3-19-2013

Clark v. Shari's Management Corp. Appellant's Reply Brief Dckt. 40393

BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

DALLAS L. CLARK, Claimant, Appellant, v. SHARI'S MANAGEMENT CORPORATION, Employer, and LIBERTY NORTHWEST INSURANCE CORPORTATION, Surety, Defendants/Respondents.	)	Supreme Court No. 40393-2012 APPELLANT'S REPLY BRIEF

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APPELLANT'S REPLY BRIEF

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APPEAL FROM THE INDUSTRIAL COMMISSION
OF THE STATE OF IDAHO
Chairman Thomas E. Limbaugh, Presiding

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CLAIMANT/APPELLANT'S REPLY

In it's Opposition to Claimant/Appellant's Opening Brief, Defendants/Respondents argue that the Commission's findings were based on "substantial and competent evidence," and therefore Claimant's appeal must be denied. [Respondent's Opposition Brief, p. 17] They argue that Claimant is asking the Court to "re-try the underlying case and re-weigh evidence." [Defendant's Opposition Brief, p. 22]

Defendant's further argue that Claimant "has not argued that the Commission misapplied the law in this case." [Respondent's Opposition Brief, p. 22]

Defendants argue they are entitled to attorney's fees in addition to costs on appeal.

Claimant contends the Referee clearly made numerous obvious factual errors and the Commission clearly misapplied the law in this case, and, as a result, they came to an erroneous conclusion.

"Whether the Commission correctly applied the law to the facts is an issue of law over which we exercise free review." *Combes v. State, Indus. Special Indem. Fund,* 130 Idaho 430, 432, 942 P.2d 554, 556 (1997).

REPLY ARGUMENT:

It is worth repeating that in the Conclusion of her Opening Brief, pages 25 and 26, the Claimant clearly set forth her contention that the Commission misapplied the law in this case.

She stated:

> "Arthur Larsen, in his treatise "The Law of Workmen's Compensation," states that the "by accident" requirement is now deemed satisfied in most jurisdictions either if the cause was of accidental character *or if the effect was the unexpected result of the strain of*

claimant's usual exertions.[1] (emphasis added) He states therein that since a so-called "slipped intervertebral disc" is a herniation or rupture, and thus mechanically comparable to an inguinal hernia, it is not surprising to find that a heavy preponderance of jurisdictions, (including Idaho)[2] afford compensation for this type of injury without exacting proof of unusual exertion or mishap as a cause.

"It is a mistake of law for the Referee and the Commission in this case, to hold this Claimant to a standard higher than that of other, similarly situated Claimant's in this State, and order her to prove "unusual exertion or mishap as a cause" of her injury, when it is clear that she has proven that, whatever the cause - whether reaching, lifting, stooping, or just standing, clearly her back injury arose on or about November 24, 2008, while she was "engaged in her ordinary, usual work" as a waitress. There is no substantial evidence to the contrary."

In other words, it was an error of law for the Commission to hold the Claimant to show "exacting proof of unusual exertion or mishap" or "some sudden or violent accident" preceding the injury as the cause of her injury, and focus on her several statements given over a period of a number of years, when there is no substantial or competent evidence that Claimant's injury did not occur on about November 24, 2008, while she was at work waitressing. The Commission and Defendants focus on the definition of "accident" as being some sudden or violent event at work, when in fact the standard they should have applied provides that the *injury* in Claimant's case is the "unexpected, undesigned, unlooked for mishap" or "accident."

The Commission (and Defendants) have failed to afford Claimant the equal application of the law, and held her to a standard of proving an "unusual exertion or mishap," misplacing their attention to the details of the *events* of that day at work, when

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[1] Larsen, *The Law of Workmen's Compensation*, §38.00.

[2] *Ibid.* §38.22, citing *Harding v. Idaho Department Store*, 80 Idaho 156, 326 P.2d 992. At page 159 of this case, this Court stated: "It is unnecessary that the claimant be engaged in some unusual work or that there be a slipping, falling or some sudden or violent accident preceding the injury before it is compensable. If the claimant be engaged in his ordinary, usual work and the strain of such labor becomes sufficient to overcome the resistance of claimant's body and causes an injury, such injury is compensable."

the attention should have been on *what* was her injury and *where* the Claimant was *when* the injury arose, and whether or not it occurred while she was engaged in her usual and ordinary work.

This correct standard was recently applied in the case of *Joseph Henry v. Department of Corrections, et. al.*, Docket No. 39039-2011, Opinion No. 9, January 23, 2013.

In that case the Claimant suffered a heart attack shortly after arriving at work. As in this case, the issue was causation. Henry was not required to prove an "unusual exertion or mishap" or some "sudden or violent event" preceding his injury. In fact, this Court held that "[T]he plaque rupture *certainly* was "an unexpected, undesigned, and unlooked for mishap, or untoward event" causing injury. (emphasis added) Then the issue turned on whether or not the accident was one "arising out of and in the course of" employment. [*Ibid.*] Regarding that, this Court stated:

> "The issue in this case is not when the heart attack occurred. The heart attack is the injury, and for Mr. Henry to be entitled to compensation there must have been an industrial accident that caused that injury. *In this case, the accident would have to have been the rupture of the atherosclerotic plaque.*"

In the present case the Claimant suffered a herniated disc that is in need of surgery. That ruptured disc is undisputed and should have been considered the "industrial accident." The Claimant should not have been forced to try to recall the precise moment and details of some sudden, violent incident at work that caused the injury. She should have needed only to show it occurred while engaged in her ordinary, usual work for the Defendant employer - which she did. There is no substantial, competent evidence to the contrary.

In the *Henry* case there was only one medical expert who supplied an opinion as to *when* the plaque rupture took place.

In this case there was not just one, but four doctors who gave expert medical opinions regarding whether or not this was a work-related injury/accident - Crook, Walker, Blair and Hajjar. As explained more fully in Claimant's Opening Brief, Dr. Hajjar was mislead that the Claimant initially injured herself outside of work, since the record is clear that the "house" is the kitchen and dish area of the restaurant. [HT p. 53, lines 1-11]. Further, even the Referee found Dr. Hajjar's opinion to be unpersuasive and lacking foundation.[3] It was Dr. Justin Crook, DC's opinion that the herniated disc was "a direct result of the injury she sustained at work while lifting and twisting." [Claimant's Exhibit 2, p. 4] In his IME report Dr. Gary Walker gave his unequivocal opinion, that "Ms. Clark had the onset of pain complaints on November 24, 2008." [Claimant's Exhibit 6, p. 9] And Dr. Benjamin Blair reviewed all of the Claimant's medical records and interviewed the Claimant and gave his clear and unequivocal opinion that the herniated disc was caused by a lifting incident at work

It is clear that the Claimant suffered a herniated disc at work on November 24, 2008. She had no pre-existing conditions and there is no substantial or competent evidence that the injury/accident occurred anywhere else. The medical experts agree.

In her Opening Brief Claimant explained why it was important to observe that notice was not an issue in the case and by admission the Surety had timely notice of the

[3] Findings of Fact, p. 14, par. 31.

work injury by December 15, 2008.[4] The Claimant showed beyond any doubt it was the *Surety, not Claimant,* who completed the FROI after it was discovered the Claimant needed surgery. This fact is not "harmless error" since it changes the context of every statement Claimant made after December 15, 2008.

When considered in light of that notice, Claimant's allegedly contradictory statements as well as the statements regarding her injury in her medical records, as well as the medical opinions of her treating physicians and the IME doctors, support the fact that, regardless of what she was specifically engaged in doing at the time, the Claimant injured her back at work waitressing on November 24, 2008. It doesn't matter whether she was standing, bending, reaching, lifting, falling, or stooping - the "accident" that occurred at work was her herniated disc and it should be considered compensable because it occurred in the course and scope of her employment. Both the Commission's and Defendants' reliance on the details of Claimant's version of an "unusual exertion or mishap" at work to deny her claim is misplaced, since there is no substantial or competent evidence that the Claimant's injury/accident occurred anywhere other than at work while engaged in her waitressing duties.

As such, the Commission and Defendants' have misapplied the facts and the law, and the Claimant respectfully requests this Court to apply the correct facts to the correct law.

Defendant's arguments that they are entitled to attorney's fees are also without foundation in either fact or law.

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[4] See last sentence on page 8 of Defendants' Opposition Brief; See also top of page 18. The FROI was completed by the manager, Zach Dummermuth, and stated the employer was notified of the accident on December 15, 2008. Furthermore "notice" was admitted in Defendants Answer and is not an issue in this case. (AGENCY RECORD, p. 9)

Respectfully,

Dated: March 18, 2013

Paul T. Curtis

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Dallas Clark

Certificate of Service

I hereby certify that on the 18 day of March, 2013, two copies of the foregoing **APPELLANT'S REPLY BRIEF** were served upon the following attorneys of record by the method indicated:

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[✓] US Mail, postage pre-paid
[ ] Hand Delivery
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Paul T. Curtis