1983

Alvin G. Rhodes Pump Sales And State Insurance Fund v. Industrial Commission of Utah And Second Injury Fund : Brief of Plaintiffs

IN THE SUPREME COURT

OF THE STATE OF UTAH

ALVIN G. RHODES PUMP SALES and STATE INSURANCE FUND,	:	
Plaintiffs/appellants,	:	Case No. 19163
vs.	:	
INDUSTRIAL COMMISSION OF UTAH and SECOND INJURY FUND,	:	
Defendants/respondents.	:	

BRIEF OF PLAINTIFFS

James R. Black
BLACK & MOORE
Attorney for Plaintiffs
500 Ten Broadway Building
Salt Lake City, Utah 84101
363-2727

Steven W. Julian
Attorney at Law
P.O. Box 1538
Cedar City, Utah 84720

Frank V. Nelson
Assistant Attorney General
236 State Capitol Building
Salt Lake City, Utah 84114

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P.O. Box 1538
Cedar City, Utah 84720

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BRIEF OF PLAINTIFFS

NATURE OF THE CASE

Wilbur G. Rhodes, an employee of appellant employer was injured in an industrial accident on May 1, 1978. A claim was filed with the Industrial Commission by injured employee Wilbur G. Rhodes, against his employer Alvin G. Rhodes Pump Sales, and its insurance carrier, The State Insurance Fund, for an increase in his 20% permanent partial impairment rating previously agreed to by the Statement and Request settlement. The Second Injury Fund was also joined as a party pursuant to Sections 35-1-68 and 69, U.C.A. The Industrial Commission entered an order improperly apportioning benefits between the Second Injury Fund and the appellants.

DISPOSITION BY THE INDUSTRIAL COMMISSION

A hearing was held on March 25, 1982 before an Administrative Law Judge to determine if the applicant's degree of impairment had substantially increased since the Statement and Request settlement. Pursuant to that hearing, the Administrative Law Judge, appointed a medical panel to make an impartial evaluation of the medical aspects (R. 114). The medical panel report indicated that the applicant's impairment of the lower back had not changed from the original 20% impairment rating, but that 10% of this was due to pre-existing conditions. The medical panel also found that the applicant had an additional 5% pre-existing impairment for alcoholism (R. 122).

Findings of the medical panel were adopted over the applicant's objections when, on August 18, 1982, the Administrative Law Judge issued his Findings of Fact, Conclusions of Law and Order (R. 130-131). Motions for Review were filed by both the applicant, Wilbur G. Rhodes (R. 137-138), and by Alvin G. Rhodes Pump Sales and State Insurance Fund (R. 139-141).

On November 24, 1982, an Amended Order was entered by the Industrial Commission which modified the decision of the Administrative Law Judge (R. 152-153). A Motion for Review of the Amended Order was filed by the appellants, Alvin G. Rhodes Pump Sales and The State Insurance Fund, (R. 155-156), and an Answer to Motion for Review was filed by the respondent Second Injury Fund (R. 157-158). Subsequently a denial of a Motion for Review was entered by the Industrial Commission on March 23, 1982 (R. 159-161). The Petition for Writ of Review was filed by plaintiffs/appellants herein on April 22, 1983 (R. 167-169).

RELIEF SOUGHT ON APPEAL

Plaintiffs seek an order of this court modifying the order of the Industrial Commission which failed to properly apportion liability between appellants and the Second Injury Fund as to temporary total disability compensation and medical expenses paid by the plaintiffs to the applicant Wilbur G. Rhodes and an order requiring the Second Injury Fund to reimburse the appellants for an overpayment of permanent partial disability compensation which amount was found to be pre-existing the industrial accident.

STATEMENT OF FACTS

This appeal focuses entirely upon the interpretation that the Industrial Commission gave to the medical panel's determination concerning the degree of Mr. Rhode's physical impairment which resulted from the industrial accident of May 1, 1978, as opposed to the physical impairment which was deemed pre-existing. Therefore, there appears to be no dispute as to the facts per se but there is a serious dispute as to the apportionment of liability which was refused by the Commission.

On or about July 23, 1980, the State Insurance Fund and the applicant Rhodes entered into an agreement compensating the applicant for a 20% permanent partial impairment sustained as a result of his industrial accident on May 1, 1978 (R. 1, 63-64). At that time there was no medical evidence available to the appellants of any pre-existing impairment and the extent thereof. The treating physician did not break the impairment rating into increments of the pre-existing percentage and the percentage due to the accident. (R. 159).

Later, Mr. Rhodes applied for increased benefits (R. 3)

alleging that his condition had changed substantially. After a hearing before the Administrative Law Judge on March 25, 1982, the medical aspects of the case were submitted to a medical panel appointed by the Industrial Commission. The medical panel report indicated that Mr. Rhodes was suffering from a 10% impairment from his industrial injury of May 1978 and 15% pre-existing the industrial event, combined together for a total of 24% impairment of the whole man (R. 122). These findings were adopted by the Commission; however, no apportionment was ordered. Subsequently, in an amended order the Administrative Law Judge found that the applicant was entitled to additional benefits based on the 4% increase in his permanent partial impairment. The Second Injury Fund was ordered to reimburse the appellants on the basis of 4/24ths or 16.6% of amounts paid by it for temporary total disability compensation and medical expenses. (R.152-153). The State Insurance Fund then filed a Motion for Review for reimbursement from the Second Injury Fund and apportionment of benefits as required by § 35-1-69 U.C.A. (R. 155-156) on the basis of 15/24 or a 62.5% reimbursement plus a reimbursement for the overpayment of permanent partial disability compensation. Plaintiffs Alvin G. Rhodes Pump Sales and State Insurance Fund now appeal the denial of that Motion (R. 159-161).

ARGUMENT

I. SECTION 35-1-69 U.C.A. AND CASE AUTHORITY REQUIRE THAT THE INDUSTRIAL COMMISSION APPORTION TEMPORARY TOTAL DISABILITY COMPENSATION AND MEDICAL BENEFITS BETWEEN THE SECOND INJURY FUND AND THE EMPLOYER AND THAT THE SECOND INJURY FUND PAY FOR THE PRE-EXISTING IMPAIRMENT OF THE INJURED EMPLOYEE.

Before explaining why the Commission's ruling should be reversed in this case, (except as to the 4/24 described above), it is helpful to make several introductory statements which are applicable to the concepts involved. First, plaintiffs do not dispute that the applicant William G. Rhodes is entitled to his compensation; they only raise the question of apportionment of this compensation between the Second Injury Fund and themselves as his employer and the employer's insurance carrier.

Second, the Second Injury Fund was created in order to encourage employers to hire handicapped workers. Prior to the establishment of such a fund, an employer would be reluctant to hire the handicapped for the obvious reason that they are a higher risk group. They would be more susceptible to injury and a minor injury could result in a significantly more severe consequence such as longer periods off work, greater medical bills, and a higher likelihood of not being able to return to work at all. All of that potential liability would fall on the current employer. With the implementation of the Second Injury Fund concept, a disabled employee may receive full compensation for a disability resulting from an industrial injury as well as for his pre-existing impairments. However, the employer is responsible only for disability attributable to an accidental injury occurring in that particular employment. Northwest Carriers v.Industrial Commission of Utah, 639 P.2d 138, 141 (1981). See also Intermountain Smelting Corp. v. Capitano, 610 P.2d 634, (Utah 1980); White v. Industrial Commission of Utah, 604 P.2d 478 (Utah 1978); Larson Workmen's Compensation Law, Section 59.31.

Third, and very important to this case, is the principle

that in light of the underlying purpose of the Second Injury Fund an employer should be required to pay only the amount which the industrial accident added to the overall permanent impairment. Alaska Workmen's Compensation Board v. H. & M. Logging Company, 492 P.2d 98 (Alaska 1971), Cox v. Intermountain Lumber Company, 439 P.2d 913 (Idaho 1968). See also Jacobsen Construction v. John Monroe Hall et. al., Utah Supreme Court No. 18469, June 29, 1983.

With these concepts in mind it now remains for us to examine the proper application of the present facts. There is no dispute in the record developed before the Industrial Commission that Mr. Rhodes has a permanent combined impairment of 24% of the whole man which is arrived at by combining the 15% due to the pre-existing conditions and the 10% due to the industrial accident. (R. 159). The Industrial Commission, however, refused to limit the liability of Mr. Rhodes' employer at the time of his industrial accident to the accident of May 1, 1978. This refusal is an arbitrary failure to comply with the express provisions of the Utah Code Annotated Section 35-1-69, 1953, as amended in 1974. That section mandates an apportionment between the employer and the Second Injury Fund. This section of the act, as it existed at the time of Mr. Rhodes' injury, provided for the following apportionment of compensation:

> If any employee who has previously incurred a permanent incapacity by accidental injury, disease, or congenital causes, sustained an industrial injury for which compensation and medical care is provided by this title that results in permanent incapacity, compensation and medical care, which medical care and other related items are outlined in Section 35-1-81, 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

provided for in Section 35-1-68(1) hereinafter referred to as the "special fund."

A medical panel having the qualifications of the medical panel set forth in Section 35-2-56, shall review all medical aspects of the case and determine first, the total permanent physical impairment resulting from all causes and conditions including the industrial injury; second, the percentage of permanent physical impairment attributable to the industrial injury; and third, the percentage of permanent physical impairment attributable to previously existing conditions whether due to accident injury, disease, or congenital causes. The Industrial Commission shall then assess the liability for compensation and medical care to the employer on the basis of the percentage of the permanent physical impairment attributable to the industrial injury only and the remainder shall be payable out of the said special fund. Amounts, if any, which have been paid by the employer in excess of the portion attributable to the said industrial injury, shall be reimbursed to the employer out of the said special funds.

Utah Code Ann. § 35-1-69 (1953, as amended 1974) (emphasis added)

As this Court has previously noted, the Industrial Commission has been reluctant over the years to comply with the requirements of this section. See, e.g., Intermountain Smelting Corp. v. Capitano, supra. There is no question, however, that this Court has repeatedly and emphatically held that the apportionment provided for in Section 69 must be made in all cases involving a pre-existing disability. See, e.g. Intermountain Health Care v. Ortega, 562 P.2d 617 (Utah 1977); White v. Industrial Commission of Utah, supra, Intermountain Smelting Corp v. Capitano, supra.

But in the instant matter, only a "spirit of settlement" persuaded the Administrative Law Judge to amend his order and require the Second Injury Fund to reimburse the plaintiffs herein based upon a ratio of 4/24 or 16.6% of all amounts paid, for temporary total disability compensation and medical expenses. No

reimbursement whatsoever was ordered for the permanent partial disability compensation overpayment even though Mr. Rhodes' pre-existing physical impairment and chronic alcholism were found to have contributed 15/24 or 62.5% of the total impairment. The failure of the Commission to so order is contrary to statutory mandate and all of the case authority interpreting Section 35-1-69 U.C.A. In Intermountain Smelting Corp. v. Capitano, supra, the medical panel found that the employee sustained a loss of bodily function of 25% with 16.5% attributable to the pre-existing injury and 8.5% of the result to the industrial accident. The court reversed the Commission's failure to apportion benefits and pay the applicant compensation for his pre-exsiting impairment emphasizing that:

> ". . . compensation and medical care . . . shall be awarded on the basis of the combined injuries but the liability of the employer. . . shall be for the industrial injury only and the remainder shall be paid out of the special fund provided for in § 35-1-68.

Similarly, in White v. Industrial Commission of Utah, supra, the applicant was suffering from a 10% permanent partial impairment, 5% of which pre-dated the industrial injury and 5% of which was industrial. The medical panel also found that the applicant was temporarily totally disabled for 6 months. The Supreme Court held the employer responsible for 5% of the 10% permanent partial impairment and for 50% of the temporary total disability compensation and 50% of the medical expenses incurred. The Second Injury Fund was made responsible for the remaining amounts.

In Intermountain Health Care v. Ortega, supra, the Commission found the claimant had a permanent partial impairment of

30%, of which 10% was attributable to a pre-existing condition. In apportioning liability for medical expenses between the Second Injury Fund and the employer for partial impairment liability, the Utah Supreme Court stated:

> (I)nasmuch 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.

562 P.2d at 619.

Likewise, 15/24 of Mr. Rhodes' permanent partial impairment was found to have directly resulted from pre-existing conditions aggravated by his May 1, 1978 industrial accident. It is the position of plaintiffs on appeal that Intermountain Smelting, White, and Ortega, are controlling. The Second Injury Fund is liable for 15/24 of Mr. Rhodes' permanent partial impairment, and 62.5% of his medical expenses and temporary total compensation benefits.

II. RES JUDICATA DOES NOT BAR PLAINTIFFS FROM BEING REIMBURSED BY THE SECOND INJURY FUND FOR MR. RHODES' PRE-EXISTING CONDITION.

Disallowing any reimbursement from the Second Injury Fund, the Administrative Law Judge stated: "No reimbursements are due to the State Insurance Fund . . . since all questions concerning the applicant's condition were resolved as of July 23, 1980 . . ." (R. 132). As of July 23, 1980, no medical evidence of Mr. Rhodes' pre-existing permanent partial impairment was available to plaintiffs. Therefore, pre-existing conditons were not indicated as a part of Mr. Rhodes' original 20% permanent partial impairment by his treating physician.

The Second Injury Fund was not made a party to the settlement, and plaintiffs absorbed total liability. It was later made a finding of fact by the Commission that 15/24 or 62.5% of Mr. Rhodes' permanent partial impairment was the result of pre-existing conditions. (R. 1). The Commission by its order appears to be giving res judicata effect to the benefit of the Second Injury Fund of the Statement and Request settlement between Mr. Rhodes and the appellants. (R. 126)

This is another in a long line of efforts by the Industrial Commission to find any means possible to protect the Second Injury Fund which it administers. It is specious to give a nonparty to an agreement and a nonbeneficiary of the agreement an unintended and unwarranted gift. That is what the Commission is attempting. More importantly, if the Second Injury Fund is allowed to escape liability here, future settlements would be discouraged and an extremely beneficial avenue for resolving litigation quickly would be obstructed. It would result in an increased hearing case load because there would be no benefit in attempting to resolve compensation issues early with the injured employees.

In addition to these policy considerations, Utah law is squarely against res judicata application here. A similar argument was proposed by the Second Injury Fund in Paoli v. Cottonwood Hospital, 656 P.2d 420 (Utah 1982). Therein, an injured employee sought recovery for a pre-existing condition attributable to an industrial injury for which he had already been compensated under the laws of another state. The Second Injury Fund pointed out that the potential liablity of the Fund had not been raised by either party in the earlier action, and the Fund had not participated in any settlement or proceeding.

That is similar to the case at bar wherein the potential liability of the Second Injury Fund was not raised by any party prior to July 8, 1982. In the instant matter, and the Second Injury Fund did not participate in the July 23, 1980, settlement between plaintiffs and Mr. Rhodes.

In Paoli, the Utah Supreme Court carefully considered the purpose of the Second Injury Fund, and concluded as follows:

> (T)here may be cases where the Fund has elected not to participate and its presence has not been directed but where the Administrative Judge has entered an order against the Fund. In that event, the Fund should be allowed to reopen the case. . . in order to submit further evidence bearing on the special interest and liability of the Fund". That is what the Fund should be allowed to do on the remand on this case.
>
> As we interpret the statutory purpose and procedure, the Second Injury Fund need not be a party to every workmen's compensation proceeding that may ultimately effect its interests. But there is a proceedure by which the parties should notify the Fund as its potential interests become apparent, and whereby the Fund can, where necessary, compel the reopening of the hearing . . ."

Id. at 423.

So, the Second Injury Fund wants to have the right to reopen proceedings if it can benefit from the reopening, but if it is something that may be detrimental to it, it does not want to extend the same right to injured employees and employers. Plaintiffs on appeal ask that fairness and justice be a two way street. A settlement between an injured employee and his employer simply should not preclude continuing procedings to determine the liability of the Second Injury Fund, if any.

Furthermore, the doctrine of res judicata does not prevent plaintiffs from reopening the July 23, 1980 settlement. As this

Court stated in International Resources v. Dunfield, 599 P.2d 515 (Utah 1979):

> Concerning the doctrine of res judicata, it is often said that both the parties and issues must have been the same; and also that the judgment is conclusive, both as to issues which were actually tried and those which could have been tried in the prior action.

Id. at 516-517.

Therefore, even if the pre-existing condition and Second Injury Fund liability issue could have been dealt with in July, 1980, the absence of the Second Injury Fund and lack of uniformity between the issues raised then and now prevent res judicata application here. And as indicated in Stevensen v. Bird, 636 P.2d 1029, 1033 (Utah 1981), where there are "different parties arguing over different points of law" they "are not bound" by the earlier decision or agreement.

III. THE INDUSTRIAL COMMISSION ABUSED THE CONTINUING JURISDICTION VESTED IN IT BY SECTION 35-1-78 U.C.A. IN NOT ORDERING AN APPORTIONMENT AND REIMBURSEMENT AS REQUIRED BY THE EVIDENCE HEREIN.

Even if the settlement agreement did have some effect on the Second Injury Fund, Section 35-1-78 U.C.A. gives the Commission authority to change the Second Injury Fund with its just responsibility by its obligation of continuing jurisdiction over the matter:

> "The powers and jurisdictions of the Commission over each case shall be continuing, and it may from time to time make such modification or change . . . as in its opinion may be justified. . ."

It is arbitrary and capricious and manifestly unjust for the Commission not to have granted the relief sought in this appeal

In its Amended Order, the Commission did modify and require reimbursement by the Second Injury Fund as to 4/24 or 16.6% of Mr. Rhodes' temporary total disability compensation and medical expenses. Such action makes no sense if the Commission's reasoning was correct. No mention was made therein of the other 10% to 11% also attributable to the pre-existing conditions. This omission is wholly without cause and is completely contrary to the result intended by application of Section 35-1-69 to the instant findings of fact.

CONCLUSION

When Mr. Rhodes was injured in an industrial accident on May 1, 1978, he was then suffering from pre-existing disabilities caused by previous accidents, disease process and/or chronic alcoholism. Uncontroverted medical evidence and findings of fact demonstrate that 15/24ths or 62.5% of Mr. Rhodes' disability is attributable to those pre-existing conditions. The Industrial Commission's action in imposing compensation liability upon the employer for the 20% of Mr. Rhodes' permanent partial impairment and in refusing to properly apportion liability for temporary total disability compensation and medical benefits and the further unwarranted refusal to order reimbursement from the Second Injury Fund of their share of the permanent partial disability compensation, was arbitrary and capricious, manifestly unjust and contrary to law.

RESPECTFULLY SUBMITTED this 12 Day of July, 1983.

BLACK & MOORE

BY James R. Black
JAMES R. BLACK
Attorney for Plaintiffs

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing BRIEF was sent this 24 Day of July, 1983, to the following:

Mr. Steven W. Julian
Attorney at Law
P.O. Box 1583
Cedar City, Utah 84720

Gilbert Martinez
Second Injury Fund
Industrial Commission of Utah
160 East 300 South
Salt Lake City, Utah 84111

Frank V. Nelson
Assistant Attorney General
236 State Capitol Building
Salt Lake City, Utah 84114

Annette P. Sinclaire