1983

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

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 RESPONDENT
INDUSTRIAL COMMISSION OF UTAH AND
SECOND INJURY FUND

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BRIEF OF RESPONDENT INDUSTRIAL COMMISSION OF UTAH AND SECOND INJURY FUND

NATURE OF THE CASE

The issue is whether the State Insurance Fund, insurance carrier for Alvin G. Rhodes Pump Sales, can, after the insurance carrier and the employee have reached an agreement, bring in the Second Injury Fund for reimbursement for pre-existing impairment.

DISPOSITION BY THE INDUSTRIAL COMMISSION

Respondent accepts the statement on the "Disposition by the Industrial Commission" as in Appellant's Brief.

RELIEF SOUGHT ON APPEAL

Respondent asks that the Order of the Industrial Commission be affirmed except that there should be no award for pre-existing alcoholism.

STATEMENT OF FACTS

Applicant was injured in an industrial accident on May 1, 1978. (R-107) He had a back and disc operation on May 18, 1979. (R-24) On July 23, 1980 the employee and the State Insurance Fund, insurance carrier, entered into an agreement whereby the employee received a rating of 20% permanent total disability for his back injury and for which he received $6,676.80 (R-31) based on Dr. Boyd G. Holbrook's report dated 7/16/80. (R-52) Because of recurring medical problems the employee petitioned for a hearing for additional benefits on the theory that his condition had become worse since the settlement date. (R-131) A medical panel met and it concluded the back problems had not changed from the original 20% permanent partial impairment (R-132) and the employee, therefore, failed to meet his burden of proof. The panel did, however, say that part of the 20% was pre-existing because of an earlier industrial accident while working for the same employer, the employee's brother. (R-107) The Order denied the insurance carrier apportionment from the second injury fund under Section 35-1-69 because the case had been settled. (R-132) The medical panel also gave a 5% pre-existing permanent partial impairment because of alcoholism. (R-121) The 20% back plus 5% for alcoholism combined to 24%. In the "spirit of settlement" the Second Injury Fund agreed to pay the 4%

additional for the chronic alcoholism. The insurance carrier is now seeking reimbursement for monies paid under the settlement agreement because the recent medical panel attributed part of the 20% back impairment to a previous industrial accident employee incurred while working for same employer.

ARGUMENT I

THE ORDER OF THE COMMISSION IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

The Order of the Industrial Commission must be confirmed when supported by substantial evidence and reasonable inferences to be drawn therefrom.

As stated in Kaiser Steel Corp. v. Monfredi, 631 P.2d 888 (1981), and reaffirmed in Sabo's Electronic Service v. Sabo, 642 P.2d 722 (1982), and in Kincheloe v. State Insurance Fund, 656 P.2d 440, (1982), the scope of review in Industrial Commission cases is limited to:

> [W]hether the Commission's findings are "arbitrary or capricious," or "wholly without cause" or contrary to the "one [inevitable] conclusion from the evidence" or without "any substantial evidence" to support them. Only then should the Commission's findings be displaced.

ARGUMENT II

CASES WHICH HAVE BEEN SETTLED CANNOT BE REOPENED SO AS TO GIVE INSURANCE CARRIERS REIMBURSEMENT.

The arguments in the Brief of the State Insurance Fund and their citation of cases are simply not relevant to cases which have been settled.

Intermountain Smelting Corp. v. Capitano, 610 P.2d 634, White v. Industrial Commission, 604 P.2d 478 and Intermountain Health Care v. Ortega, 562 P.2d 617, are said by appellants to be controlling. Appellants Brief page 9.

These cases are not only not controlling, they have no relevance in the cited parts to any settled cases.

The State Insurance Fund, page 9, also says, "As of July 23, 1980, no medical evidence of Mr. Rhodes' pre-existing permanent partial impairment was available to plaintiffs." Their case must fall as does the statement itself. They were the insurers of the same employer for both industrial accidents. Their doctor told them the first accident was still causing Rhodes' trouble at the time of the second accident.

The citation of Paoli v. Cottonwood Hospital, 656 P.2d 420 by appellants has no merit. In Paoli it was necessary for the Second Injury Fund to be a party because the case had not been closed and an award was made against the fund. In this case, as in hundreds of other cases, the Second Injury Fund is not made a party when cases are settled.

In the recent case of Pacheco v. Kaiser Steel and the Ind. Com. of Utah, #18896 filed 7/18/83, the claimant's

attorney requested that interest of 8% be added to the award that had been made by the commission pursuant to a previous settlement that had been made between the employer and employee.

This court in denying interest that was not included in the settlement said:

> In the present case, the parties reached a settlement before the Commission made any findings or decision as to the liability of Kaiser Steel or the amount due in claimant's case. The Commission's statement that the issue of interest should be "settled between the parties at the time any compensation agreement is negotiated" is, in effect, a determination that, as a matter of law, the interest provision of §35-1-78 does not apply to settlements unless the parties provide for interest payments in the settlement. Pacheco v. Ind. Com, supra.

In the present case a similar determination was made by the commission:

> No reimbursements are due to the State Insurance Fund based on the additional 4% of the whole man rating since all questions concerning the Applicant's condition were resolved as of July 23, 1980, unless an increase in permanent partial impairment due to the accident was found by the Medical Panel, which, of course, the Medical Panel did not find. (R-132, 133)

This court continues in the Pacheco case and distinguisnes between an award by the Commission and a settlement:

> Unlike an award, a settlement involves no factual determination by the Commission of liability or the amount of damages. In view of this distinction, we cannot presume that the

> Legislature intended the interest provision to apply to settlements. We think that if this were the Legislature's intent, it would have expressly included settlements in the section. Pacheco v. Ind. Com., supra.

The State Insurance Fund, as of July 23, 1980, agreed and paid all compensation and medicals although they were aware of the previous accident as they were the insurer for the same employer.

To allow an employer/insurance carrier to seek reimbursement by reopening previously settled cases by showing pre-existing impairments would open the gates to litigation in literally hundreds of supposedly settled cases.

In this case, the Industrial Commission of Utah assumed continuing jurisdiction under Section 35-1-78, U.C.A., as amended, to determine whether or not the injured employee's permanent physical impairment due to the May 1, 1978, industrial incident had increased above the 20% permanent partial impairment settled on between the employer and the injured worker, pursuant to their agreement of July 23, 1980. The Industrial Commission did not assume jurisdiction to disturb or reopen the settled agreement entered into by the employer/insurance carrier and the injured employee, for that was considered a binding agreement as between the insurance carrier and the employee. As in Pacheco, both parties, the employer or employee, must be estopped from withdrawing or

altering their legal obligation as stipulated under their earlier compensation agreement as in this case where the Second Injury fund was not made a party to said settlement.

The facts of the present case are especially significant. The settlement was made on the basis of the report of Dr. Boyd G. Holbrook, orthopedic specialist, retained by the insurance carrier to make the examination. Dr. Holbrook specifically detailed the earlier accident of August 15, 1977 and even stated Rhodes was still having trouble from the first accident at the time of the second accident.

> He notes that 8/15/77 he was putting a pump in a water well. He had finished the job the next day. He went to work, went to the doctor 8/15/77 so probably it was about two days earlier than that when he hurt his back in 1977. He went to Dr. John Emo in Cedar City. He said to take a couple of weeks off. He had not gotten okay but he went back to work. He had then been going to the chiropractor rather regularly but may have been getting a little worse prior to the episode of 5/1/78." (Empnasis added.) (R-55)

The doctor concluded his report to the State Insurance Fund by saying: "He has a 20% permanent physical impairment relative to his back." (R-56)

The evaluation of Dr. Holbrook was dated July 16, 1980. On July 23, 1980, the settlement was made between the State Insurance Fund and the employee.

It is also of significance that the settlement date of July, 1980, was considerably after Intermountain Health

Care v. Ortega, (March 25, 1977) which case dramatically liberalized access to reimbursement.

The State Insurance Fund made settlement with knowledge or a prior industrial accident. They, more than any insurance carrier in the state, acted at the time of the settlement agreement with knowledge and understanding of their legal position.

ARGUMENT III

MEDICAL EXPENSES ATTRIBUTABLE TO AN INDUSTRIAL ACCIDENT ARE A CONTINUING OBLIGATION OF THE EMPLOYER/INSURANCE CARRIER.

In this case both the employer and its insurance carrier, the State Insurance Fund, were the same for both the 1977 and the 1978 industrial accidents. Any medical expenses associated and incurred because of those accidents are the continuing obligation of the employer/insurance carrier.

See Kennecott Copper Corp. v. Bilanzich, USF&G v. Anderton, 647 P.2d 754 (1983).

ARGUMENT IV

ALCOHOLISM IS NOT A PRE-EXISTING IMPAIRMENT COVERED UNDER SECTION 69.

"In the spirit of settlement" it was offered to pay 4% disability caused by alcoholism. (R-152)

Alcoholism is not a pre-existing impairment covered under §35-1-69 U.C.A. 1953.

All the arguments pertaining to not reopening a case after settlement apply to the award of 4% for alcoholism.

The case was closed as to any claim for compensation for alcoholism as pre-existing, the industrial accident of May 1, 1978, by the settlement of July 23, 1980.

CONCLUSION

The Order of the Commission denying reimbursement from the Second Injury Fund should be affirmed. The State Insurance Fund chose a course of action, probably because they were the carrier in both accidents, that at the time the settlement was made, served their best interest. There would be no end to such litigation if all settled cases of workmen's compensation could be reopened for possible reimbursement by showing some pre-existing impairment.

DATED this 10th day of August, 1983.

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MAILING CERTIFICATE

I hereby certify I mailed two true and exact copies of the foregoing Brief of Respondent, first-class, postage prepaid to the following parties:

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