1987

Laverene H. Lawrence v. Second Injury Fund : Brief of Appellee

Utah Court of Appeals

Erie V. Boorman; Attorneys for Defendants.
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IN THE UTAH COURT OF APPEALS OF THE STATE OF UTAH

LAVERNE H. LAWRENCE,	*	
Plaintiff,	*	BRIEF OF DEFENDANT
vs.	*	SECOND INJURY FUND
SECOND INJURY FUND	*	Priority #6
Defendant.	*	Case No. 870345-CA

DEFENDANT'S BRIEF

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I. JURISDICTION

This action is brought pursuant to Utah Code Annotated, 35-1-83 (1953, as amended 1987) which confers original jurisdiction in such motions for review on the Utah Court of Appeals.

II. NATURE OF PROCEEDINGS

This Petition is for review of a final order of the Utah State Industrial Commission. The Findings of Fact, Conclusions of Law, and Order by the Administrative Law Judge of the Industrial Commission were entered March 4, 1987. A Motion for Review was filed by the plaintiff on March 18, 1987, which Motion was denied by Order of the Commission dated June 24, 1987. It is the Findings of Fact, Conclusions of Law, and Order as upheld by the Industrial Commission that is the subject of this Appeal.

III. ISSUES

Neither the facts in this case nor the findings of impairments are in dispute. The legal issue presented is one of statutory interpretation: Can Lawrence combine the permanent impairments resulting from separate industrial injuries with the same

employer in order to reach the 10% threshold necessary for compensation of pre-existing conditions neither caused nor aggravated by any of the industrial injuries, under the 1981 amendments to Section 35-1-69, the combined injury statute?

IV. STATEMENT OF THE CASE

Neither the facts in this case nor the findings of impairments are in dispute. The legal issue presented is one of statutory interpretation and is identical to that presented to and decided by This Court in its recent Opinion filed March 10, 1988, in the case of Richard Otvos v Industrial Commission and Second Injury Fund, 78 Utah Adv. Rep. 14, (Ct. App. 03/10/88). In this case-as in Otvos-the applicant experienced two separate industrial incidents on separate dates while working for the same employer. The Medical Panel found that these two incidents which occurred September 10, 1985, and November 29, 1985, respectively, resulted cumulatively in permanent partial impairment totalling 10%. That impairment was found by the panel to be allocated 3.3% to the industrial incident of September 10, 1985 and 6.7% whole-man impairment to the injury of November 29, 1985. The Medical Panel also found that the applicant had substantial pre-existing impairment which was not related to or aggravated by either industrial injury. That pre-existing impairment was determined by the panel to be 15% whole-man impairment (combined to 14% through application of the Second Injury Fund statute 35-1-69). No objections to the Medical Panel findings were filed by applicant or by any of the parties. Accordingly, the Administrative Law Judge entered Findings of Fact, Conclusions of Law, and Order in which he adopted the Medical Panel Report and

awarded applicant, Laverne H. Lawrence, (hereafter called "Lawrence") compensation for a 3.3% permanent partial impairment due to the industrial accident of September 10, 1985 and compensation for a 6.7% permanent partial impairment of the whole person due to the industrial accident of November 29, 1985. No compensation was awarded by the Administrative Law Judge to Lawrence for the pre-existing impairment which was neither related to nor aggravated by either the industrial accident of September 10, 1985 or that of November 29, 1985 because neither of the industrially caused impairments met the 10% threshold minimum requirements set forth in The Combined Injury Statute, Utah Code Annotated Section 35-1-69(1)(b)(1987). Therefore, the award of benefits was restricted to the impairments caused by the two industrial injuries.

On March 18, 1987, Lawrence through his counsel filed a Motion for Reconsideration (Motion for Review) in which he contended that all of his pre-existing impairment, including the 15% unrelated and unaggravated pre-existing impairment as well as the 3.3% impairment resulting from the September 10, 1985 accident, became "pre-existing" to the November 29, 1985 accident and since the latter accident aggravated a portion (3.3%) of the pre-existing impairment then all pre-existing impairment properly should be due from defendant Second Injury Fund to Lawrence. This argument was rejected by the full Commission in its Order Denying Motion for Review issued June 24, 1987. The Commission affirmed the Administrative Law Judge's Order holding that the Administrative Law Judge as well as the Commission must look at each accident separately or serially, as done by the Supreme Court in the

Torgerson case 52 Utah Adv. Rep. 22 (1987) and that since neither of the two separate industrial accidents caused permanent partial impairment amounting to 10%, there could be no liability on the part of the Second Injury Fund for the pre-existing impairment. Lawrence then filed his timely Petition for Review with this Court on July 27, 1987 asserting "that the Industrial Commission of Utah acted in error as a matter of law in its interpretation of Section 35-1-69 Utah Code Annotated, and other statutory sections dealing with the apportionment of and payment of permanent partial impairment benefits."

V. DETERMINATIVE AUTHORITY

The authority believed to be determinative of the issue in this case is Section 35-1-69(1)(b)(1987) as interpreted by this Court in the recent (March 10, 1988) Opinion in the Otvos' case, Supra. Other pertinent authorities, also referred to in detail in the Otvos Opinion, are Second Injury Fund v. Streator Chevrolet, 709 P.2d at 1180 upholding the validity of the threshold provision set forth in subsection (1)(b) of Section 35-1-69 and Richfield Care Center v. Torgerson, 773 P.2d 178 (Utah 1987), a holding consistent with the position of the Second Injury Fund in this case that injuries must be considered individually for purposes of determining compensation under the statute.

VI. SUMMARY OF ARGUMENT

It is the position of the defendant that the decision of this Court in the Otvos' case is wholly dispositive of this controversy. There is no dispute that Lawrence incurred two separate industrial injuries. There is no dispute that the 15%

pre-existing impairment was not aggravated by the either of the separate industrial injuries. The Medical Panel allocated 3.3% whole-man impairment to the injury of September 10, 1985 and 6.7% whole-man impairment to the industrial injury of November 29, 1985. No objection was raised with respect to either of those allocations within the time allotted by the statute and in fact no objection was raised with respect to those allocations in the Motion for Review filed in behalf of Lawrence. The Medical Panel Report was adopted by the Administrative Law Judge in its entirety and was also accepted in its entirety by the full Industrial Commission as evidenced by its Denial of Motion for Review. Accordingly, there is no valid dispute before this Court to the established facts that neither the September 10, nor the November 29, 1985 industrial accident resulted in a whole-man permanent partial impairment sufficient to qualify either accident for payment for pre-existing impairments under the threshold limits set out in Section 35-1-69(1)(b). The only remaining issue is whether or not Lawrence can pyramid or combine the permanent partial impairments of the two injuries in order to qualify under the statute for Second Injury Fund benefits. That issue has been fully considered in all its aspects by This Court in its lengthy opinion in Otvos, which opinion closed with the following:

> Clearly then, if the legislature intended to allow for the accumulation of injuries under the 10% threshold requirement, it knew what language to use, as indicated by the language describing the 20% requirement.
>
> . . . however, he simply does not meet the 10% threshold of permanent physical impairment attributable to a single, relevant industrial injury and is therefore not entitled to compensation for the pre-existing congenital birth

defects in his arms. Accordingly, we affirm the Order of the Industrial Commission.

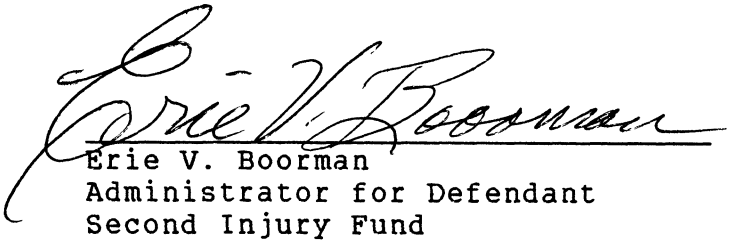
In summary, the above-quoted language from Otvos applies in its entirety to the claim of Lawrence in this case to Second Injury Fund compensation for his pre-existing impairment. Neither of his acknowledged separate industrial injuries meets the threshold qualification of the statute. Therefore, his claim before This Court properly should be dismissed.

VII. ARGUMENT AND CONCLUSION

It is defendant Second Injury Fund's position that no further argument by way of elaboration on either the facts, the law or the applicable statutory interpretations of This Court or the Utah Supreme Court is necessary-nor would it be helpful-in this case. The basic positions of Lawrence, both legal and equitable, have all been considered thoroughly in the Otvos case and, to a lesser extent, in the Streator and Torgerson cases. We now have a resolution from This Court which is consistent with the statute and is consistent with the decisions referred to above. It is the strong position of this defendant that any contrary decision in this case would result in complete turmoil with respect to our efforts to obtain a consistent interpretation of the combined injury fund statute and some consistent and reliable guidelines to be applied in determining qualification for benefits under the threshold provisions of that statute. It should be somewhat comforting for This Court to know that the Utah Legislature in its recent 1988 session completely repealed Section 35-1-69 as it presently exists and that Second Injury Fund participation no longer will occur in

any cases other than permanent total disability claims. In other words, there will be no Second Injury Fund payments of any kind for pre-existing impairments, whether aggravated or unrelated, except in permanent total disability claims. However, this case still must be resolved under 35-1-69 as it reads at the present time and as interpreted by This Court in Otvos and Torgersen, along with the Utah Supreme Court's Decision in Streator. The holdings and the rationale of those cases applied to the undisputed facts and findings of this controversy require beyond question the affirmance of the Decision of the Industrial Commission and the dismissal of Plaintiffs Appeal to This Court.

Respectfully submitted this 6th day of April, 1988.



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Certificate of Mailing

I hereby certify that I mailed (2) copies of the foregoing Brief of Defendant Second Injury Fund to the following parties by hand delivery this 6th day of April, 1988:

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