1983

Clarine Edward v. The Industrial Commission of Utah, Utah State Insurance Fund And Jack O. Tillery : Brief of Respondents

IN THE SUPREME COURT

OF THE STATE OF UTAH

CLARINE EDWARDS,	:	
	:	
Plaintiff/appellant,	:	
	:	
vs.	:	Case No. 19047
	:	
INDUSTRIAL COMMISSION OF UTAH, UTAH STATE INSURANCE FUND, and JACK O. TILLERY,	:	
	:	
Defendants/respondents,	:	

BRIEF OF RESPONDENTS

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BRIEF OF RESPONDENT

NATURE OF THE CASE

This is a workmen's compensation case involving an employee of a restaurant in West Valley City, Utah, seeking worker's compensation benefits for pulmonary difficulties allegedly caused by smoke inhalation.

DISPOSITION BY THE INDUSTRIAL COMMISSION

The Administrative Law Judge entered Findings of Fact, Conclusions of Law and Order denying applicant's claim for compensation benefits based upon a medical panel evaluation of no medical causal relationship between the smoke inhalation and the plaintiff's physical problems. A Motion for Review of the Order was then filed, which motion was denied by the Industrial Commission on February 9, 1983. The Industrial Commission affirmed the order of the Administrative Law Judge in pertinent part.

RELIEF SOUGHT ON APPEAL

It is respectfully submitted that the Order, as affirmed by the Industrial Commission, should be upheld by the Supreme Court.

FACTS

Plaintiff-appellant Clarine Edwards (hereinafter plaintiff) filed an Application for Hearing with the Industrial Commission of Utah on August 21, 1981, to determine a disability claim. (R. 1). The hearing was held on February 8, 1982. (R. 7)

In her application and at the hearing, plaintiff asserted that an accident had occurred on March 25, 1981, in the kitchen of Krazy Klara's Restaurant where she worked as a manager and cook. Her claim was that the accident had caused or partly caused her total disability (R. 1) as result of serious lung disease.

According to the testimony of plaintiff and one witness at the hearing, the accident involved a malfunction of the grill, which created a lot of smoke. Plaintiff got down under the grill to try to fix it. Shortly thereafter, a delivery man came into the kitchen, found her coughing and choking from the smoke, and pulled her out of the room. (R. 9-11) Plaintiff further reported that, after the accident, she continued working for over two months, until June 5, 1981, but that she had not been employed since that date. (R. 15)

Following the hearing, the Administrative Law Judge sent the matter to a medical panel for consideration of the medical issues. He appointed Dr. Frank Dituri and Dr. Theodore Noehren as members for this medical panel. (R. 44, 116).

Copies of the report of the medical panel were distributed to the parties on April 28, 1982. (R. 128) After an extension of time was granted, plaintiff's attorney filed timely objections to t

report with the Industrial Commission (R. 131-133).

On August 16, 1982, plaintiff's attorney filed a Motion to Vacate the Report of the Medical Panel and to have a new panel appointed. (R. 141) In a memorandum in support of the motion, plaintiff's attorney argued that Dr. Frank Dituri did not have the expertise required by state law to be a member of the medical panel. (R. 142-143)

On August 19, 1982, however, the motion was denied. In his order denying plaintiff's motion, the Administrative Law Judge specifically found both that Dr. Noehren was "eminently qualified to serve as a member of the Medical Panel" and that Dr. Dituri was "also well qualified to serve as chairman of the medical panel." (R. 144)

A hearing on the objections to the medical panel report was held at the Industrial Commission on October 7, 1982. At the hearing, Dr. Dituri was examined as to his qualifications as a member of the medical panel. (R. 279-283, 305-306, 310)

After the hearing, on October 29, 1982, plaintiff's attorney filed with the Industrial Commission a Brief in Support of Objections to the Report of the Medical Panel. (R. 216) This brief, essentially, made the same argument plaintiff's attorney had made in the earlier memorandum which was denied--namely, that Dr. Dituri did not meet the statutorily required qualifications to be a member of the medical panel. (R. 217-218)

The Industrial Commission also issued its Findings of Fact, Conclusions of Law and Order on October 29, 1982. (R. 240-243) The Administrative Law Judge's Finding of Fact was that "the applicant

suffers from severe common non-reversible chronic obstructive pulmonary disease" but that there was "no medically-demonstrable causal connection between the applicant's present condition and the smoke inhalation of March 25, 1981." (R. 242) The conclusions of law was that "the applicant has failed to sustain her burden of proof. . ." And the Order, therefore, denied the applicant's claim. (R. 243)

A Motion for Review of Order was then filed with the Industrial Commission by plaintiff's attorney on or about November 15, 1982. Plaintiff again sought to have the Industrial Commission review whether the medical panel in the case had been qualified. (R. 262) This motion was denied by the Industrial Commission on February 9, 1983. (R. 266-267)

Plaintiff's present appeal to the Utah Supreme Court (on Writ of Review) is taken from the February 9, 1983, denial.

ARGUMENT

POINT I.

THE MEDICAL PANEL MEMBER IN QUESTION FULLY MET THE QUALIFICATION REQUIREMENTS UNDER UTAH LAW.

There does not appear to be any Utah case law directly on point. Plaintiff cites the appropriate statutes, but misanalyzes their application and import.

Section 35-1-77 U.C.A. (1953 as amended) states that when an industrial claim is filed:

> . . . the Commission shall 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 §35-2-56, .

§35-2-56 (2), U.C.A. (1953 as amended), states in relevant part:

> . . . the measurement of partial permanent disability is a highly technical and difficult task and should be placed in the hands of physicians specially trained for the care and treatment of the occupational disease involved, . . .
>
> . . . the commission shall appoint an impartial medical panel to consist of one or more physicians specializing in the treatment of the disease or condition involved in the claim, . . .

Plaintiff's essential contention is that Dr. Dituri, chairman of the two-man medical panel in this case, did not meet the qualifications required by law. In particular, plaintiff suggests that Dr. Dituri should have been board certified specifically in pulmonary disease in order to be fully qualified. (plaintiff's brief page 5)

(1) Although being "specially trained" is required under §35-2-58(2), supra, there is nothing in the Utah statutes to suggest that board certification in a subspecialty is per se required. In fact, the relevant statutes do not give any special or unique meaning to the phrase "specially trained"; and no board certification of any kind is anywhere mentioned as a requirement. Therefore, the relevant statutes do not require that Dr. Dituri be board certified in the subspecialty of pulmonary medicine in order to be a qualified member of the medical panel.

(2) Essentially, the Utah statutes, § 35-1-77 and § 35-2-56, supra, require that a physician appointed to a medical panel must be an expert in the relevant field of medicine. It is well established law in Utah that an expert can qualify as such by any combination of

training and practical experience. Maltby v. Cox Construction Comp. Inc., 598 P.2d 336, 340 (Utah 1979).

Furthermore, lack of certification by a national board does not negate one's status as an expert. That would go merely to the weight to be given to his expert opinion. Swan v. Lamb, 584 P.2d 816, 818 (Utah 1978).

(3) According to Dr. Dituri's testimony at the October 7, 1982, hearing, he is board certified in internal medicine. (R. 280) Pulmonary medicine is a subspecialty of internal medicine, and all internists are considered qualified in pulmonary medicine. (R. 281)

From other testimony at the hearing, it would seem that Dr. Dituri is better qualified than most internists in this regard. He has been continuously on the faculty of some medical school since 1954 and is presently on the clinical faculty at the University of Utah Medical School. (R. 280-281) As a practicing internist, he diagnosed and treated pulmonary diseases of all types for over 20 years. (R. 281) Furthermore, Dr. Dituri has specifically kept up in the area of pulmonary medicine because it is one of the big areas of disability-evaluation, his main activity in recent years. (R. 281, 309)

None of this testimony was controverted in any way at the hearing. Indeed, Dr. Dituri's testimony as to his qualifications is neither denied by nor in conflict with anything in the entire record.

It is certainly well within the ordinary meaning of the phrase to say that Dr. Dituri is "specially trained" in pulmonary medicine, as required by the statute, § 35-2-56(2), supra. Therefore it must be concluded that Dr. Dituri was well qualified, within the

meaning of the relevant Utah statutes, to be a member of the medical panel.

POINT II.

SECTION 35-2-56(2), U.C.A. (1953 AS AMENDED), MUST BE READ AS REQUIRING THAT PHYSICIANS APPOINTED TO A MEDICAL PANEL HAVE ADEQUATE SPECIALIZED TRAINING OR KNOWLEDGE.

Plaintiff points out that the language in part of § 35-2-56(2), supra, seems to indicate that physicians appointed to the medical panel should be physicians who specialize in the treatment of the disease in question. The relevant part of § 35-2-56(2) says:

> . . . the Commission shall appoint an impartial medical panel to consist of one or more physicians specializing in the treatment of the disease or condition involved in the claim, . . . (emphasis added)

Thus, Plaintiff contends that Dr. Dituri did not qualify under the statute, because he is not currently undertaking the treatment of patients and is, instead, restricting his practice to consultation and disability evaluations. (Plaintiff's Brief, page 6)

This is ambiguity here. In the first part of § 35-2-56(2), supra, the statutory language is that the task of medical evaluation:

> . . . should be placed in the hands of physicians specially trained for the care and treatment of the occupational disease involved. (emphasis added)

Here, the emphasis is on specialized training, rather than on specialized treatment or practice.

Since the physician's role as a panel member is that of evaluation, not treatment, the statute's main concern must be to insure that panel members have adequate special training or knowledge. Ability to treat special cases or practice in a specialized area can be only of secondary concern--perhaps as evidence of the physician's specialized training or knowledge.

Carrying plaintiff's analysis to its logical conclusion, the commission would have to eliminate any number of abundantly qualified physicians who evaluate cases, because they are consultants or diagnosticians only and/or are retired physicians who simply do evaluations as a service. Absent such fine people, the difficulty of finding physicians willing to serve would be greatly increased. This would be a ridiculous result. A fair reading of the statute and the legislative intent could not be so.

Taken as a whole, therefore, § 35-2-56(2), supra, is most reasonably interpreted as requiring that physicians appointed to a medical panel have adequate specialized training in the disease or condition involved. Without a doubt, Dr. Dituri and Dr. Neohren have the requisite specialized training, both formally and by practical experience, in the treatment and analysis of the condition claimed by the applicant.

POINT III

THE MEDICAL PANEL AS A WHOLE FULLY MET THE QUALIFICATION REQUIREMENTS UNDER UTAH LAW AS THE SECOND MEMBER WAS A BOARD CERTIFIED CARDIO-PULMONARY SPECIALIST.

Even if arguendo, board certification in the relevant subspecialty were required by Utah law, the medical panel appointed in the present case would still pass statutory muster.

The co-member of the panel in this case was Dr. Theodore Noehren who is a board certified internist with a subspecialty certification in pulmonary internal medicine. (R. 144, 283-284) Plaintiff does not challenge Dr. Noehren's qualifications as a specialist in pulmonary medicine. § 35-2-56(2), supra, states in

part:

> . . . the Commission shall appoint an impartial medical panel to consist of one or more physicians specializing in the treatment of the disease or condition. . . (emphasis added)

The previous version of this section required the appointment of a medical panel consisting of "not less than three physicians . . . " (1973, ch. 68,) According to the present version of the statute, then, the Administrative Law Judge could have simply appointed Dr. Noehren as a panel-of-one. Presumably, plaintiff could have had no objection to this.

It is difficult, therefore, to see how plaintiff can be prejudiced by a panel of two that includes Dr. Noehren. Dr. Dituri and Dr. Noehren worked together closely in their evaluation of plaintiff's medical condition, and the medical panel's report was the product of the combined efforts of both physicians. (R. 283-285)

The fact that Dr. Dituri was chairman of the panel does not necessarily mean he had to take dominant responsibility for performing the evaluation. In his letter of appointment, Dr. Dituri was instructed that he could bring in other specialists if he wanted to. (R. 116) Dr. Dituri's clinical and academic training as an internist certainly qualified him to understand and appreciate the matters being evaluated. Whether Dr. Dituri performed a separate evaluation, or looked to Dr. Noehren's evaluation is basically immaterial. As the Administrative Law Judge pointed out at the October 7, 1982, hearing, the essential issue is whether the medical panel, as a whole, is qualified. (R. 308) The Judge found that it was.

POINT IV.

THE ADMINISTRATIVE LAW JUDGE DID NOT ABUSE HIS DISCRETION BY APPOINTING THE PHYSICIAN IN QUESTION TO BE A MEMBER OF THE MEDICAL PANEL.

Since the Industrial Commission, rather than the medical panel, is the ultimate finder of fact, Redman Warehousing Corp. v. Industrial Commission of Utah, 454 P.2d 283, 285 (Utah 1969),[1] it is plausible to regard the Administrative Law Judge's relation to the medical panel as similar to that of a trial judge's relation to expert witnesses.[2] The trial judge is allowed considerable discretion in deciding whether a witness qualifies as an expert,[3] Maltby v. Cox Construction Company, Inc., 598 P.2d 336, 340, (Utah 1979); Sandy State Bank v. Brimhall, 636 P.2d 481, 486 (Utah 1981). The Administrative Law Judge also exercises discretion in appointing the members of a medical panel.

By analogy, such exercise of discretion by the Administrative Law Judge should not be set aside unless, by a palpable ignorance of subject-matter manifested by the appointee, there is a clear abuse of discretion. State by and through Road Commission v. Silliman, 22 Utah 2d 33, 34-35, 448 P.2d 347. 348 (1968).

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1. In fact, in the Redman case, the Utah Supreme Court reversed a Commission award based on a back ailment, because it found that the Commission had erroneously relied on a medical panel report that had little or no weight as evidence.

2. The similarity between an Administrative Law Judge and a trial Judge is created in a number of provisions. See, generally: §§ 35-1-82.51 to 35-1-86, U.C.A., (1953 as amended).
   As with a trial court, a complete record is made at the Commission hearing (§35-1-82.52). The hearing examiner issues subpoenas and contempt citations and causes depositions to be taken, as does a trial judge (§§ 35-1-82.52; 35-1-85.1). The administrative law judge findings of fact and conclusions of l and issues orders, as does a trial judge (§§ 35-1-82.52; 35-1-85). Like the order of a regular trial court, an order f the Commission is reviewable by the Supreme Court. (§§ 35-1-8 35-1-86).

3. See: Rule 56, Utah Rules of Evidence; Federal Rules of Evidence 104, 702.

The Administrative Law Judges appoint hundreds of medical panels each year and are fully aware of the qualifications of the physicians involved. There was no abuse of discretion by the Administrative Law Judge in this case when he appointed Doctors Dituri and Neohren to form the medical panel.

CONCLUSION

Whether taken individually or together, the members of the medical panel in this case are fully qualified to act as a medical panel to evaluate the pulmonary maladies of the plaintiff. Utah law requires physicians to be specially trained in the disease or condition involved. The plaintiff would have this court find that a board certified internist who through his practice in earlier years of taking a special interest in pulmonary disorders and a second board certified internist with a subspecialty in pulmonary medicine do not have sufficient expertise to act as a medical panel. Simply because the plaintiff is not satisfied with their opinion as to the cause of her condition does not mean that the highly educated professionals on the panel are not qualified. The Industrial Commission's Findings of Fact, Conclusions of Law and Order should be sustained.

DATED THIS 19 Day of July, 1983.

BLACK & MOORE

BY James R. Black
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Attorney for Respondents

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing BRIEF was sent this 20th Day of July, 1983, to the following:

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