1963

Joseph Pintar v. The Industrial Commission of Utah et al : Brief of Respondents

Utah Supreme Court

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Joseph C. Fratto; Cleon B. Feight; Attorneys for Appellant;

IN THE SUPREME COURT
of the
STATE OF UTAH

JOSEPH PINTAR,
Plaintiff-Appellant,

vs.

THE INDUSTRIAL COMMISSION OF UTAH AND COLUMBIA GENEVA STEEL DIVISION, UNITED STATES STEEL CORPORATION,
Defendants-Respondents.

Case No. 9864

RESPONDENTS' BRIEF

On Writ of Certiorari to the Industrial Commission

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STATEMENT OF FACTS

With the exceptions hereinafter set forth, respondents agree generally with the statement of facts in appellant's brief.

The description of the nature and extent of injury to Pintar and the statement that he was no longer able to work after October 2, 1961 are not accurate but set forth the contention of Pintar rather than facts shown

by the record. The statements based upon the report of Dr. Burke M. Snow are not statements of fact. Dr. Snow's services for the examination of Pintar were not obtained by respondents. His examination was made at the request of Pintar as shown by his report dated October 17, 1961 addressed "To Whom It May Concern". (R. 1-4). Dr. Snow did not testify at the hearing held September 4, 1962 which was the only hearing held. (R. 30-40).

ARGUMENT

POINT I

The conclusion of the Industrial Commission that there was no causal connection between the injuries of March 29, 1961 and July 25, 1961 and any disability now existing is not directly contrary to the evidence and is not erroneous as a matter of law.

There is no substantial evidence that Pintar has any disability resulting from his injuries of March 29, 1961 and July 25, 1961. The Medical Panel Report dated February 5, 1962 does not so disclose. (R. 25-27). Boyd G. Holbrook, M.D., Chairman of the panel, appeared at the hearing of September 4, 1962, was sworn and testified as a witness. (R. 31-40). He did not so testify. The only suggestion of disability resulting from the industrial injuries appears in the conclusion of Dr. Burke M. Snow, who examined Pintar on October 17, 1961, approximately three and one-half

months prior to the examination of Pintar by the Medical Panel on February 5, 1962. The conclusions of Dr. Snow were set forth on the last page of his report (R. 4) as follows:

> "CONCLUSIONS: From the available history given by the patient it seems that the only conclusion one can come to is that this patient received an aggravation of a previously existing degeneration process in the lumbar spine. The conditions were present and he had been working daily and on a regular basis with no back complaints prior to his injury. The rib complaints certainly are industrial."

Dr. Snow did not testify and his report being hearsay although admissible in evidence, is not competent evidence upon which an award may be based. *Hackford v. Industrial Commission,* 11 Utah 2d, 312, 358 P.2d 899.

Appellant cites on page 6 of his brief what he sets out as a quotation from the case of *Utah-Idaho Cent. R. Co. v. Industrial Commission,* 71 Utah 490, 267 P. 785. We cannot find this quotation in the case. We assume that it is a quotation from some text which cites the case in support thereof. The case cited does not decide exactly as indicated by the quotation. It does, however, hold "A latent disease or trouble, if accelerated or lighted up by an industrial accident and a more serious injury results by reason of the fact of the existence of such latent ailment than otherwise would in a normal recovery from injuries received from or in an accident, in such case the injured employee

is entitled to additional compensation." (PP. 787 and 788 of 267 P). The case did not hold, however, that the Industrial Commission might make an award without substantial evidence. In the case, the Commission made a finding that the employee had 50% disability based upon a report of a medical board and the testimony of doctors at the hearing. The Supreme Court stated on page 787 of 267 P:

> "The report of the medical board quoted is some evidence that applicant has sustained permanent partial disability. The report of Dr. Baldwin, quoted, also recognizes that applicant has suffered some disability. The commission is the fact-finding body. If there is any substantial evidence to support its findings, such findings are conclusive upon this court."

The only question involved in the cited case was if the finding of the Commission was supported by any substantial testimony.

We have no quarrel with the decision and submit it in support of respondents' contention that the finding of the Commission in the case now before the court should not be disturbed.

POINT 2

The Commission could not have made an award based only upon the report of Dr. Burke M. Snow and did not act arbitrarily and capriciously in not adopting his conclusions.

The quotation set out on page 7 of appellant's brief as being a statement of the Supreme Court of Utah in the case of *Gunnison Sugar Co. v. Industrial Commission,* 73 Utah 535, 275 P .777, cannot be found by us.

The case cited is entirely different from the present case before the court. There is nothing in the record in the present case which indicates that the employer was not furnishing medical care for the injured employee. In the Gunnision Sugar Co. case, the employer acquiesced in the employee seeking medical attention from doctors of his choice and the court decided only that in that situation the employee was entitled to recover compensation for the extracation of his teeth, upon the recommendation of a doctor who the injured employee consulted, because he would have been so entitled if the employer had furnished or selected the doctor.

The Commission, upon recommendation of the Referee, adopted the report of the medical panel. (R. 45-46). The medical panel had before it the report of Dr. Snow and attached it to its report and quoted from it. (R. 25). The report of Dr. Snow was, therefore, not ignored. The Commission was not required to accept the conclusions of Dr. Snow. It could not make an award based only thereon without other substantial evidence upon which it could make a finding in favor of applicant's contention. *Ogden Iron Works v. Industrial Commission,* 102 Utah 492, 132 P.2d 376.

POINT 3

The order of the Industrial Commission not requiring employer to pay doctor bills incurred by employee for examination by doctors of his own choice consulted without permission of employer or order of the Commission is not contrary to law and is not contrary to the facts of the case.

This point apparently involves the refusal of the employer to pay $55.00 for X-Rays taken by Donald K. Bailey, M.D., which were apparently taken at the suggestion of Dr. Snow. (R. 21, 22 and 23). The Commission did not require the employer to pay. After the question of payment of this expense and the cost of a corset were brought up at the hearing of September 4, 1962, the employer agreed to pay the cost of the corset and so advised the Referee of the Industrial Commission by letter dated September 7, 1962. (R. 44). On this letter, Commissioner Wiesley apparently called to the attention of the Referee Rule 10 of the Industrial Commission that the employer has choice of M.D. and that charge cannot be made against employer for expense of another doctor without permission of the Commission.

To support appellant's contention, he cites the case of *Marker v. Industrial Commission,* 84 Utah 587, 37 P.2d 785. Like the other quotations in appellant's brief, we cannot find in the books cited the quotation. The case cited was one in which payment was required to be made to employee, not by employer, but out of a

special fund provided by R. S. Utah 1933, Sec. 42-1-62, wherein it was provided that where an employee previously injured and suffering permanent and complete loss of use of part of his body who is subsequently injured in the course of his employment would receive from his employer or its insurance carrier an award for the last injury and in addition thereto, might get some additional benefits payable from the special fund but not from the employer or its insurance carrier.

The case does not support the statement by appellant on page 8 of his brief, "Therefore, if an employee already had only one eye or leg or hand, the employer becomes liable for total disability upon the loss of the remaining eye, or leg or hand." The cited case is not in point on the problem under consideration

We submit that the record in this case does not support a requirement for the employer to pay for the services of a doctor selected by employee to make the examination of him, not consented to by the employer or ordered by the Commission.

POINT 4

Although the report of Dr. Burke M. Snow is competent and admissible evidence, the Commission did not act arbitrarily and capriciously in adopting the report of the medical panel.

Like the other quotations, we cannot find in the books cited the quote appearing on page 8 of appellant's

brief, although the case of *Hackford v. Industrial Commission,* 11 Utah 2d 312, 358 P.2d 899, is authority for the proposition that a physician's report might properly be received in evidence even though it is hearsay.

This does not require the Commission to make a finding in favor of appellant based upon the report of Dr. Snow. In the Hackford case, the Supreme Court set aside an award of the Industrial Commission where the medical panel had made a report which had been objected to by the applicant and where no testimony was given by any member of the panel and where another doctor had made a report but did not testify. A report alone is not sufficient to sustain an award unless it is the report of the medical panel to which no objection is made.

"This Court has uniformly held that hearsay testimony is admissible, but just as uniformly held that a finding of fact cannot be based solely upon hearsay evidence." *Ogden Iron Works v. Industrial Commission,* 102 Utah 492, 132 P.2d 376 at page 380.

In the case of *Burton v. Industrial Commission,* 13 Utah 2d 353, 374 P.2d 439, this court decided that it was not capricious, arbitrary or unreasonable for the Commission to accept the medical panel's report and testimony of the members of the medical panel even though there was evidence contrary thereto.

> "Assuming without deciding that the plaintiff's evidence if uncontradicted would be sufficient

to sustain a finding in her favor, it is indisputable that the testimony just referred to is sufficient to sustain a finding to the contrary. There being no basis upon which this court could say that the Commission acted capriciously, arbitrarily or unreasonably in denying the application, its order is affirmed." (P. 440 of 374 P.2d).

POINT 5

The Industrial Commission may adopt the findings of a medical panel supported by testimony of a member thereof.

Although we do not disagree with Point 5 as stated by appellant, we do not infer that the Commission must reject the findings of the medical panel supported by testimony and adopt findings contrary thereto based upon other substantial conflicting evidence which supports a contrary finding. By this statement, we do not admit that in this case there is any conflicting substantial non hearsay evidence contrary to the findings of the medical panel upon which the Commission made its finding.

CONCLUSION

The decision of the Industrial Commission should be affirmed.

Respectfully submitted,

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