1969

Utah Packers, Inc. and Underwriters Insurance Company v. The Industrial Commission of Utah and Lawrence L. Scruggs : Brief of Plaintiff

IN THE SUPREME COURT OF THE STATE OF UTAH

UTAH PACKERS, INC. AND UNDERWRITERS INSURANCE COMPANY,

Plaintiffs,

vs.

THE INDUSTRIAL COMMISSION OF UTAH AND LAWRENCE L. SCRUGGS,

Defendants.

Case No. 11687

BRIEF OF PLAINTI

Appeal from the Decision of the Industrial Commission of Utah

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NATURE OF THE CASE

This is a review of proceedings before the Industrial Commission of Utah culminating in an order by the Commission that plaintiffs pay defendants Lawrence L. Scruggs temporary total disability compensation for periods during which he was convalescing from back surgery as well as compensation for such permanent disability as he may establish thereafter. The award was based upon findings that applicant's basic back pathology resulted from injury by accident in the course of

his employment with plaintiff Utah Packers, Inc. on July 7, 1967.

For purposes of easy identification, defendant Lawrence L. Scruggs will be referred to herein as the "applicant"; the Industrial Commission of Utah will be referred to as the "Commission," and plaintiff Utah Packers, Inc. will be referred to as "plaintiff."

DISPOSITION BELOW

The Commission awarded compensation as if applican't disabling pathology were fully attributable to an injury sustained by him while in plaintiff's employ.

RELIEF SOUGHT ON APPEAL

Plaintiffs seek an order of this Court remanding the case to the Commission with instructions that it be referred again to a Medical Panel by reason of new medical information for resolution of the medical issues and eventual disposition in accordance with the Panel findings or that applicant's claim be denied.

STATEMENT OF FACTS

On July 7, 1967, the applicant was a somewhat overweight (Record 11, 52) 27 year old student, working for plaintiff during summer vacation. It was his third day of employment. About three hours after his shift began, he complained of a sudden onset of back pain. His job at the time was to remove cartons, each containing 6 cans of peas, from a roller track by which the cartons were delivered to his station from a labeling machine,

and place them on a pallet (Record 59, 60). Each carton weighed about twenty-five pounds (Record 85), and he lifted cartons one at a time from an elevation about 1½ feet above ground level to an elevation about six inches higher (Record 77). This was the nature of the activity in which he was engaged at the time of the alleged onset of pain.

There is a great deal of confusion in the record about the connection between the onset of pain and any lifting effort. In his initial statement on July 31, 1967 (Record 129), the applicant recalled that the pain began when he was just "reaching for an empty carton." On September 25, 1967, Dr. Nephi Kezerian, a Provo orthopedist, took the following history.

> "On July 7, 1967, he was in the ordinary process of his work at Utah Packers. This required lifting cans and cases. He recalls no specific injury but pain, a sense of weakness in the lower extremities, pain in the low back, pain in the neck and into the right shoulder appeared with rapid onset beginning as stated above on the job but without traumatic event." (Record 11)

Dr. Clark, in his first surgical report received by the Industrial Commission on August 8, 1967, (Record 3) reported the "patient's statement as to how injury occurred" to be this:

> "Leaned over *to* pick up box of canned goods and got sudden pain in back and was unable to stand." (our emphasis)

After he became aware that his claim might be more persuasively presented if pain onset were associated

with an actual lifting incident, the applicant consistently testified that pain began while he was engaged in reaching over the roller track and retrieving a fallen carton from under a conveyor belt, the most contorting work experience he could remember. Applicant's witnesses, however, don't remember applicant's complaints of pain as having been coincident with any such "reaching and retrieving" incident. Dennis Robinson testified that he was watching applicant when the pain obviously began. Applicant was in the process of lifting a carton from the roller track (the usual maneuver) when he "grabbed his back." (Record 60). Mr. Robinson thought applicant had raised the carton about five inches and set it back down to grab his back. This is not inconsistent with applicant's initial story that pain began *as* he was reaching; one normally proceeds for a moment with the action in which he is engaged when pain strikes.

Jerry Martin (Record 70 et seq.) recalled no reaching and retrieving incident. He said he was watching the applicant, that the applicant apparently dropped one can out of a carton, picked up and replaced the can, and only indicated pain as he was starting to lift a carton from the roller track in the standard employment maneuver.

Neither Mr. Martin nor Mr. Robinson corroborates the applicant's story. The applicant testified he was working at the intermediate station on the machine (controlling the opening through which cans were fed to fill the cartons which the moved on the roller track to the stacker's station) when the pain started. While oper-

ating the lever, according to his testimony, he noticed the carton he was attempting to retrieve when, by his later story, the pain struck.

Throughout the proceedings before the Industrial Commission, the applicant denied any significant back problem pre-dating his July 7 incident. His testimony before the Commission, under oath and on direct examination was this:

> "Q. Now, let's talk a little bit about your medical history: Had you ever had trouble with your back before?
>
> A. No.
>
> Q. Had you ever worn a corset or a supportive device for your back?
>
> A. No.
>
> Q. Dr. Clark indicates in his report that you told him that you had worn such a corset or supportive device for a period of time.
>
> A. Well, I think —
>
> Q. Did you ever tell Dr. Clark that you wore such a device?
>
> A. No, sir. (Record 102)
>
> * * * *
>
> "Q. Had you ever had any back trouble before this time?
>
> A. No.
>
> Q. What type of work have you done in the last five or six years?
>
> A. Construction. I worked for West Coast Builders, was a division of Sears, building Sears stores and decorating them and stuff.

Q. Heavy work?

A. Yes. Building concrete, reinforced concrete buildings, and stuff, and packing around forms and things.

Q. Have you ever made a claim for workmen's compensation before, before this occasion?

A. No, not — no, I never have. (Record 103)

* * * *

"Q. Did you have any medical attention, for any reason, between 1964, the time you've described, and the time of this injury at the cannery in 1967?

A. Had any medical? No. I — the only two doctors I saw was a Dr. Golden, an eye doctor at home, to have my eyes checked, and —

Q. When you say "at home," where do you refer to?

A. Well, at that time I was in Redwood City, California. And he checked my eyes.

And then I got a physical, oh, about two years ago." (Record 107)

The Medical Panel, in considering the relationship between the July 7 incident and the subsequent disabling pathology was obviously impressed by the applicant's denial of any previous back trouble. The following are excerpts from the Medical Panel Report of November 25, 1968:

"The applicant was then called to testify and describe the alleged accident and the duties involved in the job. He denied any prior back trouble nor that he had ever worn a corset or supportive device. He testified regarding his past work history. He related his accident in

August 1964 when he was beaten. He has had no trouble since then except for headaches. He was in the service from 1957 to 1961 but had no medical problems. Dr. Clark referred him to Dr. Faust. While receiving these chiropractic treatments he had experienced some evidence of bleeding in his stools. He has not been able to work since the time of the injury on 7 July. The applicant denied any back pain prior to 7 July. On one occasion two or three years previously while doing some heavy work he had pain in his legs one day and went to the hospital across the street from the job. The doctor said that he had pulled some ligaments in his legs or something. His operation was 8 April." (Record 172)

"At the time of this examination the applicant was interviewed regarding all of his past history, the present accident and his subsequent course. He related that after the beating episode he had, he had headache and tingling for six moths but was hospitalized very briefly and was off work for one week. As far as he knows there were no injuries to his back or nervous system and as far as he knows he sustained no subsequent after affects." (Record 174)

"He related that several years ago he had strained his back at which time he thought it was a pulled muscle. He was working across the street from the San Mateo General Hospital where they were lifting concrete panels into place. They had to do a good deal of pushing and pulling and at this time he hurt his back. He was not off work though he was examined and had x-rays taken. He recovered uneventfully and had no further difficulty." (Record 174)

At the time of hearing on the objections to the Medical Panel Report, February 10, 1969, Dr. Holbrook made

it clear that the Panel chose to disregard any evidence of a back pathology pre-existing the July 7, 1967 incident. At page 189 of the record, we find the following colloquy:

> Q. Now when you just testified that you and your fellows on the Panel saw nothing in the record which you felt was significant with reference to pre-existing pathology, did you simply discount this report of Dr. Clark, or did you conclude that the symptoms to which he refers were not significant?
>
> A. Well, I think the only way I can answer that is to say that there is considerable evidence and testimony in the file that this report is in error, and ultimately the Commission must decide whether or not they accept that testimony to be true and valid. But the Panel was advised they could assume the accident that took place at the time that he was working near the conveyor, and therefore based its findings on the assumption that this accident did take place.
>
> Q. But your conclusion that there was no evidence of significant pre-existing pathology was arrived at by simply discounting Dr. Clark's statement?
>
> A. I believe that we did feel that there was a mistake in it, yes.

Subsequent to the hearing of May 24, 1968 and because there appeared to be reason (in the manifold discrepancies between the applicant's different stories and between *his* account and the accounts of the witnesses) to question the applicant's candor and veracity, plaintiff caused an investigation of the records of the California Industrial Accident Commission to be made.

The investigation disclosed that applicant had recently settled a claim for disability from back pain based on an injury sustained while working for Redmont Construction & Investment Company in California. The official records of that California claim were made a part of the record in this proceeding on appropriate motion by plaintiff and order by the Utah Commission. Those records constitute pages 225 through 239 of this Record on Appeal.

The California records show that the applicant simply lied when he testified (see pp. 5 & 6 of this brief) that he had never had any back trouble before July 7, 1967, that he had never asserted a previous claim for workmen's compensation, that he had never worn a supportive corset, that the only medical attention he had received in the years between 1964 and July 7, 1967 was an eye examination and a general physical, and that he had recovered uneventfully without lost time from any previous industrial injury he might have sustained.

The California records establish that applicant Lawrence L. Scruggs filed application for compensation for injuries sustained during California employment with Walter Springs Construction Company on October 19, 1965. The applicant stated he was employed as a carpenter and fell through ceiling joists and struck his back. The first medical report of Stanley T. Soholt, M.D., 139 Arch Street, Redwood City, California lists symptoms including pain in the low back with paresthesia in the lower extremities. Dr. Soholt concluded that the complaints were largely functional and recom-

mended neuro-surgical examination. The applicant consulted E. H. Renschler, M.D., 2943 Broadway, Redwood City, California on or about November 26, 1965, with reference to low back and leg complaints. On August 9, 1966, Merrill C. Mensor, M.D., 490 Post Street, San Francisco, California examined the applicant. At that time he gave a history of having felt acute pain in his low back while lifting shoring in the course of employment with Williams & Burrows. About seven weeks before the examination, applicant had been treated by a Dr. Kenner of the San Mateo Clinic (according to Dr. Mensor's report) who prescribed a back brace which the applicant was still wearing at the time of Dr. Mensor's examination. The claim or claims filed by the applicant in California resulted in his receiving *temporary total disability* compensation from October 20, 1965 to February 6, 1966 at $70.00 per week, his medical expenses and an additional $750.00, presumably for permanent partial disability compensation. This disposition of the compensation claim was approved by the Workmen's Compensation Appeals Board referee on February 1, 1967, less than six months before the Utah injury for which applicant now seeks compensation. The applicant himself signed the settlement agreement on January 10, 1967. (Record 226)

Finally, it is significant that Dr. Kezerian, in his report of September 25, 1967, makes this statement:

> "The injury of July 7, 1967 appears to be an event incident to a mild physical incapacity and debility of long standing. It is not probable that an industrial injury in the usual sense occurred

> on July 7, 1967 which would have been compensable beyond that of a simple sprain or strain. It is my impression that, so far as industrial injury is concerned, he has returned to a pre-injury level." (Record 12)

Plaintiff believes the Medical Panel, if it were to consider the record now before this Court, would be compelled to reach the same conclusion.

ARGUMENT

POINT I

THE COMMISSION ABUSED ITS DISCRETION BY ITS FAILURE TO REFER THE MATTER TO ITS MEDICAL PANEL FOR RECONSIDERATION AFTER RECEIPT OF THE CALIFORNIA RECORDS.

The Medical Panel concluded, without question, that applicant's extensive low back pathology as eventually demonstrated by surgery was caused by employment related activity on July 7, 1967. It is equally clear that the Panel based its conclusion on a completely inaccurate and fabricated history. On cross examination, the Panel Chairman admitted that the Panel had chosen to disregard as mistaken any suggestion in the medical reports of a pre-existing problem. The Panel report and Dr. Holbrook's testimony dwell on the complete credence given by the Panel to the applicant's denial of any previous low back symptoms. In fact, despite the most persuasive evidence of perjury, it is manifest that the Commission has based its orders herein on findings

that every statement the applicant has made is true. Despite the applicant's own statements to his doctors and to plaintiff's investigator that pain started without relation to a specific lifting incident, the Commission finds an accident by choosing to believe applicant's later, uncorroborated story of a "reaching and retrieving" incident.

The California records establish beyond contest that:

1. Applicant was totally disabled from back pain for 3½ months of the eighteen months before the July 7, 1967 incident.
2. Applicant had known persistent low back pathology and had accepted $750.00 in settlement of his claim for permanent partial disability in that regard.
3. Applicant had signed the settlement agreement less than 6 months before the July 7, 1967 incident.

And it is equally well established that his employment with plaintiff was the first work applicant had attempted since his settlement. None of this history was known to the Panel when it considered this case, and the Panel emphatically declared that it believed the applicant had been essentially free from back complaints before July 7, 1967. Nevertheless, the Commission decided that the Panel's conclusion about the importance of the alleged lifting incident of July 7, 1967 in producing the total back pathology would have been unaffected by knowledge of the content of the California records.

Plaintiff, in petitioning for a second referral of the case to the Panel, called attention to the many occasions when the Panel had, on medical principles, exculpated the second employer where a workman had developed a chronic low back problem as a result of industrial accident in previous employment and symptoms recurred in the course of activity, involving limited strain or trauma, with the second employer.

The Commission denied plaintiff's petition. In so doing, it ruled that the Panel could not have reached a different conclusion on the new evidence from the one it reached on the accumulation of perjury in the record it first considered. The Act (Section 35-1-77) requires the Commission to refer the medical aspects of a claim to the Panel. By its refusal to return this case to the Panel the Commission has either (1) made its own medical findings that the incident of July 7 caused the back pathology without reference to any previous medical history or (2) chosen to believe the applicant's testimony that he had *never* had previous back complaints, had *never* asserted a previous compensation claim, had *not* seen a doctor between 1964 and July 7, 1967 except for eye examination and general physical examination and had *never* worn a supportive corset.

In either case, the Commission has exceeded its jurisdiction and abused its discretion. It may not make its own findings on medical issues. It may not choose to believe the applicant in the face of overwhelming evidence that his testimony is untrue.

POINT II

THE GRANT OF A COMPENSATION AWARD ON THE BASIS OF OBVIOUS PERJURY IS DESTRUCTIVE OF THE JUDICIAL PROCESS.

The applicant in this case gave false testimony on at least four relevant points. He said he had never previously asserted a compensation claim when he had compromised one less than six months before; he said he had never previously had a back problem when he had collected 3½ months of temporary total disability compensation for disabling low back pain. He said he had never worn a low back support although the medical records in the California case show a support was prescribed and worn. He said he had seen no doctors for back complaints since 1964 when he had seen at least three in California.

We have no quarrel with the basic concept that compensation acts should be liberally construed to effect their purposes. We are aware that workmen's compensation commissions traditionally do and should give sympathetic ear to workmen asserting claims. We are aware that commissions traditionally resolve fact issues in favor of applicants where the evidence is in equipoise. We do not contend that these are antisocial tendencies.

Nevertheless, the essence of our judicial system is its dependence on the sworn testimony of witnesses. The system inevitably disintegrates when false testi-

mony is received. Knowing this sometimes happens, we still prefer to rely on the popular conscience to produce true testimony.

It is particularly destructive of the system that a judicial body should base a decision on testimony known to be false. The applicant in this case, having settled his California claim only six months before the July 7th onset of pain, patently decided to conceal his history of back trouble from the Utah Commission. Although he occasionally slipped in relating his past experience with back pain to Utah doctors, he was able to convince both the Commission and the Panel that he came to his employment with plaintiff with a perfectly healthy back. The evidence to the contrary is now overwhelming, but the Commission still has found entirely in accordance with applicant's testimony.

When the Commission stubbornly insists on believing the applicant in the face of the contrary evidence in this record, it encourages the most pernicious perversion of the judicial system.

CONCLUSION

The Panel's findings in this case are a complete nullity. They are based on assumptions which were logical in the context of the record submitted to the Panel but which could not be defended on the record now before this Court. The Commission has either made its own medical findings or has made non-medical findings

which are against the law and the evidence. The matter should be remanded to the Commission with instructions that it be referred again to the Panel for resolution of the medical issues in the light of the applicant's true medical history as now revealed by the record.

Respectfully submitted.

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