COMMISSION'S REJECTION OF THE PETITIONER'S CLAIM.

It is well settled that this court on review of the order of the Industrial Commission will not interfere with the findings of the Commission unless the findings are without reasonable basis and unsupported by substantial evidence. *Freuhauf Trailer Co. v. Industrial Commission*, 16 Utah 2d 95, 396 P.2d 409 (1964). In order for the petitioner to prevail in the instant case, this court must find that the Industrial Commission acted arbitrarily, capriciously, and unreasonably refused to consider evidence which would have justified an award. *Kent v. Industrial Commission,* 89 Utah 381, 57 P.2d 724 (1936).

In the instant case the evidence is obviously sufficient to sustain the findings of the Industrial Commission. The

evidence, when viewed in a light most favorable to the Commission's determination, discloses that the petitioner was not engaging in any unusual exertion or heavy activity when the alleged accident occurred. By her own testimony she was uncertain as to just when and how the alleged injury occurred. She was engaged in routine office activities which, under normal circumstances, would be unlikely to result in the injury complained of. By her own admissions, she returned to work following the day in which she felt the injury occurred, and did not report the matter to her employer. Further, she did not seek medical attention over the week-end. The petitioner's statements to other persons show that there is doubt in her mind as to when and how the accident occurred. Thus, she told Helen Morris that she "guessed" that she hurt her back filing (R. 24). She also indicated to Phyllis Wright that she was uncertain as to how the injury occurred. Miss Wright testified that the petitioner stated: "I hurt my back at work, *I guess.*" (R. 26.) She did not disclose to Phyllis Larsen how she hurt her back (R. 28), and told Beverly Cudney that she "*thought*" she hurt her back while filing. It is apparent, therefore, that the petitioner retained a good deal of uncertainty in her own mind as to just how and when the accident occurred.

In *Smith v. Industrial Commission*, 104 Utah 318, 140 P.2d 394 (1943), this court observed that in workmen's compensation cases the award must be based on facts found from the evidence and not "mere possibility." The court in that case in similar circumstances found it within the province of the Commission to deny the award.

In *Holland v. Industrial Commission*, 5 Utah 2d 105, 297 P.2d 230 (1956) the petitioner contended that he sustained a ruptured disc from an industrial accident. In that

case the evidence of the petitioner's actual involvement was substantially greater than in the instant case, since the foreman actually observed the alleged accident. This court held that the actions of the Industrial Commission in denying recovery were not arbitrary and capricious, and that the Commission was not obliged to believe the claimant's uncorroborated testimony. This case is similar in circumstance since the petitioner here did not notify her employer of the alleged injury until several days after its occurrence and resumed work during the interim. Further, her statements to other persons show that she entertained doubt as to the actual cause of the pain in her back. Also, approximately one month prior to the alleged incident she had been involved in the process of moving her residence, which must have entailed some physical activity. Thus, the *Holland* case supports the Commission's action in this case. There was no "identifiable accident" which the Commission could say caused the injury. *Pintar v. Industrial Commission*, 14 Utah 2d 276, 382 P.2d 414 (1963).

In *Allen v. Goodyear Tire and Rubber Company*, 184 Kan. 184, 334 P.2d 370, the petitioner, seeking affirmation of the Industrial Commission's award which had been set aside by the trial court, claimed that he sustained an injury to his back which was in the nature of a kink or pain while he was on the job as he was talking to his foreman. The Kansas Supreme Court noted that the question of the credence of the witnesses was for the triers of fact and that the trial court's determination that the injury did not arise out of the employment should be sustained.

It is submitted that there is sufficient precedent in this State and in other jurisdictions to sustain the Commission's determination that an award in this case was not justified.

CONCLUSION

The facts before the Commission in this case do not demonstrate clearly that the petitioner sustained an injury as a result of her employment. Indeed, this court in *Malmstrom v. Olson,* 10110, 19 March 1965 (Ut. Sup. Ct.) most recently acknowledged that a ruptured disc is usually an unusual occurrence resulting from a violent act. The absence of any unusual activity, the delay of the petitioner in reporting the incident, and her own incredulity lends support to the Commission's determination that the injury did not result from the petitioner's employment. This court should affirm.

Respectfully submitted,

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