1978

Ophelia Archuletta Armenta v. Grandview Café et al : Brief of Plaintiff-Appellant Ophelia Archuletta Armenta

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

OPHELIA ARCHULETTA ARMENTA, :

Plaintiff-Appellant, :

vs. :

GRANDVIEW CAFE; STATE INSURANCE FUND and INDUSTRIAL COMMISSION OF UTAH, as Custodian of the "Special Fund," provided for in 35-1-68(1) UCA, 1953, : Supreme Court No. 16[illegible]

Defendants-Respondents. :

BRIEF OF PLAINTIFF-APPELLANT OPHELIA ARCHULETTA ARMENTA

APPEAL FROM ORDER OF THE
INDUSTRIAL COMMISSION OF UTAH
Joseph C. Foley, Administrative Law Judge

Grandview Cafe and State
Insurance Fund,
Defendants-Respondents

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OPHELIA ARCHULETTA ARMENTA, Plaintiff-Appellant, vs.	:	
GRANDVIEW CAFE; STATE INSURANCE FUND and INDUSTRIAL COMMISSION OF UTAH, as Custodian of the "Special Fund," provided for in 35-1-68(1) UCA, 1953, Defendants-Respondents.	:	Supreme Court No. 16038

BRIEF OF PLAINTIFF-APPELLANT

NATURE OF THE CASE

This is an appeal from an order of the Industrial Commission of Utah denying plaintiff, Ophelia Archuletta Armenta, compensation benefits from the "Second Injury Fund," as is provided for by Sections 35-1-68(1) and 35-1-69 UCA, 1953.

DISPOSITION BY THE INDUSTRIAL COMMISSION

The Industrial Commission denied plaintiff the benefits provided for by Section 35-1-69 UCA, 1953 from the "Special Fund," hereinafter referred to as "Second Injury Fund."

RELEASE SOUGHT ON APPEAL

Plaintiff on appeal respectfully asks that the decision of the Industrial Commission denying plaintiff benefits under

the provisions of 35-1-69 UCA, 1953, be reversed by this court and applicant receive benefits from the "Second Injury Fund."

FACTS

This case involves a medical history wherein the employee had previously incurred a "permanent incapacity by accidental injury, disease, or congenital causes"; to wit: a cervical fusion in 1966, wherein surgery was performed by an anterior approach by C. M. Smith, Jr., M.D., and a further posterior cervical fusion performed in 1968 by C. M. Smith, Jr., M.D. (R.56,¶9)

On June 29, 1974, while in the employ of Grandview Cafe of Provo, Utah, plaintiff was carrying a tray of dishes to the kitchen when she slipped and fell to the floor. A fork from the tray bounced into an upright position and the prongs of the fork penetrated her right elbow. (R.3-4) The report of the treating physician indicates that she "slipped on the floor and fell on a fork, which lacerated her right elbow." As to the nature and extent of the injury, Orthopedist, John Mendenhall, M.D., indicated that plaintiff suffered a lacerated triceps tendon, exposure of ulner nerve and cervical strain. (R.1) She was hospitalized at Utah Valley Hospital and Dr. Mendenhall performed surgery on June 29, 1974, repairing a lacerated triceps tendon. He also exposed the ulnar nerve. He diagnosed a cervical sprain. (R.50,¶1) Her condition stabilized and she

was released by Dr. Mendenhall on October 20, 1974 to return to work. Payment of temporary total compensation benefits commenced on September 13, 1974 and the compensation was paid at that time from July 1, 1974 to September 15, 1974. (R.5-6) Temporary total compensation benefits continued until October 20, 1974, the date of her release by Dr. Mendenhall. (R.7)

On November 15, 1975 the State Insurance Fund requested a supplemental report of her physical condition directed to Dr. John Mendenhall. (R.11) Further requests were made for this report by the State Insurance Fund on February 18, 1976. (R.12) No supplemental report on permanent partial disability was ever received from Dr. Mendenhall (R.46-47) and plaintiff was on family assistance payments.

The plaintiff left the State of Utah in April, 1976 and went with her husband to Stockton, California.

On May 2, 1977, plaintiff filed her claim for compensation. (R.14) The matter came on for hearing on May 9, 1977. (R.19)

Upon her return to Utah for the hearing, Mrs. Armenta was seen and examined by Wayne M. Hebertson, M.D., Neurologist, on May 11, 1977, who filed his report dated May 12, 1977. (R.50-53) Dr. Hebertson rated her permanent partial disability. (R.53, Para.2)

Subsequent to the hearing and upon the basis of the report of Dr. Hebertson, she was seen by Boyd G. Holbrook, M.D.,

Orthopedist, on May 20, 1977. His report under the same date was received by the Industrial Commission on May 27, 1977. (R.55,58) Dr. Holbrook rated her permanent partial disability. (R.57, last paragraph and R.58, Para.1)

Proposed Findings of Fact and Conclusions of Law were submitted by plaintiff on October 7, 1977. (R.60-65)

Based thereon, the Administrative Law Judge made and entered Interim Findings of Fact, Conclusions of Law and Order on November 22, 1977. (R.68-72)

The Administrative Law Judge, insofar as in issue here, found:

> 6. Boyd G. Holbrook rated the applicant on the basis of permanent partial impairment of the whole person as follows:
>
> a. 20% permanent physical impairment as a result of her prior neck operation.
>
> b. 20% permanent physical impairment of the body as a whole relative to the upper right extremity and neck aggravation.
>
> c. 20% and 30% sic (20%) combined under the AMA Chart to 36% permanent physical impairment at this time.
>
> 7. Both examining physicians recommended further diagnostic procedures and further treatment of the applicant while recommendations are adopted. (sic) "which"
>
> 8. Applicant's attorney has rendered legal services to the applicant in the reasonable sum of $110 which should be awarded to him as temporary attorney's fees, the same to be deducted from the present award.

CONCLUSIONS OF LAW:

> The applicant is entitled to temporary total disability compensation in addition to that previously paid in a lump sum amount of $735.28. Based upon the present state of the record, the applicant is entitled to further compensation for permanent partial disability and for relief under the provisions of Section 35-1-69 UCA, 1953. Applicant should receive further medical treatment for the maximum benefits and be referred to a medical panel for determination of the medical issues involved. Applicant's attorney should be awarded the interim attorney's fee in the sum of $110, the same to be deducted from the present award. (R.70) (emphasis added)

Pursuant to Dr. Holbrook's recommendation and pursuant to the interim order, plaintiff was admitted to St. Mark's Hospital on December 1, 1977, wherein a myleogram was performed. Dr. Holbrook filed a further report (R.75-76) again rating permanent partial disability. She was also seen by Dennis D. Thoen, Neurologist. Plaintiff was examined by Edwin McGough, M.D., chest surgeon, and LaVerne Erickson, Neurologist. This is summarized in a further report by Boyd G. Holbrook, M.D., dated December 8, 1977. (R.75-76) She was again rated for permanent partial disability by Dr. Holbrook, restating his rating of May 20, 1977, omitting the combining statement. (R.75-76)

On December 12, 1977, plaintiff moved the Commission for entry of an order:

> 2. Based upon the record in the foregoing matter, applicant moves the commission to join the Industrial Commission of Utah as

custodian of the special fund provided for by 35-1-68(1) UCA, 1953 and for relief under the provisions of 35-1-69 UCA, 1953.

The commission should enter its order determining that applicant has suffered a 20% permanent physical impairment as a result of her prior neck operation and 20% permanent physical impairment of the body as a whole relative to the right upper extremity and neck aggravation resulting from the injury of June 29, 1974. The combined impairment under the AMA chart is 35% permanent physical impairment. That the order provide that the State Insurance Fund be ordered to pay the sum of (18% of 312 weeks equals 56.16 weeks at $89.33 per week) $5,016.77. That the Industrial Commission of Utah as custodian of the special fund be ordered to pay the sum of (18% of 312 weeks equals 56.26 weeks x 89.33 per week) or the sum of $5,016.77. That future medical expenses and hospitalization be borne in the same ratio. Further, that applicant's attorney be awarded an attorney's fee of $1,503.53 to be deducted equally from the segemented award.

Findings of fact, conclusions of law and order were made and entered by Joseph C. Foley, Administrative Law Judge (R.82-85), wherein the Administrative Law Judge found:

3. The applicant has sustained a 20% permanent physical impairment as a result of her prior neck operations. (emphasis added)

4. The applicant has sustained a 20% permanent physical impairment of the body as a whole, relative to the right extremity and neck aggravation resulting from the injury of June 29, 1974. (emphasis added)

5. That in the opinion of the Administrative Law Judge 20% permanent physical impairment

> as a result of her prior neck operation may be the responsibility of the Second Injury Fund. The combined impairment under the AMA chart is 36% permanent physical impairment and the State Insurance Fund should be ordered to pay the sum of (18% of 312 weeks = 56.1 weeks at $89.33) $5,016.77. (R.83)

On March 27, 1978, plaintiff filed a further motion requesting a ruling upon the "Second Injury Fund" aspects of the case. (R.87-88)

An amended findings of fact, conclusions of law and order correcting a typographical error were made and entered by the Administrative Law Judge and the award against the compensation carrier including attorney's fees was paid. (R.89-92) On June 5, 1978, plaintiff further requested a ruling upon the "Second Injury Fund" aspects of the case. (R.93)

A further report of Boyd G. Holbrook, M.D., dated July 31, 1978, was filed with the Industrial Commission on August 7, 1978. (R.94-97) Dr. Holbrook again reiterated his original permanent partial disability rating. (R.97, ¶2) The Industrial Commission entered its denial of benefits from the combined injury fund on August 7, 1978, which was transmitted to the parties by a mailing on August 8, 1978. (R.98-100)

Plaintiff filed her petition for writ of review in the Supreme Court of the State of Utah on September 6, 1978. (R.101-107)

ARGUMENT

Point I

PLAINTIFF IS ENTITLED TO AN AWARD OF COMPENSATION, MEDICAL EXPENSES, REHABILITATION AND TRAINING FOR COMBINED INJURIES, RESULTING IN PERMANENT INCAPACITY, WHICH IS SUBSTANTIALLY GREATER THAN SHE WOULD HAVE INCURRED IF SHE HAD NOT HAD A PRE-EXISTING INCAPACITY, AS IS PROVIDED FOR BY 35-1-69, UTAH CODE ANNOTATED (1953).

This appeal involves the interpretation of the following statute, reproduced in its entirety for convenience:

> 35-1-69. Combined injuries resulting in permanent incapacity--Basis of compensation--Special fund--Training of employee--(1) If any employee who has previously incurred a permanent incapacity by accidental injury, disease, or congenital causes, sustains an industrial injury for which compensation and medical care is provided by this title that results in permanent incapacity which is substantially greater than he would have incurred if he had not had the pre-existing incapacity, compensation and medical care, which medical care and other related items are outlined in section 35-1-81, shall be awarded on the basis of the combined injuries, but the liability of the employer for such compensation and medical care shall be for the industrial injury only and the remainder shall be paid out of the special fund provided for in section 35-1-68(1) hereinafter referred to as the "special fund."
>
> 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 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.
>
> (2) In addition the commission in its discretion may increase the weekly compensation rates to be paid out of such special fund, such increase to be used for the rehabilitation and training of any employee coming within the provisions of this chapter as may be certified to the commission by the rehabilitation department of the state board of education as being eligible for rehabilitation and training; provided, however, that in no case shall there be paid out of such special fund for rehabilitation an amount in excess of $1,000.

It is to be noted that the provisions of 35-1-69 UCA, 1953, speaks in terms of "incapacity." In other sections of the Workmen's Compensation and Occupational Disease Act, the statute speaks in terms of "disability," which may be temporary total disability,"'total disability" or"permanent partial disability."

Under the concept of 'permanent incapacity,"the 'previous incapacity"may be incurred by 'accidental injury, disease, or congenital causes." The choice of words by the Legislature is significant.

The problem of "second injury fund" relief is being brought to the courts attention with alarming regularity. This court in a little over two years has ruled upon four cases involving this concept:

John M. McPhie v. United States Steel Corporation, 551 P2d 504 (1976)

Intermountain Health Care, Inc. v. Mary Jean Ortega, 562 P2d 617, (1977)

John M. McPhie v. The Industrisl Commission of Utah, 567 P2d 153 (1977)

Beverly R. Buxton v. Industrial Commission of Utah, No. 15802 (October 27, 1978)

In addition to these cases counsel is aware of an additional four cases in process before this court.

Running through all of these cases is a central theme, the Industrial Commission of Utah refuses to apply the principles mandated by the legislature in 35-1-69.

The reasons for denial vary from case to case, but the policy is uniform.

The Industrial Commission of Utah has been made custodian of the "special fund" by 35-1-68(1). This fund, in addition to the purposes set forth in 35-1-69, also provides for the significant costs of medical panels, including autopsies, as well as the insurance reserve. The concern of the Industrial Commission for the continuing liquidity of this fund is real and significant. It is not an unlimited well, but is a public trust akin to the reserves of the State Insurance Fund, which this court has demonstrated in recent decisions.

Be that as it may, the solution to the problem is the province of the legislature. It is the duty of the Industrial Commission to fairly and justly apply the law as is set forth in Title 35, UCA as is interpreted by this court.

The case of Mrs. Armenta is strikingly similar factually and legally to that of Mary Jean Ortega, supra. There can be no doubt that the only medical evidence before the Commission are the two ratings made by two competent medical specialists, whose expertise is recognized by those who practice in this field to the extent that after the hearing, the plaintiff was referred to Boyd Holbrook, M.D., an orthopedist, for evaluation and treatment, as was recommended by Wayne M. Hebertson, M.D., whose practice is limited to neurology and electroencephalography, and we proceeded with a one-man panel.

The ratings of the applicant in May of 1977 are as follows:

Wayne M. Hebertson, M.D.

> Mrs. Archuletta (Armenta) has permanent partial impairment of the whole person amounting to 15 percent as a result of her prior cervical fusions. She has temporary impairment of the right upper extremity amounting to 30 percent of the whole person relating to the accident of June 29, 1974. She has 10 percent temporary impairment of the whole person relating to sprain injury of the spine residual from the accident of June 29, 1974. (R.53) (emphasis added)

Boyd G. Holbrook, M.D.

I would conclude the following:

> 1. 20 percent permanent physical impairment as a result of her prior neck operations.
>
> 2. 20 percent permanent physical impairment of the body as a whole relative to the right upper extremity and neck aggravation.
>
> 3. 20 and 20 combined to 36 percent permanent physical impairment at this time. (R.58)

The rating of Boyd G. Holbrook, M.D. of December 8, 1977 is word for word, paragraphs 1 and 2 above, omitting only the combined values in paragraph 3 above.

Dr. Holbrook's last examination and report dated July 31, 1978, with a copy to Stephen Hadley, Commissioner, but not to counsel, as a concluding paragraph is as follows:

> Her rating of 20 percent permanent physical impairment of the body as relates to this accident was given because of continued complaints relative to the right upper extremity. She continues to have some complaints relative to the neck but these seem to be exceedingly minor. We did not find objective evidence that the neck had been permanently involved in any way by this accident and stated '20 percent permanent physical impairment of the body as a whole relative to the right upper extremity and neck aggravation' because of subjective complaints relative to the neck. (R.97)

The Order of Denial of Benefits from the Combined Injury Fund is as follows:

> Pursuant to Section 35-1-82.53, Utah Code Annotated, the matter was submitted to the entire Commission for review. The Commission has reviewed the matter and we are of the opinion that the benefits from the Combined Injury Fund should be denied in this particular case. The Panel Report written by Dr. Boyd G. Holbrook, dated May 20, 1977, on Page 4, states as follows: 'It is difficult at this time to specifically state that the neck is worse as a result of this injury than it was prior to this injury as there is nothing substantial to indicate this is the case.' Based upon the finding of the Medical Panel it is the conclusion of the Commission that there is no substantially greater increase in disability than would have occurred had not the pre-existing condition existed and with that finding and conclusion the Commission further concludes that the provisions of Section 35-1-69 are not applicable. (r.98-99)

Let us add the balance of Dr. Holbrooks statement, quoted out of context by the author of the Commission's order with the omitted part underlined from his first report dated May 27, 1977.

> In summary, this woman has had two previous cervical operations with significant permanent physical impairment of the cervical spine related to this. It is difficult at this time to specifically state that the neck is worse as a result of this injury than it was prior to this injury as there is nothing substantial to indicate this is indeed the case. (emphasis added) (R.58)

The action of the Industrial Commission is unlawful, arbitrary, capricious and is not supported by, and is directly

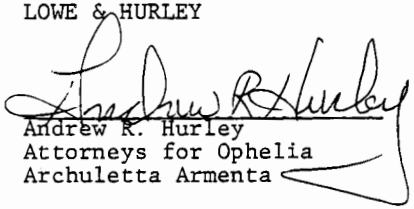
contrary to the medical evidence. The Commission has usurped the function of the medical panel and is acting unlawfully.

CONCLUSION

This court should issue its opinion reversing the Commission, remanding the matter and directing the Commission to enter its Order awarding applicant compensation, medical care and rehabilitation, including an increase in weekly compensation rates to be used for rehabihilation and training of the plaintiff as is provided for by 35-1-69(1) and (2).

Respectfully submitted this 17th day of September, 1978.

LOWE & HURLEY



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