1980

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. 16[illegible]

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, STATE INDUSTRIAL COMMISSION OF UTAH.

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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.

NATURE OF THE CASE

Defendants on Appeal accept statement of Plaintiffs on Appeal in the Nature of the Case.

DISPOSITION BY THE INDUSTRIAL COMMISSION

Defendant on Appeal, Industrial Commission, issued 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

Defendants on Appeal respectfully ask the decision of the Industrial Commission be confirmed.

FACTS

This case is an excellent example of the need and benefit of a "special" or "second injury" fund, if correctly used.

There was a previous "incapacity" to employee by reason of a gunshot injury to his left foot while in the military. He has

and is receiving benefits of $113 per month from the United States Government which will continue during the remainder of his life based on a thirty percent "disability" rating for such injur The employee then sustained an industrial accident to his right foot which was rated by a medical panel as thirty percent loss of the right foot, or eight and one-half percent loss of the whole man. The panel then gave a rating of twenty-five percent loss of the whole man to which the administrative law judge concluded as eight and one-half percent for each foot injury plus eight percent loss because of the right foot injury "acting upon" the left foot injury to produce an additional loss over and above the loss sustained by each foot injury taken seperately, or as stated by Larson's Workman's Compensation Law, Sec. 59.00: "The total effect of two successive injuries may be much greater than the sum of schedule allowances for the parts." The Order in this case by the Industrial Commission awarded the employee compensation from the second injury fund for this "added upon" eight percent increase. See R-160 for excellent account by the administrative law judge on the method of arriving at the percentage of impairment by the medical panel. The only question at issue is the liability of the Second Injury Fund for apportionment of compensation and medical expenses during temporary total disabi

This case was heard by the Industrial Commission after the Ortega decision and before the combined case of White, etc was issued.

Point I.

TEMPORARY TOTAL COMPENSATION AND MEDICAL EXPENSES DURING TEMPORARY TOTAL ARE NOT APPORTIONABLE.

The Industrial Commission is well aware of the Ortega and White decisions and the stated position of apportioning temporary total compensation and medical expenses during temporary total disability. The present case was heard before the White case ruling upheld Ortega without comment, even though the issue of apportionment of temporary total and medical expenses during temporary total disability was never at issue in Ortega.

The present case is typical of the complete disruption of long standing logical and workable orders of the Industrial Commission that have been put in confusion by the Ortega and White decisions. There has been almost no judicial precedent on the subject of apportioning compensation and medical expenses during temporary total disability because the objections to such apportionment are so apparent. California has, however, under almost identical circumstances, clearly enunciated why temporary disability is not apportionable.

> In view of the ambiguity of the statute, the rule of liberal construction, the delays which will necessarily result if temporary disability is made apportionable, the resulting frustration of the legislative policy of making temporary disability substitute for lost wages, and our public policy of expeditious payment, we conclude that temporary disability is not apportionable. Granado v. Workmen's Compensation Appeals Board, 445P.2 294 at 299.

The rule of not apportioning temporary disability has always prevailed in Utah until Ortega. And that same rule applies

whether or not a prior disability increases compensation or medi expenses during temporary disability.

The arguements against apportionment are especially meaningful under the present facts of this case. There is nothing in the record to indicate that either medical expenses or the time of temporary total disability was increased by the prior foot injury that occured in military service.

There is no possible reason under the law of workmen's compensation for a second injury fund to be liabile for the expense incurred by an industrial accident when those expenses were not increased by a prior disability. Even sec. 35-1-69 makes th employer liable "for the industrial injury only," and not for just a part of the expenses of that industrial injury.

The commission detailed at considerable length in the White brief how the Ortega decision drastically changed the applicati of the second injury fund. This case illustrates how far reaching the judicial decision went in changing the law in this sta without a new legislative enactment. I will give an illustrati of what Ortega could do in just the case of approtionment of temporary total disability:

Employee breaks a leg in an industrial accident and complications exist which cause the medical panel to give him a f percent permanent partial disability for the leg injury after s months temporary total. He has a ten percent prior disability because of arthritis in his shoulder. The panel therefore gi him fifteen percent permanent partial, five percent for indus

injury and ten percent pre-existing. Under Ortega the second injury fund would pay 66 2/3 percent of all expenses during temorary total even though none of the expenses were for other than the industrial injury.

The facts of both the illustration and of this case clearly demonstrate the unfairness of apportionment under Section 69 until a determination of permanent incapacity is made.

Point II.

THE SECOND INJURY FUND IS NOT LIABLE FOR A PRIOR INCAPACITY FOR WHICH THE EMPLOYEE HAS RECEIVED COMPENSATION.

Double payment to an injured worker has not been approved by this court or any court to our knowledge in workmen's compensation cases. Capitano is receiving $113 per month for the military injury from the U.S. Government. The general rule is well stated in Larson's Workmen's Compensation Law:

> It has always been accepted without question that the situation to which the Second Injury Fund applies consists of a prior noncompensable injury followed by and combining with a subsequent compensable injury. Sec. 59.32 page 10-316.

CONCLUSION

The Order of the Industrial Commission should be affirmed. The general rule of not apportioning compensation or medical expenses during temporary total disability is valid and followed by all jurisdictions.

It would be indefensable to apportion under the facts of

this case where all the medical expenses and compensation during temporary disability were the result of the industrial accident.

DATED this 4th day of February, 1980.

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