1965

Fred Wilstead v. The Industrial Commission of Utah, The Independent Coal & Coke Co., and Continental Casualty Co : Brief of Plaintiff

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IN THE

SUPREME COURT

OF THE

STATE OF UTAH

FRED WILSTEAD,

Plaintiff,

vs.

THE INDUSTRIAL COMMISSION OF UTAH, THE INDEPENDENT COAL & COKE CO., AND CONTINENTAL CASUALTY CO.

Defendants.

Case No. 10318

BRIEF OF PLAINTIFF

STATEMENT OF NATURE OF CASE

The plaintiff is an employee of defendant, The Independent Coal & Coke Co., a self insured employer. The plaintiff filed an application for compensation on April 7, 1964, with the defendant, The Industrial Commission of Utah, alleging that on or about Feb. 10, 1960, he sustained injury arising out of or in the course of employment, while employed at Castle Gate, Utah, by defendant, Independent Coal & Coke Co., said injury being received in the following manner: "Twisted back while lifting a rock." The parts of the body injured and subsequent results are "Back was injured." Has been operated on twice and has had a back fusion. Injured left work June 28, 1960, and disability continued to present time, but injured returned to work July 13, 1964. The defendant, The Independent Coal & Coke Co., a self insurer, paid wages to and including June 27, 1960. The accident was not disputed; and defendant, The Inde-

pendent Coal & Coke Co., paid compensation for temporary total disability to and including Jan. 11, 1963. The compensation payments were $44.50 per week. No temporary total disability compensation payments were paid from Jan. 11, 1963, up to July 13, 1964, a period of over 74 weeks, and such payments if paid would have amounted to over $3,293.00.

The plaintiff appeared before a Medical Advisory Board, and they determined as of Jan. 23, 1964, his permanent partial disability at 20% loss of bodily function.

The plaintiff claims that the award of Dec. 9, 1964, by the Industrial Commission of Utah should be modified so as to award him temporary total disability for the period from Jan. 11, 1963, to July 13, 1964, or, for the period from Jan. 11, 1963 to the date of his determination of his permanent partial disability on January 23, 1964, for approximately 54 weeks, or a total temporary disability of $2,403.00.

DISPOSITION BY INDUSTRIAL COMMISSION OF UTAH

As per their order of Dec., 9, 1964, the Industrial Commission of Utah awarded him permanent partial disability of $1,700.00, or 40 weeks at $44.50 per week, based on 20% loss of bodily function, but denied him any total temporary compensation from Jan. 11, 1963, either to Jan. 29, 1964, or to time of reemployment, July 13, 1964.

RELIEF SOUGHT ON APPEAL

Modification of the award to allow him total temporary disability for the period from Jan. 11, 1963, until he was able to return to work, July 13, 1964, or total temporary disability for the period from Jan. 11, 1964, until he appeared before the Medical Advisory Board, and his permanent partial diability was then determined at 20%, on Jan. 23, 1964.

ARGUMENT

The Industrial Commission of Utah based their denial of temporary total disability for the periods above set forth, or either of them, on the fact that as follows:

> "Because both Dr. Beck and Dr. Powell released applicant as of Jan. 11, 1963, applicant is entitled to temporary total compensation from Dec. 28, 1962 to and including Jan. 11, 1963, the date applicant was released for light work"

though the record shows that his employer, The Independent Coal & Coke Co. refused to give him any work until he was restored where to he could do a full days work as in the past, and provided no light work for him, as recommended by the Drs. Beck and Dr. Powell, and the record further shows that Dr. Chester B. Powell as late as June 20, 1963, wrote as follows:

> Dr. O. W. Phelps, 42 South Main St., Helper, Utah.
> Re: Fred Wilstead:
>
> Mr. Wilstead was rechecked at your referral June 14, 1963. Thank you for forwarding Dr. Linstrom's note which is herewith returned.
>
> At this time, the first occasion on which I had seen Fred since January, he reported the following course:
>
> Attempted to return to work in January but unable on account of pain. January to May: Became gradually stronger but pain persisted across the middle of the back and down the back of the legs. The pain comes and goes. Questioning discloses that pain is significantly greater in left leg and that coughing aggravates the pain chiefly in the back.

And upon reexamination of the plaintiff, Fred Wilstead, Dr. Powell in his findings upon reexamination July 20, 1963, which are on file in the records of the Industrial Commission of Utah, found as follows:

"Reexamination: Examination of the back discloses a loss of lordosis, mild tightness of paravertebral muscles with localized tenderness in the lumbar region generally. Percussion produces pain without radiating characteristics.

Lower extermities—the sciatic stretch sign is bilaterally negative for sciatic irritability although straight leg elevation from either side reproduces back discomfort.

There is subjective hypassthesia demonstrable in both legs, without very clear margins.
Right Leg: Lateral calf and foot (probably S lroot)
Left Leg: Anterior and lateral aspect of the calf, dorsum of foot (probably L 4+ L 57)

Impression: Residual low back and possibly radicular pain without reliable localizing signs and symptoms for involved roots.

Comment: Would concur with Doctor Lindstrom that probably there is a radicular componant here and that there is some psychegenic overlay. Would not feel, however, that the evidence with respect to specific nerveroots is sufficiently clear to justify reoperation and rhizetomy—how could one be sure which sensery roots were specifically involved? How many sensory roots should be sectioned? One would naturally desire. If such a procedure were carried out, to give the patient worthwhile relief without adding to his neurologic impariment.

Would very much concur with Dr. Lindstrom that cordetomy would be inappropriate, certainly at this time because of the additional deficit it would impose.

My strong recommendation at this time is to temporize longer in the hope that the future will indicate diminishing pain and an increasing range of activity.

I doubt very much that the patient will ever be

able to resume heavy work but do feel that he will probably be rehabilitable in a sedentary job.

While I suspect that Mr. Wilstead's ultimate disability rating on the basis of maximal recovery will be relatively high for a back and disc order. I would suggest that deferring such a rating three to six months will result in a lower rating.

If for any reason it is necessary to obtain a rating at this time I would suggest referring Mr. Wilstead to an Industrial Commission panel.

I wish there were something more effective to offer in a very difficult problem of this sort. With best regards,

Sincerely yours,

Chester B. Powell, M.D."

cc:
N. R. Beck, M.D.
William A. Dorsey, M.D.,
Mutual of Omaha.

From this reexamination of June 14, 1963, 5 months later than the Industrial Commission claimed that Drs. Beck and Powell had released the plaintiff, it does not seem that the Drs. Beck and Dr. Powell did so find that the plaintiff could be released for light work, for as Dr. Powell stated:

> "My strong recommendation at this time is to temporize longer in the hope that the future will indicate diminishing pain and an increasing range of activity"

and the fact appears that the plaintiff should of as matter of right been awarded total temporary permanent disability as of Jan. 25, 1964, the time plaintiff's permanent partial disability was fixed at 20% loss of bodily function, as compared to an amputation of the arm at the shoulder, which entitled him to compensation for 40 weeks at $44.50 per

week, beginning Jan. 25, 1964, payments to be made every four weeks, if his right to recover total temporary permanent disability is limited from Jan. 11, 1963, to the date of the 20% rating of loss of bodily function, to-wit: Jan. 25, 1964, because then his condition became fixed, though of course it's the plaintiff's contention that the loss of bodily function should not deprive him of permanent total temporary disability from Jan. 11, 1963, until he returned to work on July 13, 1964.

As Otto A. Wisely, Chairman, Industrial Commission of Utah, in a letter dated Nov. 9, 1954, to T. Van Campen, Kaiser Steel Corporation, Sunnyside, Utah; stated:

> "We have received a number of complaints that you have refused to pay compensation to employees who have been released for light duty. According to the complaints, you have not supplied the light duty and have terminated compensation.
>
> "It has always been the rule of the Commission and I am sure it is the law that the employer must supply the light work or continue payment of compensation until the man's condition has become fixed, and he is given a permanent partial disability rating or returns to regular duty.

Evidently, the Industrial Commission on Dec. 9, 1964, in their ruling on the question of temporary total disability, as set forth in the beginning of the argument herein, failed to follow their previous policy, because it held that the plaintiff was only entitled to permanent total temporary disability up to Jan. 11, 1963, and not to the date of (1) either Jan. 25, 1964, when the rating for loss of bodily function was fixed or (2) when the plaintiff resumed work, July 13, 1964, holding that since the Doctors released him for light work as of Jan. 11, 1963, though the employer did not supply light work, and would not accept him back until he could perform at his regular duty a full days work for a full days pay, that he was not entitled to temporary total

permanent disability either for the period of Jan. 13, 1963, until Jan. 25, 1964, in the amount of approximately $2,403.00, or for the period of Jan. 13, 1963, until July 13, 1964, in the amount of approximately $3,203.50.

As stated in the "Law of Workmen's compensation, Vols 1 & 2, Larsen, Sec. 57-61, it is stated, Sec. 57-61, Workmen's Compensation, Vol 1:

> "Unemployment without total medical disability" "Inability to get work traceable to compensable injury may be as effective as establishing disability as inability to perform work"
>
> "Even without total medical disability the two essentials are present: wage loss, and causation of the wage loss by work connected injury:
> **(Lonido v. Lewis,** 75 A. 2nd 108)
>
> "Employee remains disabled by inability to do same work, not light work.
> **(Helen v. New Amsterdam,**
> 128 S., 2nd, 269.

and as stated in Vol. 1, 57-30, Vol. 1, Larsen, Workmens' Compensation:

> "Compensation is awarded not for the injury as such but rather for an impairment of earning capacity caused by the injury"
>
> **(Zegales Case,** 325 Mass. 128, 80 NE 264)

And, as stated in **Meyler v. A. G. Ins. Co.,** 122 South 2nd, 100, having been refused light employment duties by employer, the claiment was held totally disabled.

And, in **McKenzi v. Campbell Mfg. Co.,** 354 SW 2nd, 440, it was held:

> "Temporary total disability is payable from date of injury to date when permanent partial disability could be determined."

And, in this case, as hereinabove stated, Dr. Powell

the examining Physician found that even after as the Industrial Commission claimed, he had been released for light work, that the healing period of the plaintiff was not over, and that he was still unable to perform the same work he had been performing, and that because of such injuries he could not perform other work; and also, that he was a coal miner, doing heavy work, and he could not qualify for this work, until his injuries healed.

Here, the plaintiff is not seeking total permanent disability compensation; he is seeking temporary total disability for the period which he could not resume work; he has went back to working at his old employment for Independent Coal & Coke Co., but seeks payment for compensation either on the basis up and to the time his rating became fixed as aforesaid, or up until the time he resumed work, which here was July 13, 1964.

Also, while the plaintiff was on Jan. 25, 1964, awarded permanent partial disability for 20% loss of bodily function, or 40 weeks of $44.50, or $1,780.00, and while he has received total temporary disability up to Jan 11, 1963, the amounts he now seeks for temporary disability does not come within the limitation of Secs 35-1-65, 35-1-66 and 35-1-67, as the amounts by these statutes is limited to $14,757.00, $8,759.00, and $15,415.00, as amended by the Legislature in 1961, and under Utah **Apex Mining Co. v. Industrial Commission of Utah,** 209 P. 2nd, 571, and **Peerless Sales Co. v. Industrial Commission of Utah,** 107 U. 419, 154 P. 2nd, 644, and in fact the amounts received in actuality, if you find in his favor, is way below the amounts set up as limitations to recovery in such cases.

In checking the cases, and particularly in Utah, they deal with permanent total incapacity or disability, and not temporary total incapacity or disability. The plaintiff is seeking no award for total permanent disability, he is only seeking compensation for the extent of his healing period,

which he claims did not end until July 13, 1964, or which by law may have ended Jan. 25, 1964, when his rating of loss of bodily function was determined by the Medical Board on Jan. 29, 1964, as advised by the Industrial Commission, as shown by the records and files in this case of the Industrial Commission of Utah, which have been filed with the Supreme Court.

In the case of **Spring Canyon Coal Co. vs. Industrial Commission of Utah,** 74 U. 103, 277 P. 208, and in case of **Utah Fuel Co. vs. Industrial Commission of Utah,** 76 U. 141, 145, 287 P. 931, these cases deal with claims for total permanent disability, where the workman seeks pay for injuries, and because of these injuries, cannot return to work at his work before he was injured. Here, the plaintiff resumed his work, and wants temporary disability compensation not until Jan. 13, 1963, as the defendant, and self insurer, Independent Coal & Coke Co. want to be the limit of their liability for temporary disability, but either temporary disability until Jan. 25, 1964, when a 20% disability rating was given him, or until July 13, 1964, when he resumed work.

The only applicability that the decisions of this Court would have relative to this case is whether during the period of healing the plaintiff was bound to obtain outside work. Dr. Powell stated the plaintiff tried to resume work Jan. 13, 1963, but could not make it, and his (Dr. Powell's) reexamination on June 14, 1964, confirmed that, and then put an additional 3 to 6 months before rating could be made, or the same would be too high.

As stated in **Olsen v. Triplett,** 255 Ky. 724, 75 S. W. (2n) 366, the Court stated:

> "That is a well settled rule that "total disability" does not mean absolute helplessness or entire physical diability; that it means loss of earning power as a workman in consequence of the injury, inabil-

> ity to perform such work as may be obtainable or inability to secure work to do"

And as set forth in **Texas Employer's Insurance Association v. King,** 346 SW2d, 380:

> "Total incapacity" as used in this charge does not imply an absolute disability to perform any kind of labor, but a person disqualified for performing the usual tasks of a workman to such extent that he is unable to proccure and retain employment is ordinarily regarded as being totally incapacited or totally disabled"

And, in **Relph Lightner, Petitioner and Respondent,** vs. **Samuel F. Cohn, Respondent and Apellant,** 184 A. 2d 878, on page 881 thereof, the Court said:

> "An employee who is so injured that he can perform no services other than those which are so limited in quality, dependability, or quantity that a reasonable stable market for them does not exist, may well be classified as totally disabled.

Here, the plaintiff is a coal miner, and that is his only occupation. Dr. Powell certified that the only possible work he could do for some time was sedentary, and the employer, defendant herein, stated they did not want him until he could return and do a day's full work, and they had no light work for him.

CONCLUSION

Under the facts and law in this case, we believe that the award of the Industrial Commission rendered Dec. 9, 1964, should be modified to award to the plaintiff additional temporary disability, either from Jan. 13, 1963, to date of rating of loss of bodily function, Jan. 29, 1964, or from Jan. 13, 1963, until July 13, 1964, the time when the plain-

tiff resumed work again at the mine in Kenilworth or Castle Gate, Utah, operated by the employer and defendant herein, Independent Coal & Coke Co. and to keep in force the award for partial permanent disability, to-wit: 20% of loss of bodily function; both awards being permissible under the statute and both justified in this case.

Respectfully submitted,

FRANK B. HANSON,

Attorney for Plaintiff.