

1980

Northwest Carriers, Inc. And State Insurance Fund v. Industrial Commission of Utah Second Injury Fund, And Herbert Merz : Brief of Plaintiffs

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

NORTHWEST CARRIERS, INC. and :
STATE INSURANCE FUND, :

Plaintiffs, :

vs. :

Case No. 17170

INDUSTRIAL COMMISSION OF UTAH :
SECOND INJURY FUND, and :
HERBERT MERZ, :

Defendants. :

WRIT OF REVIEW FROM AN ORDER OF THE
INDUSTRIAL COMMISSION OF UTAH

BRIEF OF PLAINTIFFS

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TABLE OF CONTENTS

	<u>Page</u>
Nature of Case.	1
Disposition by the Industrial Commission.	1
Relief Sought on Appeal	2
Statement of Facts.	2
Argument	
THE EMPLOYER IS ONLY RESPONSIBLE FOR COMPENSATION AND MEDICAL CARE ATTRIBUTABLE TO THE INDUSTRIAL INJURY.	4
Conclusion.	7

CASES CITED

<u>Intermountain Health Care v. Ortega,</u> 562 P.2d 617 (Utah 1977)	6
<u>Intermountain Smelting v. Anthony Capitano,</u> Sup. Ct. No. 16530 (March 24, 1980).	6
<u>McPhie v. Industrial Comm'n,</u> 567 P.2d 153 (Utah 1977)	5
<u>White et al. v. Industrial Comm'n,</u> 604 P.2d 478 (Utah 1979)	6

STATUTE CITED

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TREATISE CITED

Larson, <u>Workman's Compensation Law</u> , Vol 2, Section 59.31 pp. 10-285 to 10-288	6,7
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BRIEF OF PLAINTIFFS

NATURE OF CASE

This is a Workman's Compensation Act case dealing with a claim filed by injured workman, Herbert Merz, against his employer, Northwest Carriers, Inc. and its insurance carrier, the Utah State Insurance Fund (hereinafter plaintiffs) for injuries he suffered in an industrial accident on August 11, 1974. (R. 1)

DISPOSITION BY THE INDUSTRIAL COMMISSION

On May 8, 1980, the Administrative Law Judge entered an Order requiring Second Injury Fund Payment. Therein Mr. Merz was found to be permanently and totally disabled from a combination of his industrial and nonindustrial physical impairments as well as factors of employability. (R. 250) On May 19, 1980, plaintiffs filed a timely Motion for Review asserting

the right to reimbursement of 60% of the compensation paid by plaintiffs from the Special Fund (hereinafter, defendant) pursuant to §35-1-69 U.C.A. (R. 253) The Administrative Law Judge responded on May 29, 1980 with Supplemental Findings of Fact, Conclusions of Law and Order granting only a 15% reimbursement (R. 257-260) for the amount of pre-industrial injury physical impairment without considering employability factors.

An additional Motion for Review by plaintiffs reasserting the right to a 60% reimbursement was filed on June 2, 1980 (R. 262) which was denied by the Industrial Commission on June 16, 1980. (R. 267)

A timely Petition for Writ of Review (R. 260) was filed and a Writ of Review (R. 274) was issued bringing this matter before the Supreme Court.

RELIEF SOUGHT ON APPEAL

Plaintiffs respectfully request that the Order of the Industrial Commission denying reimbursement from the Special Fund to the State Insurance Fund of 60% of the amounts advanced to Herbert Merz in compensation benefits as required by §35-1-69 U.C.A. be reversed with the matter to be remanded for an appropriate order of reimbursement to be entered.

STATEMENT OF FACTS

The following facts of this matter are not subject to dispute. They are presented to give the Court the background which brings this claim before the Court.

On August 11, 1974, Herbert Merz suffered an injury to his back while in the course of his employment for plaintiff, Northwest Carriers, Inc. (R. 163)

Because of the complicated nature of the medical difficulties, inter alia, experienced by Mr. Merz his case came to a hearing and was referred to a medical panel for evaluation. From an examination on October 18, 1976, (R. 157-165) the panel found that he was suffering from a 55% whole man physical impairment. 40% of that impairment was due to the industrial injury of August 11, 1974 and 15% impairment was the result of a prior accidental injury. (R. 161)

The panel was of the opinion that a decompression at one nerve root level in Mr. Merz' back at a later date might be beneficial to him. (R. 161) That operation was performed on May 17, 1977. (R. 185)

After a period of recuperation to allow his condition to stabilize, the medical panel again placed his permanent partial loss of bodily function or impairment at 40% for the industrial accident with 15% predating that event. (R. 196)

On January 16, 1980, the medical panel chairman, Boyd Holbrook, who had become a treating physician expressed the opinion that "I do not believe that this man will be able to return to gainful employment . . . " (R. 241)

Taking into consideration the above opinion by Dr. Holbrook, the fact that plaintiff had nearly paid the statutory maximum of 312 weeks of compensation, the fact that Mr. Merz is 58

years of age with only an eighth grade education, the fact that he had tried to be employed without success, that he is not a good candidate for rehabilitation, and the fact that he has a 55% physical impairment; the Industrial Commission rightfully found Mr. Merz permanently and totally disabled from gainful employment in its Order of May 8, 1980. (R. 250)

Plaintiffs did not and do not object to such a finding of disability. However, plaintiffs did file a Motion for Review because no consideration was given to their right of reimbursement from the Special Fund of the proportionate share of the 100% disability not directly attributable to the industrial injury. §35-1-69 U.C.A.

The Industrial Commission later acknowledged the right of reimbursement, but only allowed it to the extent of fifteen percent. The basis for that decision by the Commission is that employability factors are not to be considered in analyzing the obligation of the Special Fund in §35-1-69 U.C.A. (R. 257)

It is the position of plaintiffs that where there is a pre-existing condition the employer is only responsible for the proportion the bodily impairment from the industrial accident bears to the total disability whether that disability be total or some lesser percentage.

ARGUMENT

THE EMPLOYER IS ONLY RESPONSIBLE FOR COMPENSATION AND MEDICAL CARE ATTRIBUTABLE TO THE INDUSTRIAL INJURY.

The Industrial Commission takes an interesting approach to the issue of the apportionment in a permanent and total disability.

such as the one currently before this Court. However, the approach is in error and fails to take into account the clear statement of the responsibility of the employer and the employer's insurance carrier in §35-1-69 U.C.A. The pertinent parts are as follows:

. . . 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

A medical panel . . . shall review all medical aspects of the case . . . 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
(emphasis added)

The clear and unequivocal language of §35-1-69 is to the effect that the employer is responsible for the industrial injury only. The employer is not responsible for factors that were not caused by the industrial injury. In the case at bar, the date of the applicant's birth, his education, the availability of jobs, his intelligence quotient, the pre-existing physical impairment, all of which contribute to his being found permanently and totally disabled were not caused by the industrial injury. In order to accomplish what the Industrial Commission is attempting by their order, it would be necessary for legislative amendment.

The case of McPhie v. Industrial Comm'n, 567 P.2d 153 (Utah 1977) stands for the proposition that the Second Injury

Fund is to pay pursuant to §35-1-69 U.C.A. and §35-1-67, the "remainder" of whatever is left to be paid after the employer has discharged its liability. The case of Intermountain Health Care v. Ortega, 562 P.2d 617 (Utah 1977); White et al. v. Industrial Comm'n, 604 P.2d 478 (Utah 1979); and Intermountain Smelting v. Anthony Capitano, Sup. Ct. No. 16530 (March 24, 1979) have further clarified the meaning of "remainder". The employer is responsible only for the industrial accident, the permanent loss of bodily function or impairment attributable to the industrial accident and the percentage share that the permanent partial loss of bodily function bears to the overall disability suffered by the injured workman for temporary total and medical benefits.

To rule otherwise would be directly in contradiction of public policy which dictated the passage of the legislation in the first place:

While at first glance it might appear that the apportionment rule favors the employer and nonapportionment the employee, in practice the nonapportionment rule proved the worse of the two evils from the standpoint of the handicapped worker. As soon as it became clear that a particular state had adopted a rule requiring an employer to bear the full cost of total disability for the loss of the crippled worker's disability for loss of the crippled worker's remaining leg or arm, employers had a strong financial incentive to discharge all handicapped workers who might bring upon them this kind of aggravated liability.

Under either rule, then, the compensation system operated unsatisfactorily in the case of previously impaired workers: Under apportionment

they received far less than their actual condition required to prevent distitution; under nonapportionment they lost their jobs. Second Injury Funds, which have been adopted in all but four states, are the solution to this dilemma. The usual provision makes the employer ultimately liable only for the amount of disability attributable to the particular injury occurring in his employment, which the Fund pays the difference between that amount and the total amount to which the employee is entitled for the combined effects of his prior and present injury. (emphasis added).

Larson, Workman's Compensation Law, Vol 2, Section 59.31 pp. 10-285 to 10-288.

It is clear from the wording of §35-1-69 U.C.A., supra, that it is intended not only as a benefit to the employee, but also as a limitation to the extent of liability of an employer so that the public policy stated by Prof. Larson can be satisfied. The employer is not responsible for factors contributing to disability other than the actual physical impairment caused by the industrial injury.

Therefore, in the case at bar, plaintiffs are entitled to a reimbursement of 60% of the benefits for temporary total compensation and medical compensation advanced to Herbert Merz through the years.

CONCLUSION

The Industrial Commission of Utah acted in excess of its administrative powers in failing to order reimbursement to plaintiff of 60% of the medical and temporary total disability payments advanced to Herbert Merz. The Commission erroneously interpreted §35-1-69 U.C.A. to mean that the employer is

responsible for employability factors in addition to the percentage of physical impairment caused by the industrial accident. The result, contrary to §35-1-69, is that the employer is made to pay for an injured employee's age, lack of education, lack of intelligence, lack of job availability, and the fact that because of the above an employee is not a good candidate for vocational rehabilitation.

The Industrial Commission shall . . . 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 Special Fund . . . (emphasis added)

§35-1-69 U.C.A.

This case should be remanded to the Industrial Commission with instructions that an Order be entered directing the Special Fund reimburse plaintiffs 60% of the amounts paid for medical care and for temporary total compensation.

DATED this 22 day of August, 1980.

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CERTIFICATE OF MAILING

I hereby certify that two true and correct copies of the foregoing BRIEF were mailed, postage prepaid this 24 day of August, 1980 to the following:

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