2001

Intermountain Health Car, Inc. v. Industrial Commission of Utah and Mary Jean Ortega : Petition for Rehearing

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

INTERMOUNTAIN HEALTH CARE, INC., a Utah Corporation, d/b/a LDS HOSPITAL,	:	
Plaintiff,	:	Case No. 14690
-vs-	:	
INDUSTRIAL COMMISSION OF UTAH and MARY JEAN ORTEGA,	:	
Defendants.	:	

PETITION OF DEFENDANT INDUSTRIAL COMMISSION OF UTAH FOR REHEARING AND FOR CLARIFICATION OF SUPREME COURT DECISION OF MARCH 25, 1977.

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LDS HOSPITAL, :
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UTAH and MARY JEAN ORTEGA,
:
Defendants.

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PETITION FOR REHEARING

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COMES NOW the defendant Industrial Commission of Utah, and respectfully petitions this Honorable Court for a rehearing in the above-entitled case.

This Petition is based on the following grounds.

POINT I.

THIS COURT ERRED IN STATING THAT THE COMMISSION MADE A FINDING WHICH IN FACT THE COMMISSION DID NOT MAKE.

This Court, as part of its decision of March 25, 1977, stated:

> The major difficulty in this case stems from the fact that the Commission found that the claimant had a pre-existing psychological condition relating to pain in her back, which combined with this accident resulted in permanent partial disability of 30 percent, 10 percent attributable to the pre-existing

> condition and the other 20 percent to this accident. The claimant's testimony and the medical report provide support for that finding; and, since the latter also indicates that continued psychiatric treatment may lead to further significant improvement in the claimant's condition, the Commission reserved its final determination of the plaintiff's liability for total disability benefits until the treatment is completed. (emphasis added).

The Commission made no such finding. The medical panel and individual doctors and attorneys for the parties talked of such percentages but the record clearly shows that the findings and Order of the Commission reserved, pending the outcome of the psychiatric treatment and further psychiatric evaluation, the issues pertaining to permanent partial disability compensation. (R-97).

This Court correctly acknowledged in the above quoted paragraph that the Commission reserved its final determination until the treatment is completed but incorrectly stated "the Commission reserved its final determination of the plaintiff's liability for total disability benefits" when it should have read "permanent partial disability benefits." There is nothing in the Ortega case concerning total disability benefits.

This Court's action in attributing a finding to the Commission which the Commission did not make should properly void the decision of the Court concerning contribution and apportionment from the special fund becuase the Commission has yet to make a determination concerning permanent partial disability which would allow apportionment under 35-1-69, Utah Code Annotated, 1953.

The language of the Court in stating:

> Consequently, inasmuch as it appears that the pre-existing condition increased the resulting disability by one third, it follows that under the requirements of the statute, the medical expenses as well as the compensation award should have been apportioned two thirds from the employer and one third from the special fund.

is again not proper because it is based on the false premise that the Commission made a finding of 10 percent and 20 percent of permanent partial disability.

All other major points of the Court's decision are clouded because they would not have rightly been before the Court except for the false presumption that the Commission had made a finding which they did not make. Such points are the question of "substantially greater" and the question of apportionment of medical expenses. Both questions are dependant upon there being a previous permanent incapacity which has not yet been determined.

POINT II.

THIS COURT ERRED IN "APPARENTLY" DETERMINING THAT IT IS NOT NECESSARY TO HAVE A PREVIOUS AND A PERMANENT INCAPACITY BEFORE APPORTIONMENT CAN BE MADE.

Because of the wrong assumption made by the Court in Point I the questions involving apportionment were not properly before the Court. Before apportionment can be made under 35-1-69, supra there must be a finding of a previous and a permanent incapacity.

The statute allowing apportionment, 35-1-69 U.C.A. 1953 reads:

> 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...(emphasis added).

As outlined in Point I the Commission has not yet found that there is a permanent incapacity, either pre-existing or from the industrial accident. And depending upon the results of treatment there may well be no permanent incapacity.

POINT III.

THIS COURT ERRED IN ITS DETERMINATION OF "SUBSTANTIALLY GREATER PERMANENT INCAPACITY."

Again, based on the false presumption that the Commission had made a finding as to permanent incapacity, the Court stated that it cannot be doubted that 30 percent is substantially greater than 20 percent, nor that 10 percent disability is itself substantial in that it is definite and measurable. But if there had been a determination as to percentage of disability that existed before the accident that percentage figure would have to be measurable before the accident. If Mrs. Ortega had been examined before the industrial accident the record is clear that there would have been no disability found. There cannot be an apportionment value placed on a non-permanent, illusory and non-definable possible ailment. Before the industrial accident there was only the possibility of a pre-disposition to an incapacity. If the reason for 35-1-69, supra, was to encourage employers to hire the handicapped and to apportion expenses among employers (see McPhie vs. U.S. Steel, 551 P.2d 504) it

would be meaningless unless it provided for a definite and measurable handicap that existed before the industrial accident. Mrs. Ortega did not have a demonstrable incapacity before the accident.

POINT IV.

THIS COURT ERRED IN NOT FOLLOWING PRECEDENT OF COMMISSION ORDERS ON MEDICAL EXPENSES.

The Commission has, for many years, acted under the guiding philosophy that workman's compensation laws should provide a fast determination not available in the regular courts and also to stay within the actuarially constructed framework of the special fund.

Actuarially the second injury fund (special fund) was never intended and has never been used to apportion medical payments.

If medical payments were apportioned it would be rare to have a case that would not go before the Commission. This would place a burden upon the Commission that would seem to be unmanagable.

CONCLUSION

Because the decision of the Court was based on a false statement that the Commission had made a finding which it did not make the decision of this Court should be vacated and the case remanded to the Commission for necessary findings when the treatment of Mrs. Ortega is completed.

Respectfully submitted,

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