

1962

Oscar Hackford v. The Industrial Commission of Utah : Brief of Plaintiff

Utah Supreme Court

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

OSCAR HACKFORD,

Plaintiff,

vs.

THE INDUSTRIAL COMMISSION OF
UTAH,

Respondent.

Case No.

9749

BRIEF OF PLAINTIFF

FILED
OCT 18 1962

Clerk, Supreme Court, Utah

Petition for Review of Industrial Commission Award.

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BRIEF OF PLAINTIFF

STATEMENT OF THE KIND OF CASE

This is a claim for compensation, filed with the Industrial Commission of Utah, under the Workmen's Compensation Act.

DISPOSITION BEFORE THE COMMISSION

The hearing was conducted by Roland G. Robinson, appointed as Referee by the Commission, who made Find-

ings of Fact and Conclusions of Law, which the Commission adopted as its own and awarded plaintiff 30 weeks compensation at \$35.00 per week, or a total of \$1050.00, payable in a lump sum.

The Commission further ordered the employer to pay all medical and hospital expenses, if not paid. The plaintiff filed his Motion for a Rehearing which was denied by the Commission and plaintiff brings the matter to this Court by Petition for Review.

RELIEF SOUGHT ON REVIEW

The plaintiff contends that he has not recovered from the injury complained of and that he is totally incapacitated to do any kind of work and that the Referee's Findings are totally void of any Findings in respect to plaintiff's ability to work, and hereby seeks to have the award set aside and the Commission Ordered to make an award based on plaintiff's disability to work as shown by the evidence.

STATEMENT OF FACTS

Plaintiff was employed by Deseret Live Stock Company as a sheep herder and on December 31, 1957, was injured in line of duty, which is not disputed by any parties concerned, and the Referee found that plaintiff suffered a 15% loss of body function as a result of said injury and that said injury arose out of and in the course of his employment (R. 63, Part 2).

The testimony of all of plaintiff's witnesses, (R. 27-59, R. 41-43, Part 2 and R. 47 to 57, Part 2), show that he has not been able to work since the day of the accident. All of said witnesses testified that prior to the accident the plaintiff was strong, healthy and performed his work without difficulty or complaint and that said work consisted in hard manual labor.

In the Employer's first report of the accident to the Commission, in their answer to question No. 24, on their form, they state, specifically, that there was "no Pre-Existing Condition In The Part Of Body Now Injured" (R. 1).

All of the medical testimony, both for and against, plaintiff is to the effect that he is unable to perform any work, and Dr. Holbrook, one of the Commission's Panelists, testified that plaintiff appeared to be in worse physical condition at the hearing on October 30, 1961, than when he first examined him (R. 32, Part 2, Line 13).

The Company Doctor and the Medical Panel found that plaintiff had a 15% loss of body function. Based upon this report the Referee found (R. 63, Part 2) :

"The referee chooses to believe the report and testimony of the medical panel and accordingly concludes that applicant suffered a 15% loss of body function as a result of the injury sustained on December 31, 1957, said injury arising out of and in the course of his employment with defendant."

The Commission adopted these Finding and Conclusions as its own and made an award as indicated above (R. 61, Part 2).

It is the position of plaintiff that the award is contrary to law and to reverse the same, we rely on the following:

POINT

LOSS OF BODY FUNCTION IS NOT THE CRITERION UPON WHICH COMPENSATION MAY BE AWARDED UNDER THE WORKMEN'S COMPENSATION ACT.

Insurance Co. vs. Hughes, 188 F. S. 623,
Mitchell vs. Insurance Co., 136 So. 2nd 143,
Lucero vs. Koontz, 367 P. 2nd 916,
Rhodes vs. Construction Co., 357 P. 2nd 672,
Romero vs. Lott, 369 P. 2nd 777,
Schram vs. Ready Mix Co., 125 So. 2nd 213,
Spencer vs. Industrial Com., 40 P. 2nd 118,
Transit Co. vs. Hayes, 341 S. W. 2nd 240.

ARGUMENT

This case has been before this Court on two previous occasions, 358 P. 2nd 899 and 364 P. 2nd 1091. In the first instance this Court set the award aside because the Medical Report was not properly received in evidence. The second instance was mandamus to compel the Commission to Act. In the instant case the Commission ignored all of the uncontradicted evidence of plaintiff and made an award based on the report of the Medical Panel stating that plaintiff had a 15% loss of bodily function by reason of the accident.

In the *Hughes* case, *supra*, the employee was a Longshoreman who was injured in line of duty, by reason of

which he could not engage in unrestricted menial labor. In upholding an award for total disability, the Federal Court of Appeals said:

“A man may be permanently totally disabled within the Workmen’s Compensation Act, and partially disabled in a true medical sense.”

In the *Rhodes* case the employee contended that he should have total compensation during the period actually required for healing, as against the anticipated period. The employer contended that payments should cease when the employee has recovered to a point where he was no longer totally disabled. The Supreme Court of New Mexico held:

“Total disability, within the Workmen’s Compensation Act, may be said to exist when, considering the age, education, training, general physical and mental capacity and adaptability of the workman, he is unable by reason of his accidental injury to obtain and retain gainful employment.”

In the *Schram* case X-ray pictures showed an arthritic condition existing in the employee prior to the accident and the doctors said the arthritis was not related to the accident. Prior to the accident the employee was able to work. Subsequent thereto he was not able to work. In upholding an award for total disability, the Supreme Court of Louisiana said:

“The test of total disability is whether the injured employee is capable of performing the work of the occupation in which he was engaged at the time of the injury or whether he is able to do the kind of work he is trained to do in the usual and

customary way and without any serious impairment of his capacity to perform such work.”

Spencer vs. Industrial Commission is a Utah case wherein the Commission found that the employee had a loss of 25% bodily function, caused by the accident, based upon medical reports. In establishing the law on this point, this Court said :

“Whether an employee is totally disabled or permanently disabled are matters to be decided by the Commission, as 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 function become the measure of compensable function possessed by an employee prior to his injury.”

In the case at bar, the only evidence upon which the Commission made its award is the reports of its doctors that the plaintiff had a 15% loss of body function, caused by the accident. The doctors do not say that the plaintiff was or was not able to work. All of plaintiff's testimony, which is uncontradicted anywhere in the entire record, is to the effect that prior to the accident he was strong and did hard manual labor; that subsequent to the accident he has been confined to his home, most of the time in bed and without funds with which to secure medical treatment.

The Commission made an uncertain and indefinite Order that medical expenses be paid, by the use of this language :

“It is further Ordered that the defendant pay all medical and hospital expenses, if not already paid.”

At R. 31-32, Part 2, Doctor Holbrook testified that Mr. Hackford's condition might be relieved by treatment in a hospital which would require about six months at a cost of about \$900.00.

Upon the entry of the above cited Order, I contacted the Company Attorney in an effort to get Mr. Hackford in the hospital for treatment, and was advised by said attorney that all of the medical expenses for which they were liable had already been paid. My experience with the Commission in this case forces me to the conclusion that it would take the same position.

In *Mitchell vs. Insurance Co.*, supra, the employee had an accident from which he recovered and went back to work. Soon thereafter he had a second accident in which he was injured again. Upon the hearing the employee and lay witnesses testified that the employee suffered pain in the lower part of his back soon after the second accident and that prior thereto he made no complaints about his back. In upholding an award for compensation, the court said:

“The testimony of plaintiff and his lay witnesses does indicate that the complaints in the lower back did begin soon after the accident. That he had an accident before but recovered.”

The Court will observe that the Referee found that there was no conflict in the evidence (R. 63, Part 2, 3rd

Paragraph). The Court will also observe that none of the expert witnesses testified that plaintiff was able to do any kind of labor or that his inability to work was not contributed to by the injury. All they say is that the injury caused a 15% loss of BODY FUNCTION.

It is a matter of common knowledge, which any high school student knows, that upon maturity the physical structure of the human body begins to degenerate. This Court can take judicial notice that the bone structure of each one of its members are in the process of degeneration but, barring injury, each one of you may continue on active duty indefinitely. From the evidence in this case, there is no dispute about Mr. Hackford carrying on his common pursuit of labor up until he was injured in the accident herein complained of, since which time he has not been able to stand on his feet any appreciable length of time. And, as indicated herein, upon the Record as it now stands, if the inability of plaintiff to perform his usual labors was not caused by the accident, the burden should be on the employer to go forward and show it by competent evidence.

CONCLUSION

In *Spencer vs. Industrial Commission*, this Court said that the question of whether an employee is totally disabled are matters to be decided by the Commission upon all the evidence and that expert witnesses may not properly express opinions, nor that opinions relating to loss of bodily function as a measure of compensation. All of the cases cited in this brief sustain this principle.

We submit that on the record, as it now stands, there is a probability that plaintiff's health might be substantially improved with the treatment suggested by Doctor Holbrook at a cost of approximately \$900.00. The record shows that plaintiff is impecunious and unable to obtain this treatment himself and for this reason we submit that an Order should be made, definite and certain, for the payment of this expense by the employer. We further submit that plaintiff is entitled to statutory compensation for all of the time he has been unable to work in addition to his medical expenses, and in this we respectfully submit that the award should be set aside with directions.

Respectfully submitted,

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