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USX Corporation v. Dick Lawrence Brown, Industrial Commission of Utah : Reply Brief

Utah Court of Appeals

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890011 IN THE UTAH COURT OF APPEALS

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USX CORPORATION, (SELF-INSURED),))	
)	
Petitioner-Defendant,))	REPLY BRIEF OF PETITIONER
)	USX CORPORATION
vs.))	
)	
DICK LAWRENCE BROWN, and))	
INDUSTRIAL COMMISSION OF UTAH,))	Case No. 890011-CA
Respondent-Applicant.))	Case Priority # 6

* * * * *

REPLY TO RESPONDENT'S RESPONSE TO PETITION FOR
REVIEW FROM THE DECEMBER 6, 1988 ORDER OF THE
INDUSTRIAL COMMISSION OF UTAH GRANTING
APPLICANT'S MOTION FOR REVIEW

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Mary T. Noonan
Clerk of the Court
Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

* * * * *

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SUMMARY OF ARGUMENT

The Industrial Commission's Order Granting Applicant's Motion for Review, is without a reasonable basis in the the evidence. The evidence clearly indicates that applicant suffers fifteen percent (15%) permanent partial disability as a result of his work-related injuries. The Industrial Commission's award of permanent total disability benefits is supportable only by the most arbitrary and unreasonable reading of the Medical Panel Report and therefore it must be set aside.

Allen v. Industrial Commission, 729 P.2d 15 (Utah 1986), is applicable in the present case because Respondent's back injury constitutes precisely the type of internal failure that Allen addresses. In any event, Respondent cannot recover from USX for his disability unless he can show that his industrial accident was the medical cause of the disability.

In interpreting the Medical Panel Report, the Commission introduced an ambiguity, and therefore a question of fact, that was not present before the Administrative Law Judge. Because the ambiguity was administratively created after the report had already been admitted in evidence, USX has been deprived of its right to cross-examine the witnesses against it in connection with the newly raised questions of fact.

Finally, the Commission has not complied with Utah Code Ann. § 63-46b-12(6)(c)(v) which requires that the Commission give the reasons for its disposition of the case.

ARGUMENT

I. THE INDUSTRIAL COMMISSION'S INTERPRETATION OF THE MEDICAL'S PANEL REPORT IS WITHOUT ANY REASONABLE BASIS IN THE EVIDENCE.

Decisions of the Industrial Commission may be set aside if they are "arbitrary and capricious, and they are arbitrary and capricious when they are contrary to the evidence or without any reasonable basis in the evidence." Rushton v. Gelco Express, 732 P.2d 109, 111 (Utah 1986). The Industrial Commission's decision in this case is based entirely on language which the Commission interpreted contrary to the entirety of the evidence, thus creating an ambiguity where none had existed before. The medical panel found that Respondent's back injury resulting from the 1986 accident was a significant factor only in connection with his partial disability rating and that it was not the cause of his permanent total disability. The panel assigned a fifteen percent (15%) permanent impairment rating for his back problem, five percent (5%) due to pre-existing conditions and ten percent (10%) directly related to the industrial accident. (Medical Panel Report, at 7.) The medical report concluded with the following language:

It should be mentioned that the Panel felt that Respondent would never be able to return to the work force in any capacity unless he has significant remission in his rheumatoid disease. With a remission he would still not be able to do anything that required light labor.

Id. Rather than interpreting the above-quoted passage consistently with the rest of the evidence, the Commission, taking the final statement out of context of the report, found that it required an award based on permanent total disability. To reach its conclusion, the Commission gave the report the most unlikely and unreasonable interpretation possible. Thus, the Commission's decision was arbitrary and capricious and its Order Granting Applicant's Motion for Review should be reversed.

II. THERE IS NO SUBSTANTIAL EVIDENCE TO SHOW THAT RESPONDENT'S INJURY WAS CAUSED BY HIS EMPLOYMENT ACTIVITY.

Respondent argues in his brief that he meets the legal standards for permanent and total disability, and that the reports of various doctors support an award of permanent total impairment. Petitioner, USX, does not contend that Respondent is not impaired, but rather that his impairment is not due to his employment at USX. There is simply no evidence of any causal connection between his work-related activities and his total disability.

At the time of the accident, Respondent was already afflicted with arthritis and, as he points out in his Reply Brief, approximately one month after his most recent industrial accident, he was diagnosed as having "severe degenerative arthritis with total destruction of the right hip. . ." (Brief of Respondent at 13-14 (quoting Dr. Bromley's report at R.48.))

Although Respondent is correct in asserting that his arthritis does not necessarily preclude an award of benefits, Respondent may not recover benefits from USX for his arthritis. He is entitled to recover benefits from USX only to the extent his disability resulted from his employment. In Large v. Industrial Commission, 758 P.2d 954 (Utah App. 1988), the claimant suffered a 10% permanent disability attributable to a slip and fall accident on the job. Although the claimant was totally disabled due to "age, obesity, lack of transferable skills and prior back surgery," the court upheld a denial of permanent total disability benefits because the claimant's total disability was "the result of pre-existing conditions and not an industrial accident." Id at 957. A denial of benefits was upheld on the same grounds in Hodges v. Western Piling & Sheeting Co., 717 P.2d 718, 721 (Utah 1986), where the court stated: "While it is unquestioned that the medical panel found [the claimant] to be one hundred percent physically impaired, the panel also found that the total impairment was due to the onset of severe arthritic problems." See also Allen v. Industrial Commission, 729 P.2d 15,18 (Utah 1986) (there must be a sufficient causal connection between the disability and the working conditions).

Although the respondent is correct in stating that two-thirds of his back problems are related to his 1986 industrial accident, it is clear from the record that his back problems are not the cause of his total disability. The specific

finding of the medical panel in that regard is that Respondent is fifteen (15%) permanently partially disabled due to his back injury at USX: ten percent (10%) directly due to the back injury and five percent (5%) due to "lighting up" of an earlier back injury. (Medical Panel Report at 7.) The panel also specifically found that Respondent's back injury did not aggravate or light up the arthritis.

Given the totality of the evidence, the ALJ correctly concluded that "the applicant has not establish[ed] that his present disability is due to the industrial accident." (Findings of Fact, Conclusions of Law and Order, at 4.) USX's liability, if any, must be limited to benefits for the industrial injury. If indeed Respondent is permanently totally disabled, compensation for that portion of his disability not arising from the industrial accident must come from the Second Injury Fund. See Utah Code Ann. § 35-1-69(1) (Supp. 1987) (as amended 1984) (when permanent total incapacity results from a combination of disease and industrial accident, "liability of the employer . . . shall be for the industrial injury only. The remainder shall be paid out of the Second Injury Fund . . .").¹ The Commission's award

¹ The quoted language is from the 1984 version of §35-1-69(1) which was repealed when the current version became effective on July 1, 1988. Because this action arose before that date, it is governed by the 1984 version of §35-1-69. See Carlucci v. Utah State Indus. Comm'n, 725 P.2d 1335 (Utah 1986) (law establishing substantive rights and liabilities is statute in force when cause of action arises).

of permanent total disability benefits should be reversed because there is no evidence that Respondent's employment was causally connected to his total disability.

III. THE INDUSTRIAL COMMISSION'S ORDER HAS DEPRIVED USX OF ITS RIGHT TO DUE PROCESS.

In his brief, Respondent asserts that because neither party objected to admission of the Medical Panel Report, USX is now precluded from claiming a violation of its right to due process. As explained in Section I of this brief, however, the unreasonable and arbitrary interpretation of the Medical Panel Report by the Industrial Commission raised a question of fact that was not present in the proceedings below. USX, therefore, had no opportunity for a meaningful hearing on the issue raised solely by the commission. If the Court allows the Industrial Commission's interpretation of the report to stand, USX will have been deprived of due process.

IV. THE INDUSTRIAL COMMISSION DID NOT COMPLY WITH THE APPLICABLE PROVISIONS OF THE ADMINISTRATIVE PROCEDURES ACT.

Respondent correctly points out that Petitioner should have cited section 63-46b-12 of the Utah Code rather than section 63-46b-10 for the proposition that the Commission must base its decision on the record and give reasons therefor supported by facts from the record. Respondent, however, in quoting section 63-46b-12(6)(c) has omitted subsection (v) which states

that the Commission's order on review must contain the reasons for the particular disposition of the case.

As explained in Section I of this brief and in the Brief of Petitioner submitted to this Court on May 10, 1989, the Commission relied on inferences that are not adequately supported by the facts from the record. It gave no reasons for reaching a conclusion contrary to the overwhelming weight of evidence and, instead, simply stated that the last sentence of the report could not be overlooked. (Order Granting Applicants Motion for Review, at 2.) Because the Commission's order was without a reasonable basis in the evidence, and because the Commission failed to give reasons for its decision, the Order Granting Applicant's Motion For Review must be overturned.

CONCLUSION

The Industrial Commission's decision in granting applicants motion for review was arbitrary and capricious because it was based on an unreasonable interpretation of the facts of record. There is simply insufficient evidence to show that Respondent's disability was caused by his employment activity.

In addition, the ambiguous interpretation of the Medical Panel Report raised a question of fact not present in the proceedings below. Because the issue arose only after the report had been adopted by the ALJ, USX has been deprived of its right to due process.

For the foregoing reasons, the Industrial Commission's Order Granting Applicant's Motion for Review should be reversed. At the very least, the case should be remanded for clarification of the Medical Panel Report.

DATED this 4th day of August, 1989.



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MAILING CERTIFICATE

I hereby certify that I caused to be mailed, postage prepaid, four true and correct copies of the foregoing REPLY BRIEF USX CORPORATION to the following on this 7th day of August, 1989:

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

ADDENDUM

Utah Code Ann. §35-1-69 (Supp. 1987) (as amended 1984):

If any employee who has previously incurred a permanent incapacity by accidental injury, disease, or congenital causes, sustains an industrial injury for which either compensation or medical care, or both, is provided by this chapter that results in permanent incapacity which is substantially greater than he would have incurred if he had not had the pre-existing incapacity, or which aggravates or is aggravated by such pre-existing incapacity, compensation, medical care, and other related items as 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, medical care, and other related items shall be for the industrial injury only. The remainder shall be paid out of the Second Injury Fund as provided for in Subsection 35-1-68(1), and shall be determined after assigning the impairment for the industrial injury on a whole person uncombined basis and then deducting this percentage from the total combined rating. This combined impairment rating may not exceed 100%.

....

....

....

Utah Code Ann. §63-46b-12(6)(c)(1988):

(6)(c) The order on review shall contain:

(i) a designation of the statute or rule permitting or requiring review;

(ii) a statement of the issues reviewed;

(iii) finding of facts as to each of the issues reviewed;

(iv) conclusions of law as to each of the issues reviewed;

(v) the reasons for the disposition;

(vi) whether the decision of the presiding officer or agency is to be affirmed, reversed, or modified, and whether all or any portion of the adjudicative proceeding is to be remanded;

(vii) a notice of any right of further administrative reconsideration or judicial review available to aggrieved parties; and

(viii) the time limits applicable to any appeal or review.