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Ophelia Archuletta Armenta v. Grandview Café et al : Brief of Defendant-Appellee State Insurance Fund

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

OPHELIA ARCHULETTA ARMENTA,
Plaintiff-Appellant,

v.

GRANDVIEW CAFE; STATE INSUR-
ANCE 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 DEFENDANT-APPELLEE
STATE INSURANCE FUND

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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Fund", provided for in	:	
35-1-68(1) UCA, 1953,	:	
	:	
Defendants-Respondents.	:	
	:	

BRIEF OF DEFENDANT-APPELLEE

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", to which she is entitled under 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 §35-1-69 UCA, 1953 from the "Special Fund", herein-after referred to as the "Seond Injury Fund".

RELIEF SOUGHT ON APPEAL

The defendant on appeal State Insurance Fund 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, that the applicant be granted the benefits

to which she is entitled from the Second Injury Fund including compensation for future medical expenses and future temporary total disability, and that the defendant State Insurance Fund be reimbursed by the Second Injury Fund for its proportionate share of medical compensation and temporary total compensation benefits already paid.

FACTS

The facts of this case are as stated by the plaintiff-appellant in her Brief. The defendant on appeal State Insurance Fund accepts and incorporates herein that statement of facts.

ARGUMENT

POINT I.

THE SECOND INJURY FUND IS LIABLE FOR A PORTION OF THE COMPENSATION PAYABLE TO THE APPLICANT EQUAL TO THE PERCENTAGE OF HER PERMANENT INCAPACITY ATTRIBUTABLE TO A PRE-EXISTING CONDITION.

The defendant on appeal State Insurance Fund joins the plaintiff on appeal in her contention that she is entitled to permanent disability compensation from the Second Injury Fund for that portion of her disability attributable to her pre-existing condition. The defendant State Insurance Fund agrees that the Second Injury Fund is liable for its proportionate share of future medical expenses, and further contends that the State Insurance Fund is entitled to reimbursement from the Second Injury Fund for its proportionate share of medical expenses already paid by the State Insurance Fund.

As noted by the appellant, the Administrative Law Judge found that she suffered a 20% permanent physical impairment as a result of prior neck operations, and a 20% permanent physical impairment of the

body as a whole relative to the right upper extremity and neck injury resulting from the industrial accident of June 29, 1974. He found her total impairment under the AMA chart to be 36%. These findings were based on the report of Dr. Holbrook who served as a one-man medical panel in this case.

The Industrial Commission denied the applicant Second Injury Fund benefits despite Dr. Holbrook's conclusion that half of her 36% impairment was attributable to a pre-existing condition. In so doing, the Commission once again ignored the clear directives of the applicable statute and definitive interpretations of the law by this Court. Once again, this Court is called upon to require the Commission to award benefits to which an applicant is legally entitled from the Second Injury Fund which is administered and controlled by the Commission.

The Commission denied these benefits because, in its opinion, "there is no substantially greater increase in disability than would have occurred had not the pre-existing condition existed . . ." This conclusion is based on Dr. Holbrook's remark that "it is difficult at this time to state that the neck is worse as a result of this injury than it was prior to this injury." The Commission obviously found insufficient Dr. Holbrook's report that the applicant had a 20% impairment as a result of prior neck operations, and a 20% impairment relative to her right upper extremity and neck aggravation. In fact, this evidence itself compels the payment of Second Injury Fund benefits, and only by misconstruing the statute could the Commission justify a refusal to make such an award.

In pertinent part, §35-1-69(1) UCA, 1953 provides:

If any employee who has previously incurred a permanent incapacity by accidental injury, disease or congenital causes, sustains an industrial injury. . . 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. . . shall be awarded on the basis of the combined injuries, but the liability of the employer . . . shall be for the industrial injury only and the remainder shall be paid out of the Special Fund provided for in §35-1-68.

This section was construed by this Court in the case of Intermountain Health Care, Inc. v. Ortega, 562 P.2d 617, 619 (Utah 1977). In that case, the applicant was 30% disabled after her industrial accident. Twenty percent of her disability was caused by her industrial back injury; ten percent was psychosomatic pain attributable to a pre-existing psychological condition.

. . . if the requirement of the statute is met, that is if the resulting permanent incapacity is substantially greater than if the pre-existing incapacity had not existed, the proportional causation must be found and that portion attributable to the previous condition paid out of the Special Fund.

The requirement that the pre-existing condition combines with the later injury to cause a "substantially greater" permanent incapacity does not mean that the former must be greater than the latter. It simply means that it be some definite and measurable portion of the causation of the disability. It surely cannot be doubted that 30% is substantially greater than 20%, nor that 10% disability is itself substantial in that is definite and measurable. Consequently, inasmuch as it appears that the pre-existing condition increased the resulting disability by 1/3, it follows that under the requirements of the statute, the medical expenses as well as the compensation award should have been apportioned 2/3 from the employer and 1/3 from the Special Fund.

As a result of her industrial accident, the applicant in this case became 18% disabled. Her total disability after the

accident was 36%. Eighteen percent of her permanent disability is directly attributable to her pre-existing incapacity. She is entitled to benefits from the Second Injury Fund because her prior incapacity is a measurable portion of her total incapacity after the accident.

It was apparently significant to the Commission that the applicant's prior incapacity was specifically related to her neck, whereas the accident caused a disability of the right upper extremity as well as the neck. However, the law does not require that the prior incapacity result in a substantially greater disability to the same area of the body which becomes disabled as a result of the industrial injury. Such a requirement would be inconsistent with the interpretation given the statute by this Court in the Ortega case as quoted above.

Some states require by statute that an industrial injury aggravate the pre-existing condition before their Second Injury Fund has any liability. That is the law in Arizona, for example. See A.R.S. §23-1065(a)(5). However this requirement is inconsistent with the law of most states and should not be read into our statute. Professor Larson discusses this issue in Vol. 2 §59.32 of Workmen's Compensation Law at pp. 10310-10314.

The typical Second Injury statute speaks of a second injury "added to" a pre-existing injury or disability. The question sometimes arises whether the second injury must be shown to have been related to or to have acted upon the prior injury--as, for example, loss of fingers of the same hand. It is generally held that no special relation between the injuries is necessary, so long as the existence of the former substantially augments the disability ensuing from the latter. . . . Although the prior impairment need not combine with the compensable injury in any special way, it must add something

to the disability before the Special Fund can become liable. In other words, it is not enough to show that the claimant had some kind of handicap if that handicap contributed nothing to the final disability.

It is the significance of the increase in the final overall disability that determines the liability of the Second Injury Fund. If an industrial injury itself results in total disability, or if the prior incapacity is the sort which, in combination with the industrial injury, does not appreciably alter the claimant's physical incapacity, the Second Injury Fund has no liability. But in this case, it is certain that the prior incapacity substantially increased the overall incapacity from which the applicant suffered as a result of her injury. Neither the statute, nor the rulings of this court, nor the law of Workmen's Compensation in general, require that an industrial accident aggravate the pre-existing condition in order to qualify an applicant for Second Injury Fund benefits.

POINT II.

THE SECOND INJURY FUND IS LIABLE FOR ITS PROPORTIONATE SHARE OF COMPENSATION FOR MEDICAL EXPENSES AND TEMPORARY DISABILITY.

The appellant seeks a ruling that the Second Injury Fund is liable for its proportionate share of medical expenses which she may incur in the future. The defendant on appeal State Insurance Fund joins in this assertion, and contends that the Second Injury Fund should be held liable for its pro rata share of medical expenses already paid by the State Insurance Fund. Furthermore, the Second Injury Fund should be ordered to pay an equivalent share of temporary total disability compensation whether already paid by the State Insurance Fund, or yet to be incurred.

This Court is well aware that the Industrial Commission has categorically refused to apportion medical expenses and temporary total disability compensation in cases where the Second Injury Fund has been found liable for a portion of permanent disability compensation. (See the Brief of Plaintiffs on Appeal in Supreme Court cases No. 15882, No. 15881, and No. 15796 currently pending before this Court.) However, Section 35-1-69 UCA, 1953, and this Court's construction of the provision in the Ortega case, supra, leave no doubt that the commission is required to apportion compensation for medical expenses as well as temporary and permanent compensation benefits between the employer and the Second Injury Fund in any case where an applicant's permanent incapacity has been measurably increased by a pre-existing condition.

As noted earlier, Section 35-1-69 UCA, 1953, provides that an employer's liability "for such compensation and medical care shall be for the industrial injury only and the remainder shall be paid out of the Special Fund. . ."

In the Ortega decision, supra, this Court held that medical expenses as well as compensation were to be apportioned in cases where the liability of the Second Injury Fund was established.

But it will be noted that the statute makes no distinction between the award for compensation and medical expenses; and that if the requirement of the statute is met, that is, if the resulting permanent incapacity is substantially greater than if the pre-existing incapacity had not existed, the proportional causation must be found and that portion attributable to the previous condition paid out of the Special Fund.

P.2d at 619.

Furthermore, the definition of compensation in the Workmen's Compensation Act, makes it clear that temporary total disability benefits are "compensation", and therefore subject to apportionment as well.

- (6) Compensation shall mean the payment of benefits provided for in this title §35-1-44(6) UCA, 1953.

Accordingly, the defendant on appeal State Insurance Fund asserts its right to reimbursement from the Second Injury Fund for compensation for medical expenses and temporary total disability benefits previously expended in an amount equal to its proportionate share of permanent disability compensation. Furthermore, the Second Injury Fund should be ordered to pay the same portion of any future medical expenses and temporary total disability benefits to which this applicant becomes entitled.

DATED this 27th day of December, 1978.

BLACK & MOORE


JAMES R. BLACK


TIMOTHY C. HOUP

CERTIFICATE OF MAILING

Mailed a copy of the foregoing Brief this 27th day of December, 1978 to Mr. Andrew R. Hurley, 1011 Walker Bank Building,

Salt Lake City, Utah 84111 and to Mr. Frank V. Nelson, Attorney
General's Office, State Capitol Building, Salt Lake City, Utah 84114.



SECRETARY