1972

Ivan B. Evans, Jr. v. Gibbons & Reed Comp Any And Employers Insurance of Wausau : Brief of Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

IVAN B. EVANS, JR.,
Plaintiff, ~~Appellant,~~

vs.

GIBBONS & REED COMPANY and EMPLOYERS INSURANCE OF WAUSAU,
Defendants, ~~Respondents.~~

Case No. 12794

BRIEF OF APPELLANT

Appeal From an Order of the Industrial Commission of the State of Utah

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NATURE OF THE CASE

This matter arises from an Order of the Industrial Commission dated December 27, 1971, which modified a hearing examiner's order by reducing compensation benefits awarded to appellant for injuries resulting from and industrial accident of May 6, 1969.

DISPOSITION OF THE CASE BY THE INDUSTRIAL COMMISSION

Appellant filed an application for compensation with the Industrial Commission and by letter dated July 6, 1970, carrier assumed liability for the injuries sustained by appellant. On September 29, 1970, the medical aspects of the case were referred to a special medical panel of the Commission pursuant to 35-1-77 Utah Code Annotated as amended. On March 25, 1971, the medical panel submitted a report of its findings and determined, among other things, that the appellant was entitled to a permanent partial disability assessment of five per cent (5%) of loss of body function attributable to the industrial accident of May 6, 1969. Appellant objected to the findings of the medical panel and the matter was heard before hearing examiner on July 1, 1971. The hearing examiner then made his findings of fact and conclusions of law and entered an order November 16, 1971, awarding to appellant compensation for temporary total disability for a period of three months; and compensation for twenty per cent (20%) permanent partial disability of loss of body function attributable to the industrial accident. The order of the hearing examiner was modified by order of the Industrial Commission on December 27, 1971, which reduced the award of compensation for permanent partial disability to the appellant from twenty percent (20%) to five per cent (5%). From this ruling the applicant seeks a review by the Supreme Court.

RELIEF SOUGHT ON APPEAL

The appellant seeks a reversal of the Industrial Commission's ruling that he is entitled to compensation benefits for permanent partial disability of five per cent (5%) and reinstatement of the hearing examiner's order that appellant is entitled to compensation benefits of twenty per cent (20%) permanent partial disability; and an additional award of compensation for temporary total disability for the additional period of time which appellant has remained temporarily totally disabled from the injuries he sustained from the industrial accident of May 6, 1969.

STATEMENT OF FACTS

Appellant, on May 6, 1969, while working for his employer, Gibbons & Reed Company, was involved in an industrial accident from which he suffered injuries to his person as a direct result of the accident, which facts are not disputed. The appellant was seen and treated by Dr. Neil C. Cappel and a report was submitted to the Industrial Commission of his diagnosis and findings on appellant's injuries (R-28-29).

The medical aspects of the injuries suffered by appellant as a direct result of the industrial accident were submitted to the medical panel on September 29, 1970, by letter of the hearing examiner, Peter Marthakis II, with instructions to the panel to make certain medical findings and conclusions. (R-41-42).

The medical panel then submitted its report to the Industrial Commission, which report included a findings and conclusions that the appellant had suffered fifteen per cent (15%) permanent partial disability for loss of body function as a result of pre-existing conditions, and had suffered five per cent (5%) permanent partial disability of loss of body function as a direct result of the industrial accident complained of. The Commission further found that temporary total disability attributable to the accident was three months. (R-54, 55). The medical panel determined further that the temporary total disability which appellant had suffered and was suffering was due to a condition of spondylolisthesis as a result of spondylolysis. (R-53).

Appellant objected to the findings of the medical panel and a hearing was held before a hearing examiner on July 1, 1971. At this hearing it was clearly established that the diagnosed condition of appellant of spondylolisthesis was asymptomatic prior to the industrial accident of May 6, 1969. (R-75, 76, 80, 86). Dr. Hess also stated at the hearing that he could not say with certainty that appellant had a grade 1 spondylolisthesis before the accident of May 6, 1969. (R-85 and 86).

The hearing examiner, after submission of arguments in writing by the respective parties, submitted findings of fact and conclusions of law and an order dated November 16, 1971, wherein he determined as a matter of law that the appellant was entitled to workmen's compensation benefits for the injuries resulting

from the industrial accident of May 6, 1969, and awarded compensation to the appellant of twenty per cent (20%) permanent partial disability for loss of body function attributable to the industrial accident in that the appellant's pre-existing condition was asymptomatic prior to the accident and became disabiling as a direct result of the industrial accident and that the defendants were liable for the resulting disability. (R-98, 99).

The order of the hearing examiner was later modified by order of the Commission dated December 27, 1971, wherein the Commisssion ordered the hearing examiner's order of November 16, 1971, to be amended reducing the award for compensation for permanent partial disability to five per cent (5%) attributable to the accident and awarded compensation accordingly. (R-104, 105) The Commission in making its order modifying the hearing examiner's report relied heavily upon an off the cuff statement made by Dr. Hess at the hearing of July 1, 1971, as to the panel debating whether or not to award appellant any impairment because they felt the spondylolisthesis was already present. (R-104, 105, TR. p. 19) Based upon the above facts, the Industrial Commission ordered that the applicant be awared compensation of five percent (5%) permanent partial disability for loss of body function attributable to the industrial accident of May 6, 1969; and that fifteen per cent (15%) of the permanent partial disability of appellant was due to pre-existing conditions.

ARGUMENT

POINT I

THE INDUSTRIAL COMMISSION ERRED IN ATTRIBUTING FIVE PER CENT PERMANENT PARTIAL DISABILITY TO THE INDUSTRIAL ACCIDENT OF MAY 6, 1969.

It is not disputed that appellant suffered injuries to his low back as the result of an industrial accident which occurred on May 6, 1969. The injuries which appellant sustained were diagnosed as consisting of low back sprain, cervical sprain, mid-back sprain, and syatic irritation with an early grade 1 spondylolisthesis of the L-5 vertebrae as a result of spondylolysis at this level. (R-29-R-53). Appellant suffered temporary total disability as a result of the injury sustained from the industrial accident for a period of approximately one year and was released to return to light work on or about April 1, 1970. (R-31). However, appellant continued to suffer temporary total disability and has required treatment up to and including the present time. (R-32, 40, 44, 61; TR. p. 16 and 17). The medical aspects of the case were referred to a special medical panel of the Commission pursuant to 35-1-77 Utah Code Annotated as amended. Subsequently the panel filed its report on March 25, 1971, wherein the panel determined that the appellant had suffered a total physical impairment resulting in a twenty per cent (20%) loss of body function and found that the degree of permanent physical impairment attributable to the industrial injury to be five per cent (5%) loss of body

function. (R-54, 55). Appellant objected to the findings of the medical panel and the matter was heard on July 1, 1971, at which time it was clearly established by Dr. Hess under cross-examination that appellant's condition of spondylolisthesis was asymptomatic prior to the industrial accident and became symptomatic after the industrial accident. (R-75, 85; TR. p. 10, 20). It was also established at the time of hearing on appellant's objection that the condition of spondylolisthesis is a developmental condition and trauma ordinarily brings it to light or makes it recognized in that trauma is one of the causitive factors. (R-74, TR. p. 9) Dr. Hess admitted that there was nothing in the X-rays reviewed by the panel taken prior to the industrial injury to appellant indicating that he had spondylolysis and that the X-rays taken after the accident were the first to show some evidence of spondylolysis which was diagnosed by the panel as being an early grade 1 spondylolysthesis. (R-47-55).

It is the position of appellant that the fact that the pre-existing condition of spondylolysis prior to the industrial accident was clearly asymptomatic, and became symptomatic after the accident, the Commission should follow the long-established rule of law that the vulnerable or pre-disposed victim of an accident is afforded definite legal redress for his injuries; that where the accident of May 6, 1969, put into motion the forces which have culminated to create the present condition of spondylolisthesis, appellant should be fully compensated therefor. (See *Thomas Dee Memorial Hospital Association v. Industrial Commission, et al*, 104 Utah 61, 138

P.2d 233; *Jones v. Cal-Pac Corporation*, 121 Utah 612, 244 P.2d 640; and *Purity Biscuit Corporation v. Industrial Commission, et al*, 115 Utah 1, 201 P.2d 961). This principle and rule of law has been applied in workmen's compensation cases by this court as well as personal injury cases and was so applied in the recent case of *Goldleaf v. Sheraton Restaurants*, 79 ALR 881,

> "If an accidental fall percipitates or accelerates disabling affects of a disease theretofore acquiescent, resulting disability is compensable under the workmen's compensation act."

Also, in the case of *Deep Rock Oil Company v. Betchan, et al*, (Okla) 35 P.2d 905, the Court said:

> "Existing pre-disposition to injury does not furnish grounds for denying compensation when accidental injury substantially causes disability."

In view of the facts and circumstances as established at the hearing of July 1, 1971, it is clear that the present condition of the appellant and the resulting disability from the injuries he suffered from the industrial accident of May 6, 1969, is directly attributable to the accident, and an award of a twenty per cent (20%) permanent partial disability for loss of body function by the medical examiner was proper and should be upheld. Appellant should not be denied compensation on the basis of an "off the cuff" statement by Dr. Hess, as contained in the Commissioner's order of December 27, 1971, when Dr. Hess stated that it was difficult to determine disability in cases such as this and there are no books to tell you exactly how to do this." (R-84).

Further, Dr. Hess stated that the ordinary rating of disability for a man with a Grade I spondylolisthesis is 20% loss of body function. (R-84) All of the facts as determined at the hearing of July 1, 1971 clearly establish that the trauma suffered by appellant as a result of the industrial accident of May 6, 1969 was the causative factor in producing the appellant's condition of spondylolisthesis and the resulting disability in that appellant was clearly asymtomatic prior to the accident and he became symptomatic after the accident and remains symptomatic to the present time.

Dr. Hess, at the July hearing, indicated that a different rating procedure is followed in industrial cases when surgery is required in cases of spondylolisthesis (R-84) It is the contention that the medical panel and Industrial Commission should follow the established Rule of Law for negligence cases and industrial cases in assessing disability occasioned by industrial accidents and award appellant compensation for permanent partial disability of twenty per cent (20%) loss of body function in accordance with the Hearing Examiner's order of November 16, 1971. (See Cases cited Supra)

POINT II

APPELLANT SHOULD BE AWARDED COMPENSATION FOR THE ENTIRE PERIOD THAT HE SUFFERED TEMPORARY TOTAL DISABILITY ATTRIBUTABLE TO THE INDUSTRIAL ACCIDENT OF MAY 6, 1969.

The medical panel determined in its report of December 15, 1970, that the period of temporary total disability of the appellant attributable to the accident would be approximately three months. (R-54) A review of the reports of Dr. Cappel, Dr. Morrow and the transcript of the hearing on July 1, 1971, as contained in the record clearly indicate that the appellant suffered a period of temporary total disability of approximately one year and continues to suffer temporary total disability to the present time.

At the time of the hearing on applicant's objections to the findings and conclusions of the medical panel, it was established and determined by Dr. Hess under cross-examination that the finding of the medical panel, "surgical intervention is not necessitated by the accident," should be modified or a re-evaluation of this finding should be made. It was established by Dr. Hess that surgical intervention is required in many cases of spondylolisthesis where the patient cannot, through conservative methods, eleviate the pain and suffering. (R-81, 82 TR. p. 16, 17) It was also stated by Dr. Hess that surgical intervention would be the indicated procedure for the appellant, unless there is contra-indication. (R-82, TR p. 17) Dr. Hess seemed to feel that a contra-indication was indicated by the weight of the appellant being some 300 pounds plus. However, it was established that the appellant weighed in excess of 300 pounds prior to the industrial accident of May 6, 1969, when he was asymptomatic and suffering no disability, has continued to weigh about the same weight after the accident and con-

tinues to remain at approximately the same weight. (R-82, 83, TR. p. 17 and 18.) The special medical panel had determined from Dr. Cappel's reports that Mr. Evans had become asymptomatic after the accident and was released to return to work to do light work only on April 1, 1970, approximately one year after the accident. Appellant attempted to return to work, his condition became worse and he has remained temporarily totally disabled up to and including the present time. Dr. Hess stated that the observation of the medical panel concerning the appellant's condition becoming asymptomatic after the accident and then becoming symptomatic once again was not an objective finding but was merely subjective or opinion. (R-85, 86, TR. p. 20, 21.) It is the position of appellant that he has remained in a condition of temporary total disability since the industrial accident of May 6, 1969, except for a short period in April, 1970, and he should be awarded compensation for this entire period of temporary total disability up to and including the present time and until such time as it is determined that his condition of spondylolisthesis has subsided to enable him to return to gainful employment or is corrected by surgical intervention as is indicated. (R-82, TR. p. 17.)

POINT III

THE FINDING OF THE MEDICAL PANEL THAT SURGICAL INTERVENTION IS NOT NECESSITATED BY THE ACCIDENT OF MAY 6, 1969, AND THE HEARING EXAMIN-

SE'R ORDER OF NOVEMBER 16, 1971, AND THE COMMISSION'S ORDER OF DECEMBER 27, 1971, SHOULD BE MODIFIED.

Dr. Hess stated at the time of the hearing held on July 1, 1971, that the finding of the medical panel on page 6 of its report should be modified or changed. In response to the question of appellant's attorney:

> "By this statement you do not mean to imply Doctor, that surgical intervention is not necessitated, with respect to Mr. Evans, on an overall picture?"

Dr. Hess stated:

> "No. The statement, without putting a paragraph in there, means were this man of a reasonable weight—190 or 200 pounds—and still symptomatic after reasonable conservative treatment, decompression arthrodesis would be the indicated procedure." (R-82, TR. p. 17.)

It can be seen from the testimony of Dr. Hess as contained in the transcript of the proceedings held on July 1, 1971, that surgical intervention is now indicated and would be necessitated by the industrial accident of May 6, 1969. Appellant has obviously not responded to conservative treatment and continues to be symptomatic by suffering pain and discomfort as a result of the early grade 1 spondylolisthesis as diagnosed as a condition which resulted from the accident of May 6, 1969.

SUMMARY

It is respectfully submitted that the Industrial Commission erred as a matter of law in not finding as the hearing examiner did, that the appellant suffered permanent partial disability of twenty per cent loss of body function attributable to the industrial accident of May 6, 1969. Further, that the medical panel and the Industrial Commission erred in awarding compensation for temporary total disability for a period of three months only where the record clearly shows that the appellant suffered temporary total disability for a period approximating one year and continues to suffer temporary total disability by reason of the spondylolisthesis brought about as a direct result of the accident of May 6, 1969. Appellant should be awarded compensation for temporary total disability for all periods directly attributable to the accident of May 6, 1969, and a re-evaluation should be made as to whether or not surgical intervention is necessitated by the industrial accident.

Respectfully submitted,

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