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

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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 DEFENDANTS

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INDUSTRIAL COMMISSION OF
UTAH and GLENN M. DOWDLE,
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BRIEF OF DEFENDANTS

STATEMENT OF KIND OF CASE

This is a proceeding before the Utah State Industrial Commission wherein the defendant, Glenn M. Dowdle, filed an application with said Commission to secure compensation and benefits for injuries sustained to his eye resulting in permanent partial disability, which injuries resulted from an accident occurring June 25, 1960, while the applicant was in the employ of the plaintiff, Goodyear Service Store. The issue raised by plaintiff's appeal is whether or not the Commission's findings and conclusions as to the source and extent of defendant, Dowdle's, injuries and resultant disability were based upon substantial and competent evidence.

DISPOSITION BEFORE THE INDUSTRIAL COMMISSION

At the conclusion of the hearings upon said defendant's application, the Commission found that the applicant had suffered a total loss of vision of one eye and by Order dated February 10, 1967, awarded to him, in addition to other benefits, 100 weeks compensation at the rate of \$42 per week, or

\$4,200, pursuant to and in compliance with Title 35-1-66, Utah Code Annotated, 1953.

RELIEF SOUGHT ON CERTIORARI

Defendants seek affirmation of the Commission's order of February 10, 1967, the factual findings of the Commission as to the source and extent of applicant's injuries being based upon substantial and competent evidence and the Commission acting within its jurisdiction.

STATEMENT OF FACTS

The defendants substantially agree with the factual representations appearing in plaintiff's brief under the section "Statement of Facts," but would make the following additions to the facts as stated by the plaintiffs:

Dr. C. Charles Hetzel, Jr., following examination of the defendant, Dowdle, reported in writing on January 3, 1962, as follows (R. 6):

"Found to have deplopia (sic) when tested with the red lens. A prismatic correction was recommended. Vision right eye, 20/25; corrected to rt eye 20/20; left eye 20/25."

"no, most probably due to air force in eyes."

"deplopia (sic) most probably permanent. Rechecked on 12/1/61 with red lens, deplopia (sic) present, prismatic."

Dr. Glen F. Harding, M.D., following examination of the defendant, Dowdle, reported in writing on January 14, 1964, as follows (R. 18):

"The major finding in his eyes are a paresis of depressors (eye muscles). He sees double especially when looks down."

"It would appear that such an explosion as claimed, could cause this diplopic or paresis of depressors."

It should be noted that the opinion and report of the medical panel, comprised of Dr. Homer E. Smith, Dr. Richard W. Sonntag and Dr. Rowland H. Merrill, dated September 7, 1965, to the following effect (R. 51):

"The details of the accident were obtained by talking to Mr. Dowdle. It appears very likely as though the accident did contribute to the muscle defect in the right eye to cause his doubleness of vision. He did not notice the doubleness of vision until about two weeks after the accident. During that interval he was in a hospital with casts on his leg and wrist. It wasn't until he had reached a facility such as to permit reading that he noticed the doubleness of vision. This is logical and compatible with the injury and symptoms described by the patient."

"On the basis of these visual efficiency determinations in current use by the Utah State Industrial Commission it has been determined that Mr. Dowdle suffered a visual disturbance which represents a 100% loss of motility efficiency in one eye."

"On the basis of the binocular visual efficiency calculations this gives us a 100% efficiency loss of one eye with the other eye remaining normal. This represents a binocular visual efficiency loss of 25%."

followed the first personal interview and physical examination of the defendant by the medical panel or a member of such panel.

It should be noted that the plaintiffs filed objections (R. 55) to the findings of the medical panel report of September 7, 1965, (R. 51); to the opinion of Dr. Homer E. Smith (R. 83) following surgery of the defendant by Dr. Smith, which surgery was at the instance and request of the plaintiffs; and filed objections to the panel report of October 20, 1966, (R. 87), which panel was comprised of Dr. Richard W. Sonntag, Dr. Rowland H. Merrill and Dr. Charles Ruggeri, Jr.

A R G U M E N T

Point I

THE APPLICANT HAS RECEIVED AN INJURY IN THE COURSE OF HIS EMPLOYMENT RESULTING IN A 100 PER CENT LOSS OF VISION OF ONE EYE, WHICH FINDING BY THE UTAH STATE INDUSTRIAL COMMISSION IS BASED UPON SUBSTANTIAL COMPETENT EVIDENCE THUS ENTITLING THE APPLICANT TO THE COMPENSATION AND BENEFITS AWARDED BY THE COMMISSION'S ORDER OF FEBRUARY 10, 1967.

The issue before the court is whether or not there is substantial, competent evidence supporting the findings of the Industrial Commission to the effect that the defendant, Dowdle, has suffered a total loss of vision of one eye resulting in permanent partial disability.

In support of defendant's contention that the findings are supported by such evidence, reference is made to the following medical testimony and medical reports concerning defendant's disability:

Dr. C. Charles Hetzel, Jr., following examination of the defendant, Dowdle, reported in writing on January 3, 1962, as follows (R. 6):

"found to have deplopia (sic) when tested with the red lens. A prismatic correction was recommended. Vision right eye, 20/25; corrected to rt eye 20/20; left eye 20/25."

"no, most probably permanent. Rechecked on 12/1/61 with red lens, deplopia (sic) present, prismatic."

Dr. Glen F. Harding, M. D., following examination of the defendant, Dowdle, reported in writing on January 14, 1964, as follows (R. 18):

"The major finding in his eyes are a paresis of depressors (eye muscles). He sees double especially when looks down."

It would appear such an explosion as claimed could cause this diplopic or paresis of depressors."

The medical panel, comprised of Dr. Homer E. Smith, Dr. Richard W. Sonntag and Dr. Rowland H. Merrill, dated September 7, 1965, reported in writing as follows (R. 51):

"The details of the accident were obtained by talking to Mr. Dowdle. It appears very likely as though the accident did contribute to the muscle defect in the right eye to cause his doubleness of vision. He did not notice the doubleness of vision until about two weeks after the accident. During that interval he was in a hospital with casts on his leg and wrist. It wasn't until he had reached a facility such as to permit reading that he noticed the doubleness of vision. This is logical and compatible with the injury and symptoms described by the patient."

"On the basis of these visual efficiency determinations in current use by the Utah State Industrial Commission it has been determined that Mr. Dowdle has suffered a visual disturbance which represents a 100% loss of motility efficiency in one eye."

"On the basis of the binocular visual efficiency calculations this gives us a 100% efficiency loss of one eye with the other eye remaining normal. This represents a binocular visual efficiency loss of 25%."

On July 18, 1966, Dr. Smith reported in writing to the Commission as to the results of the surgery performed on the defendants, together with his opinion as to the then condition of the defendant, as follows (R. 83):

"When he does not wear his glasses, he has doubleness of vision which is manifest in all quadrants of gaze."

"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 a 100 per cent visual efficiency loss of one eye."

On July 29, 1966, a medical panel comprised of Dr. Richard W. Sonntag, Chairman; Dr. Rowland H. Merrill and Dr. Charles Ruggeri, Jr., was appointed by the Commission (R.86) and on October 20, 1966, reported in writing as follows (R.87):

- "1. The applicant was examined by a member of the panel.
2. Surgery has been accomplished in an effort to make his visual mechanism more tolerable.
3. The patient has diplopia in all cardinal meridians of gaze.
4. On the basis of these findings according to A.M.A. standards this represents the equivalent of the total loss of one eye.
5. The opinion of the panel substantiates the A.M.A. conclusion that one eye is lost to normal function."

It is readily apparent that the medical findings from the date of defendant's injury to the conclusion of the matter before the Industrial Commission are consistent in diagnosis and substantially uniform in their conclusions. The Commission's finding as to the defendant's 100 percent loss of vision of one eye adopts and is consistent with such reports and, it is submitted, cannot seriously be argued to be factually unfounded considering the quantity and consistency of the medical opinions rendered.

Plaintiffs submit that the factual findings of the Commission are contrary to the evidence in that the Commission chose to accept the medical testimony and opinion as to de-

fendant's visual loss of one eye and excluded the binocular rating approach. It should be noted that the basis for plaintiff's argument is partially found in claimed remarks of Commissioner Otto A. Wieseley, which remarks were not part of the record, and upon an A.M.A. standard, not binding upon the Commission. It is not suggested by plaintiffs that there was not sufficient and substantial evidence upon which the Order entered by the Commission could, in fact, be based.

The binding effect of factual findings of the Commission as to the source and extent of an applicant's injuries when based upon substantial and competent evidence received by it has been decided many times by this Court. See *Kent v. Industrial Commission*, 89 Utah 381, 57 P. 2d 724.

Further authority in this regard is found in the case of *Western Contracting Corp. v. the Industrial Commission of Utah*, 15 Utah 2d 208, 390 P. 2d 125 decided March 6, 1964, though plaintiff's attempt to distinguish that decision from the instant case. In the *Western* case the applicant's eye was injured causing "essentially total blindness to such eye without glasses" but with the use of an optical lense, substantial function of the eye was restored. The Commission awarded the applicant an award of 100 weeks of compensation for total blindness of the eye. The plaintiff contended that the restoration of the function of the injured eye by use of optical lense showed the applicant was not totally blind in one eye and sought a reduction in the amount of award. The Court in affirming the award of the Commission stated as follows:

"Whether the injury resulted in total blindness to the eye was within the prerogative of the Industrial Commission to determine. They having so found under the evidence in the instant case, we are not persuaded that they acted capriciously, arbitrarily, or unreasonably, in which event the award must be affirmed."

It is true as stated in plaintiff's brief that there are no

decisions of this state requiring the exclusion by the Commission of a binocular vision rating in cases of ocular injury, but it is equally true that there are no such decisions requiring such a rating. The Commission has been left with the prerogative of making factual findings as to the source and extent of injury, which findings will not be disturbed if supported by substantial evidence.

It is again submitted that the Commission's factual findings in the instant case are supported by the medical evidence received and reflected in the record, and that the Order entered pursuant to such findings, considering that a 100 percent loss of vision of one eye is the equivalent of or tantamount to blindness of one eye, was consistent with and well within the statutory discretion allowed the Commission by the provisions of Title 35-1-66, Utah Code Annotated, 1953.

POINT II

THE COMMISSION'S AWARD, AS CONTAINED IN ITS ORDER OF FEBRUARY 10, 1967, WAS BASED UPON SUBSTANTIAL COMPETENT EVIDENCE FOLLOWING FULL CONSIDERATION OF THE MEDICAL EVIDENCE AND TESTIMONY AND WAS NOT ARBITRARY OR CAPRICIOUS IN NATURE.

Defendants assign the same reasons and argument contained in Point I hereof in response to plaintiff's claim that the Commission acted arbitrarily and capriciously in entering its Order of February 19, 1967 (R. 120). The Order was entered following a full and complete examination into the medical aspects of defendant, Dowdle's, injury and again was completely supported by the record evidence.

CONCLUSION

Defendants respectfully submit that the finding of the Commission to the effect that the defendant, Dowdle, has suffered a 100% loss of vision of one eye and the award to him of 100 weeks compensation at \$42 per week, or \$4,200, is based upon substantial evidence and should be affirmed.

Respectfully submitted,

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