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Recommended Citation

Brief of Respondent, *Harlan v. Industrial Comm. Of Utah*, No. 10026 (Utah Supreme Court, 1964).

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**IN THE SUPREME COURT
OF THE STATE OF UTAH**

GARY WAYNE HARLAN

Plaintiff,

— vs. —

THE INDUSTRIAL COMMISSION,
GARRETT FREIGHTLINES, and
TRUCK INSURANCE
EXCHANGE

Defendants.

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- 1964

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Case —

No. 10026

DEFENDANTS' BRIEF

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DEFENDANTS' BRIEF

STATEMENT OF FACTS

Inasmuch as we are not in complete agreement with the statement of facts as given by the Plaintiff, we desire to make the following restatements:

During the month of September, 1962, Plaintiff, Gary Wayne Harlan was employed by Garrett Freightlines, Inc., at Moab, Utah (R-28). His employment involved the delivering of freight. Plaintiff filed an Application (R-10) on November 19, 1962, alleging that he was injured on September 26, 1962 when, with other indi-

viduals, he was pulling on a cable, trying to unload it from a truck. Plaintiff had worked for Garrett Freightlines, Inc., for about six months (R-28). The cable had been brought in to Moab from Harrison International on a truck driven by one Tom Balsey (R-87). The truck on which the cable was brought was placed alongside the dock which was approximately five inches higher than the truck bed. It was while Plaintiff and other employees were attempting to remove the cable from the truck bed onto the loading dock, that Plaintiff claims he injured his back (R-29). Plaintiff testified that he had to sit down approximately twenty minutes. Snick Dalton was present, but Plaintiff did not say anything to him about having been injured (R-30). Plaintiff worked the following day (R-30), which was Thursday, and then he worked Friday and Saturday (R-30). Plaintiff worked until 10:30 on Monday, after which he found it necessary to go to a doctor (R-31). Subsequently, Plaintiff underwent an operation on his back (R. 32).

According to Dr. E. K. Hall's letter (R-4) Plaintiff had previous back trouble and had been in an accident about one year before, when he fell into an ore bin, a distance of about twelve feet, to the ground. At that time, he was hospitalized for approximately eleven days and was off work for two months (R-4).

Dr. Hall refers to this letter in his surgical report dated October 15, 1962 (R-1). This letter was referred to by Dr. Oliver E. K. Hall, attending physician in his Surgical Report dated October 31, 1962 (R-1).

ARGUMENT

POINT I.

PLAINTIFF HAS NOT ESTABLISHED THAT HE SUSTAINED AN INJURY WHILE IN THE COURSE OF HIS EMPLOYMENT.

Plaintiff, in his Brief (P.B.-5) takes the position that the sole defense of Defendants is based on the theory that the Applicant did not notify his employer when the accident occurred. This is not a correct statement of the Defendants' position. There are other very valid defenses which sustain the Order of the Industrial Commission. The findings of the Industrial Commission, upon which it based its Order denying the claim of the applicant, are as follows:

“Applicant had a weak back prior to employment by Garrett Freightlines. According to testimony, he commented on several occasions prior to the lifting incident about his sore back. It appears that he did sit down on a culvert for a few minutes because of a back pain following pulling on cable reel. He completed shift, however, and worked the following two days, was off one day, returned to work the next day for part of a shift before seeing a doctor. He did not report an injury. Gary Wayne Harlan's back condition needed attention before the incident which was quite inconsequential in that it barely received passing notice at the time, even by applicant.”

“We do not believe that the cable pulling incident caused any significant change in the preexisting back condition.” (R-92)

The Commission found after hearing testimony and considering the other evidence in the file that the appli-

cant had a weak back prior to his employment with Garrett Freightlines and prior to his alleged injury of September 26, 1962. In respect to his previous weak back condition, Dr. Oliver E. K. Hall had this to say:

“He was injured in an automobile accident at the age of nine and states that he has had some back discomfort off and on since that time. He states that he has only been off work on one previous occasion because of his back. This occasion was about one year ago when he fell through an ore bin, a distance of about 12 feet down to the ground. He was hospitalized approximately 11 days at that time and was off work for 2 months. He recovered and has had no particular difficulty until the present episode.” (R-4)

Dr. Hall again referred to this letter in his surgical report (R-1).

Dr. James R. Alexander, in his report dated July 3, 1963, which was admitted in evidence as Applicant's Exhibits No. 2 (R-24) had the following to say relative to the applicant having previously sustained a back injury when he fell into an ore bin:

“From his history the only matter of importance found was that he had suffered an injury to his back in a fall from an ore bin in November 1961. He reported that he was treated by Dr. Dunn in Grand Junction, Colorado, and apparently was treated for muscle sprain and released.”

The doctor went on to comment that applicant reported that his back had completely healed. However, this is not true as the Plaintiff complained about back

trouble prior to September 26, 1962, as will be shown later on in this brief.

The Plaintiff was given a physical examination prior to his employment with Garrett Freightlines, Inc., and on cross-examination, Plaintiff admitted that he told the doctor that his back was all right.

“MR. OTTOSEN: Q. You told them that your back was okay, didn't you?”

“A. That's right.” (R-40)

Plaintiff was seeking employment, he wouldn't tell the examining physician that he had a bad back as that would disqualify him for the job he was seeking.

The Plaintiff was questioned about whether he had previously complained about back trouble:

“Q. The fact is you complained quite frequently about your back to the employees, didn't you?”

“A. Not frequently, no.

“Q. Did you occasionally?”

“MR. COTRO-MANES: Just specify the times and places.

“MR. OTTOSEN: Q. During the time you worked on this job? It was quite frequently, or at least you suggested there was times when you did so, didn't you?”

“A. I remember one time, yes. But after that I don't.

“Q. That was prior to this injury, wasn't it? This alleged injury?”

“A. Uh-huh.

“Q. You only remember once? Is that all?

“A. To the best that I can remember that far, yes.

“Q. There might have been other occasions: Is that right?

“A. I remember telling Keith one day.

“Q. Keith who?

“A. Keith Clendenin. That, after picking up some shoes, that I had hurt my back. Or between my shoulders. Whether a muscle spasm, or what it was. But the next day why it was all right.”
(R-41)

Kenneth Norris, a fellow employee with the Plaintiff at Garrett Freightlines, Inc., was called to testify and upon being questioned relative to whether or not he had heard the Plaintiff complain about his back condition, testified as follows:

“Q. Had you ever heard Harlan make just general complaints about his back?

“A. Yes. He would complain that his back hurt. He told me several times. As a rule in the morning, when I go there, I check the bills. Check the freight off as it comes off the truck. And if a guy which is stacking freight, there's nobody in there to take the freight out, well, once a while they'll come out and comment about something, and a few times I had heard him say: “Well, my back sure gave me trouble today.” But, on the same hand, anybody that isn't used to handling freight, and bending over like that at all, naturally their back would hurt.

“Q. In matter of time, was that before or after this electric cable?

“A. Which is that?

“Q. When he was making those general complaints.

“A. Oh, yes. It was before.

“Q. I see. (R-85)

In view of the testimony and evidence regarding Plaintiff's previous back condition, the Commission in its decision stated that it did not believe that the cable-pulling incident caused any significant change in the pre-existing back condition. The Commission apparently felt that the Applicant had been suffering from a back condition for a long period of time, and that the pulling on the cable and the occurrence of pain was incidental and was not the basic cause of his back problems.

The Commission also took into consideration the fact that Applicant did not, at the time of the incident, report an injury to his employer.

Inasmuch as the usual printed employer's report had not been filed, the Industrial Commission chose to accept the letter of Garrett Freightlines dated November 26, 1962, as the first report of injury (R-8). This letter states that Applicant did not report an accident.

Keith Clendenin, the Terminal Manager, who signed the letter (R-8), was called as a witness on behalf of the Defendant. At pages 75 and 76 of the Record, appears the following testimony of Mr. Clendenin:

“Q. And do you know whether Gary Harlan was working on there that day?

“A. Well, I presume he was. He worked out there. He would be with them.

“Q. And do you know the day this thing happened?

“A. No, I don’t. Not exactly.

“Q. The main reason being what?

“A. It was never reported to me.

“Q. Until when?

“A. Oh, the first time I actually heard of it is when I got the doctor’s report of an industrial accident, on the 22nd of October. Nobody had told me. No men had told me. Nobody had told me.

“Q. So you hadn’t heard a thing about it until the 22nd of October?

“A. No.

“Q. Do you have frequent contact with these men, and see them around?

“A. I see them every day. And talk to them every day. (R-75-76)

And on page 77 of the record, Keith Clendenin testified as follows:

“MR. OTTOSEN: Q. Do you know when his employment was terminated?

“A. The 2nd of October.

“Q. Had he worked up to that time?

“A. Yes.

“Q. That would be October 1st? He worked the full shift October 1st?

“A. Yes.

“Q. Were any incidents of injury reported to you at all, during that time?

“A. No sir.

“Q. Through anyone else?

“A. No sir.

Plaintiff testified on cross-examination that he did not say anything to the foreman Snick Dalton about being injured.

“Q. Was any of the foreman or the managers of the freightline present at that time?

“A. Snick Dalton.

“Q. Did you say anything to him?

MR. OTTOSON: “I didn’t hear that.

THE WITNESS: “Snick Dalton.

MR. COTRO-MANES: “Did you say anything to him?

“A. No I didn’t.

“Q. Why?

“A. Well, I didn’t realize I was hurt as bad as I was.

“Q. Did you tell anybody else that you were hurt at that time?

“A. Well, I said: ‘I have hurt my back.’ But I never said it particularly to anyone.

It would appear from the fact that the Applicant did not report to Mr. Clendenin, who was his Terminal Manager, and who he saw several times a day, or to anyone else, that he had injured his back, that it is most likely that the incident of pulling on the cable from the truck was not of sufficient consequence to cause the Applicant any great concern. Otherwise, it would be assumed that he would have reported the incident to his employer.

Section 35-1-99, Utah Code Annotated, 1953, provides for the reduction of fifteen (15%) percent from the award as pointed out by Plaintiff. We also concede that the

delay in giving notice to Plaintiff's employer does not in and of itself cut off Plaintiff's rights, but we do contend that the fact that no immediate notice was given was a matter to be considered by the Commission in rendering its decision.

Along with applicant's failure to immediately report, it should be noted that applicant was able to continue with his regular work following the cable incident. The Applicant testified as follows:

“Q. How long did you work after you injured your back?

“A. Well, that was Thursday, the 26th. And then I worked Friday, and Saturday and Sunday I didn't do a thing. I laid in bed. And then Monday, October the 1st, why I worked until 10:30, and then I called in for a doctor appointment that afternoon.” (R-30-31)

The Commission took into consideration the fact that Applicant worked following the alleged incident (R-92). It is unlikely that had Applicant injured his back sufficiently to require an operation, he could have continued for more than two days doing the same kind of work that he had done previously.

There is strong evidence in this case that the applicant did not know when this accident is supposed to have happened. All Documents and Reports of recent origin uniformly report the accident as of September 26, 1962, but in his original contacts there is confusion, and it is only fair to assume it arose out of his own confusion. Dr. Alexander reported the accident as of September 24,

1962, (R. 20). Apparently, Dr. Hall was not given a specific date (R. 1 and 4). Apparently, the Commission had the date of October 1, 1962, (R. 51), which date could have been taken by the Commission from the original report of Dr. Hall (R. 1). Other Doctors were given other dates (R. 51). Again, we feel it fair to assume the applicant supplied the Doctors with their different dates.

This confusion of dates left the Defendants in a very unfair position, and entirely at the mercy of the applicant. Defendant, Garrett Freightlines, had to take the position that they knew nothing about the accident, (R. 73, 74, 75), until about October 22, 1962 (R. 75), about one month after the alleged time of injury. Then in an effort to reconstruct the case so as to properly identify, or defend the case, a research of the records was made, and no delivery of a cable was found, except one for September 21, 1962 (R. 74, 78-80), evidenced by a shipping order.

This Shipping Order was placed in evidence (R. 23). Defendants feel that the applicant's confusion, as to when the accident happened, imparted to the Doctors and others involved, and his failure to report the accident is further evidence that he received no injury as claimed and the Commission had good cause to deny his claim.

POINT II

THE INDUSTRIAL COMMISSION, BY REFUSING TO ALLOW MEDICAL TESTIMONY AT THE HEARING, DID NOT ACT IN EXCESS OF ITS POWERS

The Plaintiff, when he presented his case before the Commission had the burden to establish that he had been injured by an accident arising out of or in the course of his employment. This burden of proof must be met first.

In his Brief, Plaintiff avers "that the Industrial Commission, by refusing to allow medical testimony at the hearing acted without and in excess of its powers and that medical testimony would have shown that the injury was acute as set forth in Dr. Alexander's affidavit."

We submit that it is incumbent upon the Industrial Commission to first determine whether or not an accident occurred within the meaning of the Workmen's Compensation Act.

Section 35-1-45, Utah Code Annotated, 1953, is as follows:

"Every employee . . . who is injured . . . by accident arising out of, or in the course of his employment, . . . shall be entitled to receive and shall be paid such compensation . . ."

The Commission must first determine whether there was an accident. If, in the opinion of the Industrial Commission, no accident occurred, then it would appear that the Commission has no duty to refer the medical aspects of the case to a medical panel for determination.

Section 35-1-77, Utah Code Annotated, 1953, as amended, commences as follows:

"Upon the filing of a claim for compensation for injury by accident, or for death, arising out of, or in the course of employment, and where the employer or insurance carrier denies liability, the Commission shall refer the medical aspects of the

case to a medical panel appointed by the Commission . . .”

This does not mean that in all cases, whenever liability has been denied, that the cases should be referred to a medical panel. This would take away from the Commission its duty to determine if an accident within the meaning of the Workman's Compensation Act had occurred. In this case had the Commission determined that an accident occurred, and had there been some controverted medical questions, then it would have been proper for the Commission to have referred the matter to a panel for its consideration of the medical aspects of the case.

In this case there were no controverted medical facts, the Applicant had a back condition. It was a condition which had existed for a long period of time. The Commission was fully aware of the nature of the Applicant's claim.

The Plaintiff made no offer of additional medical evidence at the time of the hearing.

POINT III

THE FINDINGS AND ORDER OF THE INDUSTRIAL COMMISSION ARE FINAL UNLESS ARBITRARY AND CAPRICIOUS.

Section 35-1-85, Utah Code Annotated, 1953, clearly defines the duty of the Commission to make findings of fact and conclusions of law. This section states 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.”

This section places squarely on the Industrial Commission the duty to make and the responsibility for the making of findings of fact and conclusions of law. This court has commented on this proposition many times so we will not belabor the point at length.

Plaintiff cites the recently decided case of *Pintar v. Industrial Commission of Utah and Geneva Steel Division, United States Steel Corporation*, defendants, 14 Utah 2d 276, 382 P2d 414, as authority for the rule that if a person who is suffering from a pre-existing condition, sustains an aggravation of that condition or a lighting up of that condition by an industrial injury, that there is coverage under the act for the resulting condition.

We do not quarrel with that general proposition, but we submit that the *Pintar* case is one in which the Commission denied compensation and the decision of the Commission was affirmed by this court for the reason that there was evidence which supported the view of the Commission. The court said at page 415:

“The difficulty with Plaintiff’s position is that there is other evidence which supports the view adopted by the Commission, whose prerogative it is to determine the facts. *Burton v. Industrial Commission*, 13 Utah 2d 353, 374 P2d 439.”

We submit that in the case now before the court that there was substantial evidence to support the finding and decision of the Commission.

In *Burton v. Industrial Commission*, 13 Utah 2d 353, 374 P2d 439, this court said at page 554:

“In order to reverse the finding and order made Plaintiff must show that there is such credible uncontradicted evidence in her favor that the Commission’s refusal to so find was capricious and arbitrary.”

See also, *Morris v. Industrial Commission*, 90 Utah 256, 61 P2d 415.

The Commission could reasonably disbelieve the Plaintiff’s story that his physical problems were the result of the incident described by him. *White v. N. P. Mettome Company*, 2 Utah 2d 415, 275 P2d 880 and *Smith v. Industrial Commission*, 104 Utah 318, 140 P2d 314.

CONCLUSION

We submit that the proceedings of the Industrial Commission were properly conducted and that the Commission reached the proper result from the evidence presented. The decision and order of the Commission should be affirmed.

Respectfully submitted,

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