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Lloyd R. Crittenden v. The Industrial Commission of Utah, D. & L. Construction Company, And The State Insurance Fund : Brief of the Plaintiff

IN THE SUPREME COURT OF THE STATE OF UTAH

LLOYD R. CRITTENDEN,
Plaintiff,

vs.

THE INDUSTRIAL COMMISSION OF UTAH, D. & L. CONSTRUCTION COMPANY, and THE STATE INSURANCE FUND,
Defendants.

Case No. 12117

BRIEF OF THE PLAINTIFF

WRIT OF REVIEW TO THE INDUSTRIAL COMMISSION OF THE STATE OF UTAH

ALLEN H. TIBBALS
604 El Paso Natural Gas Building
315 East Second South Street
Salt Lake City, Utah 84111
Attorney for Plaintiff

ROBERT D. MOORE
530 Judge Building
Salt Lake City, Utah 84111
Attorney for D. & L. Construction Co. and The State Insurance Fund, Defendants

VERNON B. ROMNEY
Attorney General of the State of Utah
State Capitol Building
Salt Lake City, Utah 84114
Attorney for The Industrial Commission of Utah

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STATEMENT OF THE NATURE OF THE CASE

Plaintiff applied to The Industrial Commission of Utah for an award under the Workmen's Compensation Act of Utah 35-1-1-106 inc. for injuries arising out of an industrial accident in the course of his employment. The claim of the applicant was denied by The Industrial Commission. This is an action for review by the Supreme Court under the terms and provision of 35-1-83 U.C.A. 1953 as amended, of the action of The Industrial Commission in denying plaintiff's claim.

THE DISPOSITION OF THE CASE BEFORE THE INDUSTRIAL COMMISSION

The Hearing Examiner, Robert J. Shaughnessy, denied plaintiff's application for an award. A motion for review was filed in accordance with the

terms of 35-1-82.54. UCA 1953 as amended. The Industrial Commission affirmed the findings of the Examiner and denied the claim.

THE NATURE OF THE RELIEF SOUGHT ON APPEAL

Plaintiff seeks to have the Supreme Court on review reverse the action of The Industrial Commission and direct that body to make an award under the Workmen's Compensation Law of the State of Utah for the benefits to which by law the plaintiff is entitled.

STATEMENT OF THE FACTS

The following facts were admitted by stipulation, by admission, or were uncontroverted:

Lloyd R. Crittenden, plaintiff, was an operating and managing partner in D. & L. Construction Company, contractor, at all times pertinent in this case and particularly on November 16, 1963. (R. 1, 10, 14, 15). Together with his partner, Doug Jones, Mr. Crittenden was operating a 10 ton crawler type tractor with back hoe and bulldozer attachments, owned by the D. & L. Construction Company. On the day in question, while operating the said tractor for the partnership, by which he was employed, Mr. Crittenden noted an apparent oil leak. (R. 15, 16). Mr. Crittenden and Mr. Jones placed railroad ties upon the cement apron in front of the workshop or garage utilized by the partnership in the maintenance of its equipment, located on the property of

plaintiff's father approximately two and one-half miles south of Coalville, Utah in Summit County. (R. 16-19). Mr. Jones then proceeded to back the tractor onto these ties to elevate the tractor sufficiently to permit a man to get underneath the unit and examine if for the purpose of locating the source of the oil leak. (R. 16, 19). Plaintiff got under the tractor and was examining the underside when one of the ties broke and gave way and the tractor slipped off the ties, pinning the plaintiff between a steel plate ¾" thick, about 6" wide and 30" long, welded to the underside of the tractor as a support to the back hoe, and the ground. (R. 16, 17). The plaintiff was lying on his right side and the machine rested on his left hip and thigh. (R. 17). Plaintiff's hip was on the concrete slab. (R. 17). The plaintiff immediately became aware of terrible pain and pressure and the machine "squoze" him until it could rest on the ground. (R. 17). Plaintiff's partner, Mr. Jones, drove the machine off of the plaintiff and as he did so, the machine dragged and pulled plaintiff along on the ground until he in some way came free from under the machine. (R. 18). Plaintiff did not lose consciousness during this accident and described the pain he suffered as, "and it was a real severe pain — probably the worst I have ever suffered. And I have been burned and other things like that, that I have felt was bad pain. This was the worst that I have ever suffered." (R. 18, Lines 13 thru 16). His sister-in-law, Marjorie Crittenden, called a doctor,

mainder of that year and did not commence doing anything of that nature until March or April of the succeeding year. (R. 22). The plaintiff worked the following year approximately five months for W. W. Clyde and in the next year worked some seven months for Morrison-Knudsen, each time as an operator of heavy equipment. (R. 37, 38). Never at any time after the accident was the plaintiff free of pain and discomfort in his back, radiating down into his leg. (R. 31, 32). Plaintiff testified he was unable to do any lifting and his effeciency and ability to work on heavy equipment was impaired. (R. 32). He would have episodes when the pain was not as great and he felt better and then would again suffer new bouts of pain and discomfort, ultimately resulting in his returning to Dr. Parker in June 1966 because of his extreme discomfort. (R. 25, 26). Dr. Parker recommended that plaintiff see a specialist and in August of 1966 he contacted Stewart A. Wright, M.D., a neurosurgeon. (R. 27). Dr. Wright first saw plaintiff August 1, 1966 and performed a complete examination in his office. (R. 27, 150). The history and notes taken by Dr. Wright were introduced in evidence before the Examiner for The Industrial Commission. (R. 11, Exhibits 1, 2 & 3; R. 57, 58, 59). As a result of the office examination, Dr. Wright concluded that "Mr. Crittenden had suffered an injury to the spine in the lower lumbar area when the accident had occurred, and that as a result of this injury the patient had finally developed an

Dr. Reed Parker of Coalville. (R. 18). Mr. Crittenden continued to lie on the ground, partly on his right side and partly on his back, until the doctor came. At the time that the doctor arrived, he had others present and himself assist Mr. Crittenden in straightening himself out on the ground. "He pulled my legs out straight, laid my body out straight, on my back, and then asked me about where I had pain and things of that nature." (R. 20). Mr. Crittenden testified that he had pain in his legs, hip, back and shoulder. The doctor then asked him if he could stand by himself but Mr. Crittenden was unable to do so, but did stand with help. He was helped to the ambulance, laid down in the back part and was taken to his home. (R. 20). Dr. Parker did nothing for him, took no X-rays, made no examination other than a cursory examination at the scene, without even removing the clothing from the plaintiff. (R. 19, 20). The plaintiff testified that the accident happened on a Saturday. (R. 21). He remained in bed the rest of that day, all day Sunday and Monday. (R. 21). On the following Tuesday his partner came to the house and advised him he was having a problem on the job. (R. 21). The plaintiff was unable to move by himself but with Mr. Jones' help, succeeded in getting out to a pickup truck. Mr. Jones drove him to the job, from which point he was able to examine the problem from the truck, advise as to what should be done, and then returned home. (R. 21). The plaintiff was unable to do any operation of heavy equipment the re-

acute protrusion of the lumbar disc between the fifth lumbar vertebra and the sacrum, and that this acute protrusion of the disc was what was giving him his severe distress at the time I first examined him." (R. 153). Dr. Wright hospitalized Mr. Crittenden at St. Mark's Hospital August 9, 1966 and had a myelogram done on the 10th of August 1966. (R. 154). The roentgenologist's report who read the myelogram was submitted to The Industrial Commission as an exhibit attached to plaintiff's motion to dismiss and vacate the report and findings of the medical panel. (R. 209-217). On the 11th of August Dr. Wright did surgery at St. Mark's Hospital and removed virtually 100% of the disc material and found that the disc between the fifth lumbar vertebra and the top of the sacrum had ruptured entirely through its own capsule and also through the ligaments which line the anterior wall of the spinal canal and hold the vertebrae together. (R. 156). Dr. Wright removed the pieces that lay free outside of the interspace and in the spinal canal, then enlarged the rent in the ligaments and removed a further large amount of disc material. (R. 156, 157). The pathologist's report of the examination of the material removed was attached to the motion to dismiss and vacate the report and findings of the medical panel and was submitted to The Industrial Commission. (R. 209-216). Dr. Wright testified specifically that in his opinion the condition for which surgery was requried in 1966 stemmed from and was caused by

the industrial accident of which Mr. Crittenden was the victim November 16, 1963. (R. 153, 160, Report R. 57, 287). Upon application by the plaintiff herein for benefits and a hearing, a hearing was scheduled before Robert J. Shaughnessy, Examiner for The Industrial Commission, on the 13th day of February 1967. The plaintiff appeared and his testimony was taken. (R. 8 thru 46). Plaintiff also had available for examination and presentation before the Examiner, corroborative witnesses relative to the accident and the injuries which Mr. Crittenden suffered thereby. Mr. Doug Jones, Mr. Crittenden's partner, was actually operating the tractor and removed it from Mr. Crittenden after it fell upon him. (R. 43). At the instance of the attorney for The State Insurance Fund, Mr. Robert Moore, Mr. Jones was not examined, it being stipulated that he would testify in corroboration of Mr. Crittenden's testimony, and in addition, would state "that he has known Mr. Crittenden for many years prior to the time of the accident and had never known him to have any back trouble, and that to his personal observation, Mr. Crittenden was incapable of operating equipment in the fall of 1963 after the accident and did so with great difficulty during the period of the year 1964 while they were in business together." (R. 44). Mr. Crittenden's brother, Kay Crittenden, was present and ready to testify but at the request of the attorney for the defendant, ~~was~~ was not examined, it being stipulated that he would testify that he and

the plaintiff had seen each other together nearly two or three times a week most of their lives and that to his knowledge he had never heard of Lloyd having any back trouble prior to the time of the accident, that he was present at the time of the accident and that it was his wife who had called the doctor on the day of the accident. (R. 45). Mr. Keith Black, an employee of the D. & L. Construction Company, who was likewise present at the scene of the accident, was also available for testimony but at the request of the attorney for the defendant, The State Insurance Fund, it was stipulated that if he were examined he would testify that he had known Lloyd Crittenden, the plaintiff, and had worked for him, that Mr. Crittenden had never had any trouble with his back until after this accident and that from that time on he had had more or less continuous trouble in getting up and down off the equipment or being able to handle it, and that this condition persisted, to his knowledge, as long as he was associated with Lloyd, and he had observed him as a neighbor and acquaintance. (R. 45). Mr. Black was present and in the employ of the D. & L. Construction Company at the time that the accident occurred and had helped place the ties that the tractor was backed on to before it slipped off onto Mr. Crittenden. (R. 46). Mrs. Crittenden, wife of the plaintiff, (Betty R. Crittenden), was examined and testified as to the discomfort that the plaintiff suffered continually from the time of the accident until it finally became so bad that he "had to have

something done." (R. 50, Line 22). In response to the question as to why the plaintiff had suffered along for such a long time before going back to a physician for further assistance, Mrs. Crittenden testified, "Well, he figured that he'd probably be hospitalized and we just couldn't, he just didn't feel like we could afford to have him hospitalized." (R. 51).

The matter was determined to be one for the review of a medical panel, and a medical panel was appointed by letter of March 24, 1967. (R. 62). The panel consisted of three orthopedists, chairmaned by Wallace E. Hess, M.D., and consisting of Dr. Hess, Dr. Thomas D. Noonan, and Dr. Norman R. Beck. Apparently Dr. Hess summarized the information contained in The Industrial Commission file for the benefit of the other panel members. (R. 64 thru 66). Thereafter, a panel report was written and submitted, bearing date of May 1, 1967 and received by The Industrial Commission May 23, 1967, in which the panel reached the conclusion that they were unable to relate the condition necessitating surgery by Dr. Wright to the accident of November 16, 1963. (R. 74). Plaintiff, by and through his counsel, immediately filed objections to the findings and conclusions of the medical panel. (R. 78 thru 81). A hearing was granted on the objections and the transcript of the hearing in which Dr. Hess was examined is found at R. 84 to 128. Further reference to the testimony of Dr. Hess will be made in the argument. Pursuant to

an understanding had at the time of the appearance of Dr. Hess, since Dr. Wright could not appear at the same time, arrangement were made and Dr. Wright appeared before the Examiner to testify with regard to this matter on behalf of the plaintiff on August 31st, 1967. Dr. Wright's testimony appears in the record at R. 148 to 198 inc. On January 2, 1968, a letter was directed to the attorney for the plaintiff by the Hearing Examiner, Mr. Shaughnessy, requesting advice as to the further intentions of the plaintiff in connection with the case in regard to the introduction of any further medical evidence. (R. 206). A response was sent on January 8th advising the Examiner that if the transcript of record which had then become available bore out the personal recollections of the attorney, that it was the intention of the attorney to recommend to the plaintiff that a motion to dismiss and vacate the report and findings of the medical panel be filed. (R. 207). This motion was in fact filed on the 23rd of February 1968. (R. 209 thru 217 inc.). The attorney for The State Insurance Fund, Mr. Moore, filed a letter with The Industrial Commission, to the attention of the Examiner, under date of March 22nd, stating it was his view that the motion filed by the plaintiff should not be a basis for the summary dismissal of the findings of the panel, and requesting that a hearing be provided at which Dr. Hess, the Chairman of the medical panel, might comment upon the testimony of Dr. Stewart A. Wright. (R. 220). A response was

filed to this letter on March 25, 1968 by the attorney for the plaintiff. (R. 221,222). But without making any disposition of plaintiff's motion to dismiss the medical panel and its findings or to permit appearance or argument thereon and without acting on the request by attorney for defendants for further examination of Dr. Hess, the Examiner peremptorily made and entered findings of fact and conclusion of law and an order denying the plaintiff's claim. (R. 224 thru 226). The Industrial Commission indicated its approval of the Examiner's report and decision as of June 5, 1969. A motion by plaintiff for review of the findings of fact, conclusions of law and order made and entered by the Examiner was filed before the Commission June 19, 1969. (R. 227-231 inc.). An order was made and entered August 13, 1969 by The Industrial Commission, granting the motion for review and setting up an additional hearing to permit examination of the medical panel chairman and the plaintiff's physician in the presence of each other. (R. 233). The Commission in its order granting the review further requested the presentation of a complete medical history and any other information germane to the issues. (R. 233). In response thereto plaintiff filed his affidavit of medical history and a supporting letter from Reed J. Parker, M.D. of Coalville, his family physician, certifying that he had never at any time treated the plaintiff for back complaints prior to November 1963. (R. 238, 240). Dr. Hess and Dr. Beck of the medical panel, and Dr.

Stewart A. Wright, plaintiff's physician, were present and examined on January 29, 1970. (R. 251-318). Further testimony was also taken at this hearing from the plaintiff relative to the present condition of his back and pertinent to the question of whether between the time of the industrial accident in November 1963 and the time of surgery, August 1966, plaintiff had suffered any other accident or injury or there had been any occasion of stress of which he became cognizant or was aware that might have contributed to or caused the acute symptoms which took him to Dr. Wright and resulted in the surgical procedure in August of 1966. (R. 297-300 inc.). Mr. Crittenden's testimony was that there was no such incident and that he had not been aware of any particular time at which this condition worsened, that it appeared to him to be a gradual thing which ultimately culminated in the problem and resulted in his having to see Dr. Wright. (R. 29, 298, 299). Mr. Crittenden further testified that since the surgical procedure performed by Dr. Wright, his back had so improved and was in such condition that he had during the summer of 1969 contracted to do sidewalk work for Coalville City and personally did a big share of the finishing work on this sidewalk which required that he be bent over, using his back in the work of finishing the concrete. (R. 299). The Commission Hearing on Review was conducted by Commissioner Stephen M. Hadley, inasmuch as the Hearing Examiner who had heard the main case, Robert J.

Shaughnessy, was no longer with the Commission. (R. 252). Thereafter, the Commission entered an order entitled "Supplemental Order" dated April 30, 1970. No additional findings of fact were made. The Commission sustained the Hearing Examiner's order of June 5, 1969 and denied the plaintiff's claim. (R. 319-324 inc.).

STATEMENT OF POINT RELIED UPON

THE INDUSTRIAL COMMISSION ARBITRARILY AND CAPRICIOUSLY IGNORED AND DISCOUNTED ALL COMPETENT UNCONTRADICTED EVIDENCE ESTABLISHING THE CHAIN OF CAUSATION FROM THE INDUSTRIAL ACCIDENT TO THE ULTIMATE PROLAPSE OF THE DISC IN PLAINTIFF'S BACK AND THE SURGERY TO CORRECT THE CONDITION, AND ADOPTED THE FINDINGS AND CONCLUSIONS OF THE MEDICAL PANEL WHICH WERE BASED UPON HERESAY, SUPPOSITION AND UNSUPPORTED BY THE EVIDENCE AND WHICH, CONTRARY TO THE LAW OF THIS STATE, RESOLVED ALL DOUBTS AGAINST PLAINTIFF.

ARGUMENT

THE INDUSTRIAL COMMISSION ARBITRARILY AND CAPRICIOUSLY IGNORED AND DISCOUNTED ALL COMPETENT UNCONTRADICTED EVIDENCE ESTABLISHING THE CHAIN OF CAUSATION FROM THE INDUSTRIAL ACCIDENT TO THE ULTIMATE

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In the long fought battle to try and establish the plaintiff's claim before The Industrial Commission to the compensation which the law intended for him to have, not one person has ever questioned the fact that Lloyd Crittenden, plaintiff, in the course of his employment, was by accident crushed under a 10 ton crawler tractor. The implication, while not expressed in so many words in the record, has been clear that he was lucky to be alive. Perhaps it was the feeling of the Commission in denying his claim that gratitude for his life having been spared should cause him to forego any claim for compensation. Certainly, such reasoning is of greater logic than the reasoning employed by the Commission in denying his justified claim.

The problem, as stated by Mr. Robert D. Moore, attorney for The State Insurance Fund, at the original and first hearing on this matter, is

> "The only issue here is purely a medical panel question; that is, whether or not the accident that occurred in November of 1963 is what occasioned the applicant's present difficulties, including his recent surgery." (R. 10, 11).

Mr. Crittenden's story of what happened to him, of the pain that he felt and of the continuing pain in his back and legs from the time of the accident in November 1963, until he ultimately saw Dr. Wright in August of 1966 and underwent corrective surgery, has never been challenged. The chairman of the medical panel, on interrogation, affirmed his belief in the veracity of the plaintiff:

> "Q. Do you believe that the fact that Mr. Crittenden did not consult a physician, although he has testified and I know of no reason why his word should not be taken, Doctor, that he was in continuous pain from the time of this accident until it became so acute that he finally had to succumb to a physician's attentions, and you believe that these symptoms which he described to you and which he stated have existed since the time of this accident, are not truly stated?
>
> "A. No, as I stated in another hearing, we found Mr. Crittenden to be a very fine gentleman." (R. 283).

The medical panel called to review the work of Dr. Wright and the particular case of the plaintiff, consisted of three orthopedists. Dr. Wright, the physician and surgeon who attended the plaintiff, diagnosed the condition and performed the corrective surgery on plaintiff's spine, is a neurosurgeon. It is interesting to note that Dr. Hess, chairman of the medical panel, admitted that there was a running feud between the orthopedic surgeons and the neuro-

surgeons. (R. 98, 99). That such a disagreement between the members of the profession should be allowed to introduce itself into deliberations involving the right of the plaintiff in this case to workmen's compensation, is appalling but it is manifest that it did so, to the extent that plaintiff's attorney made formal objection to the composition of the panel. (R. 199). The Referee took judicial notice of this conflict. (R. 175). The objection by the plaintiff's attorney to the investigation made by the panel outside the scope of the material that was submitted to it and to the composition of the panel is stated at R. 198, 199.

The effect that this difference between the two specialties within the medical profession had in this case is manifest in the report that was submitted by the panel. In its original report, the panel stated:

> "3. The applicant has not reached a fixed state. He has had a simple disc excision, the degenerate disc remains, and prognosis is guarded." (R. 74, 75).

The medical panel was not called upon to speak with regard to the prognosis or the corrective surgery that had been performed. It was asked only one question,

> "The Hearing Examiner is interested in determination of whether or not, as a reasonable medical probability, that the injury of November 1963 contributed to or was causally related to the subsequent back difficulty and surgery. You are also to make inquiry as to whether or not any pre-existing disease, in-

jury, or congenital defect contributed to the problem and if so, how much?" (R. 62).

The panel was not in any way called upon to comment upon the professional services of Dr. Wright but nevertheless did so. In attempting to explain the inclusion of this statement in the panel report, Dr. Hess testified:

"Q. Now you say in No. 3 of your findings, 'The applicant has not reached a fixed state. He has had a simple disc excision, that degenerate disc remains, and prognosis is guarded.' Now, what is a disc excision if it isn't the removal of this offending disc?

"A. It's just what I said, the removal of all loose material between L-5 and S-1 that it is possible to remove. That does not cure cure the problem.

"Q. Now, what is the cure of the problem then, Doctor?

"A. I think I can explain this and it will help. May I state that I have read the objection and you infer that the panel implied that Stewart Wright might not have performed the best surgery on this patient. The panel did not wish to imply this, but this is a long term argument between the orthopedic surgeons and the neurosurgeons. The orthopedic surgeons, in general, believe in not only removing this loose disc material, but orthodizing this space. Stripping. Putting that joint out of commission. And this is what the panel had reference to. This man still has a worn

out bearing, so to speak. He does not have a bony fixation. He still has a potential source of disability." (R. 98, 99).

The medical panel was in error in its prognosis as well as its conclusion that the condition treated was not a consequence of the industrial accident. The passage of time (this matter has been pending for more than three years before The Industrial Commission) permits the plaintiff to demonstrate clearly the error in the prognosis. At the final hearing before The Industrial Commission on Review, January 29th, 1970, Mr. Crittenden testified:

"Q. Now, Mr. Crittenden, since the appearance before this Commission in February 1967, as a part of the Medical Panel's report they indicate that, 'the degenerative disc remains, and the prognosis is guarded.' Would you state to the Commission what you have done, by way of earning a living this past year and what the condition of your back is presently?

"A. Well, actually I have continued the same type of work. I haven't changed since 1957, which at that time I worked for Mountain Fuel Supply. And since that time I have been in business for myself, and I have done the same type of work. Now this past summer I contracted to do sidewalk work for Coalville City, and during this time I actually did a share, a big share of the finishing work on this sidewalk. And this is concrete work. It's the type of work that a person is bent over, he needs to use his back, and this gave me

> no problems as far as my back was concerned, and I was able to do this work. And I have operated equipment of all types, since the operation, in this type of work." (R. 299).

Mr. Crittenden further testified that he had not seen any physician concerning his back since he last consulted Dr. Wright in March of 1967. (R. 300).

The error in the conclusion reached by the medical panel, that the Industrial Accident in which plaintiff was involved was not the cause of the subsequent prolasped disc and the corrective surgery required thereby is not so easily demonstrated. A review of the record, however, does demonstrate that:

1. The conclusion was not based upon credible evidence.
2. It ignores the testimony of the plaintiff and plaintiff's medical expert.
3. There is neither a factual or medical basis for the conclusion.

Starting with the initial report of the medical panel, there is a recognition therein that the plaintiff may have suffered, "possible aggravation of a pre-existing degenerate L-5 disc." (R. 74 No. 2). We quote from the case of *Jones vs. California Packing Corporation*, 121 U. 612, 244 P2d 640 at page 642:

> "A pre-existing desease or other disturbed condition or defect of the body of any employee, when aggravated or lighted up by an industrial accident, is compensable under the Workmen's Compensation Act".

The record is replete with admissions by Dr. Hess, who testified on behalf of the medical panel, that it was a medical possibility that the injury suffered by plaintiff in the industrial accident November 16, 1963 culminated in the prolapsed disc and the corrective surgery. (R. 99, 100, 102, 107, 117, 118, 121, 280). Dr. Hess testified that there was nothing to preclude the possibility that the industrial accident could have caused the injury complained of by the plaintiff by lighting up a degenerative process that could have been symptom free until the accident. (R. 99, 100, 102, 107, 117).

Despite these admissions which rather than supporting the conclusion of the medical panel, clearly refuted it, Dr. Hess said he just did not believe it was probable in this case that the accident caused the injury. (R. 108).

The interference by the supposedly impartial Hearing Officer with the efforts of plaintiff's counsel to ascertain the reasoning behind the medical panel's refusal to recognize the possibility of the industrial accident having caused the prolapsed disc is indicative of the arbitrary attitude of the Examiner toward the plaintiff's claim. (R. 111-114).

By persistent questioning it was finally elicited from Dr. Hess that the panel in arriving at the conclusion of no causal connection placed great weight upon the fact that Dr. Parker, the physician called to the scene of the accident, took no X-rays of Mr.

Crittenden. (R. 112, 114). The fact is Dr. Parker did nothing at all for plaintiff. The Doctor violated the most elementary rules of proper procedure in handling an accident victim. (R. 18-20). Nevertheless, the panel found this persuasive and Dr. Hess testified:

> "It was not that Dr. Parker failed to do his job that it implied to the panel that this man was perhaps not injured as severely as was reported. Ordinarily X-rays are taken for very menial injuries. Here is a man who is apparently severely injured, yet was not hospitalized, had no X-rays, and was sent home." (R. 112).

At R. 114, L. 17:

> "Q. Well, what status — in the consideration of the Panel — did the fact that no roentgenological studies were made play in the determination made by this Panel, Doctor?
>
> "A. This indicated to the Panel that perhaps this man was not injured as severely as he perhaps thought.
>
> "Q. So that the panel then determines Mr. Crittenden's graduation of injury by utilizing the medical judgment of Dr. Parker, who did not undertake to have any roentgenological studies made; is that true?
>
> "A. We utilized his judgment?
>
> "Q. Yes.
>
> "A. That's all we had available, is what was reported to us." (R. 114-115).

Thus if Dr. Parker erred in not making radiographic studies of Mr. Crittenden (or for that matter not doing anything else for him) immediately following the accident, then by reason of his error, Mr. Crittenden is denied the benefits of the Workmen's Compensation Act. We do not believe this is a fair interpretation of the Act, nor of the duties of the medical panel in this case. Timely objection was made to the adoption of the hearsay report by Parker to Dr. Hess in the findings of the medical panel. (R. 198-199). Objection was again raised in the formal motion to dismiss the medical panel and vacate its report. (R. 209-211). Again objection was raised and the attorney for the plaintiff attempted to get a commitment from the physicians of the panel as to wether it was good medical practice to do as Dr. Parker did in not making any X-rays of Mr. Crittenden immediately following the accident. (R. 314-315). But this examination was stopped on objection of the attorney for The State Insurance Fund and the Commissioner ruled that the question was not pertinent to the issues. (R. 315). The Commissioner in essence ruled that the fact that Dr. Parker did not take X-rays could be considered by the panel as a basis for determining that plaintiff was not entitled to benefits, but the question of whether or not X-rays *should* have been taken is not pertinent to the case. Dr. Wright testified with regard to the significance of X-rays with respect to this particular injury:

"Q. Doctor, specifically I call your attention

to the Medical Panel's report in which there it is indicated that one of the reasons — and you have previously been here as a potential witness and heard the discussion relative to the failure of Dr. Reed Parker to take X-rays, or to have them taken. Had X-rays been taken by Dr. Parker at this time, would they have necessarily shown anything in regard to the condition that ultimately necessitated surgery?

"A. They may not — had they been made, they may very well have shown nothing at all. Because X-rays, gentlemen, don't show tears in soft tissues. You could tear ligaments in the spine, you could stretch the capsule of an intervertebra disc, and X-rays won't show this at all." (R. 166).

This unrefuted testimony by Dr. Wright further substantiates the error of the panel in placing such emphasis on Dr. Parker's omissions.

The second point on which Dr. Hess said the panel relied in support of its conclusion was the review by the panel of the X-rays which the panel had made in May 1967 after surgery. (R. 74 No. 1 (d)). From these X-rays the panel concluded that Mr. Crittenden suffered from a degenerative condition which anteceded the industrial accident. (R. 74 No. 1 (d)). There were no X-rays made prior to the accident, at the time of the accident, or before surgery. (R. 73, 111). The panel based its opinion as to the existence of a degenerate disc on conjecture from the X-rays taken after surgery. (R. 73). Dr. Wright was asked

about the panel's report of a degenerative condition based on the X-rays after surgery and testified:

> "And I should mention, in relation to the X-rays which you mentioned e a r l i e r, which as I recall were made in May of this year —
>
> "Q. This is correct.
>
> "A. (Continuing) — that the doctors in their report referred to a degenerated disc at the interspace between the fifth lumbar vertebra and the top of the sacrum. But, gentlemen, be it recalled that a little earlier in this testimony that I reported that I had essentially 100 per cent removed this disc. So they could not then be seeing a degenerated disc, but they could be seeing the results of the removal of the disc, plus the body's attempts — not attempts, but the body's healing which had occurred after the surgery. Plus, of course, effects of wear and tear on this area in the course of ordinary living, one's work and so on. But there was essentially no disc remaining, gentlemen, between the fifth lumbar vertebra and the top of the sacrum. As I mentioned, I removed it at surgery." (R. 166, 167).

Dr. Hess' testimony in explaination of the panel's interpretation of the X-rays is as follows:

> "Q. Is it not true, Dr. Hess, that then based on your examination and the panel's examination of the X-rays taken May 1st, the conclusion that this shows an obvious degenerate disc at the L-5 level is not medically correct?

"A. No, it's not my conclusion. I have no reason to change what we said in the panel report.

"Q. The disc had been removed, had it not?

"A. A portion of the disc.

"Q. You made no mention of that in your report.

"A. There was no reason to.

"Q. Well, the disc, if it were simply degenerate, would not be the same in appearance, would it, Doctor, as the condition that existed at the time of your X-ray?

"A. Say that again.

"Q. I say, by reason of the surgical intervention, the condition of the disc at the time of your X-ray would not be the same as it would had there been no surgical intervention.

"A. That is correct.

"Q. Why did you not make mention of this in your report?

"A. Well, there are many things we could have mentioned in the report. We were trying to keep it brief.

"Q. Why did you indicate that the degree of degeneration indicated this problem meant that it had predated the injury?

"A. It was based on the experience of the panel that it would be highly unusual for the disc to collapse, a disc space to collapse to this degree and develop the degenerative changes noted in the *eight months*

from the time of his surgery." (Emphasis ours) (R. 259).

The problem which the medical panel was asked to consider was not the change from the time of the surgery in August 1966, but the change between the accident in 1963 and the time of the examination by Dr. Wright in 1966, a space of 2 years 9 months. This same erroneous or immaterial finding is incorporated into the ultimate discision of The Industrial Commission and we refer to the decision of The Industrial Commission (R. 323, paragraph No. 4 on that page) where it is stated:

> "Highley unlikely for a disc to degenerate to the degree indicated in a period of eight months."

The myelograms taken immediately prior to surgery do not support the panel's diagnosis as shown by the reading of the roentgenologist who read the myelograms:

> "The pantopaque contrast medium was injected into the lumbar subarachnoid space through the needle inserted at the 3rd lumbar disc level. A large extradural defect is seen centrally and extending bilaterally at the 5th lumbosarcral disc space. No other definitely significant defects are identified in the lumbar or lower thoracic areas.
>
> "At the completion of examination all the contrast medium was removed. IMPRESSION — Large central type extradural defect at the lumbosacral disc level which extends bilater-

ally and slightly more on the left than the right." (R. 217).

The panel ignored the testimony of Mr. Crittenden that he had never suffered any trouble with his back prior to the accident. (R. 24). The testimony was substantiated by his partner, Doug Jones, brother, Kay Crittenden, and a fellow employee and neighbor, Keith Black, all of whom had known the plaintiff long prior to the accident and testified they had never known him to have trouble with his back until the accident, but that he had continuous trouble thereafter. (R. 44, 45).

The third ground upon which the panel relied in reaching its conclusion of no causual connection between the industrial accident and the prolapsed disc was the fact that Mr. Crittenden was not under the care of a physician from the time of the accident until he went back to Dr. Parker and was referred by him to Dr. Wright. In support of this facit of the panel's conclusions Dr. Hess testified:

"Q. Well, if I understand you correctly, Dr. Hess, your conclusion is that had he seen a physician periodically, from the time of this accident until the time he went to see Dr. Wright, there wouldn't be any question in the panel's mind?

"A. That is absolutely correct." (R. 283).

The medical panel offered no explanation for the fact that Mr. Crittenden continually suffered pain from the accident until surgery. The panel simply ig-

nored this testimony and because Mr. Crittenden continued to work despite his handicap concluded that he was cured and that the prolapse treated by Dr. Wright was an entirely new and separate cause. (R. 282).

In contrast Dr. Wright offered a plausible, understandable explanation of the injury received at the time of the industrial accident and its ultimate development to the point that surgical intervention was required. Dr. Wright, in his testimony before the Examiner, testified specifically that he considered the industrial accident the cause of Mr. Crittenden's ruptured disc. (R. 153). Dr. Wright offered the following medical hypothesis of what happened to Mr. Crittenden:

"Q. Now, Doctor, such a condition as you describe, would this necessarily occur instantaneously, if there were an industrial accident such as Mr. Crittenden gave you in his history?

"A. Oh no, In my experience, the vast majority of discs do not occur instantaneously as a result of an injury. Some do, but they are very few in my experience. What happens is that the ligaments and the capsule around the disc are injured. They are often stretched, they are somewhat torn, and hence they are weakened. And then over a period of time further stretching and further weakening and further tearing, further t h i n n i n g of the capsule around the disc and to the ligaments which help to guard it occurs and finally

the capsule will rupture, as it did in this case. And this may occur weeks, it may occur months, it may occur even a few years after the original injury which started the problem by weakening the capsule and the surrounding ligaments. I could give you a comparison if it would be helpful. In d r i v i n g my automobile, I might hit a rock with a tire, or I might hit a cement gutter with a tire, and I bruise the tire, so to speak, I weaken it, I tear some of the cords in it. It does not immediately blow out. It is weakened and eventually in just the normal course of driving at a reasonable speed, the tire will blow out in that specific spot where it has been previously injured. And this injury, caused by striking a rock or a gutter, has been the ultimate cause of that blowout. Now, this to my mind, is a reasonable comparison of what can and does happen with a disc, and I think most likely occurred, most probably occurred with Mr. Crittenden."

"Q. Now, Dr. Wright, in your experience, would you say that the lapse of time between November 1963, when this injury, or when this accident, industrial accident occurred, and Mr. Crittenden's consultation with you August 1, 1966, is such a period as would preclude the possibility of the accidental origin of the injury which you found and treated?

"A. Not at all.

"Q. Would the fact that Mr. Crittenden during this intervening period, November

many people, thank goodness, are like that." (R. 165).

Dr. Wright characterized Mr. Crittenden as follows:

> "Mr. Crittenden was always very cool and calm and collected, and I believe that every word he told me was the truth. That was the impression that I got of the man." (R. 165).

Dr. Wright specifically stated that a protruded disc in his experience generally resulted from an injury (R. 188). Dr. Wright was asked on cross examination as to when he thought the disc material which he referred to as having been found in the spinal column had actually projected into that spinal canal, and he answered as follows:

> "A. This occurred, in my opinion, approximately two weeks prior to my seeing Mr. Crittenden. And I am basing this opinion upon the fact that at that time his condition worsened very markedly and if I remember correctly he stated he had been home in bed for almost two weeks prior to the time he saw me and I think that it was at the time of this great disability, approximately two weeks before he saw me, that this capsule finally ruptured and his ligaments finally ruptured, which let so much of th disc material escape from the interspace into the spinal canal.
>
> "Q. Then it would be a fair statement that in your opinion the dramatic bursting away of this material into the channel did not occur directly when the man was injured in November 1963. Is that correct?

1963 to August 1966, was able to seek and work at his employment which is that of working heavy duty equipment, necessarily indicate that he could not have suffered this injury as a result of the industrial accident?

"A. No, not in my opinion. It often occurs in the history of a protruded disc that there is an injury, the patient will then improve, he will then worsen, he will improve for varying lengths of time, and he will worsen. And this may occur several times over a period of years. And then eventually he may do no more than lean over to tie his shoes, and these ligaments will, and capsule will finally give way, and the capsule will push out at once then, and give very, very severe pain and cause an acute condition." (R. 160-162 inc.).

Dr. Wright specifically took issue with the findings of the medical panel (R. 164) and stated that there was no reason that the medical panel could logically conclude that the industrial accident did not cause the condition for which surgery was required. (R. 165). Dr. Wright pointed out that the mere fact that the patient did not continue to consult a physician after the original injury would not be indicative of the fact that he was not hurt. He stated specifically:

"And this would be especially true that he wouldn't need, anyone with this type of condition, would not need further care, especially if the individual is a non-complainer, and if he is gritty, and if he is willing, for the sake of his work, to go along and stand discomfort and

tire. I think we all use similies in trying to explain things to people, but there is a lot of difference involved.

"Q. Well, I understand that.

"A. I agree, basically.

"Q. But is there anything unsound medically in what he has said here, and eliminating the illustration of the tire, but going back to his medical explanation, which he tried to simplify for we laity, is there anything incorrect in his stating that the ligaments could be stretched, torn and so forth — is there anything medically unsound in that?

"A. No, I agree. This is the way discs degenerate.

"Q. So that there is nothing, in your opinion, that would absolutely preclude the causal connection between the tractor incident and the ultimate fate that Mr. Crittenden had?

"A. No. I would still have to say it is possible." (R. 280).

In the face of all of the positive testimony of Dr. Wright and the admission by Dr. Hess of the medical panel that the industrial accident could be the cause of the prolapsed disc, the Commission nevertheless reaffirmed and supported the findings of the Hearing Examiner. (R. 324).

The bias and prejudice, and arbitrary and capricious action of the Examiner for the Commission is fairly apparent in his opinon as well as in the con-

"A. This would be correct. I previously indicated I think that in my opinion the structures were damaged and weakened and that over a period of time they gradually got up to the point where much of the disc did burst through the capsule and ligaments." (R. 187).

Dr. Wright was asked, at the final hearing on this matter before Commissioner Hadley on cross examination by Mr. Moore:

"Q. Everyone's spine is going through a degenerative process, isn't it?

"A. Well, I think one would have to say yes to that because we are all aging, and all tissues of the body g r a d u a l l y do go through a degenerative process. But we might keep in mind by the same token, that of the billions of men who are gradually degenerating in all areas of their bodies, the vast majority of them do not get protruded discs. If they did there wouldn't be enough doctors in the United States, for example, to take care of only discs alone. The vast majority don't have disc troubles." (R. 293, 294).

Dr. Hess was asked to comment upon the testimony of Dr. Wright given at the previous hearing wherein he compared the situation to one involving a tire weakened by striking an object and ultimately blowing out. Dr. Hess was asked:

"Q. Now, do you disagree with Dr. Wright's statement in this regard?

"A. Well, only that a disc is a far cry from a

lenged testimony of the plaintiff and plaintiff's witnesses who appeard before him in behalf of the plaintiff, states:

> "One gets the impression that the creation of the case that was heard was developed considerably from hindsight — an attempt to find a solution after the problem was created." (R. 226).

Such an unwarranted attack on the veracity of plaintiff, whose integrity has not otherwise been attacked, and on the medical doctor who appeared before the Industrial Commission in behalf of plaintiff is not justified and stems solely from the bias and prejudice of the Examiner.

The picture as presented by a fair analysis of the testimony before The Industrial Commission is that of a man who has made his livelihood at all times driving heavy industrial equipment of one type or another. He has never had any type of back problem until this tractor fell on him. From that time on he had back problems resulting in the surgery. To imply that because he finally had to have the intervention of surgery to correct the condition and made claim under the Workmen's Compensation Act was an attempt to fictionalize the entire situation, and from hindsight build a case, is not a justified finding or comment on the part of the Hearing Examiner, and reflects the arbitrary and capricious attitude exhibited by this Examiner from the beginning to the end of these proceedings. Throughout he justified and upheld the medical panel. He flatly ignores the compe-

duct during the hearing, previously referred to in this brief.

> "The Hearing Examiner concludes that the whole case boils down to either which one do you believe or can their supposed irreconcilable positions be reconciled. I think the latter is time and the former need not be resolved." (R. 225).

Plaintiff finds this an unintelligible statement.

The Examiner's opinion continues:

> "Dr. Wright's theory essentially is that the injury occurred in 1963. Three years later a dramatic somewhat large herniation of the disc occurs two weeks prior to surgery. It is diagnosed, operated upon and the patient convalesces. Dr. Hess' theory is that the applicant had an injury in 1963, convalesced, recovered and returned to work. Three years later there was a dramatic herniation two weeks prior to surgery. The patient was operated on and recovered. It seems to the Hearing Examiner that those doctors are saying in substance the same thing, except that Dr. Wright relates the dramatic herniation to the event three years before, and Dr. Hess does not. The Hearing Examiner is inclined to believe the latter over the former for the very reason stated by the panel in reaching their conclusion. The long interval between the accident and the total disability requiring surgery — 1963 to 1966. The limited or lack of treatment during this period, the type of work performed in the interval, and somewhate questionable, the radiographic findings in the myelography. (R. 225).

The Hearing Examiner, ignoring the unchal-

the law as interpreted by this court. First, this court has on repeated occasions stated that where there is doubt respecting the right to compensation, such doubt should be resolved in favor of the employee. *Chandler vs. The Industrial Commission*, 55 Utah 213, 184 P. 1020, 8 A.L.R. 930. In the case of *M & K Corporation vs. The Industrial Commission*, 112 U. 488, 189 P. 2d 132, this court stated:

> "We have also repeatedly felt that this statute should be liberally construed and if there is any doubt respecting the right to compensation, it should be resolved in favor of the recovery."

This is likewise the law in other jurisdictions. In the case of *Mullins vs. Tanksleary* (Oklahoma) 376, P.2d 590, decided in 1962, the Oklahoma Supreme court held that any reasonable doubt as to whether an injury arose out of employment should be resolved in favor of the workman. In the case of *Baker vs. Industriial Commission*, 17 U.2d 141, 405 P.2d 613, the court states:

> "This court is committed to the rule that as a matter of law the Commission may not, without any reason or cause, arbitrarily or capriciously refuse to believe and act upon substantial competent and credible evidence which is uncontradicted."

We point out that plaintiff's situation is clearly distinguishable from the case of *William C. Jensen vs. United States Fuel Company and The Industrial Commission of Utah* (1967) 18 U2d. 414, 424 P2d

tent testimony introduced before him which was not contradicted by the medical panelists in examination, only in their unjustified conclusion. To admit, as Dr. Hess did, the validity of the illustration of the damaged tire and the fact that this could have very likely happened, and yet flatly refuse to recognize the causal relationship between the accident and the ultimate result, is a non sequitur explicable only by the prejudice and bias that the panel has shown throughout and which was adopted and inculcated in this case by the Examiner and from the Examiner to the Commission itself.

The Commission in its u l t i m a t e conclusion states:

> "The attending physician (Dr. Wright) in concluding there is a causal relationship, is in our opinion making a determination of how far the range of compensable consequences may be carried once a primary injury is causally connected with the employment. He gives very little credence, if any, to the effect of the additional activities for a thiry-three (33) month period. The panel stated, from a medical viewpoint the time lapse creates a medical improbability of causal relationship. This improbability, coupled with the attending physician's statement the applicant had trouble, then improved, leads us to conclude the claim of causal relationship has been broken and the range of compensable consequences cannot extend to allow benefits to Mr. Crittenden." (R. 324).

The action of the Commission is in violation of

pressed the hope that all of the members of the panel could be present before the Commission at the final hearing on review in January 1970,

> "I don't suppose it is practical for all to testify; but certainly with the three of us present in the room listening to all the testimony, I believe it will be a more *impressive performance.*" (R. 244) (Emphasis ours).

If the Examiner concurred that this would be a "more impressive performance" the Examiner was to call the other members of the panel. (R. 244).

At the hearing Dr. Beck appeared with Dr. Hess, though Dr. Noonan failed to come. The performance was indeed impressive. Dr. Hess had succeeded in obtaining from a cadaver the portion of the spine involved in this case and donning rubber gloves made an erudite, illustrated lecture on the problem. (R. 268-270). But finally in response to a question by counsel for plaintiff admitted the long discussion before the Commission that morning had nothing to do with the matter the panel was to consider:

> "Q. Dr. Hess, the long discussion we have had this morning, with regard to whether Dr. Wright removed all of the degenerate material or whether he didn't, really has nothing to do with the Medical Panel's actual job of determining whether or not the injury when the tractor fell resulted in the condition, does it?
>
> "A. That's right. (R. 276, 277).

If the "impressive performance" of the panel

440. In that case the applicant was denied benefits. The injury was the same as in the Crittenden case, an intervertebral disc, but the factual situation was entirely distinct. The claimant bumped himself on a piece of equipment. No one saw the accident. He told some fellow employees about it but did not report the accident to his foreman for some three weeks. He continued work with only one day's absence and worked from August 25th to October 23rd. He bent over at home on the 25th of October and developed the pain in his back and down his leg. The panel concluded in that case there was no causal connection between the bumping of his back and the ruptured disc and the Commission so found. Furthermore, in the Jensen case there was no proof of an industrial accident save the word of the claimant. No one saw him bump himself. There was no medical testimony in support of claimant's theory. No doctor testified to the possibility of a connection between the bump and the ruptured disc. That is to be contrasted with Mr. Crittenden's case where the industrial accident is admitted and Dr. Wright testified that the accident caused the prolapsed disc, and the medical panel chairman admitted this possibility.

In one final display of disregard for the realities of the duty it was by law to perform, the chairman of the medical panel in a letter to the Hearing Officer of The Industrial Commission, Mr. Robert Shaughnessy, exhibited concern not for the verity and authenticity of the panel's findings and conclusions but ex-

was intended to intimidate Dr. Wright, plaintiff's expert, it failed for he adhered steadfastly to his previous testimony:

"Q. Dr. Wright, do you recall your previous testimony given August 31, 1967, before this Commission on examination?

"A. Yes.

"Q. You are the attending physician and surgeon who performed surgical service for Mr. Crittenden?

"A. Yes.

"Q. You expressed your opinion at that time, Doctor — and I refer to your testimony of August 31, 1967 — that the surgical condition which you treated was causally connected to an incident wherein a tractor fell on Mr. Crittenden in November of 1963?

"A. Yes.

"Q. Do you still entertain that opinion, despite the opinion of Dr. Hess that has been expressed here today?

"A. Yes.

"Q. You were present here this morning, when I read your previous testimony giving an illustration of how you believed this matter occurred, both medically and in lay language. Do you wish in any way to revise or correct that testimony at this time?

"A. No. But only to state further that, granted that a disc is not an automobile tire, still each of those items is subject to in-

jury. And the illustration was purely to try to help all of us better understand what I was trying to explain. That I thought that, at the time of the tractor falling on Mr. Crittenden, there was injury to the disc, there was injury most probably to the ligaments which helped support the disc, and keep it in place and keep it in normal condition.

"Q. And do you think that the ultimate condition which you saw, and reported surgically to this Commission, was then proximately caused by this injury?

"A. Yes. If I may refer to my history, which I personally wrote. This is a copy of what is on the hospital chart at St. Mark's Hospital.

"The patient complained of 'trouble with my back and hips and right leg.' He said he had quite a bit of pain, especially when he sits or stands." Then he volunteered that: "In the fall of 1963 a tractor fell on me, and pinned me across my hips. No X-rays. Treated at home with pills for pain and muscle spasm. To work in one week. Back continued to bother. Worse, then better. Past three or four days pain appeared in right lower extremity, and goes to lower calf. Numbness and tingling appeared in right toes 2, 3, 4, 5 at same time. Back and leg pain worse with cough and sneeze. I have to hold tight."

"The point I am making is that from the time of this injury Mr. Crittenden had trouble with his back, and this is typical in my experience of disc problems. That

by the Industrial Commission Examiner. Such is the quality of Administrative Justice. We pray that this Court may right the wrong done plaintiff and Order the Industrial Commission to grant to plaintiff the Award to which he is so clearly entitled under any unbiased view of the evidence submitted.

Respectfully submitted,

ALLEN H. TIBBALS
604 El Paso Natural Gas Building
315 East Second South Street
Salt Lake City, Utah 84111
Attorney for Plaintiff

they will have trouble, they will improve, they will again have trouble, they will again improve, and then there may or may not — in this case there did — come an ultimate time when they can no longer get along, and they have to seek medical help. And this is what this man did in my case. And I know of no one who has any evidence that this man ever complained of his back prior to the injury by the tractor falling on him." (R. 286-288 inc.).

CONCLUSION

After being the victim of a serious accident, which well could have been fatal, plaintiff herein by a display of grit, fortitude and determination made a heroic effort to carry on as usual. Such an effort in days gone by was considered commendable and courageous. Today it is the ground for denying the benefits of the Workmen's Compensation Act to the plaintiff.

By not giving up and succumbing to the continual pain sooner; by not consulting a competent physician earlier; by working and trying to meet his obligations and support his family instead of lying around drawing disability for his injured back, the plaintiff when he finally could go on no longer and had to have help finds the door is closed to the benefits of the Workmen's Compensation Act by reason of his exercise of these spartan qualities. Plaintiff, his medical advisor and physician and his attorney are accused of trying to build a case from hindsight