

1963

# Larry Nicholson v. The Industrial Comm. Of Utah et al : Brief of Defendants

Utah Supreme Court

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IN THE SUPREME COURT

of the  
STATE OF UTAH

FILED  
JUL 9 - 1963

LARRY NICHOLSON,

Plaintiff, } Clerk, Supreme Court, Utah  
UNIVERSITY OF UTAH

vs.

THE INDUSTRIAL COMMISSION  
OF UTAH, AMERICANA CORP-  
ORATION and FIREMEN'S FUND  
INSURANCE COMPANY,

Defendants. }

Case No. 9888  
OCT 29 1963

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BRIEF OF DEFENDANTS

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Writ of Certiorari to Review an Order of the  
Industrial Commission of Utah

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

---

LARRY NICHOLSON,

*Plaintiff,*

vs.

THE INDUSTRIAL COMMISSION  
OF UTAH, AMERICANA CORP-  
ORATION and FIREMEN'S FUND  
INSURANCE COMPANY,

*Defendants.*

Case No.  
9888

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BRIEF OF DEFENDANTS

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STATEMENT OF THE KIND OF CASE

This is a claim for compensation benefits under the Workmen's Compensation Act of Utah for injury sustained by the plaintiff in an accident which he claims arose out of, or in the course of, his employment.

DISPOSITION BEFORE INDUSTRIAL  
COMMISSION

The Industrial Commission determined that the accident did not arise out of, or in the course of plaintiff's employment, and that therefore he was not entitled to compensation, and denied his application.

RELIEF SOUGHT IN THIS COURT

Defendants seek an affirmance of the order of the Industrial Commission.

## STATEMENT OF FACTS

The statement of facts set forth in plaintiff's brief reflects the evidence in the light most favorable to the plaintiff. Defendant employer and its insurance carrier, having prevailed in the Industrial Commission, are entitled to have the evidence viewed in the light most favorable to them, and to have the order affirmed if there is any substantial evidence in the record to support it. We therefore deem it necessary to state here the evidence supporting the Commission's Findings and Conclusions.

The record before this court is in two parts, each of which is separately numbered. We accordingly refer to pages in the record both by the part number and the page number.

The record is replete with evidence as to the occurrence of the accident which is at variance with the plaintiff's claim as to how the accident occurred. There is considerable evidence to support the Commission's findings that the accident occurred as plaintiff was completing the process of washing and tidying up his car, something wholly unrelated to his employment. Moreover, even if the accident occurred as testified by the plaintiff at the hearing, the Commission would have been justified in determining that it did not arise out of, or in the course of his employment, and therefore he was not entitled to compensation benefits. We consider the evidence from these two points of view, under separate headings.

A. THERE IS SUBSTANTIAL EVIDENCE WHICH WOULD WARRANT THE COMMISSION IN REFUSING TO BELIEVE PLAINTIFF'S TESTIMONY AS TO HOW THE ACCIDENT OCCURRED, AND IN FINDING THAT THE ACCIDENT OCCURRED WHILE PLAINTIFF WAS IN THE PROCESS OF CLEANING HIS CAR, AND WAS NOT IN ANY WAY CONNECTED WITH HIS EMPLOYMENT.

The original surgical report of Dr. Oliver Richards, contains the following:

1. Statement of Patient as to How Injury was Sustained: "While attempting to fasten hook on elasticized strap of terry cloth seat covers that had come unhooked, the hook slipped out of hand and flipped back and pierced right eye." (R. Part 1, p. 2). Apparently plaintiff made no mention to his attending physician of having removed a sales kit in connection with the occurrence of the accident.

In employee's own application for compensation benefits he stated: "Applicant was removing sales kit from rear seat of automobile. Elasticized strap on seat cover flipped and punctured his right eye." (R. Part 1, p. 4). Although in that statement applicant claimed that he was in the process of removing his sales kit, he states that it was in the actual process of removing the kit that the pin was caused to flip, rather than that the plaintiff subsequently flipped the pin in attempting

to replace it after it was dislodged while the sales kit was being removed. However, when he testified as to how the accident occurred at the hearing, plaintiff testified that in sliding the kit out of the car, he knocked loose one of the straps. He then set the kit on the ground and was in the process of attempting to refasten the strap when the accident occurred. (R. Part 1, p. 43).

Plaintiff admitted that prior to the occurrence of the accident, he had taken his automobile over to the home of Dean Ellis to wash it. He had no particular reason to take it over there. He sponged it off and put it in order over there. (R. Part 2, pp. 76-77). Under his own testimony therefore, the strap could have come loose as he was tidying the car up.

After the first hearing of this matter before this court, Dr. Richards wrote a letter to the Industrial Commission in which he stated that plaintiff "sustained a penetrating injury into his eye from some type of stretch hook that he was using to place seat covers in his car, which car he uses for his salesman activities, therefore linking this injury to his employment status." (R. Part 2, p. 1).

Dean Ellis also testified that plaintiff had straightened his car up before the accident. (R. Part 2, pp. 17, 26).

Lorna Linford, former mother-in-law of the plaintiff, testified that he had told her that he was washing his car and putting new seat covers on. As he was completing this operation, a pin slipped and hit him in the eye. (R. Part 2, pp. 35, 36, 37 and 58). He also told her that

he "briefed" Dean Ellis before the first hearing. He further told her that he was going to take the insurance company for "all they were worth." (R. Part 2, pp. 39-40).

Leo Linford, former father-in-law of the plaintiff, testified that Dean Ellis said, in the presence of the plaintiff and various others, that plaintiff was putting seat covers on his car after having washed it and the last hook sprung and hit him in the eye. (R. part 2, p. 63.) He further testified that the plaintiff himself, related the same story in his hospital room, on the night of the accident. (R. Part 2, p. 73); and that he also related the same story to the witness on a later occasion, after he was out of the hospital. (R. Part 2, p. 64). Plaintiff also told Mr. Linford that he had "worked out an angle" where he thought he could get the money. "He figured that by stating that he was working at the time that he could come under the rule of the insurance company that he was employed at the time." (R. Part 2, pp. 64-65). He also mentioned "that he was going to have to work on . . . Ellis, so that he'd have the same story. . . ." (R. part 2, p. 65). Plaintiff himself admitted that he had unhooked the straps of the seat covers and shook them out. (R. Part 2, p. 79.)

The Commission, in its order, makes it perfectly clear that it accepts the testimony of the Linfords, rather than the testimony of the plaintiff. ". . . we choose to believe the testimony of Lorna Linford . . . and Leo George Linford." (R. part 2, p. 95). While ill feelings toward the plaintiff were frankly admitted by both of

these witnesses, this alone does not make their testimony unworthy of belief. They certainly had no greater motive to testify dishonestly than did plaintiff himself, who had a substantial financial stake in the outcome of the proceedings. The referee had the opportunity, as this court does not, of observing the appearance and demeanor of the witnesses on the stand—an advantaged position in determining their relative credibility. Also, as pointed out in the order, it seems more probable that an accident of the type which befell plaintiff, would occur in the process of replacing seat covers, than in the process of removing the sales kit from the automobile. (R. Part 2, p. 94).

B. EVEN IF THE ACCIDENT OCCURRED AS  
CLAIMED BY PLAINTIFF, THE EVIDENCE  
SUPPORTS THE COMMISSION'S FINDING  
THAT IT DID NOT OCCUR IN THE COURSE  
OF HIS EMPLOYMENT.

Plaintiff's employment duties, as defined in his own testimony at the original hearing, were as follows: His "work consisted of making appointments with prospective customers and then going out and giving them a pitch." (R. Part 1, p. 20). He was compensated on a commission basis for sales actually made. (R. Part 1, pp. 24, 52). He definitely was not paid for teaching other salesmen sales pitches or assisting in their training. In particular, he was not paid anything to teach Dean Ellis the sales pitch on the Harvard Classics. It was common in the organization for older salesmen to help younger ones as a matter of being a good neighbor,

or ingratiating themselves to their employer. (R. Part 1, pp. 56-67, 60, 90-91).

It is clear from plaintiff's own testimony at the original hearing, that his purpose in going to Ellis' home was not to teach him the sales pitch. He just happened to have a little free time and decided to utilize it by giving Ellis the pitch. His exact testimony was as follows: "Well, since we have a little time right now, . . . Just a minute, I'll go get the kit, because I'll have to organize it before I can make a pitch, and I'll run through, take a half hour and show you the classics." (R. Part 1, p. 41). It was further established without dispute, that there were persons in the Americana organization, namely trainers and district managers, who did receive compensation in assisting in the training of salesmen. (R. Part 1, pp. 56, 90, 116). However, plaintiff was not designated as such an employee. (R. Part 1, pp. 56, 90, 116).

Similar evidence was also developed from the witness Dean Ellis at the last hearing. He testified that it was common for salesmen to help one another with pitches, but that they were not compensated for this, or for helping others. (R. Part 2, pp. 31-32). Salesmen were paid strictly on a commission basis. (R. part 2, p. 32).

Beyond any dispute whatsoever, plaintiff was not giving, or preparing to give, a sales pitch to a prospective customer. The most that could be claimed for his activity would be that he was preparing to put his materials in

order for use later in the day in the presentation of sales pitches. This would be no more "work related" than taking his automobile to a service station to be fueled; reviewing sales material at home before departing on a sales trip; or for that matter, getting up in the morning and dressing and performing his toilet. All, in a sense, would be necessary steps to be taken before actually starting the performance of his duties. But they are not "work connected" in the ordinary sense of that term. They do not represent hazards of employment, but rather, hazards of every day living. If plaintiff's activity in this case can be said to "arise out of, or in the course of" his employment as that term is used in the Compensation Act, there would appear to be no limit as to the type of accidents for which an employer may be held liable. Substantial evidence supports the Commission's finding that the accident did not arise "out of, or in the course of" plaintiff's employment as a commission salesman.

## ARGUMENT

As we understand the position of the plaintiff in this case, he contends that there is no substantial evidence in the record to support the findings of the Commission; that the findings of the Commission are therefore arbitrary and capricious, and that the findings should be set aside and the order of the Commission reversed. In other words, plaintiff contends that the evidence compels a finding in his favor.

The scope of review of an industrial proceeding by this court is set forth in Section 35-1-84, U.C.A. 1953, which, insofar as material here, reads as follows:

"The review shall not be extended further than to determine:

"(1) Whether or not the commission acted without or in excess of its powers.

"(2) If findings of fact are made, whether or not such findings of fact support the award under review."

We also invite the court's attention to the language of Section 35-1-85, U.C.A., 1953, which reads, in part, as follows:

"The findings and conclusions of the commission *on questions of fact shall be conclusive and final and shall not be subject to review*; such questions of fact shall include ultimate facts and the findings and conclusions of the Commission."  
(Italics ours.)

These two statutes circumscribe the scope and extent of review by this court of industrial proceedings. Almost from the inception of the Compensation Act, they have been before this court for review in innumerable cases, and this court has unwaveringly followed both the letter and the spirit of the statutes. The rule of decision was well stated by this Court in the early case of *Amalgamated Sugar Co. v. Ind. Comm.*, 56 Utah 90, 189 P. 69. It was there said:

"The only question raised and presented to this court for consideration is whether or not

there is any substantial testimony in the record which tends to support the finding of the Commission \* \* \*

“\* \* \* It would subserve no good purpose to review the testimony in detail which tends to support the conflicting theories of the respective parties. In this class of cases, under our statutes, this court is confined to a review of the testimony and findings of the Commission for the sole purpose of determining whether or not there is any substantial evidence in the record to support the award. . . . *If there is any substantial evidence in the record to support the findings of the Commission and the ultimate facts found by the Commission support the award*, we as a reviewing court, under our statutes, cannot do otherwise than enter judgment affirming the award made by the Commission.” (Italics ours.)

The above rule was restated and reaffirmed in a long line of cases following that decision. However, notwithstanding the oft reiterated exposition of the rule, cases attacking the findings of the Commission continued to come before this court, and in the case of *Adams v. Ind. Comm.*, 67 Utah 157, 246 P. 364, this court, apparently somewhat annoyed at the need for restating the rule so frequently, admonished the bar as follows:

“Counsel and litigants in these cases should understand once and for all that this court is powerless to review the evidence except for the purposes heretofore frequently declared by the court in a long series of well-considered cases.  
\* \* \*

“This court is now firmly committed to the doctrine that it will examine into the evidence only to ascertain whether there is any substantial

evidence in support of the findings of the commission and whether it has either acted without or in excess of its jurisdiction. \* \* \* ”

There followed another long line of decisions to the same effect, but it again became necessary for this court to lecture the bar of the state in the case of *Leventis v. Industrial Comm.*, 84 Utah 174, 35 P.2d 770 in the following terms:

“In view of the record and the findings of the commission, our course is an open highway, marked by an unbroken line of decisions which have the support of both natural justice and of common sense. The principles involved are so limpid and axiomatic that their recitation or a citation thereof would be an adscititious burden. Therefore, we move straight toward a conclusion. In all respects the findings are supported by substantial competent evidence, which this court can neither weigh nor review, *as the commissioners are the sole judges of the credibility of the witnesses and of the weight of the evidence.*” (Emphasis our.)

Even stronger language was used in the case of *Park Utah Consol. Mines Co. v. Industrial Comm.*, 84 Utah 481, 36 P.2d 979. It was there said:

“It seems daft and unjust, certainly malapropos, that this court should be required to repeatedly expostulate with legists about principles so well established, and to so frequently reaffirm that *the findings and conclusions of the commission on questions of fact are conclusive, and final and are not subject to review . . . and that they cannot be disturbed unless it appears as a matter of law that they are contrary to law*

*and contrary to the evidence. We cannot weigh conflicting evidence, nor direct which of the two or more reasonable inferences ought to be drawn from evidence not in conflict. \* \* \** In the determining of facts *the conclusions of the commission are like the verdict of a jury, and will not be interfered with by this court when supported by some substantial evidence.*" (Emphasis ours.)

This court has continued to follow the same rule of decision down to the present time. Apparently the most recent reaffirmation is in the case of *Hackford v. Industrial Comm.*, (Ut.), 380 P.2d 927.

The problem presented to the court in this case can be well stated by quoting from the language of this court in the case of *Peterson v. Industrial Comm.*, 102 Utah 175, 129 P.2d 563, where it is said:

"In the instant case we are not asked to determine if there is any evidence to support the finding of the commission. We are asked to determine that the probative force of the evidence is such as compels a finding contrary to that made by the commission. The commission having denied an award, found no liability on the insurance carrier or employer, we are asked to declare that the evidence requires or compels a holding to the contrary; that the findings are so against the evidence as to find no support therein; that there is nothing in the evidence upon which a reasonable mind, a judicious mind could rest in arriving at a conclusion, and therefore the conclusion must have been arrived at arbitrarily or capriciously without regard to the evidence. \* \* \*

"\* \* \* To be a reasonable conclusion it must be one for which from the evidence one can give

reasons which a judicious mind would deem worthy of consideration, upon which it would be content to rest a judgment. In the case of denial of compensation, the record must disclose that there is material, substantial, competent, uncontradicted evidence sufficient to make a disregard of it justify the conclusion as a matter of law, that the Industrial Commission arbitrarily and capriciously disregarded the evidence, or unreasonably refused to believe such evidence. \* \* \*

“\* \* \* If there is substantial, competent evidence to sustain it, then it cannot be said to be arbitrary or capricious. \* \* \*”

As shown by the authorities above set forth, this court has historically been reluctant to interfere with the holdings of the Commission, and has reversed its orders, or set aside its findings of fact, only in the clearest of cases. One of the leading cases dealing with the question of what is necessary to warrant a reversal of the Commission on its findings of fact, was *Kavalinakis v. Ind. Comm.*, 57 Utah 174, 246 P. 698. The rule there laid down is as follows:

“By what has been said we do not wish to be understood as holding that there is no limit to the commission’s power or authority in disregarding or in refusing to give effect to uncontradicted evidence. The commission may not, without any reason or cause, arbitrarily or capriciously refuse to believe and to act upon credible evidence which is unquestioned and undisputed. What we hold is that in case the commission is charged with having arbitrarily and capriciously refused to consider credible evidence, and we are asked to overturn the findings and conclusions of the

commission which appear to be in conflict with or contrary to the evidence, *it must be clearly made to appear to us that the commission acted arbitrarily or capriciously and wholly without cause* in rejecting or in refusing to give effect to the evidence. We cannot set aside a finding or conclusion of fact merely because we are of the opinion that upon the face of the record the commission refused to give effect to certain uncontradicted evidence. *Before we can set aside findings or conclusions of fact, the fact that the commission acted arbitrarily or capriciously must be so clear and convincing that but one conclusion is permissible*, and that we would be required to issue a writ of mandate directing a specific finding of dependency, as we are empowered to do by subdivision (d) of section 3148, *supra*. Any other conclusion would make this court merely a reviewing court with power to weigh the probative effect of the evidence.” (Italics ours.)

In the case of *Norris v. Ind. Comm.*, 90 Utah 256, 61 P.2d 413, this court further refined the principles of the *Kavalinakis* case, and set forth definite criteria by which to measure the sufficiency of the evidence to support the findings of the commission. The standards there laid down were as follows:

“Where the matter presented on appeal is the question of whether the commission should have in law arrived at a conclusion of fact different from that at which it did arrive from the evidence, a question of law is presented only when it is claimed that the commission could only arrive at the conclusion from the evidence, and that it found contrary to that inevitable conclusion.

But in order to reverse the commission in this regard it must appear *at least* that (a) *the evidence is uncontradicted*, and (b) *there is nothing in the record which is intrinsically discrediting to the uncontradicted testimony* and (c) *that the uncontradicted evidence is not wholly that of interested witnesses*, or, if the uncontradicted evidence is wholly or partly from others than interested witnesses, that the record shows no bias or prejudice on the part of such other witnesses, and (d) the uncontradicted evidence is such as to carry a measure of conviction to the reasonable mind and sustain the burden of proof, and (e) *precludes any other explanation or hypothesis as being more or equally as reasonable*, and (f) there is nothing in the record which would indicate the presence of the witnesses gave the commission such an advantage over the court in aid to its conclusions that the conclusions should for that reason be disturbed." (Emphasis ours.)

The principles of the *Kavalinakis* and *Norris* cases have been oft repeated and steadfastly followed, as illustrated by the following cases: *Kent v. Ind. Comm.*, 89 Utah 381, 57 P.2d 724; *O'Brien v. Ind. Comm.*, 90 Utah 266, 61 P.2d 418; *West v. Ind. Comm.*, 90 Utah 262, 61 P.2d 416; *Milkovich v. Ind. Comm.*, 91 Utah 498, 64 P.2d 1920; *Johnson v. Ind. Comm.*, 93 Utah 493, 73 P.2d 1308; *Stoddard v. Ind. Comm.*, 103 Utah 351, 135 P.2d 174; *Lorange v. Ind. Comm.*, 107 Utah 261, 153 P.2d 272; *Bailey v. Ind. Comm.*, 110 Utah 395, 174 P.2d 429.

Applying the tests of the *Norris* case to the facts of this case, we find that at least four of the conditions necessary for reversal are missing here:

1. The evidence is not contradicted. The plaintiff himself has not told an entirely consistent story, and there is evidence from others that he has told entirely different stories as to how the accident happened.

2. There is much in the record which discredits the testimony of the plaintiff.

3. The claim of the plaintiff is based wholly upon his own testimony, uncorroborated in any part, by that of any disinterested witness.

4. The evidence presents at least an equal probability that the accident occurred in a manner different from that contended by the plaintiff in this hearing.

It follows therefore, that plaintiff has failed to sustain his burden of proof and further, that he has wholly failed to establish the matters necessary to warrant a reversal of the findings of the Industrial Commission.

Commencing at page 33 of his brief, plaintiff cites several cases from other jurisdictions wherein compensation benefits were allowed for injuries or death of employees while engaged in work in and about their personal automobiles. However, an examination of those cases will reveal that in every instance an award was made in the first instance by the tribunal having original jurisdiction of the claim, and the reviewing court merely affirmed the action of the lower tribunal. In other words, the Industrial Commission, or an equivalent court or board, found as a matter of fact that the accident arose out of, or in the course of, the employment. Such

findings were uniformly upheld. Those decisions are all entirely consistent with the position advocated by defendants here, namely that the findings of fact of the commission are not subject to review, and, when supported by any substantial evidence, must be upheld. For example, in *Hilyard v. Lohmann-Johnson Drilling Co.*, (Kan.), 211 P.2d 89, cited in plaintiff's brief at pages 34 and 35, the court said:

"It is the function of the trial court to pass upon the facts in a workmen's compensation case, and where its findings are supported by substantial, competent evidence they will not be disturbed on appeal. \* \* \*

"The scope of this court's appellate review is limited to 'questions of law', which in the final analysis simply means that its duty is to determine whether the trial court's factual findings are supported by any substantial, competent evidence. \* \* \* "

And in *Kingsley v. Donovan*, 169 App. Div. 828, 155 N.Y.S. 801, cited in the plaintiff's brief at page 34, the court in upholding the award by the State Compensation Commission, wherein it was determined that the applicant was in the course of his employment, said: "... under Secs. 22 and 21 of the Workmen's Compensation law the decision of the commission is conclusive upon the facts."

All of the other cases cited and relied upon by plaintiff are to the same effect. Further, in all of these cases, the evidence established that at the time of the accident, the employee was either on, or in the vicinity

of his employer's premises; or that the accident occurred during regular working hours, or both. In addition, in most of those cases, there was evidence that the employee received some compensation or reimbursement for the expense of operating his automobile in his employer's business. In the instant suit the plaintiff was not on his employer's premises, and he had no regular working hours. The cost of operating and maintaining his automobile was borne entirely by himself. These decisions, therefore, do not in any wise support the claim of the plaintiff, but insofar as they are of any value at all as guides or precedents to this court, they support the position of defendants.

### CONCLUSION

The plaintiff has the burden of proving that the accident arose out of, or in the course of his employment, by a **preponderance of the evidence**. The only evidence offered to support plaintiff's claim is his own uncorroborated testimony. The Industrial Commission elected to believe the conflicting testimony of other witnesses. Even plaintiff's own testimony establishes that he was engaged in an activity outside the scope of his employment duties at the time the accident occurred. Therefore, under an unbroken line of precedents established by this court, the order of the commission should be affirmed.

Respectfully submitted,  
**CHRISTENSEN AND JENSEN**  
By **RAY R. CHRISTENSEN**  
*Attorneys for defendants.*