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Marian L. Sanderson v. Industrial Commission of Utah et al : Defendants' Brief

Utah Supreme Court

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IN THE SUPREME COURT
OF THE
STATE OF UTAH

MARIAN L. SANDERSON,
Plaintiff,

vs.

THE INDUSTRIAL COMMISSION
OF UTAH, BELNAP FREIGHT
LINES, and THE STATE
INSURANCE FUND,
Defendants.

Case No.
10235

FILED
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DEFENDANTS' BRIEF

Supreme Court, Utah

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DEFENDANTS' BRIEF

NATURE OF THE CASE

This case is based upon a Writ of Review which the Plaintiff obtained in this Court on September 22, 1964, and in which the Plaintiff and her attorney have requested this Court to review a decision and order of the Industrial Commission of Utah.

STATEMENT OF FACTS

This case relates to the results of an accident which occurred on January 18, 1962, in which the

Plaintiff, Marian L. Sanderson, slipped and fell on some stairs at the premises of her employer, Belnap Freight Lines, Salt Lake City. In this brief, we are defending the Industrial Commission's decision dated July 1, 1964, in which the Commission ordered the Defendants to pay certain medical expenses incurred by Marian L. Sanderson prior to June 13, 1962, and workmen's compensation to and including February 12, 1962, and in which the Commission denied any payments for any later periods. R. 141)

We agree partly with the statement of facts contained in the Brief of Plaintiff, but that statement contains considerable argument and inferences which we feel are not justified or proper. It would probably clarify the situation if we here set out the basic facts without any inferences or argumentation.

On April 4, 1963, applicant's attorney, Mr. Farr, sent a letter to the Industrial Commission, which was in the nature of an application for benefits to his client, Marian L. Sanderson, relating to her accident of January 18, 1962 in the employ of Belnap Freight Lines. (R. 17) As the workmen's compensation insurer of Belnap, the State Insurance Fund had already paid for Mrs. Sanderson certain amounts of medical and hospital expense and had paid her workmen's compensation at the rate of \$41.75 per week from January 21 to January 30, 1962, and from February 5 to February 12, 1962 inclusive. The Fund also later paid all bills for her treatment during the entire period from January 18, 1962 to June 13, 1962.

On April 15, 1963, the Industrial Commission referred the medical aspects of the case to a Medical Panel consisting of Dr. Boyd G. Holbrook, Dr. W. E. Hess and Dr. L. N. Ossman. (R. 21) The Panel made its first report to the Industrial Commission in its letter of July 17, 1963. (R. 32-36)

On August 8, 1963, applicant's attorney sent to the Commission a letter (R. 41-43), containing objections to said Panel's report. He also requested the Commission to appoint on the Panel a neurologist and a medical doctor specializing in internal medicine.

On August 12, 1963, the Industrial Commission returned the case to the Medical Panel and added to the panel Dr. Wayne M. Hebertson, a neurologist, and Dr. Alan E. Lindsay, an internal medicine specialist. (R. 44)

The Medical Panel, now consisting of five physicians, specialists in their fields, made its report to the Industrial Commission on October 18, 1963. (R. 57-59) This Panel report was objected to by Mrs. Sanderson's attorney in his letter to the Industrial Commission dated November 21, 1963. (R. 45-47) The Industrial Commission held a formal hearing on February 10, 1964. (R. 69-137) The Commission then rendered its decision in the form of an order dated July 1, 1964. (R. 140-141) The Plaintiff appealed from the Order of the Commission.

ARGUMENT

POINT 1

THE INDUSTRIAL COMMISSION'S DECISION DENYING APPLICANT'S CLAIM FOR COMPENSATION BENEFITS AFTER JUNE 13, 1962, AND DENYING HER CLAIM FOR COMPENSATION FOR PERMANENT PARTIAL DISABILITY, WAS PROPER AND WAS SUPPORTED BY THE EVIDENCE IN THE RECORD.

In paragraph 3 of his Petition for Writ of Review, Plaintiff's attorney charged that the Industrial Commission's order of July 1, 1964 (1) failed to resolve the issues; (2) did not rate the Plaintiff for permanent partial disability; (3) limited the liability of the employer to the period of time ending June 13, 1962; and (4) denied claimant any further compensation.

The Commission did "resolve the issues." Some of them were resolved in favor of applicant's claim; and some of them were resolved against her claim. The Plaintiff by her appeal objects to those parts of the Commission's order which resolved certain issues against her claim.

The Commission's decision of July 1, 1964, (R. 140), recited the Medical Panel's actions and findings and conclusions in the case, and then said, (R. 141) :

The Commission accepts the Panel report.

The Commission concludes that applicant should receive compensation for time lost from

work because of the injury to and including June 13, 1962, and that all related medical and hospital bills to and including June 13, 1962 should be paid by carrier. She should not be rated for permanent partial disability because there is no objective evidence of permanent disability as a result of the accident.

IT IS THEREFORE ORDERED that defendants pay applicant temporary total compensation at the rate of \$41.75 per week from January 21, 1962 to February 12, 1962, if not already paid, and all medical and hospital bills to and including the 13th day of June, 1962.

IT IS FURTHER ORDERED that any claim at this time for permanent partial disability because of the injury to the back is and same is hereby denied.

There is ample evidence in the record to support the foregoing decision and order of the Commission. (R. 140-141) Both Dr. Wayne M. Hebertson and Dr. Boyd G. Holbrook, who testified at the Commission's hearing, (R. 72-107), were members of the Medical Panel which had made its report to the Commission dated October 18, 1963, and which was received by the Commission on November 5, 1963. (R. 57-59)

Reference was made in Plaintiff's brief (PB-8) to the testimony of Dr. Hebertson, a member of the Panel, that Applicant had a 5% loss of bodily function as far as her arm was concerned. It is submitted that a fair reading of the testimony of Dr. Hebert-

son (R-80-81) will show that the doctor was referring only to the subjective complaints of the Plaintiff, and that objectively he did not find any permanent partial disability.

Dr. Hebertson testified (R. 80) that there was no objective evidence of loss of function of Mrs. Sanderson's central or peripheral nervous system, which might have been the result of her injuries of January 18, 1962. That also was substantially one of the findings and conclusions contained in the Panel report. (R. 59)

Dr. Hebertson testified in answering Mr. Farr's questions, (R. 80-81):

Q. Was there any subjective evidence?

A. Yes, sir.

Q. What was the subjective evidence?

A. The pain which was present over the patient's head and neck, her decreasing grip in the left hand, and the loss of feeling over the left side of the face and left upper extremity.

Q. Any other evidence, sir?

A. I don't think so.

Q. As far as objective and subjective evidence, is one any more valid than the other in determining the disability?

A. I think so. Objective evidence is always more valid than subjective evidence in determining disability.

At R. 84, Mr. Farr further questioned Dr. Hebertson:

Q. Has there been any significant loss of function of arm or hand of Mrs. Sanderson?

A. Yes. Subjectively, yes.

Q. To what extent, sir?

A. Again that is purely subjective, or purely on the part of the patient, and I could not determine it. I would have to accept her word purely in that regard, because objectively I can find no loss of function in the extremity.

Dr. Boyd G. Holbrook, an M.D. specializing in orthopedic surgery, who was the chairman of the Medical Panel in this case, testified regarding the procedure of the Panel in performing its functions under the provisions of Section 35-1-77 of the Workmen's Compensation Law. (R. 93) The Referee (Commissioner Wiesley), asked him:

Q. Now tell us your procedure in getting together.

A. When I receive one of these Panels, I review the entire record and make up a summary of all the pertinent factors from the record. If it appears that there are any reports that are not present in the record, any doctors that have seen the patient from whom we do not have reports, or any other information that we can detect might have a bearing on it, we attempt to obtain all of this information. In addition we obtain all of the X-rays that can be obtained that had been taken on

the case. Then this information is all summarized. The X-rays, the Industrial Commission file and the summary are sent to each Panel member prior to the meetings, so that he can review them and become acquainted with the case. The applicant is then called in. We, before examining the applicant, go over all of the previous material. The applicant is then interviewed. That is a history is taken regarding their entire story, involving their alleged accident and the symptoms, and the treatment, and the applicant is then examined. Following that the Panel then goes over the findings, and reaches the conclusions. The report is then typed up, sent — or taken, actually taken — to each Panel member individually, for his signature.

In answering Mr. Farr's questions on cross-examination, (R. 96-97), Dr. Holbrook testified regarding the occasions when the members of the Medical Panel made examinations of Mrs. Sanderson's head and neck and back, etc.:

Q. Now did you examine Marian Sanderson, doctor?

A. Yes. Well, I should say that I did not personally examine Marian Sanderson. * * * I was present at both of the examinations. These are done each time with all as previously described. All of the members of the Panel examined the patient together. * * * Obviously every member of the Panel does not perform every examination test. They are done as a group examination, and I was a part of the group that examined Mrs. Sanderson on two

occasions. * * * As Chairman, the various portions of this examination were delegated to the specialists involved, and I acted as recorder, writing down the findings and the history that we obtained.

Plaintiff has taken the position that the Commission, in following the findings of the Medical Panel, acted arbitrarily and in excess of its powers. It is claimed throughout Plaintiff's Brief that the report of the Medical Panel should be considered as only an "exhibit" and not as evidence.

Section 35-1-77, U.C.A., 1953 in providing for the Medical Panel and in setting forth the procedure to be followed if objections to the findings of the Panel are made is as follows:

If objections to such report are filed it shall be the duty of the Commission to set the case for hearing within thirty days to determine the facts and issues involved, and at such hearing any party so desiring may request the Commission to have the Medical Panel or any of its members 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 it is sustained by the testimony admitted.

In this case Dr. Boyd G. Holbrook, who had been appointed Chairman of the Medical Panel to investigate the medical aspects involved, was present at the hearing held on February 10, 1964 and was

called upon to testify. Dr. Holbrook identified the signatures on the panel report (R. 92, 103, 104). He then explained how the Panel proceeded to determine the medical aspects of the case (R. 93). His testimony has been set out in full earlier in this brief. Upon cross-examination by counsel he explained in detail the examination which was made of the medical reports and of the applicant, the Plaintiff herein, (R. 94-103). Later, in response to questioning by counsel for the State Insurance Fund, he testified as follows relative to the Panel report:

Q. And you concurred and agreed with the other doctors that the statements of the facts specified in this report and the conclusions which you arrived at — particularly those set out in the latter part of the report — are your opinions and findings?

A. I concur with these, yes.

Q. And you still have that same opinion?

A. I do.

The above quoted portion of Section 35-1-77, U.C.A., 1953, sets forth that the Medical Panel report shall be received “as an exhibit, but shall not be considered as evidence in the case except insofar as it is sustained by the testimony admitted.” The testimony of Dr. Holbrook, as Chairman of the Panel, upon the careful examination of him by Plaintiff’s counsel and by counsel for the State Insurance Fund, did sustain the contents of the Medical Panel report, particularly the findings thereof, and that the report having been sustained by the testimony of the

doctors, the Medical Panel report became and was properly considered as evidence by the Commission. Dr. Hebertson also testified to the same effect (R. 72, 87).

Plaintiff's brief cites the case of *Hackford vs. Industrial Commission of Utah*, 358 P. 2d. 899, 11 U. 2d. 312, in support of the argument that neither the Commission nor the employer introduced the testimony required by Section 35-1-77, U.C.A., 1953 as amended. In the *Hackford* case, although the members of the Medical Panel were present at the hearing none of them were examined, either by the Commission or by counsel for either party. In that case the Panel report was not sustained by competent evidence. The facts in this case are entirely different. The Chairman of the Medical Panel was present, he was examined by the referee, very carefully cross-examined by Plaintiff's attorney, and further examined by counsel for the State Insurance Fund. His testimony fully sustained the findings and conclusions of the Medical Panel. Dr. Hebertson who was also a member of the Medical Panel was present and testified. The Commission strived earnestly to provide Plaintiff with a complete study of the medical aspects of her claim. Following the report of the original Medical Panel, and at the request of Plaintiff's attorney, two additional physicians were appointed to the Panel, Dr. Wayne M. Hebertson, a neurologist and Dr. Allen E. Lindsay, an internist. This enlarged Panel then made its report to the Commission and found as follows:

(1) This applicant's hospitalization on 18 January 1962 was made necessary by this accident. This accident resulted in temporary loss of control of her diabetes and care of her diabetes during this period of hospitalization was made necessary by this accident. The relationship of her diabetes to this accident ceased at the time of her discharge from the hospital and the subsequent course and care of her diabetes since that time is not related to this accident.

The Panel's findings in that paragraph were entirely in favor of the Plaintiff. In the next four paragraphs of its report the Panel found that:

(2) This applicant follows the natural history of most diabetics and appears to follow the normal course of diabetes for her. There is no evidence of aggravation of her diabetic process as a result of this accident.

(3) Total temporary disability as a result of this accident ceased when she returned to work initially following this accident.

(4) There is no objective evidence of permanent disability as a result of this accident.

(5) No further treatment is indicated as a result of this accident.

It is well established that conflicts in the evidence must be resolved by the Commission as stated in *Norris vs. Industrial Commission*, 90 U. 256, 261, 61 P. 2d. 413:

Again, therefore, we have the old case of a conflict of evidence which it is for the Commission to resolve.

It was for the Commission to resolve the conflict in the evidence in this case. That it chose to accept the conclusions of the Medical Panel was not capricious or arbitrary. The members of the Panel were specialists in their fields, and the Commission chose to believe the testimony of the Panel doctors and report of the Panel.

POINT 2

THE INDUSTRIAL COMMISSION WAS NOT LEGALLY REQUIRED TO FIND OR CONCLUDE THAT MARIAN SANDERSON'S TREATMENT FOR HER DIABETIC CONDITION AFTER JUNE 13, 1962, WAS NECESSITATED BY HER ACCIDENT OF JANUARY 18, 1962.

Basically the same situation exists in the case at bar, as has existed in a number of other cases which have been decided by this Court. One of the most recent was the case of *Burton vs. Ind. Comm.*, 13 Utah 2d 353, 374 P. 2d 439, which had many elements of similarity to the procedural situation existing in our present (Sanderson) case. Mr. Burton worked as an employee delivering beer. On the morning of October 30, 1959, after he had made his second delivery in downtown Salt Lake City and returned to his truck, he felt a severe pain in his chest. He went into the nearby Judge Building, where a doctor gave him some emergency treatment, and then called his family doctor, T. A. Clawson. Mr. Burton was taken to a hospital, where he died that after-

noon, from coronary occlusion. After hearings by the Industrial Commission, and proceedings by a medical panel, the Commission denied the claim of Mrs. Burton, on the basis that the death did not result from an industrial accident. The Supreme Court of Utah upheld the Commission's denial. In the Court's opinion, among other things it said:

In order to reverse the finding and order made the plaintiff must show that there is such credible uncontradicted evidence in her favor that the Commission's refusal to so find was capricious and arbitrary. * * * * She relies upon the circumstances of the death described above, coupled with the testimony of the family physician, Dr. Clawson. In response to the question as to whether the deceased's exertion in lifting and delivering the cases of beer was a contributing cause to the occurrence to Mr. Burton's heart attack and his death, the doctor answered that, "it could be a factor."

As opposed to the evidence upon which plaintiff relied the Commission had before it the opinions of three members of the medical panel, together with the testimony of one of them, Dr. L. E. Viko, a well-known heart specialist. The substance of their opinions was that Mr. Burton's coronary thrombosis with myocardial infarction was not caused by the exertion of his work that morning. In its decision the Commission recited, "We chose to believe the testimony of Dr. L. E. Viko and the panel report."

Assuming without deciding that the plaintiff's evidence would be sufficient to sus-

tain a finding in her favor, it is indisputable that the testimony just referred to is sufficient to sustain a finding to the contrary. There being no basis upon which this court could say that the Commission acted capriciously, arbitrarily or unreasonably in denying the application, its order is affirmed.

Another case which involved the Industrial Commission's acceptance of one side of a conflict in the medical opinion evidence in the case, was *Woodburn vs. Ind. Comm.*, 111 Utah 393, 181 P. 2d 209. Paul Woodburn was employed as superintendent on the ski-lift construction job at Snow Basin. On July 21, 1945 he rode a tractor to the upper terminal point, then he walked down the mountain to the lower terminal. When he arrived there, apparently he suffered a slight heart attack. For the next ten days he supervised the job from the lower level. On July 31st he did some climbing on the hill. Shortly afterwards he had severe pain under the breastbone. After a hearing and rehearing, the Commission denied Mr. Woodburn's claim. The Commission concluded that his coronary occlusion "was not caused by an accident arising out of or in the course of" his employment. In sustaining the Commission's decision, the Supreme Court of Utah (p. 396), referred to the expert medical testimony before the Commission. The medical testimony from four doctors was divided with respect to their opinions of the possible causation between the exertion and the heart attack. At page 399 of the Court's opinion, it quoted from a previous Utah case, *Lorange vs. Ind. Comm.*, 107 Utah 261, 152 P. 2d 272:

Unless therefore it can be said, upon the whole record, that the commission clearly acted arbitrarily or capriciously in making its findings and decision, this court is powerless to interfere. * * * * It was not intended, * * * * that this court, in matters of evidence, should to any extent substitute its judgment for the judgment of the Commission.

and at page 400 of the Court's opinion:

There is substantial competent evidence (supplied by Drs. Walker and Olson) that in this case plaintiff's injury was not caused or contributed to by the physical effort he put forth on his job. The Commission, therefore, did not act arbitrarily or capriciously in determining such to be the case.

It should be kept in mind that the burden of proof is upon the applicant to establish her claim. *Grasteit vs. Ind. Comm.*, 76 Utah 487, 290 Pac. 764; *Wherritt vs. Ind. Comm.*, 100 Utah 68, 110 P. 2d. 374.

In the case of *Kent vs. Ind. Comm.*, 89 Utah 381, 57 P. 2d 724, pages 384-385 of the Court's opinion contains the following language:

When the Industrial Commission denies compensation and the case is brought to this court for review, a different type of search of the record is demanded than when the Industrial Commission makes an award of compensation and the record is likewise brought here for review.

In the denial of compensation, the record must disclose that there is material, substan-

tial, competent, uncontradicted evidence sufficient to make a disregard of it justify the conclusion, as a matter of law, that the Industrial Commission arbitrarily and capriciously disregarded the evidence or unreasonably refused to believe such evidence.

With respect to the letter (R. 162-164), which Dr. A. F. Martin sent to Lionel M. Farr on June 18, 1964; relating to Dr. Martin's examination of Marian L. Sanderson on April 21, 1964, and a copy of which letter Mr. Farr attached to his Petition for Writ of Review (R. 169); that letter is not properly a part of the Industrial Commission's record in this case, nor a proper part of the record now before the Supreme Court.

At the end of the Industrial Commission's hearing on Feb. 10, 1964 (R. 136), the applicant's attorney said, "That's all." The defendants' attorney said, "That's all." The referee then said, "The Commission will take it under advisement." Nobody asked to be allowed to submit additional evidence. The case apparently was submitted by all parties for the Commission's decision.

Section 35-1-84, U.C.A. 1953, provides that when a case is brought to the Supreme Court for review.

No new or additional evidence may be introduced in such Court, but the cause shall be heard on the record of the commission as certified by it.

The above mentioned letter from Dr. Martin to Mr. Farr, is certainly new and additional evidence. If that letter were considered to be part of the Industrial Commission's record, there would never be an end to a hearing. After an applicant has had a hearing by the Industrial Commission and the case has been submitted for the Commission's decision, if the applicant and her attorney feel that their case would be strengthened by some additional evidence, do they have the right to obtain further examinations or to obtain further statements or other evidence and to merely mail such additional evidence to the Industrial Commission, without having given any notice to the defendants and without having given the defendants any opportunity to cross examine? The mere asking of the question shows the fallacy of such procedure.

At the hearing on February 10, 1964, the Industrial Commission properly accepted evidence relating to the applicant's accident of January 18, 1962, and the evidence relating to her condition and treatment prior to the day the hearing was being held. The issues which were at that time before the Industrial Commission involved questions as to whether the periods of temporary disability of Marian Sanderson from January 18, 1962 to January 30, 1962, and from February 5, 1962 to February 12, 1962, and from June 15, 1962 to July 4, 1962, and from December 8, 1962 to February 2, 1963, and from April 4, 1963 to May 20, 1963, (R. 130), were chargeable to her accident of January 18, 1962, or

whether they were periods of disability caused by her diabetic condition.

The Medical Panel's report (R. 57-59) and the Industrial Commission's decision (R. 140-141) decided that the first two periods of her disability, namely January 18, 1962 to January 30, 1962 and February 5, 1962 to February 12, 1962, were chargeable to the accident of January 18, 1962. But the Panel and the Commission also decided that the later periods: commencing June 15, 1962 and ending May 20, 1963, were not chargeable to her accident of January 18, 1962. The Panel and the Commission also decided that Marian Sanderson did not have any permanent disability chargeable to the accident. The Industrial Commission's determination of those points in issue, related to the time when the hearing was being held (February 10, 1964) and to all periods prior to that date.

If the applicant (Plaintiff) claims that her condition changed after the date of the hearing, it may be that she can invoke the Industrial Commission's "continuing jurisdiction" at some time in the future, under the provisions of Section 35-1-78 of the Workmen's Compensation Law, and have the Commission consider such a claim for additional benefits. But the case which is now being reviewed by the Supreme Court of Utah involves only the record relating to Marian Sanderson's condition at the time of the hearing on February 10, 1964 and prior thereto. The medical report of Dr. A. F. Martin (R. 163), is not a proper part of the record of this appeal.

CONCLUSION

For the foregoing reasons, the decision and order of the Industrial Commission should be affirmed by this Court.

Respectfully submitted,

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