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Pearl A. Long v. Industrial Commission of Utah et al : Brief of Applicant

Utah Supreme Court

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A. Pratt Kesler; F. A. Trottier; Attorneys for Defendants;

Leon A. Halgren; Attorney for Plaintiff;

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IN THE SUPREME COURT
OF THE STATE OF UTAH
— FILED

MAY 15 1963

PEARL A. LONG, wife of
WILLIAM T. LONG, deceased, Clerk, Supreme Court, Utah

Applicant,

vs.

Case
No. 9867

WESTERN STATES REFINING
CO. and the STATE INSURANCE
FUND,

Defendants.

BRIEF OF APPLICANT

LEON A. HALGREN
Attorney for Applicant

FRANCIS A. TROTTIER
Attorney for Defendants

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IN THE SUPREME COURT OF THE STATE OF UTAH

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WILLIAM T. LONG, deceased,

Applicant,

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BRIEF OF APPLICANT

NATURE OF THE CASE

Applicant filed an application on April 12, 1961, with the Industrial Commission of Utah for recovery on an industrial accident claim arising out of the death of applicant's husband, William T. Long. The claim was denied by the State Insurance Fund, and as a result of the denial of the claim a hearing on the application took place before Roland G. Robinson, Jr., referee for the Industrial Commission. The notice of the hearing

specifically noted that there would be no medical testimony given in this hearing. At the beginning of the hearing the referee advised the parties that "there will be no medical testimony given at this hearing." The only question considered was "whether the alleged injury occurred within the scope of employment of the deceased."

Pearl A. Long, your petitioner, will hereinafter be designated as "Applicant." The employer of William T. Long, deceased, Western States Refining Company and the State Insurance Fund will hereinafter be collectively designated as "defendants."

DISPOSITION BEFORE INDUSTRIAL COMMISSION

The referee after hearing the testimony of witnesses for both sides and after having considered the information submitted in reports and letters, made recommended Findings of Fact and Conclusions of Law which the Industrial Commission adopted whereby applicant's claim was denied based on a finding "that no competent evidence was presented to support the claim of applicant that the death of deceased resulted by accident arising out of or in the course of his employment." (R. 62 and 63)

A motion for Re-Hearing was timely filed. Nearly a year thereafter the Industrial Commission requested

information concerning newly discovered material evidence. (R. 67) In reply, counsel for Applicant described the nature of this evidence and reasons why it was not available at the early hearing. (R. 64 and 65) The motion for rehearing was denied without reasons stated therefor. (R. 71)

RELIEF SOUGHT IN PETITION

The Applicant seeks a review of the findings of the Industrial Commission to determine whether or not it acted without or in excess of its powers and for the further reason that the findings of fact do not support the award or denial under review. If this court determines that the findings of fact are not supported by the evidence in the record your Applicant requests relief as follows:

1. The Order of the Commission be vacated and set aside and the cause be remanded to the Industrial Commission with instructions to find that as a matter of law Applicant is entitled to compensation in accordance with the Workmen's Compensation Law of this state, or

2. The cause be remanded to the Industrial Commission for rehearing in order to permit Applicant the opportunity to present further and newly discovered evidence on the question of accidental death of William T. Long, arising out of or in the course of his employment.

STATEMENT OF FACTS

Mr. William T. Long, deceased, was employed by the Western States Refining Company (aka, Beeline Refining Company) as a truck driver (R. 14, 15) His duties of employment included the driving of a big tank truck between designated points, hauling gas condensate, giving this truck nominal service, i.e., daily maintenance and inspection and the changing of a flat tire if there were no available service station where it could be repaired. (R. 15, 16, 17 and 18)

On the 26th day of November, 1960, the decedent was driving a truck in the course of his employment between Farmington, New Mexico and Thompson, Utah. He was directed by the Company to drive the empty truck to Farmington, New Mexico, load up and drive it to Thompson, Utah, where he was to empty it in railroad cars. R. 14 and 15)

On the above date he left home in Moab, Utah, at about 5 o'clock A.M. to drive to Farmington, New Mexico in his truck (R. 21 and 22). Along the route decedent changed a tire on the truck for reasons not definitely known but reportedly due to a flat tire (R. 1, 59). While placing the tire in the rack which was located underneath the trailer, the heavy tire slipped and hit him in the chest and stomach. (R. 1, 23, 24, 25, 48). Just where along the route this accident happened is not known but it was before decedent had arrived at Cahone, Colorado. (R. 26). After the accident, de-

cedent drove his truck to Cahone, Colorado where he parked it and was taken to the hospital in Cortez, Colorado. (R. 22, 26, 46). Mr. Long remained extremely ill in the hospital at Cortez, Colorado until the day of his death, December 10, 1961. (R. 27, 28). He was so ill, in fact, that he didn't talk very much. (R. 24). When decedent left home on the 26th day of November, 1960, to drive the truck to Farmington, New Mexico, he appeared to be well and planned on returning that day to take his wife fishing. The general condition of his health prior to this accident was very good. (R. 28).

ARGUMENT

THE INDUSTRIAL COMMISSION SHOULD HAVE RULED AS A MATTER OF LAW THAT APPLICANT WAS ENTITLED TO RECOVER ON HER CLAIM.

While it is a recognized principle of the law in Workmen's Compensation cases in this state that this court cannot substitute its judgment for that of the Commissioners, however, in reviewing a decision of the Industrial Commission, this court has the authority to determine if there is in the record such evidence as to render legal support to the finding of the Commission. *Bain vs. Industrial Commission*, 199 P. 666; *Utah Consolidated Mining Company vs. Industrial Commission*, 240 P. 440; *Parker vs. Industrial Commission*, 5 P.2d 573; *Park City vs. Industrial Commission*, 224 P. 655. Furthermore, this court, in reviewing the find-

ings of the Commission, has authority to inquire into the question of whether or not the commission in denying compensation has arbitrarily or capriciously disregarded uncontradicted evidence. *Kelly vs. Industrial Commission*, 12 P.2d 1112; *Kent vs. Industrial Commission*, 57 P.2d 724.

It may be further stated that where the evidence is uncontradicted and credible and the Industrial Commission refuses to award compensation because of insufficiency of evidence to sustain burden of proof, a question of law is presented for this court to determine. *Harness vs. Industrial Commission*, 17 P.2d 277; *Ostler vs. Industrial Commission*, 36 P.2d 95; *Wherritt vs. Industrial Commission*, 110 P.2d 374; *Woodburn vs. Industrial Commission*, 181 P.2d 209, 212.

In a recent decision by this court it was stated: "The law does not invest the Commission with any such arbitrary power to disbelieve or disregard uncontradicted, competent, credible evidence . . ." *Jones vs. California Packing Corp.*, 244 P.2d 644. The court in the *Jones* case on page 644 went on to state:

"If the Commission could go so far as to refuse to believe such evidence, in the absence of anything of substance to refute it, then it certainly would possess arbitrary powers with no effective review left available to the litigant."

The evidence before the Commission as shown by the record in the instant case reveals that the employer of decedent Long clearly recognized the fact that de-

cedent while employed in driving its truck encountered tire trouble on the road and it was after changing the tire and placing it in the rack that it slipped hitting decedent in the chest and stomach causing unknown injury; that immediately thereafter decedent became aware of severe pain in stomach and chest. This report was never questioned by the employer as being inaccurate, although the information was submitted by the wife of decedent. It was, therefore, competent evidence that the employee was injured by reason of an accident and that the accident arose out of and in the course of employment. *Mid-City Iron and Metal Company vs. Turner*, 165 N.E. 760; the testimony of Applicant clearly shows that decedent was very, very ill when Applicant arrived at the hospital; that decedent didn't talk very much but did explain to Applicant that while placing a tire in the rack it slipped striking him in the stomach, after which he felt severe pain in his chest and became extremely ill. It is clear from the record that the referee disregarded the testimony of Applicant on the ground that it was hearsay. Under the relaxed rules of evidence before the Commission, (35-1-88 U.C.A. 1953) the referee acted arbitrarily in discrediting Applicant's testimony particularly in view of the fact that there was not one scintilla of evidence presented to show that decedent died of causes other than those testified to by Mr. Day and Mrs. Long. Under the ruling of the case of *Jones vs. California Packing Corp.*, supra, the referee applied his own expert knowledge to the problem presented to him and used this "in lieu of or against the evidence intro-

duced.” The Industrial Commission thereafter adopted the referee’s recommended findings of fact and conclusions of law.

There is also a long line of authority which holds “that the Workmen’s Compensation Act should be liberally construed to effectuate its purposes, and where there is doubt, it should be resolved in favor of coverage of the employee. *Jones vs. California Packing Corp.*, supra. In the case of *Park Utah Consolidated Mines Company vs. Industrial Commission*, 36 P.2d 979, Judge McConkie in rendering the unanimous decision of this court gave an excellent history and purpose of the Workmen’s Compensation Laws. He stated:

“The act affords, through administrative bodies, injured industrial workmen or their dependents simple, adequate and speedy means of securing compensation . . . to the end that the ‘cost of human wreckage may be taxed against the industry which employs it’ . . . which tax or burden is added to the price of the produce and is ultimately paid by the consumer.”

He goes on to say,

“If there is any doubt respecting compensation, such doubt should be resolved in favor of the employee or his dependents, as the case may be.”

This court has in numerous cases since the *Park Utah Consolidated Mines* case, supra, restated this rule. *M & K Corporation vs. Industrial Commission*, 189 P.2d

132, citing numerous cases; *Jones vs. California Packing Co.*, 244 P.2d 640.

Where, as in the case before this court, the injured workman is not available to testify, the trier of facts in order to fully carry out the spirit and purpose of the law of Workmen's Compensation should resolve the question of doubt in favor of the dependent of the deceased employee.

The testimony of the insurance adjuster, Joseph Kirkham, was entirely hearsay. It consisted of alleged interviews with parties who were supposed to have seen and talked to decedent when he was ill and prior to being taken to the hospital. These alleged interviews took place on or about October 2, 1961, nearly one year after the death of Mr. Long.

These witnesses, allegedly a Mr. Rex Perry, and a Mr. Harold Tanner, according to adjuster Kirkham, didn't recall hearing Mr. Long say anything about a tire falling on his chest and stomach as he tried to put it in the rack. *This evidence proves nothing one way or the other.* On the other hand, the accident was reported to the employer immediately after the accident and right after the death of Long the employer made out the accident report as shown on Page I of this record. Also, Dr. Hites who attended the deceased prior to his death prepared and submitted a "corrected" surgical report to the Industrial Commission, dated March 8, 1961.

Dr. Hites in his report in answer to Part I, "Statement of Patient as to how injury was sustained," says: "Lifting a large truck tire by himself while changing a flat on the road." In answer to Part 2, "Give nature and extent of injuries. Patient must be thoroughly examined for all possible injuries due to the accident, and this first report must be complete in detail," he states, "Acute myocardial infarction due to over exertion developed while changing truck tire by himself."

On October 2, 1961, nearly one year after Mr. Long's death, the insurance adjuster for the Workmen's Compensation carrier solicited a letter from Dr. Hites who now can't seem to recall the facts of this accident or find any hospital record concerning them. This letter from Dr. Hites was admitted in evidence and given weight as evidence by the referee to prove that, in fact, no such accident as reported by the doctor, by the employer and by Mrs. Long ever did take place.

For the referee and the Industrial Commission to ignore the weight of these official reports, and the testimony of Mrs. Long and to allow the flimsy hearsay evidence obtained from alleged witnesses to decedent's pain and suffering but who didn't have personal knowledge of its cause to overrule and discredit these reports and testimony is clearly an abuse of discretion and is contrary to the law. *This is not a case where the Commission was faced with a conflict of the evidence.* There just was no evidence which refuted the evidence that Mr. Long, as reported by the employer and the doctor

and as testified to by Mrs. Long, died of "an acute myocardial infarction due to over exertion developed while changing truck tire by himself," and that he so exerted himself in the course of his employment with Western States Refining Company. The Commission, therefore, was wrong as a matter of law in refusing to rule in favor of your Applicant herein.

If this court, however, finds against the position of Applicant on Point I, above, Applicant is entitled to a new hearing for the reasons stated in Point II which follows

POINT II

THE COMMISSION ACTED WITHOUT OR IN EXCESS OF ITS POWERS BY REASON OF THE FACT THAT IT EXPRESSLY EXCLUDED MEDICAL TESTIMONY FROM THE HEARING.

In the notice of the hearing sent to Applicant is a notation that there would be "no medical." In light of the proceedings on October 16, 1961, this could only mean that the parties were previously notified, as stated in the beginning of that hearing, that "There will be no medical testimony given at this hearing."

By implication the only question on which the Commission would receive evidence was such evidence of a non-medical nature as would either prove or disprove this death to be one of an accidental nature which happened in the course of the decedent's employment. There were no eye witnesses to the tire changing accident as

shown by reports and as testified to by Applicant. The Commission refused to place sufficient credence on the official written reports on file in the record and the testimony of Mrs. Long to find in Applicant's favor. It then refused to allow any medical testimony to be presented which could have corroborated the said reports and testimony. By limiting the scope of the hearing, the Industrian Commission exceeded its powers and denied Applicant a full and fair hearing. If the blow to Mr. Long's stomach and chest took place as shown in the record, medical testimony may have further substantiated this fact. It is difficult to understand how a professional man such as Dr. Hites could have made the reports he did to the Industrian Commission, knowing fully the effect of such reports, unless at the time these reports were filed he had sufficient medical information on which to base his findings in those reports. To refuse Applicant the opportunity to bring in medical testimony at the October 16, 1961 hearing and to further deny Applicant a rehearing whereby she could by medical testimony prove that Mr. Long suffered a severe blow to his abdomen and chest prior to the time he was taken to the hospital where he died and that this blow caused his death was clearly an abuse of the power vested in the Commission and the Commission exceeded its powers in proceeding as it did.

In a well known treatise of the law under the subject of Workmen's Compensation is found the following:

“As claimant is entitled to every opportunity to present his claim, and the opposite party to

present his defense, each party is entitled to introduce such relevant and material evidence as he may desire. Thus, claimant should be given an opportunity to introduce evidence of relevant and material facts which logically tend to prove the issues involved, and are not excluded by some rule of law, and it is error for the Commission to deny him an opportunity to present further testimony prior to the last and final award in the cause. 100 C.J.S., Workmen's Compensation, SS 592, p. 841. See also *Forrester v. Marland*, Oklahoma, 286 P. 302; *Owatt v. Rodman's Beverage*, Pa., 82 A.2d 255; *Bereda Mfg. Co. v. Industrial Board of Illinois*, Ill., 114 N.E. 275; *Hathcock v. Loftin*, Md., 22 A.2d 479; *Smith v. Smith*, Mo., 237 S.W. 2d 84; *Stanolind Pipe Line Co. v. Geurin*, Okl., 19 P.2d 139, *Evans v. Industrial Accident Commission*, Cal., 162 P.2d 488."

On the basis of the record of this case and the law as herein cited and discussed it was a denial of due process of law, the commission exceeded its powers and thereby committed reversible error when it limited the evidence to such as was non-medical in nature. This court, therefore, should remand this case back to the Industrial Commission for a rehearing in accordance with the law as set forth herein.

CONCLUSION

The record of this hearing shows that William T. Long died of a heart attack caused by a heavy truck tire falling on his stomach and chest; that he was acting in the course of his employment when he attempted to place

this tire in the rack. There was no evidence presented to refute this fact. A year after the accident, the insurance adjuster couldn't find any witnesses who saw the accident or recalled hearing this extremely ill employee explain how he became ill. This lack of evidence the Commission accepted as tantamount to evidence that no such accident occurred. Such is not the law and as a matter of law the Commission should have awarded compensation to your Applicant as requested.

In any event, it was a denial of due process to Applicant when the Commission expressly excluded from the hearing any medical testimony whatsoever, thereby denying Applicant the opportunity to prove through medical testimony what it claimed she had failed to prove otherwise. This is the judicial equivalent of the requirement to make bricks without straw. (Exodus 5).

It is respectfully submitted that: (1) This court should find that Applicant is entitled to recover on her claim as a matter of law, or (2) This court should remand the case back to the Industrial Commission for a rehearing in accordance with the law as discussed herein.

Respectfully submitted,

Leon A. Halgren
Attorney for Applicant
2574 Sage Way
Salt Lake City, Utah