

1993

Jennie M. Featherstone v. Industrial Commission of Utah, Tooele Valley Regional, Utah Local Trust, Employers' Reinsurance Fund : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JENNIE M. FEATHERSTONE
Claimant/Appellant,

vs.

INDUSTRIAL COMMISSION OF UTAH
TOOELE VALLEY REGIONAL and/or
(Employer) UTAH LOCAL GOVERNMENT
TRUST and EMPLOYERS' REINSURANCE
FUND
Defendants/Appellees.

BRIEF OF THE APPELLANT

Appeal No. 930280-ca

Brief of Appellant in support of her Petition for Review from
order of the Industrial Commission of Utah.

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Argument priority seven (7).

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BRIEF

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Utah Court of Appeals

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Mary T. Noonan
Clerk of the Court

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Claimant/Appellant,)	
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Brief of Appellant in support of her Petition for Review from
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JURISDICTION

The Court of Appeals has jurisdiction to review an order of the Utah Industrial Commission pursuant to §35-1-86 Utah Code Ann.

NATURE OF PROCEEDINGS

This is an appeal for review of an Order of the Utah Industrial Commission.

STATEMENT OF ISSUES

The issues presented for review on appeal are as follows:

- i. Whether or not the Industrial Commission committed error by failing to construe the workers' compensation statute liberally in favor of the applicant.

- ii. Is the Industrial Commission's decision and order supported by adequate findings of fact and conclusions of law.
- iii. Whether or not the Industrial Commission erred in finding that the Applicant's medical condition was not work related.
- iv. Whether the petitioner's due process rights have been denied by virtue of the Commission taking too long to make it's findings of fact.
- v. Whether the petitioner's due process rights have been denied by virtue of the Commission's Findings of Fact or if they are arbitrarily capricious or wholly without cause.
- vi. Whether the Industrial Commission applied the proper standard of review when entertaining Applicant's Motion for Review.

CONSTITUTIONAL PROVISIONS AND STATUTES

PAGE NO.

Utah Code Ann. §35-1-45

Utah Code Ann. §35-1-86

Utah Code Ann. §35-1-99

Utah Code Ann. §63-43b-12

Utah Code Ann. §63-43b-16

Utah Code Ann. §63.43b-17

DETERMINATIVE PROVISIONS

Utah Code Ann. §63-46b-12 states as follows:

(6)(c) The order on review shall contain:

- (i) a designation of the statute or rule permitting or requiring review;
- (ii) a statement of the issues reviewed;
- (iii) findings of fact as to each of the issues reviewed;
- (iv) conclusions of law as to each of the issues reviewed;
- (v) the reasons for the disposition;
- (vi) whether the decision of the presiding officer or

agency is to be affirmed, reversed, or modified, and whether all or any portion of the adjudicative proceeding is to be remanded;
(vii) a notice of any right of further administrative reconsideration or judicial review available to aggrieved parties; and
(viii) the time limits applicable to any appeal or review.

Utah Code Ann. §63-46b-16 states as follows:

- (4) The appellate court shall grant relief only if, on the basis of the agency's record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following:
- (a) the agency action, or the statute or rule on which the agency action is based, is unconstitutional on its face or as applied;
 - (b) the agency has acted beyond the jurisdiction conferred by any statute;
 - (c) the agency has not decided all of the issues requiring resolution;
 - (d) the agency has erroneously interpreted or applied the law;
 - (e) the agency has engaged in an unlawful procedure or decision-making process, or has failed to follow prescribed procedure;
 - (f) the persons taking the agency action were illegally constituted as a decision-making body or were subject to disqualification;
 - (g) the agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court;
 - (h) the agency is:
 - (i) an abuse of the discretion delegated to the agency by statute;
 - (ii) contrary to a rule of the agency;
 - (iii) contrary to the agency's prior practice, unless the agency justifies the inconsistency by giving facts and reasons that demonstrate a fair and rational basis for the inconsistency; or
 - (iv) otherwise arbitrary or capricious.

Utah Code Ann. §63-46b-17 states as follows:

- (1)(a) In either the review of informal adjudicative proceedings by the district court or the review of formal adjudicative proceedings by an appellate court, the court may award damages or compensation only to the extent expressly authorized by statute.

- (b) In granting relief, the court may:
- (i) order agency action required by law;
 - (ii) order the agency to exercise its discretion as required by law;
 - (iii) set aside or modify agency action;
 - (iv) enjoin or stay the effective date of agency action; or
 - (v) remand the matter to the agency for further proceedings.

(2) Decisions of petitions for judicial review of final agency action are reviewable by a higher court, if authorized by statute.

Utah Code Ann. § 35-1-86 states as follows:

The Court of Appeals has jurisdiction to review, reverse, or annul any order of the commission, or to suspend or delay the operation or execution of any order.

Utah Code Ann. §35-1-45 states as follows:

Each employee mentioned in Section 35-1-43 who is injured and the dependents of each such employee who is liked, by accident arising out of and in the course of his employment, wherever such injury occurred, if the accident was not purposely self-inflicted, shall be paid compensation for loss sustained on account of the injury or death, and such amount for medical, nurse, and hospital services and medicines, and, in case of death, such amount of funeral expenses, as provided in this chapter. The responsibility for compensation and payment of medical nursing, and hospital services and medicines, and funeral expenses provided under this chapter shall be on the employer and its insurance carrier and not on the employee.

Utah Code Ann. §35-1-99 states, in part as follows:

(1) If an employee claiming to have suffered an industrial accident in the service of his employer fails to give written notice within 180 calendar days to his employer or the commission of the time and place where the accident and injury occurred, and of the nature of the accident and injury, the employee's claim for benefits under this chapter is wholly barred.

STATEMENT OF CASE

On July 15, 1991, the Petitioner asserts she was injured on the job while in the course and scope of her employment. On December 31, 1991, the Petitioner filed an Application for Hearing

for her Industrial Accident claim with the Industrial Commission. The petitioner was claimed that her on-the-job activities, including washing dishes, lifting trays and an increased workload led to an injury to her shoulder. Defendant responded that Petitioner's medical condition is directly attributable to a pre-existing condition and not attributable to an industrial accident or disease.

A hearing was held on June 12, 1992. After hearing testimony and receiving a medical exhibit, the Administrative Law Judge (hereinafter ALJ) took the matter under advisement. Several letters were sent to the ALJ requesting a decision. On November 20, 1992, (or 162 days post hearing) the Administrative Law Judge entered his Findings of Fact, Conclusions of Law and Order. The ALJ found that applicant had problems with her right arm and shoulder. That applicant knew the workers compensation system very well having prior industrially related injuries, ie cut finger and back. That the applicant was released to return to work on November 4, 1991. That applicant admitted she told her supervisor that she suffered from arthritis. The ALJ found that the applicant and her witnesses were not credible witnesses and that the defense witnesses were more credible. The ALJ found that there is no connection between the applicant's shoulder problem and the alleged industrial accident.

The applicant filed a Motion for Review and Request for Hearing on December 21, 1992. The Industrial Commission entered it's Findings of Fact and Conclusions of Law indicating there is

substantial evidence in the record to support the ALJ's findings on credibility. That there is evidence that applicant complained of shoulder and arm pain on July 15, 1991 and left work to seek medical attention. That the applicant suffered symptoms prior to the alleged incident of July 15, 1991. That the incident was not immediately reported to the employer and that applicant's treating physician attributed her complaints to a recurrent condition for which she sought treatment.

STATEMENT OF RELEVANT FACTS

The Applicant asserts she is entitled to workers compensation benefits for having suffered an industrial injury on July 15, 1991 while in the course and scope of her employment. Immediately following the incident, she confronted her supervisor, Greg Coburn, and indicated she needed medical attention. In the hearing, Mr. Coburn testified that she was in pain, that she was crying, and that she was on the job when she confronted him. See pages 123, 130 of Transcript. Mr. Coburn further testified that the applicant needed immediate medical attention.

Another witness and employee of defendant, Penny Manchester, also saw applicant in tears on the day of the accident and verified she needed medical treatment. An accident report regarding the industrial injury was filled out by a supervisor on July 15, 1991. See report.

Applicant was immediately treated for her injury by Dr. David Curtis, a physician who is employed by Defendant. In his chart

note August 8, 1991, Dr. Curtis indicates that applicant reported that the injury was industrially related. Dr. Curtis did not fill out a Physicians Report of Injury even though he was apprised that the medical condition was industrially related.

An arthrogram was performed after the injury and found that she had a torn rotator cuff. Surgery was performed 14 days following the injury and the findings showed "an obvious large tear of the rotator cuff". No prior medical report manifests a torn rotator cuff.

SUMMARY OF ARGUMENT

The Industrial Commission mis-applied the standard for review when entering it's Findings of Fact, Conclusions of Law and Order denying Motion for Review. Specifically, the Industrial Commission applied Utah Code Ann. §63-46b-16(4)(g) which is the standard the Court of Appeals must use. The Industrial Commission must apply Utah Code Ann. §63-46b-12 for the Motion for Review. It indicates that the Industrial Commission order shall contain the following:

- (i) a designation of the statute or rule permitting or requiring review;
- (ii) a statement of the issues reviewed;
- (iii) findings of fact as to each of the issues reviewed;
- (iv) conclusions of law as to each of the issues reviewed;
- (v) the reasons for the disposition;
- (vi) whether the decision of the presiding officer or agency is to be affirmed, reversed, or modified, and whether all or any portion of the adjudicative proceeding is to be remanded;
- (vii) a notice of any right of further administrative reconsideration or judicial review available to aggrieved parties; and
- (viii) the time limits applicable to any appeal or review.

The Industrial Commission did not follow Utah Code Ann. §63-46b-12. It mis-applied the standard of review, by not entering proper Findings of Facts, Conclusions of Law for each issue, by not indicating the proper disposition of the case, and by disregarding substantial evidence indicating a compensable accident.

The Industrial Commission disregarded competent evidence in favor of unsubstantial contradictory evidence in finding that Applicant did not suffer a compensable injury. The Industrial Commission committed an error of law by when it placed too much emphasis on "credibility" when it should have construed the benefits in favor of compensability. McPhie v. Industrial Commission, 567 P.2d 153 (Utah 1977).

The Applicant was substantially prejudiced by the delay of a decision by the ALJ. The ALJ tended to use superfluous evidence and disregarded substantial evidence in Applicant's favor. The ALJ took an inordinate amount of time to decide the case, and then only after prodding by the applicant. Applicant's due process rights have been violated. She is entitled to an ALJ who is unbiased. Her due process rights have been violated when the ALJ's conduct prevented meaningful and impartial consideration of the evidence. Bunnell v. Industrial Commission, 740 P.2d 1331 (Utah 1987). Anderson v. Industrial Commission, 696 P.2d 1219 (Utah 1985). The Conclusions of Law are not supported by the facts. Neither the ALJ nor the Commission entered adequate Findings to base a meaningful review. Finally, the Commission and the ALJ did not construe the facts in favor of compensability. McPhie.

DETAIL OF ARGUMENT

PROPER STANDARD FOR REVIEW

The Industrial Commission mis-applied the standard of review. The Industrial Commission relied on Utah Code Ann. §63-46b-16(4)(g) when it indicated that"

Under the Utah Administrative Procedures Act ("UAPA"), an ALJ's findings of fact will be sustained if the findings are supported by "substantial evidence when viewed in light of the whole record before the court."

The Industrial Commission went on to say:

In its discussion of review of agency fact finding, the court noted that it would "not substitute its judgment as between two reasonable conflicting views," even if the court may have reached a different conclusions had the matter come before them on de novo review. Citing Grace Drilling Co. v. Board of Review, 776 P.2d 63 (Ut. Appl. 1989).

This case is identical to Ashcroft v. Industrial Commission, 215 Utah Adv. Rep. 50 (1993). In Ashcroft, like this case, the Industrial Commission employed the phrase "substantial evidence" when reviewing the ALJ's decision. The Court of Appeals found in Ashcroft that "This is not the correct standard". That in order to prove compensability, the standard of "preponderance of the evidence" must be used. Id. at 50.

There is a significant distinction between "preponderance of evidence" and "substantial evidence" and is not one of mere phraseology. Id. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion". Grace Drilling v. Board of Review, 776 P.2d 63 (Ct. App. 1989). The Ashcroft case was remanded back to the Industrial

Commission. This case should also be remanded as both Mrs. Featherstone and the Court of Appeals are "entitled to know that the proof was evaluated under the correct standard". Id. at 51.

THE FINDINGS ARE NOT SUPPORTED BY EVIDENCE

An administrative agency must make findings of fact and conclusions of law that are adequately detailed so as to permit meaningful appellate review. Adams v. Board of Review, 173 Utah Adv. Rep. 18 (1991). The failure of an agency to make adequate findings of fact on material issues renders its findings "arbitrary and capricious". Nyrehn v. Industrial Commission, 800 P.2d 300, 335 (Utah App. 1990) cert. denied, 815 P.2d 241 (Utah 1991). The Utah Supreme Court has clearly described the detail required in administrative findings in order to be considered adequate. See Adams at page 19. Milne Truck Lines, Inc. v. Public Serv. Comm'n, 720 P.2d 1373, 1378 (Utah 1986).

In this case, the Industrial Commission merely summarized the medical records by stating that the injured employee "had a history of shoulder pain prior to July 15, 1991". That Dr. Green attributed the rotator cuff injury to the July 15, 1991 industrial incident. That Dr. Curtis made reference to "recurrent right shoulder pain" and "applicant believed her injury was associated to 'more heavy work'". The Industrial Commission then summarized the testimony. Even though a summary may be helpful, the Adams court specified that "A mere summary of the conflicting evidence in this case therefore does not give a clear indication of the ALJ's or the Commission's view as to what in fact occurred.

CREDIBILITY

Credibility has been a major source of concern at the Industrial Commission level. The Commission is now realizing that to merely decide a case based solely on credibility does not meet Constitutional muster. Ordinarily, the Commission and the reviewing Court accord great deference to the Administrative Law Judge. The policy of deference is predicated on the Judge's ability to personally observe the witness and evaluate first hand his or her demeanor. Although determination of a witness credibility is usually left to the discretion of the finder of fact, that discretion is not unlimited and can be abused. How easy it would be for an ALJ to summarily dismiss a case based solely on credibility knowing that the Commission or the Court of Appeals would have an impossible task of ruling otherwise. However, said abuse should be scrutinized carefully by this court. A judge is not at liberty, under the guise of passing upon credibility of a witness, to disregard his testimony when from no reasonable point of view is it open to doubt. Witnesses 81 Am Jur 2d §1034. Moreover, there is no reason for a trier of fact to determine the credibility of the testimony of a party where it is not contradicted by direct evidence, or by any legitimate inferences from the evidence, and it is not opposed to the probabilities, or in its nature surprising or suspicious.

In this case, the ALJ chose insignificant and often irrelevant facts to illustrate his preconceived belief that the Applicant and all her witnesses lacked credibility. The ALJ made the simple

finding that "Considering all the foregoing, the Administrative Law Judge finds that the applicant is not a credible witness". The ALJ justifies his summarizing testimony that applicant told a supervisor that she had arthritis, that pain prevented her from working, that she applied for unemployment benefits, that she knew the workers compensation system well, that she had prior problems with her right arm and shoulder and that she chose to retire. The ALJ completely ignored testimony and facts that 1) there was an increased workload, 2) that applicant performed her duties well up to the date of the injury, 3) that her supervisor found her in intense and immediate pain, 4) that her supervisor indicated she needed immediate medical treatment and 5) there is now a torn rotator cuff when previously there was not.

It should be realized that the industrial injury occurred close to one year previous. The Applicant has seen numerous doctors, underwent a battery of tests and was intimidated by her employer and employer's doctor. It is not remarkable, and in fact, is entirely natural and consistent that her memory may have some minor gaps.

In Baker v. Industrial Commission, 405 P.2d 613 (Utah 1965) the Utah Supreme Court had its first occasion to comment directly on the use of credibility determinations in workers' compensation cases. In that case, the Industrial Commission had denied compensation, sustaining an Administrative Law Judge's denial of benefits on the basis of the Applicant's alleged lack of credibility. The Supreme Court in reversing, held in part as

follows:

We believe that the Commission as a fact finder acted as it did because apparently it disbelieved uncontroverted testimony of witnesses whose interest was in no way shown or inferable, which carried a reasonable measure of conviction, and there was nothing in the record which intrinsically would discredit the testimony or be indicative of witness demeanor that would give the Commission an advantage over the Court in its determination. The Commission's Order recited testimony of the Applicant which seems to be taken out of context, without considering the record as a whole.

We think that the critical question here is whether the Commission arbitrarily can discount all competent, uncontradicted evidence. We think it can't, but did so here, calling for reversal.

There is no lack of evidence or anything in the record to reflect incredibility on the part of the Applicant or her witnesses, unless, on uncontroverted testimony we arbitrarily say six persons, under penalty of perjury, were all prevaricators.

The Baker Court noted that the purpose of the Industrial Compensation Act was to alleviate hardships upon workers and their families, and that the facts and inferences therefrom constituting a worker's right to recover are to be liberally construed and went on to hold that allegations of incredibility "must at least be supported by the record and by accurate findings of fact". 615. See also McPhie.

PRIOR INJURIES

The ALJ indicated that the applicant had a previous history of injuries. This is undisputed and was fully divulged by the Applicant. In order to recover workers compensation benefits, an

employee must prove that she was injured "by accident arising out of or in the course of employment" Utah Code Ann. §35-1-45. There are two prerequisites for a finding of a compensable injury 1) The injury must be "by accident" and 2) there must be a causal connection between the injury and the employment. Nyrehn v. Industrial Commission, 146 Utah Adv. Rep. 53 (1990). The mere fact that an applicant has a pre-existing condition does not prevent that applicant from recovering benefits. The cases are clear that "The aggravation or lighting up of a preexisting disease by an industrial accident is compensable. Allen v. Industrial Commission, 729 P.2d 15 (Utah 1986) at 25. The key question is whether given this body and this exertion, the exertion in fact contributed to the injury. The Commission must make detailed analysis as to legal and medical causation. None of this was ever done by the Commission and this matter should be remanded back to the Commission for appropriate findings. In Nyrehn, like in this case, the Court of Appeals found that:

The factual findings of the Commission are silent as to whether Nyrehn's preexisting back condition contributed to the industrial injury. The ALJ had merely concluded as a matter of law that 'since Ms. Nyrehn brought a preexisting low back condition to the workplace,' the Allen test applied. Implicit in such a legal conclusion is the critical factual finding that Nyrehn's preexisting condition contributed to her injury. Such material findings, however, may not be implied. In order for us to meaningfully review the findings of the Commission, the findings must be sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached. Id at 55.

TIMELY REPORTING

The legislature has indicated what is needed when reporting an injury. In Utah Code Ann. §35-1-99, it indicates what is necessary to notify the employer. The employee must notify within 180 days of the injury. The employer then has the obligation to notify the Industrial Commission. The employee can also notify her doctor. The doctor then notifies the Industrial Commission. You will note that neither the employer, nor the doctor notified the Industrial Commission appropriately. In this case, the supervisor was immediately apprised of the injury when he personally witnessed the applicant in tears and that she need medical treatment. A supervisor filled out the report on that day. Another supervisor filled out another report within 54 days of the date of accident. Just because the ALJ chose to accept the last supervisor as the reporting incident cannot bar a claim.

NO WITNESSES

An injured worker does not always have the privilege to have someone witness an accident. The mere fact that an injury is unwitnessed does not mean it is not compensable. Moreover, there is medical verification by her employer that she was injured. All witnesses indicated that they noticed Applicant crying and in need of medical attention while she was on the job.

ARBITRARY AND CAPRICIOUS

In Adams v. Board of Review, 173 Utah Adv. Rep. 18. (1991) the Court of Appeals found that "An administrative agency must make findings of fact and conclusions of law that are adequately detailed so as to permit meaningful appellate review". The Court

then cited Nyrehn v. Industrial Commission, 800 P.2d 330 (Utah App. 1990) when it stated:


In order for us to meaningfully review the findings of the Commission, the findings must be "sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusions on each factual issue was reached. The failure of an agency to make adequate findings of fact on material issues renders its findings "arbitrary and capricious".

There are two facets to determine whether there is a compensable injury. The first is medical causation. Renowned Dr. Green indicated that her medical condition is related to her employment. Dr. Curtis, the defendant's employee, indicates that applicant attributes her condition to increase workload. The second facet is legal causation. Neither the ALJ nor the Commission analyzed this aspect in any depth. The failure to make adequate findings renders the decision arbitrary and capricious. Nyrehn. The Court of Appeals cannot review the record meaningfully.

CONCLUSION

The Court of Appeals should remand this matter back to the Industrial Commission for further hearing.

Dated this 28 day of July, 1993.


David W. Parker
Attorney for Appellant

CERTIFICATE OF MAILING

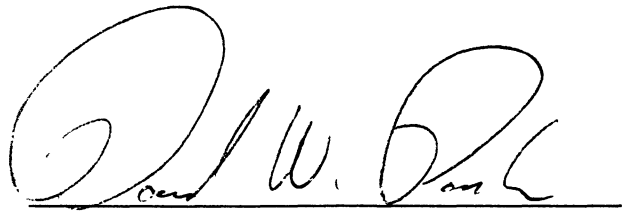
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