1970

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

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. 11887

~~RESPONDENT'S~~ Defendants' BRIEF

APPEAL FROM THE DECISION OF THE INDUSTRIAL COMMISSION OF UTAH

GLEN J. ELLIS
Maxfield, Gammon, Ellis & McGuire
28 North 1st East
Provo Utah
Attorneys for Respondent

VERNON B. ROMNEY, Esquire
Attorney General, State of Utah
State Capitol Bldg.
Salt Lake City, Utah 84114
Attorney for Industrial Commission of Utah

FRANK J. ALLEN
Clyde, Mecham & Pratt
351 South State Street
Salt Lake City, Utah 84111
Attorneys for the Plaintiff-appellant

INDEX

AUTHORITIES AND STATUTES CITED

CASES CITED

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. 11887

RESPONDENT'S BRIEF

STATEMENT OF THE CASE

This is a review of the proceedings before the Industrial Commision of Utah, which resulted in an order by the Commission that the Plaintiffs pay to the Defendant Lawrence Scruggs temporary-total disability compensation for a period of time commencing with back surgery performed upon him to and until such time as he may be released to go back to work by his doctors, as well as compensation for permanent disability such as may be determined thereafter. The award by the Industrial Commission was based upon the findings of the medical panel that the applicant's basic back pathology resulted from an injury by accident which occurred during the course of his employment with the Plaintiff, Utah Packers, Inc., on the 7th day of July, 1967.

DISPOSITION BELOW

The Commission awarded compensation based upon a finding that the disabling pathology was fully attributable to an injury sustained by him while in the Plaintiffs employ but denied compensation for the period of time between the date of injury and the date of his first surgery.

RELIEF SOUGHT ON APPEAL

Respondent agrees with the Industrial Commission's disposition and award except as to the point in time at which compensation should have commenced to be paid. The Respondent-applicant claims the award of the Commission to be inconsistent with the findings of fact and requests that the period of compensation commence from the date of injury and continue until he is released for work by his physician

STATEMENT OF FACTS

The Applicant was on the 7th day of July, 1967, a husky young man twenty-seven years of age, who had worked for a number of years as a laborer on heavy construction in Northern California. On the date stated he reported for work at the Plaintiff, Utah Packers, Inc. canning factory where he worked on the night shift to support himself and family while he attended the Brigham Young University. In process of his employment he was lifting boxes, each containing six-one gallon cans of canned produce. In lifting a box from the ground (record page 7, 19) his fellow workers observed him to drop the box in response to sudden onset of back-pain He was unable to stand or sit and was removed from the cannery by ambulance.

The Applicant was treated first by Dr. Clark, the Plaintiff's physician who diagnosed his injury as a "back-sprain" and referred the Applicant to Dr. Faust, a Chiropractor. After Chiroproctic treatments failed to alleviate the pain, the Applicant was seen by Dr. Nephi Kezerian, an orthopedic surgeon, who made a cursory and inconclusive physical examination (see page 6 of Dr. Kezerian deposition) and eventually the Applicant was granted permission to be treated by Charles M. Smith, Jr., another orthopedic surgeon in Provo, Utah.

Subsequent to neurological and psychiatry examination done at Dr. Smith's request by Dr.'s Jack L. Tedrow and Madsen H. Thomas, Dr. Smith placed the Applicant in the hospital and had a mylogram performed.

On the 8th day of April, 1968, Dr. Smith performed back surgery with further corrective surgery on December 6, 1968 (Dr. Holbrook deposition, page 16).

The medical panel report which was filed November 25, 1968, (prior to the second surgery) recounts in detail all of the medical findings of all of the Doctors and states (page 5, Medical Panel report) that the applicant had not been able to work since the time of the injury on July 7, 1967. The findings by the Medical Panel were that there was a medical probability that the episode at work on the 7th of July, 1967, created the subsequent total-temporary disability and the need for surgery, that the patient had been totally disabled since that time and that there was no medical evidence of any significant pre-existing injury nor was there evidence of any neurosis, psychosis or personality disorder. Plaintiff objected to the Medical Panel report and hearing was held on the 10th day of February, 1969. On February 27, 1969, Plaintiff filed

a motion to admit into the records of the Industrial Commission, the records of the California Industrial Commission relative to a prior Industrial claim made by the Defendant. The Industrial Commission over objection from the Applicant received the California Industrial Commission papers in toto on the 21st of March, 1969, and the Hearing Examiner made his findings of fact and an order awarding temporary-total disability on the 10th day of June, 1969. Because of patent errors in calculation and upon request duly made, the Industrial Commission amended the Hearing Examiner's order by an amended order dated July 22, 1969 and a second amended order dated August 27, 1969, and it is from the second amended order that Plaintiff's appeal to the Supreme Court was made.

ARGUMENT

POINT 1

ALL EVIDENCE OFFERED BY THE APPELLANT, IN REQUESTING A REHEARING WAS ALREADY BEFORE THE INDUSTRIAL COMMISSION PRIOR TO THE ENTERING OF THE COMMISSION'S AWARD.

There is without question a great amount of conflict in the evidence, which fact was considered in depth by both the Medical Panel and by the Industrial Commission. The statements of Dr. Craig Clark, Dr. Faust and Dr. Kezerian, based on their cursory examinations and treatments would possibly fail to show a medical probability of connection between the incident in the Plaintiff's cannery and subsequent back surgery. The medical conclusions of Dr. C. M. Smith, Jr. based upon an indepth examination, in-

cluding neurogical studies, psychiatry examination, a mylo gram and two surgical entrances into the applicant's back effectively refute any preliminary diagnosis of "mere back strain." All of these matters were taken into account by the Medical Panel, resulting in a favorable finding on the applicant's claim of injury. Plaintiff's brief quotes from Dr. Kezerian's report of September 25th, indicating a preliminary diagnosis of a simple strain but ignores Dr. Kezerian's later statement (Kezerian deposition, page 6):

> "I did not make a disability evaluation. And the reason was that I felt that my study was incomplete and limited."
>
> Dr Kezerian on the same page, further states:
>
> "My examination is not intended to be conclusive, and for this reason I insisted that he see a neurologist or a neuro-surgeon."

Likewise, the records from California proffered by Plaintiff and considered in full by the Industrial Commission, disclosed that Dr. Rentschler in a letter to the California State Compensation Insurance Fund, dated November 26, 1965, advised hospitalization and further diagnostic studies. The same Doctor in his letter of February 18, 1966 to Mr. Dahnan of the Claims Department for State Compensation Insurance Fund concluded that there was no neurological function abnormality observable at that time, thus reversing his own prior diagnosis. This too was considered by the Industrial Commission prior to the granting of the award.

This Court has ruled many times that the Industrial Commission may consider *any* evidence which comes before it and as the finder of fact resolve any discrepancies as they best determine (see Morrelly vs. Industrial Commission et al., number 11547, filed September 22, 1969.) Our statute provides that the Industrial Commission findings are conclusive and final and not subject to review. (Section 35-

1-85, UCA, 1953.) If there is substantial evidence to support the findings the Supreme Court will not reverse the Industrial Commission (Vance vs. Industrial Commission, 17 Ut 2d 217, 407 P. 2d 1006 (1965). As recently as December 1, 1969, this Court held in Kennecott Copper Corporation vs. the Industrial Commission, et al., (No. 11645, filed December 1, 1969:)

> "The Commission having made its findings upon conflicting evidence, it is the duty of this Court to view the evidence in a light most favorable to the findings and order of the Commission. As we view the evidence, while it is widely divergent, nevertheless there is creditable evidence in the record to support the Commission findings. We are not inclined in this case to depart from the principles announced in numerous prior decisions by the Court."

The Industrial Commission in the instant case found in favor of the Applicant after having considered fully the Medical Panel hearing, the Hearing Examiner's report and after having allowed into the record all of the hearsay evidence from California which is by the Appellant now offered again. It would appear pointless to refer the same materials back to the Industrial Commission for another hearing on the same record as requested by the Appellant.

POINT 2

THE COMMISSION ABUSED ITS DISCRETION IN ITS FAILURE TO AWARD COMPENSATION TO THE APPLICANT COMMENCING WITH THE DAY OF ACCIDENT INSTEAD OF THE DAY OF THE SURGERY FROM WHICH DAY THE AWARD ACTUALLY COMMENCED.

The award of the Industrial Commission was made pursuant to their adoption of the findings of fact and con-

clusions of law of Robert J Shaughnessy (Page 5, Hearing Examiner's report) which adopted the special medical panel report in that portion finding a reasonable medical probability that the episode at work on July 7, 1967, created the subsequent total-temporary disability and the need for surgery. The reason given by the Hearing Examiner for not adopting the other conclusions and recommendations of the Medical Panel (last Paragraph, Page 4, Hearing Examiner report) were that:

> "the next independent evidence of total disability would occur at the time of the Applicant's hospitalization for surgery—just prior to the hearing of April 8, 1969. Any additional temporary total-disability would commence from that date."

This tends to ignore the Medical Panel evidence on Page 5 of the Medical Panel report quoting Dr. Smith's independent report as concluding:

> "All of his studies up to the present time have been consistent with the presence of an Industrial injury. This is verified not only historically but clinically and surgically."

And further down the same page the Medical Panel finds:

> "He has not been able to work since the time of the injury on the 7th day of July, 1967."

This Court has held in Griffin vs. Industrial Commission, 16, Ut. 2d 264, 399 P. 2d 204, and other cases cited therein:

> "The other pertinent issue is whether the Commission should have allowed medical testimony to prove a connection between the slipping incident and the present ailment suffered by Plaintiff when no competent evidence was offered to show injuries from the slipping incident . . . where the injury complained of affects the internal anatomy, by what means but through medical testimony can

> petitioner prove that her ailments were caused by the accident?
>
> We do not say that the Commission wrongly decided the case. It well established that the Commission can receive any kind of relative evidence, and it is further established that the commission is not obliged to believe the Plaintiff's testimony, unless such belief is so unreasonable as to be arbitrary and capricious. But the Plaintiff in this case should be given the opportunity to introduce medical testimony in an effort to prove that the plyboard incident was the proximate cause of her present ailments."

Applicant states he did not and could not work at any time since the accident and this was verified medically by both Dr. Smith and the Medical Panel's conclusions. No contrary evidence is in the record. Disbelief in face of the facts would indeed be so unreasonable as to be arbitrary and capricious.

It should be pointed out that the Hearing Examiner concluded that Applicant was lying because of the California papers relating to a prior Industrial accident claim, but Applicant was denied an opportunity to explain, or to cross-examine or question those whose records were accepted by the Hearing Examiner as gospel truth. As appears on the California papers, that matter resulted from a fall in which Applicant's *legs* and *thighs* were bruised, causing temporary pain. The matter was pursued on Applicant's behalf by a union attorney. No hearing of any kind was held but a settlement was arranged after Applicant left California. The reason stated in the Compromise and Release form (P.2) is:

> "9. Reason for compromise. The nature and extent of permanent disability being in dispute, the parties wish to avoid the hazards of litigation."

Such a compromise makes it apparent that the claim was disposed of merely to close the record and certainly, as a compromise did not acknowledge any specific injury to Applicant's back. There was in fact none, as was determined medically by Dr. Smith and verified by the Medical Panel.

Section 35-1-45 UCA, 1953 provides:

> "Every employee . . . who is injured . . . by accident arising out of or in the course of his employment, wheresoever such injury occurred, . . . shall be entitled to receive, and shall be paid, such compensation for loss sustained on account of such injuries or death . . . as herein provided."

Section 35-1-65, UCA, 1953, provides

> "In case of temporary disability, the employee shall receive sixty percent of his average weekly wages *so long as such disability is total . . .*" (Emphasis ours)

This Court has considered the question of when a cause of action arises under Workman's Compensation laws, as follows:

> "Not until there is an accident and injury and: a disability of loss from the injury, does the duty to pay arise. A mere accident does not impose the duty to pay. Accident plus injury therefrom does not impose the duty. But accident plus injury which results in disability or loss gives rise to the duty to pay."

Salt Lake City vs. Industrial Commission, 93, U 510, 74, P.2d 657.

It is submitted then that the record in Applicant's case shows without equivocation that Applicant was injured on July 7, 1967, while on the job in Appellant's cannery, that he was temporarily totally disabled and unable to work from that time until the present and was under statute, entitled to compensation for that period. Arbitrary

selection of the date of surgery as the time for starting compensation would require a different findings of fact than relied on by the Industrial Commission in making their award.

CONCLUSION

The Industrial Commission Award should commence with the date of injury, July 7, 1967.

Respectfully submitted,

MAXFIELD, GAMMON, ELLIS & MCGUIRE

Attorneys for respondent-applicant
28 North 1st East
Provo, Utah 84601
By: Glen J. Ellis