

1979

Ophelia Archuletta Armenta v. Grandview Café et al : Brief of Defendant-Appellee Industrial Commission of Utah

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) U.C.A. 1953, :

Supreme Court No. 16030

Defendants-Respondents. :

BRIEF OF DEFENDANT-APPELLEE
INDUSTRIAL COMMISSION OF UTAH

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FILED

SEP -6 1979

Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

OPHELIA ARCHULETTA ARMENTA, :
 :
Plaintiff- Appellant, :
 :
vs

GRANDVIEW CAPE: STATE INSURANCE :
FUND AND INDUSTRIAL COMMISSION :
OF UTAH, as Custodian of the :
"Special Fund," provided for :
in 35-1-68(1) U.C.A 1953, :
 :
Defendants-Respondents.

SUPREME COURT No. 16038

BRIEF OF DEFENDANT-APPELLEE
INDUSTRIAL COMMISSION OF UTAH

NATURE OF THE CASE

This is an appeal from an order of the Industrial Commission of Utah denying plaintiff compensation benefits under 35-1-69, Utah Code Annotated, 1953.

DISPOSITION BY THE INDUSTRIAL COMMISSION

The Industrial Commission denied plaintiff's request for benefits under 35-1-69, Utah Code Annotated, 1953.

RELIEF SOUGHT ON APPEAL

Defendant, Industrial Commission of Utah respectfully asks that decision of Industrial Commission be confirmed.

FACTS OF THE CASE

Other than Plaintiff's brief incorrectly stating that employee had incurred a "permanent incapacity by accidental injury, disease, or congenital causes" and incorrectly using the terms "impairment and disability" as synonymous in the doctor's reports the Defendant Industrial Commission accepts the Facts of the Case as given by Plaintiff.

The Record does not indicate a previously incurred incapacity.

ARGUMENT

POINT I

PRIOR PERMANENT INCAPACITY IS A PRIOR AND PERMANENT LOSS OF EARNING POWER WHICH WAS KNOWN AND WHICH AFFECTED EMPLOYEE'S ABILITY TO WORK.

Section 35-1-69, Utah Code Annotated is triggered by certain mandatory conditions. Unless these conditions are met there is no apportionment under that section. These mandatory conditions are:

1. The previously incurred incapacity must have been incurred prior to industrial accident.
2. The previously incurred incapacity must have been permanent in nature.
3. The previously incurred incapacity must have a loss of earning power affected employee's ability to work, and which, in turn, resulted in a loss of earning power.

The word incapacity in workmen's compensation law means a loss of ability to work and loss of earning powers. Incapacity

is often used synonymously with disability and is to be distinguished from impairment which is a medical computation of physical injury.

Word "incapacity" as used in statutes providing for award of compensation for partial and total incapacity means earning, incapacity, not physical incapacity. *Barry v. Aetna Life & Cas. Co.*, 211 S.E.2d 595, 600, 133 Ga. App. 527.

"Incapacity" within compensation statute means incapacity to work, as distinguished from loss or loss of use of member of body. *Panico v. Sperry Engineering Co.*, 156 A. 802, 804, 113 Conn. 707

The "incapacity" referred to in statutes providing for compensation for total incapacity and for partial incapacity, is loss of earning capacity due to injury and not due to employee's unwillingness to work or to economic conditions of unemployment. *Federated Mut. Implement & Hardware Ins. Co. v. Whiddon*, 75 S.E.2d 830, 833, 88 Ga. App. 12.

Any deprivation of employee's power to work as result of injury is "Incapacity" within Workmen's Compensation Act. *Rice v. Denny Roll & Panel Co.*, 154 S.E. 69, 71, 199 N.C. 154.

Employee receiving a broken arm held not entitled to compensation under *Vernon's Ann.Civ.St.* art. 8306 §§10, 11, as for "incapacity" to work, where he continued to perform his duties and was paid full wages; "incapacity" meaning lack of capacity, lack of ability or qualification, etc. *Lumbermen's Reciprocal Ass'n v. Coody*, *Tex.Civ.App.* 278 S.W. 856, 858.

Section of Workmen's Compensation Act providing for modification of compensation agreement and review of award for increase incapacity uses the words "disability" and "incapacity" synonymously. *Colbert v. Consolidated Laundry*, 107 A.2d 521, 524, 31 N.J.Super. 588.

The terms "disability" and "incapacity" as used in workmen's compensation statutes are synonymous and former ordinarily means loss or impairment of earning power or actual physical incapacity to work at all or to work more than a part of the time. Scott v. Alaska Indus. Bd., D.C.Alaska, 91 F. Supp. 201 202.

Words "injury" and "incapacity" are not synonymous for workmen's compensation purposes. Travelers Ins. Co. v. Bearden, Tex.Civ. App., 373 S.W.2d 300, 302.

New York case law mandate that employer knew of the incapacity at time of hiring. Larson's Workmen's Compensation Law (59-33) p. 321 commented on these decisions of the N.Y.Sup. Ct. by saying:

The legislation (second injury fund apportionments) should not be extended to prior conditions of such character that employers would "resumably" be unaware of them and therefore be unaffected by them in their hiring practices.

California has the test as quoted by Larsen at 59-33, page 330:

Whether the prior condition was "labor disability". . .that is whether if industrial it would be independently capable of supporting an award.

And in a rather recent Washington case:

The total disability was due to a back and hip injury, combining with a pre-existing, nondisability arthritic condition aggravated by the injury. The court held that since the arthritis had not been disabling, the employer was not entitled to have part of the award paid by the second injury fund. Lyle, Inc. v. Dept of Labor & Industry, 66 Wash., 745, 405P.2 251.

Sec. 69 is not the easiest section to interpret in the Utah Code and there are parts of it which may yet resist logical interpretation. But a reading of the Workmen's Compensation Law and decisions concerning the words incapacity and disability have no confusion. The almost erroneous conclusion is that the incapacity and disability spoken of in second injury funds is an incapacity to do the work that results in loss of earning power.

Once again applying this to sec. 69 we come up with the necessary conditions to trigger the apportionment to the Second Injury Fund of pre-existing incapacity.

1. Incapacity that was prior to Industrial accident.
2. Incapacity that was permanent in nature.
3. Incapacity that was known and involved in the hiring procedure and which showed lack of earning power and ability to work.

These are fundamental requirements in almost, if not all, second injury fund states. And it is important once more to note that in Ortega none of these conditions existed when all three are mandatory.

It would seem to be redundant to say that when we define the word "incapacity" in section 69 it must mean inability to work and loss of earning power. This applies to both the pre-existing incapacity and the incapacity resulting from the industrial accident.

In the instant case there is nothing in the record that indicates plaintiff was handicapped in her ability to work and that she had a resultant loss of earnings because of her previous neck problems.

And when the doctors and medical panel experts speak of "impairment" it should not be confused with "incapacity."

POINT II.

TEMPORARY TOTAL DISABILITY IS
NOT APPORTIONABLE.

The respondent, Industrial Commission of Utah, relies upon the arguments submitted in the brief in the combined cases of Paris Co., Nebo School District and White v. Industrial Commission of Utah and numbered 15882, 15881 and 15796 on the issues of apportionment of Temporary total disability compensation and medical expenses incurred during temporary total disability.

A copy of that brief is made a part of this brief on the issues named. It should be noted that these issues are all the result of the "Ortega" decision. This court has not yet handed down its decision on these combined cases.

See Point II of attached combined brief on Temporary Total Disability is not apportionable.

POINT III.

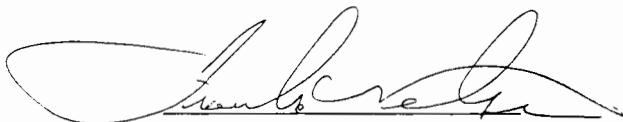
MEDICAL EXPENSES ARE NOT APPORTIONABLE
DURING TEMPORARY TOTAL DISABILITY.

See Point III of attached combined brief on medical expenses. They are not apportionable during temporary total disability.

CONCLUSION

The ruling of the Industrial Commission could be affirmed.

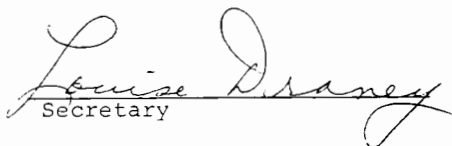
Dated this 5 day of September, 1979.



FRANK V. NELSON

MAILING CERTIFICATE

I certify that two copies of the foregoing brief were mailed, postage prepaid to Andrew R. Hurley, 1011 Walker Bank Building, Salt Lake City, Utah 84111, attorney for Plaintiff; and two copies mailed to James R. Black, Esq., Suite 500, Ten West Broadway, Salt Lake City, Utah 84101, this 5th day of September, 1979.


Secretary