1973

Duaine Brown Chevrolet Company And Royal-Globe Insurance Companies v. Industrial Commission of Utah And Arland K. Storer : Defendant's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

DUAINE BROWN CHEVROLET COMPANY and ROYAL-GLOBE INSURANCE COMPANIES,

Plaintiffs,

vs.

INDUSTRIAL COMMISSION OF UTAH and ARLAND K. STORER,

Defendants.

Case No. 13174

DEFENDANT'S BRIEF

ANSWER TO PETITION FOR WRIT OF REVIEW OF FINAL ORDER OF THE INDUSTRIAL COMMISSION OF UTAH AWARDING BENEFITS TO DEFENDANTS

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DEFENDANTS' STATEMENT OF FACTS

Plaintiff's "Statement of Facts" is substantially correct as to the facts stated therein, but Defendants wish to make the following additions and modifications to it:

Medical testimony found that multiple injuries suffered by Mr. Storer establishes a pattern that each succeeding injury adds a greater problem to his back on a successive or cumulative basis (R-122).

The doctor further testified that by history there was some recovery from each accident prior to 1970 and that Storer got back to where he could perform his work with only a reasonable amount of difficulty (R-123).

The doctor further testified that the accident of November, 1970 was unique in the sense that it eventually culminated in apparently the complete herniation but believed that the complete herniation did not occur at the time of the injury (R-124).

The doctor found that Mr. Storer was never free from pain following the November, 1970 accident (R-125) and Mr. Storer testified that he was never free of pain after the November, 1970 accident (R-40).

Storer further testified that between the accident of 1965 and the accident of 1970 he had very little inconsistent pain in his legs and, thereafter, following the accident of 1970 he had constant pain in both legs (R-40, 68).

ARGUMENT

POINT I

THE INDUSTRIAL COMMISSION'S ACTION IMPOSING LIABILITY UPON PLAINTIFFS FOR BENEFITS IS NOT ARBITRARY AND CAPRICIOUS AND IS SUPPORTED BY COMPETENT EVIDENCE.

From a careful review of the record it is apparent that there is substantial competent evidence to support the findings of the Hearing Examiner and the two commissioners who supported those findings that the accident of November 14, 1970 culminated in the herniated disc that resulted in the surgery.

The Medical Panel findings numbered 2 and 4 (R-103, 104) stated a medical fact — that is, all of the events in a human's lifetime, traumatic or otherwise, con-

tribute in some degree to the eventual breakdown of the fibro-gelatinous material that makes up a disc. After one particular event the individual experiences an exacerbation that does not recede and surgery becomes necessary. For this reason the Panel could only state that "the industrial injuries share equally in the causal relationship between the Applicant's various industrial injuries and the surgery of October 3, 1971."

In answer to a question Dr. Hess explains the mechanism involved in a disc herniation.

> "A. The disc in essence is a hydraulic jack between two vertebral bodies. As long as it's intact, it works as a hydraulic jack, because it has a tough fibrous outer lining and a central gelatinous core. But when it begins to degenerate, when it ruptures — these are synonymous, degeneration of disc, rupture of the disc — once a disc ruptures, it's degenerated. In fact, we think they start degenerating after its conception, really. Then this gelatinous material inspissates, meaning it dries out, and the vertebral bodies gradually come closer and closer together. This is degeneration of a disc.
>
> Q. Is the rupturing process, however, something that happens on say a particular occasion when it finally ruptures and protrudes out of the disc wall?
>
> A. It can happen anywhere along the line. What really happens is, one strand of this tough outer fibrous ring breaks at a time. Break one strand, then have a little back pain; break another strand, a little back pain. Finally the last strand breaks, then the nucleus, a little of that comes out, that's when the first leg pain shows

up, usually. Then that can dry out, and shrink back out of the way, and the leg pain can disappear. But the next heavy lift, he can push that out again. And as the discs come closer together, it doesn't take as much material to push out to catch the nerve root. . . ." (R-128)

The doctor later testifies:

"Q. So his activities of daily living contribute to the degeneration of the disc, do they not, doctor?

A. Yes.

Q. Just being erect is enough and these events of from 1965 and '66 also contribute to the degeneration of this disc do they not?

A. Yes.

Q. And, in fact, in 1970 there is a herniation of the disc. At least this is what they operate . . .

A. I don't know exactly when the herniation occurred but I suspect that it really occurred in about September, 1971. . . ." (R-129).

It appears that the doctor is stating that the degenerative process occurs over a long period of time with trauma and strain, without strain, with the activities of daily living, from conception, etc. However, the functioning part of the herniation occurs as the fibrous material breaks and the breaking of the fibrous material is associated with strain.

In fairness to the Panel, how else could they have answered the questions propounded by the Hearing Examiner "4. What was the causal relationship between the Applicant's various industrial injuries and the surgery

of October 3, 1971" (R-96). The only medical conclusion would be that each shared equally.

A more exact question might have been, "What ultimately caused the necessity for surgery in 1971." It is submitted that the last accident caused the need for the surgery.

Dr. Hess in further support of the Defendant's position testified as follows:

> "Q. What I'm saying is, the injury of April 2, 1965 for example would not have been severe enough to warrant the surgery.
>
> A. Depending on the file and what we find out from the patient, I would say yes, it was not sufficient to warrant surgery.
>
> Q. And the same might be true of each succeeding accident and injury, based on his complaints and the medical report you have.
>
> A. Might be true. But this man practically lived with a chiropractor, the way I read his record, and I don't think there's any doubt but that anywhere along the line this man could have had some relief by having surgery.
>
> Q. But in fact he didn't.
>
> A. He didn't. Because if one recovers with certain treatment, the results of back surgery are not that good that one pushes it onto someone if he can recover by lesser means.
>
> Q. So that history shows that there was some recovery from each of these episodes prior to 1970. Is that not correct?
>
> A. The history shows that he at least got back

to where he could perform his work with only a reasonable amount of difficulty.

Q. (By Mr. Shaughnessy) All right. We'll assume this to be true. But, in fact, he eventually had surgery after the last accident. So there would be something unique about the last one, is that not correct, that forced him into surgery if that's a problem.

A. Well, it's unique in a sense that it eventually culminated in apparentely the complete herniation. But from the file I don't think this complete herniation occurred at the time of his injury. As I read the file, it was several months later that one day he couldn't go. This could have been following manipulation, bending down to tie his shoe or anything. Also, as I read the file, he was never the same after the next-to-the-last injury" (R-122).

Actually the doctor was confused as to the last and next-to-the-last injury. The next-to-the-last injury he refers to is actually the injury of November, 1970 and there was no subsequent accident or injury (R-142, 143).

Again Dr. Hess testified:

"Mr. Shaughnessy: and I think it's very possible to have had herniation in 1965, and another herniation in 1971. It's simply that the 1965 one receded. Wouldn't that be in substance . . .

A. The Witness: My feeling is that this man had at least one of those discs all along. And probably in, I don't know just when, somewhere between '70 and — somewhere after this next-to-the-last accident (See above), this man ruptured the other disc. And then with continued manipu-

lation, or whatever, I think it came out to the extent that he couldn't take it anymore. Just brought it to a head.

Q. (By Mr. Poelman) You are not able to define the particular time when that final disc rupture occurred.

A. No. I read Dr. Bernson's notes just as carefully as I know how and he indicated the man had two-free-lying discs. That means that it could have been either one of them. Now if they're scarred down badly, and hard to get out, that means that's an old one. Don (Dr. Don C. Bernson) did not describe them that way. So that either one of them could have been the most recent. I wasn't there; I don't know." (R-133).

Still later Dr. Hess testified:

"Q. Now, so there's no question about your testimony on my cross-examination, when you are referring to the uniqueness of the next-to-the-last accident, you are in fact referring to the accident of November 14th of 1970.

A. Yes.

Q. And that following that particular accident, by history and his testimony, he was never free from pain.

A. He so stated." (R-142).

Defendant has quoted liberally from the record since the crux of the case turns upon the expert testimony of Dr. Hess. As the impartial chairman of the Medical Panel he speaks for the Panel in enunciating the medical basis upon which this case resolves.

The extensive quotations from the record tend to show the substantial underlying facts or evidence upon which the Hearing Examiner based his decision. He found that "the November 14, 1970 injury apparently produced the most continuing and disabling pain and interference with the Applicant's work duties, it constitutes the precipitating or aggravating cause of his disability and liability should be assessed accordingly."

The record is replete with evidence showing the uniqueness of the November, 1970 accident. The record is full of extensive chiropractic adjustment after the November, 1970 accident *but in treatment of that accident and injury*. The history of continuing pain, treatment and disability without intervening cause was continuous and uninterrupted culminating in the surgery.

It is apparent that this Court is definitely limited in its review of an order of the Industrial Commission. Section 35-1-84, Utah Code Annotated 1953 provides in part:

> ". . . Upon such review the court may affirm set aside such an award, but only on the following grounds: (1) That the commission acted without or in excess of its powers; (2) That the findings of fact do not support the award."

Section 35-1-58, Utah Code Annotated, 1953 provides in part:

> ". . . The findings and conclusions of the Commission on questions of fact shall be conclusive and final and shall not be subject to review; such questions of fact shall include ultimate facts and the findings and conclusions of the commission."

There are numerous cases annotated in the above code sections (35-1-84 and 35-1-58) which further define the function of this Court in its review of the findings, conclusions and orders of the Industrial Commission. For example in *Utah Consolidated Mining Company v. Industrial Commission,* 66 Utah 173, 24 P. 440 the Court stated: that such a review is "limited to the determination whether the Commission has exceeded its powers or disregarded some positive provisions of law in making or denying an award."

In *Kent v. Industrial Commission,* 89 Utah 381, 57 P.2d 724, the Court stated:

> "In the case of a denial of compensation, the record must disclose that there is material substantial, uncontradicted evidence sufficient to make a disregard of it justify the conclusion, as a matter of law, that the Industrial Commission arbitrarily and capriciously disregarded the evidence or unreasonably refused to believe such evidence."

In the present case there is no question but what there is substantial evidence for the Hearing Examiner to make an award and, it is conceded, there is likewise substantial evidence to deny an award. The Hearing Examiner chose the former and disregarded the latter.

This court held that "if there are two or more conflicting inferences possible from the evidence, this Court cannot interpose its judgment in place of that of the Commission." *Tintic Standard Mining Company v. Industrial Commission,* 100 Utah 96, 110 P.2d 367 (1941).

Justice Crockett writing in *Vause v. Industrial Commission,* 17 Utah 2d 217, 407 P.2d 1006 (1965).

> "Our statutory and decisional law requires 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."

In the very recent case of *Wilkinson v. Industrial Commission,* 23 Utah 2d 428, 464 P.2d 589 (1970) the court re-iterated its function on compensation cases before it for review stating:

> "This court has many times held that it will not interfere with the orders of the commission unless it appears as a matter of law that the order is contrary to law and contrary to the evidence, and to the same effect it has often said that unless the commision arbitrarily and capriciously disregards competent material and substantial evidence, its decision will not be disturbed by the Supreme Court."

In our present case, the order of the Commission itself refutes Plaintiffs claim that it acted "arbitrarily" and "capricious" in not ruling for Plaintiff. Each fact found by the Hearing Examiner is adequately supported by substantial evidence — albeit such evidence is both contradictory and disputed.

In Arthur Larson's treatise *Workmens Compensation Law* at paragraph 95 he writes:

> "When a disability develops gradually, or when it comes as a result of a succession of accidents, the insurance carrier covering the risk at the time of the most recent injury or exposure bearing a causal relation to the disability is usually liable for the entire compensation. In some jurisdictions apportionment has been worked out by judicial de-

cision, or provided for by express statute, when events within the coverage periods of successive insurers contribute causally to the final disability."

Needless to say there is no apportionment statute allowing for recovery from multiple insurers. Section 35-1-69, Utah Code Annotated 1953 deals with combined injuries and provides in part "If any employee who has previously incurred a permanent incapacity by accidental injury, . . . sustains an industrial injury for which compensation and medical care is provided by this title that results in permanent incapacity which is substantially greater than he would have incurred if he had not had the pre-existing incapacity. . . ." Certain benefits will be paid from the second injury fund of the Industrial Commission.

We are not here concerned with the application of this statute, although it provides for a form of apportionment, since there is no evidence of a permanent incapacity predating the injury of November, 1970. Suffice it to say the statute doesn't apply.

The occupational disease disability act provides some clue as to the thinking in the area of multiple exposure to an occupational disease working for more than one employer. Section 35-2-14 Utah Code Annotated 1953 provides: "Where compensation is payable for an occupational disease the only employer liable shall be the employer in whose employment the employee was last injuriously exposed to the hazards of such disease. . . ."

There is no question but what the concern here is not the occupational disease law. However the quoted

statute gives some insight into the legislative thinking were the same question presented concerning accidents.

The states of Massachusetts and Michigan both rule that full liability is placed upon the carrier covering the risk at the time of the most recent injury that bears a causal relationship to the disability. *Rock's Case*, 323 Mass. 428, 82 N.E. 2d 616; *Brinkert v. Kalamazoo Vegetable Parchment Co.*, 297 Mich. 611, 298 N.W. 301.

Quoting Larson further at paragraph 95.21:

> "On the other hand, if the second incident contributes independently to the injury, the second insurer is solely liable, even if the injury would have been much less severe in the absence of the prior condition, and even if the prior injury contributed the major part to the final condition. This is consistent with the general principle of the compensability of the aggravation of a pre-existing condition." Citing cases.

Many states such as Illinois, Idaho, Indiana have reached contrary results by specific statutes. California reached a different result and then codified the result.

Reference has been made to the fact that this Defendant has failed to establish a causal relationship between the accident of November, 1970, the resulting injury and the need for surgery. Plaintiff's have failed to recognize that the Medical Panel Report, the testimony of the doctor and the testimony of the Applicant is undisputed that the accident of November, 1970 bore a direct causal relationship to the surgery in 1971. The only issue to be resolved is — how much?

The evidence is overwhelming that all of the accidents, the degenerative process, the spinal manipulations had ultimate direct causal relationship to the disability and surgery. Nowhere is there any evidence to the contrary.

It is axiomatic that *Jensen v. United States Fuel Company*, 18 U.2d 414, 424 P.2d 440; *Wilson v. Carl Gilb, Inc.*, 94 Idaho 106, 482 P.2d 81 and *Redman Warehousing Corp. v. Industrial Commission*, 22 U.2d 398, 454 P.2d 283, 285 (1969) are clearly not in point.

In *Jensen* the medical panel found that "this was not the insidious onset of a protruded intervertebral disc that *we see most commonly without trauma* and that the alleged accident *was not significant in the causation of the protruded intevertebral disc.*" Clearly the medical facts are entirely different.

In the *Wilson* case the Idaho Industrial Accident Board simply found that no accident occurred.

In the *Redman Warehousing Corporation* case the driver in question drove a vehicle, loaded it and worked without a specific "accident" and then developed a herniated disc. The panel found the disc degeneration was *aggravated* by the *sitting* and *driving* alone. The court rightly reversed the commission holding that this was not an accident. *Redman* has no application here since there is in fact reported accident (November 14, 1970) and injury together with payments of compensation by these plaintiffs. They are certainly not in a posture now to say that this event did not occur.

Much emphasis has been made by Plaintiff's over the fact that Storer received extensive chiropractic manipulations. This is conceded but it must be remembered that virtually all of the manipulations arose from an industrial accident. The chiropractor "treated" Storer's back sufficiently that he was able to work much of the time without loss of pay. The panel chairman explained the effect of chiropractic manipulation (R-136) and stated in part: "Maybe he kept this man on the job four or five years." Chiropractic treatment is recognized by the Industrial Commission and paid for by insurers. Whatever deleterious effect it may have had on Storer could well be the responsibility of the Plaintiffs in any event.

POINT II

IF PLAINTIFFS ARE TO BE HELD LIABLE FOR THE CLAIMED BENEFITS, SUCH LIABILITY SHOULD NOT BE SHARED.

It is to be here noted on this appeal that the other parties to the proceedings before the Industrial Commission have not been made a defendant. Capitol Chevrolet Co. and its insurer, State Insurance Fund are not participating since they have not been named.

In defending the position of these Defendants (Storer and the Industrial Commission) we are in effect defending the position of Capitol Chevrolet and State Insurance Fund. It is in the question of apportionment that their interests are paramount.

In Larson (supra) an elaborate summary appears at paragraph 95.31 providing for those states in which ap-

portionment is allowed. It must be noted that the apportionment is between the *carriers* and on *permanent disability* only. (Emphasis added)

The theory seems to be that the carrier in whose employ the workmen suffers an injury that is temporarily and totally disabling has the full responsibility for such disability. Apportionment then occurs between the carriers for prior accidents that contribute to the permanent disability. Thus, the permanent partial disability only becomes apportionable.

In most states a statute exists providing for such procedure. It can be found in Arizona, California, Colorado, Idaho, Louisiana, Minnesota, Mississippi, New Hampshire, New Jersey and New York to name a few. It is assumed that the other states do not allow for apportionment or have not ruled on the subject.

Regis v. Lansing Drop Forge Co., 181 N.W. 2d 656 (Mich. App. 1970). There the claimant first injured his back while employed by Forge Company which was insured. The company merged with another firm and after the merger claimant re-injured his back, at a time when the employer was self insured. It was found that claimant's disability was related to both incidents. On this basis, the employer, as self insurer, was held liable for all the benefits awarded since it was the last employment in which the claimant was subjected to the condition resulting in disability. The court held:

> "It is clear that Forge Division, as the self insurer, is liable for the compensation payments to plaintiff as his last employer. *Smith v. Law-*

> *rence Baking Co.,* (1963) 370 Mich. 169, 121 N.W. 2d 684. Furthermore the appeals board's findings of fact that plaintiff's injury cannot be attributable to a single event and that Forge Division was the employer at the time the plaintiff was last subjeced to the conditions resulting in disability are supported by the record. These findings are conclusive and binding on this court."

In *Semans Dep't Store v. Dep't of Industry, Labor and Human Relations,* 184 N.W. 2d 871 (1971) the Wisconsin court in construing a case similar to this in that the employee had successive injuries by separate and distinct employers separated by a number of years. The court said in quoting from another case, *M & M Realty Co. v. Ind. Com.,* 267 Wis. 63, 64 N.W. 2d 418:

> ". . . An employer takes an employee 'as is' and the fact that he may be susceptible to injury by reason of a pre-existing physical condition does not relieve the last employer from being held liable for workmen compensation benefits if the employee bcomes injured due to his employment, even though the injury may not have been such as to have caused disability in a normal individual."

In the course of the hearing Dr. Hess in speaking to the subject of permanent disability and where it comes from testified:

> "Q. When a man is operated for a herniated disc, exactly what causes the physical impairment that he suffers afterwards, the surgery or the injury?
>
> A. Could be both. If he has an excellent result, one could not indict the surgery. If the nerve

root is cut, or a failure of fusion, then one can indict the surgery as the cause of the continued impairment.

Q. Now in the case of Mr. Storer, you found that he had a 15 percent loss of bodily function. Would this be attributable to the surgery?

A. No. It's attributable to his having two herniated discs that have been excised, and the residuals therefrom" (R-120, 121).

Under Dr. Hess's testimony the permanent disability results from the removal of the disc. If one assumes that the discs herniated as a result of the last accident, then all of the temporary total disability and all of the permanent partial disability must be attributed to that accident. There was no testimony to the contrary or a finding to the effect that the permanent disability was somehow apportionable among the separate carriers.

In dissenting from the majority opinion Commissioner Hadley took upon the Commission the authority of a "court of equity" which it is not. The Commission may only function in those areas provided for by statute. It may find disputed facts and apply principles of law but nowhere have I found where this Commission sits as a court of equity.

It may be unreasonable to assess against these Defendants all of the responsibility for this unfortunate chain of related events. However, it is not the function of this Court or the Commission to embark upon a new program of doing equity. The remedy appears to be legislative. If problems such as this are of sufficient gravity then the law should be amended to allow for appor-

tionment. In the absence of such law — the last employer should be held responsible.

CONCLUSION

There is adequate, substantial and competent evidence to support the findings and award for the Defendant imposing liability on this Plaintiff for workmens compensation benefits as provided by law. The evidence is clear that the last event of November, 1970 was a link in the chain that finally resulted in the herniation of Defendant's discs.

There is no justification in law — by statute or court decision — in this State to allow for apportionment among separate insurers for re-imbursement of a proportion of a disability heretofore awarded by the Commission. Such a procedure can only be legislative and not judicial.

Respectfully submitted this ..... day of May, 1973.

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