

1978

IML Freight Inc and Transport Indemnity Co. v. Grover L. Odekirk et al : Brief of Plaintiff

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2

 Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Robert Hanson; Frank Nelson; William F. Hanson; Attorneys for Defendants;
Arthur Sandack; Attorney for Plaintiffs;

Recommended Citation

Brief of Appellant, *IML Freight, Inc. v. Odekirk*, No. 16623 (Utah Supreme Court, 1978).
https://digitalcommons.law.byu.edu/uofu_sc2/1905

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT OF THE STATE OF UTAH

IML FREIGHT, INC., and)
TRANSPORT INDEMNITY COMPANY,)

Plaintiffs,)

Case No. 16638

vs.)

GROVER L. ODEKIRK and THE)
INDUSTRIAL COMMISSION OF)
UTAH,)

Defendants.)

GROVER ODEKIRK,

Plaintiff,)

Case No. 16638

vs.)

INDUSTRIAL COMMISSION OF)
UTAH, IML FREIGHT and)
TRANSPORT INDEMNITY COMPANY,)

Defendants.)

ACTION FOR REVIEW OF
FINAL ORDER OF INDUSTRIAL COMMISSION

* * *

BRIEF OF PLAINTIFF, GROVER ODEKIRK

Robert Hanson

Attorney General of Utah
and

Frank Nelson

Assistant Attorney General
263 State Capitol Building
Salt Lake City, Utah 84114

Attorneys for Defendant, The
Industrial Commission of Utah

William F. Hanson

702 Kearns Building
Salt Lake City, Utah 84101

Attorney for Defendants IML
Freight, Inc. and Transport
Indemnity Company

FILED

NOV 13 1944

Clerk, Supreme Court, Utah

Arthur Sandack
370 East Fifth South
Salt Lake City, Utah

Attorney for Plaintiff
Grover Odekirk

IN THE SUPREME COURT OF THE STATE OF UTAH

IML FREIGHT, INC., and)
TRANSPORT INDEMNITY COMPANY,)

Plaintiffs,)

Case No. 16623

vs.)

GROVER L. ODEKIRK and THE)
INDUSTRIAL COMMISSION OF)
UTAH,)

Defendants.)

GROVER ODEKIRK,)

Plaintiff,)

Case No. 16624

vs.)

INDUSTRIAL COMMISSION OF)
UTAH, IML FREIGHT and)
TRANSPORT INDEMNITY COMPANY,)

Defendants.)

ACTION FOR REVIEW OF
FINAL ORDER OF INDUSTRIAL COMMISSION

* * *

BRIEF OF PLAINTIFF, GROVER ODEKIRK

Robert Hanson
Attorney General of Utah
and
Frank Nelson

Assistant Attorney General
263 State Capitol Building
Salt Lake City, Utah 84114

Attorneys for Defendant, The
Industrial Commission of Utah

William F. Hanson
702 Kearns Building
Salt Lake City, Utah 84101

Attorney for Defendants IML
Freight, Inc. and Transport
Indemnity Company

Arthur Sandack
370 East Fifth South Street
Salt Lake City, Utah 84111

Attorney for Plaintiff,
Grover Odekirk

TABLE OF CONTENTS

| | <u>PAGE</u> |
|---|-------------|
| NATURE OF THE CASE..... | 1 |
| DISPOSITION AND PROCEEDINGS BELOW..... | 1 |
| RELIEF SOUGHT ON REVIEW..... | 2 |
| STATEMENT OF THE FACTS..... | 3 |
| ARGUMENT..... | 6 |
| POINT I - THE SPECIAL FUND PROVIDES DISABILITY BENEFITS TO THE PLAINTIFF..... | 6 |
| POINT II - THE INDUSTRIAL COMMISSION FAILED TO EXERCISE ITS JURISDICTION PROPERLY AND DETERMINE PLAINTIFF'S RIGHTS TO BENEFITS FROM THE SPECIAL FUND.... | 10 |
| CONCLUSION..... | 13 |

CASES CITED

| | |
|---|----------|
| <u>Buxton v. Industrial Commission of Utah</u> , 587 P.2d 121..... | 11, 12 |
| <u>Intermountain Health Care, Inc., v. Ortega</u> , 562 P.2d 617 (1977)..... | 8, 9, 12 |
| <u>Wheritt v. Industrial Commission</u> , U. 68, 110 P.2d 374..... | 10 |

STATUTES CITED

| | |
|---------------------------------------|------|
| UTAH CODE ANNOTATED, 1953, as amended | |
| Section 35-1-69..... | 1, 6 |
| Section 35-1-78..... | 11 |

NATURE OF THE CASE

This is a workman's compensation case seeking review of an order issued by the Utah State Industrial Commission denying Plaintiff, Grover Odekirk, disability benefits from the "Special Fund" also known as the "Combined Injury Fund," established by §35-1-69 Utah Code Annotated (1953).

DISPOSITION AND PROCEEDINGS BELOW

Plaintiff, Grover Odekirk, filed a workman's compensation claim on June 30, 1976 (R. 25). Hearing was held December 7, 1976 (R. 48). On March 14, 1977, the matter was referred to a Medical Panel (R. 120). Thereafter, Administrative Law Judge, Joseph C. Foley, awarded Plaintiff certain permanent partial disability benefits from the Employer and Insurer as well as medical expenses, in particular all costs incurred for psychiatric therapy for one year's time, subject to further review (R. 243). Judge Foley further required the Plaintiff's psychiatrist, Dr. Reed Andrus, to submit written reports on Plaintiff's progress and treatment.

On December 15, 1978, Judge Foley ordered the insurance carrier to pay for an additional six months of continued therapy (R. 269).

On May 23, 1979 Plaintiff moved for an order requiring the Insurer to pay for an additional 20 psychiatric visits (R. 283). Judge Foley granted this motion on June 1, 1979 (R. 285).

The Insurer made a timely motion to review that order as well as requesting modification of previous orders of November 17, 1977 and December 15, 1978 (R. 289).

Plaintiff applied for benefits from the Special Fund (R. 299). On July 17, 1979, without further hearing the Industrial Commission affirmed the Administrative Law Judge and denied Plaintiff's application for benefits from the Special Fund (R. 303).

On August 16, 1979, Plaintiff petitioned this Court for review of the denial of benefits from the Special Fund. The Employer and Insurer as well petitioned the Court for writ of review at the same time. Thereafter, the matter was consolidated upon the stipulation and motion of Plaintiff's counsels for the reason that both actions involved common questions of law and fact arising out of the same alleged industrial accident and injury and consolidation would avoid unnecessary costs and delay.

RELIEF SOUGHT ON REVIEW

Plaintiff, Grover Odekirk, seeks an order setting aside Defendants' denial of benefits from the Special Fund and awarding the same.

STATEMENT OF THE FACTS

The Plaintiff is a 51 year old man who has worked all his adult life as a truck driver, mainly in interstate traffic.

On January 5, 1974 while employed by IML Freight, he lost control of the truck he was operating due to snow and slippery road conditions. The truck jackknifed, collided with the bank of the road and threw Plaintiff against the framework of the cab door, injuring his head and snapping or popping his neck (R. 55).

After the accident, he was off work to February 24, 1974. However, when he returned to work, his symptoms would become aggravated, and there would be periods of time off the job. Dr. Holbrook admitted him to St. Mark's Hospital on October 16, 1974 for rest, therapy, traction and muscle relaxers. In November, 1974 he was treated by Dr. Baer at Holy Cross Hospital by acupuncture. He was intermittently on and off work until May, 1974. During this time he began to experience severe depression and his family physician referred him to Dr. Reed Andrus. (The foregoing facts at R. 120.) He was off work from May 12, 1975 until November, 1975 (R. 57, 58). He returned to the job until May, 1976 (R. 59). At that time he had a severe depression, attempted suicide (R. 59) and could not continue working due to the severe pain in his head. He stated,

"Well, everytime when I was out on that truck, I couldn't drive the thing but an hour and my head would start to explode. And, at the time that happened, right down in-between my shoulders here I would get a pain in my back right in the center that was just like a toothache. Everytime my heart beat, my head would be like this." (R. 59). In March, 1977 he was seen by Dr. Erickson who reported Plaintiff continued to have headaches, tenseness and soreness in shoulder and neck with increasing episodes of aching in the hands from the elbow level down with lack of strength and sensation of the hands (R. 126).

His previous medical history in part includes an accident in January, 1960 when he was thrown out of a tanker (R 203). In 1970 due to stiff necks and headaches, Dr. Holbrook performed an anterior cervical disc excision and interbody fusion at C5-6 (R. 113). Mr. Odekirk testified that prior to the accident he had never experienced the depression, feelings of despair or suicidal inclinations from which he suffered (R. 62). He had been a heavy drinker and because of it decided to quit drinking all together in December, 1973. He did not drink since that time (R. 61).

The Medical Panel reviewed a rather thorough medical file and reported after their own examination as follows:

1. Mr. Odekirk's total permanent physical impairment from all causes was 60 percent of the whole man. This was calculated by combining 45 percent loss of body function for psychiatric impairment with 25 percent loss of body function for pseudoarthrosis cervical spine with traumatic aggravation.

2. Ten percent of the 45 percent psychiatric impairment was due from the industrial accident of January 5, 1974.

3. The degree of permanent impairment preexisting the industrial accident was 50 percent loss of body function. This included 35 percent due to psychiatric problems combined with 20 percent loss due to previous arthrodesis of C5-C6.

4. Psychiatric treatment was absolutely necessary.
(R. 209, 210)

Since the time of the accident, he recieved psychotherapy from Dr. Andrus but it was often interrupted by the uncertainty over the insurance coverage due to the appeals by the insurance carrier. (Letter of Dr. Andrus. May 17, 1979, R. 282) He has not been gainfully employed since May 1976.

ARGUMENT

I

THE SPECIAL FUND PROVIDES DISABILITY
BENEFITS TO THE PLAINTIFF.

The Special Fund established in §35-1-69, Utah Code Annotated (1953, as amended), provides disability benefits to workers with a preexisting incapacity who then sustain an industrial injury resulting in a permanent incapacity substantially greater than he would have incurred if he had not had the preexisting incapacity.

The Medical Panel recognized that the Plaintiff was severely disabled, to the extent of 60 percent of the whole man (R. 209). His preexisting incapacity consisted of 20 percent loss of body function due to previous arthrodosis of C5-C6 (cervical spine) with pseudoarthrosis (failure of fusion). (R. 209).

The Panel psychiatrist felt that he had a psychiatric impairment of 45 percent loss of body function, 10 percent of which was due to the accident (R. 210).

His treating psychiatrist stated that the industrial accident combined with his own personality makeup, occupational background, forced inactivity, dependancy, inability to lead a productive life, deep seated feelings of inadequacy, worthlessness, hopelessness, all of which were aggravated by physical symptoms and fears of other accidents led to

severe depression and total occupational disability in the only trade in which he had been gainfully employed. (R. 47)

Plaintiff's preexisting impairments had not been debilitating. He was employable as an interstate truck driver. He was no longer drinking alcohol. He did not require the services of a psychiatrist. He did not suffer from pain in his head or neck and had made a successful recovery from his operation in 1970 (R. 140).

Essentially, his preexisting conditions and disabilities were dormant up to January 5, 1974. Had they not existed at all on that date, the industrial accident would have caused but a rather minor injury to his head. It certainly would not have led to occupational disability.

The accident severely aggravated his preexisting conditions, all of which were complicated by an apparent disposure towards depression. As a result a 60 percent permanent partial disability was determined after the accident. This is substantially greater than he would have had, if there had been no preexisting disability. Sixty percent is substantially greater than 15 percent.

In practical terms, the accident caused and created an occupational disability. The lack of fusion in his neck and the aggravation caused to it by the accident along with

the concomitant psychiatric problems, created a substantial work-related disability, requiring prolonged psychotherapy.

Imagine the case of an employee with total blindness in one eye. If this person thereafter suffers an industrial injury totally blinding his other good eye, the resulting incapacity would be total blindness. Prior to the accident, this man had been employable, although handicapped. After the accident, he is totally disabled. Special Fund benefits are most appropriate in this case. The result is no different for Plaintiff Odekirk.

This case is very similar to Intermountain Health Care, Inc. v. Ortega, 562 P.2d 617 (1977). In that case the Court held that medical expenses as well as compensation award should have been apportioned among the employer and the Special Fund. Id. at 619. The facts stated there, similar to the instant matter, recognize claimant had preexisting psychiatric impairment. The Court stated:

"The position of the Defendant as reflected in the Commission's order seems to be predicated on the assumption that because the pre-existing condition was quiescent and did not require medical treatment until the accident, the plaintiff employer should be held responsible for the entire expense thereof. But it will be noted that the statute makes no distinction between the award for compensation and medical expenses; and that if the requirement of the statute is met, that is, if the resulting permanent incapacity is substantially

greater than if the pre-existing incapacity had not existed, the proportional causation must be found and that portion attributable to the previous condition paid out of the Special Fund." Id. at 619.

The criteria for determining what is substantially greater was set forth in Ortega as follows:

"It surely 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 measureable. 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." Id. at 619.

In the case at bar, the resulting disability of 60 percent is substantially greater than 15 percent. The resulting disability is definite and measureable. The work-related disability is obvious. The inescapable conclusion is that benefits from the Special Fund should be allowed.

The uncontradicted medical evidence on file in this matter supports the conclusion that Plaintiff's resulting disability is substantially greater than what it would have been, but for no preexisting disability. The legal conclusions drawn by the Industrial Commission that this

evidence does not indicate a substantially greater disability, is in error and not supported by the record. As a conclusion of law, it is reviewable and reversible by this Court. Wheritt v. Industrial Commission, U. 68, 110 P.2d 374.

Plaintiff Odekirk has lived with persistent pain in his head and neck since 1974 and has been coping with severe continuous disabling depression and occupational disability. The award from the Employer, based on 15 percent permanent partial disability, is wholly inadequate to compensate him for his disabilities. The Special Fund should be held liable for the amounts remaining based on a 60 percent disability.

II

THE INDUSTRIAL COMMISSION FAILED TO EXERCISE ITS JURISDICTION PROPERLY AND DETERMINE PLAINTIFF'S RIGHTS TO BENEFITS FROM THE SPECIAL FUND.

The Industrial Commission had exercised its jurisdiction to award and require Plaintiff's employer and the insurance company to pay for his psychiatric expenses. The Medical Panel indicated that psychotherapy was essential (R. 210). Unfortunately, due to the fact the insurance carrier contested its liability in this regard, much of the psychotherapy was interrupted because of prohibited cost.

This even led to a moderate relapse (R. 282, 301). Therefore, psychotherapy has not been of the value that may have been contemplated, and the Plaintiff has continued to suffer. Although the insurance carrier certainly is entitled to appellate procedures, the necessary delay caused by the same has led to great hardship in the case of the Plaintiff.

Plaintiff's application for Special Fund benefits is justified in time now due to the reasons previously set forth. Certainly his entitlement to benefits is as justified, if not more so, than the insurance carriers. However, his application for compensation from the Special Fund was denied without so much as the benefit of a re-hearing.

In the case Buxton v. Industrial Commission of Utah, 587 P.2d 121, this Court reversed the Industrial Commission's refusals to make findings and an award regarding Claimant's application for permanent total disability benefits to be paid out of the Special Fund. The Court held:

"The Commission's jurisdiction to act on an application for modification of a previous order derives from §78 of the Act. That section empowers the Commission to make such modification of former findings and orders as 'in its opinion may be justified.' The section has been previously construed to require, as the basis of modification, evidence of some significant change or new development in the claimant's injury or proof of the previous award's inadequacy.

(Citing Kennecott Copper Corp. v. Industrial Commission 19 U.2d, 158, 42 P.2d 952.) On the evidence presented

at the 1975 hearing, the Commission found that the evidence of change or new development in the injury or inadequacy of the previous award was insufficient to justify the modification of its 1971 findings from 55 percent loss of bodily function to total disability, the only modification which would assist Plaintiff in any way.

Even though the Commission is obliged to modify previous orders only when 'in its opinion,' modification is justified, the Commission is not vested with arbitrary power; and it cannot simply ignore competent and credible evidence when there is nothing discrediting therein and there is no evidence to the contrary... it is the Commission's duty to determine whether that loss of function represents total disability in terms of capacity to perform remunerative employment, and the determination must be made on competent evidence." 587 P.2d at 123 (1978).

In the instant case the Industrial Commission totally ignored the application, the evidence before it, and the various issues put before it by counsel for both Plaintiff and the insurance carrier, flatly denying the petitions, without so much as a word as to indicate its reasoning justifying the denial as required by statute. This is arbitrary and capricious. The Commission should be reversed.

Plaintiff Odekirk has suffered a great ordeal since even the time of the original hearing in 1976. Subsequent to that time, the Ortega case was issued. As well, the

Administrative Law Judge issued several orders in regards to psychiatric treatment but the effect of those orders was nullified by economic realities in the face of appeals by the insurance carrier.

This matter should be remanded back to the Industrial Commission and an award made based on Plaintiff's application for benefits from the Special Fund.

CONCLUSION

Plaintiff's application for benefits from the Special Fund was arbitrarily and capriciously denied. Plaintiff suffers from a disability that resulted from his industrial injury of January 5, 1974 and was substantially greater than it would have been had he had no preexisting disabilities.

WHEREFORE, Plaintiff respectfully prays for an award of compensation from the "Special Fund" after the Employer's liability has been first deducted.

Dated this _____ day of _____,
1979.

ARTHUR F. SANDACK
Attorney for Plaintiff
370 East 500 South
Salt Lake City, Utah 84111
Telephone: 531-0555

MAILING CERTIFICATE

The undersigned hereby certifies that a true and correct copy of the foregoing Brief of Plaintiff Grover Odekirk was mailed postage prepaid to Robert Hanson and Frank Nelson, Attorney General and Assistant Attorney General, 263 State Capitol Building, Salt Lake City, Utah 84114 and to William F. Hanson, Attorney for Defendants IML Freight, Inc. and Transport Indemnity Company, 702 Kearns Building, Salt Lake City, Utah 84101 this ____ day of November, 1979.

ARTHUR SANDACK
Attorney for Plaintiff
Grover Odekirk