

1963

Louis W. Cooper v. Industrial Commission of Utah et al : Defendants' Brief

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

A. Pratt Kesler; Charles Welch, Jr.; Attorney for Defendants;

Recommended Citation

Brief of Respondent, *Cooper v. Industrial Comm. Of Utah*, No. 9931 (Utah Supreme Court, 1963).
https://digitalcommons.law.byu.edu/uofu_sc1/4302

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT OF THE STATE OF UTAH

LOUIS W. COOPER

FILED

Plaintiff,

7 - 1983

Clerk, Supreme Court, Utah

vs.

Case No.

9931

THE INDUSTRIAL COMMISSION
OF UTAH, MARCUS PLUMBING
AND HEATING, and THE STATE
INSURANCE FUND,

Defendants.

DEFENDANTS' BRIEF

A. PRATT KESLER,
Attorney General

236 State Capitol Building
Salt Lake City, Utah

CHARLES WELCH, JR.
Attorney for Defendants

1314 Continental Bank Bldg.
Salt Lake City, Utah

TABLE OF CONTENTS

STATEMENT OF FACTS	1
ARGUMENT	3
POINT I. PLAINTIFF HAS NOT ESTABLISHED THAT HE SUSTAINED AN INJURY AS THE RESULT OF AN ACCIDENT WHICH AROSE OUT OF OR IN THE COURSE OF HIS EMPLOYMENT	3
POINT II. THE INDUSTRIAL COMMISSION DID NOT ACT ARBITRARILY OR UNREASON- ABLY IN NOT REFERRING THE CLAIM TO A MEDICAL PANEL	11
POINT III. THE INDUSTRIAL COMMISSION'S FINDINGS OF FACT ARE CONCLUSIVE AND FINAL	14
CONCLUSION	17

CASES CITED

Burton vs. Industrial Commission, 13 Utah 2nd 553, 374 P2d 439	15, 16
Doyle vs. Industrial Commission, 115 Utah 311, 204 P2d 462	9, 10
John G. Hendrie Company vs. Industrial Commission, 12 Utah 2d 80, P2d 752	4
Holland vs. Industrial Commission, 5 Utah 2nd 105, 297 P2d 230	15
Kent vs. Industrial Commission, 89 Utah 381, 57 P2d 724	16
Long vs. Western States Refining Company - Utah - No. 9867	12, 13
Norris vs. Industrial Commission, 90 Utah 256, 61 P2d 413 ..	7, 8, 10, 14, 15
Park Utah Consolidated Mines Company vs. Industrial Commission, 84 Utah 481, 36 P2d 972	15
Smith vs. Industrial Commission, 104 Utah 2d 80 362 P2d 752	6

STATUTES CITED

Utah Code Annotated 1953, Section 35-1-45	11
Utah Code Annotated 1953, Section 35-1-77	13
Utah Code Annotated 1953, Section 35-1-85	14

IN THE SUPREME COURT OF THE STATE OF UTAH

LOUIS W. COOPER

Plaintiff,

vs.

THE INDUSTRIAL COMMISSION
OF UTAH, MARCUS PLUMBING
AND HEATING, and THE STATE
INSURANCE FUND,

Defendants.

Case No.
9931

DEFENDANTS' BRIEF

STATEMENT OF FACTS

We agree with that part of the Statement of Facts contained in the first paragraph of Plaintiff's Brief (P.B. 2, 3). We are not, however, in complete agreement with the remainder of the Statement of Facts as given by the Plaintiff, and we, therefore, desire to restate the facts as follows:

Plaintiff was employed by Marcus W. Johnson Plumbing and Heating as a laborer at Moab, Utah, on

November 21, 1961. (R. 1) On that day Plaintiff was doing the same kind of laboring work as he had done day in and day out, which consisted of manual labor in the handling and laying of sewer pipe. (R. 23-29) Plaintiff testified that he was lifting on one end of a piece of steel pipe. Two men were on the other end of the pipe which they were lifting over a pile of pipe. (R. 13) While he was lifting, Plaintiff got a catch in his back. He let the pipe down and "got another hold on it" and then continued to work. (R. 13) The catch was not disabling, as the Plaintiff was able to continue with his employment. (R. 13) He did not say anything at that time about having injured himself to Steven L. Kay, the foreman on the job. (R. 22) Nothing was said to Mr. Kay until the latter went to the Plaintiff's home to see why he did not report to work. This was after the second injury claimed by the Plaintiff. (R. 22-23) He continued working until the Thanksgiving holiday. (R. 14) After the holidays he worked for an addiitonal one or two days. At that time he was assisting with the setting of a length of concrete pipe. (R. 14) The Plaintiff on the second occasion was only guiding the pipe into place. (R. 17) The only injury sustained by him on this occasion was that the ends of his fingers were scraped, bringing blood to the surface. (R. 17) No other injury was claimed for that occasion.

At the time Plaintiff claims he was lifting the pipe on November 21st, he did not complain about pain in his groin. (R. 13) Five or six days later as he was taking a shower he found that his testicle had drawn up on him. (R. 14) Plaintiff had suffered from prostate trouble,

cirrhosis of the liver, hemorrhoids and diabetes. (R. 18-19.) Defendants contend that Plaintiff did not sustain an accidental injury which was the cause of the Plaintiff's hernia.

ARGUMENT

POINT I

PLAINTIFF HAS NOT ESTABLISHED THAT HE SUSTAINED AN INJURY WHICH AROSE OUT OF OR IN THE COURSE OF HIS EMPLOYMENT.

Plaintiff argues through his counsel that he has established that an accident did arise out of and in the course of his employment. We submit that the facts do not support such a conclusion.

Plaintiff claims that he sustained a hernia by reason of an accident occurring November 21, 1961. (R. 8) There is the additional claim that at the same time he sustained a back injury. This claim apparently was not pressed as the record seems to primarily concern the claim that Plaintiff sustained a hernia on said date. There is very little testimony relative to the back condition.

Plaintiff did not complain about having injured his back or groin on the occasion he and a companion were guiding a small concrete pipe into place. (R. 17) This occurred after the Thanksgiving holiday. This injury involved only the tearing of some skin from his hands or fingers.

If the Plaintiff had suffered a hernia as he was lifting one end of the corrugated pipe, (R. 13), it would be logical to assume that Plaintiff would have noticed this physical ailment or condition at that time rather than five days later. The normal traumatic hernia is associated with nausea, inability to continue to work, and pain in the area affected. None of these elements of a compensable traumatic hernia were present on November 21, 1961, as far as the evidence appears in the record. Plaintiff did not find it necessary to discontinue work. He did not report his claimed injury to his foreman, Steven L. Kay (R. 22) although Kay was working nearby.

The first indication that the Plaintiff had of a hernia was after he had worked two days following the Thanksgiving holiday. It was while taking a shower that he found he was having difficulty. (R. 14)

The Plaintiff's case is weak because his testimony is not supported by the testimony of other employees, who were present at the time. According to Plaintiff's testimony (R. 13) two men were on the other end of the corrugated pipe which Plaintiff claims he was lifting when he was injured. Neither of these fellow employees were called as witnesses. This would have been a simple and direct way to substantiate the claim.

The Commission has the opportunity of seeing the witnesses and evaluating their testimony. The Court in *John G. Hendrie Company vs. Industrial Commission* 12 Utah 2d 80, 362 P2d 752, at page 81 said,

“ . . . that of believing the facts as related by the applicant widow and her witnesses. This

is a prerogative reserved to the Commission, with which we do not interfere short of arbitrary action not based on competent, believable evidence.”

Plaintiff was doing his regular work on September 21, and again on the days he worked following the Thanksgiving holiday. On examination by the Referee, (R. 28 and 29) the following questions and answers were given.

By the Referee,

Q. Was the work that you were doing on the 21st day of November about the same type of work you were doing day in and day out?

A. Yes, I have done mostly labor.

Q. I mean handling pipe like you did on that day?

A. Yes. We have had a lot of heavier pipe than that, as far as that goes.”

The Plaintiff did not testify as to anything unusual having occurred. There was no slipping, falling or stumbling. Taking the testimony of Plaintiff at face value, all that can be said of it is that Plaintiff was doing the same that he had done each day, “day in and day out.” This is not an accident.

Plaintiff had physical ailments not related to his employment, cirrhosis of the liver, prostate trouble, (R. 18-19) and “a 6th lumbar vertebra or a lumbralization of the first sacral vertebra.” (R. 5) Dr. Morrow, in his report (R. 5) indicated that the back pain was of a minor nature and that there was no disc involvement.

In *Smith vs. Industrial Commission* 104 Utah 318, 140 P2d 314, the court in considering the claim of Smith that he had suffered a hernia while he was working alone, and which alleged injury he did not report to his employer, said at page 323, the following,

“The weakness of Plaintiff’s case is that there is no evidence other than his own testimony that he had an accident, or the details of effects thereof, and he is an interested witness. By the nature of the accident it is impossible to contradict his testimony. Such a situation presents an opportunity for imposition. A person who discovers he has a hernia can readily make up details of a story which would prove that it was caused by an accident in the course of his employment. Under such circumstances he would naturally tell that it occurred while he was alone, he would describe the usual symptoms when a hernia is caused and would make a plausible explanation of why he did not report it sooner. The person making such a fabrication can do so knowing that no one can directly contradict his testimony. Under these circumstances would it be unreasonable for the commission to refuse to believe his story?

“This question must be answered in the negative. Everyone recognizes that an interested witness is not entitled to as much credibility as one who is not interested.”

The evidence clearly shows that Plaintiff did not find it necessary to stop work following the lifting incident of September 21st. There is no claim that he sustained a hernia because of the second event where Plaintiff scraped his fingers. Plaintiff did not seek medical atten-

tion immediately following the alleged lifting incident of September 21st. He did not report to his foreman. He was able to continue work. The fellow employees who Plaintiff claims were assisting with the lifting of the pipe, and who might have substantiated Plaintiff's claim, if it were true, did not testify.

We submit that Plaintiff did not sustain the burden of proof necessary to substantiate his claim that he sustained an injury arising out of or in the course of his employment.

Inasmuch as considerable space in plaintiff's brief (P.B. 8-14) is devoted to an attempt to show that the evidence presented by the Plaintiff at the hearing is sufficient to meet the tests set forth in *Norris vs. Industrial Commission* 90 Utah 256, 91 P2d 413, which would compel the court to hold that the Commission erred in its findings, we feel that a further discussion of that case and its applicability to the case now before the court is indicated.

To hold that the present case comes within the rule of the Norris case, it must be shown that as a matter of law the wrong conclusion was reached from the evidence presented. In contradiction to the argument of the Plaintiff, we do not believe that the evidence meets the requirements of the *Norris* test.

That case restates the well supported principle that it is for the Commission to resolve conflicts in the evidence, for at page 415 Utah Report, the court said:

“Again, therefore, we have the old case of a conflict of evidence which it is for the Commission to resolve.”

That case has been cited repeatedly by this Court as authority to sustain the findings and orders of the Industrial Commission.

We will discuss the *Norris* tests as we see them applied to the testimony presented at the hearing before the Industrial Commission.

(a) "The evidence must be uncontradicted."

The fact that Plaintiff did not mention the claimed injury to his foreman; (R. 22) that he was able to continue work; (R. 13) and that the hernia was not discovered by plaintiff for several days after the 21st of September contradicts Plaintiff's testimony that he sustained a hernia on September 21st.

(b) There must be nothing in the record which is intrinsically discrediting to the uncontradicted testimony."

Had Plaintiff sustained a traumatic hernia as claimed he would have felt pain, from the tearing of the tissues. It is not reasonable to suppose that he would have been able to continue with his work.

(c) "The uncontradicted evidence must not be wholly that of interested witnesses and if from noninterested witnesses the record must show no bias or prejudice on the part of such witnesses."

The testimony of Steven L. Kay and Edward L. Neff does not sustain Plaintiff's testimony as they did not see what occurred at the time of the Plaintiff's alleged "accident." The fellow employees who might have supported Plaintiff's testimony did not testify.

The case of *Dole vs. Industrial Commission* 115 Utah 311, 204 P2d 462 is cited as holding that the rule requiring that the uncontradicted evidence must not be wholly that of interested witnesses has been relaxed.

The *Dole* case involved the claim of Dole, who was driving a truck to the Kearns Army Base, when the truck hit a rough spot in the road, causing it to bounce and to go temporarily out of control. When the truck righted itself, and the Plaintiff had recovered control, he discovered that the vision in his right eye was blurred and that he could not see clearly.

The next morning Dole reported to his doctor. In the course of events, the claimant saw three doctors. The first doctor claimed that he could not remember the history as given by the Plaintiff. Dr. White, who later saw the claimant stated that he was given the details concerning the accident. A Seattle doctor, who later operated also confirmed the history. The Commission held against the claimant, the Supreme Court reversed the decision of the Commission and referred it back to the Commission for action not inconsistent with the opinion.

The *Dole* can be distinguished from the instant case in that there was a clear accident, and in that Dole immediately after the accident found that his eye was blurred. Dole went to a doctor immediately in an effort to find out what was wrong with his eye.

In the present case nothing unusual happened, and the Plaintiff did not discover his hernia for five or six days later. Plaintiff did not go to a doctor until several days had passed.

It is also important to note that there was a strong dissent in this case. The decision was three to two. Chief Justice Pratt and Justice Wolfe concluded that there was sufficient evidence to sustain the conclusion of the Commission.

(d) "The uncontradicted evidence is such as to carry a measure of conviction to the reasonable mind and sustain the burden of proof."

We cannot agree that the evidence presents a "Plausible and not unusual occurrence." We believe that the actions of the Plaintiff would have been decidedly different had he sustained a traumatic hernia.

(e) "The uncontradicted evidence precludes any other explanation or hypothesis as being more or equally as reasonable."

The Plaintiff's testimony showed that he was doing no more than usual work. There was no unusual incident or accident. (R. 28-29) The probable explanation is that Plaintiff's condition was one of long standing.

(f) "There must be no indication in the record that the presence of the witnesses gave the Commission such an advantage that its conclusions should not be disturbed for that reason."

Certainly in this as in all cases, the trier of the fact had the opportunity to see the witness and evaluate his testimony.

We do not believe that *Norris* tests were met by the testimony presented, nor that the Plaintiff by the evi-

dence presented established that he sustained an injury arising out of or in the course of his employment.

POINT II

THE INDUSTRIAL COMMISSION DID NOT ACT ARBITRARILY OR UNREASONABLY IN NOT REFERRING THE CLAIM TO A MEDICAL PANEL.

We must agree with the statement in Plaintiff's brief that the "Plaintiff must establish that he was injured" by accident arising out of or in the course of his employment (P.B. page 6). We cannot agree to the conclusion reached thereafter.

It is argued that inasmuch as medical testimony was not allowed at the hearing of the matter before the Commission that Plaintiff was not permitted to fully present his case.

Section 35-1-45, Utah Code Annotated, 1953, says:

"Every employee . . . who is injured . . . by accident arising out of or in the course of his employment, . . . shall be entitled to receive and shall be paid such compensation. . . ."

The Commission must first determine if there was an accident within the meaning of the Workmen's Compensation Act. If the Commission should find after hearing the testimony of the Applicant and any other witnesses who might be called to testify that no "accident" had occurred then it is not necessary to refer the medical aspects of the case to a Medical Panel for to

do so would be a useless thing. If there has been a determination that there has not been an accident the primary leg of a successful claim has collapsed.

The Commission after hearing the evidence, found:

“Applicant was performing the same type of work on the day of the alleged injury as he had performed day in and day out prior to November 21, 1961. He was doing nothing unusual. The mere occurrence of pain during the hours of employment and on the premises is not an accident. Applicant must prove by at least a preponderance of evidence, that something unusual, other than occurrence of pain took place. Applicant’s work was not unusual.” (R. 30)

Plaintiff’s contention that he has not been given a fair hearing because there was no medical testimony given falls on another ground, which is that Plaintiff did testify as to the medical aspects of the case when he testified that his “right testicle had drawn up inside him” (R. 19), and that he had received a “catch” and had to lower the pipe. (R. 13) This testimony was sufficient to advise the Industrial Commission of the nature of Plaintiff’s complaint.

The file of the Commission also contained the Surgical Report of Doctor R. R. Rutt, (R. 2) and the report of Doctor Robert E. Morrow. (R. 5-6) Certainly these reports fully informed the commission of the medical aspects of the claim. There was no dispute as to whether or not Plaintiff had a hernia. No further offer of medical evidence was made by the Plaintiff. See the recent Utah Case of *Pearl A. Long, wife of William T. Long, de-*

ceased vs. Western States Refining Company, et al. No. 9867, filed September 16, 1963.

Had the Commission found after the hearing that there was an accident arising out of and in the course of the Plaintiff's employment, then had there been controverted medical questions it would have been proper and necessary for the Commission to refer the claim to a Medical Panel for the purpose of determining whether, from the medical aspects of the case, the "accident" found by the Commission was the cause of or contributed to the Plaintiff's physical condition.

Section 35-1-77 U.C.A. 1953 as amended begins as follows:

"Upon the filing of a claim for compensation for injury by accident, or for death, arising out of or in the course of employment, and where the employer or insurance carrier denies liability, the Commission shall refer the medical aspects of the case to a medical panel appointed by the Commission. . . ."

We submit that undoubtedly the legislative intent was that if there were any controversial medical questions involved then the matter should be referred to a Medical Panel. The Commission having found that the Plaintiff had not sustained an accidental injury within the meaning of the Workmen's Compensation Act it was not necessary for the file to be referred to a panel of medical doctors.

POINT III

THE INDUSTRIAL COMMISSION'S FINDINGS OF FACTS ARE CONCLUSIVE AND FINAL.

It is the duty of the Industrial Commission to make findings of fact and conclusions of law. These duties are clearly set out in the Workmen's Compensation Act of our State.

Section 35-1-85 Utah Code Annotated, 1953, reads:

"After each formal hearing, it shall be the duty of the Commission to make findings of fact and conclusions of law in writing and file the same with its secretary. 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."

This question has been ruled upon many times by this court. In the case of *Norris vs. Industrial Commission*, 90 Utah 256, 61 P2d 413, the Court restated the well supported rule that it is for the Commission to resolve conflicts in the evidence and to be the final arbiter in the facts. The Court's opinion contains the following at page 260.

"Again, therefore, we have the old case of a conflict of evidence which it is for the Commission to resolve."*****

The legislature, has in effect, said:

"The Commission is the final Arbiter of the facts. If there is error in judgment or conclusions

of or from the facts, it must be the Commission's error and remain there. We give the Supreme Court the right to speak only by warrant of law in compensation cases when it speaks in reference to errors of law alleged to have been made by the Commission."

In the case of *Park Uath Consolidated Mines Company vs. The Industrial Commission*, 84 Utah 481, 36 P2d 972, the Court said in part at page 488:

"... in the determining of facts the conclusions of the Commission are like a verdict of a jury, and will not be interfered with by this Court when supported by some substantial evidence."

In the case of *Holland vs. Industrial Commission of Utah*, 5 Utah 2nd 105, 297 P2d, 230, this Court said at page 106,

"... the Commission was not obliged to believe this testimony. *Smith v. Industrial Commission* 104 Utah 318, 140 P.2d 314. This being so this Court cannot say as a matter of law that it was unreasonable for the Commission to have found as a fact from all the evidence before it, that Plaintiff's ailment was not caused by an accident and since the Commission's findings are binding on this Court unless it can be shown as a matter of law that they are so unreasonable as to be arbitrary or capricious, this Court cannot do otherwise than affirm its decision."

In a recent case, *Burton vs. Industrial Commission*, 13 Utah 2d 553, 374 P2d 439, this court said at page 554,

"In order to reverse the finding and order made the Plaintiff must show that there is such

credible uncontradicted evidence in her favor that the Commission's refusal to so find was capricious and arbitrary."

The Court in denying the Plaintiff's claim for compensation in *Kent vs. Industrial Commission* 89 Utah 381, 57 P2d 724, gave an excellent summary of the courts responsibility when asked to review a decision of the Industrial Commissions. At pages 384 and 385 the Court had the following to say,

When the Industrial Commission denies compensation and the case is brought to this court for review, a different type of search of the record is demanded than when the Industrial Commission makes an award of compensation and the record is likewise brought here for review.

In the 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.*****

When we are asked to overturn the findings and conclusions of the commission denying compensation it must be made clearly to appear that the commission acted wholly without cause in rejecting or in refusing to believe or give effect to the evidence. It was not intended by the Workmen's Compensation Act that this court, in matters of evidence, should to any extent substitute the judgment of the court upon factual matters for the judgment of the commission."

We submit that under the statute and cases above cited that the Industrial Commission's findings of fact are conclusive and final and should not be interfered with by the Court.

CONCLUSION

We submit that the Industrial Commission properly conducted its proceedings in the matter, and from the evidence reached the correct conclusion. The decision and order of the Commission should be affirmed.

Respectfully submitted,

A. PRATT KESLER,
Attorney General,

CHARLES WELCH, JR.
Attorney for Defendants