

1963

Steel Erection & Riggin Co. and The State Insurance Fund v. Industrial Commission and Jeanette T. Dahle : Defendants' Brief

Utah Supreme Court

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IN THE SUPREME COURT OF
THE STATE OF UTAH

FILED

STEEL ERECTION & RIGGING NOV 12 1963
COMPANY and THE STATE
INSURANCE FUND,

Clerk, Supreme Court, Utah

Plaintiffs

vs.

Case No.

9967

INDUSTRIAL COMMISSION and
JEANETTE T. DAHLE, widow of
William E. Dahle, deceased,

Defendants

DEFENDANTS' BRIEF

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Case No.

9967

DEFENDANTS' BRIEF

STATEMENT OF KIND OF CASE

The defendants agree that the case is properly stated in plaintiffs' statement of the kind of case.

DISPOSITION BEFORE THE INDUSTRIAL COMMISSION

The proceedings before the Industrial Commission are properly stated by the plaintiffs. Defendants maintain, however, that the Commission's Order finding and con-

cluding that the death of William E. Dahle was a result of the accident of March 23, 1961, was proper and was amply sustained by the evidence adduced at the hearing; and that the Commission's Order denying the plaintiff's application for a re-hearing was correct.

RELIEF SOUGHT ON REVIEW

The plaintiffs, by their statement of Relief Sought on Review admit that a compensable accident was sustained by William E. Dahle on March 23, 1961; that the Order and finding of the Commission as to dependency was proper, and that the only question is "Was the death of William E. Dahle caused by the accident of March 23, 1961?"

The defendants contend that the finding and Order of the Commission: that said accident was the cause of the death of William E. Dahle, is clearly proved and that the finding and Order of the Commission so holding should be sustained.

STATEMENT OF FACTS

Defendants accept the statement of facts as submitted to the Court by plaintiffs in paragraphs 1, 2 and 3, save the 16th line of paragraph 3 wherein plaintiffs state: "severe right hemiparesis (R. 11) which is a muscular weakness." "Hemiparesis" means half motor paralysis. It is the contention of the defendants that the motor paralysis involved brain injury and loss of nerve control. Defendants call attention of the Court to the last statement of Doctor Schricker reported in said paragraph 3.

"It is my impression that Mr. Dahle is showing evidence of a post-traumatic cerebral thrombosis involving the vessels of the left hemisphere of the brain, the etiological factor being the trauma and subsequent hematoma on the left. He is totally and permanently distabled." (R. 12).

Defendants admit the fact statement in paragraph 4 of plaintiffs' Statement of Facts, except that the Defendant's Application for Hearing stated that compensation was paid to include July 19, 1961, not July 19, 1963, as appears in plaintiff's brief.

Defendants agree with the plaintiffs' statement of facts in paragraph 5, and paragraph 6, save that there should be called to the attention of the Court paragraph 3 on page 3 of the findings of the Panel which is as follows: "The Panel can therefore neither affirm nor deny the following possibilities: 1. Hemipareses arising as a complicating factor secondary to the subdural hematoma, presumably due to trauma incurred in the accident."

As to paragraph 7 of plaintiffs' statement of facts, defendants object to the statement of plaintiffs that defendants filed objections to the report of the Medical Panel generally. The objection to the report of the Medical Panel states: "1. Object to those portions of the report which state, either as fact or opinion, that William E. Dahle was neurologically normal or had made a good or satisfactory recovery at any time following the accident of March 23, 1961, wherein he fell and sustained injuries to his head while working for Steel Erectors and Riggering Company. 2. Object to conclusions of the Panel, insofar

as they do not conclude that total disability and death were actually caused by the injuries received by William E. Dahle in the said accident of March 23, 1961." The remainder of said paragraph 7 is correct.

ARGUMENT

POINT I

THE PANEL ADMITTED A PRESUMPTION THAT SUBDURAL HEMATOMAS WERE DUE TO TRAUMA INCURRED IN THE ACCIDENT AND DID NOT DENY THAT DEATH OF WILLIAM E. DAHLE WAS CAUSED BY HEMIPARESIS WHICH AROSE OUT OF THE HEMATOMAS.

The concluding paragraphs of the Panel's report (R. 39), cited in plaintiffs' Argument, Point I, at page 8, to-wit:

"The Panel can therefore neither affirm nor deny the following possibilities:

"1. Hemiparesis arising as a complicating factor secondary to the subdural hematoma, presumably due to trauma incurred in the accident." — admit a presumption arrived at by the Panel that the subdural hematoma was caused by the accident, and admit the possibility that death occurred as a result of the accidental trauma to the brain. The Panel could not deny that death was so caused. It was unable to observe evidence of this in its examination of brain tissue, but Doctor Viko admitted that possibly the expert in microscopic pathology at the

Armed Forces Institute of Pathology might be able to find it. (The Institute refused to make the examination and report because this case was industrial in nature.)

On cross-examination Doctor Viko testified as follows:
(R. 50-51)

Q. Doctor Viko, as I understand from reading the panel report, the panel concluded that there was a discrepancy or an inconsistency between the clinical findings and what the autopsy could substantiate?

A. That is correct.

* * * *

Q. The fact that the tissue was sent to this agency indicates does it not, Doctor, that the Board had a doubt as to the accuracy or the conclusiveness of the findings through the autopsy; is that correct?

A. That is essentially correct. We felt that almost certainly the autopsy would show the nature of the neurologic condition he had, and therefore its cause. And we were quite surprised when it didn't. And, while we accepted the gross findings, one of the men back at the Armed Forces Institute of Pathology is considered by the neurologists on our panel as being the top man perhaps in the country in microscopic pathology in neurologic disease, and it was hoped that he might find something that wasn't found here that led us to send the slides back to him.

* * * *

Q. Now the fact that the autopsy did not show the gross evidence that you expected it to find, does not rule out the etiology of the final fatal condition of this man — as caused by the trauma, and the subsequent condition

of the brain and heart — that caused his death, does it?

A. It does not. The phraseology of the panel was that we could neither affirm nor deny the three possibilities that we enumerated.

* * * *

A. There was a possibility, not a probability, that further microscopic study by the expert that we sent it to might find something that hadn't been found here.

Q. Leaving the Board in doubt as to the real cause of the death? Correct?

A. Not so much that. We felt there was sufficient heart disease to cause death, but in doubt as to the relation of two things. The cause of the neurologic signs and symptoms, the disability — he had almost total disability from his neurologic things, entirely aside from the heart — and whether that neurologic disability was related solely to the heart by embolism, or whether it was related to the accident by trauma to the brain. That was where the doubt existed, which the autopsy failed to answer.

Q. Realizing, then, as the Board did, that the heart condition could have been aggravated by the trauma and the neurological condition; is that correct?

A. That was stated in the report.

POINT II

ALL DOUBTS SHOULD BE RESOLVED IN FAVOR OF THE DEPENDENTS OF THE INJURED EMPLOYEE.

This Court has for many years consistently held: "If there is any doubt respecting right to compensation, such

doubt should be resolved in favor of the injured employee or his dependents, as the case may be." *Park Utah Consolidated Mines Co. v. Industrial Commission*, 84, U. 481, 36 P. 2d 979.

"This statute should be liberally construed and, if there is any doubt respecting right to compensation, it should be resolved in favor of recovery." *M & K Corp. v. Industrial Commission*, 112 U. 488, 189 P. 2d 132.

POINT III

STRONG AFFIRMATIVE MEDICAL TESTIMONY REQUIRED THAT THE AWARD BE MADE BY THE INDUSTRIAL COMMISSION.

Doctor Silas S. Smith, the attending physician, who attended the injured employee from the beginning and followed the case throughout its course, saw Mr. Dahle more than any other doctor, and was in the best position to know the full medical history and condition, stated as follows: (R. 68)

Q. Would you say that this condition that you found, and his injuries, were — as far as you were able to determine — the result of a fall that he sustained on the 24th (should be 23rd) day of March 1961?

A. Yes sir.

* * * *

(R. 69, line 6)

Q. Did you refer him to Dr. Louis Schricker?

A. Yes, I did.

Q. Did you get a report from Doctor Schricker?

A. Yes sir.

(R. 70, line 2)

Q. Would you state what your opinion is as to the cause of the condition found by Doctor Schricker at that time?

A. *I feel certain in my mind that it was due to the fall, and as a result he had some hemorrhage into his skull.* (Italics ours)

(R. 70, line 15) The doctor then describes the condition of Mr. Dahle as of the visit of July 19, 1961:

A. Mr. Dahle was failing rather rapidly at that time. His speech was slurring, he was unable to walk without the assistance of his wife when he came into the room. It was necessary to assist him even on the table, to keep him from falling off.

Q. Would you say that this condition was also brought about by the fall of March 23, 1961?

A. I feel quite certain it was due to the fall.

(R. 70, line 22) Doctor Smith testified as to whether or not this condition would have resulted if he had not had the fall:

A. But I feel quite definitely that is was a secondary result of the fall.

(R. 71, line 22) In support of the Commission's award:

Q. Did you feel that that is a medical probability, that the fall and the surgery aggravated the heart condition?

A. *I don't think there is any question of that.* (Italics ours) Could I add one thing here?

Q. Yes.

A. Since you're trying to get the facts?

Q. Yes.

A. Mr. Dahle had a disposition that he had to be working and he had to pay his bills, and he had to do this and he had to do that. It was a compulsion almost with him that he had to do things that were supposed to be done at that time, and, when he couldn't do it, it just fretted him to death almost. He couldn't hardly put up with it.

(R. 73, line 4) After some detailed discussion in answer to a question about Mr. Dahle's condition:

A. There is no question that he was totally and permanently disabled.

Q. And the cause of that in your opinion would be what, Doctor?

Q. (Should be A.) At this time he was suffering from a hemiplegia of the right side, *as the result, in my opinion, of the fall.* (Italics ours). He had a cardiac condition too, but his main problem was his lack of balance and coordination from the circulatory disturbance of the brain.

(R. 74, line 3) As to bleeding in the brain of Mr. Dahle following the accident.

Q. Mr. Dahle had two trephine openings and the drainage of hematomas, one on each side of his head, did he not, Doctor?

A. Yes. Doctor Schricker in his operation reported that on May 4th — should I read this?

Q. If you will, please.

A. This from Doctor Schricker on June 28, 1961, to me. Well, it's to The State Fund, rather, and I got a copy. He states: "On May 6, 1961, bilateral drill openings were performed and evacuation of subdural hematomas, bilaterally carried out. His post-operative course was uneventful and he was discharged May 13, 1961."

Q. So as a matter of fact he did have some laceration, did he not?

A. There is no question he had bleeding.

Q. That is what I — —

A. Bilateral bleeding.

(R. 78, line 14)

MR. KENNARD: Q. As of that date, what was your opinion as to the cause of the condition that he had?

DOCTOR SMITH: A. Oh, he definitely had his hemiplegia on his right side. He couldn't hold even his head up, and his right arm and foot were very weak from the thrombosis in his brain. He definitely had a hemiplegia.

Q. Doctor, is it a medical probability that this condition would have existed at that time if he had not had the fall?

A. Well, I have to answer that this way. He probably would not have had it just this way. Because at the time

he was injured he was working, and never did he work after that, but his progress was downhill from then on down.

Defendants pause to say: In view of this clear concise testimony, how could the Commission in a liberal interpretation of our workmens compensation law, arrive at any other decision than what they did?

(R. 79, line 1)

Q. Do you believe that the heart condition then that he had, which of course, carried on down to this point, would not have caused this condition?

A. I doubt very much if it would have caused the condition.

(R. 79, line 6)

THE REFEREE: Q. May I ask you a question, Doctor, now. This concerns me. Had he not had this pre-existing heart condition, would he have died anyway as a result of the hemiplegia?

DOCTOR SMITH: A. Yes, I think so. I think he would have died anyway, because his hemiplegia progressively increased. He got more feeble. More unable to move. If it hadn't been for his wife balancing him, I don't know what he would have done. Because he was just unable to get around, because of this paralysis.

This well states the contention of the defendants and the justification of the Commission's award.

(R. 80, line 18)

Doctor Smith also stated:

“I’m sure the accident was instrumental in his more rapid deterioration of his heart problem.”

The Panel says it cannot tell, from its autopsy examination, what caused death. Doctor Smith, on the other hand, is very positive, based on his clinical findings, that death resulted from the trauma and related neurological pathology. The evidence from the two sources is really not conflicting; but even if it were, the findings of the Commission should not be disturbed. *Hauser v. Ind. Comm.*, 77 U. 419, 296 P. 780.

(R. 81, line 6)

MR. KENNARD: Q. Doctor, would a fall from a distance of 15 to 17 feet,, striking his head on a hard surface reasonably cause the subdural hemorrhage that we are referring to?

DOCTOR SMITH: A. Yes, that could cause it. Or a fall. For instance a fall in itself may even cause such an accident. For instance as the body hits, the head is driven down against the spine, and may fracture in that manner. Do I make it clear? For instance —

Q. Even though he didn’t strike his head on the hard surface?

A. Even though the blow against the floor was not sufficient sometimes a fall can be severe enough on the buttock that it might fracture the head from just the trauma of the head forced against the spine.

THE REFEREE: Isn’t there medical evidence in the file that he did have a bruise on his head?

THE WITNESS: He had a small bruise on his head.

THE REFEREE: *Then we don't have to speculate about that. (Italics ours)*

The testimony of Doctor Smith, the attending physician, is not impeached anywhere in the record. There is no rebuttal to it. The Commission properly made an award in this case.

Doctor LaVERNE S. ERICKSON testifying:

(R. 58, lines 6 & 7)

Q. Would you tell us your opinion as to what he died of? Heart condition or neurological?

* * * *

(R. 58, line 16)

A. I'd suspect that it had some relation to the injury. If before this time he was able to have gainful employment, then suffered what was a change in that course, and have disability from that period. I would expect that the trauma had either aggravated or changed the course such that an aggravation of the heart condition, or of the trauma as such, had caused the changes.

Q. Now a man who has a heart condition, would you say that a neurological occurrence such as we had here would aggravate his heart condition?

(R. 59, line 2)

A. I think the clinic in this case, the clinical course, would suggest that. *It was at that point that some change occurred, (Italics ours)* that the heart condition became one of his primary problems to the end.

(R. 62, line 1)

Q. In other words, you can't eliminate the neurological condition which developed, as the record shows, after the accident; is that right?

A. I can't eliminate, you say?

Q. Yes.

A. No.

Q. As the cause?

A. It was part of the course (cause), certainly. He had progressive disability.

POINT IV

THE INDUSTRIAL COMMISSION HAD NO DUTY TO REFER THE MEDICAL QUESTIONS BACK TO THE PANEL AFTER THE HEARINGS.

1. The Commission was not obligated, under the provisions of 35-1-77, Utah Code Annotated, 1953, to submit medical aspects to a panel the second time. Every required step is clearly described by the statute, every step was performed, and no action not expressly required by the statute can be rightfully considered as a requirement by implication or inference.

The Commission fully complied with the provisions of 35-1-77, U. C. A. 1953.

(a) By referring the medical aspects to a panel upon the denial of the claim by the employer and insurance carrier.

(b) By promptly distributing to claimant, employer and insurance carrier, the Panel's written report.

(c) By setting the case for hearing within thirty days following filing of claimant's objections to the Panel's report.

(d) By having present at the hearing, for examination and cross-examination, those Panel members whose presence was requested by any party.

(e) By receiving the Panel's report as an exhibit at the hearing.

(f) By admitting as evidence in the case the Panel's report insofar as it was sustained by the testimony.

2. The Commission had no duty to again submit the medical aspects to a panel on the basis of any reasonable possibility that the testimony of Doctor Smith would result in findings less favorable to claimant than those initially found by the Panel.

(a) The Panel was empowered to take Doctor Smith's testimony in the course of its first study, and the members of the Panel knew he was the attending physician and they had access to his several reports and letters.

(b) The members of the Panel, individually if not collectively, did consult with Doctor Smith and communicated with him by letter during the course of their study for their report.

(c) If the medical aspects as stated in Doctor Smith's testimony on the second hearing had been submitted to the Panel, they could not from that have arrived at any conclusion less favorable to claimant than the one first submitted to the Commission.

- (1) By reading the Panel's report, the findings of which were sustained by the testimony of Doctor Viko at the hearing held on January 14, 1963, we learn that the Panel presumed that the subdural hematoma was due to trauma incurred in the accident, and that the Panel did not deny that the hemiparesis arose as a complicating factor secondary to that subdural hematoma. There was nothing in Doctor Smith's testimony which could have persuaded the Panel to deny this.
- (2) The Panel was unable to affirm cerebral complications arising from thrombotic embolic phenomena associated with the severe rheumatic valvular disease and mitral stenosis; nor was it able to point to any unrelated cerebral disease, such as neoplasm, degenerative process, encephalitis, or other pathologic process not related to trauma or cardiac disease, as a cause of the right hemiparesis. Plaintiffs have pointed to nothing, and there was nothing, in the testimony of Doctor Smith at the second hearing which could have influenced the Panel to find that either of these possibilities actually caused Mr. Dahle's death.
- (3) The Panel could not deny that death was caused by a brain laceration sustained in the fall and resulting progressive hemiplegia, and it could not deny that the hemiplegia was instrumental in the more rapid deterioration of the pre-existing heart problem and therefore did contribute to Dahle's death. The testimony of Doctor Smith was, in substance, that death was actually caused by the brain laceration, hematomas, and hemiplegia, and that these probably aggravated the heart con-

dition which, in turn was also a contributing factor. Had the members of the Panel heard him on the witness stand, or had his testimony been submitted to them for consideration, they could not therefrom have arrived at a conclusion less favorable to defendant than the one they wrote in their report.

The Industrial Commission, which in every respect fulfilled its duty in the conduct of the proceeding herein, being fully acquainted with all of the evidence, and acting in the exercise of its law-given prerogative, formulated and issued its conclusion as expressed in its Order dated May 7, 1963. There is no basis for reversal.

It is the position of defendants that the purpose of the Medical Panel is to advise the Commission on medical questions, but not to supplant the Commission or to assume its duty of deciding disputed claims.

Counsel for defendants take exception to the statement of counsel for plaintiffs on page 14 of the brief, to-wit: "the testimony of Doctor Smith was that of the attending surgeon, although he did not perform surgery in the case. It was on his testimony that the Commission decided to ignore the findings of the Medical Panel." Counsel fails to point out wherein the Commission ignored the findings of the Panel. The Panel left the matter in equipoise, just as favorable to the award as against it; and the Commission saw fit, in view of the testimony and the complete record, to make an award. It should be sustained.

SUMMARY

The points contended for and argued by the defendants herein under the rule of liberal construction in favor of the employee and his dependents and clearly sustained by reliable medical testimony, justify the conclusion that the Order of the Commission should be upheld. The medical facts of the case were submitted to the Medical Panel under procedure required by law. Further submission to the Panel was not required by law and could not have changed the Panel's decision to make it less favorable to the defendant. The award should stand.