1984

Shirley Moyes, On Behalf of H. Jack Moyes, Deceased, State Or Utah And Utah State Insurance Fund v. Second Injury Fund And Industrial Commission of Utah : Brief of Appellant State of Utah And/Or Utah State Insurance Fund

IN THE SUPREME COURT OF THE STATE OF UTAH

SHIRLEY MOYES, on behalf of H. JACK MOYES, deceased, STATE OF UTAH and UTAH STATE INSURANCE FUND,	:	
Plaintiffs-Appellants,	:	Case No. 19236
-v-	:	
SECOND INJURY FUND and INDUSTRIAL COMMISSION OF UTAH,	:	
Defendants-Respondents.	:	

BRIEF OF APPELLANT STATE OF UTAH and/or UTAH STATE INSURANCE FUND

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BRIEF OF APPELLANT STATE OF UTAH
and/or UTAH STATE INSURANCE FUND

STATEMENT OF THE NATURE OF THE CASE

The Utah State Insurance Fund is joining the plaintiff's appeal, seeking review of an order of the Industrial Commission of Utah adopting the findings of the medical panel which denied Mr. Moyes Worker's Compensation benefits.

DISPOSITION BY THE INDUSTRIAL COMMISSION

An initial hearing was held before Administrative Law Judge Keith Sohm at 8:30 a.m. on May 3, 1982. At that time, the Administrative Law Judge appointed a medical panel to review [illegible] issues in the case. The medical panel determined that the industrial accident on November 5, 1979 did not result in any permanent partial impairment to Moyes.

On August 26, 1982, Roger D. Sandack, attorney for Moyes, filed Objections to the Medical Panel Report. A further hearing on Objections to the Medical Panel Report was held before Administrative Law Judge Keith Sohm at 2:00 p.m. on September 10, 1982. Subsequent to the hearing, the Administrative Law Judge adopted the findings of the medical panel that the November 5, 1979 industrial accident did not result in a rateable permanent partial impairment to Moyes. The Administrative Law Judge entered his Findings of Fact, Conclusions of Law and Order on October 27, 1982. On November 15, 1982 Moyes, the State of Utah and/or the State Insurance Fund filed a Motion for Review challenging the Administrative Law Judge's adoption of the medical panel report. On April 26, 1983, the Industrial Commission denied plaintiffs' Motion for Review.

RELIEF SOUGHT ON APPEAL

The State of Utah and/or the Utah State Insurance Fund have joined this appeal asking for a reversal of the Industrial Commission's finding that Moyes' November 5, 1979 industrial accident did not result in a rateable permanent partial impairment. The Utah State Insurance Fund has paid out considerable amounts of money for medical expenses and compensation since the accident. The finding of the Commission that the accident did not result in a rateable permanent partial impairment effectively denies the State Insurance Fund reimbursement from

Second Injury Fund in a case where the applicant had suffered extensive pre-existing conditions for a long period of time. Utah Code Ann., § 35-1-69 (Supp. 1981), which provides for reimbursement from the Second Injury Fund, requires that a permanent partial impairment result from an industrial accident before reimbursement from the Second Injury Fund can be ordered. A new order should be entered by the Commission rating the permanent partial disability due to the industrial accident and the permanent partial disability due to pre-existing conditions. The Utah State Insurance Fund should be reimbursed from the Second Injury Fund for a proportion of the expenses and compensation it has paid out equal to the percentage of permanent partial impairment due to pre-existing conditions.

STATEMENT OF THE FACTS

Mr. Moyes had a long and tragic medical history. He suffered from neck problems, heart problems, arthritis, back problems, and numerous other health problems. In October, 1983, Mr. Moyes passed away as a result of unrelated medical problems. This Court granted Mrs. Shirley Moyes, widow of H. Jack Moyes, the right to be substituted as a party.

Moyes had been involved in at least four work-related accidents involving injuries to his lower back. The first accident occurred in 1967, when Moyes, then employed by IBEC Motor Truck, strained his lower back while changing a tire (R. 26).

This injury caused him to lose a few days of work (R. 26). The other three accidents occurred while Moyes was employed by the State Department of Finance. In 1973, Moyes slipped on some ice and snow at work and fell against a wall, twisting his back (R. 24). He received no compensation for this accident and had only a minimal amount of time off from work. In 1976 Moyes injured his back while moving a desk. He lost some time from work from this injury and received some temporary total disability compensation from the State Insurance Fund; however, Moyes received absolutely no compensation for permanent partial impairment or even a permanent impairment rating for any of these previous injuries or conditions (R. 24-25). On November 5, 1979, Moyes fell on the Capitol steps, injuring his back (R. 15). This accident is the subject matter of this litigation.

Early in the morning of November 5, 1979, Moyes left his office to check on his car (R. 15). On the way to his car, he fell down the Capitol steps, twisting his back (R. 15). Moyes did not seek immediate medical attention because he had a doctor appointment in early December (R. 16). During the day the pain in his lower back grew steadily worse, forcing him to leave work in the early afternoon (R. 16). During the following month his pain grew increasingly worse (R. 17). When Mr. Moyes saw his physician, Dr. Thomas Noonan, in December, he was advised that surgery would be appropriate (R. 17

was admitted to the hospital on January 6, 1980 (R. 17). On January 7, 1970, a myelogram was performed on his back which indicated that he had a herniated disc with significant protrusion (R. 107). On January 8, 1980, Dr. Noonan operated on Moyes' lower back (R. 19). Dr. Noonan performed a second operation on Moyes' back in December, 1980 (R. 20). In November of 1981, Dr. Noonan referred Mr. Moyes to Dr. Morrow (R. 20). At this time, Dr. Morrow injected a narcotic into the spine to relieve the pain (R. 20). Later that month, Dr. Morrow operated on Moyes' back (R. 20). None of these surgeries was contemplated or planned prior to Moyes' slip and fall on November 5, 1979.

The medical issues of this case were referred to a medical panel consisting of Dr. Frank Dituri and Dr. Edward Spencer (R. 58-59). Neither doctor reviewed all of the medical records of the treating physicians, Dr. Noonan and Dr. Morrow (R. 59-61). For example, neither Dr. Dituri nor Dr. Spencer reviewed the x-rays taken prior to the 1979 injury (R. 60). Further, neither Dr. Dituri nor Dr. Spencer reviewed the myelogram which was performed on January 8, 1980 (R. 61). Nevertheless, the medical panel concluded that none of Mr. Moyes' impairment was due to the accident of November 5, 1979, and that all of his lower back problems were the result of long years of a chronic degenerative disease (R. 116). Dr. Morrow, on the other hand, testified and stated in his records that Moyes suffered from a 10% permanent partial impairment of the whole man to the back,

5% of which is attributable to the November 5, 1979 accident (R. 98), and 5% of which is attributable to pre-existing conditions.

Under Dr. Morrow's analysis, the State of Utah and/or the Utah State Insurance Fund is entitled to a 50% reimbursement from the Second Injury Fund for all medical, temporary total disability and permanent partial impairment benefits paid or due and owing Mr. Moyes that accrued by the date of his death.

ARGUMENT

POINT I

PETITIONER SHIRLEY MOYES MAY PROSECUTE THIS APPEAL FOR BENEFITS WHICH WOULD HAVE ACCRUED PRIOR TO THE DATE OF H. JACK MOYES' DEATH.

Appellants State of Utah and/or Utah State Insurance Fund concur and adopt by reference the position of petitioner Shirley Moyes regarding her right to accrued benefits due and owing her husband as of the date of his death (see Argument, Point I of petitioner Moyes' brief).

POINT II

THE ADMINISTRATIVE LAW JUDGE AND THE INDUSTRIAL COMMISSION ACTED ARBITRARILY AND CAPRICIOUSLY IN ACCEPTING THE MEDICAL PANEL DETERMINATION, BASED ON AN INCOMPLETE AND WHOLLY INADEQUATE REVIEW OF THE MEDICAL EVIDENCE, THAT MOYES DID NOT INCUR PERMANENT PARTIAL IMPAIRMENT AS A RESULT OF THE NOVEMBER 5, 1979 ACCIDENT.

The medical panel in this case determined that the industrial accident of November 5, 1979 did not result in a rateable permanent partial impairment. The panel stated:

> It is the opinion of the panel that no part of this is due to the industrial injury of November 5, 1979. After carefully reviewing all the records and taking a careful history from Mr. Moyes, it is our opinion that his low back problems are a result of long years of chronic degenerative disease. We do not feel that the injury in November of 1979, for which he did not see a doctor and for which he did not take off work, caused any serious increase in the impairment. We do not believe that the surgery done in January of 1980 was a result of the injury but was a result of the progression of a pre-existing disease (R. 116).

This opinion is misleading. First, it is not true that Mr. Moyes did not miss any work due to his fall on November 5, 1979. An examination of the record indicates that he missed some work:

> Q. Did you return to work during that period of November 5 to December?
>
> A. Yes.
>
> Q. You lost no time off work?
>
> A. Yes, I took off that afternoon the date it happened because I was hurting, and I may have missed a day or two between, but I don't really know. I am not sure (R. 16-17).

Secondly, Moyes did see his doctor. He merely waited a few weeks until his regularly scheduled appointment. The members of

the medical panel relied heavily upon the fact that Mr. Moyes did not see a doctor immediately to determine that the November 5, 1979 accident did not result in permanent partial impairment and was not the reason Moyes required surgery in January and December of 1980. Apparently the panel felt that if the November 5, 1979 accident resulted in a rateable permanent partial impairment and necessitated the 1980 surgeries, then Mr. Moyes would have been in such severe pain that he would have immediately contacted his physician. The November 1979 accident did cause Mr. Moyes a great deal of pain. He testified that the pain grew worse between November and December of 1979. The fact that Moyes, a man with a long history of medical problems, did not immediately contact a doctor is not necessarily indicative of a lack of pain. Dr. Dituri, chairman of the panel, admitted at the hearing on Objections to the Medical Panel Report that Moyes might be more tolerant of back pain than other human beings:

> Q. But you would agree with me, would you not, that it would be reasonable to assume any person with a 12-year history of back problems, who had been working during that 12-year period, might be more tolerant of back pain, and work with that condition.
>
> A. Yes sir (R. 83).

However, the panel apparently did not consider that plaintiff's long history of back problems, not an absence of pain, explained plaintiff's short delay in contacting a physician.

Finally, the conclusion of the medical panel is misleading as it states ". . . after carefully reviewing all the records . . ." Indeed, neither Dr. Dituri nor Dr. Spencer reviewed all of the medical records in this case. Neither of them reviewed the x-rays taken of plaintiff's lower back prior to the 1979 accident (R. 60). Furthermore, neither of them reviewed the myelogram taken of plaintiff's back on January 7, 1980 prior to surgery (R. 61).

One of plaintiff's examining physicians, Dr. Morrow, testified and stated in his records and reports that there is a medically demonstrable connection between the industrial injury of November 5, 1979 and the protrusion along plaintiff's spine which required surgery in January of 1980. Dr. Morrow's findings were based on a more extensive review of the records, including the myelogram and the x-rays taken of plaintiff's back prior to the 1979 injury (R. 98).

Prior to the January 1980 surgery, Moyes had a moderately large herniated disc in the lower part of his back. This protrusion was discoverable through the myelogram taken on January 7, 1980. Dr. Morrow testified that it was consistent that the type of injury Moyes sustained in November of 1979 would cause a large herniated disc:

> . . . also it's quite consistent that an injury of that sort would cause a moderately large herniated disc.

> If it were simply a degenerative disc, we would not see a significant protrusion. We might see just a small gentle bulge, from which it does not yield much disc material when it's opened, as described this did (R. 100-101).

Perhaps had the medical panel reviewed the myelogram taken on January 7, 1980, they would have been aware that Moyes suffered from a large protrusion in his lower back which was medically probably not merely the result of a degenerative disease, but the result of the traumatic incident of November 5, 1979.

POINT III

THE ACCIDENT OF NOVEMBER 5, 1979 RESULTED IN A RATEABLE PERMANENT PARTIAL DISABILITY; THEREFORE THE STATE OF UTAH AND/OR THE STATE INSURANCE FUND IS ENTITLED TO REIMBURSEMENT FROM THE SECOND INJURY FUND FOR A SHARE OF THE WORKER'S COMPENSATION.

This Court's interpretation of § 35-1-69 has consistently allowed contribution from the Second Injury Fund for all types of Worker's Compensation payments in an amount equal to the percentage of permanent partial disability attributable to any pre-existing condition. McPhie v. United States Steel Corp., 551 P.2d 504 (Utah 1976); Intermountain Health, Inc. v. Ortega, 562 P.2d 617 (Utah 1977); White v. Industrial Commission, 604 P.2d 478 (Utah 1979); Intermountain Smelting Corp. v. Capitano, 610 P.2d 334 (Utah 1980); Paoli v. Cottonwood Hospital, 656 P.2d 410 (Utah 1982); United States Fidelity & Guaranty Co. v. Industrial Commission, 647 P.2d 754 (Utah 1983).

In Intermountain Health Care, this Court held that § 35-1-69 ... proportionate contribution from the Special Fund (the ... Injury Fund) for compensation and medical benefits in ... involving pre-existing injuries. In Intermountain Health Care, the Commission found that the claimant had a permanent partial disability of 30%, 10% attributable to a pre-existing psychological condition and 20% attributable to an accident which occurred on the job. The Commission failed, however, to require the Second Injury Fund to pay its proportionate share of the Worker's Compensation benefits. On appeal, the Utah Supreme Court found that § 35-1-69 required the Second Injury Fund to reimburse the insurance carrier for one-third of the medical expenses and compensation because one-third of the employee's permanent partial disability was attributable to her pre-existing condition.

In the instant case, the November 5, 1979 accident resulted in permanent partial impairment as determined by Mr. Moyes' treating physician, Dr. Morrow. Dr. Morrow found the applicant suffered from a 10% permanent partial impairment due to his lower back condition, 5% of which was directly attributable to the industrial accident of November 5, 1979 and 5% of which was due to pre-existing conditions. Therefore, the Second Injury Fund is obligated to reimburse the State Insurance Fund for a ... of the temporary total compensation and medical benefits which the State Insurance Fund has paid to the

applicant equal to the percentage of the permanent partial disability attributable to applicant's many pre-existing conditions.

In the case of White v. Industrial Commission, 604 P.2d 478 (Utah 1979), the Utah Supreme Court held that the Second Injury Fund must reimburse the insurance carrier for a proportion of medical expenses and temporary total disability compensation equal to the percentage of permanent partial disability applicable to the pre-existing injury.

In the instant case, the State Insurance Fund has paid out a substantial amount of benefits in the form of medical expenses and temporary total disability. The State Insurance Fund should be reimbursed for that portion of the medical expenses and the temporary total compensation equal to the percentage of the impairment due to the applicant's pre-existing injury.

In Intermountain Smelting Corp. v. Capitano, 610 P.2d 334 (Utah 1980), this Court again held that the Commission erred in ordering the employer to pay all medical compensation and temporary total disability benefits when a portion of the disability was attributable to a pre-existing injury. In that case, the Court stated:

> We think that the reasonable conclusion to be drawn therefrom is that the employer is responsible for only the percentage of compensation and medical care which the injury occurring in the employment bears to the applicant's total disability. This conclusion is also borne out by the final provision that any amount which has been paid by the employer in excess of the portion attributable to said industrial injury shall be reimbursed to him out of the Special Fund.

Id. at 337.

POINT IV

THE STATE OF UTAH AND/OR THE UTAH STATE INSURANCE FUND IS ENTITLED TO REIMBURSEMENT FROM THE SECOND INJURY FUND ON A 71/76THS RATIO.

The State of Utah and/or the Utah State Insurance Fund urge this Court to remand this matter to the Industrial Commission for entry of an order sustaining the position espoused herein. It is these plaintiff-appellants' position that they are entitled to reimbursement from the Second Injury Fund on a 71/76ths ratio. The basis for this position is the medical panel report and the opinion expressed by Dr. Robert E. Morrow, one of the treating physicians.

In respect to the applicant's pre-existing conditions, the medical panel stated the following:

> DIAGNOSIS AND DISCUSSION
>
> Assuming but not deciding that the applicant was involved in the events as alleged, the panel finds him to have significant impairment in many areas. First of all, it should be noted that he has a problem of chronic alcoholism with alcoholic liver disease. He also has severe, chronic obstructive pulmonary disease consistent with his history of heavy smoking. It is our

> opinion that he has significant peripherovascular disease with intermittent claudication. He also has arteriosclerotic heart disease, status post-bypass surgery, with angina pectoris.
>
> In addition, he has degenerative arthritis of the spine and is status post-fusion of the cervical spine and status post-diskectomy of the lumbar spine.
>
> If we rate all these separate medical problems using the Guides to the Evaluation of Permanent Impairment of the American Medical Association, we find that his chronic alcoholism rates as 5 per cent permanent partial impairment of the whole man. His alcoholic liver disease rates as 15 per cent permanent partial impairment of the whole man. His chronic obstructive pulmonary disease rates as 35 per cent impairment of the whole man. His peripherovascular disease with intermittent claudication rates as 5 per cent permanent partial impairment. His arterio-sclerotic heart disease with angina pectoris rates as 40 per cent. The degenerative disease of the cervical spine, status post-diskectomy and fusion, rates as 10 per cent and the status post-diskectomy of the lumbar spine rates as another 10 per cent. When all of these are combined using the Combined Values Scale, we find that Mr. Moyes has a permanent partial impairment of 76 per cent of the whole body.

As was stated above, Dr. Morrow agreed with the medical panel chairman, Dr. Dituri, regarding Moyes' 10% permanent partial impairment due to the lower back. However, Dr. Morrow disagreed with Dr. Dituri in that he found 5% of it was due to the industrial accident.

Plaintiffs-appellants did not contest the medical panel's opinion regarding the pre-existing conditions other than the assessment that all of the impairment of the lower back was

... to the pre-existing condition; therefore the ratings given ... panel when combined with Dr. Morrow's substantiated ... demonstrate Moyes had a 76% permanent partial impairment, 5% of which was due to the industrial accident of November 5, 1979 and 71% of which was due to pre-existing conditions.

Pursuant to Utah Code Ann., § 35-1-69, the Industrial Commission on remand should order the Second Injury Fund to reimburse the State Insurance Fund on a 71/76ths ratio or for 93% of the medical benefits and temporary total disability compensation paid.

In United States Fidelity & Guaranty Co. v. Industrial Commission, 657 P.2d 764 (Utah 1983), this Court interpreted § 35-1-69. Though that case involved several statutes and a fairly complicated fact situation, the Court did discuss the implication and purpose of § 35-1-69:

> Explicit statutory authority exists to apportion compensation awards and medical costs between the employers and the Second Injury Fund, provided pertientn conditions are met. Basically those conditions are three in number: (1) permanent incapacity occasioned by accidental injury, disease or congenital causes, followed by (2) subsequent injury resulting in further permanent incapacity which is: (3) substantially greater than that which would have been incurred if there had been pre-existing incapacity. Those conditions having been met, the liability of the employer is assessed on "the basis of the percentage of permanent physical impairment attributable to the industrial injury only and the remainder shall be paid out of the said special (second injury) fund."

Id. at 767.

In the instant case, the State Insurance Fund has paid temporary total disability and medical expenses due to the November 5, 1979 accident and the resulting surgical and non-surgical procedures performed upon the applicant in 1980. This Court should find, based on the substantial weight of the evidence presented, that the November 5, 1979 injury resulted in a rateable permanent partial disability, the State Insurance Fund should be reimbursed from the Second Injury Fund for a portion of the expenses it has paid out equal to the percentage of disability attributable to pre-existing injuries.

CONCLUSION

The Industrial Commission acted arbitrarily and capriciously in adopting the medical panel's conclusion that plaintiff's November 5, 1979 industrial accident did not result in a rateable permanent partial impairment. The medical panel relied on incomplete evidence. Plaintiff's treating physician, based upon an examination of the entire medical record, testified and reported the November 5, 1979 accident resulted in a rateable permanent partial impairment of 5% of the whole man to the back. The Findings of Fact and Conclusions of Law, which the Industrial Commission affirmed, accepted the report of the medical panel and rejected the report of the attending physician without giving any reasons therefor. Thus, the determination of the Industrial Commission was arbitrary and capricious, and the denial of the Motion for Review should be reversed.

The appellant, State Insurance Fund, respectfully requests the Court to remand this case to the Industrial Commission so that they can enter an order requiring the Second Injury Fund to reimburse the appellants for 93% of the benefits paid based on a 71/76ths ratio.

Respectfully submitted this 8th day of March, 1984.

BLACK & MOORE

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CERTIFICATE OF MAILING

I hereby certify that I mailed two true and exact copies of the foregoing Brief, postage prepaid, this 12th day of March, 1984, to the following:

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