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Pipe Specialty, Inc. v. Industrial Commission of the State of Utah and Salvador Montoya : Brief of Petitioner

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

PIPE SPECIALTY, INC., a Utah Corporation, Petitioner,	:	COURT OF APPEALS
-vs.-	:	Case No. 930364-CA
INDUSTRIAL COMMISSION OF THE STATE OF UTAH and LESTER E. HUNT, Respondents	:	Priority No. 7

BRIEF OF PETITIONER

APPEAL TAKEN FROM A DECISION OF THE
INDUSTRIAL COMMISSION
STATE OF UTAH

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FILED
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COURT OF APPEALS

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JURISDICTION AND NATURE OF PROCEEDINGS

The Utah Court of Appeals has jurisdiction in this matter pursuant to Article VIII, section 3 of the Utah Constitution, and Utah Code Ann. 35-1-1 *et seq.* and 63-46b-1 *et seq.* This is an appeal from a final order of the Industrial Commission of the State of Utah issued by Administrative Law Judge, Donald L. George, on the 7th day of May, 1993. Subsequently, Petitioner timely filed its Petition for Writ of Review in this Court on the 7th day of June, 1993. In the final order issued by the Industrial Commission, it was determined that Petitioner was obligated to pay an amount approximately equal to $4,651.33 together with interest thereon at the rate of 8 percent per annum.

ISSUES PRESENTED FOR REVIEW

I. Was Applicant injured while employed by Petitioner in light of Applicant's preexisting condition?

II. Assuming arguendo, Applicant was injured while employed by Petitioner, what were the number of hours averaged by Applicant prior to his injury?

III. Whether Applicant could have returned to work earlier than his subsequent reemployment date?

STATEMENT OF THE CASE

A. Nature of Proceeding. This is an appeal from the decision of the Industrial Commission rendered by Administrative Law Judge on May 7, 1993, (Case No. 92-489) finding that Applicant sustained a personal injury during the course of employment with Petitioner, Pipe Specialty. Because of such injury, Petitioner was ordered to compensate Applicant in an amount exceeding $4,651.33.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Utah Code Annotated, (1953 as amended) S 35-1-1 *et seq.*

Utah Code Annotated, (1953 as amended) S 63-46(b)-1 *et seq.*

Article VIII, Section 3 of the Utah Constitution.

STATEMENT OF FACTS

It is undisputed that applicant became employed by Petitioner, Pipe Specialty, Inc., in or about May of 1991. However, the amount of work in which Applicant worked for Petitioner is in dispute. Though the records and evidence presented by Petitioner indicate that for the most recent complete quarter prior to the alleged injury of Applicant, Applicant worked on the average approximately 28 hours per week. Prior to the hearing, the parties had agreed to stipulate to the Applicant having worked an average of 32 hours per week in the last complete quarter prior to the alleged injury. A Finding of Fact made by the Administrative Law Judge indicates that Applicant was working an average of 40 hours per week for the Petitioner. Though Applicant's counsel indicated that that would be the testimony, no such evidence supporting that Finding was presented to the Administrative Law Judge.

Also in dispute is the second Finding of Fact by the Administrative Law Judge of the Industrial Commission that Applicant sustained a personal injury arising out of and in the course and scope of the Applicant's employment as an employee of Petitioner, Pipe Specialty, Inc. Though there is ample testimony by Applicant concerning the personal injury alleged to be sustained during the employment of the employee with Pipe Specialty, Pipe Specialty submitted equally persuasive evidence of a prior condition, especially in light of a preexisting condition on the same right lower extremity.

Though Applicant claims to have been wearing a lace-up protective work boot, he nevertheless claims the sprained ankle injury was caused by exiting a back hoe front end loader which he was operating Petitioner.

On the alleged injury date of February 20, 1992, Applicant four and a half hours subsequent to the alleged injury drove himself to a distant InstaCare emergency first-aid treatment center. Subsequently, Applicant was referred to an orthopedic surgeon wherein he received treatment for the ankle sprain that was diagnosed as a grade two. Further, Applicant was directed to a physical therapist wherein a physical therapy was initiated.

There was conflicting testimony concerning the date on which Applicant was able to return to work. Petitioner claims that it should not be required to pay any worker's compensation benefits for a time period beyond which Applicant could have worked. To that end, Petitioner recalls the April 8th go-ahead date wherein the orthopedic surgeon was told by Applicant that he felt ready to return to work (R. 64). However, the finding by the Administrative Law Judge was that Applicant's treating physician determined Applicant to be temporarily and totally disabled from engaging in any employment from the date of injury, February 20, 1992, through May 6, 1992. Further, Applicant's treating physicians, Dr. Mark A. Rosen, evaluated Applicant and determined that a permanent partial impairment rating of the lower right extremity of 1 percent existed, and that there was no significant preexisting physical condition or impairment which contributed to Applicant's present impairment arising from the subject accident on February 20, 1992.

During the hearing before the Administrative Law Judge, Petitioner's counsel sought by way of Motion an independent medical evaluation to be performed for the benefit of the parties involved, specifically review of Dr. Rosen's evaluation that there was a 1 percent permanent partial physical impairment rating. Such motion was denied by the Administrative Law Judge. Based on the foregoing and other Findings of Fact and Conclusions of Law by the Industrial

Commission's Administrative Law Judge, Petitioner's counsel timely filed its Petition for Writ of Review.

SUMMARY OF ARGUMENT

The Administrative Law Judge made Findings of Fact and Conclusions of Law which were not well supported by the evidence before the court when viewed in light of the whole record. Such Findings are erroneous in that they are against the clear weight of evidence and several mistakes were made in arriving at the Findings of Fact and Conclusions of Law. Namely, Applicant was not injured while in the scope of employment with Petitioner, but rather suffered an injury, either that recurring from a preexisting condition or an independent injury outside the scope of employment with Petitioner. Assuming for argument's sake that Applicant did injure himself while in the scope of employment with Petitioner, he was working no more than 28 hours per week in the last complete quarter prior to the injury. Further, the evidence clearly shows that in the eight week period prior to the date of injury, Applicant worked on the average less than 10 hours per week. Finally, if in fact Applicant was injured while in the scope of employment with Petitioner, it is unreasonable for him to be awarded damages through May 6, 1992, when by Applicant's own testimony to his treating physician that he was able to return to work an entire month earlier, April 8th rather than May 6th, 1992.

ARGUMENT

STANDARDS OF REVIEW

Factual Determinations must Be Supported by the Evidence

As with Reviews of other Administrative Agencies, this court gives deference to facts determined by the Agency at the hearing level if they are supported by the evidence. Where they are not supported, no such deference is given. In Hurst v. Board of Review of the Industrial Commission, 723 P.2d 416, 419 (Utah 1986), the Utah Supreme Court described this deference. "On questions of fact, the Commission's Findings are conclusive and not subject to review by this court unless they are without substantial support in the record and thus clearly arbitrary and capricious." The Findings of the Agency are reviewed under a clearly erroneous standard. "The Findings are clearly erroneous only if they are against the clear weight of the evidence, or if the Appellat Court otherwise reaches a definite and firm conviction that a mistake has been made." State v. Walker, 743 P.2d 191, 193 (Utah 1987). Further, the Findings of Fact must be supported by substantial evidence when viewed in light of the whole record before the court. See Grace Drilling Company v. Board of Review of the Industrial Commission of Utah, 776 P.2d 63, 67 (Utah 1989).

POINT I

APPLICANT HAD A PREEXISTING CONDITION OF THE SAME LOWER EXTREMITY PRIOR TO HIS EMPLOYMENT WITH PETITIONER.

Shortly before the alleged industrial accident suffered by Applicant, Petitioner's employee and secretary had noticed Applicant walking in an impaired state and brought his actions to his attention once Applicant came into the shop office (Tr. 78-79, 82-83). Further, the testimony given by Ms. Margetts indicates that there was not sufficient work for the Applicant and that Petitioner was consciously striving to find adequate work in which to allow Applicant the opportunity to earn some money for his living expenses (Tr. 80-81, 93).

Petitioner was aware of Applicant's preexisting condition as well as the impaired state demonstrated by Applicant shortly before the alleged injury (Tr. 82-83, Tr. 44-47). In fact, Petitioner's employees suggested to Applicant that he seek the necessary medical attention at an emergency care facility. The finding by the Administrative Law Judge concerning the injury being sustained during the course of employment is without support and is controverted by the testimony of Petitioner.

Based on the foregoing, the Findings listed above should be disregarded under the appropriate standard of review because they are without substantial support in the record and are, therefore, arbitrary and capricious.

POINT II

APPLICANT WORKED PART-TIME ONLY FOR PETITIONER PRIOR TO THE ALLEGED INJURY.

The evidence presented to the Administrative Law Judge clearly substantiates the working hours of the Applicant. In the most recent full quarter in which Applicant worked for Petitioner, his average weekly hours amount to 28 (Tr. 15-22, 27-29). At the hearing, Counsels for the

respective parties agreed to stipulate that 32 hours would be an average weekly number of hours worked by Applicant. However, Applicant's Counsel indicated that testimony would demonstrate that Applicant worked in excess of 40 hours per week (Tr. 5-8). However, testimony and evidence presented to the Administrative Law Judge that was uncontroverted indicated that the alleged accident date was February 20, 1992, and that prior to that time during the entire year of 1992, Applicant worked only 72 hours or an average of only 10 hours per week (Tr. 90-93, 99-100, 106). Because that evidence was uncontroverted, it is clearly erroneous, arbitrary and capricious. Therefore, the finding by the Administrative Law Judge that Applicant was employed on a weekly average of 40 hours per week with Petitioner should be disregarded.

POINT III

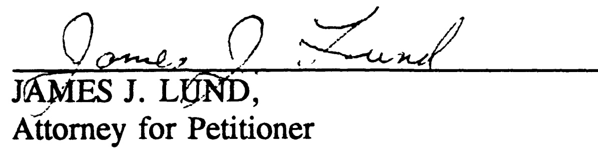
APPLICANT WAS ABLE TO RETURN TO WORK EARLIER THAN HIS SUBSEQUENT REEMPLOYMENT DATE.

Regarding the timeframe in which worker's compensation benefits were awarded to Applicant, the record as supported by testimony and evidence presented to the Administrative Law Judge indicates that Applicant was in a position to return to gainful employment appoximately one month prior to the actual award date (R. 83). The record at page 83 indicates that Applicant told his treating therapist that he felt he could return to work on or about April 8th. At that time "the swelling was greatly diminished and he had some mild tenderness" (R. 83, paragraph 4). However, for some reason, Applicant did not return to work until May 13th.

CONCLUSION

The Findings of the Industrial Commission are erroneous and against the clear weight of the evidence presented. Therefore, Petitioner is entitled to have the Findings of Fact, Conclusions of Law and Order of the Administrative Law Judge set aside or modified.

Respectfully submitted this 22nd day of November 1993.



JAMES J. LUND,
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CERTIFICATE OF SERVICE

I hereby certify that I caused to be mailed or hand delivered, four true and correct copies of the foregoing Brief of Petitioner to the attorneys at the address listed below, on the 22nd day of November 1993.

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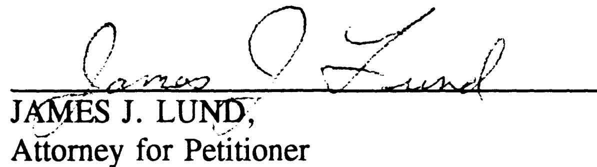

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