

1964

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

Utah Supreme Court

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

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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.*

BRIEF OF DEFENDANTS, INDUSTRIAL COMMISSION OF UTAH AND TYVEN ADAMS

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

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

vs.

THE INDUSTRIAL COMMISSION OF UTAH, TYVEN ADAMS, WASHINGTON CONSTRUCTION COMPANY and THE STATE INSURANCE FUND,  
*Defendants.*

Case No.  
10101

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BRIEF OF DEFENDANTS, INDUSTRIAL COMMISSION OF UTAH AND TYVEN ADAMS

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STATEMENT OF FACTS

The facts are generally as set forth in the Statement of Facts presented by the Plaintiffs. In addition thereto, it should be pointed out clearly that the Plaintiffs, Mollerup and Liberty, participated fully in the proceedings from the time of the order of the Commission,

September 5, 1963, through the hearing, November 13, 1963, (wherein their counsel examined the witnesses, including the medical witness and the claimant) and filed Petition for Rehearing (R. 134-138). The rights of said Plaintiff were fully considered by the Commission, and every opportunity afforded to the Plaintiffs for participation; hence, no prejudice to their rights appears in the record. Defendants, Wasatch Construction Company and State Insurance Fund have been parties to and participated in all stages of the proceeding.

## ARGUMENT

### POINT I

INJURED EMPLOYEE REQUIRES MEDICAL CARE  
AND HAS NO PREFERENCE AS TO WHICH EMPLOYER  
IS HELD RESPONSIBLE.

We have before the Commission and now before the Court both employers and the insurance carriers of both employers who might be responsible for the disability and required surgical care now needed by Mr. Adams, The record reflects that the first employer, Wasatch and the State Insurance Fund, were found not to be responsible, and then the original employer, Mollerup and its carrier, Liberty, were made necessary parties and given notice of the proceeding in the same case. Both employers and

their carriers, through counsel, participated in the second hearing on the matter prior to the order of the Commission which is now being appealed. Both employers, through counsel, had an opportunity to present any evidence desired and to cross-examine any witnesses.

Now we have the situation where Mr. Adams is totally, although we hope temporarily, disabled from carrying on his occupation as a mechanic and is waiting surgical repair on his back. He is without funds to provide for his own medical care; and until one or the other of the employers or their insurance carrier accept the responsibility or have it imposed upon them by the Commission and this Court, this disability will continue and the surgical repair will be delayed. It is immaterial to Mr. Adams which of the employers pay for the back injury which he has suffered from a compensable industrial accident in the course of his employment. But, certainly, the dispute between these two employers and insurance carriers should not be so resolved as to leave Mr. Adams without compensation for his disability and required surgical repair. Mr. Adams has gone along with the determinations of the Commission; and as both employers and their insurance carriers participated in the final hearing and were served with the order of the Commission, no occasion arose for Mr. Adams to file exceptions to the order of the Commission or to petition for rehearing or redetermination as he fully expected that the employer and its carrier would pay the obligation as required by the Commission. Mollerup and Liberty have

refused to do so. Wasatch and the State Fund have denied liability on the premise that the disability resulted from the original injury while Mr. Adams was employed by Mollerup.

We respectfully urge the Court not to leave Mr. Adams on the horns of the dilemma and without remedy, and suggest that the decision of the Court should, with finality, spell out the responsibility of one or the other of these employers so that this disabled employee will have the protection entitled by the legislature of Utah.

## POINT II

EITHER THE ORIGINAL INJURY OR THE SUBSEQUENT "AGGRAVATION" CAUSED CLAIMANT'S PRESENT DISABILITY.

The various factual bases of the present condition of Mr. Adams are related in the report of the Medical Panel (R. 76-79).

Some further attention may well be directed to the "aggravation" on October 27, 1962, while an employee of Wasatch Construction. Here, while changing a cable, he fell from a scraper, twisting his leg and back (see surgical report, R. 2). Testimony relating to the details is found in the transcript (R. 15-19). He stepped off the tongue of the scraper and "it give me a kink" — referred



to pain in his lower back — “very sharp pain” . . . “in my back and hip” . . . “it’s started to extending down my leg now” — called Dr. Eddington — “Well, I’ve had trouble with my back ever since that.”

Mr. Adams must have surgical repair. If the 1962 industrial accident is an “aggravation” of the type contemplated by the *Makoff v. Industrial Commission* case, 13 Utah (2) 23, 368 P. (2d) 70, then the Commission should be directed to reinstate the claim as to the Wasatch and the State Fund. They have participated in the proceedings at all stages and are parties here. They are the ones who urged the Commission to relate the causal connection back to the Mollerup employment injury in 1958.

In the Mollerup case this Court rejected the Oklahoma rule and held that (p. 72) “a subsequent aggravation or ‘lighting up’ of a previous injury is compensable if it is demonstrated that there was a causal relation between the two.” The “independent, intervening cause” theory of putting on the injured employee’s trousers was rejected. Dr. Holbrook testified in part that the 1962 accident at Wasatch Construction would have a worsening effect “also would push him down” (R. 105) and that it is medically difficult to state which accident “had a greater pushing down effect.”

Whether it was the original Mollerup accidental industrial injury or the later Wasatch accidental industrial injury should be determined by the Commission and Court. Both arose out of and in the course of his employment. Both injured his back. Each has contributed to the present serious disability and required surgical procedure.

These Defendants believe and assert that the findings of the medical panel and of the Commission are correct, that the basic cause of the disability is the original industrial accident while in the employ of Mollerup, yet, by asserting that, we do not wish to preclude recovery from the last employer, Wasatch Construction should this Court reverse the finding of the Commission as to the cause; nor should we wish to preclude recovery from Wasatch should this Court find that for some technical procedural reason the Commission erred in not opening the original file No. IM 140-99. It is of critical importance to Mr. Adams that he be compensated for the lost time and that the surgical procedure be completed at the expense of one or the other of these two employers and their insurance carriers.

It has long been the practice of the Commission and this Court in workmen's compensation cases to look to the circumstances of the claim rather than hyper-technical niceties as to the procedure in filing claims and processing the issues. So long as all parties who may be af-

affected by the determination are before the Commission and before this Court, justice can be accomplished by making an award for the benefit of the injured employee commensurate with the loss of employment and medical expenses required.

### POINT III

THE COMMISSION'S STATUTORY POWER OF CONTINUING JURISDICTION WAS, IN FACT, INVOKED AS TO PLAINTIFFS.

The Legislature of Utah in Section 35-1-78, Utah Code Annotated, 1953, provided, "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." This Section was adopted so as to protect workmen in situations just such as has developed in this particular case. Mr. Adams' original injury in April of 1958 has now matured to the point where, in the opinion of the medical panel, "This man's present condition represents a continuation of the injury of April 9, 1958, and the subsequent minor accidents have not been significant in the over-all progress of his condition since that injury." (R. 79)

Were it not for the legislative foresight providing the continuing jurisdiction to the Commission, Mr. Adams would be left to his own devices to provide medical treatment and to bear the expense of his extended total temporary disability without income. The public policy enunciated by the legislature and adopted and followed by the Commission dictates a program of retained jurisdiction so as to make awards against the employer and its insurance carrier and in favor of the injured employee at later dates when the facts develop as here.

Apparently, the *argument* of the Plaintiffs' brief is that the Commission should have gone through the formality of re-opening a particular file bearing a Claim No. IM 140-99, and that the failure of the Commission to open that particular file number is fatal to the rights of this injured employee.

At no place in the brief has there been any showing of any prejudice whatsoever to the employer or its insurance carrier as result of the hearing and adjudication of the injured employee's problem in Claim No. 6064 instead of calling it Claim No. IM 140-99. The record shows that the prior order in Claim No. IM 140-99 was in January of 1961, and payment was made in February of 1961. In this claim and case the Plaintiffs were ordered made parties to the proceeding by order dated September 5, 1963 (R. 84). At that same time, the Commission ordered that the matter be set for further hearing. This was in

pursuance of the recommended findings and conclusions of Referee Robert J. Shaughnessy (R. 84). Promptly thereafter notice was given of the further hearing which was set for November 13, 1963, (R. 87) and on October 25, 1963, Mollerup Van Lines and Liberty Mutual Insurance Company made a formal appearance in the proceeding (R. 88).

The report of the hearing as reflected by the transcript (R. 89-130) clearly reflects the active and vigorous participation of the plaintiffs, Mollerup and Liberty, in the matter wherein full opportunity was afforded them to examine witnesses and, if desired, present evidence.

Much hope and store is placed by the Plaintiffs in the expression of the Referee in this matter as reflected in the transcript (R. 126-127) wherein Mr. Snow raised the question of whether or not the continuing jurisdiction of the statute comes into play and allows the Commission to re-open a matter where there has been a disability rating made and accepted. Then he made reference to the intervening injuries and said, "And if they hurt him while he is on the job, they should pay for it. That is the position we are asserting. Not a statutory limitations issue." Then the Referee stated that if the Mollerup case is re-opened, it would be that case we should hear if we are not barred by the statutory limitations to re-open it.

## POINT IV

THE ACTIVE PARTICIPATION OF PLAINTIFFS IN THIS CASE ESTOPS THEM FROM ASSERTING ABSENCE OF JURISDICTION AND BAR OF THE STATUTE OF LIMITATIONS.

The three-year period within which to file a formal application to re-open and reconsider the prior award in Case No. IM 140-99 would have matured between the time of the hearing by the Commission and its order on January 8, 1964, and the time of the Petition for Re-hearing which was filed on February 6. Apparently it is the theory of the Plaintiffs that three years from the order of January 31, 1961 and the payment, February 3, 1961, is the maximum time within which to present and file a request for further hearing and consideration of the present condition of the claimant, Tyven Adams, and for the determination of liability of the Plaintiff employer and its insurance carrier. By order of the Commission on January 8, 1964, it recites the earlier hearing when Mollerup and its carrier were not parties and the subsequent hearing in November 1963 when both employers and both of their insurance carriers were present and participated and then discussed the issues and concluded, "Based on the foregoing findings that applicant's present condition is a result of the injury of April 9, 1958," the claim against Wasatch Construction Company

was dismissed and the Plaintiffs herein, Mollerup and Liberty, were ordered to pay the temporary total disability from January 1, 1963.

It would have been a unique and futile requirement to say that in face of such findings and orders by the Commission that Mr. Adams, the injured employee, was duty bound to run back to the Commission and file a formal request for re-opening in the original case Claim No. IM 140-99. The parties had participated, the Commission had directed the award, and, although the file bore a different clerical number, no other or additional parties would have been present or participated, nor could there have been other further or different evidence presented, so far as the record shows, than such as was presented at the actual hearing in November. Plaintiffs do not contend that they have been denied the right of presenting evidence nor denied the right of examination or cross-examination by this procedure, but assert that the Commission "did not invoke, nor could it have invoked, the statutory power of continuing jurisdiction of the applicant's prior claims against the plaintiffs."

If the Commission omitted the procedural clerical detail of numbering the case to correspond with the prior claim number, it is the only omission that appears in the record. With definitive certainty the Commission related the present disability to the prior injury when Mr. Adams was employed by Mollerup, and such injury was found

to be the cause of the present disability and required the medical treatment and the payment for total temporary disability. This finding and determination is fully confirmed by the medical panel and no contrary medical or other evidence was adduced. The mere fact of minor, subsequent, and perhaps slightly aggravating, injuries do not rob the Commission of its continuing right of jurisdiction nor throw the employee into the stream of life without the protection of workmen's compensation under the statutes of Utah.

#### POINT V

THE ORDER OF THE COMMISSION IS LAWFUL AND IS FULLY SUSTAINED BY EVIDENCE.

Not only did the the Commission have Mr. Adams before it on two occasions wherein he was examined relative to the nature of the original injury and his subsequent treatments and subsequent employment, but, also, it had the report of the medical panel, consisting of doctors Boyd G. Hollbrook, S. W. Allred and L. N. Ossmond, and it had the testimony of the Chairman of the said panel, Dr Boyd G. Hollbrook. In the brief of the Plaintiffs, Mollerup and Liberty, quotes are included concerning the other accidents and the cases of *Continental Casualty Co., et al. v. Industrial Commission of Utah*, 75 Utah 220, 284 P. 313, and *Makoff v. Industrial Commission of Utah*, *supra*, are cited, apparently, to support



the position that an award cannot rest upon mere conjecture or possibility and that a subsequent aggravation of a prior condition makes the last employer liable. We have referred to the definite factual determination of the panel that Mr. Adams' present condition represents a continuation of the injury of April 9, 1958, and the subsequent minor accidents have not been significant in the over-all progress of his condition since that injury (R. 79). Let us also direct your attention to (R. 101-102) . .

“BY MR. PUGSLEY:

Q. Dr. Holbrook, your panel was aware of the 1958 and the 1960 injuries as well as the 1962 injury at the time of your examination of Mr. Adams, was it not?

A. Yes.

Q. And you were also aware of this apparent arthritic spurring that showed in the later X-rays, when you made the examination?

A. Yes.

Q. Now notwithstanding that awareness etc., the conclusions that are shown on the last page of the panel's report, particularly No. 1: 'This man's present condition represents a continuation of the injury of April 9, 1958,' was made by you?

A. That's correct.

Q. You referred to: "That subsequent minor accidents have not been significant." Was that the conclusion of all of the participants in the panel?

A. It was."

Certainly, these skilled members of the medical panel, all of whom are experts in this particular field, had fully weighed the possibility of subsequent or intervening causes before making their determination; and the chairman affirmed that in his testimony. Naturally, as people advance in age (Mr. Adams is not an old man—44 years of age) minor changes in the bone and muscle structure naturally occur. However, the obvious and compelling reason for his present disability was the back injury suffered in 1958, which has flared up in the ordinary and normal course of life and which, though treated in 1958, was never cured. Now, as reflected by the record, surgical procedures for a spinal disc fusion appears to be imperative as the man can no longer work in his trade as a mechanic without such corrective steps. The Commission observed condition of Mr. Adams in his personal appearance, his gait, heard his testimony, and had the confirming testimony of the panel's chairman to reinforce its determination. It cannot be said that the conclusions and order of the Commission were arbitrary or capricious.

## POINT VI

THE COMMISSION HAD AUTHORITY TO RESUME JURISDICTION AS CLAIMANTS PRESENT CONDITION REQUIRING SURGICAL REPAIR IS A CHANGE AND NEW DEVELOPMENT.

There appears to be no dispute but that Mr. Adams back was severely injured in 1958 while an employee of Mollerup. He was in the act of removing a heavy wheel and tire when the injury was suffered; and since that time, he has had some difficulties. The determination and settlement accomplished in January of 1961 in Case No. IM 140-99 by the payment of \$374.50 does not negative the right of the Commission to make subsequent modifications. We agree that had nothing further developed and had there been no change in the condition of Mr. Adams, then he should not be permitted to have a further award as has now been made by the Commission. However, definite changes have occurred in his condition. It is now impossible for him to work at his trade in mechanical operations, and it becomes necessary that surgical procedures to be carried forward for the repair of the herniated disc in his back. Such was not necessary in 1961 when the settlement was made but is now essential.

The theory of a grant of further hearings for additional compensation is that the Commission under Section 35-1-7S, U.C.A. 1953, may determine that either the

original award was inadequate or that the disability of the employee, on account of his injury, has continued and then additional awards of compensation may be made on the ground of changes or that the prior award was inadequate. *Carter v. Industrial Commission*, 76 Utah 520, 290 Pac. 776, held that the permitting or allowing an applicant to present additional evidence and the consideration of issues such as have been raised in this case is a matter of discretion with the Commission; and when such has been exercised in good faith and notice given to all parties, with a full opportunity to be heard, this Court has consistently sustained the action of the Commission.

## CONCLUSION

The injured employee has filed his claim and left the procedural aspects up to the Commission. Whether the first employer is held liable or the last employer is not material to Mr. Adams. We urge that the Court set down the rule so as to achieve justice and protect this injured employee.

Respectfully submitted,

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