

1963

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

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.

Robert C. Cummings; Stone & Flangas; Attorneys for Plaintiff;

A. Pratt Kesler; Charles Welch, Jr.; Attorneys 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_sc1/4303

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

APR 16 1964

OF THE

STATE OF UTAH

LAW LIBRARY

LAW LIBRARY
FILED

AUG 27 1963

LOUIS W. COOPER,

Plaintiff,

Clerk, Supreme Court, Utah

vs.

No. 9931

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

Defendants.

BRIEF OF PLAINTIFF

Original proceeding to review Orders of The
Industrial Commission of UtahRobert C. Cummings
Stone & Flangas
705 Utah Savings Building
Salt Lake City, Utah
Attorneys for PlaintiffA. Pratt Kesler
Attorney General
State Capitol Building
Salt Lake City, Utah
Charles Welch, Jr.
1314 Continental Bank Building
Salt Lake City, Utah
Attorneys for Defendants

TABLE OF CONTENTS

	Page
STATEMENT OF THE KIND OF CASE-----	1
DISPOSITION BEFORE INDUSTRIAL COMMISSION-----	1
RELIEF SOUGHT ON REVIEW-----	2
STATEMENT OF FACTS-----	2
ARGUMENT-----	6
POINT 1. The Industrial Commission acted arbitrarily and unreasonably in finding and concluding that plaintiff's injuries were not the result of an accident arising out of or in the course of plaintiff's employ- ment.-----	6
CONCLUSION-----	15
INDEX OF CASES AND AUTHORITIES CITED	
Dole v. Industrial Commission 115 Utah 311, 204 P. 2d 462 (1949)-----	12,13
Jones v. California Packing Corp. 121 Utah 612, 244 P. 2d 640 (1952)-----	8
Norris v. Industrial Commission 90 Utah 256, 61 P. 2d 413 (1936)-----	8,9,12,13
Peterson v. Industrial Commission 83 Utah 94, 77 P. 2d 31 (1933)-----	12
Purity Biscuit Co. v. Industrial Commission 115 Utah 1, 201 P. 2d 961 (1949)-----	8
Stroud v. Industrial Commission 2 Utah 2d 270, 272 P. 2d 187 (1955)-----	9

TABLE OF CONTENTS - CONTINUED

	Page
Utah Code Annotated 1953, Section 35-1-45-----	6
Utah State Road Commission v. Industrial Commission, 109 Utah 553, 168 P. 2d 319 (1946)-----	15

IN THE SUPREME COURT

OF THE

STATE OF UTAH

LOUIS W. COOPER,
Plaintiff,

vs.

THE INDUSTRIAL COMMISSION OF)
UTAH, MARCUS PLUMBING & HEATING,))
and THE STATE INSURANCE FUND,))
))
Defendants.)

No. 9931

BRIEF OF PLAINTIFF

STATEMENT OF THE KIND OF CASE

This is a proceeding for compensation and medical care under the Utah Workman's Compensation Act for injuries sustained by plaintiff by accident arising out of and in the course of plaintiff's employment by defendant, Marcus Plumbing & Heating.

DISPOSITION BEFORE INDUSTRIAL COMMISSION

The case was heard before Commissioner Otto A. Wiesley, referee. Plaintiff seeks review of the order

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library. Available via eText at: <http://www.lib.ark.edu/eTexts/eTextcompilerr.htm>

of the Industrial Commission of Utah denying plaintiff's

claim and of its order denying plaintiff's application for rehearing.

RELIEF SOUGHT ON REVIEW

Plaintiff seeks to have said orders set aside.

STATEMENT OF FACTS

On August 22, 1962, plaintiff filed an application for hearing to settle industrial accident claim with defendant, Industrial Commission of Utah, hereafter referred to as the Commission, claiming that he was injured November 21, 1961, and that such injuries arose out of or in the course of his employment by defendant Marcus Plumbing & Heating at Moab, Utah, and claiming that said injuries consisted of a hernia and back injuries which occurred while plaintiff was lifting pipe (R. 8). Plaintiff was given notice that no medical testimony would be allowed at the hearing of said application (R. 10). The hearing was held before Commissioner Otto A. Wiesley, referee, on January 21, 1963 (R. 11, 30), and thereafter the Industrial

Commission of Utah by order dated February 14, 1963, denied plaintiff's claim (R. 30). Plaintiff filed an application for Rehearing March 15, 1963, (R. 33), with the Commission, and the Commission denied the same by order dated May 8, 1963, (R. 34). Defendant, State Insurance Fund, was the Workman's Compensation insurance carrier for defendant, Marcus Plumbing & Heating at the time of the alleged injuries (R. 9, 12).

On or about November 21, 1961, plaintiff was lifting a pipe, which turned out to be too heavy for him, over a pile of pipe of about 4 feet high (R. 13). The pipe was being lifted by hand because the hoist loader could not reach it (R. 16). Plaintiff was on one end of the pipe alone and two other persons were on the other end (R.13). While doing so plaintiff testified that he received a "catch" and had to let the pipe down and then lift it again, (R. 13). At that time, he stated "That is what makes dead babies", and the lifting bothered him in the groin area and back (R. 13). The pipe which plaintiff lifted was, plaintiff testified, about 18 inches in diameter, and about 18 feet long (R. 15). Steven L. Kay, the

foreman on the job, testified that it was 15 inch
corrugated steel 20 feet long and weighed about 250
pounds (R. 24), and he affirmed that the pipe was being
set by hand. Plaintiff continued to work until the
Thanksgiving holidays (R. 14). After the Thanksgiving
holidays, plaintiff worked again for a few days (R. 14)
and while straddling a smaller concrete pipe and lifting
and guiding it into place (R. 17), toward quitting time,
the pipe slipped. Plaintiff stated to a companion, M.
Neff, that he didn't think he was hurt, however, the
accident had torn the skin from his hands and brought
blood to the ends of his fingers, (R. 14). After plaintiff
got home, his right testicle (R. 19) had drawn up and
was up inside of him which was the first time plaintiff
had had such trouble before (R. 14). The next morning,
he couldn't get out of bed and was confined to bed for
several days before going to a doctor (R. 14) on about
November 30, 1962 (R. 18). About four or five days
elapsed between the two accidents (R. 16). Prior
to the accidents, plaintiff had had a less than severe
case of prostate trouble and also had hemorrhoids
(R. 18, 19).

Plaintiff told the doctor, Dr. Rutt, of Moab, (R. 18) that he was having trouble in the groin area (R. 19).

Steven L. Kay, foreman on the job(R. 21) went to see plaintiff the next day (R. 22) when he didn't come to work to see what was the matter; this visit was on the day following plaintiff's last work on said job. At that visit, plaintiff told said foreman that he had hurt himself, his testicle had been giving him a problem as the result of having strained himself, and that it was swollen up, and that he was real stiff and sore and couldn't move around very well (R. 23), and that he had pain in the groin area (R. 24). The foreman told plaintiff to go see a doctor (R. 23). This was the only conversation the foreman had with plaintiff regarding plaintiff's injuries (R. 23).

A co-worker, Edward L. Neff, (R. 25) on the same job (R. 26) testified that plaintiff told him that he had strained himself down in this testicles on the occasion when they were lifting and plac ing 20 foot lengths of corrugated pipe (R. 27). Neff was on the back hole digger (R. 27) and plaintiff was down in the trench

lifting the pipe and Neff testified that the remark was made after plaintiff had done some lifting (R. 28). Plaintiff testified that the work he was doing on November 21 was the same type of work he was regularly doing (R. 28).

ARGUMENT

POINT 1

THE INDUSTRIAL COMMISSION ACTED ARBITRARILY AND UNREASONABLY IN FINDING AND CONCLUDING THAT PLAINTIFF'S INJURIES WERE NOT THE RESULT OF AN ACCIDENT ARISING OUT OF OR IN THE COURSE OF PLAINTIFF'S EMPLOYMENT.

In order to establish his right to compensation and medical care pursuant to Section 35-1-45 Utah Code Annotated 1953, plaintiff must establish that he was injured "by accident arising out of or in the course of his employment".

Plaintiff must thus show three things: (1) an accident arising out of or in the course of his employment, (2) an injury, and (3) that the accident caused the injury.

Plaintiff is entitled to produce medical testimony to establish the injury and that the accident caused

the injury. In most cases such testimony is essential. Until plaintiff is given such an opportunity, such issues cannot be considered disposed of. Since medical testimony was not allowed at the hearing in this matter (R. 10), the only issue which the Commission has considered is whether there was an accident arising out of or in the course of plaintiff's employment. If the Commission was upon the evidence justified in finding that there was no such accident that would of course conclude the matter entirely. If not, then the decision of the Commission must be set aside and the matter returned to the Commission for consideration of the questions of causation and injury.

The Commission was not justified in finding that no accident arose out of or in connection with plaintiff's employment. Since plaintiff was not given a hearing on the question of causation or injury, the definition of the kind of "accident" which plaintiff was required to prove is a very limited one, since its meaning does not involve the question of causation. All that the word

“accident” can mean in this sense is an event or occurrence, which may be an extraordinary exertion or which according to the case of Purity Biscuit Co. v. Industrial Commission, 115 Utah 1, 201 P. 2d 961, may be an ordinary exertion. In fact, it appears that plaintiff need not even establish an incident “identifiable at a definite time and place”. See Jones v. California Packing Corp., 121 Utah 612, 616, 244 P. 2d 640. If plaintiff has proved that an exertion took place which could have produced a hernia, he has met the burden on this issue. Further, if the proof is such that reasonable minds could not but conclude that a hernia could result (not did result, as plaintiff has not had his day on this point) then plaintiff has established the point as a matter of law and the commission acted arbitrarily and unreasonably in not so finding and concluding. Such is the proof in this case.

In the case of Norris v. Industrial Commission, 90 Utah 256, 61 P. 2d 413, this court set forth the test for determining when action of the Commission becomes a matter of law rather than one of fact.

It was stated in that case at page 260:

"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 one 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 reasonably, and (f) there is nothing in the record which would indicate that 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 not be disturbed."

That test appears to have received general approval by this court as recently as 1954, in the case of *Stroud v. Industrial Commission*, 2 Utah 2d 270, 272 P. 2d 187. Applying the Norris test in this case:

(a) The evidence is ~~not~~ uncontradicted.

Such is the case here. A fair analysis of the transcript clearly shows that neither Steven L. Kay nor Edward L. Neff, the only two witnesses at the hearing other than plaintiff, contradicted the testimony of plaintiff, that he was involved in an accident while lifting pipe on the job. There is no discrepancy of substance.

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

Such is the case here. It is by no means unusual or surprising for a person to receive a hernia and a back injury while lifting. The injury, by nature, is one which can't be seen by others except during an examination. The issue at the hearing before the Commission was not whether plaintiff technically received a hernia or a back injury. In as much as plaintiff was not allowed to introduce medical testimony at the hearing, the only issue was whether the injury, if any, arose out of or in the course of plaintiff's employment. The only proof which can be presented on that question is that of the plaintiff and of his actions and comments as observed by others. Such

proof was made in this case. Although the witnesses were at times uncertain as to the exact dates of the events, there were no disagreements of substance. Any uncertainty on the part of the witnesses is not surprising in the light of the lapse of time since the accident, and is certainly not intrinsically discrediting.

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

This test is also met in this case. The testimony of Steven L. Kay and Edward L. Neff supports that of plaintiff. The evidence does not disclose that they saw the hernia or the back injury. They could not have seen it unless plaintiff had disrobed and that would certainly have been highly unusual under the circumstances. They did, however, testify to the statements and the conduct of plaintiff and their testimony supports that of the plaintiff. Nor can it be said that said witnesses are interested or that the record shows that they were in any way biased

or prejudiced. The record does not indicate that they will be affected either favorably or negatively by any decision in this matter - plaintiff didn't call them.

Further, it appears that the requirement of the Norris decision, *supra*, that there be disinterested testimony has been considerably relaxed since the Norris decision. In the case of *Dole v. Industrial Commission*, 115 Utah 311, 204 P. 2d 462, a case decided about twelve years after the Norris case, this court annuled the order of the Commission denying compensation, although in that case the injury occurred while the plaintiff was alone in a truck. Although plaintiff's was the only testimony of the occurrence of the accident, the court held as a matter of law that the evidence established the necessary accident. In that case the court appeared willing to dispense with the requirement of disinterested testimony if the record was sufficiently consistent. This rule seems to be a good one, and appears to be supported by the case of *Peterson v. Industrial Commission*, 83 Utah 94, 77 P. 2d 31, in which the

court appears to find the accident established as a matter of law in large measure by the appearance and conduct of deceased. In the present case, the utterances and conduct of plaintiff taken together with his testimony establish a consistency which brings the case within the decision in the Dole case, even if it did not meet the strict Norris test, which, however, it does.

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

This requirement is met. The testimony presents an entirely plausible and not unusual occurrence.

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

This test is met. The record does not suggest or even hint at any explanation whatsoever for plaintiff's injuries other than the lifting incidents which were brought out in the testimony. It is thus not enough that some hypothesis might be advanced

in the realm of conjecture. It would have to arise naturally and reasonably from the evidence. There is no such other hypothesis here.

(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.

There is no such indication in the record. Furthermore, since the hearing was before only one of the commissioners as referee, the other two commissioners did not have any advantage in seeing or hearing the witnesses, and this test has much less meaning in this case than it might in others. There is certainly no indication of any special advantage.

If plaintiff has established that an accident arose, out of or in the course of his employment, as a matter of law, then due process requires that he receive a hearing on the question of causation and injury.

Plaintiff is not required to give reasons to the Commission for a hearing on the question of causation and injury but only to petition for such, which plaintiff

has done. The petition for rehearing adequately gives reasons for rehearing on the issue of whether an accident arose out of or in the course of plaintiff's employment. See *Utah State Road Commission v. Industrial Commission*, 109 Utah 553, 168 P. 2d 319.

One other point should be made. Although the only issue which has been fully heard by the Commission is that of the occurrence of an accident, some of the testimony, as is only natural, tends to show causation. In fact it would appear that this issue has been established as a matter of law, for the reasons heretofore advanced on the question of accident, except for the fact that defendants have not had opportunity to call expert witnesses to present medical testimony on that issue if they desire to do so.

CONCLUSION

For the foregoing reasons, the findings and conclusions of the Industrial Commission constitute error as a matter of law and the said orders of the

Commission should be set aside.

Respectfully submitted,

Robert C. Cummings
Stone & Flangas
705 Utah Savings Building
Salt Lake City, Utah
Attorneys for Plaintiff