1979

Intermountain Smelting Corp. and State Insurance Fund v. Industrial Commission of Utah et al : Brief of Defendants

Utah Supreme Court

Andrew R. Hurley; Attorney for Defendants;
Robert B. Hansen; Frank V. Nelson; James R. Black; Attorneys for Plaintiffs;

IN THE SUPREME COURT OF THE

STATE OF UTAH

INTERMOUNTAIN SMELTING CORP. and STATE INSURANCE FUND,	:	
Plaintiffs on Appeal,	:	
vs.	:	Case No. 16530
INDUSTRIAL COMMISSION OF UTAH; ANTHONY CAPITANO, and SPECIAL FUND OF Section 35-1-69 Utah Code Ann.,	:	
Defendants on Appeal.	:	

BRIEF OF DEFENDANTS ON APPEAL

ANTHONY CAPITANO

ROBERT B. HANSEN
Attorney General

FRANK V. NELSON
Assistant Attorney General
Attorneys for Industrial
Commission and Special Fund
of Section 35-1-69 Utah Code
Ann.
236 State Capitol Building
Salt Lake City, Utah 84114

JAMES R. BLACK
Black & Moore
Attorney for Intermountain
Smelting and State
Insurance Fund
500 Ten Broadway Building
Salt Lake City, Utah 84101

ANDREW R. HURLEY
Attorney for Anthony Capitano
1011 Walker Bank Building
Salt Lake City, Utah 84111

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NATURE OF THE CASE

Defendant On Appeal Capitano accepts the statement of Plaintiffs on Appeal as to the nature of the case.

DISPOSITION BY THE INDUSTRIAL COMMISSION

Defendant on Appeal Capitano accepts the statement of the Plaintiff on Appeal as to the disposition of the case by the Industrial Commission: issuing its Order for Compensation and Medical Expenses during temporary total disability be paid by the employer. Permanent partial compensation was apportioned.

RELIEF SOUGHT ON APPEAL

Defendant on Appeal Capitano respectfully ask the decision of the Industrial Commission be affirmed as to liability, but

joins the State Insurance Fund in requesting that the award be apportioned as is set forth in 35-1-69, UCA 1953.

FACTS

Anthony Capitano accepts the facts as stated by the plaintiff on appeal, except that the record will show Mr. Capitano filed an Occupation Disease Claim on November 23, 1976. He filed a claim to protect his rights on February 22, 1977 on the injury of June 4, 1976 and a Motion to Consolidate and Motion To Add Second Injury Fund on November 23, 1977.

POINT I.

TEMPORARY TOTAL COMPENSATION AND MEDICAL EXPENSES ARE APPORTIONABLE.

The statute 35-1-69 of the Utah Code Annotated, 1953 as amended with the pertinent part underlined is as follows:

> 35-1-69 Combined injuries resulting in permanent incapacity--Basis of compensation--Special fund--Training of employee.--(1) If any employee who has previously incurred a permanent incapacity by accidental injury, disease, or congenital causes, sustains an industrial injury for which compensation and medical care is provided by this title 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, which medical care and other related items are 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 and medical care shall be for the industrial injury only and the remainder shall be paid out of the special fund provided for in section 35-1-68 (1) hereinafter referred to as the "special fund."

A medical panel having the qualifications of the medical panel set forth in section 35-2-56, shall review all medical aspects of the case and determine first, the total permanent physical impairment resulting from all causes and conditions including the industrial injury; second, the percentage of permanent physical impairment attributable to the industrial injury; and third, the percentage of permanent physical impairment attributable to previously existing conditions whether due to accidental injury, desease or congenital causes. The industrial commission shall then assess the liability for compensation and medical care to the employer on the basis of the percentage of permanent physical impairment attributable to the industrial injury only and the remainder shall be payable out of the said special fund. Amounts, if any, which have been paid by the employer in excess of the portion attributable to the said industrial injury shall be reimbursed to the employer out of said special fund.

(2) In addition the commission in its discretion may increase the weekly compensation rates to be paid out of such special fund, such increase to be used for the rehabilitation and training of any employee coming within the provisions of this chapter as may be certified to the commission by the rehabilitation department of the state board of education as being eligible for rehabilitation and training; provided, however, that in no case shall there be paid out of such special fund for rehabilitation an amount in excess of $1,000.

The statute is quite clear and not subject to any doubt.

See the following cases:

Intermountain Health Care, Inc. v. Ortega
562 P2d 617 (1977)

Patricia H. White v. Industrial Commission
__P2d___ November 28, 1979, No. 15796

Nebo School District, et al. v. Cragun, et al.
__P2d___, November 28, 1979, No. 15881

The Paris Co., et al. v. Industrial Commission, et al.
__P2d__, November 28, 1979, No. 15882

All of the cited cases involve permanent partial disability. They correctly interpret the provisions of 35-1-69, Utah Code Annotated 1953 as amended.

The Industrial Commission of Utah has applied a warped, inconsistent and evasive interpretation of this statute to the confusion of appellants, insurance carriers and their counsel. The real reason for the tortured application is an economic one, namely fear of depleting the "Special Fund." Real or not, this is a matter for legislative consideration. Also in passing, joining the Industrial Commission as a defendant as custodian of the "Special Fund" produces a real anomaly in that the applicant and the insurer are seeking relief against the court who decides the issues. This again is a matter for the legislature, but it may account for some fourteen appeals on this point which were or are before this court prior to White, supra.

The case of Granado v. Workmens' Compensation Appeals Board 445 P2d, 294 at 299 was decided October 30, 1968. The case interprets Section 4663 of the Labor Code of California involving aggravation of a disease existing prior to a compensable injury, etc. It does not deal with Section 4751 of the California Labor Code which is the equivalent of Utah's 35-1-69, with the added feature of a threshold of permanent partial disability amounting to thirty percent permanent partial disability. You cannot compare cases interpreting statutes unless they are substantially identical.

POINT II.

THE SECOND INJURY FUND IS LIABLE FOR THE PRIOR INCAPACITY IN THIS CASE.

The Administrative Law Judge, the medical panel and counsel struggled with this problem. Additional information was sought after the panel report was filed. It is not all that difficult, however, if we consider that Mr. Capitano, as a young man, suffered a gun shot wound in Korea and was awarded a thirty percent (30%) permanent partial disability for loss of use of his right foot. He engaged in heavy work as a smelterman and compensated for his injured right foot with a totally functioning left foot. However, when he injured his left foot to the extent he did in the accident of June 9, 1976, he is now dependent upon two injured feet. He can no longer engage in the work for which he was trained. However, he has sought and is employed at a reduced wage as a sharpener of surgical instruments.

The award of the Administrative Law Judge as to his disability is correct, based on the medical facts, and should be affirmed.

CONCLUSION

The Order of the Industrial Commission as to disability should be affirmed. The award should be apportioned pursuant to 35-1-69 Utah Code Annotated, including medical and hospital expenses as prayed for by the State Insurance Fund.

DATED this 13th day of February, 1980.

Respectfully submitted,

/s/ Andrew R. Hurley

Andrew R. Hurley
Attorney for Anthony Capitano

Applicant's counsel apologizes for the lateness of this brief, but was not served with the brief of the Attorney General until February 4, 1980.

CERTIFICATE OF SERVICE

I hereby certify that I personally served two copies of the following brief to the following on this 13th day of February, 1980.

Frank Nelson
Attorney for Industrial Commission of Utah
and the Second Injury Fund
Attorney General's Office
State Capitol Building
Salt Lake City, Utah 84114

James R. Black
BLACK & MOORE
Attorney for Intermountain Smelting
and State Insurance Fund
500 Ten Broadway Building
Salt Lake City, Utah 84101

/s/ Andrew R. Hurley