1964

Eldon P. Rowley v. The Industrial Commission of Utah et al : Defendants' Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

ELDON P. ROWLEY,
Plaintiff and Appellant,

vs.

THE INDUSTRIAL COMMISSION OF UTAH; THE STATE INSURANCE FUND; and EDGEMONT DEVELOPMENT COMPANY,
Defendants and Respondents.

Case No. 10053

DEFENDANTS' BRIEF

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STATEMENT OF FACTS

In this brief we are defending the Industrial Commission's decision and order dated September 30, 1963, in which the Commission denied Eldon P. Rowley's application for workmen's compensation benefits relating to his accident of December 9, 1961.

We agree partly with the statement of facts contained in the Brief of Plaintiff; but feel that we should state some additional facts to make the case more clear.

On May 18, 1962, Eldon P. Rowley filed his application with the Industrial Commission, in which he stated on Dec. 10, 1961 he had an accidental injury in the course of his employment with the Edgemont Development Company, which had its Workmen's Compensation insurance in the State Insurance Fund. Dec. 10, 1961 was a Sunday. Mr. Rowley's later statements specified the day of the accident as Saturday, which would make it Dec. 9, 1961.

The first Industrial Commission hearing of this case was held on November 13, 1962 by Clarence J. Frost, who was acting as the Industrial Commission's referee at that time. On Jan. 8, 1963, referee Frost made his Recommended Findings of Fact and Conclusions of Law to the Industrial Commission, (R. 38), in which he made several errors, among them being one that "the alleged injury occurred on a Sunday afternoon." In the latter part of his recommendations Mr. Frost said that Mr. Rowley's injury was on December 8, 1961. Dec. 8, 1961 was a Friday. So the referee was wrong in both findings. The referee also recommended a finding #2: that "the injury resulted from an accident arising out of or in the course of employment."

After the Industrial Commission adopted the recommended findings and conclusions of the referee, in its Order dated Jan. 14, 1963, (R. 37), the State Insurance Fund filed an Application for Rehearing, (R. 39), which the Industrial Commission granted on Feb. 28, 1963. (R. 40) On May 20, 1963, the rehearing of this case was held by the Industrial Commission, with the chairman of the Commission presiding. (R. 42) Thereafter,

on Sept. 30, 1963 the Commission made its final decision and order, (R. 60), the third paragraph of which said:

> "The Commission does not disagree with the referee's finding that an accident occurred***."

In the fourth paragraph of this decision, the Commission said:

> "The Commission finds and concludes that the accident did not arise out of or in the course of applicant's employment."

In the next to last paragraph, the Commission said:

> "Applicant was not discharging a duty he was employed to perform or something in some way connected with or incidental to the duty owing to his master."

ARGUMENT

POINT 1

THE INDUSTRIAL COMMISSION'S ORDER OF FEB. 28, 1963, GRANTING THE REHEARING, HAD THE EFFECT OF VACATING ALL OF THE PREVIOUS PROCEEDINGS IN THE CASE.

There have been several decisions of the Supreme Court of Utah, which have discussed the legal status of an Industrial Commission case following the action of the Commission granting a rehearing. In the case of *Carter vs. Ind. Comm.*, 76 Utah 520, 290 Pac. 776, the Court's opinion went into this subject at considerable length, and among other things said, (p. 537):

> "The effect of granting the rehearing, unless otherwise restricted or limited, is to vacate and set aside the prior order or judgment of the Commission and try the case anew. Whatever order is made on such rehearing, it is in effect a new order or judgment, analagous to a judgment rendered on a new trial."

At the rehearing of the case on May 20, 1963, (R. 43), we stipulated that the testimony of the witnesses who had testified at the former hearing on November 13, 1962, would be considered as given at the rehearing; but we also stated:

> "We are not stipulating to the correctness or the truthfulness of anything,"
>
> also
>
> "We are not waiving any objection that may be had to any part of any testimony which might be incompetent or immaterial."

After the rehearing of May 20, 1963, the Industrial Commission's record then consisted of the testimony given by the witnesses at the hearing of Nov. 13, 1962, and also the testimony of Joseph Kirkham which was given at the rehearing, (R. 45 - 48), most of which related to the statement which Mr. Rowley had made to Mr. Kirkham on April 9, 1962, which was four months after the accident and eight months prior to the first hearing. In taking Mr. Rowley's statement, Mr. Kirkham had used a Dictaphone, (with the knowledge and consent of Mr. Rowley). (R. 47) He quoted Mr. Rowley as saying:

> "We were in the neighborhood because we stopped in to see his (my son's) friend. My son, Robert, had just recently returned from his six-

> months training at Fort Ord. And we consequently, in making the visit to his friend, who didn't happen to be home, we were in the neighborhood where Mr. Jensen's home was located, so we went by to check and see how the utilities in the house were working."

From the foregoing statement, it appears that the main purpose of the trip on that Saturday afternoon, was the taking of his son to visit his friend. The other matter of calling at the home of Mr. and Mrs. Jensen and inquiring about the utilities, was merely an incidental.

POINT 2

THE INDUSTRIAL COMMISSION WAS NOT REQUIRED TO FIND OR CONCLUDE THAT ELDON P. ROWLEY'S ACCIDENT OF DECEMBER 9, 1961 AROSE OUT OF OR IN THE COURSE OF HIS EMPLOYMENT.

There have not been many Workmen's Compensation cases in the Supreme Court which involved a factual situation similar to that which is contained in our present case, where the "employee' who had the accident was substantially his own boss because he owned or controlled the company which was the employer, and he could choose the times of his work duties as he might see fit.

In order for the Industrial Commission to perform its function and duty of determining the facts, it was required to evaluate Mr. Rowley's testimony to determine whether he started out from his home that Saturday afternoon with the purpose in his mind of performing

services for the employer, Edgemont Development Company, or whether the main purpose of the ride which he and his son took that afternoon was personal in nature, that is for the purpose of visiting together and of taking his son to see his friend, and that any services relating to the affairs of the Edgemont Development Company were merely incidental.

What may have been Mr. Rowley's purpose and intention when he and his son started out from their home that Saturday afternoon, was exclusively within his own mind. Neither we nor the Industrial Commission can read his mind; so they and we must attempt to determine what was in his mind, partly by his actions, and partly by what he said about it on the occasions when he did make statements about it.

The testimony of Joseph Kirkham at the Commission's rehearing of this case, quoted Mr. Rowley's statement of April 9, 1962 relating to his purpose in making the automobile trip on that Saturday afternoon, Dec. 9, 1961. The statement indicated that the main purpose of the trip was personal or familial in nature. (R. 47)

Regardless of what Mr. Rowley's legal status may have been during the half-hour period he was in the Jensen home discussing how the furnace and the other utilities were working, he had finished that mission, according to his own testimony. (R. 14 & 21). He left the Jensen home and was walking over to where the Edgemont Development Company's tractor was located, for the purpose of helping his son get the tractor started. He was 200 feet away from the Jensen home when he stepped off the curb of the public sidewalk and fell.

(R. 15) He said that their purpose in procuring the tractor was so that his son could help pull Jensen's trailer out of the snow in his back yard, so that he could complete moving his furniture from his trailer into his house.

The ultimate question then comes down to this: Was it a function and duty of Mr. Rowley to his employer, to take part in procuring said employer's tractor, so that his son could use it to pull out of the snow the trailer of a former customer to whom a company built home had been sold, so that said former customer could more easily complete moving his furniture from his trailer into his house?

It had not been contracted or agreed by the Edgemont Development Company that the company would move the furniture of their customers into the houses which customers might buy from said company. The matter of getting their furniture moved into their new home was the Jensen family's own business. It was not the business of the Edgemont Development Company. That corporation was in the construction business, not the moving business.

There is strong reasonable basis supporting the Industrial Commission's finding and conclusion that Mr. Rowley's accident of Dec. 9, 1961 did not arise out of or in the course of his "employment" when he slipped in the snow at the side of the curb of the public sidewalk. Either his whole detour over to the Jensen home that afternoon was nothing but incidental; or if he was in the course of his employment when he was in the Jensen home discussing their utilities, after he walked away from the Jensen home he was "on his own" again. In other

words, he had reverted to the same status after leaving the Jensen home as he was in before going there. Some examples of other possible factual situations may be helpful in analyzing this case.

If, on a Saturday afternoon Mr. Rowley and his son were going to a grocery store to do the week-end shopping for their family, and they happened to see Mrs. Jensen (or any other former customer of the Edgemont Development Company) coming out of the store with several bulky packages, and Mr. Rowley and his son volunteered to carry some of the packages to her car, and in doing so Mr. Rowley slipped in the snow at the curb of the sidewalk and injured his ankle and back; would that accident be in the course of his employment as manager and salesman of the Edgemont Development Company? Obviously the answer is "No."

Another example of a similar factual situation is as follows: If, on a Saturday or Sunday afternoon Mr. Rowley and his family are riding in his automobile, and he sees at the side of the road Mr. and Mrs. Jensen with a' flat tire or some other mechanical difficulty with their automobile, (and because of knowing them as former customers of his company to whom he had sold a house), Mr. Rowley stops and tries to assist them with their problem; in doing so he slips in the snow and injures himself; would he be conisdered as being in the course of his employment with the Edgemont Development Company? Again the answer is "No," even though the basic factual situation is quite similar to that which is involved in our present case.

It should be kept in mind that the burden of proof is upon the applicant to establish his claim. *Grasteit vs Ind. Comm.,* 76 Utah 487, 290 Pac. 764, *Wherritt vs Ind. Comm.,* 100 Utah 68, 110 P.2d 374, *General Mills, Inc. vs Ind. Comm.,* 101 Utah 214, 120 P.2d 379. This is the rule whether the applicant is represented by an attorney or whether he acts as his own attorney as Mr. Rowley did at both of the hearings. *Spencer vs Ind. Comm.,* 81 Utah 511, 20 P.2d 618.

In the case of *Kent vs Ind. Comm.,* 89 Utah 381, 57 P.2d 724, pages 384 -385 of the Supreme Court's opinion contains the following language:

> "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."

Smith vs Ind. Comm., 104 Utah 318, 140 P.2d 314, is a case which deals particularly with the weight of an interested witness' testimony. At page 323 of the Supreme Court's opinion is found the following language:

> "The weakness of the plaintiff's case is that there is no evidence other than his own testimony that he had an accident, or the details or 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. * * * Everyone recognizes that an interested witness is not entitled to as much credibility as one who is not interested."

At page 327 of the Smith case, the opinion quotes from the case of *Norris vs Ind. Comm.,* 90 Utah 256, 61 P.2d 413:

> "But in order to reverse the commission * * * 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 * * * 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 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."

The case of *Greer vs Ind. Comm.,* 74 Utah 379, 279 Pac. 900, while it does have several points in which its factual situation differs from the factual situation of our present case, does contain a general statement of law which is applicable here:

> "But the mission (for the employer) must be the major factor in the journey or movement, and not merely incidental thereto; that is to say if incidental to the main purpose of going to or from

the place of employment, it would not bring such person under the protection of the Act. * * * There was nothing he was doing for his master at the time which exposed him to the perils of the street. * * * The accident did not occur while he was actually engaged in the performance of a duty for the employer."

POINT 3

THE INDUSTRIAL COMMISSION WAS NOT REQUIRED TO AWARD COMPENSATION BENEFITS TO THE APPLICANT.

In addition to the statement of Mr. Rowley which the witness, Joseph Kirkham quoted in his testimony at the rehearing, as we have herein previously referred to, Mr. Kirkham also testified relating to Mr. Rowley's previous back trouble, (R. 48):

> "Mr. Rowley had been telling me the story with reference to Mr. Jensen's car, or trailer, being stuck in the snow, and that they had gone over to get a tractor to pull it out, and he had been telling me about being embarrased in not being able to help very much because he had been wearing a belt, or a brace, and I asked him this question: "This brace that you were wearing at the time, will you explain what it was, the reason you were wearing a brace at the time, and what were you wearing this brace for?" Mr. Rowley's answer: "I had had back trouble for a period of approximately two years. In August of 1960 I went to Dr. Charles M. Smith, Jr. with my back. I was in pain constantly because I was unable to do my work. Hardly any movement at all would cause

> pain in my back, and I went to him and he diagnosed it as I recall disc fracture, and he prescribed this brace for me, which I had worn daily from the time of the injury."

The Plaintiff's Brief, (page 8) cited the case of *Stroud vs Industrial Commission,* 2 Utah 2d 270, 272 Pac. 2d 187. The basic facts of that case are dissimilar to the basic facts in our present case. Sergeant Stroud had arrived at the police station to check out a special car to two policemen, and it was *while he was waiting there for them to arrive* that he received his fatal injury by his gun accidentally dropping from its holster and discharging. In our present case, Mr. Rowley had completed whatever work might possibly have been within his duties as an employee, (manager and salesman) of the Edgemont Development Co., namely his checking of the utilities, etc.; and he had left the Jensen home and was walking on the public sidewalk 200 feet away, when he had his accident by stepping off the curb into the snow. (R. 14 - 15)

The cases cited at page 9 of the Plaintiff's Brief are not particularly helpful in our present discussion, as an examination of each of those cases shows very little similarity in the controlling facts to those of Mr. Rowley's case.

In the case of *Holland vs Ind. Comm.,* 5 Utah 2d 105, 297 P. 2d 230, the Supreme Court's opinion said:

> " * * * 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 the case of *Lorange vs Ind. Comm.,* 107 Utah 261, 153 P.2d 272, it said:

> "Unless therefore it can be said, upon the whole record, that the commission clearly acted arbitrarily or capriciously in making its findings and decision, this court is powerless to interfere. * * * It was not intended, * * * that this court, in matters of evidence, should to any extent substitute its judgment for the judgment of the commission."

In its Order and decision of Sept. 30, 1963, (R. 60), the Industrial Commission cited the Supreme Court's decision in the case of *Sullivan vs Ind. Comm.,* 79 Utah 317, 10 P.2d 924. Plaintiff's Brief (p. 8) argues that the Sullivan case is not in point. Admittedly there are some factual differences between the Sullivan case and our present case; but the Supreme Court has not changed the rule quoted in the latter part of the Commission's Order:

> "To be compensable, it must appear that at the time of the injury he was discharging some of the duties he was employed to perform, or that he was doing something in some way connected with or incidental to the duty owing to the master."

The argumentation of Mr. Rowley at the first hearing, which is quoted in Plaintiff's Brief at pages 6 & 7, is not part of the Industrial Commission's record now. After

the Commission had granted the rehearing, at the commencement of the rehearing on May 20, 1963, we stipualted that the testimony given by the witnesses at the first hearing would be considered as given at the rehearing, (R. 43 & 44); but that stipulation did not include the argumentation which Mr. Rowley had made at the first hearing.

CONCLUSION

For the foregoing reasons, the decision and order of the Industrial Commission should be affirmed by this Court.

Respectfully submitted,

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