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Goodyear Service Store and Continental Casualty Company v. Industrial Commission of Utah and Glenn M. Dowdle : Brief of Plaintiffs

IN THE SUPREME COURT OF THE STATE OF UTAH

GOODYEAR SERVICE STORE and CONTINENTAL CASUALTY COMPANY, *Plaintiffs,*

vs.

INDUSTRIAL COMMISSION OF UTAH and GLENN M. DOWDLE, *Defendants.*

Case No. 10859

BRIEF OF PLAINTIFFS

On a Writ of Review from the Industrial Commission

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BRIEF OF PLAINTIFFS

STATEMENT OF KIND OF CASE

This is a proceeding before the Industrial Commission wherein the defendant Glenn M. Dowdle filed an application with the Industrial Commission to secure compensation for an eye disability allegedly resulting from an accident on June 25, 1960. The Industrial Commission originally determined, on the basis of the medical evidence, that there was no cause and effect relationship between the defendant's eye condition and the accident of 1960. The Commission later

changed its order and made an award for total blindness in one eye. The point at issue on this appeal is whether or not the Commission correctly evaluated defendant's eye condition and disability in its order of February 10, 1967.

DISPOSITION BEFORE THE INDUSTRIAL COMMISSION

The Commission has found that the applicant has sustained a total loss of vision in one eye as a result of the June 25, 1960, injury. The Commission stated that it must reject the panel reports, Dr. Smith's testimony, and the testimony of Dr. Sonntag with respect to the evaluation of plaintiff's condition under a belief that the Supreme Court of Utah has required that the Commission cannot consider binocular vision evaluations at all. The Commission awarded defendant the full amount provided by statute for the total loss of one eye.

RELIEF SOUGHT ON CERTIORARI

Plaintiffs seek a reversal of the Commission's order and an appropriate remand to the Industrial Commission for a disability finding in accordance with the evidence and the law in this case.

STATEMENT OF FACTS

On June 25, 1960, defendant was injured when he was filling a tire with air and the tire exploded

causing fractures in his hands and injury to his kneecap. No evidence of ocular injury from the accident was noted at that time (R. 2 and R. 3). On August 1, 1961, defendant filed an application for hearing claiming that air pressure in the original accident caused injuries to his eye so that he had double vision (R. 11). On December 8, 1961, defendant was notified by the Commission that no eye injury was found by Dr. Pugmire and that he therefore had no claim for this reason (R. 14).

Thereafter, the Commission appointed a medical panel to evaluate defendant's case and on November 20, 1964, the panel reported that it was its unanimous conclusion that without evidence of injury to the head and orbits, there was no evidence to substantiate a cause and effect relationship between the injuries and the eye complaints (R. 29).

However, subsequently after a hearing on March 8, 1965 (R. 34 through R. 43), defendant was reexamined by Dr. Smith, and Dr. Smith stated that now the defendant

> " . . . surmises that the right hand might possibly have come up and struck the right eye . . . and it is somewhat more realistic to presume that this accident did have relationship to the weakness of the muscles on the right eye" (R. 45).

Thereafter, on September 7, 1965, the medical panel filed a report in which it agreed that it was

> " . . . very likely as though the accident did contribute to the muscle defect in the right eye . . . " (R. 51).

and said further that

> " . . . Mr. Dowdle had suffered a visual disturbance which represents a 100 per cent loss of mobility efficiency in one eye.
>
> On the basis of the binocular visual efficiency calculations this gives us a 100 per cent efficiency loss of one eye with the other eye remaining normal. This represents a binocular visual efficiency loss of 25 per cent" (R. 51).

Thereafter, another hearing was set before the Industrial Commission on January 10, 1966 (R. 63 through R. 74). In substance, what occurred at this hearing was that Dr. Smith testified that it was his opinion that surgery would be of significant benefit to the defendant and improve his visual situation. Therefore, the Commission continued the hearing for surgery to be performed and left its consideration open for further determination by the Commission (R. 71).

Regardless of this continuance, however, the Commission on February 25, 1966, entered its order that the plaintiffs herein pay to the applicant for loss of binocular vision efficiency on the basis of fifty weeks permanent partial disability or a total amount of $2100 payable in a lump sum (this is the equivalent of one-half the amount allowed by our statute Title 35-1-66 Utah Code Annotated 1953 for total blindness of one eye.)

Because it was not known at that time what the result of Dr. Smith's surgery would be, plaintiffs objected to that order and reminded the Commission that the hearing had been continued pending the surgery (R. 77 and R. 78).

Thereafter, on July 18, 1966, Dr. Homer E. Smith reported to the Industrial Commission on the results of his surgery on defendant. He said (R. 83) that defendant

> " . . . has good satisfactory vision in all fields of gaze when wearing his glasses. . . . With his glasses he would then have no visual efficiency loss. But without his glasses he has the visual efficiency loss of one eye. Without his glasses, this would then represent a 25 per cent loss of binocular visual efficiency, with 100 per cent visual efficiency loss of one eye."

Thereafter, the medical panel on October 20, 1966, filed its report stating that

> " . . . according to AMA standards this represents the equivalent of the total loss of one eye" (R. 87).

Thereafter, another hearing was held before the Commission on January 16, 1967, at which time Dr. Homer E. Smith and Dr. Richard W. Sonntag, chairman of the medical panel, testified in detail before the Commission.

Thereafter, on February 10, 1967, the Commission entered its order awarding defendant one hundred

weeks for $4200; the equivalent under our statute, Title 35-1-66 Utah Code Annotated 1953, of an award for total blindness of one eye.

ARGUMENT

POINT I.

THE APPLICANT HAS NOT RECEIVED ANY INJURY IN THE COURSE OF HIS EMPLOYMENT OR OTHERWISE WHICH HAS OR WILL RESULT IN THE TOTAL BLINDNESS OF ONE EYE WITHIN THE MEANING OF TITLE 35-1-66 UTAH CODE ANNOTATED 1953 AND THE DECISIONS OF THIS COURT.

The basic problem in this case is that the Industrial Commission has misconstrued prior cases of this court and is under the mistaken impression that the Industrial Commission cannot in any event consider a binocular medical disability rating with respect to visual impairment.

After the hearing of January 16, 1967, was concluded, the Commissioner, Mr. Wiesley, before whom the hearing was held, stated at R. 115:

> "It is true that when we have an eye examination we like to have both binocular vision and monocular vision, because if there is not a 100 per cent loss of vision in the one eye, then we use the monocular vision findings. See, this is the only

reason we ask for both of them. But our Supreme Court has on three or four occasions interpreted the law. *And because the law provides one hundred weeks for a total loss of vision in one eye, we may not use binocular vision."* (Emphasis added).

In discussion off the record, Mr. Wiesley stated again two or three times in substance and effect that his hands were tied by the decisions of the Utah Supreme Court and that the Commission could not use a binocular rating.

Plaintiffs and appellants have examined the decisions of this court to determine whether or not there are any such decisions in effect directing the Commission in eye cases. There are no such decisions.

The only two Utah decisions which could be construed in any way as having any bearing on this problem are the Utah cases of *Moray v. The Industrial Commission,* 58 Utah 404, 199 Pac. 1023, decided July 9, 1921, and *Western Contracting Corp. v. The Industrial Commission of Utah,* 15 Utah 2d 208, 390 P.2d 125, decided March 6, 1964.

In the *Moray* case, *supra,* the applicant's eye had been damaged by an electrical flash and the evidence was that there was 90 per cent vision left in one eye and 95 per cent in the other, and applicant was claiming that the Commission had not granted him enough compensation. This court said in that case at page 1028 of 199 Pacific Reporter

> "It certainly cannot be successfully claimed that plaintiff's defective vision is greater than what he has actuallly lost. . . . At most, therefore, without glasses he has suffered a loss of vision of only 10 per cent since his loss of vision can be no greater than that of his most defective eye, while with glasses he has suffered no loss of vision whatever."

In the *Moray* case, *supra,* there was no question raised or discussed as to whether the Industrial Commission could use a binocular or monocular rating. The question simply is not involved. In the *Western Contracting* case, *supra,* the applicant's eye was injured causing "essentially total blindness to such eye" without glasses, but with the use of an optical lense a substantial function of the injured eye was restored. The Commission in the *Western Contracting* case awarded the applicant an award of one hundred weeks for total blindness of one eye. The question involved in the *Western Contracting* case was whether or not the Commission was bound to rate an eye disability in terms of what correction could be obtained by glasses or artificial lenses. The court pointed out in the *Western Contracting* case that there was a sharp conflict of authorities on this question and squarely held that it was within the prerogative of the Industrial Commission to determine whether or not the award would be diminished in a case where a totally blind eye without glasses could be corrected with glasses.

We do not dispute the *Western Contracting* decision. If the applicant in this case was totally or even

50 per cent blind in either eye without glasses, we would not be before this court. The Commission has completely misconstrued the Utah cases in its mistaken belief that it cannot consider a binocular vision rating.

The medical panel (R. 87) stated that

> " . . . according to AMA (American Medical Association) standards, this (applicant's condition) represents the equivalent of the total loss of one eye;" and Dr. Smith also stated (R. 83) that without glasses applicant's condition would represent a 25 per cent loss of binocular visual efficiency with 100 per cent visual efficiency loss of one eye."

With these evaluations appellant has no quarrel and they represent a perfectly valid medical approach when *in fact* there is *actually* a loss of vision in one eye or the other considered alone without glasses. This was the situation in the *Western Contracting* case, *supra,* but this is not the situation in this case. The defendant applicant in this case without glasses after the corrective surgery sees almost 20/20 in the left eye and 20/20 in his right eye (R. 97) and in this situation, the American Medical Association measurement requires that a deficiency rating be carried a step further and related to binocular vision (R. 97, Line 17). This is the point which the Industrial Commission in this case has completely missed and overlooked.

When one has good vision in each eye under the American Medical Association measuring,

"we then go to the binocular visual efficiency relationships that exist between the two eyes to determine the percentage of impairment of the visual system" (R. 95, Lines 1 through 4).

Therefore, it is clear on the basis of this record that the applicant's visual problem is this: without glasses he has perfect vision in the right eye and almost perfect vision, that is 20/20 vision in the left eye (R. 97). But without glasses and with the two eyes looking together, because of muscular defects, he has a doubleness of vision (R. 95). With glasses and after the corrective surgery, he has no doubleness of vision in any field of gaze and has an excellent degree of stereoscopic vision (R. 96).

In short, applicant has perfect vision with glasses, according to Dr. Smith. We note that Dr. Sonntag does not quite agree with this statement of Dr. Smith's concerning applicant's visual efficiency with glasses. Dr. Sonntag testified (R. 111) that even with glasses in the extremes of gaze but not in the usual areas of normal coordinate functions, applicant has some defect. But aside from this qualification, Dr. Sonntag agreed completely with Dr. Smith's rating of 25 per cent binocular loss and with Dr. Smith's statement as to the proper manner in which to apply the American Medical Association visual efficiency standards (R. 111).

Dr. Sonntag further testified that the reason that the medical panel's report of October 20, 1966 referred only to AMA standards with respect to the equivalent

of the total loss of one eye was because the Industrial Commission has required that its opinion be so stated (R. 111).

In short, all the medical evidence in this case clearly shows the following:

1. that applicant has perfect vision in one eye and nearly perfect vision in the other eye without glasses.

2. that without glasses, applicant has a doubleness of vision called diplopia.

3. With glasses applicant has perfect vision, according to Dr. Smith and, according to Dr. Sonntag, perfect vision except in the extreme fields of gaze.

Both doctors agree, without qualification, that it is improper to use an American Medical Association standard representing the equivalent of the total loss of one eye when *in fact* there is *actually* no real loss of vision in either eye. See **R. 101** where Dr. Smith testified and Dr. Sonntag agrees with him as follows:

> "Now, this alters the basic concept in approaching his visual efficiency system so that, although the *initial* measurements would give us 100 per cent loss of one eye, the vision being good in each eye therefore takes us to the next step of the actual determination of the visual efficiency loss of his visual system. This is the binocular visual efficiency relationship, which are calculated on a formula which is specifically given by the American Medical Association, so that its formula then becomes important in determining the impairment to this man's visual system."

This is not a case like the *Western Contracting* case, *supra,* and the Commission has confused it with that case.

POINT II.

IN ANY EVENT THE COMMISSION'S AWARD IN ITS ORDER OF FEBRUARY 10, 1967, WAS ARBITRARY AND CAPRICIOUS IN LIGHT OF ITS ORDER OF FEBRUARY 25, 1966.

On February 25, 1966, after the January 10, 1966 hearing, the Commission ordered that the applicant be paid for fifty weeks in the amount of $2100 or, in effect, for one-half the award for total blindness of one eye. In the Commission's order of February 10, 1967, the Commission set aside the order of February 25, 1966, saying it was doing so "because of the testimony of Dr. Homer E. Smith."

The evidence shows conclusively that the only thing that happened to the applicant between the Commission's order of February 25, 1966, and its order of February 10, 1967, was that the surgery of Dr. Homer E. Smith substantially and materially improved his eye problem.

At R. 94, 95 and 96, Dr. Smith explains applicant's condition prior to the surgery and testified that the correction needed to overcome the diplopia before the surgery was a 20 prism diopter and that after the

surgery he only has a 3 prism defect (R. 96) and Dr. Sonntag (R. 111) says:

"Dr. Smith's result is elegent."

Prior to the surgery applicant still had doubleness of vision in normal fields of gaze even with glasses. After surgery both Dr. Sonntag and Dr. Smith agree that he has no doubleness of vision in any normal field of gaze with glasses (R. 96 and R. 111). Plaintiffs and appellants submit that applicant's visual situation was materially improved by the surgery which was performed by Dr. Smith after the order of February 25, 1966, but regardless of this fact, the Commission arbitrarily doubled the award from fifty weeks to one hundred weeks.

CONCLUSION

Plaintiffs and appellants respectfully submit that to permit an award for total blindnes of one eye under the uncontroverted medical facts of this case would be a completely erroneous application of the provisions of Title 35-1-66 Utah Code Annotated 1953 and an unwarranted distortion of the medical facts of this case.

Respectfully submitted,

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