1965

Mollerup Van Lines and Liberty Mutual Insurance Co. v. Industrial Commission of Utah et al : Reply to Defendant Tyven Adams to Petition for Rehearing and Brief in Support Thereof

Utah Supreme Court

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John H. Snow; Phil L. Hansen; Charles Welch, Jr.; Attorneys for Defendants;

IN THE SUPREME COURT
of the
STATE OF UTAH

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

Plaintiff,

vs.

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

Defendants.

Case No. 10101

REPLY TO DEFENDANT TYVEN ADAMS TO PETITION FOR REHEARING AND BRIEF IN SUPPORT THEREOF

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Comes now TYVEN ADAMS, replying to the petition of the plaintiff employer and insurance carrier for a rehearing, and states in support thereof as follows:

POINT I

COURT HAS ALREADY CONSIDERED CAREFULLY BOTH POINT CLAIMED BY PLAINTIFFS IN SUPPORT OF THEIR PETITION FOR RECONSIDERATION.

Briefs were submitted in May and June, 1964, the case argued in September and the decision was rendered in February, 1965. The care given this case is evident from the main opinion and the two dissenting opinions. Undoubtedly, much earnest research and discussion must have preceded the ultimate issuance of the decision herein.

Two points are raised again by plaintiffs in their brief:

> (a) The Makoff case rule has been cast in doubt; and
>
> (b) The Industrial Commission's procedure was irregular, though all parties were present and participated.

A quick review of the original biref filed by plaintiffs in this case discloses that both points were presented, briefed and argued before this Court. As to (a), such Makoff case was cited at page 19 and made a part of the argument in plaintiffs' Point III of the original brief. As to contention (b), such argument was presented as Point I and II in the former brief.

Though plaintiffs have dressed their arguments in different garb in this Petition for Rehearing, no new law and no new facts have been presented. A few older but different cases have been cited in support of plaintiffs'

reiterated position. Each such point has been covered in both the answering brief by Tyven Adams, the injured employee, and by the brief of the other employer and the State Insurance Fund. Oral arguments before the Court covered these identical points.

The rule on petitions for rehearing has been stated with clarity in several cases. *In re McKnight and Brown v. Pickard*, 4 Ut. 237, 9 Pac. 299, and 4 Utah 573, 11 Pac. 512, outlined this rule.

> "To justify a rehearing a strong case must be made. The Supreme Court must be convinced either that it failed to consider some material point in the case, that it erred in its conclusions, or that some matter has been discovered which was unknown at the time of original hearing. In re McKnight 4 U. 237, 9 P. 299; Brown v. Pickard, 4 U. 292, 9 P. 573, 11 P. 512"

More recently in *Wellsville East Field Irrigation Co. v. Lindsay Land & Livestock Co.*, 143 Pac. (2d) 278, Ut., the Court had before it a petition for rehearing. Therein it was held that where the case was considered by the trial court on the same theory as was presented on rehearing as well as in the initial briefs and arguments, no rehearing would be granted and appellant could not contend on rehearing that the evidence did not support such.

POINT II

THE MAKOFF DECISION HAS BEEN CAREFULLY CONSIDERED.

As an injured employee seeking relief through the Industrial Commission, Mr. Adams has not tried to foreclose the Commission or this Court as to which employee should be required to provide surgical repair of his disabled back.

This issue has been briefed and argued. We assume that the last employer and his insurance carrier, Wasatch Electric, and State Fund will again rebrief this issue. Pages 13, 14 and 15 of their initial brief deal with this Makoff decision.

Evidences of the Court's full awareness of this problem and its resolution of the same are found in the following language of the major opinion:

> "The ordinary rule of res judicata is not applicable to the instant proceeding. Inherent in the act is recognition that industrial injuries cannot always be diagnosed with absolute accuracy, nor their consequences predicted with complete certainty. Section 35-1-78, U.C.A. 1953 provides that '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 others with respect thereto, as in its opinion may be justified.' Accordingly, even though the Commission has made an award, if there later develops some substantial change or new development with respect to the injury than was known or was contemplated at the time of the original award, upon proper proceedings the Commission can make such adjustment as is just and reasonable and in conformity with the act."

"We are sensitive of the fact that due to the continuing jurisdiction of the Commission as above set forth, there is danger of unfairness and injustice in imposing liability upon an employer for a supplemental award based upon a prior injury such as this. The only safeguard against this danger is the prudence and caution of the Commission, which we fully agree should be exercised to a high degree in regard to such situations. Nevertheless, it is firmly established that the Commission has the exclusive prerogative of judging the credibility of the witnesses, appraising the evidence and findings the facts, which must not be disturbed if there is a reasonable basis therein to support them, as we have concluded exists here. 4."

POINT III

PROCEDURALLY, ALL PARTIES WERE BEFORE THE INDUSTRIAL COMMISSION AND BOUND BY ITS DETERMINATION.

At no part of the appellant's petition for rehearing nor in their original brief can we find any suggestion as to what different bases would have been shown or contended had this case been given a different number of name by the Industrial Commission. No allegation of new or different evidence accompanied the petition for rehearing. No contention is made by appellants that they were foreclosing at any stage from cross examination or other procedural rights.

At no place in the brief has there been any showing of any prejudice whatsoever to the employer or its insurance carrier as a 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. 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-.30) 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.

CONCLUSION

During the long months since the filing in this case in February of 1963, Mr. Adams has been awaiting a determination so his back can be repaired surgically. None of the insurance carriers has been willing to authorize this necessary treatment so he can get back to work.

We urge a prompt affirmation of the decision rendered by this court on Februrary 8, 1965. Astute counsel representing the employers and insurance carriers will have no problem in reading and understanding this case law. As shown, each factual situation before the industrial Commission varies and that administrative body has been given by the Legislature "the prerogative of judging the credibility of witnesses, appraising the evidence and finding the facts."

This duty has been discharged by the Commission in the presence of all parties and has been affirmed by this Court after much care and consideration. The petition for rehearing should be denied.

Respectfully submitted,

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