1965

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

IN THE SUPREME COURT OF THE STATE OF UTAH

FRED WILSTEAD,
Plaintiff and Appellant,

vs.

THE INDUSTRIAL COMMISSION OF UTAH, THE INDEPENDENT COAL & COKE COMPANY AND CONTINENTAL CASUALTY COMPANY,
Defendants and Respondents.

Case No. 10318

RESPONDENT'S BRIEF

Review of an Award of the Industrial Commission of Utah

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Statement Of The Kind Of Case

This is an action for the recovery of temporary total disability compensation from January 11, 1963 to July 13, 1964, the date on which appellant returned to his old job or from January 11, 1963 to January 29, 1964, the date on which the medical advisory board

determined that appellant had a permanent partial disability of 20 per cent loss of bodily function.

Disposition By Industrial Commission

The Industrial Commission found that appellant had been released for work by both Drs. Beck and Powell on January 11, 1963, and that his temporary total disability terminated on January 11, 1963. The employer had paid temporary total disability compensation from the date of the injury until January 11, 1963, for the full period during which appellant was entitled to temporary total disability compensation. Appellant was also entitled to a partial permanent disability for loss of bodily function of 20 per cent or 40 weeks at $44.50 per week in addition to the temporary total disability previously paid.

Relief Sought On Appeal

Appellant seeks to obtain payment for temporary total disability from the date his doctors released him for work and from additional treatment until he was actually reemployed, or, in the alternative, until the Medical Advisory Board gave him a rating of 20 per cent permanent loss of bodily function.

Statement Of Facts

Appellant was injured on or about February 10, 1960 in the course of his employment. He was treated

by Dr. Beck and Dr. Powell and had a spinal fusion in June 1962.

On January 11, 1963, Dr. Powell examined appellant and reported that:

> "The patient appears to have had maximum benefit from treatment and to have reached a fairly stable state but with somewhat greater permanent partial impairment than the average disc patient. He will apparently be limited in his range of activity to relatively sedentary types of work. I would consider his permanent partial impairment, as the result of disc disease and spinal degenerative changes, to be approximately fifteen per cent bodily function.
>
> "No further diagnostic or major therapeutic measures seem to be indicated."

Dr. Beck also examined appellant on January 11, 1963, and reported:

> "I feel that Mr. Wilstead should be able to return to work at the present time . . .
>
> "I do not feel that further active medical treatment is indicated at this time and estimate his disability at 10 per cent loss of bodily function."

Appellant did not feel that he was able to do a full day's work at the same job he had at the time of injury until he was actually reemployed at his old job on July 13, 1964 (Record 62-63), but did believe that he could have done "a light duty job" (Record 64).

At the hearing of the Medical Advisory Board on January 25, 1964, appellant was given a rating of a 20 per cent permanent partial disability.

Argument

I.

This Court's review is limited by Utah Code Annotated 1953, Section 35-1-84, to a determination of:

(1) Whether or not the Commission acted without or in excess of its powers.

(2) If findings of fact are made, whether or not such findings of fact support the award under review.

Appellant has not claimed that the Industrial Commission acted without or in excess of its powers and the appeal is not based on a claimed violation by the Commission of action beyond its powers. It appears that appellant bases his appeal on a claim that the Commission's findings of fact do not support the award made by the Commission. Appellant has not specified particular findings of fact which fail to support the award made.

The Commission found, as a fact, that appellant had been released for work by Dr. Beck and Dr. Powell on January 11, 1963. As a result of this finding of fact the Commission determined that appellant was entitled to receive compensation for total disability up to January 11, 1963.

The Commission also found that the Medical Advisory Board had examined appellant on January 25, 1964, and had recommended a permanent partial disability rating of 20 per cent loss of bodily function. Based upon this finding of the Medical Advisory Board the Commission determined that appellant had a permanent partial disability of 20 per cent loss of bodily function which entitled him to compensation for 40 weeks at $44.50 per week. This award of permanent partial disability was subsequently paid by defendant Independent Coal & Coke Company.

The record of this case fully supports the findings of fact by the Commission and the facts as found fully support the award made by the Commission. It is this Court's function to determine if the facts found by the Commission support the award made and its function is not to review the evidence to determine whether there is any evidence which could lead to a different award. See, e.g., *Tintic Standard Min. Co. v. Industrial Comm.*, 100 Utah 96, 110 P.2d 367; *Kelly v. Industrial Comm.*, 80 Utah 73, 12 P.2d 1112; *Chief Consol. Min. Co. v. Industrial Comm.*, 70 Utah 333, 260 Pac. 271; *Park City v. Industrial Comm.*, 63 Utah 205, 224 Pac. 655.

The language of this Court in the *Kelly* case is here appropriate:

> "In cases like this where compensation has been denied, and the applicant dissatisfied with the decision upon the facts has brought the case here by writ of review, we are committed to the

rule that the review is limited to the question of whether the commission in denying compensation has arbitrarily or capriciously disregarded uncontradicted evidence. *Kavalinakis v. Ind. Com.*, 67 Utah, 174, 246 P. 698; *Banks v. Ind. Com.*, 74 Utah, 166, 278 P.58; *Rukavina v. Ind. Com.*, 68 Utah, 1, 248 P. 1103. This is the correct standard, according to the weight of authority, for reviewing such findings of fact made by courts and juries in judicial proceedings. See Annotation "Disregarding uncontradicted testimony in civil actions," 8 A.L.R. 796.

"We therefore, upon this review, examine the evidence, not to ascertain what weight or credibility we should give it, not to determine whether in our opinion a different result should have been reached, but whether or not the commission has arbitrarily or capriciously disregarded and refused to follow and give effect to uncontradicted testimony."

Appellant has argued in his brief (pp. 3-5) that because Dr. Powell subsequent to January 11, 1963, on July 20 ,1963 examined him and determined at that time that appellant might never be able to resume heavy work and that his physical condition could improve even more than it had in the past that this indicates that the facts found by the Commission do not support the award made. When Dr. Powell earlier determined that appellant had received maximum benefit from treatment and that further diagnostic or major therapeutic measures were not indicated, he was not saying that appellant would never get any better than he was at that time. He was merely saying that appellant had

reached a point where it was more important for him, from a medical point of view, to work than to receive additional medical care. At that point appellant was not "totally disabled."

The inferences to be drawn from the written reports of Dr. Powell are not conflicting and furnish no basis for a determination by this Court that the Commission's findings are not supported by the facts as found by the Commission.

There is no basis upon which the award of the Industrial Commission can be modified because the findings of fact made by the Commission fully support the award made and this is as far as the statute permits this Court to inquire.

II.

AN INJURED EMPLOYEE CEASES TO BE TEMPORARILY AND TOTALLY DISABLED WHEN HIS PHYSICAL CONDITION IS SUCH THAT HE IS ONLY PARTIALLY DISABLED AND AN INJURED EMPLOYEE WHO IS ONLY PARTIALLY DISABED CANNOT BE ENTITLED TO TOTAL DISABILITY PAYMENTS.

The statutes which establish the amounts to be paid injured employees are Sections 35-1-65 and 35-1-66, Utah Code Annotated 1953. These statutes provide payments to an employee when he is totally but

temporarily disabled and when he is partially but permanently disabled. It is axiomatic that when one is only partially disabled he is not totally disabled and vice versa.

This Court has previously held that determination of a permanent partial disability ends the period of the temporary total disability. See, e.g., *Peerless Sales Co. et al v. Industrial Comm. et al,* 107 Utah 419, 154 P.2d 644 (1944), where this Court said:

> "It becomes apparent, therefore, that following the accident which occurred to Morrison, the doctors determined that he was suffering from synovitiis or inflammation of the synovial membrane of the left knee, for which he was given medical treatment and hospitalization from time to time until August 11, 1943, on which date it was determined that the injury to the knee had developed into ankylosis or a complete stiffening and loss of use of the left knee, *and his disability was determined as of that date to be permanent partial, thus ending the period of temporary total disability.* He had been paid compensation at the rate of $16 a week from February 20, 1938, to August 11, 1943, during this period of temporary total disability, or the period in which efforts were being made to restore the function of his left knee, *and during which time he was totally disabled from performing any work.* This compensation was clearly paid under the provisions of Sec. 42-1-61, supra. *Now, when his disability became fixed and certain, under the circumstances stated, the payment of compensation fell under the provisions of Sec.* 42-1-62, *supra, for the specified loss of the use of*

a member of his body. Twenty-five weeks' compensation under this permanent partial disability had been paid at the time the State Insurance Fund ceased making payments, to-wit, February 1, 1944; hence the order of the Commission is proper directing plaintiffs to pay to Morrison 125 weeks' compensation for such permanent partial disability "in addition to the compensation" already paid him for temporary total disability. *Spring Canyon Coal Co. v. Ind. Comm.,* 57 Utah 208, 193 P. 821, and particularly the later case of the same title in 60 Utah 553, 210 P. 611; *Continental Gas. Co. v. Ind. Comm.,* 70 Utah 354, at page 364, 260 P. 279; and see cases collected in 88 A.L.R., commencing at page 385." (Emphasis added).

Also see *Continental Casualty Co. v. Industrial Comm.,* 79 Utah 532, 11 P.2d 329 (1932), where this Court said:

"If the hearing of October 7th can be considered as having proceeded under a new application, then, *if the first permanent partial status* (which is the only status with which the plaintiffs under the evidence are concerned and in regard to which, under the state of the evidence, they could be bound) *became fixed as early as January* 13, 1929, *the date which, at all events, the temporary total disability ceased, it would appear that the statute of limitations has run as to such claim.* The fact that a change in the condition of the applicant occurred due to subsequent accidents while under other employers cannot alter the situation as far as these plaintiffs are concerned, because there was no causative connection between the first injury and the two subsequent injuries, and consequently any

change of condition after January 13, 1929, is not referable to the first injury. Consequently it stands that the commission having, as far as these plaintiffs are concerned, made a finding only as to the permanent partial status as of January 13, 1929, and that no change of condition was shown or in fact could, with such evidence as was introduced concerning the final status, have been shown so as to be binding on these plaintiffs as resulting from the first accident, the statute must have run if the hearing of October 7, 1931, is to be considered as a new application for compensation for the permanent partial disability fixed as of January 13, 1929." (Emphasis added.)

The fact is that appellant had recovered sufficiently from his injury by January 11, 1963, to receive a permanent partial disability rating of 10 per cent by Dr. Beck and of 15 per cent by Dr. Powell. The fact that appellant did not obtain a rating from the Medical Panel until January 29, 1964, does not affect the condition of his physical recovery when examined by the treating physicians. The date of the examination by the Medical Advisory Board may, in an appropriate case, be important if there is no evidence as to whether an injured employee ceased to be totally disabled prior to the date of the examination by the Medical Advisory Board. In this case there is substantial and persuasive evidence that appellant was not totally disabled after January 11, 1963, as the Commission determined.

Appellant cites a letter from Mr. Wiesely, Chair-

man, Industrial Commission, to T. Van Campen (Br. p. 6). It is not known what the facts and circumstances giving rise to this letter were. The letter is not a part of the record of this case and is not appropriate for consideration by the Court.

This Court has determined in the case of *Spring Canyon Coal Co. v. Industrial Comm.*, 58 Utah 608, 277 Pac. 206 (1929), that an employee is not totally disabled when he cannot return to his former employment but could perform the work of some other employment. The Court said:

> "It remains to be determined whether or not the evidence in the case at bar brings the applicant within the general provision of section 3139. *It is not always an easy task to determine what constitutes total disability.* It will rarely be found that two cases present the same facts. Keeping in mind the purposes of our Workmen's Compensation Laws, *it may be said generally that, where the injured employe's earning power is wholly and permanently destroyed, and because of his injuries he is incapable of performing remunerative employment, such employe is permanently totally disabled.* Stated conversely, *if an injured employe is not prevented from securing and retaining employment because of his injuries, and if he can perform the duties of such employment without pain or suffering and without unduly endangering his health, life, or limb, then, and in such case, the employe is not totally disabled.* To make out a case of total disability, the applicant is not required to show that he is incapacitated from performing any and all kinds of work. On the other hand, he

is required to put forth an active effort to procure such employment as he is able to perform. *If he is incapacitated from performing the kind of labor required in his former employment, but is able to perform the work of some other employment, he is not totally disabled.* The following authorities support or tend to support such a general rule: 28 R.C.L., § 106, p. 820; L.R.A. 1916A, 145; *American Zinc Co. of Tennessee v. Lusk,* 148 Tenn. 220, 255 S.W. 39; *Employers' Liability Assurance Corporation v. Williams et al.* (Tex. Civ. App.) 293 S.W. 210; *United States Fidelity & Guaranty Co. v. Weir et al.* (Tex. Civ. App.) 286 S.W. 565; *Home Life & Accident Co. v. Corsey* (Tex. Civ. App.) 216 S.W. 464; *Bishop v. Millers' Indemnity Underwriters* (Tex. Civ. App.) 254 S.W. 411; *In re Burns,* 218 Mass. 8, 105 N.E. 601, Ann Cas. 1916A, 787; *Roller v. Warren et al.,* 98 Vt. 514, 129 A. 168; *Employers' Mutual Ins. Co. et al. v. Industrial Commission of Colorado,* 65 Colo. 283, 176 P. 314; *Dosen v. East Butte Copper Mining Co.,* 78 Mont. 579, 254 P. 880; *Moore v. Peet Bros. Manufacturing Co.,* 99 Kan. 443, 162 P. 295; *Sakamoto v. Kemmerer Coal Co.,* 36 Wyo. 325, 255 P. 356; *Consolidation Coal Co. v. Crislip et al.,* 217 Ky. 371, 289 S.W. 270."

"The evidence in this case shows that the applicant has suffered a serious injury, but we are of the opinion that there is no substantial competent evidence which brings him within the class of 'permanent total disability.' The case was disposed of upon the theory that the condition of applicant's legs entitled him to an award for permanent total disability, regardless of whether he was or was not able to secure and

retain employment. *It is a matter of common knowledge that persons with injuries similar to those sustained by the applicant are able to and do perform the duties of some kinds of employment. It cannot be said as a matter of law under our Workmen's Compensation Law that one who has his legs partially paralyzed, as does the applicant, is unable to secure any kind of employment and perform the duties thereof. . . .*" (Emphasis added).

There is no judicial nor statutory authority for appellant's claim that an injured employee who could do light work must be given light work by his former employer or that the former employer must pay him total disability compensation. The cases cited by appellant from other jurisdictions are inapposite here. The statutes here in question are not unemployment compensation statutes but are disability compensation statutes. When the employee is totally disabled he is entitled to the compensation provided for total disability. When he is only partially disabled he is entitled to the compensation provided for partial disability and the fact that he is unable to perform his former work while partially disabled does not, under the statutes, entitle him to total disability payments while he is unemployed. The statute contains no requirement that the former employer furnish a light duty job different than the one the employee held prior to injury or be required to pay total disability compensation for failure to provide such light duty employment.

The only statutory basis for payment of total dis-

ability payments to appellant beyond January 11, 1963 is if he is totally disabled and not otherwise. The Commission determined that he was not totally disabled after January 11, 1963 and this finding supports the award made.

Conclusion

Appellant's appeal should be dismissed with prejudice.

Respectfully submitted,

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