

1986

LDS Hospital v. Industrial Commission of Utah, Second Injury Fund and Anna Webster: Brief of Respondent Second Injury Fund

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

DOCKET NO. 86 0046

LDS HOSPITAL,

Defendant and Appellant,

vs.

INDUSTRIAL COMMISSION OF UTAH,
SECOND INJURY FUND and
ANNA WEBSTER,

Respondents.

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Case No. 860046

BRIEF OF RESPONDENT SECOND INJURY FUND

Appeal from an Order of the Industrial Commission of Utah which held that the Respondent Webster (1) was partially dependent notwithstanding over \$85,000 in savings and (2) that the Second Injury Fund was not liable for dependency benefits beyond the initial 312 weeks of benefits.

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STATEMENT OF SECOND INJURY FUND ISSUE ON APPEAL

Did the Industrial Commission commit reversible error when it held that the 1979 Utah Legislative Amendment to U.C.A. Section 35-1-68 removed the liability of the Second Injury Fund for dependency death benefits after the first 312 weeks and, in effect, assigned the liability for all dependency death benefits to the employer/carrier?

STATEMENT OF THE CASE AS IT PERTAINS TO SECOND INJURY FUND LIABILITY

It is not controverted and the record shows that Gene Webster husband of respondent Anna Webster died on December 15, 1982 due to complications arising out of his industrial accident of July 20, 1979. The 312 week period of statutory benefits from the date of injury ended in 1985. At that time Mrs. Webster was receiving \$179.00 per week. She applied to the Commission for continued benefits pursuant to Section 35-1-68, as amended in 1979. The Second Injury Fund declined liability, pointing out that the amendment in 1979 by the Utah Legislature of Section 35-1-68, effectively removed the Second Injury Fund from the liability for dependency death benefits after the 312 week period which had existed prior to the 1979 amendment.

Applicant requested a hearing which was held on June 26, 1985. The Administrative Law Judge, in an Order dated July 2, 1985, held Mrs. Webster to be partially dependent and ordered the self-insured employer, appellant herein, to pay her \$89.50 per week (R. 78-80). Applicant filed two separate

Motions for Review. The first, filed on August 28, 1985, contended that the widow claimant is not a dependent because of other financial resources available to her. The Second Motion for Review was filed October 8, 1985 and constitutes Appellant's first contention that the additional death benefits should be paid out of the Second Injury Fund rather than by the employer as Ordered by the Administrative Law Judge.

On January 9, 1986 the full Industrial Commission in a unanimous Order Denying Motion for Review, denied both Motions for Review and, as pertaining to Second Injury Fund liability, specifically held that the 1979 amendment to Section 35-1-68 deleted the prior language in that section assigning liability to the Second Injury Fund for dependency benefits after the 312 week period and replaced it with language assigning responsibility for dependency benefits to the employer or insurance carrier [Section 35-1-68 (2) (c) (iii)].

On January 11, 1986, Appellant filed its Petition for Review with this Court asserting that the industrial Commission committed reversible error in refusing to order the Second Injury Fund to pay dependency benefits after the expiration of the initial 312 week period.

SUMMARY OF ARGUMENT BY RESPONDENT

SECOND INJURY FUND

The obligation of the Second Injury Fund for dependency death benefits was removed by Legislative amendment to Section 35-1-68, U.C.A.,

passed March 8, 1979, in effect May 8, 1979. The amendment deleted the former language in that Section assigning liability for continued dependency death benefits to the Second Injury Fund and inserted new language specifically assigning responsibility for all dependency death benefits to the employer or insurance carrier.

ARGUMENT

I. Prior to 1979, Section 35-1-68, U.C.A. assigned responsibility for dependency death benefits to the employer or its insurance carrier from the date of death to date not to exceed 312 weeks (6 years). Section 35-1-68 (2) and 35-1-68 (3). Following the termination of that period, responsibility for continued dependency death benefits was specifically assigned to the Second Injury Fund (then called Special Fund) by subsections (4) and (5) of Section 35-1-68. The pertinent language of Section 35-1-68 prior to its amendment in 1979 is as follows:

35-1-68. Second injury fund created-Purpose-Funding-Injury causing death-Filing claim within one year-payment into fund when no dependents-Payment to dependents-Presumptions of dependency-Payment to partially dependent persons-Effect of remarriage.

In case injury causes death within the period of six years from the date of the accident, the employer or insurance carrier shall pay the burial expenses of the deceased as provided in section 35-1-81, and further benefits in the amounts and to the persons as follows:

(1) If there are no dependents,. . . .

(2) If there are wholly dependent persons at the time of the death, the payment shall be $66 \frac{2}{3}\%$ of the decedent's average weekly wage at the time of the injury, but not more than a maximum of 85% of the state average weekly wage at the time of the injury per week and not less than a minimum of \$45 per week plus \$5 for a dependent spouse and \$5 for each dependent minor child under the age of eighteen years, up to a maximum of four such dependent minor children not to exceed the average weekly wage of the employee at the time of the injury, but not to exceed

85% of the state average weekly wage at the time of the injury per week, to continue during dependency for the remainder of the period between the date of the death and not to exceed six years or 312 weeks after the date of the injury.

(3) If there are partly dependent persons at the time of the death, the payment shall be 66 2/3% of the decedent's average weekly wages at the time of the injury, but not more than a maximum of 85% of the state average weekly wage at the time of the injury per week and not less than a minimum of \$45 per week, to continue during dependency for the remainder of the period between the date of death and not to exceed six years or 312 weeks after the date of injury as the commission in each case may determine and shall not amount to more than a maximum of \$15,600. The benefits provided for in this subsection shall be in keeping with the circumstances and conditions of dependency existing at the date of injury, and any amount awarded by the commission under this subsection must be consistent with the general provisions of this title.

(4) If there are wholly dependent persons and also partly dependent persons at the time of death, the commission may apportion the benefits as it deems just and equitable; provided, that the total benefits awarded to all parties concerned shall not exceed the maximum provided for by law. Following the period during which the employer or its insurance carrier is required to pay benefits under this act, there shall be paid to such persons, during the period of their dependency, out of the special fund provided for in subsection (1), the same benefits as paid by the employer or its insurance carrier, as provided in subsection (2) and (3). The issue of dependency shall be reviewed at the time application is made for additional benefits from the special fund. (emphasis supplied)

(5) The commission shall order that there be paid to such dependents as provided in subsections (2) and (3), benefits at the rate of 66 2/3% of the deceased's average weekly wages at the time of the injury, but not more than a maximum of 85% of the state average weekly wage at the time of the injury per week and not less than a minimum of \$45 per week, out of that special fund provided for in subsection (1) and for that period of time beginning with the time that the payments to be made by the employer or its insurance carrier terminate and ending upon the termination of said dependency. (emphasis supplied)

(6)

II. 1979 Amendment: Section 35-1-68 following the Legislative amendment, effective May 8, 1979, reads as pertinent hereto as follows:

35-1-68. Second injury fund-Injury causing death-Burial expenses-Payments by employer or insurance carrier-Filing claim within one year-Payments to dependents-Review of dependency-Appportionment of benefits (emphasis supplied)

(1)

(2) In case injury causes death within the period of six years from the date of the accident, the employer or insurance carrier shall pay the burial expenses of the deceased as provided in section 35-1-81, and further benefits in the amounts and to the persons as follows:

(a)

(b) (i) If there are wholly dependent persons at the time of the death, the payment by the employer or insurance carrier shall be $66 \frac{2}{3}\%$ of the decedent's average weekly wage at the time of the injury, but not more than a maximum of 85% of the state average weekly wage at the time of the injury per week and not less than a minimum of \$45 per week plus \$5 for a dependent spouse and \$5 for each dependent minor child under the age of eighteen years, up to a maximum of four such dependent minor children not to exceed the average weekly wage of the employee at the time of the injury, but not to exceed 85% of the state average weekly wage at the time of the injury per week, to continue during dependency for the remainder of the period between the date of the death and not to exceed six years or 312 weeks after the date of the injury.

(ii) The weekly payment to wholly dependent persons during dependency following the expiration of the first six-year period described in subsection (2)(b)(i) shall be an amount equal to the weekly benefits paid to those wholly dependent persons during the initial six-year period, reduced by 50% of any weekly federal social security death benefits paid to those wholly dependent persons.

(iii) The issue of dependency shall be subject to review by the commission at the end of the initial six-year period and annually thereafter. If in any such review it is determined that, under the facts and circumstances existing at that time, the applicant is no longer a wholly dependent person, the applicant may be considered a partly dependent or non-dependent person and shall be paid such benefits as the commission may determine pursuant to subsection (2)(c)(ii).

(iv) For purposes of any dependency determination, a surviving spouse of a deceased employee shall be conclusively presumed to be wholly dependent for a six-year period from the date of death of the employee. This presumption shall not apply after the initial six-year period and, in determining the then existing annual income of the surviving spouse, the commission shall exclude 50% of any federal social security death benefits received by that surviving spouse.

(c) (i) If there are partly dependent persons at the time of the death, the payment shall be 66 2/3% of the decedent's average weekly wages at the time of the injury, but not more than a maximum of 85% of the state average weekly wage at the time of the injury per week and not less than a minimum of \$45 per week, to continue during dependency for the remainder of the period between the date of death and not to exceed six years or 312 weeks after the date of injury as the commission in each case may determine and shall not amount to more than a maximum of \$18,720. The benefits provided for in this subsection shall be in keeping with the circumstances and conditions of dependency existing at the date of injury, and any amount awarded by the commission under this subsection must be consistent with the general provisions of this title.

(ii) Benefits to persons determined to be partly dependent pursuant to subsection (2)(b)(iii) shall be determined by the commission in keeping with the circumstances and conditions of dependency existing at the time of the dependency review and may be paid in a weekly amount not exceeding the maximum weekly rate that partly dependent person would receive if wholly dependent.

(iii) Payments under this section shall be paid to such persons during their dependency by the employer or insurance carrier. (emphasis supplied)

(d)

(e)

Analysis of the dependency death benefit provision of Section 35-1-68 before and after the legislative amendments of 1979 reveals clearly the change in responsibility for the payment of such benefits made by the Legislature in its enactment of the 1979 amendments. Under the pre-1979 Statute the responsibility of the employer or insurance carrier is clearly limited to the 312 weeks (6 year) period following the date of injury (death) by subsections (2) and (3) while subsections (4) and (5) of 35-1-68 unmistakably require the Special Fund to continue the same benefits during their continued dependency beyond the termination of the employer/carrier liability.

Likewise, the intent of the Legislature in the 1979 amendments to

exempt the Second Injury Fund from future dependency death benefits and to assign liability for such benefits to the employer/carrier is manifest beyond question. All references to the Special Fund (Second Injury Fund) with respect to dependency death benefits were deleted and new language was inserted in the statute expressly assigning the responsibility for all dependency death benefits to the employer/carrier. What could be more clear than the new language of Section 35-1-68 found in subsection (c) (iii) that:

Payments under this section shall be paid to such persons during their dependency by the employer or insurance carrier.

In summary, the Legislature in its 1979 amendment to Section 35-1-68 accomplished its dual objectives of (1) removing the Second Injury Fund from any future liability for continued dependency death benefits and (2) assigning responsibility for all such benefits to the employer or its insurance carrier. As the Industrial Commission indicated in its Denial of Motion for Review, the 1979 amendments to this Section were in response to the increasing liability placed on the Second Injury Fund. At the same time, however, the impact upon the employer/carrier was alleviated by additional amendments providing for annual review of the dependency issue after the initial six year period, the exclusion of the dependency presumption after that date and the offset of 50% of any federal social security death benefits received by the surviving spouse. Such changes, along with those made on the dependency of spouses and minor children and the effect of remarriage of the surviving spouse, operate to support beyond reasonable controversy the decision of the Industrial Commission that the 1979 amendments to Section 35-1-68 effectively removed the Second Injury Fund from liability for continued dependency death benefits.

RESPONSE TO POSITION ASSERTED BY APPELLANT

The 1979 amendment to Section 35-1-68 removing the Second Injury Fund from liability for continued dependency death benefits is neither affected by nor inconsistent with Section 35-1-70 referred to by Appellant as being determinative of its liability in this controversy.

Appellant has asserted that Section 35-1-70 somehow applies to this case and operates to overcome and nullify the new language in Section 35-1-88 enacted in 1979 carrying out the intent of the Legislature (1) to assign responsibility for continued dependency death benefits to the employer or its insurance carrier and (2) to remove any liability for such benefits from the Second Injury Fund. As the Industrial Commission stated in its Denial of Motion for Review, the "special cases" provision of Section 35-1-70 is not contradictory to Section 35-1-68, as amended in 1979, and does not apply in this controversy in any event. As pointed out by the Commission, Section 35-1-70 gives the Commission, in its discretion, certain authority to continue benefits which otherwise would have been terminated. In this case, applicant's benefits have not "otherwise been terminated"; therefore there is no occasion for the Commission to exercise its discretion under 35-1-70.


In summary, Appellants reliance upon Section 35-1-70 is misplaced. That Section was not intended nor does it operate to nullify the expressed intent of the Legislature in 1979 to remove the Second Injury Fund from liability for continued dependency death benefits.

CONCLUSION

It was not error for the Commission to refuse to order the Second Injury Fund to pay the continued dependency death benefits in this case.

Analysis of the death benefit provisions of the Act, Section 35-1-68, before and after its amendment in 1979 by the Utah Legislature reveals unmistakably that the Legislature intended to and in fact clearly accomplished its objectives (1) to remove the Second Injury Fund from its former liability for continued dependency death benefits and (2) to assign responsibility for such continued dependency benefits to the employer or its insurance carrier. The amendments which became effective May 8, 1979 are not in conflict with Section 35-1-70 as asserted by appellant nor are they nullified or modified by that Section with respect to the liability of the Second Injury Fund in this case.

Respectfully submitted this 3d day of June, 1986.

A handwritten signature in cursive script, reading "Erie V. Boorman", is written over a horizontal line.

Erie V. Boorman
Administrator and Attorney
For the Respondent Second Injury Fund

CERTIFICATE OF MAILING

I certify that on June 3 , 1986

two (2) copies of the attached Brief of Respondent

were mailed to the following persons at the following
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THE INDUSTRIAL COMMISSION OF UTAH

By Madelyn