1965

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

Utah Supreme Court

Charles Welch, Jr.; A. Pratt Kesler; Attorneys for Defendants;
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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 FUNDS,

Defendants.

Case No.
10101

PLAINTIFFS' PETITION FOR REHEARING AND BRIEF IN SUPPORT THEREOF

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and The State Insurance Fund

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Plaintiffs petition the Court for rehearing and re-argument of the above case upon the following grounds:

POINT I

THE COURT'S DECISION IS IN DIRECT CONFLICT WITH ITS DECISIONS OF 1962 AND EARLIER UPON THE QUESTION OF WHICH EMPLOYER IS LIABLE FOR AGGRAVATION OF A PREVIOUS INJURY.

POINT II

THE COURT'S DECISION IS IN DIRECT CONFLICT WITH ITS LONG-ESTABLISHED DECISIONAL STANDARDS GOVERNING THE INDUSTRIAL COMMISSION'S STATUTORY RIGHT TO INVOKE CONTINUING JURISDICTION AND THE DECISION THUS CASTS DOUBT ON THE MEANING OF THE APPLICABLE STATUTE.

WHEREFORE, plaintiffs pray that the judgment and opinion of the Court be recalled and a reargument be permitted upon the points herein set forth.

A brief in support of this petition is filed herewith.

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Attorney for Plaintiffs

John H. Snow hereby certifies that he is attorney for plaintiffs, that there is good cause to believe the decision of the court is erroneous and that the case should be reheard and reargued, as prayed in said petition.

DATED this 10th day of March, 1965.

JOHN H. SNOW

BRIEF IN SUPPORT OF PETITION FOR REHEARING

POINT I

THE COURT'S DECISION IS IN DIRECT CONFLICT WITH ITS DECISIONS OF 1962 AND EARLIER UPON THE QUESTION OF WHICH EMPLOYER IS LIABLE FOR AGGRAVATION OF A PREVIOUS INJURY.

Although each of the parties in this case suggested or urged, in printed briefs and upon oral argument, the applicability of the 1962 decision of this Court in *Makoff Company v. Industrial Commission,* 13 U. 2d 23, 368 P.2d 70, the Court's opinion did not even mention that decision or the applicable principle for which it stands.

That principle, so firmly established that this Court stated in 1929 it was "no longer an open question in this state" (*Graybar Electric Co. v. Industrial Commission,* 73 U. 568, 276 P. 161) has now been weakened, though perhaps unintentionally, by the decision of the Court in the present case.

The *Makoff* decision was but the latest in a long line of cases holding, so far as applicable here, that an aggravation of a previous injury is compensable and that regardless of the identity of the employer at the time of

the first injury, the employer at the time of the aggravation is the responsible employer.

In the decision here under attack, the Court fastens liability upon the employer at the time of the first injury, exonerates the employer at the time of the second of two aggravations and totally ignores the employer at the time of the first aggravation (Iverson), who had paid compensation to the applicant, through the State Insurance Fund, for such first aggravation.

A comparison between the facts of the present case and the facts of *Makoff* will demonstrate that the decisions in the two cases are in direct conflict.

In *Makoff* the applicant had been injured in 1955 while employed by a stranger to the Makoff case. In 1957, while working for Makoff, he slipped on a stairway and sustained injury which the medical panel concluded "was an episode in a progressive back disorder." Later an incident occurred away from work at which time the 1957 injury "ripened" into a compensable disability.

On these facts, this Court, speaking through Justice McDonough, stated:

> ". . . under our aggravation cases whether he was employed by someone else in 1955 would make no difference in result. The employment by plain-

> tiffs (Makoff) in 1957, when his initial injury was aggravated, is of primary importance here."

Makoff was held responsible for the compensation due for the disability.

In the present case the applicant was injured while working for plaintiffs in 1958. (Plaintiffs therefore are in the position of the stranger in *Makoff.*) He was found by the Commission to have a 5% permanent disability for which he was paid compensation by plaintiffs, pursuant to the order of the Commision. In June, 1960, while employed by Iverson he sustained a further injury to his back and applied for compensation for the injuries thus sustained, and the State Insurance Fund paid benefits as compensation for the Iverson injury.

In 1962, while employed by Wasatch, he had a further injury and the chairman of the medical panel, as was pointed out by the Court in its decision, stated that his back was undergoing "a degenerative process that has been slowly progressing." This was just as the panel found in *Makoff.*

In the present case, as in *Makoff,* the subsequent episodes aggravated the condition which had developed following the first injury. As the chairman of the medical panel testified (R. 105), each of the accidents sustained by the applicant caused a worsening of the progressive degenerative process.

As should be clear from the foregoing, Makoff, which was found liable, occupied the identical position as Wasatch occupies in the present case, or as Iverson would have occupied had he been brought into the case as a party, but at that point the similarity between the cases ends because the court found Makoff liable but now finds Wasatch not liable.

It is submitted that if there are two applicants, each with a progressive degenerating process in the back which is injured and each suffers a subsequent injury which worsens the condition and the court in one case determines that the subsequent employer is liable, as it has always previously held, there can be neither reason, consistency, nor justice in a later holding, without explanation, that the subsequent employer is not liable.

If the present decision stands, there can be no meaning to the proposition, often stated by this Court, that "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.*" (Emphasis added.) *Spencer v. Industrial Commission* (1935), 87 U. 336, 40 P.2d 188.

Any other policy would impose a heavy burden upon all "first-injury employers," particularly where, as in

this case, the injured employee (whose compensation case is thought to be closed) then works for at least four subsequent employers, sustains injuries while working for two of the four, and a period of more than five years elapses between the first injury and notice of hearing on the last injury.

Here, during most of the period of more than five years after the applicant's original injury, plaintiffs had no association with him, knew nothing of him, received no notice about him and, of course, could make no investigation concerning him. Neither could plaintiffs offer early medical treatment which might have reduced the ultimate disability.

These facts demonstrate the wisdom of those previous decisions holding the subsequent employer, the "employer at aggravation," liable for aggravations of previous disabilities and holding that such subsequent employers take "employees as they find them."

Employees are not the only ones to be considered in cases arising under the Act. Under various sections of the Act, employers also have rights and these include, as this Court has said, the right to know the facts promptly, so there will be the "opportunity of giving prompt and proper medical aid" and the right to "protect employers against fraudulent claims." *Salt Lake City v. Industrial Commission* (1943), 104 U. 436, 140 P.2d 644.

By use of this quotation, we do not mean to imply this claim is fraudulent. But, since decisions of this Court govern all claims, whether litigated or not, its holdings should furnish guidelines as consistent as justice and the judicial process can produce. The decision in this case does not.

POINT II

THE COURT'S DECISION IS IN DIRECT CONFLICT WITH ITS LONG-ESTABLISHED DECISIONAL STANDARDS GOVERNING THE INDUSTRIAL COMMISSION'S STATUTORY RIGHT TO INVOKE CONTINUING JURISDICTION AND THE DECISION THUS CASTS DOUBT ON THE MEANING OF THE APPLICABLE STATUTE.

The Commission's power of continuing jurisdiction is found in Section 35-1-78, U.C.A. 1953. Heretofore, this Court has consistently held that the power "to make such modification or change with respect to former findings, or orders with respect thereto," as provided by the statute, cannot be exercised by the Commission without a showing of "good cause," which means that there is "*some change or new development in the injury* complained of not known to the parties when the former award is made." *Salt Lake City v. Industrial Commission* (1923), 61 U. 514, 215 P. 1047; *Aetna Life Ins. Co. v. Industrial Commission* (1929), 73 U. 366, 274 P. 139.

Continental Casualty Co. v. Industrial Commission (1927), 70 U. 354, 260 P. 279; *Carter v. Industrial Commission* (1930), 76 U. 520, 290 P. 776 (emphasis added).

The present decision appears, at first glance, to hold the same but when the facts of this case are examined, it is clear the Court has approved a course of conduct by the Commission that is at complete variance with the long-established standards governing the power of continuing jurisdiction.

First, the applicant never had any intention of claiming, and does not now claim, there was a "change or new development" in the *original injury*. Thus, he made no attempt to show "good cause" and no notice of a claimed reopening of his case against plaintiffs was ever given, because he did not seek it nor did his counsel.

Second, the only parties claiming this "change in original injury" are those who would escape their own responsibility by doing so — Wasatch and the State Insurance Fund.

Third, even the Industrial Commission has not contended it was reopening the former case. Just the opposite is true, as is shown by Chairman Wiesley's statement (R. 128):

> "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 (sic) I can't consider this procedure as an application for further and additional compensation under that case."

Fourth, the applicant's application was filed in February, 1963 and notice of hearing was sent to plaintiffs in October, 1963, nearly eight months later, even though there had been proceedings in the meantime and even though nearly 11 months had elapsed since the Wasatch accident — 11 months of precious investigative time which was denied to plaintiffs. This never-to-be-regained investigative opportunity now looms particularly large since Wasatch claims (as shown in its brief, p. 15) that the applicant "did not sustain an accident" when he was injured on its job.

Fifth, the notice did not state "the objective of the proceedings," nor did it show "the nature and character of the relief sought" or the party seeking it. These have been minimal due process requirements for more than 40 years. *Spring Canyon Coal Co. v. Industrial Commission* (1922), 60 U. 533, 210 P. 611. If this requirement had been met, plaintiffs would have had notice that their true antagonist was Wasatch and they could have prepared their defenses accordingly.

These practices and procedures cannot be sustained by statute or by decisional standards set by this Court since the statute was enacted, yet the present decision seems to approve them and most certainly will be cited in the future as doing so, if it is not recalled.

A decision which approves these methods and practices, which allows subsequent employers to escape their obvious responsibility, which permits such employers to make unwitting employees mere pawns in a contest between employers, is a decision which should not be allowed to stand.

If these methods and practices of the Commision are not disapproved, what is to prevent the Commission from conducting similar proceedings in other cases of successive injuries? This invites the very evil this Court had in mind when it said, in 1923, that permitting these practices "would invite endless litigation in this class of cases." *Salt Lake City v. Industrial Commission,* (1923) 61 U. 514, 215 P. 1047.

This Court has always construed the Workmen's Compensation Act liberally "with the purpose of effectuating its beneficent and humane objects." *North Beck Mining Co. v. Industrial Commission* (1921), 58 U. 486, 200 P. 111. It is, therefore, particularly ironic that this applicant, who *has not once in this case* sought relief against these plaintiffs, now finds himself, more than two years after his application against Wasatch, still

awaiting surgery on his back. As he pointed out in his brief (P. 5), Wasatch and the State Fund "are the ones who urged the Commission to relate this causal connection back to the Mollerup employment injury in 1958."

CONCLUSION

The decision creates unnecesary conflicts with earlier cases involving aggravation and approves practices and procedures which violate basic statutory and decisional standards governing exercise of the power of continuing jurisdiction.

Precedent need not be followed, merely for the sake of consistency, if it is concluded that the reason for the standards of the earlier cases is no longer valid. No such conclusion was announced by the Court in this decision and none can be inferred from the decision.

The effects of this decision upon those who must conduct their affairs within the framework of the Act and its administration are widespread and deletorious. The Court should recall the decision, order reargument of the case and, in such event, reverse the order of the Commission under appropriate instructions to prevent such occurrences in the future.

Respectfully submitted,

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