

1992

James Turcsanski v. Salt Lake City Corporation, and Board of Review of the Utah State Industrial Commission : Brief of Appellant

Utah Court of Appeals

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BRIEF

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DOCKET NO. 920716-CA

BEFORE THE UTAH COURT OF APPEALS

JAMES TURCSANSKI,

Petitioner/Applicant

vs.

SALT LAKE CITY CORPORATION,
and BOARD OF REVIEW OF THE
UTAH STATE INDUSTRIAL
COMMISSION

Respondent/Defendant.

Case No. 920716-CA

Priority No. 7

BRIEF OF PETITIONER

BRIEF OF INJURED WORKER SEEKING
REVIEW OF INDUSTRIAL COMMISSION
RULING DENYING WORKERS COMPENSATION
ON THE GROUND THAT THE INJURY WAS
NOT WORK RELATED

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FILED

Utah Court of Appeals

APR 16 1993


Mary T. Noonan
Clerk of the Court

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None

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JURISDICTION AND NATURE OF PROCEEDINGS

The Utah Court of Appeals has jurisdiction over this Appeal pursuant to Section 78-2a-3(2)(a) and Section 35-1-86 Utah Code Annotated, 1953 as amended.

STATEMENT OF ISSUES

The issues raised by this appeal are:

a. Did Industrial Commission err when it ruled that the claimant had failed to meet his burden of proof with regard to the issue of medical causation?

b. Did the Industrial Commission err when it affirmed the refusal of the Administrative Law Judge to refer the issue of medical causation to a medical panel?

STANDARD OF REVIEW

The Utah Admin. Procedures Act, Section 63-46b-16(4)(b)&(d) authorize Appellate relief when an agency has acted beyond the jurisdiction conferred by statute or erroneously interpreted or applied the law. The standard of review with respect to questions of law is that the court applies a correction of error standard. Morton International v. Utah State Tax Comm., 814 P.2d 581 (1991).

The appellate court need give no deference to the legal interpretation of Section 45 applied by the Industrial Commission. There had been no express or implied grant of power to construe said statute. Cross v. Board of Review of Industrial Comm., 824 P.2d 1202,1204 (Ut. App. 1992).

STATEMENT OF THE CASE

This Workers Compensation Case involves a Petition for Review of an Industrial Commission Order affirming the Administrative Law Judge's denial of disputed benefits.

STATEMENT OF THE FACTS

a. Petitioner was employed by a self insured employer, Salt Lake City Corporation, on February 13, 1988. (R-00057)

b. Claimant fell twelve (12) feet from a ladder and landed on his back on February 13, 1988 while cleaning the ceiling of a pump house. (R-00057)

c. The Applicant was on a ladder 10 to 12 feet from the floor. The ladder slipped, and the Applicant fell straight down, but backwards. He landed on his back with the ladder beneath him. He put his hands down to break his fall, and he injured his arm on a protrusion. (R-00099)

d. After the fall, Claimant got off the ladder and felt pain in his right arm and leg. He then went to the Holy Cross Hospital Emergency Room where he was treated for a contusion on his right arm and returned to work to finish his shift. (R-00099)

e. On June 20, 1988 Applicant saw his regular treating physician Dr. King Udall complaining of pain in his back. Dr.

Udall diagnosed prostatitis and prescribed medication. (R-00057)

f. On November 20, 1989 Mr. Turcsanski again saw Dr. Udall complaining of neck pain among other things. Dr. Udall ordered a cervical x-ray. The x-ray report indicated "marked degenerative changes of the intervertebral disc" between C5 and C6 and between C6 and C7. (R-00057)

g. In December of 1991 Claimant contacted Dr. Jim Antinori who had originally treated him at the Holy Cross Emergency Room after his fall on February 13, 1988. Dr. Antinori opined that a back problem could have resulted from the fall and referred Mr. Turcsanski to Dr. Corey Anden, a physiatrist. Dr. Antinori is the only doctor actually familiar with the injuries suffered by Claimant on February 13, 1988, and made this referral only because the current back problem is fully consistent with those injuries. (R-00003)

h. Dr. Anden saw Applicant on December 9, 1991. Dr. Anden indicated that Mr. Turcsanski has "persistent left-sided low back pain," and "he generally has increased low back pain every winter since 1989." Dr. Anden recommended that the applicant have x-rays and possibly, a CT scan. (R-00058)

i. On December 23, 1991 Dr. Anden saw Mr. Turcsanski on a follow up visit and reported "post traumatic changes of the L5 vertebral body with disk space narrowing at L4-5 most likely sustained in the industrial fall in 1988; possible left L3-4 radiculopathy secondary to disk herniation; left gluteus medius muscular strain." (R-00004-5)

j. After receiving the Holy Cross Hospital emergency room records from the Assistant Salt Lake City attorney, Dr. Anden issued a letter changing her original opinion given in this case concluding that "In fact, it is unlikely that the lumbar vertebral compression fracture at L5 was sustained in the fall."

k. There is no evidence in the record that Claimant has ever suffered a lumbar vertebrae compression fracture at any other point in his life, or that he has ever had any other accidents as serious as the one of February 13, 1988. (R-00044 and R-00045)

l. There is no evidence in the record that the current condition of Claimant could only have resulted as an aftereffect of an actual lumbar vertebral compression fracture, even if it did result from his work related accident. (R-00044)

m. Dr. Stuart was hired by Defendants to do a medical file review, and he concluded that "it is just as probable" that Claimant's current back and neck problems resulted from his accident, as from any other cause. (R-00032)

n. The Applicant filed an Application for Hearing. (R-00002)

o. The Administrative Law Judge found that the injury to Claimant's back did not arise out of the fall on February 13, 1988. (R-00102)

p. The Industrial Commission affirmed the finding and ruling of the Administrative Law Judge. (R-00102)

SUMMARY OF ARGUMENT

The Industrial Commission has a fundamental misconception of

how little additional evidence is needed to constitute a "preponderance" , once Defendants have conceded an equal probability of medical causation.

The Industrial Commission clearly erred if any part of its reason for not convening a medical panel was based on its perceived failure by Claimant to comply with U.C.A. 35-1-99.

ARGUMENT

POINT I

THE PREPONDERANCE OF THE EVIDENCE IN
THIS CASE SHOW AS A MATTER OF LAW
THAT MR. TURCSCANSKI SUFFERS FROM A
WORK RELATED BACK INJURY

Claimant acknowledges that he has the burden of proving medical causation between his back problem, and his work related accident of February 13, 1988. Further, he is required to prove this causation by a preponderance of the evidence. Large v. Industrial Comm'n of Utah, 758 P.2d 954, 956 (Utah App. 1988).

The dispute in this case, then, is over how the Industrial Commission understands and applies the legal standard of "preponderance of the evidence". Preponderance of the evidence clearly only means more probable than not, or, roughly, 51% of the "weight" of the evidence. The Industrial commission, on the other hand, has used a standard in the instant case which has required the Claimant to prove that it was much more likely than not that his present condition resulted from his accident.

For the purpose of this case, and consistent with the findings of its own doctor, (R-00043-44) the City has already conceded that it is equally probable that the claim of Mr. Turcsanski, is valid.

"[T]he medical evidence demonstrated that it was [only] equally probable that a non-industrial exertion caused the Applicant's condition." (R-00080) (And note the use there of the "proximate cause" language disapproved by this Court in Large.) Thus, it is clear that only very little more evidence of causation was required to be presented by claimant, before his burden of proof had been fully met. However, it is also clear from the decision of the Industrial Commission that it simply did not understand this very fundamental proposition.

Please note the following two facts: (1) Dr. Antinori, the only physician actually familiar with the original injuries of Claimant, thought it likely enough for the back problem to have resulted from the accident that he made a referral for further review (R-00003); and (2) at one time or another, Dr. Anden has stated both that "It is probable that the lumbar injury seen on the x-rays was sustained in the fall" (R-00004), and that "the lumbar disc space narrowing at the L4-5 level . . . may be related to trauma". Both of these facts were completely discounted by the Industrial Commission, in spite of the fact that this case was a draw without them. In reality, however, these facts cannot be made to disappear from the record, and they need be given no more than almost no weight at all before they tip an evenly balanced scale in the favor of Claimant.

The totality of the record in this case leaves no doubt that the accident of February 13, 1988 could have caused the condition that Claimant now suffers from. The denial of his claim by the

Industrial Commission, on the other hand, resulted only from the possibility that Claimant might be suffering solely from a degenerative condition. However, the fact is undisputed that, if Claimant does not have a degenerative condition, there is no other source of trauma that he has ever suffered that can account for his present problem. Further, trauma caused aggravation of pre existing conditions is at least partially compensable, and is a widely noted fact in back problem cases. (See e.g. Large, and Kennecott Corp. v. Indus. Com'm of Utah, 740 P.3d 305 (Utah App. 1987)). So, it should be held, as a matter of law, that any accident sufficient in itself to have caused a back injury, would, at the very least, have acted to aggravate a pre-existing condition, if any there was, which the Claimant might have suffered from. Further, if this claimant had no pre-existing degenerative condition, then the only other possible cause of his current condition is the trauma of February 13, 1988.

The Industrial commission has required this Claimant to show that it was highly likely that his back problem resulted from his accident. Even under this standard, Mr. Turcsanski should have prevailed, because a fall like his, at a minimum, would have had some lasting impact on a back that was already less than perfect. However, Claimant was only required to show that medical causation was more likely than not, the result of his work related accident and the concession of Defendant almost removed even this relatively low barrier. Accordingly, only very little additional evidence was required before Claimant could prevail, and the Industrial

Commission must be reversed for its faulty understanding of the law in this area.

POINT II

UNDER THE TOTALITY OF THE CIRCUMSTANCES, THE COMMISSION ERRED IN NOT ALLOWING THIS CASE TO GO FORWARD TO A MEDICAL PANEL FOR DECIDING THE ISSUE OF MEDICAL CAUSATION

It is not clear what role the interpretation of U.C.A. 35-1-99 by the Industrial Commission played in the outcome of this matter. However, there is no doubt that the law holds this to have been a case appropriate for the appointment of a U.C.A. 35-1-77 "Medical Panel".

Workers are all people who can have accidents on the job, but almost none of them are doctors. Thus, the "accident and injury" phrase of Section 35-1-99 can only mean "don't take any more than a year to tell your employer that you've had an accident that hurt you". The interpretation of this language advocated by Defendants would, of course, mean only those persons who can tell what is wrong with themselves can ever recover under a Workers Compensation Claim. Clearly, the Legislature never intended that compensation would be avoidable in all but such a narrow class of cases.

"The purpose of the notice requirement is two-fold: (1) to enable the employer to provide immediate medical diagnosis and treatment; and (2) to facilitate the earliest possible investigation of the facts surrounding the injury." Kennecott, at P.309 (emphasis added). The first purpose is clearly for the benefit of the employee. There would be no logic in concluding that employers are saved from paying for those injuries that their

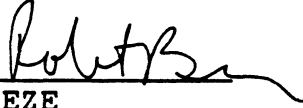
own doctors fail to discover. A more counterproductive result could hardly be imagined. The second purpose is fully served when the employer knows enough to be able to study and document the accidents that their employees claim to have been the victims of. Obviously, then, this second purpose is simply not implicated in the instant case, because there is no doubt that the present back problems of Mr. Turcsanski are fully consistent with the earlier accident that he suffered, and that that accident was reported immediately.

Further, back injuries are an inherently complicated area of medicine. (Recovery, is available for an injury that aggravates a "pre-existing condition", Large at P.955. A 1984 back surgery "was necessitated by residuals from the 1969 neck injury". Kennecott at P.307). This, then is exactly the sort of case where the uncertainties undoubtedly would have benefited from review and considerations by independent medical experts.

CONCLUSION

The totality of the record in this matter shows that it is more likely than not that the Claimant suffers from back problems that were caused, or at least aggravated by the February 13, 1988 accident on the job. At a minimum, then, a medical panel should review what portion of his current problems resulted from that accident.

DATED this 16 day of April, 1993.


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CERTIFICATE OF SERVICE

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on this 16 day of ^{April}~~March~~, 1993.

