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# Intermountain Health Car, Inc. v. Industrial Commission of Utah and Mary Jean Ortega : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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INTERMOUNTAIN HEALTH CARE, INC.,:  
a Utah corporation, d/b/a LDS  
HOSPITAL, :

Plaintiff, :

-vs- :

Case No. 14690

INDUSTRIAL COMMISSION OF UTAH :  
and MARY JEAN ORTEGA, :

Defendants.

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BRIEF OF PLAINTIFF

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ORIGINAL ACTION TO REVIEW THE PROCEEDINGS AND  
ORDER OF THE INDUSTRIAL COMMISSION OF UTAH

---

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BRIEF OF PLAINTIFF

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STATEMENT OF THE NATURE OF THE CASE

Plaintiff appeals from a temporary order in favor of the defendant Ortega and against plaintiff, which order granted defendant Ortega temporary total disability and medical payments.

DISPOSITION OF THE CASE BEFORE THE INDUSTRIAL COMMISSION

The claim of defendant Ortega against plaintiff was heard by the defendant Commission, after which the defendant Ortega appeared before a medical panel which subsequently issued a medical panel report. Based on the report, the defendant Industrial Commission issued a temporary order,

subsequently amended, which awarded temporary total disability payments and medical payments to defendant Ortega pending a final determination on the issue of permanent partial disability.

#### RELIEF SOUGHT IN THIS COURT

Plaintiff seeks to have an apportionment made of the medical expenses awarded, seeks to have the temporary total disability payments eliminated, and seeks to have a dollar limit set on the medical benefits awarded.

#### STATEMENT OF THE FACTS

Defendant Ortega was an employee of plaintiff's hospital in November, 1970. While so employed and while lifting laundry bags, she felt the onset of burning pain in the left inter-scapular area. She was told that she had pulled a muscle, was given a prescription for pain, and sent back to work. She was unable to continue her work and after further consultation in the emergency room at the hospital was sent home. She was hospitalized on January 14, 1971 with a discharge diagnosis of cervical strain, followed by a second hospitalization on November 8, 1973 with a discharge diagnosis of severe dorsal and lumbar spine pain and anxiety. Both times she was treated conservatively and no

neurological abnormalities were found. She has a history of family problems, including a recently divorced son living at home who is now facing a second degree murder charge on an automobile accident, and a husband who is an alcoholic. In addition, she is having financial problems and has a 15 year old son who has health problems and misses school. The medical panel reported that of the 30 percent disability due to psychological problems, only 20 percent can be attributed to the industrial accident.

#### ARGUMENT

##### POINT I

U.C.A. § 35-1-69 REQUIRES THAT THE AWARD TO CLAIMANT BE APPORTIONED BETWEEN EMPLOYER AND THE SPECIAL FUND.

Utah Code Ann. § 35-1-69 is clearly applicable in a case such as is presented here for review. This Court in a recent case which reviewed that section of the law noted that among other purposes, the law encouraged employers to hire handicapped workers who had previously existing disabilities and established a "broader base of responsibility for preexisting conditions." McPhie v. United States Steel Corp., 551 P.2d 504 (Utah 1976). Those two purposes would be specifically frustrated if the temporary order of the defendant Commission in this case were allowed to stand.

The medical panel's report in this case specifically found as follows:

1. 30 percent permanent, partial disability because of the psychological aspects of the claimant's injury and 5 percent permanent, partial disability due to scoliosis and muscle strain, making the total 35 percent permanent, partial disability;
2. 20 percent permanent disability due to the industrial injury on November 11, 1970, all of which was due to the psychological aspect; and
3. 15 percent permanent physical impairment attributable to a preexisting permanent, partial disability.

Since there was preexisting permanent physical impairment, the defendant Industrial Commission, according to the statute, should have assessed plaintiff measured by "the percentage of permanent physical impairment attributable to the industrial injury only, and the remainder shall be payable out of the Special Fund." Utah Code Ann. § 35-1-69. To the contrary, the defendant Industrial Commission by its order has directed the plaintiff to pay all costs for medical treatment of defendant Ortega without any apportionment.

The defendant Industrial Commission cited as the basis upon which it refused to make an apportionment the case of Powers v. Industrial Commission, 19 Utah 2d 140, 422 P.2d 740 (1967). In fact, that case is not applicable here since there is no argument on behalf of defendant Ortega or the plaintiff that the industrial accident complained of aggravated or lightened up a preexisting disease. Moreover, that case



stands only for the principle that the employer must pay for such aggravation or lighting up. It does not reach the subject of apportionment at all. Nothing in that case indicates that in a case of aggravation or lighting up, the employer must pay for the preexisting condition as well. To make such a claim would fly directly in the face of the apportionment statute.

There are a number of cases decided by this Court on apportionment between the employer and the special fund, but in none of those cases where this Court found that the employer must pay the full cost, was there any finding by the medical panel of preexisting conditions. See, e.g., Hafer's, Inc. v. Industrial Commission, 526 P.2d 1188 (Utah 1974); Halvorson, Inc. v. Williams, 19 Utah 2d 113, 426 P.2d 1019 (1967). Moreover the defendant Commission failed to have a determination made by the medical panel whether the 20 percent attributable to the industrial accident by the medical panel was substantially greater than it would have been had there been no previous existing condition of permanent partial disability. Cf. McPhie v. United States Steel Corp., 551 P.2d 504, 506 (Utah 1976) (concurring opinion of Ellett, J.).

In the instant case the bulk if not all of the preexisting disability was due to the psychological problems defendant Ortega was suffering. The claimed-accident in question came as a result of the claimant lifting laundry bags and feeling a burning pain in the left inter-scapular area, which she was told was a pulled muscle. It is fairly obvious, although the medical panel is

silent on the question, that since the panel found 20 percent permanent partial disability based solely on psychological impairment stemming from the industrial accident in question, then that impairment was substantially greater than it would have been normally had there not been the preexisting psychological disability.

It should be noted that the award which has been entered is only a temporary award, but nonetheless making the plaintiff responsible for all medical treatment of the claimant's psychological problems. The claimant is presently on an out-patient basis with a psychiatrist with no indication when that treatment might be terminated. It is, therefore, patently unfair to charge the plaintiff with the full cost of that rather expensive treatment, particularly without the benefit of a final determination by the defendant Commission as to the percentage of permanent disability attributable to the plaintiff. It is the position of the plaintiff that, at the most, it should only have to pay its apportioned share of the medical cost. The Special Fund, or, if necessary, defendant Ortega herself, should pay the remaining portion. Further, upon a final determination of the amount of permanent partial disability attributable to the industrial accident in question, and also attributable to preexisting conditions, if the ratio attributable to the plaintiff should be less than at the present, the plaintiff

should be given credit on any final award for that proportion of medical payments paid in excess of its proper share.

## POINT II

CLAIMANT IS NOT ENTITLED TO TEMPORARY TOTAL DISABILITY PAYMENTS DURING MEDICAL TREATMENT.

As part of the first temporary order of the defendant Industrial Commission, the plaintiff was ordered to pay temporary total disability compensation during periods of inpatient hospitalization and after release from the hospital until defendant Ortega was released for work activities. After plaintiff objected to the initial order, the Industrial Commission amended its order but in that amended order, made no reference to the temporary total disability award. Nonetheless, this was clearly raised by plaintiff's motion for review, and more particularly by its memorandum in support of its motion for review.

According to the understanding of plaintiff, defendant Ortega, pursuant to the temporary order, began inpatient treatment at the University of Utah Hospital and shortly thereafter, transferred to outpatient treatment. According to reports received by plaintiff, it appears that she is continuing at the present time under outpatient treatment and there is no indication that she has been released to work. On that basis,

it would appear from the temporary award, that plaintiff is required to pay a substantial temporary total disability award.

The very nature of a temporary total disability award would be violated if such an award were upheld in this case. Since it was necessary that defendant Ortega had stabilized in order for the medical panel to assess a permanent partial disability, there can be no claim that at the time of her appearance before the medical panel she was entitled to temporary total disability in addition to a permanent partial disability award. The findings of fact in the temporary award itself indicate that defendant Ortega was temporarily totally disabled only until November 11, 1973.

To claim that defendant Ortega is now entitled to temporary total disability during the period of hospitalization has to be on the basis that such hospitalization totally incapacitates her. Such is, however, not the case since she is being treated on an outpatient basis. Whether or not she has returned to work is not determined by her hospitalization needs, but rather by the degree of her permanent partial disability for which the medical panel has already made a finding. There is, therefore, no basis to assess the plaintiff with the costs of temporary total disability past November 11, 1973.

### POINT III

THE COMMISSION SHOULD NOT BE ENTITLED TO GIVE THE CLAIMANT A "BLANK CHECK" WITH REGARD TO HER TREATMENT.

The temporary order of the defendant Commission does not specify the amount or extent of medical treatment which defendant Ortega should receive. Since the ailment is psychological and mental, it is conceivable that treatment could continue for an indefinite period of time. The defendant Commission in denying the motion for review, addressed itself to that issue and attempted to resolve the matter by indicating that a report by the administrative law judge and by the treating physician would be filed every 30 days. That does not, however, meet the objection that there is nothing to limit that treatment. The fact that the treating physician indicates what he has done, rather than what he will do in the future, and the fact that there are no brakes on the medical treatment, argues against any control. This Court has held in Carbon Fuel Co. v. Industrial Commission, 81 Utah 156, 17 P.2d 215 (1932) that "the Commission is required to determine and fix the amount that shall be allowed an injured employee for medical treatment in advance of the rendering of such treatment." (emph. added.) That this should be applied in this particular case is abundantly clear. The failure of the defendant Commission to meet that argument and to allow the "Blank Check" circumstances to exist is contrary to the law and the defendant Commission should be ordered to set a maximum amount that can be spent for medical treatment.

### CONCLUSION

It is clear that the plaintiff in this case is, at most, responsible for only a portion of defendant Ortega's permanent partial disability and that the remainder, or at least a good share of the remainder, of those disabilities is attributable to preexisting conditions. It would be manifestly unjust to require this plaintiff to pay the full amount of the medical expenses incurred by defendant Ortega in the treatment of those disabilities, including the pre-existing disabilities. An apportionment should be established as to those medical expenses. In addition, the defendant Commission should be required to set a level on those expenditures which would not be unreasonable under the circumstances. Finally, during the pendency of that treatment there should be no award for total temporary disability to be assessed against the plaintiff.

Respectfully submitted,

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