

1980

Melvin E. Ingersoll And State Insurance Fund v. Richard M. Camp, Second Injury; Fund And Industrial Commission: of Utah : Brief of Plaintiffs

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

MELVIN E. INGERSOLL and :
STATE INSURANCE FUND, :
 :
Plaintiffs, :
 :

vs. :

Case No. 17245

RICHARD M. CAMP, SECOND INJURY: :
FUND and INDUSTRIAL COMMISSION: :
OF UTAH, :
 :
Defendants. :

BRIEF OF PLAINTIFFS

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

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STATUTE CITED

Utah Code Ann. §35-1-69 (1953).	passim
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TREATISE CITED

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

NATURE OF CASE

This is a Workman's Compensation Act case dealing with a claim by injured employee Richard M. Camp against his employer Ingersoll Construction Company and its insurance carrier, The Utah State Insurance Fund (hereinafter plaintiffs) for injuries suffered in an industrial accident that happened on August 6, 1975. (R. 3) Mr. Camp also joined the Special or Second Injury Fund (hereinafter defendant) as a party pursuant to §35-1-68 and 69 U.C.A.

DISPOSITION BY THE INDUSTRIAL COMMISSION

On May 20, 1980, the Administrative Law Judge of the Industrial Commission entered an Order finding Richard M. Camp permanently and totally disabled, awarding him benefits from the

Second Injury Fund, and requiring the Second Injury Fund to reimburse a certain percentage of the medical and temporary total compensation benefits to plaintiffs pursuant to §35-1-69 U.C.A. (R. 234-236)

On May 29, 1980, plaintiffs filed a Motion for Review challenging the percentage to be reimbursed. (R. 237-238) That Motion for Review was denied by the Industrial Commission with one of the three Commissioners dissenting. (R. 240)

RELIEF SOUGHT ON APPEAL

Plaintiffs respectfully request that the Order of the Industrial Commission denying reimbursement of 32% of the amount advanced to Richard M. Camp in compensation benefits for medical expenses and periods of temporary total disability pursuant to §35-1-69 U.C.A. be reversed and remanded to the Industrial Commission for an appropriate Order of reimbursement to be entered

STATEMENT OF FACTS

Richard M. Camp, the applicant before the Industrial Commission, was injured on the job while employed by Ingersoll Construction Co. on August 6, 1975. At that time he fell 16 feet from scaffolding after a brick archway on which he was working broke away. (R. 3, 118-122)

Mr. Camp had a great many medical complications both physical and psychiatric resulting from conditions that predated the industrial injury as well as those that followed the industrial accident. These complications are not particularly important for this brief and therefore, will not be enumerated in detail herein. The ultimate medical conclusion is, however, important.

Dr. Jack L. Tedrow found him to be 50% physically impaired as a result of psychiatric difficulties with 10% of that impairment predating the industrial accident. (R. 89-91) Dr. Boyd Holbrook found him to be orthopedically suffering from a 46% permanent partial physical impairment as a result of his industrial accident. Dr. Holbrook then used a standard table for combining impairments to determine that Mr. Camp's total loss of bodily function would be 68% with 3% pre-existing the industrial accident. (R. 97)

The Industrial Commission, using the above bodily impairment figures as one of the factors, found Mr. Camp to be permanently and totally disabled. (R. 234) Some other factors in the record justify the conclusion of 100% disablement or unemployment are:

1. That the applicant suffered from an unrated bilateral nerve palsey, peripheral neuropathy or deterioration of the peripheral nerves secondary to pre-existing chronic alcoholism. (R. 50, 89-91, 141, 155, 157)

2. That he had already registered for rehabilitation training three months prior to the industrial injury and made unsuccessful attempts at rehabilitation training after the accident. (R. 61)

3. That he had been married five times without success. (R. 37)

4. That he had hurt his back before the industrial accident which would at times lay him up though that condition had not been rated. (R. 144)

5. That he had intestinal obstruction operative procedures related to drug overdoses in about 1973 that had not been specifically rated. (R. 147)

6. That he had an extremely troubled childhood that led to his only obtaining a 4th grade education. (R. 40)

7. That the only skill he had acquired was that of a journeyman bricklayer, which occupation he could no longer perform with his injuries. (R. 40)

8. That he is a man nearly 50 years of age. (R. 159)

As is obvious, a percentage of his physical impairment is not the result of the industrial accident and, therefore, not the responsibility of the employer. Furthermore, all of the additional factors listed above which may be termed "employability" factors are likewise not the responsibility of the employer and are not factually caused by Mr. Camp's employment with plaintiff.

Plaintiffs did not and do not now object to the finding of a 100% disability. However, plaintiffs do object to the reimbursement from defendant of only 4% of the amounts already advanced for medical expenses and temporary total compensation. The basis for the decision by the Commission to limit the reimbursement to 4% is that employability factors are not to be considered in determining the obligation of the Special Fund as stated in §35-1-69 U.C.A.

It is the position of plaintiffs that where there is a pre-existing condition the employer is only responsible for the proportion of 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.

It should be stated at this point that the argument that follows is nearly identical to that offered in the case of Northwest Carriers, Inc. et al. v. Industrial Commission of Utah, Supreme Ct. No. 17170. From plaintiffs' view the issues in the two cases are the same and should be considered at the same time to conserve the Court's time as much as possible. For that purpose, a separate Motion for Consolidation is being filed simultaneously with this brief.

The Industrial Commission takes an interesting approach to the issue of the apportionment in a permanent and total case 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, 1980) 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 the 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 loss of the crippled worker's disability for the 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 destitution; 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 32% of the benefits for temporary total compensation and medical compensation advanced to Richard M. Camp through the years.

CONCLUSION

The Industrial Commission of Utah acted in excess of its administrative powers in failing to order reimbursement to plaintiff of 32% of the medical and temporary total disability payments advanced to Richard M. Camp. 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 32% of the amounts paid for medical care and for temporary total compensation.

DATED this 25 day of September, 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 25 day of September, 1980 to the following:

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