1966

William C. Jensen v. The Industrial Commis-Sion of Utah and United States Fuel Company : Plaintiff's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

WILLIAM C. JENSEN,
Plaintiff and Appellant,

vs.

THE INDUSTRIAL COMMISSION OF UTAH and UNITED STATES FUEL COMPANY,
Defendants and Respondents.

Case No. 10600

~~Plaintiff's~~ ~~APPELLANT'S~~ BRIEF

On Certiorari From Order of the Industrial Commission of Utah

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APPELLANT'S BRIEF

STATEMENT OF KIND OF CASE

Plaintiff-appellant claims workman's compensation benefits from the United States Fuel Company as a result of an injury received in the course of his employment at the mine of said company on July 27th, 1964. Liability was denied by the company and on

March 15th, 1965, plaintiff-appellant made application for hearing to settle his claim.

DISPOSITION IN THE LOWER COURT

The claim was denied by the Commission, petition for rehearing was denied, and this review was taken.

RELIEF SOUGHT ON APPEAL

Plaintiff-appellant seeks a decision reversing the order of the Industrial Commission and directing that plaintiff-appellant's claim be allowed.

STATEMENT OF FACTS

On July 27th, 1964, plaintiff-appellant was employed in a coal mine by United States Fuel Company as a mechanic earning $27.68 per day for a 5-day week.

About 7 p.m., on that day plaintiff-appellant testified that while repairing a roofbolting machine he ducked under its boom, hitting his lower back on a pipe fitting (R. 28 and 29). He felt a pain in his back (R. 30) at the time of injury and rested for about 15 minutes to half an hour (R. 31). Spencer Day, fellow employee, was present and witnessed the accident (R. 33). Day testified plaintiff complained to him about his back after the accident and had quite a struggle

to get to the train which took him out of the mine (R. 57).

Another fellow employee, John Colosimo, testified he saw a real dark bruise on plaintiff's lower back in the bathhouse (R. 59).

Another fellow employee, Remo Spigarelli, testified that on either the 29th or 30th of July the plaintiff asked him to carry some tanks because plaintiff had hurt his back (R. 63). A week or two later plaintiff's boss asked Spigarelli about plaintiff's accident. Spigarelli told him plaintiff was having back trouble (R. 63). Plaintiff reported to work the next day and notwithstanding the pain worked until August 10th, 1964 (R. 65).

On August 10th, 1964, plaintiff consulted William Gorishek, M.D., his family physician, about his back pain and had X-rays taken (R. 36). Dr. Gorishek diagnosed plaintiff's injury as a herniated disc (R. 7 and 14), and referred him to the company doctor, L. H. Merrill, because it occurred by accident in the course of employment (R. 50 and 99).

On August 17th, 1964, plaintiff saw the company doctor, L. H. Merrill, who refused to examine plaintiff because he had not reported the accident to the company (R. 139).

The next day, on August 18th, 1964, plaintiff reported the accident to Leon Draper, his foreman (R. 39).

The company denied all liability (R. 39).

Both L. L. Shepherd and Leon Draper, plaintiff's supervisors, denied plaintiff told them he had injured his back (R. 67 and 70). However, Draper admitted Day had told him plaintiff had injured or hurt his back on the night in question (R. 75).

Frank Stevenson, union official, testified the company's superintendent, Max Robb, told him that plaintiff was claiming an injury to his back (R. 77).

After being off work two weeks, plaintiff went back to work on August 25th, 1964, and worked until October 23rd, 1964, when he ceased working because of severe back pain and numbness in his left leg (R. 49).

Dr. Gorishek, the family physician, referred plaintiff to Chester B. Powell, M.D., a Neurosurgeon for evaluation and anticipated surgical treatment (R. 8). Dr. Powell found plaintiff to be totally disabled including atrophy in the left leg (R. 12).

Plaintiff was hospitalized between December 18th, 1964, and December 26th, 1964, for severe left sciatica and on December 21st, 1964 plaintiff underwent surgery (R. 8 to 14). An interlaminar exploration was performed and a lumbrosacral left disc was removed.

Both Dr. Gorishek and Dr. Powell indicate petitioner's back injury was due to the accident (R. 6 and R. 8).

On June 18th, 1965, a hearing was held before The Industrial Commission of Utah (R. 22 to 87).

On June 29th, 1965, after the hearing the matter was referred to the medical panel with the direction that "the panel has no jurisdiction to make a finding on the occurrence of an accident" (R. 87).

On July 26th, 1965, plaintiff entered the hospital, had a myleogram on July 27th and on July 29th further disc material was excised and a fusion was performed (R. 88 and 120).

On August 13th, 1965, the medical panel made its report (R. 92 to 98).

On September 8th, 1965, plaintiff objected to the findings of the medical panel in writing (R. 109 to 110).

On November 12th, 1965, a further hearing was held (R. 114 to 146). At that hearing one of the panel members, Boyd G. Holbrook, M.D., testified that plaintiff's back condition was asymptomatic prior to accident (R. 116); that there was no history of any complaint or injury to plaintiff's back except an accident in 1958 which occurred while plaintiff was working for defendant, United States Fuel Company (R. 117) and that there was no history of any lost time or of any treatment to plaintiff's back prior to the accident (R. 117). In addition the panel made no evaluation of any permanent disability to plaintiff (R. 117). Nor did the panel have the plaintiff disrobe (R. 119), nor

did they make even a routine orthopedic examination of the plaintiff (R. 119). Dr. Holbrook, did, however, testify that if the plaintiff suffered a blow in the region of the protruded disc, it could have resulted in injury or disability (R. 124). Dr. Holbrook further testified it was more reasonably probable that the protrusion of plaintiff's disc would have occurred even if the accident had not occurred (R. 138).

By letter, dated October 26th, 1965, Dr. Gorishek asked Dr. Powell whether the plaintiff's injury aggravated his condition (R. 112).

In reply Dr. Powell stated that plaintiff's history plus seven years interval of freedom from symptoms would discount prior back symptoms and indicate that the injury of July, 1964, was probably the principal injury and not an aggravaton of a prior condition (R. 113).

On February 14th, 1966, the Commission, by Order received in evidence and adopted the panel report (R. 146).

Plaintiff petitioned for rehearing on March 11th, 1966, (R. 147) and on March 16th, 1966, the same was denied (R. 149).

POINT I

THE COMMISSION ACTED ARBITRARILY AND ITS ORDER DENYING RECOV-

ERY IS NOT SUPPORTED BY THE EVIDENCE.

There is no reasonable basis in the evidence to sustain the finding that plaintiff's injury would have occurred even if the plaintiff's accident had not occurred. Industrial Compensation Acts are to be liberally construed and where there is doubt it should be resolved in favor of recovery. Spencer v. Industrial Commission, 4 Utah 2d 185, 290 P. 2d 314. Purity Biscuit Co. v. Industrial Commission, 115 Utah 1, 201 P. 2d 1961. Here the evidence is uncontroverted that plaintiff's disc was asymptomatic prior to the accident (R. 116); that he had no lost time due to the back condition (R. 117); that previous X-rays to determine eligibility for employment revealed only moderate scolosis of his back (R. 86); that he was re-employed after such X-rays (R. 129); that he had an accident to his back while repairing a machine (R. 55); that he felt pain and had to rest (R. 45 and 55); that he had quite a struggle to get to the train which took him out of the mine (R. 57); that he had a real dark bruise on his back (R. 59); that he couldn't carry heavy tanks afterwards (R. 63) and that a competent Neurosurgeon reported there was no history of any back symptoms or difficulties except for a prior mine accident in 1958 and that plaintiff's history plus a seven years' interval from symptoms would discount prior back symptoms and indicate that the injury of July, 1964, was prob-

ably the principal injury and not an aggravation of a prior condition (R. 113).

The Commission in its Order Denying Recovery doesn't state that the testimony of plaintiff and three of his fellow employees, as above set forth, was disbelieved and untrue. Plaintiff submits that such evidence should have been accepted as tending to prove the date of injury and injury in the course of employment. Allen v. Industrial Commission, 110 Utah 328, 172 P. 2d 669. Baker v. Industrial Commission, 17 Utah 2nd 141, 405 P. 2d 613.

The Commission's finding that plaintiff's disability was an insidious onset of a protruded disc without trauma when the uncontroverted testimony of three of plaintiff's fellow employees is to the effect that he had an accident and experienced trauma, is not supported by the evidence (R. 146).

The Commission's finding that the accident was not significant and that the protrusion would have occurred had the accident not occurred is not supported by the evidence (R. 96). The uncontroverted evidence is that he *did* have an accident and that he did become disabled as a result of the accident. The finding in question is based on a set of circumstances which did not happen and which are not in evidence. In Jones v. California Packing, 121 Utah 612, 244 P. 2d 640, the Court held that where facts are proved by uncontradicted testimony of competent disinterested witnesses and there is nothing inherently unreasonable nor

any circumstances which tend to raise doubt of its truth they should be taken as established. Refusal to do so is an arbitrary disregard of the facts by the trier.

In the case at bar by denying recovery the Commission is in effect saying plaintiff did not have a back accident and that an accident to the back is not established by the evidence.

The Commission infers that plaintiff would have had back trouble without an accident. The difficulty with the finding is that there is no doubt under the evidence that he did have an accident, and, therefore, this finding is not supported by the evidence, and if there was doubt then that doubt should have been resolved in plaintiff's favor. Purity Biscuit Company case, supra.

Plaintiff is entitled to compensation because his disability results from an uncontroverted identifiable back accident in the course of his employment, Pintar v. Industrial Commission, 14 Utah 2d 276, 382 P.2d 414, and the Commission cannot arbitrarily discount all competent uncontradicted evidence indicating that plaintiff's injury occurred in the course of his employment. Baker v. Industrial Commission, 17 Utah 2nd 141, 405 P. 2d 613.

In Hackford v. Industrial Commission, 11 Utah 2d 312, 358 P. 2d 899, it was held that where plaintiff had filed his written objections to the panel report the burden was on the Commission to sustain it by testimony at the hearing.

It is submitted that the testimony at the hearing does not sustain that burden. Dr. Powell at the hearing merely stated that it was more likely that plaintiff's disc was caused because of his back condition and not by any trauma (R. 136). This bald conclusion, unsupported by any other testimony, is the only evidence offered to sustain the burden. If such testimony casts a doubt on plaintiff's right to recover then under the Purity Biscuit Company case, supra, that doubt should have been resolved in plaintiff's favor.

Petitioner is aware that in order to reverse the Commission "the record must disclose that there is material, substantial, 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." Kent v. Industrial Commission, 89 Utah 381, 57 P. 2d 724, and cases cited therein.

Plaintiff submits this is such a case.

As authority for the proposition that claimant's failure to report imediately is insufficient to defeat recovery please refer to:

Smith v. Industrial Commission, 104 Utah 318, 140 P. 2d 314.

In the Baker case previously cited and in Hunter v. Industrial Commission, 73 Ariz. 84, 237 P. 2d 813, the Court reversed an order denying recovery upon evi-

dence as to accident much less certain and uncontroverted than in the case at bar. There is no lack of evidence in the record here as to accident unless the testimony of 4 witnesses is disbelieved in its entirety.

We submit that, while it may be difficult to disagree with the Commission, the instant case is such a case and that plaintiff is entitled to recover for a back injury suffered by accident in the course of his employment.

CONCLUSION

That this Honorable Court should reverse the Commission and remand the case for a determination of plaintiff's degree of disability.

Respectfully submitted,

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