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

Utah Supreme Court

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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

BRIEF OF DEFENDANT, STATE INSURANCE FUND OPPOSING PLAINTIFFS' PETITION FOR REHEARING

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This brief is written in response to Plaintiff's Brief in Support of Petition for Rehearing.

POINT I.

THE COURT'S DECISION IS IN HARMONY WITH ITS EARLIER DECISIONS.

Plaintiff's Brief discusses at length the theory that the last employer is responsible for an aggravation of a previous existing condition. We do not dispute this argument if there is under consideration

a matter involving "aggravation" as there are numerous cases which so hold. However, it appears that the Plaintiffs in this case confuse the aggravation of a pre-existing condition with a reoccurrence of an injury. These two conditions are entirely different. The aggravation of a pre-existing condition assumes that there has been a fixed condition and that thereafter a new injury occurs which adds to the disability which was then and there existing. In reoccurrence cases the condition is different. A reoccurrence involves a reoccurring or extension of the disability and difficulty which had its beginning at the time of the original accident.

Plaintiff's Brief in Support of the Petition for Rehearing (PB3) takes the position that the Court's decision in this case is in direct conflict with its earlier decisions on the question as to which employer is liable for the aggravation of a previous injury. We submit that this is not a case of an aggravation of a pre-existing condition, but it is a case involving the reopening of a case by the Commission after there has been discovered a change in the condition of the injured workman.

The jurisdiction and power of the Industrial Commission to make modifications or changes in its former orders is set forth in Section 35-1-78:

> "The powers and jurisdiction of the Commission over each case shall be continuing, and it may from time to time make such modifications or changes with respect to its former findings, or orders with respect thereto, as in its opinion may be justified."

It is clear that the Commission in this case considered the condition of the claimant to be such that there was a continuing process of deterioration making it necessary to reopen the Mollerup case. Claims have been reopened by the Commission on numerous occasions, and its decisions to do so has been sustained by the Supreme Court.

In *Barber Asphalt Corp. v. Industrial Commission*, 103 U. 371, 135 P. 2d. 266, the medical advisory board had made a rating of 5% disability. The claimant, Leonard Cook would not accept the rating, but at a later date did enter into a release with his employer and its insurance carrier upon the payment of compensation for 15% permanent partial disability. More than one year later, Cook filed a claim for additional compensation claiming to be totally disabled. Even though in this case there had been a release signed by the claimant, the Industrial Commission held that the case could be reopened and the claimant was found to be totally disabled. This award was sustained by the Supreme Court.

Although we mentioned this case in our earlier brief we feel that it is important to again discuss it in order to direct this Court's attention to its earlier decisions which affirm the right and the duty of the Industrial Commission to reopen a claim and to grant additional compensation or benefits when such seems to be necessary in order to accomplish the spirit of the Workmen's Compensation Act. The Supreme Court of the State of Utah has clearly emphasized this right and duty on the part of the

Commission when it said in the *Barber* case, at 270 P.:

> "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 party 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."

Several cases are also cited which support the same doctrine.

One of the earlier cases which discusses the effect to be given to the language of this section, which was then known as Section 3144 is *Utah Apex Mining Company, et al. v. Industrial Commission*, 298 P. 381. The Court said at 382 P. the following:

> "If the Commission be required to determine the amount of compensation that shall be paid before the extent of the injury becomes certain and fixed, the employee may receive more or he may receive less than he is justly entitled to under the Industrial or Workmen's Compensation Act. It was evidently to lessen or avoid the probability of such injustice that the provision granting the Commission continuing jurisdiction was enacted. In this case Dr. Critchlow believed that Butler's condition would be improved if he would go to work. Butler was anxious to work rather than try

> to eke out an existence on the amount of compensation awarded to him. Under such circumstances we can conceive of no legal reason why he should be deprived of further compensation in the event that after a fair trial he found that he was unable to work. Butler's application for additional compensation was in no sense the beginning of a new proceeding, but was merely another step in the proceeding instituted by the filing of the original application. *Chebot v. State Industrial Accident Commission*, 106 Or. 660, 212 P. 792. The Commission had not made a final disposition of the cause, but on the contrary expressly retained jurisdiction thereof. This the Commission had the right and power to do under the law granting it continued jurisdiction."

This same section is discussed in *Spencer v. Industrial Commission*, 4 U. 2d. 185, 290 P. 2d. 692. In respect to Plaintiff's argument that the doctrine of res judicata should apply in this case inasmuch as the applicant was awarded a 5% disability settlement soon after he was injured while he was working for Mollerup this Court said the following in the *Spencer* case:

> "We are not concerned here with the merits of the decisions just referred to, but this much is unquestionably true: The doctrine of res judicata as applicable to court procedure is not in a strict sense applicable to proceedings before the Industrial Commission.
>
> "It is not to be assumed from the above that an applicant can re-apply to the Commis-

> sion for a new determination upon the same facts merely because he may be dissatisfied with its former order, any more than it means that a defendant in such a proceeding could so do. 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 times prescribed by law."

The court went on further to say:

> "In view of the express terms of the statute hereinabove referred to, and the adjudicated cases supporting the idea of continuing jurisdiction of the Industrial Commission, there can be no doubt that once the application has been filed, and the Commission's jurisdiction invoked, it has authority to entertain further proceedings to deal with any substantial changes or unexpected developments that may arise as a result of the injury."

This court found against the claimant in the *Spencer* case because the testimony proffered was not sufficient to compel a finding that the old 1941 injury was the cause of the disability Spencer claimed to be suffering in 1954, but the case does set forth the recent views of this Court as to the continuing jurisdiction of the Industrial Commission to act under the authority of Section 35-1-78, U.C.A. 1953. It is our position that the Industrial Commission, in the case now before this court, had justification and authority under the said section to hold that Tyven Adams condition related back

to the industrial injury he received while working for Mollerup.

The Commission after the hearing, at which Dr. Boyd G. Holbrook, Chairman of the Medical Panel testified, entered its Order and in the Order stated that it accepted the testimony of Dr. Holbrook, and the finding of the Panel which was:

> "(1) 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."

The Commission's Order was based upon adequate, and competent testimony.

POINT II.

THE RULE OF RES JUDICATA IS NOT APPLICABLE.

We have discussed this point in connection with our discussion of Point I, but we wish to make the following additional comments:

This court, in rendering its decision in this case now under consideration, was fully aware of the arguments made by the Plaintiff's counel as to the rule of res judicata and the inherent powers in the Industrial Commission by reason of Section 35-1-78, U.C.A., 1953, when it said in the main 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. Sections 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 therefore submit that this argument has been fully and carefully considered by this court.

POINT III.

ADAMS' PHYSICAL AILMENTS WERE NOT CAUSED BY THE INCIDENT WHICH OCCURRED WHILE HE WAS WORKING FOR WASATCH.

May we again direct the Court's attention to the testimony which puts to rest the argument that there was anything of a substantial nature in the way of an injury which occurred while Tyven Adams

was working for Wasatch Construction Company. He merely stepped off the tongue of the scraper which was about two or three feet high into some sand or dust. He did not fall, but remained standing. (R-15).

What occurred at that time was certainly nothing of great consequence. What happened was considered by the medical panel and the conclusion was reached that this minor event was not the cause of the claimant's difficulties.

The fact that he experienced some pain after stepping off the tongue was not unusual because Adams had been experiencing pain prior to the time that he went to work for Wasatch Construction Company. On October 15th he saw Dr. Eddington in Lehi and reported to the doctor that he was having considerable pain across the lower back and down his legs. The evidence of this is found in a letter written by the doctor to the Industrial Commission dated October 22, 1962 *which was before* the claimed Wasatch accident which occurred on October 27, 1962. It should be observed that Dr. Eddington's letter written prior to the Wasatch Construction Company accident suggested to the Industrial Commission that his case be reopened. (R-11)

This evidence clearly illustrates that the Plaintiff was experiencing a great deal of difficulty prior to the time he was employed by Wasatch.

The Plaintiff testified that he had gone to see Dr. Eddington about his back prior to the time he went to work for Wasatch. (R-20).

The incident which occurred while the Claimant was working for Wasatch was aparently not serious and his condition had not changed much as he continued working for about a month thereafter and did not see a doctor until about December 6th. (R-41, 42).

POINT IV.

THE MAKOFF DECISION IS NOT IN CONFLICT.

There is no conflict between the decision rendered by this Court in the case now under consideration and the *Makoff* decision, *Makoff Company v. Industrial Commission*, 13 U. 2d. 23, 368 P. 2d. 70. In that case the Industrial Commission after considering the report of the Medical Advisory Board and the testimony of the Applicant which pointed to the fact that the Applicant had, while working for Makoff, sustained such an injury to his back in the 1957 accident that he was able to do only light work from that time on and found that the 1957 industrial accident *aggravated* the previous condition. In the case now before this court the conclusion of the medical panel and the finding of the Commission was that it was the original accident which occurred while the Applicant was working for Mollerup was the cause of the physical disability. The medical panel apparently concluded that this was not a case of aggravation, but was a case of a reoccurrence of the old injury, and that the incidents which occurred in between were incidental thereto and

were not the underlying reason for the Applicant's present condition. As it did in the *Makoff* case, the Industrial Commission properly gave consideration to the findings and report of the medical panel in reaching its conclusion. This was properly done and such procedure was contemplated by the enactment of the statute setting up the medical panel.

POINT V.

NOTHING NEW HAS BEEN PRESENTED BY THE PLAINTIFF.

The arguments presented by the Plaintiffs in their Brief in support of their Petition for Rehearing are the same as were presented by the Plaintiffs in their original brief. Nothing new has been presented by the Plaintiffs in the Petition for Rehearing. All matters discussed in their Brief were considered by this Court. In addition thereto the same matters were presented to the Court by oral argument, so it cannot be said that the court did not, at the time this decision was rendered, consider the points now made by the Plaintiffs.

In the old case entitled *In Re: Proceedings to Disbar, MacKnight, Attorney*, 4 U. 237, 9 Pac. 573 this Court stated:

> "We have many times held that, to justify a rehearing, a strong case must be made. We must be convinced, either that the Court failed to consider some material point in the case or that it erred in its conclusions, or that

some matter has been discovered which was unknown when the case was argued."

The record is clear and complete in this case and none of the elements are present as set forth above, which would compel the court to grant a rehearing.

CONCLUSION

In conclusion we urge this Court to deny the Petition for Rehearing as we feel that all matters presented have heretofore been fully considered by the Court.

Respectfully submitted,

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