

1991

Kriste A. Pitkin v. Preston's Incorporated, Industrial Commission of Utah : Brief of Appellant

Utah Supreme Court

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Recommended Citation

Brief of Appellant, *Kriste A. Pitkin v. Preston's Incorporated, Industrial Commission of Utah*, No. 914588.00 (Utah Supreme Court, 1991).
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UTAH SUPREME COURT

BRIEF

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EME COURT

1st JUN 1977

E O F U T A H

ORIGINAL

J. Reuben

KRISTE A. PITKIN,

*

Plaintiff and
Appellant,

*

*

vs.

Case no. 14588

*

PRESTON'S INCORPORATED and
THE INDUSTRIAL COMMISSION OF
UTAH,

*

*

Defendants and
Respondents,

*

BRIEF OF APPELLANT

Appeal from the Industrial Commission of Utah

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FILED

JUN 21 1976

Clerk, Supreme Court, Utah

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IN THE SUPREME COURT
OF THE STATE OF UTAH

KRISTE A. PITKIN,	*	
Plaintiff and	*	
Appellant,	*	
vs.	*	Case no. 14588
PRESTON'S INCORPORATED and	*	
THE INDUSTRIAL COMMISSION OF	*	
UTAH,	*	
Defendants and	*	
Respondents,	*	

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

Appellant is appealing from an Order of the Industrial Commission of Utah denying comepnasation to Appellant under Workmen's Compensation provisions of the Utah Code Annotated [hereinafter cited as U.C.A.].

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the Order of the Industrial Commission and a determination of the disability, suffered by Appellant, under provisions of U.C.A.

STATEMENT OF THE FACTS

At the time the injury was sustained, Appellant was a 23-year-old female employed by Defendant, Preston's Incorporated

owners of a bus station in Logan, Utah. Her period of employment was from the 17th day of December, 1973, until the 9th day of December, 1974, at which time she was terminated. Her duties included selling tickets for Greyhound bus lines, occasionally cashiering at the cafe, and handling freight, some of which weighed one hundred pounds (T.R. 9). More specifically, her handling of freight included lifting outgoing freight or baggage onto carts, removing incoming freight from the carts, and retrieving freight for customers.

While lifting freight on or about the 28th day of August, 1974, Appellant suffered an acute attack of back pain which radiated down her left leg. Appellant did not recognize that the leg pain was associated with her back injury until the 5th day of September when she was told by Dr. Russell N. Hirst that she was probably suffering from an "early disc". Later, at an employees' party, Appellant informed Respondent corporation's president, Patrick Preston that she had a ruptured disc (T.R.42).

Dr. Hirst referred Appellant to Dr. James M. Steele who diagnosed her injury as a herniated nucleus pulposis L5 S1 on the left or a herniated disc. (See Exhibit A-1).

In November, a claim was filed with the Industrial Commission placing the date of injury on September, 19, 1974, "over a period of time working caused by lifting freight". Subsequent to the filing, Appellant contacted counsel who instructed her to try to remember the exact date and time of

the accident (T.R. 45, 46). As a result she determined that it occurred on or about the 28th day of August, 1974. An amended complaint was filed alleging the 28th day of August. Appellant continued working until she was terminated on December 9, 1974.

A hearing was held in the Hearing Room of the Industrial Commission of Utah on March 19, 1975 pursuant to Order and Notice of the Industrial Commission. The two witnesses who testified at the hearing in addition to Appellant were Patrick Preston and Heather Hardy.

ISSUES PRESENTED

1. The Industrial Commission acted arbitrarily in not considering or acting upon the testimony of witnesses when such testimony is substantial, credible, and uncontradicted.
2. Appellant's failure to promptly report her injury does not bar compensation.
3. The Industrial Commission erred in not finding that, as a matter of law, the Applicant did sustain an industrial injury by accident in the course of her employment, despite her inability to recall the precise time and occurrence responsible for said injury.

ARGUMENT

ISSUE NO. 1

THE INDUSTRIAL COMMISSION ACTED ARBITRARILY IN
NOT CONSIDERING OR ACTING UPON THE TESTIMONY OF
WITNESSES WHEN SUCH TESTIMONY IS SUBSTANTIAL,
CREDIBLE, AND UNCONTRADICTED.

It is evident from the Industrial Commission's findings that Appellant's claim of disability resulting from a back injury is undisputed. The primary question is whether the injury was sustained by accident in the course of Appellant's employment. Consistent with legislative intent, this Court has liberally construed provisions for employees' right to compensation under the Workmen's Compensation (see Chandler v. Industrial Commission, 55 Utah 213, 184 P. 1020). "This court is committed to the rule that as a matter of law the Commission may not, without any reason or cause, arbitrarily or capriciously refuse to believe and act upon substantial, competent and credible evidence which is uncontradicted." Baker v. Industrial Commission, 17 Utah 2d 141, 405 P.2d 613, 614-15 (1965) and cases cited therein.

In the instant case Appellant testified that the accident occurred on or about the 28th day of August, at which time she suffered low back and sciatic pain. She did not realize that this sciatic pain was associated with her back injury until the 5th day of September when she was examined

by Dr. Hirst. She then informed at least two people of her injury at an employees' party. One was Heather Hardy, a fellow employee and the other was Patrick H. Preston, President of Preston's Inc.

No formal report of the injury was made to Respondent corporation due to its failure to produce any Industrial Insurance and its lack of assistance to employees relative to claims and notice of injury forms. (T.R. 42, 43) Notwithstanding the above, Respondent did not even commence an investigation, despite the fact that Preston was informed of the accidental injury only eight days after the approximate date of injury. Further, Appellant did inquire about Workmen's Compensation benefits on the 19th day of September subsequent to being examined by Dr. Steele (T.R. 31,36).

In the instant case, acknowledgement of corroborative evidence given by the two witnesses who testified at the hearing on March 19th is conspicuously absent from the Findings. Both Preston and Hardy testified and substantiated Appellant's testimony concerning the issues of the time Appellant incurred her injury, the apparent nature of the injury, and when Respondent corporation was informed of the accidental injury.

Heather Hardy, who was still employed by Preston's Inc. at the time of the hearing, testified that in August she personally observed Appellant limp after the last week in August.

MR. PRESTON Q Do you recall anything that she specifically said to you during that month?

A No

Q Concerning her back I mean?

A Not until after she had talked to Dr. Hirst.

Q I see. So that was the first time that you heard anything concerning her back, was when she talked to Dr. Hirst?

A Well, we had discussed leg pain, but we didn't know it was her back.

Q When did she first discuss the fact that she had leg pain?

A She didn't have to. I brought it up. She was limping.

Q What date was that?

A Sometime during the last week in August. I don't know what day.

Q How do you know it was the last week of August?

A Because it was about a week after I had returned from a trip home to California the first of August.

Q Did she complain of leg pain?

A Uh-huh. She was limping and she'd sit down, and she couldn't stand straight up after sitting for a while (T.R. 66 1 1-23).

Q But as near as you can pinpoint, did you first start noticing the pain that she was apparently suffering in her leg?

A It was the last week of August.

MR. PRESTON: That's all (T.R. 93 1 18-22).

This testimony clearly substantiated Appellant's statements concerning the time of her injury. It also focuses on the differences between normal backaches of which nearly all employees complained and the very serious nature of the herniated disc Appellant suffered. It is clear that such testimony should have been considered both in relation to the time and occurrence of the accident and to the issue of Appellant's credibility.

Heather Hardy further verified both that she had been told of the injury on September 5th and that Earl Halverson was informed on September 19th.

MR. PRESTON: Q When did she first tell you that she hurt it working?

A She never really did.

Q So this is the first time you have ever heard that this injury occurred as a result of employment at Dick's Cafe then?

A No. Because after she had gone to the doctor, and they had decided that it was her back, and it could be from lifting the freight. She hadn't been doing any other strenuous activity, or lifting anything so---
(T.R. 67 1 9-17).

Q Do you know whether or not she filed -- of your knowledge, or any other employee, including Earl Halverson --of any notice of any injury that she sustained?

A Not until after she had gone to the doctor on the 19th.

Q So that was the first time you were aware that she claimed an injury?

A No. At the employees' party she did bring it up that she had talked to Dr. Hirst, and he had told her that he thought it might be a crushed disc.
(T.R. 70 1 10-19).

Patrick Preston also stated that he had been informed of Appellant's injury on September 5th, the day of the employees' party.

MR. PRESTON: Q And can you tie any one of these conversations? The first date that you can place on a conversation? Can you tell us the approximate date?

A I can't tell you the approximate date. I think it was at the employees' party, however.

Q When was that, approximately?

A I don't remember. I'm sure it's in the records.

Q Would you tell me what was said at that time?

A I think she said she had a bad back ache at the time. Now she announced to me that she was going to have an operation. I don't remember whether it was then. I don't think so. I think it was sometime in November. But there again, I'm sorry, but I can't remember a date.

Q Did she tell you the reason for the bad back?

A No, she didn't tell me any reason for the bad back. Oh yes. She told me a reason of lifting freight. I'm not sure that I accept that reason.

MR. LOW: I move to have that stricken, Your Honor. What difference does it make whether she accepted that or not?

REFEREE: Well, for that reason it may stand.
(T.R. 84 l. 17-25, 85 l 1-11)

The Commission should have considered these witnesses' testimony because it is not bound by the testimony of the claimant to the exclusion of all other evidence in reaching its final determination. Lorange v. Industrial Commission, 107 Utah 261, 153 P.2d 272. Had the Commission considered

this evidence, the only reasonable conclusion it could have reached would be that a serious back injury had been sustained by Appellant during the last week of August on or about the 28th day in the course of her employment.

ISSUE NO. 2

APPELLANT'S FAILURE TO PROMPTLY REPORT
HER INJURY DOES NOT BAR COMPENSATION.

Appellant's failure to promptly report her injury is "not sufficiently consistent with the facts to be ground for denying compensation where the injury was of the kind that would ordinarily cause the claimant to think that it would soon heal and that it would be alright to continue working" Baker, supra, at 614. Similarly, in Arizona, the Court of Appeals does not charge the claimant with the duty of knowing the nature of his injury before it is determined by a competent medical investigation. Employer's Mutual Life Insurance Co. of Wisconsin v. Industrial Commission, 24 Arizona App. 427, 539 P.2d 541 (1975). In the instant case, Appellant continued working, testifying that she did not recognize the pain in her leg as symptomatic of a back injury until September 5th (T.R. 15, 42, 67, 70). When she became aware of the seriousness of her injury she did notify Patrick Preston the same day.

Respondent appears to blame Appellant for failing to report the accident the day it occurred, despite the fact that

she did not realize the nature of the accidental injury as shown above. Respondent then ignored the fact that no notice relative to Workmen's Compensation, no claim forms, no reporting procedures, nor any evidence of insurance was provided by Respondent. The combination of these things and Appellant's inability to diagnose her injury are what caused the delay in reporting.

The Code provides, under Section 35-1-99, one year for notice to be given a reduction for late notice after 48 hours if the employer investigates the accident. Respondent took no action. There is nothing unusual in this case to bar compensation.

ISSUE NO. 3

THE INDUSTRIAL COMMISSION ERRED IN NOT FINDING THAT, AS A MATTER OF LAW, THE APPLICANT DID SUSTAIN AN INDUSTRIAL INJURY BY ACCIDENT IN THE COURSE OF HER EMPLOYMENT, DESPITE HER INABILITY TO RECALL THE PRECISE TIME AND OCCURRENCE RESPONSIBLE FOR SAID INJURY.

The major issue arising out of the March 19th hearing was whether Applicant sustained an "injury by accident" which can be compensated as provided in U.C.A. 35-1-44. The Administrative Law Judge found that Appellant suffered a back injury, but that the injury developed over a period of time and, therefore, falls without the statutory definition of "injury by accident." On authority of Pintar v. Industrial Commission of Utah, 14 Utah 2d 276, 282 P.2d 414, the Judge

held that a claimant must be able to specify an "identifiable accident or accidents in the course of the employment." In holding that a precise act or incident be alleged in order to receive compensation, the Administrative Law Judge has misconstrued the intent of the Legislature.

This issue focuses on the definition of "injury by accident." A brief review of the history and purpose of Workmen's Compensation legislation is enlightening. The English Workmen's Compensation Law provided compensation for "injury by accident." The 1903 case of Fenton v. Thornley, 1903 A.C. 443, held that an employee who ruptured himself by strain in the course of his work was within the provisions of the statute and, significantly, that the rupture was unexplained despite intended strain. The discussion of this case and subsequent interpretation in Purity Bisquit Co. v. Industrial Commission, 201 P. 2d 961, 967 (Utah, 1949) is definitive of the proper legislative construction of the Workmen's Compensation Act.

The opinion recognized that the language of the statute suggests a separate accidental event which causes the injury but held that such language was used loosely and should be construed in its popular sense. That so construed, all that is required is that the resulting injury be accidental. It was said that the distinction between accidental cause and accidental result was over the heads of parliament and of employer and employee, and that the average person would consider he had met with an accident in either case.

Under this construction, the "accident" in the instant case was the rupture of the disc and the result in "injury" was the pain and restricted ability to sit, stand, and lift.

The opinion further addressed the problem of legislative intent at page 968 of the text.

This very problem was discussed and legislatures were advised that if the result reached in Fenton v. Thornley, supra, was intended, the use of the term "injury by accident", since its meaning had been construed to mean only an unexpected result, was desirable. Thereafter, with full access to that decision and article our legislature enacted our Workmen's Compensation Law and adopted the term "injury by accident." It is a familiar doctrine of statutory construction that where a legislature adopts a statute which has already been construed, it usually adopts the construction placed thereon.

The opinion recognizes that if the policy behind Workmen's Compensation is to "insure all employees against disabling accidental injury caused by employment" and "to prevent expensive litigation and uncertain results" then to hold that an internal failure, such as a herniated disc, comes within the statutory requirements is consistent with such intent. Id. at 968.

Thus, the term "injury by accident" embodies, primarily the element of unexpectedness. See 44 ALR 363, Larson, Workmen's Compensation (Desk Ed.) §37.20, 1976. In the instant case, this element is satisfied on the authority of Fenton v. Thornley

which defines an accident as "an unlooked for mishap or an untoward event which is not expected or designed." First, the existence of Appellant's injury is acknowledged in the findings of the Administrative Law Judge. Additionally, the unexpected nature of the injury is confirmed by Appellant, herself, in response to the Referee's questioning at the hearing (T.R. 50 l 17-25, 51 l. 1-16). It is clear that Appellant's injury was unexpected.

A second element of the term "injury by accident" is one which has been added by most jurisdictions: The injury should be reasonably identifiable as to time and occurrence. Larson § 37.20. The Utah cases of Frederickson v. Industrial Commission, 68 Utah 206, 249 P. 480 and Bamberger Coal Co. v. Industrial Commission, 66 Utah 203, 240 P. 1103 hold that an internal failure was not accidental when no definite time or place of injury was determined. However, a case factually similar to the case at bar appears to have modified this strict interpretation, thus bringing the treatment of like cases in line with the heavy preponderance of jurisdictions which allow compensation for herniated disc injuries without demanding proof of a particular occasion as the cause. See Larson, §38.20. The case is Baker v. Industrial Commission, supra.

In Baker, the claimant was denied compensation by the Commission for a ruptured disc on the ground that her injury did not occur in nor did it arise out of her employment as a clerk-typist. The order was reversed on appeal, the state's highest court holding that "[t]he claimant's indefinite statements concerning the cause of the injury should not be held to defeat her recovery." (emphasis added) Id., at 614. As in the case at bar, Claimant's testimony was indefinite as to the cause of the injury. Also, the injury, the nature of which was uncertain until days afterward, was not reported to the employer until the following week. Her testimony was also supported by credible testimony which was either disbelieved or not considered by the Commission.

The Pintar case, *supra*, upon which the Commission's Findings were predicated in the instant case, is inapposite especially in light of Baker, *supra*. In Pintar, *supra*, the claimant was suffering from a degenerative arthritic lumbar spine, and one of the issues appears to have been whether the injury was an occupational disease and compensable. In the present case, Appellant sustained an injury of internal failure of a disc, there being no question of whether it was compensable as an occupational disease. The criteria to be established for an "identifiable accident or accidents" (Pintar, *supra*, at 415) in occupational diseases are necessarily

different from those to establish an "injury by accident."
(compare chapters 1 and 2 of Title 35, U.C.A.) There is,
therefore, no basis for Pintar as authority under the facts
of this case.

Conceding the fact that herniated discs do sometimes
develop over a period of time, that period of time can be as
short as a couple of hours. Larson, §39.10 and cases cited
therein. This fact probably constitutes the reason Appellant
is unable to recall an exact moment or triggering occurrence
of her injury, although she can approximate the week and even
the day she experienced pain. This inability is not essential,
however. "The accident consists in the unexpected internal
failure of his system to function normally. There is no requirement
that the accident be the first in the chain of events which ulti-
mately results in injury or that it be an outward force applied
to the employee, all it requires is injury or death by accident."
Purity, supra, at 966. Most recently, in the case of Residential
and Commercial Construction Co. and State Insurance Fund v.
Industrial Commission of Utah and Gary Lynn Eskelson, 529 P.2d
457 (Utah, 1975), the court held that a lumbosacral strain was
unexpected and compensable despite the fact that the medical
panel found the injury resulted from congenital anomaly instead
of trauma.

In the instant case, the accident was the rupturing of the disc which caused symptoms of pain. The pain, resulting in inability to move and a disability in employment constitutes the injury. Thus the requisites of injury by accident are satisfied under both Purity, supra, and Baker, supra. Finally, since the Administrative Law Judge stated that it was the lifting of freight which contributed significantly to Appellant's injury, it is clear that, as a matter of law, she sustained an injury by accident in the course of her employment.

CONCLUSION

The purpose of the Workmen's Compensation Act is to provide compensatory relief for injuries sustained in the course of employment. There is nothing to indicate that the intent of the Legislature is to compensate only those employees who can demonstrate an exact time and precise act which caused their injuries. Such an interpretation would both arbitrarily deny legitimate claims and foster fabrication of events to fulfill such requisites.

First, it appears that the Commission, as a fact finding body, disregarded testimony of a substantial, credible and competent nature. There was even testimony from the president of Respondent corporation to corroborate, not to discredit, Appellant's testimony. There is no good cause why the Commission arbitrarily failed to mention uncontradicted evidence or record.

Secondly, Appellant's failure to promptly report her injury is not a bar to her recovery. There is nothing to indicate she had any reason to make specific note of it until she discussed the matter with counsel. Certainly her employer did not aid in her knowledge regarding notice requirements for Workmen's Compensation. The fact is that Respondent was not in compliance with U.C.A.35-1-46 requiring some kind of employee insurance.

Ultimately the facts show that Appellant sustained an injury by accident on or about the 28th day of August, 1974, while she was lifting freight. She is unable to recall the exact moment or act which initiated the accidental injury. However, her candid admission of her inability does not preclude recovery because the statutory requirements of "injury by accident" are fulfilled by the accidental event of her ruptured disc and the resulting injury of nerve impingement causing pain. Appellant is therefore, entitled to compensation. For this reason and those stated above, the Order of the Industrial Commission should be reversed.

Respectfully Submitted,

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I hereby certify that I delivered copies of the foregoing brief of appellant to the Industrial Commission of Utah, and to George W. Preston, Attorney for Defendant, this ____ day of June, 1976.
