1967

Clinton C. Thompson v. The Industrial Commission of Utah, State Board of Health and The State Insurance Fund : Brief of Plaintiff

In the

upreme Court of the State of Utah

CLINTON C. THOMPSON,
Plaintiff,

vs.

THE INDUSTRIAL COMMISSION OF UTAH, STATE BOARD OF HEALTH and THE STATE INSURANCE FUND,
Defendants.

Case No. 10642

BRIEF OF PLAINTIFF

Writ of Certiorari to Review an Order of the Industrial Commission of Utah

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STATEMENT OF THE KIND OF CASE

This is a proceeding under the Industrial Act for recovery of workmen's compensation benefits claimed by plaintiff for physical disability arising out of his employment with the defendant, the State Board of Health.

DISPOSITION BEFORE THE INDUSTRIAL COMMISSION

The Industrial Commission heard evidence on the plaintiff's claim and concluded that there was no evidence the seizure activity experienced by plaintiff was directly related to plaintiff's employment. Plaintiff moved to review the order of the Commission, contending, inter alia, that the Commission's findings were contrary

to the evidence presented at the hearings, that the conclusions of the Medical Panel were in error in view of the facts and circumstances present at the time the work was in progress and the failure of the panel to take into account certain significant factors (R. 211, 212). The Motion for Review was denied.

RELIEF SOUGHT ON APPEAL

The case is before this court on writ of certiorari. Plaintiff seeks reversal of the order of the Industrial Commission and an order directing judgment in favor of plaintiff, or that failing, a new hearing.

STATEMENT OF FACTS

On Sunday, July 19, 1964, around 11:00 o'clock in the evening, plaintiff experienced painful muscular cramps and spasms involving his left side. On his way to the hospital he began having severe generalized seizure activity which continued for approximately a 24-hour period, resulting in plaintiff's total and permanent disability. The Utah Department of Health's Compensation insurer, State Insurance Fund, denied liability for workmen's compensation benefits and plaintiff filed his application for compensation with the Industrial Commission. Hearing was set for February 8, 1965, at which time the testimony of plaintiff and others was taken. At the conclusion of the hearing the referee referred the medical issues to a panel of doctors. The panel filed its report and objections to the report were heard by the Commission. A second report was issued which was

adopted by the Commission. This report found that there was no evidence that the seizure activity was directly related to the circumstances surrounding plaintiff's employment prior to the onset of his convulsive activity.

Plaintiff went to work for the Utah Department of Health as a janitor in January of 1960. His work up until July of 1964 consisted of janitorial and general maintenance duties, including carpenter work, painting, plumbing, washing windows, etc. (R. 34). During the week commencing July 13, 1964, plaintiff was required to perform an entirely different type of work. A hot water pipe in the basement of the building was broken and it became necessary to make an opening in an 8-inch cement wall to gain access to the pipe. The portion of the wall which had to be drilled was located about 35 feet back in a small tunnel, about 4 feet wide and 4-½ to 5 feet high, which connected to the furnace room. The tunnel was filled with various types of pipes servicing the building, such as steam, hot water, sewage, etc. To get into the tunnel, plaintiff would have to either stoop over or sit down on a four wheeled cart and push himself back. The temperature in the tunnel was a "lot warmer" than in the outside rooms and halls. Once in the tunnel, plaintiff would use a rotary electric drill which the workmen referred to as a "jackhammer" (Exhibit A) weighing between 30 and 40 pounds, to drill through the concrete. Because of the confined area in the tunnel it was not possible to stand erect while working. Since the drill was so heavy, it had to be suspended from the pipes with wire and swung back and forth (R. 35-41).

Plaintiff testified that he worked in the tunnel most of the week with the exception of one day spent moving furniture. He specifically recalled working on Friday, July 17, and recalled a conversation about a new drill that was purchased on that Friday (R. 47). During part of the time spent in the tunnel plaintiff worked with Mr. Prunkard, who would hold the barrel of the drill and guide it, while plaintiff would reach over the pipes to take hold of the handle and apply pressure to the drill (R. 40-41). Since Mr. Prunkard also handled the mail for the building he only worked with plainiff for about three hours each day (R. 41). The rest of the time spent in the tunnel plaintiff worked alone, lifting and operating the drill by himself (R. 62).

The rental agreement for the electric drill used in the tunnel was signed by Mr. Prunkard and indicates that the drill was leased out at 9:14 a.m., on July 13, 1965 (Exhibit 2). There was some trouble with the drill the first day and the agreement indicates a "new time started 7/15/64." The invoice shows a charge for 2-½ days time.

Due to the strenuous nature of the drilling work plaintiff received blisters on his fingers and hand from working the drill (R. 44, 75). When he went home after working in the tunnel, he was totally exhausted and his clothes would be wringing wet from heavy perspiration (R. 50, 76). Contrary to his usual practice, his wife drove the car home during the time he was working in the tunnel.

On Saturday, July 18, plaintiff was so exhausted from the week's work, he rested most of the day (R. 50)

On Sunday, July 19, he went to a family reunion in Manti, Utah, and returned around 8:30 o'clock in the evening. Around 11:00 o'clock that evening, he felt a "charley horse" sensation in his left hand and arm which spread to the whole of his left side accompanied by severe pain. He was shortly thereafter rushed to the hospital where he was diagnosed as having a series of generalized seizures, grand mal in nature, which continued for about a 24-hour period (R. 19-23).

Approximately 25 years prior to this incident, plaintiff was thrown from a horse striking the right side of his head. Subsequent study revealed a subdural hemotoma and he was operated on by Dr. Reed Harrow in Salt Lake City, which resulted in limited impairment to his left hand. Plaintiff fully recovered from the operation, and suffered no ill effects from the injury since that time, except the impaired left hand (R. 30, 34).

Plaintiff's doctor, Kenneth J. Nielson, treated him during the time the seizures were occurring. In a letter to the Industrial Commission, dated September 26, 1964, Dr. Nielson stated that in his opinion the seizure was a result of the prior brain damage, precipitated by *strenuous activity* (R. 1). Dr. Nielson testified that the seizures experienced by plaintiff began as Jacksonian and became grand mal. The seizures continued for approximately a 24-hour period (R. 174). As a result of the seizure activity, Dr. Nielson testified that plaintiff was permanently and totally disabled (R. 176).

Dr. E. Daniel Nusbaum, a neurologist, also examined plaintiff. Dr. Nusbaum had considerable ex-

perience as a Naval Doctor dealing with individuals exercising in high thermal environment, some of whom died in a status epilepticus and others of various forms of physical failure and collapse, all associated with heavy sweating (R. 184).

Dr. Nusbaum also rendered his opinion of plaintiff's condition in a letter, dated January 21, 1965. After reviewing plaintiff's condition, Dr. Nusbaum concluded, "It is my opinion that this gentleman has an ecephalopathy, diffuse and severe ,secondary to cerebral anoxia resulting from prolonged status epilepticus. He has a seizure disorder which resulted in the status epilepticus, probably a focal cortical onset in the right hemisphere, secondary to a remote brain and head injury, but with the status epilepticus *very likely precipitated by fatigue and fluid loss, and electrolyte imbalance associated with the performance of heavy labor in a confined space* (R. 17).

Dr. Nusbaum testified at the hearing that it is not at all unusual for a seizure caused from electrolyte imbalance to occur within a period of 3 days after the seizure activity. During the hearing, Dr. Nusbaum was question on why his conclusions differed from the medical panel. Speaking of the panel's report, Dr. Nusbaum testified as follows (R. 192-193):

> "Dr. Nusbaum — But the conclusion I think that they based their decision on, the findings that they based their decision on, was lack of evidence of circumstances arising out of his confinement in this narrow space they mentioned as contributing to his seizures. Where I disagree apparently

with the panel is that I — on an assumption that there was heavy perspiration associated by the patient, when I examined him — I concluded that his seizures had a relationship to this confined space and the high temperature.

The Referee — Well, that is a good statement. Of course, in the last analysis the Commission must make the finding and conclusion that he was really working in unusual temperature, and unusual exertion for him."

The medical panel's first report made findings that on the way to the hospital plaintiff's seizure activity lasted "for a minute or two." The panel concluded that in spite of the findings and conclusions of plaintiff's own doctor, Kenneth J. Nielson, and the consulting neurologist, Dr. Daniel Nusbaum, that there was "no good evidence that the alleged injury on or about July 17, 1964, had any direct relationship to producing the cerebral status noted or that the alleged injury aggravated a preexisting condition resulting in the present cerebral status." It is important to note, however, the panel recognized that "further evidence in the case which might bear significantly on the determination of disability arising from the alleged injury might bear consideration in the future." (R. 147-148). The last sentence was stricken from the report by the Commission on the grounds the panel exceeded its authority.

Following the hearing on the medical evidence, the case was again referred to the panel. The medical panel's second report simply reaffirmed their first report in spite of the fact that they now recognized that the duration of the seizure activity lasted not a few minutes but

for over a period of 24 hours after the patient was admitted to the hospital (R. 202-203).

Based upon the second medical report, the Commission found that there was "*no evidence* that the seizure activity was directly related to the circumstances surrounding the applicant's employment prior to the onset of his recurrent focal and generalized convulsive activity following admission to the hospital."

ARGUMENT

POINT I

THE COMMISSION ERRED IN HOLDING THAT THERE WAS NO EVIDENCE THE SEIZURE ACTIVITY WAS RELATED TO THE EMPLOYMENT

Section 35-1-84, Utah Code Annotated, 1953, provides, inter alia, that the Utah Supreme Court may affirm or set aside an award of the Industrial Commission upon the following grounds:

1. That the Commission acted without or in excess of its powers;
2. That the findings of fact do not support the award.

The issue in this case is whether the Commission acted unreasonably in concluding that the seizure activity rendering plaintiff totally and permanently disabled was not related to the employment.

Cases of this type have been decided many times by the Utah Supreme Court. In *Jones v. California Packing*

Corp. 121 Utah 612, 244 P.2d 640 (1951), Jones was a foreman of the California Packing Company at Hooper, Utah. As foreman, Jones was required to get a certain "pea viner" going and keep it in operation over a brief period of time known as a "campaign" which involved long working hours during the short harvesting season. Trouble occurred in a booster motor and Jones was required to work with it constantly. During the three days prior to the accident, Jones was required to work 11-½, 13-½ and 15-½ hours each day. On the day of the injury, Jones started working at 2:00 o'clock in the morning. He was apparently alright at 6:30 o'clock in the morning. He for breakfast and returnd at 7:00 o'clock. He continued to work with the balky engine, squatting over it to adjust the carburetor or trying to crank it until 8:30 or 9:00 o'clock in the morning when he became ill and complained of stomach distress, a violent headache and pain in his chest; his color was bad and he appeared clammy according to several witnesses. Shortly after 9:00 a.m. he went home. He continued to have pains in his chest and back and was sweating profusely. He lay down on the bed and within a few minutes he was dead.

Both sides agreed that he died of a coronary occlusion, but disagreed upon the question of whether the occlusion was caused by his work. The Utah Supreme Court held that the decedent's death, caused by a coronary occlusion suffered by decedent following a three day period of hard physical labor with little rest, was an accident arising out of and in the course of decedent's employment. The court set aside the Commission's order and remanded for further proceedings holding that the

Commission acted unreasonably and arbitrarily in refusing to believe competent evidence.

The court set out some "cardinal principles" governing cases of this type at 121 Utah 615:

> "This court has repeatedly held that the Workmen's Compensation Act should be liberally construed to effectuate its purposes, and where there is doubt, it should be resolved in favor of coverage of the employee. See M. & K. Corp. v. Industrial Comm., 112 Utah 488, 189 P.2d 132.
>
> It is settled beyond question that a pre-existing disease or other disturbed condition or defect of the body, when aggravated or lighted up by an industrial accident is compensable under the act, Graybar Electric Co., Inc. v. Industrial Comm., 73 Utah 568, 276 P. 161; Thomas D. Dee Memorial Hospital Ass'n v. Industrial Comm., 104 Utah 61, 138 P.2d 233. And also that an internal failure brought about by exertion in the course of employment may be an accident within the meaning of Sec. 42-1-43, U.C.A. 1943, without the requirement that the injury result from some incident which happened suddenly and is identifiable at a definite time and place. Robertson v. Industrial Comm., 109 Utah 25, 163 P.2d 331; Thomas D. Dee Memorial Hospital Ass'n v. Industrial Comm., supra; Hammond v. Industrial Comm., 84 Utah 67, 34 P.2d 687; Purity Biscuit Co. v. Industrial Comm., 115 Utah 1, 201 P.2d 961, 966. In the latter case, Mr. Justice Wade stated:
>
> '. . . this court is definitely committed to the proposition that where an employee suffers an internal failure or breakdown which results from overexertion in the course of his employment that such is a compensable accidental injury . . .' Citing cases."

There is no dispute in the instant case that plaintiff had a head injury about 25 years previous when he was thrown from a horse. Sudsequent study revealed a subdural hemotoma and surgery was performed to remove the blood clot. There was no history that plaintiff had ever had any kind of seizure activity (R. 146). The seizure occurred some 55 hours following the heavy labor in a confined space accompanied by a great deal of fatigue, perspiration and some shortness of breath. During this 55 hour period, plaintiff engaged in no strenuous or unusual physical activity. In fact, he was so fatigued from the week's work that he spent the large part of Saturday resting. Dr. Nusbaum testified that under these conditions the seizure activity was associated with the pre-existing brain injury and was "very likely precipitated by fatigue and fluid loss, and electrolyte imbalance associated with the performance of heavy labor in a confined space." (R. 195. 196).

Under these circumstances it is clear that the internal failure was brought about by exertion in the course of employment and is compensable under the act.

In the Jones case, supra, the court found that the portion of the medical evidence which concluded the strenuous work did not cause the internal failure, was not sufficient evidence of substance that the evidence of the other doctors which had every appearance of trustworthiness could be rejected.

Similarly in the instant case, the medical panel examined plaintiff for only an hour and a half (R. 162). More importantly, there is no indication in either of their

reports or in their testimony to the Commission, that the evidence adduced during the hearing of February 8, 1965, when plaintiff and his co-workers were examined and cross-examined , was even considered by or available to the panel. Without a full appreciation of plaintiff's working conditions prior to the seizure the panel reports can be given little weight.

Even though the Commission itself stated that they would eventually have to rule on plaintiff's working conditions (R. 192), they failed to independently make that determination and instead merely adopted the medical panel's report who based their conclusions, at best, on a meager knowledge of plaintiff's working conditions obtained during a short interview.

In *Standard Coal v. Industrial Commission,* 69 Utah 83, 252 P. 292 (1926), the court stated at 69 Utah 91:

> "It is no defense to a claim for compensation that the injury lighted up, reopened or revived an existing infirmity of the injured employee. Such is the holding of this court in the cases cited above. The principle or rule of law there announced is supported by the great weight of authority, if not by the unanimous opinions of this court. Our statutes prescribe no standards of health or of physical conditions to entitle one to the benefits of the Compensation act."

It has often been held that if an erroneous statement in the Commission's order is so mistaken in fact or in law that in its absence there would be a reasonable likelihood of a different result, a reversal is justified. *Carling v. Industrial Commission,* 16 Utah 2d 260, 263, 399 P.2d

203 (1965); *Walker v. Peterson,* 3 Utah 2d 54, 278P.2d 291 (1954).

In the case at bar the Commission found there was "no evidence the seizure activity was directly related to the circumstances surrounding applicant's employment." (R. 210). This finding is clearly erroneous and completely disregards the testimony of plaintiff's doctor and the consulting neurologist, Drs. Nielson and Nusbaum. In the absence of the Commission's erroneous finding, a different result would certainly obtain and a reversal is clearly justified.

In *Thomas D. Dee Memorial Hospital Ass'n v. Industrial Comm.,* 104 Utah 61, 138 P.2d 233 (1943), the court considered the question of whether or not extra work or overexertion constitute an "accident" in the statute. Applicant was suffering from a heart disease prior to the night the "accident" occurred. On that night he was required to do heavy lifting greatly in excess of his normal duties. After his shift ended at 8:00 a.m., he went home and rested until afternoon. He then went to see his doctor who diagnosed his condition as a coronary occlusion resulting in his total disability. The court speaking through Justice Wolfe affirmed the Commission's order awarding compensation for the pre-existing heart ailment aggravated by overexertion, relying upon *Hammond v. Industrial Comm.,* 84 Utah 67, 34 P.2d 687 (1934). After citing the facts of the Hammond case, supra, the court stated at 104 Utah 67:

> "The opinion was thus based on the series of 'efforts' and 'exertions.' The only distinguished fea-

> ture between the facts of that case [Hammond] and this [Dee Memorial] might be in the degree of exertions. In both cases the injured employee was doing work of the same type usually done by hime but the work was heavier than usual. Both had continuous overexertions. Both suffered a heart attack. Experts in both cases testified that the overexertion contributed to the disability or death. Both had pre-existing heart ailments which were aggravated by the overexertion. There appears to be no logical basis for distinguishing these cases."

It is submitted there is no logical basis for distinguishing the Dee Memorial and Hammond cases, supra, from the case at bar. In the instant case competent medical witnesses testified that the seizures were caused by overexertion. The testimony that overexertion was present was uncontradicted; the only disputable item was the degree of overexertion. The Commission acted arbitrarily and unreasonably in failing to recognize the holdings of these cases that such overexertion constitutes an accident within the meaning of Sec. 42-1-43, U.C.A. 1943.

In *Robertson v. Industrial Comm.*, 109 Utah 25, 163 P.2d 331 (1945), the court was presented with a similar problem. The medical experts were of the opinion that the deceased workman suffered an acute heart affliction shortly before his death. The question was whether the heart affliction resulted from pulling on the leg of a dead horse during the course of his employment. One of the doctors expressed the opinion that the cause of death was brought on by the overexertion. The court stated at 109 Utah 28:

> "Our first task is to determine whether the evidence shows just ordinary exertion, and whether the testimony of witnesses is properly reflected in the decision. As to the medical testimony, it seems clear to us that the Commission misconceived the import therof."

The court held that the factual premise of the Commission — ordinary exertion — was not supported by the record. Based upon the Hammond and Dee Memorial cases, supra, the court vacated the Commission's order.

It is submitted that the Commission in the instant case failed to make the determination of whether or not plaintiff was working in unusual temperature and unusual exertion for him. The panel report failed to take into account the full extent of plaintiff's activities and it seems clear the Commission misconceived the import thereof in adopting the medical panel's conclusion. The panel made no finding or reference to plaintiff's unusual sweating, salt loss nad electrolyte imbalance. They offer no explanation of what triggered the seizure after admitting plaintiff had been seizure free for 25 years. In this regard it is important to note that the medical panel's first report concluded that future evidence in the case might bear significantly on the determination of disability arising from the alleged injury. The medical panel recognized a deficiency in the facts available to them.

Under such circumstances it is submitted the Commission acted unreasonably in failing to make a determination, obvious from uncontroverted facts, that plaintiff's overexertion in the course of employment was an accident within the meaning of Sec. 42-1-43, U.C.A. 1943,

and is compensable under the act, and that such accident triggered the seizure activity resulting in plaintiff's disability.

CONCLUSION

It is respectfully submitted that the order of the Industrial Commission is contrary to law and that the same should be reversed with instructions to award compensation in accordance with the Industrial Act, or in the alternative, that the matter should be remanded for further hearing.

Respectfully submitted,,

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