1992

Jacqui C. Walls v. Uncle Barts, Uninsured Employers Fund, Board of Review of the Industrial Commission of Utah : Brief of Petitioner

Utah Court of Appeals

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BEFORE THE UTAH COURT OF APPEALS

JACQUI C. WALLS, Applicant and Petitioner, vs. UNCLE BARTS, UNINSURED EMPLOYERS FUND, BOARD OF REVIEW OF THE INDUSTRIAL COMMISSION OF UTAH, Defendants and Respondents.	Case No. 920499 Priority No. 7

BRIEF OF PETITIONER

BRIEF OF INJURED WORKER SEEKING REVIEW OF INDUSTRIAL COMMISSION ORDER DISMISSING WORKERS COMPENSATION CLAIM

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JURISDICTION AND NATURE OF PROCEEDINGS

This Court has jurisdiction over this Appeal pursuant to Section 78-2a-3(2)(a) and Section 35-1-86 Utah Code Annotated 1953 as amended.

In this Appeal the Petitioner seeks review of an Order of the Utah Industrial Commission denying her claim for benefits.

STATEMENT OF ISSUES

Did the Commission err when it ruled that the injury did not arise out of and in the course of employment.

STANDARD OF REVIEW

The Standard of Review regarding the issue raised in this Appeal: The Appellate Court's Standard of Review is a correction of error standard, giving no deference to the agency's decision regarding questions of law. Morton International v. Utah State Tax Commission, 814 P.2d 581 (Utah 1991), Questar Pipeline v. Utah State Tax Commission, 817 P.2d 316 (Utah 1991). There is no implied or expressed grant of authority to the Industrial Commission to construe the meaning of Section 45. Cross v. Board of Review of the Industrial Commission, 824 P.2d 1202, 1204 (Ut.

App. 1992).

STATEMENT OF THE CASE

The injured worker filed a claim for benefits. The employer answered the application and denied liability. The Administrative Law Judge ruled that the injury did not arise out of and in the course of employment. This appeal ensued.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Section 35-1-65 Utah Code Annotated, (See Addendum for full text). Section 35-1-45 Utah Code Annotated, (See Addendum for full text).

STATEMENT OF FACTS

The facts as found by the Administrative Law Judge are as follows:

a. On December 29, 1989 the Applicant was employed by Bart Dunston d/b/a Uncle Bart's Tavern as a bartender. (R.36). Uncle Bart's was uninsured for Workers Compensation purposes at the time of the injury to the injured worker. (R.36).

b. The Applicant got off work at 5:00 P.M. but remained on the premises and played pool and socialized. (R.36).

c. Following her normal duty hours, the Petitioner attempted to ready a keg of beer for tapping, without having been specifically requested to do so. (R.38).

d. While moving the keg of beer the keg fell on the foot of Petitioner causing a serious injury. (R.37).

e. The Applicant filed an Application for Hearing. (R.2).

f. The employer answered but died before trial. (R.7, 16,

36).

g. It was ultimately determined that the estate of the employer was insolvent and the Uninsured Employers' Fund was joined as a party. (R.36).

h. The Administrative Law Judge found that the injury did not arise out of and in the course of the Petitioner's employment. (R.38).

i. The Industrial Commission affirmed the finding and ruling of the Administrative Law Judge. (R.52).

SUMMARY OF ARGUMENT

The conduct undertaken by the injured worker was intended to benefit the employer. Therefore the injured worker comes within the terms of Section 45 of the Workers Compensation Act and is entitled to coverage.

ARGUMENT

The Utah Workers Compensation Act, Section 35-1-1 et seq, U.C.A. was amended drastically in 1988. Those amendments included a change in the language regarding compensability under Section 45 of the Act. Under the amended version a Claimant is required to show that the accident arose out of and in the course of employment. The prior language used the disjunctive "or" and was considered to be quite a liberal standard. (See M & K Corporation v. Industrial Commission, 189 P.2d 132 (1948 Ut.). Therefore, this Petitioner was required to prove both the arise and the course elements.

Argument I

THE INJURY AROSE OUT OF THE EMPLOYMENT RELATIONSHIP

The law regarding the "arising" component of Section 45 of the Workers Compensation Act has been long settled. The arising component is construed to refer to the origin or cause of the action. M & K Corporation v. Industrial Commission, 189 P.2d 132, 134 (1948 Ut.).

Professor Larson, The Law of Workmen's Compensation, Section 6.00 identifies five (5) different approaches to the causative interpretation of the "arising out of" component. As reflected by Professor Larson, the majority position is a requirement that the Claimant show the injury was caused by an increased risk to which the Claimant, as distinguished from the general public, is subjected by his employment.

The undisputed factual findings of the Administrative Law Judge and the Industrial Commission compel a finding that the Claimant's injury arose out of the employment relationship.

First, even the ALJ found that the Claimant on her own decided to ready a new keg of beer. Even though this conduct occurred after normal duty hours it can be anticipated that workers will sometimes perform conduct which benefits their employers even when they are not specifically asked. For example, an employee might drive by his place of employment during off duty evening hours and observe a fire or crime being committed. If the off duty employee decided to extinguish the fire or contact the police regarding the burglary there would be benefit to the employer. The question

becomes whether the employee risk level was increased because of the employment relationship and the benefit deriving to the employer.

It should also be clear that a patron of a bar would be completely out of line to make ready a keg for the bar. In fact, if this Claimant had been at another bar strictly as a patron, she would clearly not be within the employment relationship. However, the facts in the case at issue are quite to the contrary.

By the same token, if this Applicant had suffered an injury while playing pool (clearly not job related) she could not claim an employment relationship. However, the undisputed facts show that the Claimant was attempting to make ready a keg of beer (clearly a work related activity).

Argument II

THE INJURY AROSE DURING THE COURSE OF EMPLOYMENT

Course of Employment Law is well defined in Utah. In the case of Black v. McDonald's of Layton, 733 P.2d 154 (Ut. 1987) the Utah Supreme Court stated that "To be embraced within the ambit of "course of employment", the injury must be received while the employee is carrying on work which he is called upon to perform or doing some act incidental thereto." (Citations omitted). i.d. 156. The court went on to state: "it must occur within the period of employment, at a place or area where an employee may reasonably be, and while the employee is engaged in an activity at least incidental to her employment." (Citations omitted). "The activity will be considered incidental to the employee's employment if it

advances, directly or indirectly his employer's interests." The Administrative Law Judge and the Commission focused their analysis of "course of" on the entire period during which the Claimant was at the bar following her normal employment hours and found that the overall purpose was social.

The correct analysis requires the Court to analyze that exact point in time when the injury occurred. The injury occurred, not when the Claimant was socializing, drinking beer or playing pool, but when she was readying a keg of beer for tapping.

1. Had the Claimant been injured while socializing, playing pool, or drinking beer, a finding that the injury was not in the course of employment would be appropriate. However, the facts of this case show that the injury occurred during an attempt to benefit the employer. The Utah case law, eg. Black v. McDonald's of Layton, 733 P.2d 154 (Ut. 1987) requires the following analysis: was the employee performing work which he is called upon to perform? The findings of the Administrative Law Judge mandate a conclusion that the employment of the Claimant was bartender. It follows naturally therefrom that readying a keg of beer for tapping is part of a bartender's duty.

2. Did the injury occur during the period of employment? Before considering the second in the analysis it is important to note the case of J & W Janitorial v. Industrial Commission of Utah, 661 P.2d 949 (Ut. 1983) wherein the Utah Supreme Court stated at 950 that: "The fact that the fatal accident occurred after work hours does not necessarily render the death outside the coverage of

the compensation act. (Citation to Larson). The question is not "whether the employee was engaged in only work duties but whether the accident occurred as a result of his having engaged in "those things which it should reasonably be expected an employee would do in connection with those duties." Although the injury took place after work hours the falling of the keg onto the foot of the Applicant occurred during a period of time during which the employee was employed as a bartender. Although not specifically on duty at the exact moment of injury, the injury did occur during a time period during which the Applicant was employed by the bar.

3. Did the injury occur in an area where employees may reasonably be? It is clear that bartenders must deal with the cooler holding refill kegs.

4. Was there incidental benefit to the employer? Readying the keg for tapping was in furtherance of providing customers with beer to drink. This is clearly of benefit to the employer.

CONCLUSION

The injury suffered by the Claimant took place at least in part because the employee was trying to benefit her employer. Therefore the Court can and should conclude that the Applicant was placed at risk of injury by her job. Clearly the Applicant was more at risk than would be the average patron of the bar.

The conduct relevant herein was an attempt to benefit the employer. Therefore the factors with regard to the "course of" element militate in favor of coverage.

WHEREFORE, Applicant prays for the following relief:

1. For an Order finding as a matter of law that the injury herein arose out of and in the course of the employment of Claimant;

2. For an Order remanding this matter to the Industrial Commission for proceedings consistent with a finding of liability.

DATED this 25 day of October, 1992.

ROBERT BREEZE
Attorney for Applicant

CERTIFICATE OF SERVICE

I certify I mailed or hand delivered four copies of the foregoing Petitioner's brief to:

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on this 26 day of October, 1992.

ROBERT BREEZE
Attorney for Appellant

ADDENDUM

35-1-45. Compensation for industrial accidents to be paid.

Each employee mentioned in Section 35-1-43 who is injured and the dependents of each such employee who is killed, by accident arising out of and in the course of his employment, wherever such injury occurred, if the accident was not purposely self-inflicted, shall be paid compensation for loss sustained on account of the injury or death, and such amount for medical, nurse, and hospital services and medicines, and, in case of death, such amount of funeral expenses, as provided in this chapter. The responsibility for compensation and payment of medical, nursing, and hospital services and medicines, and funeral expenses provided under this chapter shall be on the employer and its insurance carrier and not on the employee.

35-1-65. Temporary disability — Amount of payments — State average weekly wage defined.

(1) In case of temporary disability, the employee shall receive 66⅔% of that employee's average weekly wages at the time of the injury so long as such disability is total, but not more than a maximum of 100% of the state average weekly wage at the time of the injury per week and not less than a minimum of $45 per week plus $5 for a dependent spouse and $5 for each dependent child under the age of 18 years, up to a maximum of four such dependent children, not to exceed the average weekly wage of the employee at the time of the injury, but not to exceed 100% of the state average weekly wage at the time of the injury per week. In no case shall such compensation benefits exceed 312 weeks at the rate of 100% of the state average weekly wage at the time of the injury over a period of eight years from the date of the injury.

In the event a light duty medical release is obtained prior to the employee reaching a fixed state of recovery, and when no such light duty employment is available to the employee from the employer, temporary disability benefits shall continue to be paid.

(2) The "state average weekly wage" as referred to in Chapters 1 and 2 of this title shall be determined by the commission as follows: on or before June 1 of each year, the total wages reported on contribution reports to the department of employment security under the commission for the preceding calendar year shall be divided by the average monthly number of insured workers determined by dividing the total insured workers reported for the preceding year by twelve. The average annual wage thus obtained shall be divided by 52, and the average weekly wage thus determined rounded to the nearest dollar. The state average weekly wage as so determined shall be used as the basis for computing the maximum compensation rate for injuries or disabilities arising from occupational disease which occurred during the twelve-month period commencing July 1 following the June