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

IN THE SUPREME COURT OF THE STATE OF UTAH

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

vs.

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

Case No. 12794

BRIEF OF DEFENDANTS

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

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NATURE OF THE CASE

This is an appeal from an order of the Industrial Commission of Utah (herein called the "Commission"). The Commission ordered permanent partial disability compensation to be paid in accordance with a finding, as to loss of bodily function attributable to employment-related injury, made by a medical panel (herein called the "Panel"), appointed pursuant to Section 35-1-77 of the Utah Code. Appellant asserts that he is entitled to more.

DEPOSITION BELOW

The Panel found appellant to have been suffering, before his injury, from a development defect called "spondylolisthesis" which represented a 15% loss of bodily function. After maximum recovery from his injury, his impairment from all causes, the Panel found, was properly rated at 20% loss of function. The Hearing Examiner ordered payment as if the entire 20% disability were attributable to the injury. The Commission, on timely petition for review, corrected the order to require payment for only that portion of the disability found by the Panel to be attributable to the injury.

STATEMENT OF FACTS

Appellant unquestionably sustained injury by accident in the course of his employment on May 6, 1969. Among his consequent symptoms was lumbosacral pain. That pain had fully subsided by the date of the Panel examination (December 15, 1970), when there was no evidence of residual pain or loss of motion during an orthopedic examination including all the standard tests for pain and motion loss (Panel report, page 3, Record, page 50). These tests were so negative for continuing injury-related problems that it is appropriate to quote the relevant paragraph:

> ORTHOPEDIC EXAMINATION: The patient exhibited a negative Romber and was able to walk a straight line without difficulty. He was able to bend forward and touch the floor with his fingertips. Side motion and rotation were within normal limits and caused no pain. He was non-tender to palpation or percussion and good alignment of the back. Straight leg raising was possible to 70° bilaterally, with some tightness of the hamstrings but no pain. There were no sensory changes. Reflexes were equal and active. Leg lengths were equal. There was no apparent atrophy.

Circulation was excellent. He was able to heel and toe walk and get on and off the table without difficulty. There were no abnormal reflexes. Cervical motion was normal and nonpainful. There was no spasm. Motion in the upper extremities was normal. Strength was normal. Reflexes were normal. The cranial nerves were intact. He was noted to have a tattoo on the right midforearm.

The significant Panel findings relate to the physical condition of the appellant just before his May 6 injury. He was 5'9½" and weighed 330 pounds (R 50). He had been born with a defect in his lumbosacral assembly known as spondylolysis which had permitted the fifth lumbar segment to slip forward on the sacrum (Record, page 71).* The displacement or mis-articulation between fifth lumbar and sacrum is spondylolisthesis.

It was the testimony of the Panel Chairman, Dr. Hess, that it is "inconceivable" that a man of appellant's weight and with his structural defect could have been asymptomatic doing heavy work in the years before the May 6, 1969, injury (Record 86). Despite his statements to the contrary, the record shows that appellant *did* have recurrent low back problems. It is unlikely, of course, that the appellant consulted a physician every time he felt low back pain or that the Commission's or Panel's investigations revealed every instance of consultation with a physician with reference to low back symptoms. Nevertheless, the record does reveal these instances of pre-injury low back problems:

1. When he was seven years old, appellant was hit by a truck, became paraplegic, and was hospitalized for two years, (Record 80).

* It should be noted that appellant contends the slippage occurred at the time of the accident, but the Panel finding was that slippage occurred in childhood (R 55, 75 et seq.) and no competent testimony to the contrary was adduced.

2. In June of 1963, appellant slipped on some m and twisted his back. He was treated by Dr. M row beginning a week or so after the injury. did not become pain free for some three wee (Record 54).

3. In March of 1969, appellant consulted Dr. Bak whose notes of March 29 (about 40 days befc the injury) indicate "back pain the past four da (Record 54).

After the May 6 injury, appellant returned to work July 20th, but he left again in September because of a varie of complaints which are the subject of many medical repo reviewed by the Panel in the course of its investigation a analysis. At the time of his release from treatment, howev appellant was in essentially the same condition as before injury of May 6. That is, he was an extremely obese wo man with a Grade I spondylolisthesis, disposed to develop l back symptoms (with or without trauma) which would luctantly subside.

ARGUMENT

POINT I

THE COMMISSION PROPERLY AWARDED PERMANENT PARTIAL DISABILITY COMPENSATION ON THE PANEL RATING.

The Panel could not more clearly have stated its findi with reference to the degree of causal relationship betwe the injury of May 6 and the structural defect discovered in course of treatment of symptoms associated with that inju The Panel found the spondylolisthesis to have pre-existed injury and in no way to have been caused by the injury. T sheer defect constitutes a 15% impairment of total funct

simply because the poorly supported tissue surrounding the defect is peculiarly subject to injury and, being under continuing stress, peculiarly slow to heal.

The episode which began May 6 is typical of episodes which can be anticipated where spondylolisthesis exists. Once the pain associated with a particular sprain subsides and the damaged tissue heals, the employee is in essentially the same condition as before the injury, able to function but vulnerable if strain is imposed at the point of defect. The Panel in fact "debated whether to give him *any* impairment because of the accident, because the spondylolisthesis was already present" (Record 84, our emphasis).

The applicant, in Point I of his argument, attacks two findings of the Panel. First, he says that the movement forward of the fifth lumbar segment on the sacrum occurred at the time of the accident even though the Panel found to the contrary. Applicant argues that the Commission *must* find differently from its Panel because (a) the first pictures to reveal tht defect were taken after the injury and (b) the first symptoms indicative of the defect appeared after the injury.

The fact that no radiological evidence of defect existed before the injury is not of *any* significance. There were no pictures taken *before* the injury which show the area of the defect. Dr. Hess testified positively, however, that the defect observed always develops (where, as here, it drives from spondylolysis in the first decade of life (Record 75). It is *possible* for lumbosacral dislocation to be caused by trauma, but "this is rarely seen, and would be easily recognized". In this case, the pre-existence of the spondylolisthesis could not

be established radiologically, but the pre-existence of spondylolyis could be and was. Based on perfectly orthodox medical science, Dr. Hess could state positively that the slippage predated the injury. The attending physician, Dr. Cappel, did not hesitate to categorize the spondylolisthesis as "pre-existing" (Record 29).

With regard to the argument that the injury must be regarded as a factor contributing to the basic pathology because the applicant was asymptomatic before the injury, it is simply not true that he was asymptomatic. The record shows two years of paraplegia in childhood, treatment for back symptoms in 1963, and low back complaints, persisting for at least four days, in the 60 days immediately preceding the accident. There may have been other episodes which applicant has forgotten or chooses not to recall. He denied *any* pre-existing history of back symptoms when interviewed by the Panel.

We submit that the Commission would indeed have erred if, on the basis of the testimony elicited at the hearing of July 1, 1971, it had made medical findings at variance with those of the Panel.

POINT II

THIS IS NOT A CASE WHERE THE AGGRAVATION THEORY HAS APPLICATION.

Applicant cites three Utah cases for the proposition that, where an industrial injury aggravates a pre-existing condition (previously non-disabling) so that it becomes disabling, compensation should be paid as if the injury were the cause of the condition.

Defendants do not quarrel with this doctrine, but it is subject to limitation. It must be true, for the doctrine to apply, that the pre-existing condition is in fact made worse by the injury and is not merely the occasion for discovery of the condition. To take an extreme example, the disease of hemophilia may be diagnosed because of a slight industrial injury which produces immoderate bleeding. The employer must pay compensation for the period of disability necessary to bring the bleeding under control. The employer is not, however, now obligated to pay permanent partial disability compensation for the disability attributable to the disease. The disease is not *worse* because of the injury; it is merely *known* because of the injury.

The problem has been presented to this court on at least two occasions where the underlying pathology was arthritis. In *Silcox v. Industrial Commission,* 101 U 438, 121 P2d 901, the employee's pain started when he was lifting a 225 pound leyner machine in the course of employment. The Commission found the source of the pain to have been arthritis — even though made symptomatic by the lifting — and this court upheld the denial of compensation. In *Pintar v. Commission,* 14 U2d 276, 382 P2d 414, the fundamental problem was again arthritic disease, and the Commission again denied application for compensation even though the employee developed symptoms in employment related activity.

In the instant case, the applicant was, before his injury, a grossly obese workman with a Grade I spondylolisthesis and therefore peculiarly subject to low back problems. The injury may have been more disabling because of the lumbosacral defect and less responsive to treatment, but the injury did not in-

crease the grade of the spondylolisthesis or cause it to be of greater significance as a work limiting factor than it was before.

POINT III

THIS COURT SHOULD NOT MAKE FINDINGS AS TO THE DURATION OF TEMPORARY TOTAL DISABILITY.

In his Point II, plaintiff argues that he should be awarded temporary total disability compensation for a longer period than the Panel found his injury to have been disabling. If we comprehend it, his reasoning is that (a) defendants are chargeable as if his employment had caused the spondylolisthesis (b) he cannot work while the condition remains uncorrected (c) surgery is contra-indicated so long as he is greatly overweight, so (d) temporary total disability should continue until he chooses to lose weight.

We do not agree that the legislature intended to impose any such burden on employers. We submit that the length of the period of actual temporary total disability is a medical issue to be resolved by medical specialists having access to all the relevant data. This is exactly what was done in this case. For this court to compel findings on medical issues different from those made by the Commission and its Panel, it must be persuaded that the Panel is composed of scoundrels or incompetents and that the Commission acted in the absence of credible evidence, arbitrarily and capriciously (*Vause v. Commission*, 17 U 2d 217, 407 P 2d 1006; *Frenchik v. Commission*, 22 U 2d 123, 449 P 2d 649).

POINT IV

THERE IS NO BASIS FOR MODIFICATION OF THE ORDER HEREIN AS IT RELATES TO SURGERY.

The Panel in this case recognized a pre-existing spondylolisthesis which was not materially changed because of the damage to adjacent tissue caused by the industrial accident. It further found that the applicant had recovered, with some residual, from the effects of that accident. The mere fact that the appellant became aware of his defect in the course of medical investigation of an industrial injury does not justify an order that his employer pay for surgical correction. Moreover, the wisdom of surgery cannot be evaluated while the appellant is a hundred pounds or so overweight. So far as the record reveals, the obesity is a problem the appellant can solve if he will. The employer should not be required to pay additional compensation because of complications of his problem deliberately generated by the appellant.

CONCLUSION

We are not dealing here with a previously quiescent disease or condition which was made disabling and changed in nature or severity by injury. The appellant had a lumbosacral defect which periodically became manifest when stress was imposed on the area. The accident of May 6, 1969, produced low back symptoms which, because of the defect, persisted. Compensation was paid for the extended period of disability, and the costs of treatment were paid. It was the finding of the

Commission and the Panel, however, that no permanent aggravation of the spondylolisthesis occurred, and there is no justification for charging the employer with the disability associated with the defect or the costs of its surgical correction.

Respectfully submitted,

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