1983

University of Utah, (Pioneer Memorial Theater), State Insurance Fund and Second Injury Fund v. Russell Cuff : Brief of Respondent Industrial Commission Of Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

UNIVERSITY OF UTAH, (PIONEER MEMORIAL THEATRE), STATE INSURANCE FUND and SECOND INJURY FUND,	)	
Plaintiffs/appellants,	)	Case No. 19043
vs.	)	
RUSSELL CUFF,	)	
Derendant/Respondent.	)	

BRIEF OF RESPONDENT
INDUSTRIAL COMMISSION OF UTAH

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Derendant/respondent.	)	

BRIEF OF RESPONDENT
INDUSTRIAL COMMISSION OF UTAH

NATURE OF THE CASE

The State Insurance Fund brought this Writ of Review under the theory that §35-1-77 mandated that a medical panel be called to determine the medical issues.

DISPOSITION BY THE INDUSTRIAL COMMISSION

The Commission found that there was an industrial accident, that there was no permanent partial impairment and none was asked for by Applicant. No medical panel was necessary. The Applicant received $135 temporary total disability compensation, which was for the 3-week period he was not able to work, and his medical expenses were paid by the State Insurance Fund.

RELIEF SOUGHT ON APPEAL

The Industrial Commission asks the Court to affirm the judgment herein as Section 35-1-77, as amended, does not mandate a medical panel.

STATEMENT OF FACTS

Respondent accepts the "Statement of Facts" as in Appellant's Brief.

ARGUMENT I

THE ORDER OF THE COMMISSION IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

The Order of the Industrial Commission must be confirmed when supported by substantial evidence and reasonable inferences to be drawn therefrom.

As stated in Kaiser Steel Corp. v. Monfredi, 631 P.2d 888 (1981), and reaffirmed in Sabo's Electronic Service v. Sabo, 642 P.2d 722 (1982), and in Kincheloe v. State Insurance Fund, 656 P.2d 440, (1982), the scope of review in Industrial Commission cases is limited to:

> [W]hether the Commission's findings are "arbitrary or capricious," or "wholly without cause" or contrary to the "one [inevitable] conclusion from the evidence" or without "any substantial evidence" to support them. Only then should the Commission's findings be displaced.

The Commission complied with Section 35-1-77 as it was amended.

ARGUMENT II

AMENDED SECTION 35-1-77 UTAH CODE ANNOTATED DOES NOT MANDATE A MEDICAL PANEL.

Perhaps the largest case load of any administrative agency in Utah is handled by the Industrial Commission and its four Administrative Law Judges. One of the delaying

difficulties that has placed considerable stress on the timely processing of claims has been the past necessity of having to submit so many of these claims to a medical panel to advise the Commission.

The legislature, in order to facilitate the administration of workmen's compensation, amended Section 35-1-77 in the Budget Session of 1982. That section, which became effective April 1, 1982, now reads:

> Medical panel -- Discretionary authority of commission to refer case -- Findings and reports -- Objections to report -- Hearing -- Expenses. Upon the filing of a claim for compensation for injury by accident, or for death, arising out of or in the course of employment, and where the employer or insurance carrier denies liability, the commission shall <u>may</u> refer the medical aspects of the case to a medical panel appointed by the commission and having the qualifications generally applicable to the medical panel set forth in section 35-2-56. The medical panel shall <u>then</u> make such study, take such X-rays and perform such tests, including post-mortem examinations where authorized by the commission, as it may determine and thereafter shall make a report in writing to the commission in a form prescribed by the commission, and shall <u>also</u> make such additional findings as the commission may require. The commission shall promptly distribute full copies of the report of the panel to the applicant, the employer and the insurance carrier by registered mail with return receipt requested. Within fifteen days after such report is deposited in the United States post office, the applicant, the employer or the insurance carrier may file with the commission objections in writing thereto. If no objections are so filed within such period, the report shall be deemed admitted in evidence and the commission may base its finding and decision on the report of the panel, but shall not be found

> by such report if there is other substantial conflicting evidence in the case which supports a contrary finding by the commission. If objections to such report are filed it shall be the duty of the commission to may set the case for hearing to determine the facts and issues involved, and at such hearing any party so desiring may request the commission to have the chairman of the medical panel present at the hearing for examination and cross-examination. For good cause shown the commission may order other members of the panel, with or without the chairman, to be present at the hearing for examination and cross-examination. Upon such hearing the written report of the panel may be received as an exhibit but shall not be considered as evidence in the case except insofar as far as it is sustained by the testimony admitted. The expenses of such study and report by the medical panel and of their appearance before the commission shall be paid out of the fund provided for by section 35-1-68.

This statute, as amended was the law on the date of the accident which was May 6, 1982.

The State Insurance Fund mistakenly quotes only the old wording of the section which has been changed from shall to "may refer the medical aspects of the case to a medical panel . . . ."

The cases cited by the insurance carrier apply only to the previous wording. They have no relevance to the amended statute.

After the statute was amended, the Commission issued new rules and regulations which were in effect when the Order in this case was issued on January 12, 1983. The new Rules and

Regulations on the Utilization of a Medical Panel became effective June 5, 1982. In pertinent part they read:

> 33. GUIDELINES FOR UTILIZATION OF MEDICAL PANEL (Effective June 5, 1982)--Pursuant to Section 35-1-77, U.C.A. the Commission adopts the following guidelines in determining the necessity of submitting a case to a medical panel:
>
> (a) A panel will be utilized where:
>
> (1) One or more significant medical issues are involved.
>
> Generally a significant medical issue must be shown by conflicting medical reports. The issues of permanent partial impairment will be considered significant if conflicting medical reports vary with a rating more than 5% of the whole person; or if the temporary total cut off date varies more than 90 dys; or if the amount of medical expense in controversy is more than $1,000.
>
> (2) In the opinion of the Commission the medical issues are so intertwined with the events that a determination of whether an accident has occurred cannot be made without first resolving medical consideration.
>
> (b) Where in the opinion of the Commission, the evidence is insufficient for the Commission to make a final determination, the Commission may require an independent medical evaluation. Costs to be assessed against the employer and/or Second Injury Fund.
>
> (c) A hearing on objections to the panel report may be scheduled if there is a proffer of conflicting medical testimony or an indication that all relevant medical evidence was not considered by the panel.

(d) The Commission may authorize an injured worker to be examined by another physician for the purpose of obtaining a further medical examination or evaluation pertaining to the medical issues involved, and to obtain a report addressing these medical issues in all cases where:

(1) The treating physician has failed or refused to give an impairment rating.

(2) The employer or doctor considers the claim to be non-industrial.

(3) A substantial injustice may occur without such further evaluation.

The Commission followed the amended statute and the Regulations. There was no testimony or record of conflict on any medical aspects of this case. Dr. Hoesinger (R-45) says there was no pre-existing condition.

He examined Mr. Cuff on admittance to the University Hospital.

Dr. Hofmann, the surgeon who operated on Mr. Cuff, reported that there was no pre-existing condition. Dr. A. F. Martin, who treated Mr. Cuff for a knee injury in 1977 reported on Cuff's last visit, one week after the accident, "This boy's knee and ankle are both feeling immensely better. I will start him on isometrics and a range of motion exercises today and check him again in two weeks." (R-62) Mr. Cuff did not go back, supposedly because he had no further trouble and this extended to the time of his injury while dancing. (R-32)

The Administrative Law Judge made the following findings or Fact in his Order that shows that he took into consideration the previously mentioned medical aspects of the case:

> The applicant was seeking recovery of medical bills and compensation for his three weeks of lost time, but was not seeking any permanent partial impairment benefits.
>
> The Administrative Law Judge finds that the applicant was involved in an accident in that the events and activities were certainly unusual from everyday activities and that the routines represented an unusual exertion and strain though no direct fall or blow was involved. There was some indication that back in 1977 the applicant had injured his left knee, he denied any complication from that problem or restrictions in his activities. Since there is no permanent impairment issue involved and since it is the Administrative Law Judge's responsibility to determine if an accident occurred, it does not appear necessary or even wise to appoint a medical panel to evaluate the case.

There specifically were no conflicting medical reports and no medical testimony or any testimony that under Section 35-1-77 it was necessary to have a medical panel.

CONCLUSION

The Order of the Commission must be affirmed when supported by the evidence and the inferences to be drawn therefrom.

DATED this 10th day of August, 1983.

Frank V. Nelson

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Assistant Attorney General

MAILING CERTIFICATE

I hereby certify I mailed two true and exact copies of the foregoing Brief of Respondent, first-class, postage prepaid to the following parties:

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DATED this 10th day of August, 1983.

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