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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

FILED

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

Clerk Supreme Court, Utah

Plaintiffs,

vs.

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

Defendants.

Case
No.
10101

BRIEF OF DEFENDANTS,
INDUSTRIAL COMMISSION OF UTAH,
WASATCH CONSTRUCTION COMPANY AND
THE STATE INSURANCE FUND

APR 29 1965

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BRIEF OF DEFENDANTS,
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WASATCH CONSTRUCTION COMPANY AND
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NATURE OF THE CASE

This case, which is presented pursuant to a writ of certiorari, calls for a review by the Supreme Court of the Industrial Commission's proceedings and Order for the purpose of determining whether the Industrial Commission exceeded its power and authority and whe-

ther or not the Findings of Fact and evidence introduced support the decision of the Commission.

DISPOSITION BEFORE THE INDUSTRIAL COMMISSION

The Defendant, Tyven Adams, made application for a hearing to settle an industrial claim which matter was thereafter heard by the Industrial Commission which entered its Order in favor of the Applicant and against Mollerup Van Lines and Liberty Mutual Insurance Company, the Plaintiffs herein. The Industrial Commission dismissed the action against the Wasatch Construction Company and the State Insurance Fund, two of the Defendants herein. Application for Rehearing was later denied and this matter is now on appeal to this Court.

DISPOSITION SOUGHT BY THESE DEFENDANTS

The Defendants, Wasatch Construction Company and The State Insurance Fund asks the Supreme Court to affirm the Order of the Industrial Commission (R. 131, 133) which ordered that the claim filed against Wasatch Construction Company and the State Insurance Fund be and the same is hereby dismissed.

STATEMENT OF FACTS

The Defendant, Tyven Adams, first sustained an injury to his back in 1958 while working for Mollerup Van Lines, at which time he was putting a wheel on a

truck (R-23, 24). While attempting to do this he slipped on "some oil or something" and "something just broke and snapped." He fell to the ground (R-32). Mr. Adams didn't lose much time from work, he stated: "I had just gotten married and I had to work." (R-23)

On July 13, 1960 he filed with the Industrial Commission in connection with the Mollerup claim, an Employee's Application for Hearing to Settle Industrial Accident Claim (R-68), Paragraph 2 of which reads:

"The parts of the body injured and subsequent results are: My back, and it has never been the same since. And I can't do my job efficiently. I was laid off the job because of it." (R-68).

Thereafter upon the recommendation of the medical advisory board, which examined the applicant on January 28, 1961, the Commission, by letter dated January 31, 1961, ordered a lump sum payment and gave as its opinion that Mr. Adams had suffered a "permanent partial disability amounting to 5% loss of bodily function." (R-52)

Following this event, the Defendant, Tyven Adams was employed at Mick's Service, which was a service station. While he was changing a battery on one of the ambulances for a mortuary he again hurt his back which required him to seek medical attention. (R-21, 22)

On October 27, 1962, he was employed by Wasatch Construction Company and while in the process of changing a cable on the unit on which he was working he lost his balance and stepped off the tongue of the

scraper which was about two or three feet above the ground. On that occasion he sustained a "kink" in his back. (R-15)

He thereafter filed an application for hearing with the Industrial Commission in connection with the Wasatch incident. A hearing was held on the claim against Wasatch Construction Company and the State Insurance Fund on April 15, 1963. (R-11) By direction of the Industrial Commission of Utah, the medical aspects of the claim were referred to a medical panel consisting of Dr. Boyd G. Holbrook, Chairman, Dr. S. W. Allred and Dr. L. N. Osmond. (R-75) The panel's report was submitted and on July 26, 1963 the panel reported as its conclusion:

"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 overall progress of his condition since that injury." (R-79)

The Plaintiffs herein, Mollerup Van Lines and Liberty Mutual Insurance Company were added as parties-defendant to the Applicant's Claim No. 6064 by the Commission's Order dated September 5, 1963. (R-84) A further hearing on the matter was held November 13, 1963, at which time Dr. Boyd Holbrook, Chairman of the medical panel, and the Applicant were examined. (R-89) The Commission's Order dated January 8, 1964 dismissed the claim as filed against Wasatch Construction Company and the State Insurance Fund and directed that,

"Mollerup Van Lines and Liberty Mutual Insurance Company pay to the Applicant, temporary total disability from January 1, 1963 until the Applicant is released by his attending physician." (R-131)

The Petition for Rehearing timely filed by Mollerup Van Lines and Liberty Mutual Insurance Company was denied on February 6, 1964. (R-139)

ARGUMENT

POINT I

THE COMMISSION PROPERLY INVOKED ITS STATUTORY POWER OF CONTINUING JURISDICTION.

It is contended by the Plaintiffs herein that the Commission was without jurisdiction to make them parties to the proceedings herein on the theory that prior claim No. IMI 40-99 which was the claim based upon the occurrence when Tyven Adams was injured while working for Mollerup Van Lines had been settled and closed.

Section 35-1-78, U.C.A., 1953 reads as follows:

"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 Plaintiffs herein contend that even though the above statute gives the Commission continuing jurisdiction to modify or change its former orders or findings, if justified, that in this case because the Applicant did not file an Application for Further and Additional Compensation the Commission was without legal power to enter its order against the Plaintiffs.

It is claimed that Plaintiffs herein were prejudiced by the fact that the Commission did not give them notice of the reopening of Claim No. IM 140-99. The case of *Spring Canyon Coal Co., et al. v. Industrial Commission of Utah*, 60 U. 533, 210 P. 611 is quoted as follows:

"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, notice should state the objective of the proceedings, together with the nature and character of the relief sought."

The Plaintiffs herein were given notice of the hearing, and of the purpose and objective of the hearing.

Upon the conclusion of the first hearing herein, a copy of the Order of the Commission (R-84) and the Recommended Findings of Fact and Conclusions of Law of the referee (R-85) were mailed to the Liberty Mutual Insurance Company. (R-84, 86) Further communication was had with Mr. Busby, care of Liberty Mutual, 68 South Main Street, Salt Lake City, Utah, by Harry D.

Pugsley, attorney for Tyven B. Adams by a copy of his letter dated September 20, 1963 addressed to the Industrial Commission of Utah. This letter was dated some month and a half prior to the date of the second hearing which was held on November 13, 1963. It would appear that regardless of a technicality of the failure of the Applicant to file an application for additional or further compensation in the original Mollerup case, that the Plaintiffs herein cannot be heard to say that they did not have actual knowledge of the proceedings in which the earlier Mollerup claim was to be considered by the Commission. Plaintiff was present and participated in the hearing. Ample opportunity was given for plaintiff to defend the action.

In connection with Claim No. IM 140-99, Tyven Adams vs. Liberty Mutual and Mollerup Van Lines, it should be noted that Applicant Adams filed an Employees Application for Hearing to Settle Industrial Accident Claim with the Commission on July 13, 1963. The filing of the application gave the Industrial Commission continuing jurisdiction to again consider the claim when there was some change or new development since the original hearing, not the result of a new independent occurrence. Such was the situation here, where the commission found that there had been a change in and new development directly chargeable to the original injury which occurred while Applicant was working for Mollerup Van Lines.

Section 35-1-100, U.C.A., 1953, provides for the continuing jurisdiction of the Commission to make an

award "when the injury becomes apparent." It provides as follows:

"Whenever an employee sustains an accident arising out of or in the course of his employment it shall be mandatory that the employee file with the commission in writing notice of such accident with a copy to the employer; if such notice is so filed within three years of the time of the accident the commission shall obtain jurisdiction to make its award when the injury becomes apparent."

It is incumbent upon the Commission to ascertain the rights of the parties within the meaning and spirit of the Workman's Compensation Act. It is not bound by formal rules of procedure. Section 35-1-88, U.C.A., 1953 provides as follows:

"The commission shall not be bound by the usual common law or statutory rules of evidence, or by any technical or formal rules of procedure, other than as herein provided; but may make its investigations in such manner as in its judgment is best calculated to ascertain the substantial rights of the parties and to carry out justly the spirit of this title."

We believe that the Commission proceeded within the spirit and concept of the act in this matter.

Although a claim for additional compensation was filed in *Barber Asphalt Corporation vs. Industrial Commission*, 103 U. 371, 135 P.2d. 266, the following language is found at page 270 Pacific, which is helpful in explaining the power of the Commission to reopen a case and

award additional compensation in those cases in which there has been some new development:

“This court has frequently held that a case may be reopened by the Commission if there has been a change of condition of the injured workman or if there has been some new development which shows the former award to be either inadequate or excessive if an injured part fails to heal as had been expected at the time the award was made, such fact is a “new development” so as to give the Commission jurisdiction to entertain an application for additional compensation.”

The fact that there was a small amount of permanent partial disability paid originally in the Mollerup case does not preclude the Commission from again considering the claim in the light of new and changed developments.

POINT II

THE FINDINGS AND ORDER OF THE INDUSTRIAL COMMISSION ARE BASED UPON SUFFICIENT EVIDENCE AND SHOULD NOT BE OVERRULED.

It has been said by the Supreme Court in numerous decisions that pursuant to Section 35-1-84, U.C.A., 1953 that only if the Industrial Commission arbitrarily disregards competent, uncontradicted evidence will the decision of the Commission be reversed.

In *Kent vs. Industrial Commission*, 89 U. 381, 57 P.2d. 724 at 385 U. the Court said,

“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 disregard the evidence or unreasonably refused to believe such evidence.”

The Supreme Court held in *Sutton, et al. vs. Industrial Commission*, 9 U.2d 339, 344 P.530, that there was no basis on which the Commission’s action could be regarded as capricious, arbitrary or unreasonable when there was substantial credible evidence to sustain the findings of the Commission.

In *Burton vs. Industrial Commission*, 13 U. 2d. 553, 374 P.2d. 439, this Court said at 554 U.,

“In order to preserve the findings and order made Plaintiff must show that there is credible, uncontradicted evidence in her favor that the Commission’s refusal to so find was capricious and arbitrary.”

In the matter now before this Court the Commission had substantial, uncontradicted testimony on which to make and enter its findings that the injuries sustained by the Applicant, Tyven Adams, while working for Mollerup Van Lines was the cause of his back difficulty.

Pursuant to the provisions of Section 35-1-77, U.C.A., 1953, the medical aspects of this claim were assigned to a medical panel consisting of Dr. Boyd G. Holbrook, Chairman, Dr. S. W. Allred, Dr. L. N. Osmond (R-74).

The above mentioned section of our code provides in part as follows:

“Upon the filing of a claim for compensation for injury by accident or for death, arising out of the case to a medical panel appointed by the employer or insurance carrier denies liability, the Commission shall refer the medical aspects of the case to a medical panel appointed by the Commission . . . The medical panel shall make such study . . . as it may determine and thereafter make a report in writing to the Commission . . . If objections to such report are filed it shall be the duty of the Commission to set the case for hearing, and at such hearing any party so desiring may request the Commission to have the medical panel or any of its members present at the hearing for examination and cross-examination. Upon such hearing the written report of the panel may be considered as an exhibit but shall not be considered as evidence in the case except insofar as it is sustained by the testimony admitted.”

In accordance with the provisions of the statute above quoted, Dr. Boyd G. Holbrook testified at the second hearing. He was shown the medical panel report by the Referee, which he identified. He testified that he was still of the same opinion as that contained in the report. (R-92). On cross-examination Dr. Holbrook testified as follows: (R-93)

“Q. Now I'll ask you if the panel considered any incident that this man had, other than the claimed injury of April 8, 1958 or the injury that is described in the report as the injury at Mick

Iverson's? Did you consider anything other than those two claimed incidents?

A. We considered all of the ones of which we had any knowledge which included the one in 1958, the one at Mick Iverson's, and the one he was getting down off his tractor or the tongue of it. I don't recall exactly what he was doing at that time. Those are the three injuries or incidents that we had any direct knowledge of, from the records and from interviewing him."

And again on cross-examination by Mr. Pugsley, attorney for Mr. Adams, Dr. Holbrook testified:

"Q. Dr. Holbrook, your panel was aware of the 1958 and 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." (R-101-102)

There have been but few cases come before the Court which have involved procedure under the provisions of the medical panel section. One such case is *Makoff Company vs. Industrial Commission*, 13 U. 2d. 23, 368 P.2d. 70 wherein the Commission referred the medical aspects of the claim to a medical panel. The report of the panel was filed and the applicant notified. He objected in writing. A hearing was held at which the applicant was the only witness. The facts are somewhat similar to the facts of the case now under consideration by this court. As stated by the Court at Page 24, Utah Report:

"He testified that at the time of the 1957 industrial accident, while working for Makoff, he suffered pain, had done only light work since, had worn a back brace continuously thereafter, and had asked his doctor to perform surgery on his back but was persuaded to wait. In January, 1960 in reaching for his trousers he stood up, suffered a severe pain and was hospitalized. He was operated on to relieve a herniated disc condition which was done on the advice of his physician. The last mentioned incident occurred within three years of the 1957 incident but not as to the 1955 injury."

The medical panel, in its report to the Commission, concluded that,

"1. The onset of this man's symptomatic back disease was with his injury 21 May, 1955.

2. The industrial injury of 6 July, 1957 was an episode in a progressive back disorder.

3. The episode requiring surgical treatment occurred at home and was not result of his industrial injury of July 6, 1957."

Under the provisions of the above mentioned act the panel report was accepted by the Commission except as to the third proposition which the Court held with the Commission was a legal conclusion. The decision in the *Makoff* case supports the Industrial Commission in giving consideration to the report of the medical panel in assisting it to come to a conclusion as to the compensability of claims which it is called upon to hear.

In the case now before the Court there were at least two and perhaps three incidents which occurred prior to the incident which occurred when applicant was employed by the Wasatch Construction Company. The last incident which occurred is similar to that which was found to have occurred in the *Makoff* case when this Court said at Page 25, Utah Reports:

"Excluding the panel's third statement to the effect that the trouser incident was not the result of the 1957 occurrence. It would seem to follow that if one is injured in 1957 attended by severe pain, which requires the wearing of a back brace, deterioration which might result in subsequent surgery and compensable disability in a direct causal connection with the 1957 incident, whether the disability occurred while in the course of employment on a stairway, while eating breakfast, reaching for one's pants, lying in

bed reading a book. A chronic appendix is no respecter of time, person, or place, nor is a herniated disc. We cannot attribute to pants-reaching (a most necessary daily domestic chore) any resemblance to an independent, intervening cause that could lead to a conclusion that there would be a divorcement from a progressive herniated disc deterioration that would amount to any *causa causans* other than the 1957 incident itself."

Tyven Adams did not sustain an accident when he stepped off the tongue of the equipment on which he was working. This was an ordinary usual thing for him to do. The Industrial Commission found that this was not an accident, nor was it the cause of his subsequent disability, but the cause was the earlier incident which started his back problem as was the situation in the Makoff case. The Commission had substantial medical testimony to support its finding.

One other Utah case in which the medical panel is mentioned is that of *Oscar Hackford, Plaintiff, vs. The Industrial Commission of Utah*, 14 U. 2d. 184, 230 P.2d. 927. In that case the commission appointed a panel to examine Hackford. At the hearing the panel chairman testified on behalf of the panel. The decision of the Industrial Commission was affirmed. The findings of the Industrial Commission were apparently based upon the report of the medical panel and the testimony of the Chairman of the panel which the Court felt was substantial enough evidence to permit it to sustain and affirm the decision of the Commission.

Apart from the report from the medical panel the Industrial Commission had substantial evidence based upon the testimony of the Applicant upon which to conclude that the difficulties of the Applicant came from his original injury while working for Mollerup Van Lines.

The Applicant was questioned by the referee as follows: (R-22, 23),

“Q. Now, had you ever had an injury before, or an accident to your back before the one while working for Iverson?

A. Yes.

Q. When was that?

A. That was in '58.

Q. And where were you working on that occasion?

A. Mollerup Van Lines.

Q. What happened then, Mr. Adams?

A. I hurt it real bad by working on a wheel. Putting a wheel, front wheel, on a truck. On one of the vans.

Q. Was it the same type of pain that you have now?

A. Yes. That was the first time I hurt it.”

The Applicant continued to have the trouble from that occasion and finally culminating in the necessity for an operation:

“Q. So the difficulty, if any, with your back is dated entirely then from 1958? From the incident at Mollerup Van Lines; is that right?

A. Yes.

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.

Q. Now, would the back bother you after you had worked extensively?

A. Well, I could do anything I have ever tried. Outside of a shovel. Running a pick and shovel.

Q. But that might bother you?

A. That would bother me. That would make my back ache, yes.

Q. Up until the time of the Mick Iverson accident; is that correct?

A. Yes.

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 kind of take my own — Well, didn't have to hit the ball, like you do on the job.

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

A. Yes.” (R-24, 25)

And again at (R-32) the following testimony is found relative to how applicant was injured while working for Mollerup.:

“Q. And what were you doing?

A. I was lifting, with a bar in the wheel. A piece of pipe that goes through the hub, and over the spindle.

Q. What were you trying to do?

A. I was trying to put it on the truck.

Q. You were trying to put the wheel on the truck?

A. On the truck, yes sir.

Q. And get it into the lug bolts; is that right?

A. Well, it was the hub and all, see. I had had the whole wheel off.

Q. I see. And then what happened?

A. Well, I was lifting, and I slipped in this oil or something. I don't know what happened. I slipped a little and twisted, and something just broke and snapped.

Q. Did you fall?

A. Yes. I slid over this way. (Demonstrating) I couldn't hold anything.

Q. Did you fall on the ground?

A. Yes, I went down.

Q. Did the truck wheel hit you?

A. No. The driver caught it.

Q. What part of your body did you strike at that time?

A. You mean my back?

Q. Yes.

A. Right here. (Indicating)

Q. Did you land on your buttocks?

A. No. I kind of fell over on my side, like this.

Q. On the side?

A. Yes.

Q. And you say it popped as you fell?

A. No. It popped before I fell.

Q. Well, as you were lifting on this wheel, it popped?

A. As I was lifting on the wheel it snapped."

There is ample evidence that the Applicant was having substantial difficulty with his back prior to the time he commenced working for Wasatch Construction Company. He opened his own station after working for Mick Iverson and he testified as follows:

"Q. By that I mean so far as your back was concerned?

A. No sir. I had to awful careful what I done. When I was underneath, I couldn't work on a hoist very long. If I had a brake job, or working underneath, where I was stooped back, I couldn't. I'd have to quit. I laid awake nights. I took from. — Well, I don't know. I have been

buying better than 200 aspirins a month, which was for relief, up until the time I got these from Dr. Eddington.

Q. So that all during the period that you were working in your own station, you were having continuing difficulty with your back?

A. Yes." (R-27)

Mr. Adams was apparently experiencing sufficient difficulty with his back prior to the time that he reported to work for Wasatch Construction Company that he found it necessary to see Dr. Eddington as the doctor reported that on October 15, 1962, Tyven W. Adams was in his office complaining of considerable pain across the lower back and down his legs. The doctor wrote a letter to the Industrial Commission dated October 22, 1962, suggesting that his case be reopened. (R-51). This visit to Dr. Eddington and the other doctor's letter occurred *before* the incident which occurred on October 27, 1962, while Adams was employed by Wasatch Construction Company.

CONCLUSION

We submit that the Industrial Commission properly conducted its proceedings in this matter, and from the evidence reached the correct conclusion. The decision and order of the Commission should be affirmed.

Respectfully submitted,

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