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William C. Jensen v. The Industrial Commission of Utah and United States Fuel Company : Brief of Respondents

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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.
18600

BRIEF OF RESPONDENTS

On Certiorari From Order of the
Industrial Commission of Utah

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Plaintiff and Appellant,

vs.

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Case No.
10600

BRIEF OF RESPONDENTS

STATEMENT OF FACTS

Plaintiff claims that an operation for a protruded intervertebral disc at the lumbosacral level on December 21, 1964, and a fusion on July 29, 1965 were necessitated by an accident which occurred July 27, 1964 in the course of his employment with United States Fuel Co. The Medical Panel, consisting of Doctors Boyd G. Holbrook, L. N. Ossman, and Charles C. Hall, unanimously concluded:

1. This man had a protruded intervertebral disc that was treated surgically without satisfactory relief and therefore necessitated a second surgical procedure. His early post operative course following the second surgical procedure appears to be excellent.

2. This man had pre-existing radiographic degenerative changes at L-4 and L-5 being more marked at L-5. These apparently had been asymptomatic prior to the alleged accident.
3. The panel feels that it is a more reasonable probability that this was the insidious onset of a protruded intervertebral disc that we see most commonly without trauma and is of the opinion that the alleged accident was not significant in the causation of his protruded intervertebral disc and that the protrusion would have occurred and that the subsequent course would have been no different had this incident not occurred. (Tr. 96)

Plaintiff objected to the medical panel findings and a second hearing was held before the Industrial Commission on November 12, 1965. (Tr. 114) At this hearing, plaintiff failed to call either Dr. Chester B. Powell who removed the disc, Dr. Norman R. Beck who performed the fusion, or Dr. W. M. Gorishek, his family physician. Plaintiff offered no medical testimony or opinion whatsoever that his back operations were caused by any alleged accident. The medical panel reviewed the x-ray report of Dr. Irwin F. Winter and the x-rays dated 2-17-59, the myelogram of November 6, 1964, and x-rays of August 10, 1964. As reported by Dr. Irwin F. Winter (Tr. 86) the films taken of Mr. Jensen's back on 4-17-57, 1-15-58 and 9-11-62 showed that Mr. Jensen had moderate hypertrophic arthritis at the lumbosacral and D-12 interspaces, with a shallow upper lumbar scolliosis (curvature). The films taken in 1962 demonstrated slightly more extensive arthritis. (Tr. 93)

At the hearing Dr. Holbrook, chairman of the medical panel, testified at length as to the structure and function of the intervertebral disc; that the disc is high in water content and acts as a hydraulic mechanism. (Tr. 123) As a portion of the aging process the disc gradually becomes dehydrated and becomes slowly degenerated. The disc slowly bulges out and causes stretching of the ligaments. It may then bulge out far enough to press on the nerves. It may suddenly bulge out and press on the ligaments or press on the nerves. By attrition the surrounding ligaments may give way and allow the center, the nucleus pulposus, to completely protrude, or extrude through the annulus fibrosis and the ligament, and become free-lying in the spinal canal. This may occur suddenly rather than slowly. (Tr. 124)

The significant thing in Dr. Holbrook's opinion was that the very first films taken in 1957 showed moderate arthritic changes in the lumbosacral level. (Tr. 135) "And then if one follows through both records and x-rays available up to the present, or up to 1964, there was a gradual increase in these changes, which is what we ordinarily expect will take place." (Tr. 135)

Q. And you considered that this man could have possibly bumped his back as he claimed on July 27, (1964) but nevertheless in this case it was more likely that his disc was caused because of his back condition, and not by any trauma?

A. That's correct.

Q. And that is your opinion here today?

A. Yes.

Q. And everything in this Medical Panel Report you affirm?

A. Yes.

(Tr. 136)

On cross examination by Mr. Litizette, Dr. Holbrook explained that disc disease is a degenerative disease. It's a wearing out type of thing. It's very likely that all of the people who get ruptured discs, whether it occurs at work or not, would sooner or later have gotten a ruptured disc from something else had they not gotten it at work. (Tr. 137) * * * Then what we try to do, because it is my understanding of how these things are supposed to be related to the legal aspects, that if one has to make a conclusion as to what is the most reasonable approach to the problem in any one given case . . . is that it has to happen in reasonable proximity, and be a reasonable type of accident that might be expected to accelerate or precipitate such a condition even though we know it is a degenerative process. (Tr. 138)

Q. But all you say, in any event, that this is only reasonably probable?

A. The more reasonable probability.

Q. You don't say it is an absolute fact?

A. There is no such thing in medicine as an absolute fact.

In view of the plaintiff's failure to call any doctors to testify that it was more reasonably probable that the bump to Mr. Jensen's back caused his ruptured intervertebral disc, there is no basis whatsoever to appeal to this court and claim that the Commission acted arbitrarily, and its order

denying recovery is not supported by the evidence. The medical evidence in the record entirely supports the order made by the Commission. There is not one scintilla of medical evidence to the contrary.

Although this case was decided by the Industrial Commission on the basis of the Medical Panel Report, there was considerable dispute in the testimony as to any accident sustained by the applicant. At the first hearing on June 18, 1965, applicant testified that on July 27, 1964 he worked as a mechanic on a D.M. 8 roofbolting machine in a stooped position for approximately six hours and in the course of work, crossed over from the left side of the machine to the right side, and bumped his back on a fitting on a drill boom. His fellow employees gave some corroboration to his statement. Mr. Jensen did not report the accident to his foreman or any company personnel until August 17 and 18, 1964. (Tr. 44) H worked regularly through Friday, August 6, but did not report for work the following Monday, August 9, 1964. (Tr. 46) He returned to work on August 25, and worked regularly until October 23, 1964. On October 25, 1964, while bending doing something at home, he developed severe pain in the back, as well as pain down the left leg. (Tr. 6) He has not returned to work since October 23, 1964, and as noted, had his first operation on December 21, 1964. The United Mine Workers Welfare and Retirement Fund paid the cost of his operations. (Tr. 17)

On August 18, Mr. Jensen reported to his foreman, Mr. Leon Draper and Mr. L. L. Shepherd, the master mechanic, that he had a lame back but he didn't know whether it was from an old accident or an old hurt or

anything like that. (Tr. 70) Both Mr. Draper and Mr. Shepherd were certain that Mr. Jensen said he had been told by Dr. Gorishek that he had a herniated disc, but he couldn't recall anything that had happened on the job to hurt his back. (Tr. 66)

Mr. Jensen's Application for Hearing was not filed with the Industrial Commission until March 17, 1965.

At the second hearing held November 12, 1965 after the Medical Panel Report had been filed, Mr. Jensen and his attorney brought out the fact that he had sustained an industrial injury on January 15, 1958. At this time he had a fracture of the 9th and 10th ribs and a contusion of his left kidney. However, no claim for compensation was filed with the Industrial Commission within three years from the date of payment of temporary total compensation and hospital and doctor bills, and therefore the Commission ruled that any claim as to his present back operations is barred by the three year statute of limitations. 35-1-99 U.C.A. '53, *Jones v. Ind. Comm.*, 17 Utah 2d, 28, 404 P. 2d 27.

ARGUMENT

THERE IS NO MEDICAL EVIDENCE IN THE RECORD TO REFUTE THE MEDICAL PANEL REPORT.

After plaintiff objected to the Medical Panel Report, a second hearing was held at which time Dr. Boyd G. Holbrook and Dr. L. H. Merrill, the company doctor, testified. The Medical Panel Report was received in evidence and was fully sustained by the testimony of its chairman Dr. Holbrook in compliance with 35-1-77 U.C.A. '53.

This Court stated in *Vause v. Ind. Comm.*, 17 Utah 2d 217, 407 P2d. 1006, that:

“Our statutory and decisional law require us to look at the evidence in the light most favorable to the Commission’s finding and it is the obligation of the parties involved to so present the matter to the court.”

* * *

“This court cannot properly reverse the Commission and compel an award unless there is credible evidence without substantial contradiction which points so clearly and persuasively in plaintiff’s favor that failure to so find would justify the conclusion that the Commission acted capriciously, arbitrarily or unreasonably in disregarding or refusing to believe the evidence.”

See *Kent v. Ind. Comm.*, 89 Utah 381 57 P2d. 724; and
Kavalinakis v. Ind. Comm., 67 Utah 174, 246 P. 698.

This fundamental principle is expressed in the Statute 35-1-84 U.C.A. '53 and in the following cases:

United Park City Mines Co. v. Prescott 15 Utah 2d. 410, 393 P2d 800

Rowley v. Ind. Comm., 15 Utah 2d 330 392 P2d. 1016

State Ins. Fund. v. Ind. Comm. 16 Utah 2d. 50, 395 P2d. 541

Fruehauf Trailer Co. v. Ind. Comm., 16 Utah 2d 95., 396 P2d 409

Mollerup Van Lines v. Adams, 16 Utah 2d 235, 398 P2d. 882

Plaintiff's brief argues that the accident caused plaintiff's operations and disability as though mere argument could take the place of medical testimony to such effect. At page 4 and the top of page 10, plaintiff refers to Dr. Powell testifying at the hearing, but Dr. Powell was not called by either party. It is apparent that this latter reference was meant to be to Dr. Boyd G. Holbrook.

In this case, the medical panel made an exhaustive study of the case (Tr. 146) and the Industrial Commission unanimously concluded to adopt the Medical Panel Report, particularly Finding No. 3, to wit, that the alleged accident was not significant in the causation of Mr. Jensen's protruded intervertebral disc. This conclusion is further substantiated by the very minor type of accident which plaintiff alleges, the fact that he did not report it for 21 days, and his back surgery having been performed many months later after he was bending over at home when he developed pain in the back as well as down the left leg.

Defendant submits that the Commission decided the matter fairly and properly upon the medical evidence adduced. The decision should be affirmed.

Respectfully submitted,

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