

1975

Mountain States Steel Company and Argonaut Insurance Company v. Industrial Commission of Utah, Liberty Mutual Insurance Company, and Jerry Allen Taylor : Unknown

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

MOUNTAIN STATES STEEL
COMPANY and ARGONAUT
INSURANCE COMPANY,

vs. *Plaintiffs,*

INDUSTRIAL COMMISSION OF
UTAH, LIBERTY MUTUAL
INSURANCE COMPANY, and
JERRY ALLEN TAYLOR,

Defendants.

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Case No.

DEC 30 1975

BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School

PLAINTIFFS' BRIEF

Appeal from an Order of
The Utah Industrial Commission.

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FILED

JAN 27 1975

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INSURANCE COMPANY,

Plaintiffs,

vs.

INDUSTRIAL COMMISSION OF
UTAH, LIBERTY MUTUAL
INSURANCE COMPANY, and
JERRY ALLEN TAYLOR,

Defendants.

Case No.
13872

PLAINTIFFS' BRIEF

NATURE OF THE CASE

This is an appeal from an order of the Utah Industrial Commission which decreed that apportionment of liability among successive workmen's compensation insurance carriers was not allowed in Utah in the absence of a statute specifically providing for apportionment.

DISPOSITION IN THE INDUSTRIAL COMMISSION

The Commission ruled that plaintiffs Argonaut Insurance Company and Mountain States Steel were liable to the applicant-employee, Jerry Taylor, for compensation under the Utah Workmen's Compensation Act

for his 15% permanent partial disability as well as his medical expenses and temporary total disability subsequent to the third of a series of three injuries to his back.

RELIEF SOUGHT ON APPEAL

The plaintiffs seek to have the order of the Industrial Commission reversed and have this court rule that apportionment of liability among successive Workmen Compensation insurance carriers is proper under the facts of this case.

FACTS

The applicant, Jerry Allen Taylor, sought compensation from the Utah State Industrial Commission for three back injuries which he alleged culminated in his permanent partial disability. In 1969, while working in Klakamus, Oregon, in the course of his employment with Linwood Lumber Company, the applicant injured his back while lifting. He was off work for three weeks as a result of this injury and was compensated for temporary disability under the Oregon Workmen's Compensation laws.

He eventually moved to Utah and began working for Mountain States Steel on May 22, 1969, where he continued to be bothered by pain in his left leg as a result of the Oregon injury. While working at Mountain States Steel he again injured his back while pushing a welding unit in January of 1973. The industrial accident insurance carrier for Mountain States Steel at that time was the defendant Liberty Mutual.

The applicant continued work without losing any time due to the second injury until October 5, 1973, when he tripped and twisted his ankle while walking through the shop where he worked. His back was again injured as a result of his tripping. Following this injury, he underwent surgery for the repair of two herniated intervertebral discs. The insurance carrier for the employer, (Mountain States Steel) at the time of this third injury was the plaintiff Argonaut. A hearing was held on March 7, 1974 before Richard G. Sumsion, hearing examiner for the Utah State Industrial Commission on the questions of the applicant's disability and the liability of the respective compensation insurance carriers.

Following the hearing, the applicant was referred to a special medical panel for an examination as to applicant's disability and the relationship of the applicant's back condition to the various industrial accidents that he had sustained.

No objections were filed to the medical panel findings by any of the parties and the hearing examiner adopted the findings of the medical panel. The findings of the medical panel were that the applicant had suffered a herniated but not extruded intervertebral disc as a result of the Oregon injury; that the injury of January 27, 1973 was a significant aggravating factor which contributed toward the eventual need for surgery; and that the third injury of October 3, 1973 was also a precipitating factor making surgery necessary at that time. The applicant was found to have a permanent 15% loss of body function, with 5% of that disability resulting

from each of the three accidents. (Pages 118 - 121 on the Record of Appeal).

The Examiner held that the applicant was entitled to benefits for the disability which resulted from the cumulative effect of the three injuries, and held each of the Utah carriers should pay one-third toward the applicant's permanent partial disability.

A motion for review was then filed by Liberty Mutual with a supporting memorandum, which was opposed by Argonaut Insurance Company. The matter was reviewed by the Industrial Commission which reversed the Order of the Examiner, holding that:

The State of Utah does not have an apportionment statute and in the absence of the same we are of the opinion that the responsibility should be assigned to the last carrier. (Findings of Fact and Conclusions of Law, page 2; Record on Appeal, p. 142)

The Commission continued:

It would appear to this Commission that there is some merit to the apportionment method applied by the New York Court but again we refer back to the *Storer* case [Duaine Brown Chevrolet Co. and Royal Globe Insurance Co. v. Industrial Commission and Storer, 511 P.2d 743, 29 U.2d 478 (1973)] where our court indicated we have no authority under present statute to make such an apportionment. (Findings of Fact and Conclusions of Law, page 3; Record on Appeal, p. 143).

The Commission then ordered Argonaut to pay compensation for all of the permanent 15% disability and the medical expenses and temporary disability incurred subsequent to October 3, 1973. It is from this order that the plaintiffs bring this action, seeking reversal of the Commission's order.

ARGUMENT

POINT I

THE UTAH CASE AUTHORITY UPON WHICH THE COMMISSION BASED ITS ORDER IS NOT CONTROLLING UNDER THE FACTS OF THE INSTANT CASE.

The Commission based its reversal of the Hearing Examiner's Order "primarily on the case of *Duaine Brown Chevrolet Co. and Royal Globe Insurance Co., vs. Industrial Commission of Utah and Arlen K. Storer*, 511 P.2d 743, 29 U.2d 478." (Findings of Fact and Conclusions of Law, page 2; Record on Appeal, p. 142). The Commission quoted the following language from the *Duaine Brown* case to support its holding that in the absence of an apportionment statute the full responsibility for the disability should be assigned to the last carrier:

Some states have apportionment statutes which allow a recovery to be prorated among multiple insurers. We have no such statute in the State of Utah, nor has the court attempted by decision to make apportionments. The record in this case would indicate that Storer's last injury aggravated his prior disability and the act

of the commission in assessing the award against the plaintiffs was correct. (Record on Appeal, p. 142).

What the Commission failed to perceive in so holding is the critical difference between the facts of the *Duaine Brown* case and the fact of the instant case. In *Duaine Brown* the defendant Storer was employed by Duaine Brown Chevrolet Company, and while in the course of his employment there he suffered a back injury on November 14, 1970. Prior to this time, he had suffered a back injury on April 1, 1970, while employed by Capitol Chevrolet Company, and had also suffered similar injuries in 1965, 1966 and 1969. Storer filed for Workmen's Compensation benefits following his last injury and the suit was heard by a hearing examiner after a medical panel had filed a report regarding the injuries. The medical panel in its report apportioned Storer's physical impairment among the various accidents, which would have had the effect of apportioning liability between various employers (and, thus, among their respective insurance carriers). However, the hearing examiner rejected the findings of the medical panel regarding apportionment, holding such an action to be improper. This was due to the fact that the chairman of the medical panel testified at the hearing that the medical panel was unable to attribute Storer's two herniated discs to any particular accident. In short, the panel had been unable to attribute the injury to any particular accident or accidents and as a result had apportioned the injuries between several accidents. The Commission concurred in the findings of the Examiner and this

court affirmed, stating that Utah had no apportionment statute allowing a recovery to be prorated among multiple insurers, "nor has the court attempted by decision to make apportionments." Under the facts of that case, the only decision that this court could reasonably have made was to affirm the refusal of the commission to apportion insurer's liability, since the medical panel had been unable to determine which accident or accidents caused the injury.

Although the instant case is very similar on its facts, even to the type of injury involved, one critical difference exists which makes this case a proper one for apportionment of the insurers' liability. Here the medical panel *was* able to apportion the physical impairments between three separate injuries, finding that a total 15% permanent disability existed with 5% of that disability attributable to each of the three accidents. The panel stated in its report, on page 3:

[the panel] is of the opinion that, though it may be somewhat arbitrary in nature, it would best be considered a reasonable medical probability that each of these events contributed one-third to the need for surgery at this time.

The panel discussed each of the three injuries in question, ruling specifically that each one contributed separately toward the total disability. In the *Duaine Brown* case, the panel, finding itself unable to attribute the disability to any particular injury, threw up its hands in frustration and divided the liability in a totally arbitrary fashion. Since the recommended apportion-

ment there was totally without supporting findings or evidence, the Commission in that case correctly ruled that apportionment was improper.

The instant case presents a totally different situation, one where the panel clearly and unequivocally was able to divide the total physical disability into three separate and distinct, but cumulative segments. Under this set of facts, the only logical and reasonable course to follow would be apportionment of the liability coinciding with the apportionment of the disability.

POINT II

THIS COURT SHOULD ADOPT THE RULE OF APPORTIONMENT UNDER THE FACTS OF THIS CASE.

Although Utah does not have a statute which apportions liability among insurance carriers, the concept of apportionment is not foreign to the Workmen's Compensation Law of Utah. Section 35-1-69 provides that if an employee becomes permanently incapacitated as a result of an industrial injury while already suffering from a pre-existing permanent incapacity, the liability for the incapacity is apportioned according to a certain formula, provided that the incapacity following the last injury is "substantially greater" than the incapacity which would have existed without the last injury. This statute is commonly known as the second-injury fund statute, and its effect is to alleviate the harshness of the rule that the last insurer (i.e., employer) bears the bur-

den for the entire incapacity in certain situations. The statute reads in part as follows:

A medical panel having the qualifications of the medical panel set forth in Section 35-2-56, shall review all medical aspects of the case and determine first, the total permanent physical impairment resulting from all causes and conditions including the industrial injury; second, the percentage of permanent physical impairment attributable to the industrial injury; and third, the percentage of permanent physical impairment attributable to the industrial injury; and fourth, the percentage of permanent physical impairment attributable to previously existing conditions whether due to accidental injury, disease or congenital causes. *The Industrial Commission shall then assess the liability for compensation and medical care to the employer on the basis of the percentage of permanent physical impairment attributable to the industrial injury only and the remainder shall be payable out of the said special fund.* Amounts, if any, which have been paid by the employer in excess of the portion attributable to the said industrial injury shall be reimbursed to the employer out of said special fund. (Emphasis added).

Were it not for the fact that none of the injuries in the instant case "substantially" increased the incapacity of Mr. Taylor, 35-1-69 would be applicable, in which case the liability would have been apportioned between the last carrier and the special second-injury fund, into which all participating employers pay.

It is not argued that 35-1-69 applies to the instant situation, but it does set a statutory precedent for the

concept of apportionment in the field of the law, and for that reason should be considered.

Other than the *Duaine Brown* case, there appears to be no case in this jurisdiction which definitely decides whether or not apportionment of liability among Workmen's Compensation insurance carriers should exist in the absence of a statute, but many other courts have done so.

As noted in the Commission's Findings, Conclusions and Order, pages 2 and 3, Larson on Workmen's Compensation, Vol. 3, Section 95 reads as follows:

When a disability develops gradually, or when it comes as a result of a succession of accidents, the insurance carrier covering that risk at the time of the most recent injury or exposure bearing any causal relation to the disability is usually liable for the entire compensation. In some jurisdictions, apportionment has been worked out by judicial decision, or provided for by express statute, when events within the coverage period of successive insurers contribute causally to the final disability.

Mr. Larson further states that the above rule is "tempered in some jurisdictions by a practice permitting apportionment between two carriers when two successive accidents combine to produce the final disability." The leading case establishing this rule is *Anderson v. Babcock and Wilcox Company*, 175 N.E. 654 (N.Y. 1931), wherein the injured employee fell while on the job on December 3, 1926, fracturing his hip. The fracture apparently

healed following medical care, and Anderson went back to work where, on August 8, 1927, while he was lifting a heavy timber, the fragments in the hip parted at the line of union, resulting in a disability.

The first accident occurred while Anderson was in the employ of Carl Pierleoni, the second while he was working for Babcock and Wilcox Company. An award for the total disability was made against Babcock and Wilcox Company and its insurance carrier, Travelers, and from this award an appeal was taken.

The court stated:

Here it would seem that the evidence points conclusively to two accidents; that the bones merely parted does not appear. The healing and union were partial as was apparent from the evidence as to the cracks felt in the hip at the same place where the fracture had been . . . The lifting of the heavy timber produced an accidental result. . . . Obviously that result would not have happened had it not been for the first injury, but it was immediately due to strain caused by heavy lifting. (175 N.E. at p. 655).

The court continued:

On the evidence the present disability exists by reason of the two accidents, and the compensation should be equally apportioned between the two insurers. Unjust it is that the second insurer should bear the entire liability when the second accident is related in large measure to the first. No less unjust it is that the first insurer should bear the entire liability if it appears that without

the second accident an earlier recovery might have been had. In no event does the evidence sustain an award against the second insurer alone. (175 N.E. at p. 655).

The court then reversed and remanded the case to the Industrial Board for a determination as to how the liability should be apportioned.

Subsequent to the *Babcock* decision, several cases have adopted a rule of apportionment under circumstances similar to those of the instant case.

In *Tri-State Insurance Co. v. Industrial Commission*, 379 P.2d 388 (Colo. 1963), the Colorado Industrial Commission awarded compensation to one Boyd Ezell, finding that he was 20% permanently but partially disabled as a working unit as a result of three separate back injuries. The first injury occurred on May 7, 1958, while working in Oklahoma, the second injury occurred on June 15, 1958 while working for Sooner Contracting Company in Colorado and the third injury occurred September 22, 1958, while again working for Sooner.

The insurance carrier in June 1958 was Tri-State while the carrier in September, 1958 was Standard Casualty Company.

The Commission apportioned the liability for the compensation due for the permanent disability equally between the two carriers. Tri-State appealed, urging that the apportionment was not proper under Colorado law. The fact that Sooner Company was liable for the

entire injury was not disputed nor was the finding of 20% disability.

In upholding the Commission's decision, the court ruled that where two injuries occur during one employment, both of which contribute toward a permanent disability, and two carriers are involved, one with coverage of the first injury and one with the coverage of the second, it is proper to apportion the award made for the total disability between the two, even in the absence of an apportionment statute. The court quoted from an earlier opinion, stating the reason for its holding.

We think it is the policy of the Workmen's Compensation Act to at all times hold the employer primarily liable to the employee for disability proximately resulting from accidents arising out of and in the course of the employment. . . . It was not within the power of the employee to require the employer to insure in one company, nor was it within his power to prevent the employer from insuring with two companies; but it was within the power of the employer and the two insurance companies to provide as they might deem advisable against just such contingency as has here arisen. The Commission, as a fact-finding body, has exercised its best judgment in assessing the payment of this award against the two companies equally. . . . (379 P.2d at p. 391).

In *Haverland v. Twin City Milk Producers Ass'n.*, 142 N.W.2d 274 (Minn. 1966), the court ruled that apportionment was proper in a workman's compensation case where two or more injuries were causally connected with a resulting disability.

Haverland, the employee, while in the course of his employment, injured himself on December 28, 1960, while working for Twin City's Milk Producers. Surgery was required to repair a ruptured bicep muscle and he eventually returned to work where on October 13, 1961 he sustained a herniated intervertebral disc while working. Following hospitalization for this injury and subsequent partial recovery, he again returned to work. On November 21, 1961, while working for Tilleges Lumber Company in a part-time capacity, he was again injured when a truck backed over him and was subsequently hospitalized with serious injuries. He eventually returned to work where, on August 18, 1962 (while working for Twin Cities), he slipped and fell from a ladder, fracturing his right leg. Again, he returned to work following recovery and on the second day after returning he became ill and was hospitalized with what was diagnosed as severe mental depression and conversion hysteria.

Following this series of events, he filed a claim for permanent total disability due to his lack of capacity to perform any work stemming from his mental disease. He was awarded temporary total disability from August 18, 1962 to August of 1973 and temporary partial disability for some months after that. The referee held that the insurer who covered the accident of August 18, 1962 was liable for this award under the provisions of Minn. St. 1961, Section 176.13, which is similar to Section 35-1-69 U.C.A. (1953). The Industrial Commission upheld this award and Twin Cities appealed, arguing that the award should be apportioned between it and those who were liable for the injuries prior to August 18, 1962.

The court reversed and remanded for a determination of whether or not the accidents prior to August 18, 1962 were causally connected with the disability, saying:

While we have not had occasion to pass directly on this question, we have approved apportionment of liability for disability resulting from successive accidents under the same employer between two insurers, one of whom represented the employer at the time of the first accident and the other of whom represented him when the second occurred [citations deleted].

It appears reasonable that if liability for compensation arising from two or more industrial accidents under the same employer may be apportioned between his successive insurers, it would likewise be apportionable between successive employers where industrial accidents are sustained under each of them, both of which contribute to the disability of the employee. Such apportionment, of course, would be in the ratio that each accident bears to the total disability involved, but without limiting the primary responsibility of the last employer as provided in Section 176.13. (142 N.W.2d at 280).

In *Mund v. Farmers Cooperative*, 94 A.2d 19, (Conn. 1952), a workman's compensation case, the court opted for a rule of apportionment without a specific status dictating that such should be the practice.

On July 29, 1946, the employee in question strained his back while in the course of his employment and while Ocean Accident & Guarantee, Ltd. was the insurance carrier for his employer. As a result of this accident he was disabled, but eventually returned to work following

conservative treatment, suffering from a 15% permanent disability. On June 29, 1950, he re-injured his back while working for the same employer, but this time Liberty Mutual Insurance Company was the carrier for his employer. This time surgery was performed and he eventually returned to work on October 16, 1950 still with a permanent disability (although the court's opinion does not specify the percentage of the disability after the second injury). An appeal was taken after the commission directed that both insurers should bear the cost of the disability and medical expenses following the second injury, and the issue on appeal was framed by the court as follows:

The appeal presents the question of whether the [lower] court erred in sustaining the Commission's decision requiring both of the defendant insurers as well as the defendant employer to pay the award.

The court held, after discussion of the arguments presented by the insurers (each urging that the other should bear the full burden) that:

There is a conflict of authority in other jurisdictions on the respective liability of successive insurers, but the rulings of a substantial group of courts support our conclusion that the commissioner's award against both insurers should be sustained. . . . It is our conclusion that upon the facts found in the present case common sense and fairness support the rule adopted in New York, Minnesota and Arkansas. The Commissioner's conclusion holding both insurers equally liable was properly sustained. (94 A.2d at p. 22).

In *Employer's Casualty Co. v. United States Fidelity and Guaranty Company*, 214 S.W.2d 774 (Arkansas 1948), an injured workman applied for compensation following an industrial injury. The employee injured his back while in the course of his employment on December 19, 1946, while pushing a wheelbarrow, but continued to work until February 14, 1947, although he was in pain during this entire period. After visiting several doctors, he was finally operated on for a herniated disc in his lower back on April 16, 1947. The state's Industrial Commission found following its hearing that prior to December 19, 1946, the employee suffered from a pre-existing back weakness which made him susceptible to injury, that he had aggravated this pre-existing condition on December 10, 1946, and that from December 19, 1946 to February 14, 1947, he had continued to receive successive injuries to his back which progressively aggravated his condition until these events finally culminated in a disability. U.S. Fidelity, was the workman's compensation insurance carrier, on the employer in question prior to February 1, 1947, at which time, Employer's Casualty took over. The issue on appeal was framed by the court as follows:

The question for our determination is the respective liabilities of these two insurance carriers to pay the award, it being appellant's contention that the full liability should fall upon appellee, and appellee on cross-appeal argues that the full liability should fall upon appellant. (214 S.W.2d at p. 774).

The court held as follows:

In the circumstances here, while this court as above noted appears not to have specifically passed upon the question dividing liability, and while we think the evidence, when liberally construed, was sufficient to have fastened liability on either of these insurance carriers for the full amount, we are unable to say that an equal division of this liability, for a single disability, on the facts presented, was not within the Commission's power and we hold that the action of the trial court in affirming the Commission's order is supported by reason and authority. (214 S.W.2d at p. 777).

Also see *Continental Casualty Co. v. Industrial Commission*, 445 P.2d 846 (Ariz. 1968) and *Quinn v. Automatic Sprinkler Co.*, 142 A.2d 655 (N.J. 1958).

The common thread which runs through all of these cases is the fact that a compensable disability is causally connected with two or more injuries and it is possible to attach a percentage of the disability to each injury. This is exactly the situation in the instant case. Even though the Workmen's Compensation law of Utah is statutory rather than common law, this court still has the power to interpret and expand statutory law when the situation requires it. The facts of the instant case present a more compelling case for apportionment than any of the fact situations in the cases cited above, and the most sound and logical course to follow would be to apply the rule of apportionment in this case.

CONCLUSION

The plaintiffs do not seek a blanket holding that apportionment should apply in all situations where two insurance carriers have coverage over a succession of injuries, nor do they even contend that apportionment is proper in all cases where two or more injuries result in a disability. All plaintiffs seek from this court is a ruling that under the facts of this particular case, where the medical panel is able to and clearly does, upon sufficient evidence, divide the responsibility for a disability among two or more successive injuries, and where each of these injuries is found by the panel to be a partial cause of the total disability, and where a causal connection is found between each injury and the final disability, the liability for that disability (including the medical expenses incurred as a result) should be apportioned among successive insurance carriers and/or employers, should they exist.

Respectfully submitted,

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