

1964

Mollerup Van Lines and Liberty Mutual Insurance Co. v. Industrial Commission of Utah et al : Plaintiffs' Brief

Utah Supreme Court

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OCT 14 1964

IN THE SUPREME COURT
of the
STATE OF UTAH

MOLLERUP VAN LINES,
a corporation, and
LIBERTY MUTUAL INSURANCE
COMPANY, a corporation,

Plaintiffs,

vs.

THE INDUSTRIAL COMMISSION
OF UTAH, TYVEN ADAMS,
WASATCH CONSTRUCTION
COMPANY and THE STATE
INSURANCE FUND,

Defendants.

Case No.
10101

UNIVERSITY OF UTAH

APR 29 1965

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PLAINTIFFS' BRIEF

APPEAL FROM AN ORDER OF THE INDUSTRIAL
COMMISSION OF UTAH

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Defendants.

Case No.
10101

PLAINTIFFS' BRIEF

NATURE OF THE CASE

This is an appeal from an order awarding injury benefits under the Workmen's Compensation Act.

DISPOSITION IN THE INDUSTRIAL COMMISSION

An order was entered by The Industrial Commission for the applicant and against Plaintiffs Mollerup Van Lines and Liberty Mutual Insurance Company and

dismissing the action against defendants Wasatch Construction Company and the State Insurance Fund, and after an application for rehearing was denied, this appeal followed.

RELIEF SOUGHT ON APPEAL

Plaintiffs Mollerup Van Lines and Liberty Mutual Insurance Company, herein called Mollerup and Liberty, seek reversal of the order as a matter of law and dismissal of the action against them.

STATEMENT OF FACTS

The applicant, Tyven Adams, suffered an industrial accident on April 8, 1958, during his employment with Mollerup. (R-72). While attempting to lift a truck wheel onto its axle (R-32), he slipped and something "popped" in his back, causing him to fall to the ground (R-32, 33). Little or no working time was lost as a result, but chiropractic treatments were authorized by the Industrial Commission (R-23, 69). Applicant's back continued to trouble him somewhat, but did not prevent his working (R-33) or other normal activities (R-24).

Based upon this accident, application for a hearing entitled: "Tyven Adams, Applicant, v. Liberty Mutual, Defendant, Claim No. IM 140-99" was made by the applicant to the Industrial Commission on July 13, 1960

(R-68). The case was referred to a Medical Advisory Board, which examined the applicant on January 28, 1961 (R-53) and upon its findings the Commission ordered a lump sum payment of \$374.50 to the applicant by Liberty, as insurer of Mollerup, as compensation for a "permanent disability amounting to 5% loss of bodily function" (R-52), which amount was paid on February 3, 1961, and accepted by the applicant.

Thereafter, on February 26, 1963, the applicant sought a hearing upon an application entitled "Tyven Adams, Applicant, v. The State Insurance Fund, Defendant, Claim No. 6064," based on a claimed industrial accident of October 27, 1962 while employed by Wasatch Construction Company (R-4). The applicant had been standing on the tongue of some heavy construction equipment, pulling on a cable, when the cable suddenly came loose. The applicant lost his balance and stepped back off the equipment into a hole, causing a "kink" in his back (R-15). The applicant continued to work at a less strenuous rate (R-19) until November 28, 1962, at which time he was terminated because of a cut in force and has not worked since (R-29).

The applicant had also sustained a back injury in June, 1960, while employed by Mick Iverson's Service Station as he was lifting a battery out from under the hood of a car (R-115). He suffered an immediate pain in his back for which he sought chiropractic treatment and

which subsequently forced him to seek lighter work (R-25).

On April 15, 1963, the hearing on Claim No. 6064 was held with the applicant present and the defendants Wasatch Construction Company and The State Insurance Fund represented (R-11). The Referee, upon discovery of the applicant's prior back injuries while employed by Mollerup and Mick Iverson, referred the matter to a Medical Advisory Panel, which examined the applicant and reported by letter on July 26, 1963, its conclusion that the applicant's "present condition represents a continuation of the injury of April 8, 1958, and the subsequent minor accidents have not been significant in the overall progress of his condition since that injury" (R-79).

Mollerup and Liberty were added as parties defendant to the applicant's Claim No. 6064 by order of the Commission dated September 5, 1963 (R-84), and another hearing on Claim No. 6064 was held November 13, 1963, at which time the Medical Panel Chairman, Dr. Boyd Holbrook, and the applicant were examined (R-89). Upon cross-examination, Dr. Holbrook conceded that the applicant suffered from pre-existing progressive degenerative changes in his back prior to the 1958 accident (R-103), that the applicant's condition was aggravated by each of the three subsequent accidents (R-105), and that it was difficult to say which of the accidents had greater "pushing down" effect (R-106).

By order of the Commission dated January 8, 1964, the defendants Wasatch Construction Company and The State Insurance Fund were dismissed from the proceedings and Mollerup and Liberty were directed to pay the applicant "temporary total disability from January 1, 1963 until the applicant is released by his attending physician" and they were further ordered to "proffer to the applicant the needed surgical treatment" (R-131).

A petition for rehearing was filed by Mollerup and Liberty within the time provided by law. The petition was denied February 6, 1964 (R-139).

ARGUMENT

POINT I

THE COMMISSION DID NOT INVOKE, NOR COULD IT HAVE INVOKED, ITS STATUTORY POWER OF CONTINUING JURISDICTION OF THE APPLICANT'S PRIOR CLAIM AGAINST THE PLAINTIFFS.

The Commission hearing of November 13, 1963 was based upon the applicant's Claim No. 6064 against Wasatch Construction Company and was not a continued litigation of the prior Claim No. IM 140-99, which had already been filed, settled, and closed. The record reveals the Commission's intent when Commissioner Wiesley was confronted with this question:

“Mr. Snow: Now I don’t think that is the law, and I see no basis for a reopening here. If that is what this is, although I confess I am not sure it is an attempt to reopen.

“Referee: It isn’t a reopening. It’s a further hearing.”

The Utah Workmen’s Compensation Act, Section 35-1-78, U.C.A., 1953, allows a reopening of a previously settled and concluded claim. It reads:

“The powers and jurisdiction of the commission over each case shall be continuing, and it may from time to time make such modification or change with respect to former findings, or orders with respect thereto, as in its opinion may be justified, provided, however, that records pertaining to cases, other than those of total permanent disability or where a claim has been filed as in 35-1-99, which have been closed and inactive for a period of 10 years, may be destroyed at the discretion of the commission.”

The Commissioner understood the power to invoke this jurisdictional section of this statute and noted the established procedure for doing so, but he expressly denied that Claim No. IM 140-99 was under consideration.

“Mr. Snow:

But when the Commission follows out the Medical Advisory Board by sending us notice of what the determination is, and what should be paid, and we pay it and the file is closed, that

constitutes, it seems to me, at the very least an acceptance by all parties, and a ratification of a non-statutory medical advisory board finding.

“Referee :

Yes. Now if an application was on file within the three-year limit, then the applicant could reopen that by filing an application for further and additional compensation, because of the continuing jurisdiction section of the statute. Which I can’t consider this procedure as an application for further and additional compensation under that case.

“Mr. Snow :

I can’t see how you could either. I agree. That is why I am wondering what I am doing here.” (R-128.)

It is obvious from the above recital that in order for Claim IM 140-99 to be reopened the applicant must file “an application for further and additional compensation” against the Plaintiffs and such was never accomplished in the instant case.

By reference to not having “issued any order” to reopen Claim IM 140-99, the Commissioner concedes the legal necessity of issuing some notice to the Plaintiffs that the Commission is reopening the formerly settled

claim. Such a requirement is discussed by this Court in *Spring Canyon Coal Co., et al. v. Industrial Commission of Utah*, 60 Utah 533, 210 P. 611 (1922). After quoting the Code section on continuing jurisdiction, this Court said at page 614:

“It is perhaps unnecessary to state that in order to invoke the jurisdiction of the Commission, under the section just quoted, due notice should be given to necessary parties, which notice should state the objective of the proceedings, together with the nature and character of the relief sought.”

The record shows that such notice was never issued to the Plaintiffs. Thus the hearing of November 13, 1963 was solely based upon the new Claim, No. 6064, and Plaintiffs were brought into that claim as defendants to the new action against Wasatch Construction Company.

Had there been an attempt to invoke the continuing jurisdiction of the Commission as to Claim No. IM 140-99, the Commission was without the legal power to do so under the facts of this case. The broad jurisdictional power given to the Industrial Commission under Section 35-1-78 does not give the Commission an unlimited or arbitrary power to ignore all principles of res judicata and commence to re-litigate claims, such as Claim IM 140-99, which have once been heard, settled, and closed.

On the contrary, law determined by this Court has confined the Commission's power thereunder to cases where there is a showing of some change or new development which could not have been anticipated by the Commission at the first hearing of the claim and which is not caused by subsequent independent events.

Aetna Life Ins. Co., et al. v. Industrial Commission of Utah, et al., 73 Utah 366, 274 P. 139 (1929), explained the limits put upon the statute at p. 145:

"The Utah Statute does not expressly state that good cause must be shown after an award is once made to authorize jurisdiction by the Commission as does the California statute, but we are of the opinion, as held in the case of *Salt Lake v. Industrial Commission*, supra, that good cause must be shown, especially if the previous award purports to be final."

Salt Lake City v. Industrial Commission, 61 Utah 514, 215 P. 1047 (1923), explains the "good cause" referred to in the *Aetna* case at p. 1048:

"It certainly was not intended by that section that the Commission might resume jurisdiction of a case that had been once regularly determined without some change or new development in the injury complained of not known to the parties when the former award was made.

* * *

“ The Court is of the opinion that the foregoing is a reasonable and logical interpretation of . . . (the Section), and that any other interpretation would invite endless litigation in this class of cases.”

Continental Casualty Co., et al. v. Industrial Commission of Utah et al., 70 Utah 354, 260 P. 279 (1927) explains at p. 283 that:

“There must be a changed condition or a development of some kind to justify a modification of the previous award either in favor of or against the applicant.”

The requirements, thus set out, were restated in *Carter v. Industrial Commission*, 76 Utah 520, 290 P. 776 (1930) by referring to *Brklacic v. Industrial Commission*, 63 Utah 582, 227 P. 1036 and numerous subsequent cases have restated and confirmed the rule.

Even when the Commission finds cause for assuming its continuing jurisdiction, *Johnson v. Industrial Commission of Utah*, 93 Utah 493, 73 P. 2d 1308 (1937) at p. 1309 thus restricts the scope of the matters considered:

“Notwithstanding the continuing jurisdiction of the Commission over the case, the award as made was a final adjudication as to the matters therein decided including the issue as to the plaintiff's condition then existing.”

It is evident upon the record in the instant case that Claim No. IM 140-99 determined that the applicant's injury as of January 28, 1961, amounted to a "permanent disability of 5%" (R-53). It is further evident that liability for said disability was paid to and accepted by the applicant, thus closing that claim (R-49).

To reopen that claim, the applicant was obligated to prove some change or new development in his case which was not known by the Commission on January 30, 1961, when its Order was made. The hearing on November 13, 1963 neither was sought by the applicant for such purpose nor, as will be shown by argument under Point III, was any change or new development, referable to the 1958 accident, proven.

POINT II

THE INDUSTRIAL COMMISSION HAD NO JURISDICTION OVER THE PLAINTIFFS UNDER THE CLAIM MADE BY THE APPLICANT.

Having determined that the new and independent Claim No. 6064, not Claim No. IM 140-99, was under consideration at the hearing on November 13, 1963, it is obvious that the Commission could not have jurisdiction over the Appellants. The doctrine of res judicata under Utah law bars the subsequent filing of a new claim based on a previous litigated and concluded claim in Workmen's

Compensation cases as well as any other type of legal action.

In *Spencer v. Industrial Commission of Utah, et al.*, 4 Utah 2d 185, 290 P. 2d 692 (1955), this Court explained the doctrine of res judicata as applied to Workmen's Compensation cases. After discussing the effect of Section 35-1-78 (continuing jurisdiction) on the doctrine, this Court said at p. 694:

“It is not to be assumed from the above that an applicant may reapply to the Commission for a new determination upon the same facts merely because he may be dissatisfied with its former order, any more than it means that the defendant in such a proceeding could do so. The act provides that a party aggrieved by the action of the Commission may apply for a rehearing or seek a review in this Court within the time prescribed by law. This is the exclusive means of securing a review of determination made on any given state of facts. If this is not done, it is inconceivable that the Legislature intended, or that the law should be, that the party could file a new application and have the Commission redetermine his case on identical facts.”

The general rule as to res judicata as applied to Workmen's Compensation cases is set out in 99 C.J.S. 200, 204 (Workmen's Compensation, Sections 853 and 854):

“Except as provided otherwise by statute, a final award or judgment in a compensation case is like a final judgment in any other case, and, subject to the right of appeal, is conclusive as to all matters which may be adjudicable, and all issues before the tribunal at the time of the entry of its decision . . .

“Statutes authorizing review or modification of an award or judgment or a change of condition, the reoccurrence of incapacity, or its aggravation, increase, diminution or termination do not affect the conclusiveness of the award or judgment in question as to matters of law or fact residing in the adjudication. In proceedings brought under such statutes the original or prior award or judgment is conclusive of all questions determined whether of law or of fact, or which might have been presented and determined . . .”

The applicant's only remedy as to Plaintiffs was, therefore, an application for modification of the Order entered in Claim No. IM 140-99.

POINT III

THE ORDER OF THE COMMISSION IS UNLAWFUL
BECAUSE ITS FINDINGS ARE ARBITRARY, CAPRICIOUS
AND CONTRARY TO THE UNCONTRADICTED EVIDENCE.

The applicant may not recover from the Plaintiffs unless there is some evidence that the 1958 accident, uninterrupted by an independent intervening cause, produced his present condition. The compensability of an aggravation or "lighting up" of a prior disease or infirmity caused by an industrial accident is established by a long line of cases decided by this Court. See *Makoff Company v. Industrial Commission*, 13 Utah 2d 23, 368 P. 2d 70 (1962).

In *Spencer v. Industrial Commission, et al.*, 87 Utah 336, 40 P. 2 188 (1935), this Court explained the reason for the rule at page 197:

"A claim for compensation may not be denied because a new injury 'lighted up, reopened or revived an existing infirmity of the injured employee.' No standard of health or physical fitness for an employment is prescribed by our statute to entitle an employee to compensation for an injury arising by accident out of or in the course of his employment. Apparently, when one enters an employment, the employer takes the employee as he is."

The criteria set up in these cases for determining the aggravation is whether the employee's ability to perform the same type of work has been reduced by the accident. In *Tintic Milling Co., et al. v. Industrial Commission of Utah, et al.*, 60 Utah 14, 206 P. 278, 23 A.L.R. 325 (1922), this Court pointed out the change in the

employee's capacity to continue his regular employment and stated at page 279:

"If the plaintiff's contention is true, that the injury of which Snyder complains is but a continuation of a disease previously existing, unaggravated or unaccelerated by any fortuitous event which may be denominated an accident, then, in view of the statute quoted, the injury is not compensable and the award made by the Commission should be vacated, annulled and set aside. On the other hand, if the findings of the Commission are true, that . . . (the accident) . . . was either the direct cause of the tuberculosis or lighted up a dormant condition which existed previously, but which had not incapacitated him for performing his duties as an employee, then the award made by the Commission should not be disturbed"

All evidence in the instant case conclusively shows that the applicant's disability was immediately increased by both the Iverson and Wasatch accidents. After the Mollerup accident, his back didn't give him . . . "any trouble to speak of . . ." and as he states . . . "I was able to do anything I wanted to." (R-36) He continued his same work for Mollerup into 1959 (R-108) at which time he accepted other equally strenuous work at Kennecott (R-108), Flaming Gorge Dam (R-110) and Mick Iverson's service station (R-110, 111). But the accident at Iverson's caused an immediate change in working capacity:

“Q. Would you say that you have had trouble off and on ever since that time?

“A. Yes. A little. But it hasn't been anything serious, or anything to bother me much, until after the Mick Iverson deal.” (R-24)

and resulted in forcing the applicant to see doctors and subsequently take lighter work:

“Q. Now from that time on, the Iverson incident, what was your ability to work? Were you able to do most anything?

“A. No. That's the reason I took that service station. Was to try to get off where it was easy. Where I could take my own — Well, didn't have to hit the ball, like you do on the job.

“Q. So following the Iverson injury you took what you thought would be lighter work, by running your own service station; is that correct?

“A. Yes.

“Q. Did you receive any treatment following the Iverson injury?

“A. Oh, yes. That is when I went to the chiropractor up in the avenues here . . . I went to him as long as the insurance fund would let

me, and then I visited doctors — Dr. Argyle, and Dr. Evans, and Dr. Clegg, and Dr. Ed-dington, all of the rest of them — since, trying to get relief.” (R-25)

The record also shows a marked change in the applicant's condition following the Wasatch accident. He immediately contacted a doctor for pain pills (R-17) and was allowed to work “in a slow, easy manner” (R-41) until November 28, 1962, since which time he has been unable to work at all (R-43, 45).

The medical evidence compels a finding that the Iverson and Wasatch accidents aggravated the applicant's prior condition. The testimony of Dr. Boyd Holbrook upon cross-examination established:

(a) That the applicant suffered from a back condition prior to 1958 which was progressive and degerative in nature (R-103),

(b) That each of the three accidents caused a worsening of that condition (R-105), and

(c) That medically it is difficult to say which of the accidents had the greatest adverse effect (R-106).

These conclusions stand uncontradicted by other medical evidence and, as this Court held in *Oberg v. Sanders et al.*, 111 Utah 507, 184 P. 2d 229, (1947) on page 235,

“the testimony of a witness is no stronger than where it is left on cross-examination.” No evidence, medical or otherwise, was presented to establish a casual relationship between the 1958 Mollerup accident and the applicant’s present condition.

The Commission seemingly based its Order upon the conclusion stated in the Medical Panel report of July 7, 1963. Section 35-1-77, U.C.A., 1953, makes it the duty of the Commission to refer the “medical aspects of the case” to the Medical Panel which is to make an examination of the injured and report its findings. The duty of the Commission is then to consider the medical evidence obtained from the Panel together with all other evidence presented to it in arriving at a finding which will, under the law, support an Order. The statute does not permit the Medical Panel to assume the Commission’s duty of determining the liability of the parties according to the law.

The Commission’s Order was based upon mere conjecture. It was arbitrary, capricious, and not based upon evidence. This Court held in *Continental Casualty Co., et al. v. Industrial Commission of Utah*, 75 Utah 220, 284 P. 313 (1929) at page 314 that:

“An award cannot rest upon mere conjecture or possibility.”

In *Makoff Company v. Industrial Commission of Utah, et al., supra*, Richard Howell suffered from a back condition dating from an accident in 1955. In 1957, Mr. Howell slipped on stairs while employed by Makoff's, causing an aggravation of the prior condition. In 1960, he again injured his back while putting on his trousers. This Court affirmed Mr. Howell's award against Makoff under the aggravation rule and pointed out that it was immaterial who his employer was in 1955, as this would not alter Makoff's liability for the aggravation. The appellants here seek a consistent ruling.

CONCLUSION

The Commission never intended that its hearing on this case involve the prior claim made by the applicant against Liberty Mutual in 1960. That claim was determined and closed and no change or new development was shown to require the granting of further compensation thereunder.

To bring the Plaintiffs into a new action filed against another employer years later is directly against the doctrine of *res judicata* and the provisions of the Workmen's Compensation Act providing for a modification of prior Orders.

If the Commission's Order be upheld, in this case, the aggravation rule will be denied its application and

the employer who chanced to be involved in the first of a series of aggravations of a degenerative condition, will be burdened with a responsibility which should rightfully be shared by all employers in proportion to the increase in disability caused by their accidents. Such an Order cannot be permitted to stand.

Respectfully submitted,

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