1963

Ray McConnell v. The Commission of Finance of Utah : Respondent's Petition for Rehearing and Supporting Brief

Utah Supreme Court

Hanson & Baldwin; H. Wayne Wadsworth; Attorneys for Respondent
A. Pratt Kesler; Raymond W. Gee; Attorneys for Appellant;

IN THE SUPREME COURT
of the
STATE OF UTAH

RAY McCONNELL,
Plaintiff & Respondent,

vs.

THE COMMISSION OF FINANCE OF UTAH,
Defendant & Appellant.

Case No. 9635

RESPONDENT'S PETITION FOR REHEARING AND SUPPORTING BRIEF

HANSON & BALDWIN
H. WAYNE WADSWORTH
515 Kearns Building
Salt Lake City, Utah
Attorneys for Respondent

A. PRATT KESLER
Attorney General

RAYMOND W. GEE
Chief Assistant Attorney General
State Capitol
Salt Lake City, Utah
Attorneys for Appellant

INDEX

CASES CITED

STATUTES CITED

IN THE SUPREME COURT
of the
STATE OF UTAH

RAY McCONNELL,
Plaintiff & Respondent,

vs.

THE COMMISSION OF FINANCE OF UTAH,
Defendant & Appellant.

Case No. 9635

RESPONDENT'S PETITION FOR REHEARING AND SUPPORTING BRIEF

Ray McConnell, the plaintiff and respondent in the above-entitled matter, by and through his attorneys of record herein, pursuant to Rule 76(e), Utah Rules of Civil Procedure, respectfully petitions this Honorable Court for a rehearing in the above-entitled action upon the following grounds:

1. The decision is erroneous because in effect it holds that the provisions of Section 35-1-62, U.C.A., 1953, apply only when a recovery is effected through the filing of a lawsuit, and then only between parties named in the lawsuit, which is contrary to the wording of the section itself which

states that it shall apply to *any* recovery obtained against the third party tort feasor.

2. The construction placed upon subsection (2) nullifies the requirements of subsection (1) since it would require the injured employee to pay the total amount of attorney's fees involved regardless of the amount of the recovery or who were parties to the action, if one is filed.

3. The decision completely ignores and is contrary to the doctrine of equitable subrogation which Section 35-1-62 incorporates and which has long been recognized at common law.

WHEREFORE, respondent respectfully requests that a rehearing be granted, that the court re-examine the law applicable to this case, and that an order be entered affirming the judgment of the trial court, or in the alternative, that the case be remanded to the trial court for a determination of any issues of fact which this court may deem necessary.

HANSON & BALDWIN and
H. WAYNE WADSWORTH

By.....

Attorneys for
Plaintiff & Respondent

515 Kearns Building
Salt Lake City, Utah

CERTIFICATE OF COUNSEL

I certify that I am one of the counsel for respondent, petitioner herein, and that in my opinion there is good cause to believe the judgment objected to is erroneous and that the case ought to be reexamined as prayed in the Petition, and that this Petition is not filed for the purpose of delay or to otherwise hinder the prosecution and final determination of this action.

HANSON & BALDWIN and
H. WAYNE WADSWORTH

By.....

Attorneys for
Plaintiff & Respondent

515 Kearns Building
Salt Lake City, Utah

BRIEF IN SUPPORT OF REHEARING

POINT I.

THE DECISION IS ERRONEOUS IN HOLDING THAT SECTION 35-1-62, U.C.A., 1953, APPLIES ONLY TO RECOVERIES OBTAINED THROUGH THE FILING OF LAWSUITS AND PARTIES TO THE LAWSUIT.

The Opinion states:

> "With relation to the disbursement of the proceeds of a recovery against a third party, the first subsection of the statute gives a first priority to the payment of the costs, including attorney's fees, of the action. These ex-

penses are to be apportioned among the *parties*.

* * *

"If an insurance carrier initiates an action under this statute against a third party, or is made a party in the action initiated by the injured employee, any attorney's fees incurred by it would fall within the priority provided in subsection (1). However, in the instant case, the State Insurance Fund was not a *party* to the action and did not incur any legal expenses." (Court's emphasis).

According to the decision, Section 35-1-62, U.C.A., 1963, would not govern the distribution of a settlement recovery obtained before a lawsuit was filed, since neither the injured employee nor the insurance carrier would ever be *parties to the action.*

Such a result was obviously not intended by the legislature since the second paragraph of the statute states as follows:

"If *any recovery* is obtained against such third person it shall be disbursed as follows:

(1) The reasonable expense of the action, including attorney's fees, shall be paid and charged proportionately against the *parties as their interests may appear.*

(2) The person liable for compensation payments shall be reimbursed in full for all payments made.

(3) The balance shall be paid to the injured employee or his heirs in case of

> death, to be applied to reduce or satisfy in full any obligation thereafter accruing against the person liable for compensation." (Emphasis added)

No Distinction or indication is made that the statute is to govern distribution of a recovery only after a lawsuit is filed. To the contrary, it specifically states that if any recovery is obtained, it shall be disbursed as provided for by the statute. Likewise, a reading of the entire statute clearly indicates that *parties* refers to *parties in interest* and not to *parties to a lawsuit.* In the words of the statute, the interest of the injured employee or his heirs arises "when any injury or death . . . shall have been caused"; and the interest of the person paying compensation arises when it "becomes obligated to pay compensation". A ruling by this court that the provisions of Section 35-1-62 U.C.A., 1953, apply only after a lawsuit has been filed could have chaotic effect upon the practice of workmen's compensation law in this state.

POINT II

THE DECISION IS ERRONEOUS IN THAT THE CONSTRUCTION PLACED UPON SUBSECTION (2) OF SECTION 35-1-62, U.S.A., 1953, REQUIRES THAT THE TOTAL ATTORNEY'S FEE BE PAID FROM THE EMPLOYEE'S SHARE OF THE RECOVERY.

The opinion states:

> "Furthermore, subsection (2), requires that the insurance carrier be reimbursed in *full,*

> providing, of course, the amount of recovery is sufficient to do so after payment of the legal expenses, including attorneys' fees. If plaintiff were right in his contention that an insurance carrier is liable for its proprortionate share of the cost and fees, then an insurance carrier would never be reimbursed in full." (Court's emphasis).

According to this statement of the court, the insurance carrier is forever relieved of paying any share of the attorney's fees, contrary to the requirement expressed in subsection (1), which states:

> "The reasonable expense of the action, including attorneys' fees shall be paid and charged proportionately against the parties as their interests may appear."

It is elementary that there are only two parties in interest to a recovery obtained against a third party tort feasor. First, the injured employee, and second, the person who has paid or who is obligated to pay compensation. If disbursement were made according to the court's decision, the results would be as follows:

> *First.* The casts of the action would be paid, including fees of the employee's attorney and the insurance carrier's attorney, if the insurance company was named as a party.
>
> *Second*: The insurance carrier would be reimbursed for the total amount it had paid in compensation or medical payments.
>
> *Third*: The injured employee would receive the remainder of the recovery.

Therefore, the injured employee has in effect paid both attorneys' fees because if the fees ar paid first and the insurance carrier is then reimbursed in full, the balance of the recovery which is paid to the injured employee is reduced by the amount of *both* attorneys' fees. Thus, the court's decision would apparently provide for an apportionment of the amount of attorney's fee paid each attorney according to the interest of his principal in the action, but would charge both fees against only one party — the injured employee. This result would be in direct opposition to the mandate of the legislature that the attorneys' fees be charged proportionately against the *parties* as their interests may appear.

POINT III

THE DECISION IS CONTRARY TO THE DOCTRINE OF EQUITABLE SUBROGATION RECOGNIZED IN COMPARABLE STATUTES AND AT COMMON LAW.

There is some indication that our present statute, Section 35-1-62, U.C.A., 1953, was patterned after the California statute on this subject since *Deering's California Labor Code* is cited under the "Comparable Provisions" section of the *Utah Code Annotated, 1953*. The California Statute, Section 3856, applicable to the payment of attorneys' fees at the time our statute was rewritten in 1945, read as follows:

> "The court shall first apply, out of the entire amount of any judgment for any damage re-

covered by the employee, a sufficient amount to reimburse the employer for the amount of his expenditures for compensation. *If the employer has not joined in the action* or has not brought action, or if his action has not been consolidated, the court, on his application, shall allow, as a first lien against the entire amount of any judgment for any damages recovered by the employee, the amount of the employer's expenditures for compensation; *provided, however, that where the employer has failed to join in said action* and to be represented therein by his own attorney, or where the employer has not made arrangements with the employee's attorney to represent him in said action, the court shall fix a reasonable attorney's fee, which shall be fixed as a share of the amount actually received by the employee, to be paid to the employee's attorney on account of the services rendered by him in effecting recovery for the benefit of the employer *which said fee shall be deducted from any amounts due the employer.*" (Emphasis added)

While the Utah statute is worded in more concise terms, it is nevertheless comparable in that it purports to cover all situations where " any recovery is obtained" and provides that expenses of the action be "charged proportionately against the parties as their interests may appear". However, the court's decision in this case is far afield from the intent expressed in either statute. In the case of *Hardware Mutual Casualty Company* vs. *Butler*, 148 P.2d 563 (Mont. 1944), the widow of a deceased employee

retained an attorney of her own selection who brought an appropriate action against the third party tort feasor from which a cash settlement resulted. Regarding the payment of attorneys' fees by the insurance carrier, the court stated:

> "However, whereas here, one litigant has borne the burden and expense of successful litigation which has created and brought into court a fund in which others share with him, it is only just and equitable that those who share the benefits should contribute to the payment for the services of the attorney whose labors resulted in creating or preserving of such common fund."

Pennsylvania also has a statute very similar to our statute which provides that:

> ". . . reasonable attorneys' fees and other proper disbursements incurred in obtaining a recovery or in effecting a compromise settlement between the employer and the employee, if personal representative, his estate or his dependents."

In construing this provision, the United States District Court for the Eastern District of Pennsylvania in *Yeager* vs. *Heckman*, 158 F. Supp. 933, stated that in view of the provisions as to the distribution of the proceeds of third party actions, it appears that the legislature intended that the attorney's fee was to be prorated between the employer and the recipient of the compensation, to the extent that each benefited from the third party recovery. Short-

ly thereafter, the Superior Court of Pennsylvania reached the same conclusion in the case of *Soliday* vs. *Hires, et al*, 142 A. 2d 425, in which it stated:

> "The logical conclusion is inescapable that the legislature intended that the employer be required to share the burden of attorneys' fees on the basis of its total benefit from the third party recovery, that is, the total amount which the carrier would have been called upon to pay."

The Michigan statute on this point provides:

> "Expenses of recovery (including attorneys' fees) shall be appropriated by the court between the parties as their interests appear at the time of said recovery."

In *Horsley* vs. *Stone & Webster Engineering Corporation*, 162 F. Supp. 649, the court held that this statute required that the insurer pay a portion of the attorney's fee in the third pary action based on the ratio of the amount of compensation paid to the amount of the total recovery.

A well-seasoned opinion on facts very similar to those in the instant case is found in *Voris* vs. *Gulf-Tide Steveadors*, 211 F.2d 549 (5th Cir. 1954). The action against a third party was instituted on behalf of minor children who had received compensation under the Federal Longshoremen's & Harbor Workers Compensation Act. A judgment was entered in the suit awarding the minor children $7,857.42, the insurance carrier $1,742.58, and the child-

ren's attorneys $3,900.00. Upon entry of this judgment, the Deputy Commissioner entered a compensation order in which he directed that the employer and insurance carrier be given credit for the sum of $7,857.42 against further compensation to the minor children. However, the trial court subsequently ruled that it was the total or gross amount and not the net recovery which should be accredited to the employer's payments.

The Court of Appeals analyzed the decisive question as being whether the *amount recovered* means the amount actually received by the compensation beneficiaries in the third party action (that is less attorneys' fees) or whether it means a total amount paid by the third party defendant. In this regard, the court stated:

> "To hold that the minors recovered the aggregate amount paid by the defendant would be to discard the realities of the situation, and to ignore the age old equitable principle that one who accomplishes the creation of a fund for the benefit of another is entitled to reimbursement therefrom for the reasonable costs thereby incurred. The doctrine of salvage is akin to this principle.
>
> * * *
>
> ". . . The insurance carrier was the sole beneficiary of the legal services rendered for the plaintiff in the third party action, and it does not appear that it was in any way prejudiced by the judgment; on the contrary, it was greatly benefited by it. The subrogee

> has accepted the benefits of that recovery, and it should bear its reasonable burdens. It would be great injustice to the minors for them to have to pay for services that benefited them not at all. The courts draw back from the construction of an ambiguous statute that would lead to unjust results, just as nature draws back from the consistency of one of its laws that would encase in ice fish at the bottom of a river."

To allow the court's decision to stand in the case at bar will freeze in the jurisprudence of this state equally unjust and irrational doctrines, i.e., (1) that Section 35-1-62, U.C.A., 1953, does not apply to recoveries effected prior to the filing of a legal lawsuit and (2) the injured employee must always bear the burden of paying not only his own attorney's fees, but also the fees of the insurance carrier's attorney if one is employed. It is submitted that the workmen compensation laws were passed by the legislature to benefit injured employees and, therefore, they should be construed to this end if there is any inconsistencies in the provisions of the act.

CONCLUSION

It is respectfully submitted that on the law referred to above, the decision of the trial court should be affirmed, or in the alternative the case remanded for a trial to determine any issues of fact not evident in the record which the court may deem determinative of the issues involved.

Respectfully submitted,

HANSON & BALDWIN and
H. WAYNE WADSWORTH

By.....

Attorneys for
Plaintiff and Respondent

515 Kearns Building
Salt Lake City, Utah