1970

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

IN THE SUPREME
OF THE STATE

LLOYD R. CRITTENDEN

vs.

THE INDUSTRIAL CO
OF UTAH, D. & L CO
COMPANY, and THE S
INSURANCE FUND,

DEFEN

Appeal from an O
of

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AUTHORITIES CITED

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

DEFENDANTS' BRIEF

STATEMENT OF FACTS

The recital by the plaintiff in his Statement of Facts is accurate, in the main, in the description of the testimony of the plaintiff and his witnesses. It is respectfully submitted, however, that the defendants should submit the following Statement of Facts in order that this Court may have before it the version of all of the witnesses that appeared before the Industrial Commission:

At the onset it should be pointed out that the critical issue before the Industrial Commission and argued before this Court is one of medical causation in which there was a sharp divergence of medical opinion and the Industrial

Pursuant to the provisions of 35-1-98 U.C.A. 1953, as amended, the initial treating physician, who was present at the scene of the accident, Dr. Reed J. Parker, filed his report with the industrial Commission (R. 2). This report mentioned no difficulty to the applicant's back and corroborated the fact of November 18, 1963 as being the day in which Mr. Crittenden would be able to return to work. Without any imputation to Mr. Crittenden's "grit" it should be pointed out that other than two consultations with Dr. Parker immediately subsequent to the accident, the applicant failed to confer with or see any physician until the summer of 1966 when he returned to Dr. Parker, who referred him to a specialist, Dr. Stewart A. Wright (R. 35).

In plaintiff's brief great detail was spent in describing the trauma that was connected with the accident of November '63. The plaintiff does state, however, in his brief that Mr. Crittenden was brought to his home in an ambulance and was "laid down in the back part and was taken to his home" (Plaintiff's Brief, page 4). At one of the many hearings on this matter, that is, on the third hearing held on August 31, 1967, the plaintiff called as his witness Robert M. Walker, who is a funeral director in Coalville and also runs the ambulance service (R. 143). Mr. Walker specifically stated that Mr. Crittenden was transported to his home sitting up, rather than lying down (R. 144). Mr. Crittenden also informed the medical panel that this was the case (R. 272). Subsequent to the accident the plaintiff worked as steady as his employment conditions allowed and, in fact, worked for five months

Commission believed the testimony which was contrary to that given by the plaintiffs' treating physician.

It was admitted that the State Insurance Fund was the carrier for the partnership of D. & L. Construction Company in November of 1963 and that the applicant suffered an accident within the course and scope of his employment (R. 10). In fact, the defendant, The State Insurance Fund, paid for the compensation requested during the year 1963 by the plaintiff-applicant (R. 61). The State Insurance Fund, however, denied liability for the surgery to Mr. Crittenden's back which was performed by Dr. Stewart A. Wright on August 11, 1966 (R. 57), some thirty-three months subsequent to the industrial accident. In August of '66 Dr. Wright performed a laminectomy on "a protruded disk on the right side between the 5th lumbar verteba and the top of the sacrum" (R. 57).

The plaintiff, Mr. Crittenden, since he was a partner of D. & L. Construction Company, filed with the Industrial Commission of Utah an employer's report of injury which showed that he returned to work on the 18th day of November, 1963, some two days after the accident (R. 1). As such, there was no claim for loss of wages in the form of temporary compensation. In fact, in the cover letter to the State Industrial Commission counsel for the plaintiff specifically stated that the plaintiff made no claim for loss of wages prior to the surgery, that is, during the thirty-three month interval between the date of the accident and the date of the operation (R. 3).

two members of the medical panel felt differently, that is, that there was no medical causation between the accident and the resulting surgery and disability. The Commission in all of its orders recognized this difference of opinion between medical doctors and, in fact, in both orders, and in particular the most recent order (R. 319 to 324) the Commission sets forth the actual testimony as to the disagreement between the doctors. The Commission believed those doctors that testified that there was no causal connection and from that finding the plaintiff takes his appeal in this case.

The initial panel and the testimony supporting the same found that there was no causal connection based upon the following facts:

> "1. The panel is unable to relate the condition that necessitated surgery by Doctor Wright to the accident of November 16, 1963, for the following reasons:
>
> (a) The interval between the accident and the development of symptoms necessitating definitive treatment was quite long (two and nine-twelfths years.)
>
> (b) The applicant apparently required limited treatment immediately following the accident and was able to work at least in a supervisory capacity within two to three days, saw the doctor only twice, and no x-rays were taken or felt necessary by the treating doctor.
>
> (c) The applicant operated heavy equipment for several months at a time for at least three different employers and did not re-

for W. W. Clyde in the operation of heavy equipment. He did not miss any work during this period of time and, in fact, worked nine hours a day, five days a week and also worked for Morrison-Knudsen operating heavy equipment for some seven months and working approximately eight to nine hours a day. During this period of time the applicant did not miss any work nor lose any wages as a result of his physical condition (R. 37, 38 and 300). The applicant also testified that he felt during the first six months immediately subsequent to the accident that his physical condition was improving (R. 36) and what prompted him, Mr. Crittenden, to see Dr. Parker in the summer of '66 was when he felt pains in his legs which were different than any discomfort he had experienced before (R. 37).

All parties recognized, the plaintiff in his brief on page 14, the Hearing Examiner in his initial order (R. 24), the Industrial Commission in its final order, that the issue presented was stated by The State Insurance Fund in the initial hearing (R. 10 and 11) as follows:

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

In regard to this issue, and through the numerous hearings had in this matter, it is clear that the plaintiff's treating physician felt that there was a causal connection between the '63 accident and the '66 surgery and that

Industrial Commission should be reversed and modified. In this regard it is fundamental that the findings of the Industrial Commission on conflicting medical testimony cannot be disturbed on appeal. As early as 1924 the Utah Supreme Court in *Campbell v. Eagle and Blue Bell Mining Company,* 64 Utah 430, 231 Pac. 620, stated succintly the approach to be taken in cases of this kind, as follows:

> "The testimony taken before the Commission consists entirely of the opinions of medical experts with the exception of the testimony of the applicant, Campbell. This testimony is conflicting. We can see nothing in this record for review except the findings of the Commission based upon conflicting testimony. The testimony was competent and material to the issues to be determined by the Commission, and on that testimony the Commission made its findings. This court, in proceedings of this character, is without power to disturb the findings of the Commission based upon competent conflicting testimony. The statute so provides, and the court has so decided in numerous opinions. It is wholly immaterial that this court, or the individual members thereof, might have come to a different conclusion than that reached by the Commission. *The Commission's findings are binding when supported by competent, material testimony.*" (Emphasis added).

Therefore, the question of whether or not Dr. Stewart Wright's testimony should be believed is not the proper question to be determined upon appeal. The issue is whether or not the Industrial Commission acted in an arbitrary and capricious manner. This Court has pointed out recently in *Vause v. Industrial Commission,* 17 U. 2d

quire (or seek) medical treatment until approximately August 1966.

(d) The only x-rays of the patient's lumbosacral spine and pelvis were taken by this panel and show an obvious degenerate disk at the L5 level that, because of degree, probably predates the injury." (R. 74).

As outlined herein, the facts that the panel relied upon as the bases for its decision, as delineated above, is sustained by the record and, in fact, is uncontroverted.

STATEMENT OF POINT RELIED UPON

THE COMMISSION'S ORDER IS SUPPORTED BY CREDIBLE EVIDENCE AND IN FINDING AGAINST THE PLAINTIFF IN THIS INSTANCE THE COMMISSION DID NOT ACT IN AN ARBITRARY AND CAPRICIOUS MANNER.

ARGUMENT

THE COMMISSION'S ORDER IS SUPPORTED BY CREDIBLE EVIDENCE AND IN FINDING AGAINST THE PLAINTIFF IN THIS INSTANCE THE COMMISSION DID NOT ACT IN AN ARBITRARY AND CAPRICIOUS MANNER.

In reviewing the record in this matter before the Industrial Commission and the plaintiff's brief, it appears that this appeal is based on the fact that this Honorable Court should believe the expert testimony of causation of the plaintiff's treating physician as versus the opinion of Dr. Wallace Hess and Dr. Norman Beck. It is respectfully submitted that the plaintiff is rearguing this factual question to this Court and is urging that Dr. Wright's opinion is more persuasive and as such the order of the

"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 may have not performed the best surgery on this patient. The panel did not wish to imply this, ..."

There is no evidence that a disagreement on how the operation was performed in any manner affected the decision of the panel. The plaintiff, however, urges on page 16 of his brief that this made a difference in that the panel stated:

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

Dr. Hess explained the reason that the panel made this finding. He stated at page 275:

". . . This man was eight months. He lacked 18 inches of touching the floor. He was still having some pain, and to our knowledge wasn't working, except in a supervisory capacity.

"The reason this was put in was just to simply indicate that he hadn't reached a maximum improvement, and he wasn't ready for rating. That is all that implies.

"MR. MOORE: Q. In other words it is a practice of Panels — as I understand, from your testimony — that, even if the Panel feels there is no connection between the accident and the resulting disability, that the Panel in many instances attempts to assign a percentage of disability; is that correct?

"A. That's correct.

217, 407 P. 2d 1006, that our "statutory and decisional law require us to look at the evidence in the light most favorable to the Commission's finding and it is the obligation of the parties involved to so present the matter to the Court." It is suggested, therefore, that the plaintiff in this case in quoting at length from his doctor's testimony is rearguing a factual question that has been determined by the Commission and has set no basis for this Court to find that the Commission acted without power and authority.

The initial problem the plaintiff presents is the composition of the medical panel. It is argued that there is a difference between the approach of an orthopedic surgeon and a neurosurgeon. There is no doubt that within both medical specialties they perform operations to the back to solve the problem of a herniated disk. The orthopedic surgeon in relieving a person of the difficulty of a herniated disk performs an operation which is known as a "fusion". That is, an operation where that particular joint or vertebra is put out of commission by fusing the two surrounding vertebrae. A neurosurgeon in correcting a herniated disk performs a "laminectomy". That is, he removes the part of the disk that has been released from the capsule and allows the joint to be operable. (R. 270) This difference in operative approach in no manner affected the decision of the panel because it is admitted by all that surgery was essential in August of 1966. The only issue presented is whether or not the cause for surgery was due to the industrial accident that occured in November of '63. Dr. Hess made this point quite clear when he stated, as follows (R. 98):

did not, at the time I operated him, require a fusion. And in discussing the possible surgery that could be done with Mr. Crittenden, he felt that he would prefer that a fusion not be done. . . .

"And the further statement is: '. . . and prognosis is guarded.'

"Prognosis means 'outlook for the future.' Well, it could be that at sometime in the future Mr. Crittenden will have or will need a fusion done. And so one could very reasonably say that the prognosis is guarded. I have no objection to that." (R. 169, 170)

It would appear, therefore, that the implication that the panel should be disqualified because they found that the applicant had not reached a fixed condition at the time of examination by the panel is not supported by the record. This is particularly true in light of the fact that even the treating physician corroborated the fact that the applicant had not reached a fixed condition at the time that the panel examined him.

The plaintiff contends that the medical conclusion of no medical causation was not based upon credible evidence. Dr. Hess testified on numerous occasions that it was his opinion as a matter of medical probability that there was not a causation. For example, see the Commission's orders of April 30, 1970 (R. 319, 324).

Dr. Hess based his opinion that if the accident in question would have caused the rupturing of the disk, that it would be his position that the applicant could not have carried on in the capacity that he did for nearly three years (R. 108) and that it would have been impos-

"Q. And one does not assign a percentage of disability unless the condition is peaked, or reached a fixed stage; is that correct?

"A. Correct.

"Q. And were you responding to that practice, in your comments in the Panel Report, in this regard?

"A. We were."

From the foregoing testimony it can be seen that Dr. Hess in stating in the panel report that the applicant had not reached a fixed state was simply informing the Industrial Commission pursuant to the practice of panels that the applicant's condition was such that there couldn't be a permanent partial rating. There was no attempt to impute that the operation was improper and that the panel was penalizing the applicant for seeing a neurosurgeon. Even plaintiff's witness, Dr. Stewart Wright, agreed with the position of the panel in this regard and took no exception to this conclusion. Dr. Wright testified as follows:

"A. I read No. 3: 'The applicant has not reached a fixed state.'

"Now, let me answer that part of the statement first if I may. In my opinion, this is correct. It is now a little more than a year since the man was operated, and he is still improving. Hence, the state is not fixed, and we will hope that he will improve to the point of being totally well, insofar as this back and this protruded disc is concerned. But he may not. Once in awhile, after a so-called simple disc excision, a patient will later require a fusion. In my opinion, this man

(d) reports of employers, including copies of time sheets, book accounts or other records;

(e) hospital records in the case of an injured or deceased employee." (Emphasis added)

As such, these reports are admissible pursuant to specific statutory authority. See *Uta-Carbon Coal Company v. Industrial Commission,* 104 Utah 567, 140 P. 2d 649, cited with approval in *Hackford v. Industrial Commission,* 11 U. 2d 312, 358 P. 2d 899. As such, the reports of Dr. Parker which are found in the record at R. 2 and R. 38 are admissible. Plaintiff introduced a report from the treating physician (R. 240) and it appears inconsistent for him now to argue that said reports are inadmissible.

As stated at the onset of this discussion, it appears that the plaintiff is urging upon this Court the fact that the testimony of Dr. Wright should be believed as opposed to the testimony of the panel doctors.

35-1-85, U.C.A. 1953, as amended, reads in part as follows:

"The findings and conclusions of the Commission on questions of fact shall be conclusive and final and shall not be subject to review."

The testimony of the medical doctors was competent and as such the issue of whether or not they should be believed is totally immaterial on this appeal. See *McWilliams v. Industrial Commission,* 21 U. 2d 266, 444 P. 2d 513; *Garner v. Hecla Mining Company,* 19 U. 2d 367, 431 P. 2d 794.

sible, in his opinion, for the applicant to have operated heavy equipment during the period in question if, in fact, the November 13, 1963 incident caused a ruptured disk (R. 132). The record is replete with competent testimony that there was no connection between the accident in November of 1963 and the surgery in 1966. See R. 90, 91, 100, 108, 116, 120, 122, 263, 265, 277, 280 and 304.

The next issue that the plaintiff has raised is the fact that the panel took into consideration that the initial physician, Dr. Parker, failed to take x-rays or hospitalize the applicant in arriving at its conclusion that the initial trauma was not particularly significant. The fact of the matter is that the applicant testified that Dr. Parker did not take x-rays and, of course, the panel properly took into consideration this matter when examining the extent of the trauma in November of 1963. Basically, it appears that the plaintiff is complaining that Dr. Wright's reports should not have been considered because they are heresay. At this juncture it should be noted that 35-1-88, U.C.A. 1953, as amended, provides in part as follows:

> "The Commission may receive as evidence and use as proof of any fact in dispute all evidence deemed material and relevant including, but not limited to the following:
>
> (a) depositions and sworn testimony presented in open hearings;
>
> (b) *reports of attending or examining physicians, or of pathologists;*
>
> (c) reports of investigators appointed by the Commission;

CONCLUSION

There was a sharp disagreement between the opinion of the treating physician and the opinion of the medical panel. The Commission believed the opinion of Doctors Hess and Beck and plaintiff cannot reargue a factual question at this point, and as such the Commission's order should be sustained.

Respectfully submitted,

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D. & L. Construction Company
and The State Insurance Fund