

1979

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

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

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

Plaintiffs, :

vs. :

GROVER L. ODEKIRK and :
INDUSTRIAL COMMISSION OF :
UTAH, :

Case No.

Defendants. :

GROVER ODEKIRK, :

Plaintiff, :

vs. :

INDUSTRIAL COMMISSION OF :
UTAH, IML FREIGHT and TRANS- :
PORT INDEMNITY COMPANY, :

Defendants. :

BRIEF OF IML FREIGHT, INC. AND
TRANSPORT INDEMNITY COMPANY

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

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TRANSPORT INDEMNITY COMPANY, :

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16624

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Plaintiff, :

vs. :

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PORT INDEMNITY COMPANY, :

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BRIEF OF IML FREIGHT, INC.
AND
TRANSPORT INDEMNITY COMPANY

NATURE OF CASE

This is a review of the (Denial of) Motion for Review of the Industrial Commission of Utah dated January 16, 1978, wherein it ordered IML Freight, Inc. and Transport Indemnity Company to pay the entire reasonable cost and expense

of the psychiatric treatment of Grover L. Odekirk, and the Denial of Motion for Review of the Industrial Commission of Utah dated July 17, 1979, wherein it refused to apportion the reasonable cost and expense of the psychiatric treatment of Grover L. Odekirk and refused to modify its prior orders so as to provide in them for apportionment of the reasonable cost and expense of the psychiatric treatment of Grover L. Odekirk.

DISPOSITION BY THE INDUSTRIAL COMMISSION OF UTAH

The Industrial Commission of Utah denied the Motion for Review and the Motion for Review and Modification, dated December 2, 1977 and June 22, 1979 respectively, of IML Freight, Inc. and Transport Indemnity Company and affirmed the Orders of the Administrative Law Judge.

RELIEF SOUGHT BY IML FREIGHT, INC. AND TRANSPORT INDEMNITY COMPANY

IML Freight, Inc. and Transport Indemnity Company seek to have an apportionment of the reasonable cost and expense of the psychiatric treatment of Grover L. Odekirk in accordance with the provisions of Section 35-1-69, Utah Code Annotated (1953), as amended.

STATEMENT OF FACTS

Grover L. Odekirk was working for IML Freight,

Inc. on January 5, 1974, when the truck driven by him skidded from the road, struck a near by bank, and threw him against the framework of the door, causing the onset of headache and neck pain. Several days later he also noticed some back pain (R-52,55, & 77). Three days after the accident, he saw an orthopedic surgeon, who determined that he suffered from a post-fusion cervical strain and possible degenerative disc disease although the surgeon noted no definite neurological changes, and determined that his injuries had stablized as of September 29, 1975 (R-132,140, & 112).

On February 24, 1974, Mr. Odekirk returned to work for IML Freight, Inc. and apparently worked periodically through at least March 13 or May 10, 1975 and possibly through November 12, 1975 (R-2-11, 79 & 120). He thereafter worked full time for IML Freight, Inc. until May 12, 1976, when he quit work (R-58 & 74).

In the fall of 1974 or in the forepart of 1975, Mr. Odekirk began to experience periods of depression (R-86 & 95). However, he had experienced alcohol related depression prior to the time of the accident (R-89). His family physician referred him to a psychiatrist, who has since seen him periodically for care and treatment (R-115 & 282).

Mr. Odekirk has a history of difficulty with alcohol, and drank it excessively for an eight to ten year period which terminated in either December of 1973 or December

of 1974 (R-218, 219, 93 & 115). His difficulty with alcohol resulted in a deterioration of his family life and feelings of depression which arose in conjunction with alcoholic hangovers (R-218 & 89).

On October 23, 1975, the Industrial Commission of Utah approved a Compensation Agreement wherein, as a result of his accident, IML Freight, Inc. and Transport Indemnity Company agreed to pay to Mr. Odekirk the sum of \$1,393.55 in addition to the sum of \$4,501.51 which they had previously paid him (R-15).

On June 30, 1976, Mr. Odekirk filed with the Industrial Commission of Utah a Claim for Compensation, which was heard by the Industrial Commission of Utah on December 7, 1976 (R-25 & 48). On March 14, 1977, the matter was referred to a medical panel, which concluded, among other things and after thorough examination, that of Mr. Odekirk's forty-five percent (45%) loss of bodily function for psychiatric impairment, only ten percent (10%) is attributable to his accident (R-120 & 209).

After receiving the report of the medical panel, the Administrative Law Judge ordered, among other things, that IML Freight, Inc. and Transport Indemnity Company pay the entire reasonable cost and expense of the psychiatric treatment of Mr. Odekirk for a period of one year from the date of the Order (R-120 & 243). On January 16, 1978, the Industrial Commission of Utah denied the Motion for Review

of IML Freight, Inc. and Transport Indemnity Company (R-252).

On December 15, 1978, the Administrative Law Judge authorized an additional six months of psychiatric treatment for Mr. Odekirk (R-269). Further, on June 1, 1979, the Administrative Law Judge, pursuant to motion of Mr. Odekirk, authorized him to make an additional twenty visits to his treating psychiatrist (R-285). On June 22, 1979, IML Freight, Inc. and Transport Indemnity Company filed with the Industrial Commission of Utah a Motion for Review and Modification, and on June 25, 1979, Mr. Odekirk filed with the Industrial Commission of Utah an Application for Benefits from the Special Fund and Motion for Review (R-289 & 299). On July 17, 1979, the Industrial Commission of Utah, without elaboration, denied said Motions and Application (R-303).

On August 16, 1979, Mr. Odekirk, IML Freight, Inc., and Transport Indemnity Company petitioned this court for a review of the Denial of Motion for Review of the Industrial Commission of Utah dated July 17, 1979. This court thereafter, upon stipulation and motion of the parties, consolidated said petitions.

ARGUMENT

POINT I

THE REASONABLE COST AND EXPENSE OF THE PSYCHIATRIC TREATMENT OF GROVER L. ODEKIRK SHOULD BE APPORTIONED BETWEEN IML FREIGHT, INC. AND THE "SPECIAL FUND" IN ACCORDANCE WITH THE PROVISIONS OF SECTION 35-1-69, UTAH CODE ANNOTATED (1953), AS AMENDED.

Section 35-1-69 is clearly applicable to the case presented here for review. This court, in the recent case of McPhie vs. United States Steel, 551 P.2d 504 (1976), reviewed Section 35-1-69 and noted that, among other purposes, it encouraged employers to hire handicapped workers who had preexisting disabilities and established a broader base of responsibility for preexisting conditions. Those two purposes would clearly be frustrated if the rulings of the Industrial Commission of Utah which are reviewed here are allowed to stand.

Section 35-1-69 states, in pertinent part:

(I) 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 ... 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 ...

In the recent case of Intermountain Health Care, Inc. vs. Ortega, 562 P.2d 617 (1977), this court again reviewed the above quoted statute. In that case, the claimant injured her back while lifting laundry bags at defendant's hospital. She filed a claim for compensation with the Industrial Commission of Utah, which thereafter determined that she had a preexisting psychological condition which related to the pain in her back at

which, when combined with the industrial injury, resulted in a permanent partial disability of thirty percent (30%), ten percent (10%) of which was attributable to the preexisting condition and twenty percent (20%) of which was attributable to the accident. Notwithstanding, the Industrial Commission of Utah ordered the defendant to pay all the claimants medical expenses.

The defendant filed an appeal with this court, wherein it argued, among other things, that the requirement of the Industrial Commission of Utah that it pay all the claimants medical expenses was unjust and not in conformity with the law as set forth in Section 35-1-69. This court agreed that the claimants medical expenses and compensation should have been apportioned between the defendant and the Special Fund, and that the defendant should pay only that portion of such expenses and compensation which is attributable to the industrial accident. At page 619, 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.

The requirement that the pre-existing condition combines with the later injury to cause 'substantially greater' permanent incapacity does not mean that the former must be greater than the latter. It simply means that it must be some definite and measurable portion of the causation of the disability. It surely can not 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. Consequently, inasmuch as it appears that the pre-existing condition increased the resulting disability by one 1/3, it follows that under the requirements of the statute, the medical expenses as well as the compensation award should have been apportioned 2/3 from the employer and 1/3 from the Special Fund (Emphasis added).

The facts of the case reviewed here are remarkably similar to those of the Ortega case. In both cases, the claimant was found to have a preexisting psychological condition which, when combined with the industrial accident, resulted in a disability rating substantially greater than that which the claimant would have received had he not had a preexisting psychological condition. Further, the application of Section 35-1-69 is even more compelling in the case reviewed here than it was in the Ortega case because here, the claimants resulting disability was increased by thirty-five percent (35%) as a result of his preexisting psychological condition, while in Ortega, the claimants resulting disability was increased by only ten percent (10%)

as a result of his preexisting psychological condition. Inasmuch as this court found, in Ortega, that the claimants resulting disability was substantially greater than it would have been had his preexisting psychological condition not existed, it is inescapable that, in the case reviewed here, the claimants resulting disability was also substantially greater than it would have been had his preexisting psychological condition not existed. Consequently, the rule of the Ortega case and the provisions of Section 35-1-69 are applicable to the case reviewed here, and therefore IML Freight, Inc. and Transport Indemnity Company should pay only twenty-two percent (22%) [that is ten percent (10%) of the forty-five percent (45%) total psychiatric disability] of the psychiatric expenses outstanding and to be incurred by Mr. Odekirk, and the remaining portion of the psychiatric expenses outstanding and to be incurred by him should be paid the special fund.

In the recent consolidated cases of White vs. Industrial Commission of Utah, Nebo School District vs. Cragun, and The Paris Company vs. Industrial Commission of Utah, this court rendered an opinion, filed November 28, 1979, wherein it again reviewed Section 35-1-69 and found that the Ortega case was dispositive. There, this court again apportioned the award of each claimant between the employer of each claimant and the Special Fund in accordance with the provisions of Section 35-1-69. As a consequence of this courts unanimous decision in the White cases, the reasoning of the Ortega case is even more compelling and applicable to the case reviewed here.

POINT II

IF THIS COURT DETERMINES THAT THE REASONABLE COST AND EXPENSE OF THE PSYCHIATRIC TREATMENT OF GROVER L. ODEKIRK SHOULD BE APPORTIONED BETWEEN IML FREIGHT, INC. AND THE "SPECIAL FUND" IN ACCORDANCE WITH SECTION 35-1-69, UTAH CODE ANNOTATED (1953), AS AMENDED, IT SHOULD ALSO DETERMINE THAT EACH ORDER ISSUED BY THE INDUSTRIAL COMMISSION OF UTAH IN THE CASE REVIEWED HERE BE MODIFIED SO AS TO PROVIDE FOR SUCH APPORTIONMENT.

Support for such a determination by this court is ample. Section 35-1-78 grants to the Industrial Commission of Utah continuing jurisdiction to modify its awards. Specifically, in pertinent part, it states:

The powers and jurisdiction of the Commission over each case shall be continuing, and it may from time to time make such modification or change with respect to former findings, or orders with respect thereto, as in its opinion may be justified...

In United States Transport Corporation vs. Industrial Commission, 110 Utah 590, 175 P.2d 752 (1946), this court construed the above quoted statute. There, an employer, as the result of the death of an employee who resided in California but who died in Utah, was ordered by the Industrial Commission of Utah to pay an award to the State Treasurer for the benefit of the Combined Injury Benefit Fund. The employer filed an appeal with this court wherein it argued that the court's previous ruling in the case, to the effect that, assuming reciprocity between Utah and California, an award granted by the California Industrial Commission deprived the Industrial Commission of Utah of jurisdiction, was res judicata and

precluded a modification of the original order. This court disagreed, and citing after discovered evidence that California law did not provide for reciprocity as assumed, stated:

Plaintiffs contend that the previous decision is res judicata of this controversy. This issue must be decided adversely to the plaintiffs. By Section 42-1-72, U.C.A. 1943, (the predecessor to Section 35-1-69) the Commissions power over each case is a continuing one, permitting such modifications of findings and orders as in the opinion of the Commission may be justified. By Section 42-1-79, U.C.A. 1943, the power of this court upon a review is limited to entering a judgment 'Either affirming or setting aside the award.' This court has interpreted these sections to mean that the Industrial Commission should not reopen a case merely for the purpose of hearing cumulative or corroborative evidence; but when new evidence is available, or new issues have arisen, then their power to reconsider the case is not curtailed. (Cases cited) Id. pp. 754

In the United Airlines case, there was California law in existence at the time the case was originally before the Industrial Commission of Utah which, when it later came to light, was found to be dispositive of the case in that it gave the Industrial Commission of Utah jurisdiction when earlier this court had determined that such jurisdiction was lacking. Similarly, in the case under review here, the Ortega case was in existence shortly after the hearing of Mr. Odekirk's Claim for Compensation but was never brought to the attention of the Industrial Commission of Utah until recently. Consequently inasmuch as

Ortega case has now been brought to the attention of the Industrial Commission of Utah, it now should modify each order issued by it in the case reviewed here so as to provide for apportionment between IML Freight, Inc. and the Special Fund.

In the case of Buxton vs. Industrial Commission of Utah, 587 P.2d 121 (1978), as indicated by Mr. Odekirk in his brief, this court reversed the refusal of the Industrial Commission of Utah to make findings and an award regarding the claimant's application for permanent total disability benefits and limited the discretion of the Industrial Commission of Utah with regard to modification of its former findings and orders. At page 123, the court stated:

The Commission's jurisdiction to act on an application for modification of a previous order derives from Section 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.....

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 powers; and it can not simply ignore competent and credible evidence when there is nothing discrediting therein and there is no evidence to the contrary....

In the case under review, the Industrial Commission

of Utah completely ignored the Ortega case and its implications, although Mr. Odekirk, IML Freight, Inc., and Transport Indemnity Company apprised the Industrial Commission of Utah of its existence and this courts ruling with regard to it. Notwithstanding, the Industrial Commission cavalierly disregarded those motions wherein the Ortega case was raised and did not even bother to set forth the basis, if any, for its disregard of the Ortega case. Consequently, the Industrial Commission's (Denial of) Motion for Review dated January 16, 1978 and its Denial of Motion for Review dated July 17, 1979, were arbitrary and should be reversed. Further, this matter should be remanded to the Industrial Commission of Utah with instructions that it modify each order issued by it in the case reviewed here so as to provide for apportionment between IML Freight, Inc. and the Special Fund.

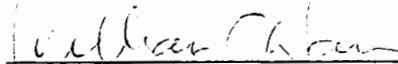
CONCLUSION

The reasonable cost and expense of the psychiatric treatment of Grover L. Odekirk should be apportioned between IML Freight, Inc. and the Special Fund in accordance with Section 35-1-69 because the psychological disability which resulted to the claimant was substantially greater than it would have been had his preexisting disability not existed, and the Industrial Commission of Utah should be ordered to modify each order issued by it in this case so as to provide

for such apportionment.

Respectfully submitted this 18th day of December,
1979.


HANSON, RUSSON, HANSON & DUNN



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I mailed, postage prepaid, two (2) copies of the foregoing Brief of IML Freight, Inc. and Transport Indemnity Company to Arthur F. Sandack, attorney for Grover L. Odekirk, 370 East 500 South, Salt Lake City, Utah 84111 and to Frank V. Nelson, attorney for Industrial Commission of Utah, 236 State Capitol Building, Salt Lake City, Utah 84114 this 18th day of December, 1979.



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