

1960

Oscar Hackford v. Industrial Comm. Of Utah : Plaintiff's Brief

Utah Supreme Court

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Recommended Citation

Brief of Appellant, *Hackford v. Industrial Comm. Of Utah*, No. 9330 (Utah Supreme Court, 1960).
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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

OSCAR HACKFORD,

Plaintiff,

vs.

THE INDUSTRIAL COMMIS-
SION OF UTAH,

Defendant.

FILED
SEP 29 1960

Clerk, Supreme Court, Utah

Case No.

9330

PLAINTIFF'S BRIEF

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IN THE
SUPREME COURT
OF THE
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OSCAR HACKFORD,

Plaintiff,

vs.

THE INDUSTRIAL COMMISSION
OF UTAH,

Defendant.

Case No.

9330

PLAINTIFF'S BRIEF

STATEMENT

On December 31, 1957, the Plaintiff was employed as a sheepherder by the Deseret Livestock Company, and while in the course of his employment a team of horses ran away, throwing him to the ground and the wheels of a wagon ran over his body and frac-

tured his spine, and otherwise bruising his body (R. 1).

Immediately after the accident he was taken to the hospital at Tooele, Utah, and there treated by Dr. Johnson. After his release from the hospital, about ten weeks later, he was placed under the care of the company physician, Dr. A. M. Okelberry, at Salt Lake City, where he received further treatment until about April, 1959. The employer, being a self-insurer, paid Plaintiff \$100 per month compensation during this period.

In May, 1959, the employer stopped paying compensation and Plaintiff, not being able to work, requested permission from the Defendant to change doctors (R. 5). This request was denied (R. 6), and on July 6, a formal, verified application was filed with the Defendant praying that it determine his claim and award relief (R. 7, 8). On May 16, 1960, a hearing was had on this application (R. 24-59). On June 16, 1960, the Defendant rendered its decision (R. 61, 62). On July 7, Plaintiff filed his motion for a re-hearing (R. 63), which re-hearing was denied (R. 64).

From the order denying a re-hearing and the decision of the Commission, Plaintiff obtained a writ of review from this Court.

To reverse the Commission, Plaintiff assign the following:

1. Error of the Commission in denying Plaintiff the right to change doctors.

2. Error of the Commission in prejudging the merits of this case.

3. Error of Commissioner Weisley in acting as Referee without being appointed by the Commission, in writing, so to do.

4. Error of the Referee in receiving in evidence the reports of Dr. A. M. Okelberry.

5. Error of the Referee in receiving in evidence the report of the medical panel.

6. Error of the Commission in denying Plaintiff's motion for a re-hearing.

7. The decision of the Commission is contrary to the evidence.

8. The decision of the Commission is contrary to law.

9. The award of the Commission is inadequate in law.

To sustain the writ, Plaintiff makes the following:

POINTS

I.

NO PERSON SHALL BE DEPRIVED OF
LIFE, LIBERTY, OR PROPERTY WITH-
OUT DUE PROCESS OF LAW.

II.

THE COMMISSION MAY NOT ACT AR-
BITRARILY OR EX PARTE IN DECIDING
A COMPENSATION CASE.

III.

THE AWARD IS CONTRARY TO THE
EVIDENCE AND THE LAW.

IV.

EQUITY WILL PROVIDE A REMEDY
WHERE NONE EXIST AT LAW.

ARGUMENT

I.

NO PERSON SHALL BE DEPRIVED OF
LIFE, LIBERTY, OR PROPERTY WITH-
OUT DUE PROCESS OF LAW.

U. S. Constitution, Amendment 14
Utah Constitution, Art. I, Sec. 7
Utah Code, 1953, Sec. 35-1-31

The 14th Amendment to the U. S. Constitution provides:

“Nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.”

Article I, Section 7, Utah Constitution, provides:

“No person shall be deprived of life, liberty, or property, without due process of law.”

For the purpose of administering the Workmen's Compensation Act, Section 35-1-31, Utah Code, 1953, provides:

“The Commission shall have power to appoint, by an order in writing, any member of the Commission, or any other competent person who is a resident of this state, as an agent, whose duties shall be prescribed in such order, for the purpose of making any investigations with regard to any employment or place of employment.”

Nowhere in the entire record is there any order of the Commission appointing Chairman, Otto A. Weisley as Referee to investigate this case and prescribing his duties therein. The proceedings and hearing in this case were conducted by Otto A. Weisley, as

Referee (R. 24). The record further shows that all other action taken in this case was taken by Otto A. Weisley as Chairman. The Commission not having appointed Otto A. Weisley as Referee by written order and prescribing his duties therein, his actions herein are a complete nullity, and the decision of the Commission, based thereon, is a violation of the constitutional provisions cited above.

II.

THE COMMISSION MAY NOT ACT ARBITRARILY OR EX PARTE IN DECIDING A COMPENSATION CASE.

Utah Code, 1953, Sec. 35-1-77
Utah Fuel Co. v. Ind. Comm., 194 P. 22
Spencer v. Comm., 40 P. 2d 188
Ocean Guarantee Co. v. Ind. Comm., 245
 P. 343
Pruno v. Comm., 204 N. W. 576
Mining Co. v. Comm., 240 P. 440

In *Ocean Guarantee Co. v. Comm.*, (supra), this court said:

“Rules promulgated by the Commission must not, of course, deprive the parties of their Constitutional right of having their day in court and of having the cause determined after (not before) an impartial hearing.”

Pruno v. Ind. Comm., (supra), is a Nebraska

case wherein the rule is stated with the following language:

“The Industrial Commission is a quasi-judicial body, and is supposed to stand as an impartial tribunal, and no partisan activity on its part towards a claimant is required; its duty being to make investigations, find the facts according to the weight of evidence, and apply the law fairly and justly.”

Mining Co. v. Ind. Comm., (supra), is another Utah case wherein this court said:

“From the language used in the act, it is clear that the Commission has not the power, and it was not intended to have the power, to dispose of any application for compensation pending before it, except upon the merits unless the application is dismissed or withdrawn by the applicant himself.”

Utah Fuel Company v. Industrial Commission, (supra), states:

“Every administrative body, if it is to function at all, must have some power and jurisdiction to determine for itself whether or not it may proceed in a given case, and this we think may be done without usurping the functions of the courts, so long as it does not act arbitrarily.”

In *Spencer v. Comm.*, (supra), this court said at page 197:

“Whether an employee is totally or permanently disabled are ultimate matters to be decided by the Commission, as is also the amount and time compensation may be awarded upon all the evidence. Upon these ultimate questions, expert witnesses may not properly express opinions, nor may such opinions relating to loss of bodily functions become a measure of compensable functions possessed by an employee prior to his injury.

“A claim for compensation may not be denied because a new injury ‘lighted up, reopened, or revived an existing infirmity of the injured employee.’ ”

Section 35-1-77, Utah Code, 1953, provides, among other things:

“If objections to such report are filed it shall be the duty of the Commission to set the case for hearing within thirty days to determine the facts and issues involved * * * Upon such hearing the written report of the panel may be received in evidence as an exhibit, but shall not be considered as evidence in the case except insofar as it is sustained by the testimony admitted.”

On June 15, 1959, Plaintiff wrote the Commission requesting permission to change doctors (R. 5). The Commission sent a copy of that letter to the employer and on June 17, 1959, the employer’s attorney wrote the Commission a letter (R. 4), objecting to the change, and pursuant thereto the Commission denied

the request (R. 6). On July 6, 1959, Plaintiff filed his verified application with the Commission praying that his claim be determined by the Commission (R. 7, 8). A copy of this application, together with some type of form, was forwarded to the employer, and on July 15, 1959, the employer's attorney wrote the Commission (R. 11, 12), calling its attention to a report of Dr. A. M. Okelberry, (R. 9, 10), and claiming that the acts of the Plaintiff were responsible for his condition, and thereupon, on July 21, 1959, the Commission wrote Plaintiff's attorney (S. R. 2), advising him, among other things:

"Your allegations that the applicant is totally and permanently disabled is entirely without foundation in fact or in law."

Thus, Plaintiff's cause was decided without a hearing.

In reply to the Commission's letter of July 21, on July 27, Plaintiff's attorney wrote the Commission insisting that a hearing be had (R. 13, 14), and thereupon, on August 11, 1959, the Commission appointed a medical panel to examine Plaintiff (R. 16), and on Sept. 21, 1959, the panel met and, under the influence of the Commission Chairman, Otto A. Weisley, examined the Plaintiff and made its report (R. 17-19). This report was not made under oath or the panel members sworn in regard thereto.

On October 6, 1959, the Commission notified Plaintiff of the filing of the panel report (S. R. 4), and on October 20, 1959, the Plaintiff filed his objections to the panel report (R. 20). There the matter rested without anything whatsoever being done by the Commission, and after repeated telephone calls and personal visits to the Commission's office, by counsel, on February 23, 1960, the Commission wrote Plaintiff's attorney a letter (R. 21) in which it said:

"Your objections to the medical panel report are not well taken. Your client was given a thorough examination by a panel of orthopedic specialists. The conclusion could not be more definite and certain. The rating is adequate. Your client cannot possibly be rated permanently and totally disabled. * * *"

Here again the Commission decided the merits of this case without a hearing and without evidence being taken, and in violation of the rule enunciated in the above-cited cases and statutes and in violation of due process of law.

III.

THE AWARD IS CONTRARY TO THE EVIDENCE AND THE LAW.

Utah Constitution, Art I, Sec. 11

Utah Code, 1953, Sec. 35-1-45

Utah Code, 1953, Sec. 35-1-67

Utah Code, 1953, Sec. 35-1-77

Spencer v. Comm., 40 P. 2nd 188

Ocean Guar. Co. v. Comm., 245 P. 343
Ellis v. Comm., 64 P. 2nd 1303

Section 35-1-45 provides:

“Every employee mentioned in 35-1-35, who is injured * * * by accident arising out of or in the course of his employment, wheresoever such injury occurred, provided the same was not purposely self-inflicted, shall be entitled to receive, and shall receive, and shall be paid, such compensation for loss sustained on account of such injury or death, and such amount for medical, nurse, and hospital services and medicine * * * as herein provided.”

Section 35-1-67, provides:

“In cases of permanent total disability, the award shall be 60 percent of the average weekly wages for five years from the date of injury, and thereafter 45 percent of such average weekly wages, but not to exceed a maximum of \$27.50 per week and not less than \$17.50 per week. * * * Where the employee has tentatively been found to be permanently and totally disabled, it shall be mandatory that the Industrial Commission of Utah refer such employee to the division of vocational rehabilitation under the board of education for rehabilitation, etc.”

On March 31, 1960, Plaintiff's counsel advised the Commission of the provisions of Section 35-1-77, and requested the Commission to grant or deny a hearing (R. 22); thereupon the Commission set the hearing for May 16, 1960 (R. 23). There is no showing

in the record to justify this prolonged delay and therefore Article I, Section 11, Utah Constitution was violated by unnecessary delay.

On June 16, 1960, the Commission rendered its decision (R. 61), based upon the reports of Dr. A. M. Okelberry, which reports were forwarded to it by the employer prior to the hearing, (see Point II). The Plaintiff was not furnished with copies of these reports or notified of their being filed with the Commission. They were not introduced in evidence at the hearing and the Plaintiff, nor his attorney, had no knowledge of them, whatsoever, until they were discovered in the record on file herein after receipt thereof from the Clerk of this Court. Citation of authority should not be necessary to hold that the consideration of these reports by the Commission is reversible error.

The report of the medical panel was received in evidence without a foundation being laid therefor and over the objection of Plaintiff (R. 50, 51).

The rules of evidence require the party relying on certain evidence to introduce it in evidence. The employer's counsel was present at the hearing (R. 24), but he did not introduce this report in evidence. The Referee, being an impartial arbiter, (supposedly), had no right to introduce it. Section 35-1-77 expressly provides that such report,

“shall not be considered as evidence in the case except insofar as it is sustained by the testimony admitted.”

There is no evidence in the entire record that says anything about the qualifications of the members of the panel or their authority to practice their professions in Utah, and the Referee erred in receiving the same in evidence and basing his decisions thereon.

The Plaintiff testified in his own behalf (R. 42-51), the substance of which is that he has not been able to work since the date of the accident. His testimony is corroborated by three other lay witnesses (R. 52-59), none of which are contradicted anywhere in the record; assuming, but not admitting, that the reports of all the doctors were properly admitted in evidence, they don't claim that Plaintiff was able to work. All they say is that he has a 15 % loss of bodily function.

Dr. Stobbe testified (R. 32):

Q. "In your opinion, is Mr. Hackford able to work? Do any kind of labor?"

A. "I don't think he's physically fit for any physical job."
On cross-examination (R. 34),

Q. "When you say, 'take for granted', what do you mean by that? You make an assumption that may or may not be true, is that right?"

A. "When you have a degenerative process existing, I would not be in a position to say when it got started. But, with a history of being run over by a wagon, when anything of

that kind * * * even if it were present
before * * * it would certainly be ag-
gravated by the injury. By the accident."

Dr. Hugh Wayman testified on behalf of Plaintiff (R. 35-41); he found a misalignment of the spine and that condition was existing on the date of the hearing, and at (R. 40), he said:

"The accident you speak of could cause this misalignment."

Nowhere in the entire record is this testimony disputed, and yet the Commission refused to consider it (R. 61).

In *Spencer v. Commission*, this Court said:

"The Commission may not, without cause or reason, arbitrarily or capriciously refuse to believe and to act upon creditable evidence which is unquestioned and undisputed."

In *Ellis v. Commission*, this Court said:

"A chiropractor may treat injured workmen in this state, and under the Workmen's Compensation Act of this state, they are entitled to be paid for their services the same as any other doctor."

The *Spencer* case is directly applicable here and expressly holds that bodily function is not the basis upon which compensation is awarded in Utah, but the ability to work is the criterion and this must be de-

terminated by the Commission (not experts), from all the evidence.

Section 35-1-45 provides for medical, hospital, nursing care and medicine. Section 35-1-67 provides for compensation as such. The Plaintiff was earning \$250 per month at the time of the injury (R. 1), and at the time of the decision, had been unable to work for 128 weeks, and under the provisions of these statutes, he was entitled to 128 weeks' compensation at the rate of \$37.50 per week, or \$4800, less any amount paid by the employer, plus medical expenses and rehabilitation cost, and as yet, no effort has been made by the Commission to rehabilitate Plaintiff.

There is no evidence in the record even indicating that Plaintiff is recovered from the injury sufficiently to work or to indicate when he will be able to work, and for this reason the Commission had no authority to arbitrarily fix his compensation at \$35.00 per week for thirty weeks (R. 62), all of which denied Plaintiff the equal protection of law guaranteed by the constitution.

IV.

EQUITY WILL PROVIDE A REMEDY
WHERE NONE EXIST AT LAW.

Lamken v. Miller, 44 Pac. 2nd 190
Mirror Co. v. L. A. County, 44 Pac. 2nd
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School District v. Pirie, 46 Pac. 2nd 105
R. R. Co. v. Bouvier, 62 A. 868
Theis v. Spokane Co., 74 Pac. 1004
Alexander v. Hillman, 75 F. 2nd 451

“Where remedy at law is clearly inadequate, equity will intervene.” *Lamken v. Miller*, *supra*.

“Equity does not wait upon precedent which actually squares with the facts in controversy, but will exert itself in those situations when right and justice would be defeated but for its intervention.” *Mirror Co. v. Los Angeles County*, *supra*.

“Equity meets all conditions for human ingenuity, and human affairs cannot create conditions which the long arm of Equity Courts cannot reach if injustice or wrong would otherwise result.” *School District v. Pirie*, *supra*.

“Equity is a better sort of justice which corrects legal injustice, where the latter errors through being expressed in a universal form, not taking account of particular cases.” *Railroad Co. v. Bouvier*, *supra*.

“A court of equity will never aid in the perpetuation of a fraud simply because application is made in empty form of law. Its powers are not so superficial or so restricted. Equity is, we are told, the correction of that wherein the law, by reason of its universality, is deficient.” *Theis v. Spokane Co.*, *supra*.

“Courts of equity may suit proceedings and remedies to circumstances of cases and formulate them appropriately to safeguard, conveniently to adjudge and promptly to enforce substantial rights of all parties before them.” *Alexander v. Hillman*, *supra*.

We have pointed out in this brief wherein the Commission had made up its mind on the merits of this case long before the hearing was held on May 16, 1960, and the arbitrary award made by the Commission in total disregard of the statutes and evidence is further evidence of that prejudice and by reason of which the Commission is disqualified to act in this case. There is no provision in the Workmen's Compensation Act for a change of Venue in the event of the disqualification of the Commission, and in this we respectfully submit that this Court, in the exercise of its equity powers, provide an impartial arbiter for the Plaintiff in this cause.

CONCLUSION

We have pinpointed the unfairness and partiality of the Commission in handling this case: we have shown wherein it has acted capriciously and arbitrarily in denying the Plaintiff the compensation and relief to which he is entitled under the statutes, and we have pointed out the lack of any provision in the statutes for a change of Venue whenever the Commission is disqualified to act, and in this we respectfully submit that this court, in the exercise of its equity

powers, set aside the award made by the Commission and award Plaintiff the relief to which he is entitled under the statute or in the alternative direct the Commission to make such award and for such other and further relief as to this Court seems just and equitable in the premises.

Respectfully submitted,

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