

1988

Wicat Systems and Hartford Insurance v. Sylvia Pellegrini : Reply Brief

Utah Court of Appeals

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Stuart L. Poelman; Snow, Christensen & Martineau; Attorneys for Appellants.

Erie V. Boorman; Attorney for Defendants.

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BRIEF

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880218-CA

COURT OF APPEALS

STATE OF UTAH

WICAT SYSTEMS and HARTFORD
INSURANCE,

Plaintiffs,

Appeals Case No. 880218-CA

vs.

SYLVIA PELLEGRINI, SECOND
INJURY FUND OF UTAH and THE
INDUSTRIAL COMMISSION OF UTAH,

Defendants.

APPELLANT'S REPLY BRIEF

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II. TABLE OF AUTHORITIES

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III. SUMMARY OF ARGUMENT IN ANSWER TO MATTERS
SET FORTH IN RESPONDENT'S BRIEF.

No evidence exists in the record to support Respondent's argument that the 1984 amendment to Utah Code Ann. § 35-1-69 was remedial or that appellate courts were confused about the pre-1984 version of Section 69. Rather, the Utah Supreme Court interpretation and application of the pre-1984 version of Section 69 are clear and unequivocal. Appellants' rights vested at the time of the injury and those rights are in the nature of contractual rights. The employer's rights and liabilities are equally as substantive as those of the injured employee. For purposes of determining the employer's liability and to meet the purposes of Section 69, the employer is entitled to rely on a strict application of the statute as it existed at the time of the injury.

IV. ARGUMENT

POINT I

THE INDUSTRIAL COMMISSION DID NOT FIND THAT
THE 1984 AMENDMENT TO SECTION 69 WAS
REMEDIAL.

The Second Injury Fund stated that the Industrial Commission "properly found" the amendment to Section 69 to be "remedial." Respondent's Brief, p. 7. The Second Injury Fund fails to cite any such finding in the record. A careful review of the record shows the Industrial Commission made no such finding.

POINT II

NEITHER THE INDUSTRIAL COMMISSION NOR THE
APPELLATE COURTS WERE CONFUSED ABOUT THE
PRE-1984 VERSION OF SECTION 69.

The Second Injury Fund asserts that the 1984 amendment to Section 69 was enacted to remedy confusion resulting from appellate court decisions construing Section 69. The Second Injury Fund fails to identify any evidence or legislative history supporting this assertion. Instead, the Second Injury Fund makes a blanket assertion that three Utah Supreme Court cases demonstrate confusion. A review of those cases shows that no confusion existed.

In Northwest Carriers, Inc. v. Industrial Comm'n, 639 P.2d 138 (Utah 1981), the Utah Supreme Court interpreted the pre-1981 version of Section 69 in apportioning liability between the employer and the Second Injury Fund for a permanent total disability claim. The Court did not find Section 69 to be confusing. Nor have subsequent cases demonstrated any confusion with that decision. In Jacobsen Constr. v. Hair, 667 P.2d 25 (Utah 1983), the Utah Supreme Court interpreted the 1981 amendment to Section 69 in determining the proper reimbursement rate for temporary disability and medical expenses from the Second Injury Fund to the employer. The formula established was clear and unequivocal. The Court did not find Section 69 to be confusing. Nor has any court interpreted Hair to be

inconsistent with Northwest Carriers. Nor have subsequent cases demonstrated any confusion with this decision.

In Kerans v. Industrial Comm'n, 713 P.2d 49 (Utah 1985), the Court interpreted the 1981 amendment to Section 69 in determining what portion of a permanent partial impairment should be paid to the employee by the employer and the Second Injury Fund. It has never been suggested that the Kerans decision was inconsistent with the Northwest Carriers decision. In addition, the Court specifically found that Hair was not inconsistent with Kerans. Nor have subsequent cases demonstrated confusion with this decision.

Northwest Carriers, Hair, and Kerans address different issues raised by Section 69. The decisions are not in conflict; nor are they confused. Northwest Carriers and Kerans are still applicable under the 1984 amendment to Section 69. The Industrial Commission has been able to implement all three of these decisions in numerous cases. Ironically, the 1984 amendment which purportedly resolves confusion does just the opposite. As indicated by an Industrial Commission internal memorandum, the 1984 amendment provisions dealing with apportionment provide two arguable bases for computation. R. at 63-64. If anything, the 1984 amendment, rather than its predecessor, is confusing.

POINT III

HARTFORD'S RIGHTS UNDER SECTION 69 WERE VESTED AND CANNOT BE DESTROYED RETROACTIVELY.

The Second Injury Fund does not controvert the fact that the numerous cases cited in Appellants' Brief have held that Section 69 and its amendments are substantive and therefore cannot be applied retroactively. Rather, the Second Injury Fund cites an unpublished decision to support its assertion that the 1984 amendment was remedial. That case is factually and legally distinguishable.

In Alter v. Hales Sand and Gravel, No. 870013-CA (Utah App. filed November 23, 1987), this Court found that an amendment to Section 68 was remedial and therefore retroactive. Hales' daughter was killed in an industrial accident. Hales objected to the Section 68 requirement that because his daughter had no dependents he was obligated to pay \$30,000 to the Uninsured Employers' Fund to cover uninsured employers, including his competitors. Hales successfully lobbied the Utah Legislature to eliminate this requirement. The amendment became effective eleven months after his daughter's death. This Court found that the amendment was intended to remedy the injustice of requiring an employer to pay for the losses sustained by employees working for uninsured employers. This Court also found that the Uninsured Employers Fund had no vested right to the \$30,000 until one year after the employee's death. Because

the amendment was enacted before a year had elapsed, the Uninsured Employers Fund had no vested right that would have been destroyed by retroactive application of the statute.

Hales is entirely different from this case. Here Hartford's right to reimbursement from the Second Injury Fund is not contingent upon a period of time elapsing. Hartford's rights vested immediately. Unlike Hales, retroactive application of the 1984 amendment would destroy those vested rights. In addition, as discussed above, unlike Hales, no evidence has been presented in this case to show that the 1984 amendment was intended to remedy an injustice.

The Second Injury Fund also argues that because the 1984 amendment does not change the benefits received by the employee, it is procedural. This argument assumes (1) that had the 1984 amendment changed an employee's benefits it would have been substantive, and (2) that the amount of benefits going to the employer is not substantive. The Second Injury Fund's first assumption is correct. However, its second assumption lacks any rational basis. No argument in reason or justice explains why an employee's rights would be substantive, while an employer's would not be. Such an argument presents serious due process and equal protection deficiencies especially where an employer foregoes the right to assert legal defenses in injury cases under a quid pro quo of the no-fault statutory and contractual scheme. As illustrated in this case, the

"procedural" rights which the Second Injury Fund dismisses amount to a difference of \$20,264.38. The Utah Supreme Court has consistently held that under Section 69, the "rights and liabilities of the parties are determined on the basis of the law as it existed at the time of the occurrence." Kaiser Steel Corp. v. Industrial Comm'n, 709 P.2d 1168, 1171 (Utah 1985). The very purpose of Section 69, to encourage employers to hire people who have a pre-existing injury, suggests that an employer is entitled to rely on a strict application of the statute existing at the time of the injury so that no substantive rights are impaired.

V. CONCLUSION

Appellants respectfully submit that Section 69, as it existed at the time of the injury, fixed substantive rights in the employer that cannot be impaired by retroactive application of the 1984 amendment to Section 69. For these reasons, Appellants request a reversal of the Industrial Commission's retroactive application of the 1984 version of Section 69 and request apportionment according to the 1981 version of Section 69.

DATED this 14th day of October, 1988.

SNOW, CHRISTENSEN & MARTINEAU

By 

Stuart L. Poelman
Attorneys for Appellants

SCMRAV192

VI. ADDENDUM



INDUSTRIAL COMMISSION OF UTAH

NORMAN H. BANGERTE, GOVERNOR

STEPHEN L. BALLY, CHAIRMAN

L. L. NELSON, COMMISSIONER

JOHN F. FLETCHER, COMMISSIONER

MEMORANDUM

TO: Administrative Law Judges
Erie V. Boorman, Administrator, Second Injury Fund
Suzan Pixton, Administrator, Uninsured Employers Fund
Barbara Elicerio, Legal Counsel

FROM: Richard Sumsion, Administrative Law Judge

DATE: October 5, 1987

RE: Awards of Compensation and Reimbursement Under 35-1-69

Under the last two sentences of the first paragraph of Section 35-1-69, effective from and after March 29, 1984, it is clear that:

1. The liability of the employer or insurance carrier shall be based on the impairment attributable to the industrial injury on a whole person uncombined basis.
2. The entitlement of the employee will be based on the total impairment rating on a (combined) basis, utilizing the combined values chart in the AMA Guidelines. *for pre-existing SEE KERRIS*
uncombined rating for the accident - App shall be pd to
3. The liability of the Second Injury Fund for permanent partial impairment payable to the injured employee shall be for the remaining percentage of impairment obtained by deducting the employer's uncombined impairment rating from the total combined impairment rating.

EXAMPLE: If the employee's impairment is rated at 10% from the industrial injury on an uncombined basis and 10% due to pre-existing conditions on an uncombined basis, the total impairment for which the applicant will be entitled to payment for aggravated injuries will be 19% with 10% being paid by the employer or carrier and 9% being paid by the Second Injury Fund. Reimbursement to the employer or carrier for temporary total and medical expenses shall be 9/19 of the total sum expended.

MEMORANDUM

FROM: Richard Sumsion

PAGE: Two

It is recognized that the second sentence of paragraph 2 of Section 6? in the 1984 amendment is susceptible of a different interpretation with respect to apportionment of liability between the carrier or employer and the Second Injury Fund. By itself, this sentence can reasonably be construed as a basis for apportioning the employer's liability and the Second Injury Fund's liability on the basis of whole person, uncombined, ratings so that in the example above the employer would be entitled to reimbursement for 10/20 of the amounts expended rather than 9/19.

It is the consensus of the Administrative Law Judges that such an interpretation creates an illogical anomaly and that apportionment should be made utilizing the same ratios upon which compensation is paid.

A handwritten signature in cursive script, appearing to read "Richard G. Sumsion", written over a horizontal line.

Richard G. Sumsion

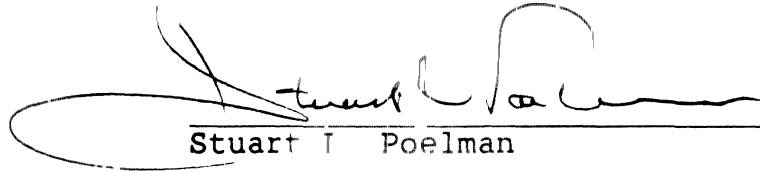
Administrative Law Judge

RGS:jm

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Appellant's Reply Brief
was mailed to the following addressee by registered mail on
October 1988 to the following:

Erie V. Boonin Administrator
Second Injury Fund
P.O. Box 45580
Salt Lake City, Utah 84145


Stuart I. Poelman