

1984

Shirley Moyes, On Behalf of H. Cack Moyes,
Deceased, State of Utah And Utah State Insurance
Fund v. Second Injury Fund And Industrial
Commission of Utah : Brief of Respondents
Second Injury Fund And Industrial Commission.
of Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

SHIPLEY 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 RESPONDENTS SECOND INJURY FUND
and INDUSTRIAL COMMISSION OF UTAH

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BRIEF OF RESPONDENTS SECOND INJURY FUND
and INDUSTRIAL COMMISSION OF UTAH

STATEMENT OF NATURE OF THE CASE

This case involves § 35-1-85 U.C.A. which provides that findings of the Commission on questions of fact are conclusive and final and not subject to review by this Court. The companion issue is whether the findings of the Commission are supported by some substantial evidence.

DISPOSITION OF THE INDUSTRIAL COMMISSION

The Industrial Commission adopted the medical panel report and held that the November 5, 1970 accident did not result in any permanent partial impairment to the applicant.

RELIEF SOUGHT ON APPEAL

Respondents Industrial Commission and Second Injury Fund request that the Order of the Industrial Commission be affirmed. The applicant Appellant Moyes endeavored, by this appeal, to obtain an award of permanent partial benefits. The Appellant State Insurance Fund, by their appeal, is endeavoring to obtain reimbursement on a 71/76 ths ratio.

STATEMENT OF FACTS

The applicant, Jack Moyes, had a long history of medical problems. Though this appeal is confined to whether a claimed industrial accident on November 5, 1979 caused a permanent impairment to the lumbar region of the spine, most of Mr. Moyes physical impairments were not associated with the lower back. And much of the problem was apparently caused by the over-use of alcohol and tobacco. R-116

The medical panel, consisting of Frank Dituri, M.D. Specialist in Internal Medicine, and Edward C. Spencer, M.D., Specialist in Orthopedic Surgery, rated Moyes impairment as follows:

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 arteriosclerotic 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 postdiskectomy of the lumbar spine rates as another 10 per cent. When all of these are combined using the Combined Value Scale, we find that Mr. Moyes has a permanent partial impairment of 76 per cent of the whole body. R-116

The Appellants have not contested this portion of the Panel Report except to press for 5% of the lower back impairment of 10% to have come from the alleged accident of November 5, 1979. See pages 14 and 15 of the State Insurance Fund Brief. On this point the panel held there was no permanent partial impairment due to the incident of November 5, 1979.

It is the opinion of the panel that no part of this is due to the industrial injury of November of 1979. After carefully reviewing all the records and taking a careful history from Mr. Moyes, it is our opinion that his lower 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 his impairment. We do not believe that the surgery done January of 1980 was a result of that injury but was the result of the progression of pre-existing disease. R-116

Appellants were incorrect in stating that the medical panel did not review the available medical records, that Dr. Robert E. Morrow was the "attending" physician, and that Dr. Morrow used "a more extensive review of the records,

including the myelogram and the x-rays taken of plaintiff's back prior to the 1979 injury." (State Insurance Fund Brief at 9.) Dr. Morrow did not see appellant's witness Moyes for the first time until August 27, 1981 . . . over a year and a half after the alleged industrial accident. Dr. Morrow had no records available to him that were not studied by the panel, and there were no known angeograms or x-rays taken of Mr. Moyes before November 5, 1979. The report of the myelogram taken January 7, 1980 was studied by the panel as was all other available information. R-61. This was the same myelogram report that Dr. Morrow reviewed. R-99

Dr. Morrow treated Moyes for pain subsequent to seeing him for the first time in August, 1981. His opinion on whether there was permanent partial impairment from the November 5th incident was mainly his review of the myelogram report. . . the same report reviewed by the panel. R-100 The record contains numerous incidents which caused the Medical Panel, the Administrative Law Judge and the Commission to all agree that there was no permanent impairment to be attributed to the November 5th incident.

Dr. Thomas D. Noonan was the applicant employees doctor for all his back problems from 1965 through 1982. Dr. Noonan referred his patient to Dr. Morrow for consultation and evaluation in August of 1981. R-123,146.

Dr. Boyd G. Holbrook, associated with Dr. Noonan, assisted Dr. Noonan in the surgeries of January and December of 1980.

Dr. Noonan and Dr. Holbrook were the only persons knowledgeable about Moyes back problems until a year and a half after the surgery of January 1980.

It was therefore logical for the State Insurance Fund to endeavor to have the doctor apply some permanent partial impairment to the November 5, 1979 incident. Dean Sanders, Claims Adjuster for the State Insurance Fund wrote to the doctor requesting acknowledgement that there had been permanent partial impairment from the November 5th accident. The doctor replied on March 12, 1980:

In reply to your letter of 3/5/80 in regard to the above captioned individual, as you know, Mr. Moyes' problems have really been a steady progression of events and I doubt if any one single episode, particularly that one in November was the thing that set it off although it cannot be entirely ruled out. As your records indicate, I had seen him during February, March, April, July, September of 1979 with things about the same. R-137

As this letter specifically denied what the Appellants were seeking they continued to have the doctor change his opinion, and on March 21, 1980 he wrote in answer to the request of the State Insurance Fund:

Dear Mr. Sanders:

A point of clarification to my letter dated 3/12/80 in regard to Mr. Moyes. As you know, the episode in 11/79 was one of slipping on

the ice and falling down the last step and twisting his upper torso and lower back. As previously pointed out, this could have been enough to precipitate the pre-existing condition. R-138

In both these letters a part of the heading read:

Re: Jack Moyes
Emp: State of Utah - Department of Finance
Inj. September 16, 1976
File: 76-24756-D

R-137,138

emphasis added.

Dr. Noonan performed an anterior cervical disc excision and interbody fusion operation in 1965 after Moyes injured his neck in an auto accident. R-45,115. Dr. Noonan treated Moyes for lower back problems from at least as early as 1967 when he admitted Moyes into St. Marks Hospital from 9/20 to 9/26/1967. The cause of the hospitalization was stated as lifting a 69 lb. box. R-163. Moyes, in telling of the accident, said his back was hurt when he changed a tire. R-25,114.

In 1973 Moyes was again hospitalized for lower back problems by Dr. Noonan from 1-24-73 to 2-1-73.

The incident was recorded in a number of different ways by the applicant from slipping on ice and snow coming out of a restroom at the state captiol, to slipping against a snowbank. See R-5,25,25,45,162.

In 1976 Moyers again had an incident which further injured his lower back. He describes this injury as being caused by obtaining a file while seated at his desk, "from the

... hand drawer, turned to check something on left side of ... and apparently threw back out of place." R.5 and 132. He also described this injury as being caused by moving or lifting a desk at work. R 45 and 114. Dr. Noonan was the attending physician for this injury.

On June 1, 1979, Moyes apparently sat on an arm of a chair at work and became unbalanced causing him to twist his back. R-5 (State Insurance Fund (letter)) Later that month, June 13 to June 24, 1979, Moyes received temporary disability compensation for lower back problems. The cause of the disability was said to be the injury of September 16, 1976. R-132. And as previously noted, Dr. Noonan saw Moyes in February, March, April July and September of 1979. R-137.

The applicant Moyes was consistant in not ascribing any significance to the November 5th incident.

He described the event under questioning by his own attorney.

Q. Did you seek immediate mecial attention?

A. No, not immediate, because I didn't think it was that bad. I had an appointment the first part of December anyway.

Q. With whom?

A. With Dr. Noonan.

Q. What was that for, the original appointment?

A. I don't remember.

Q. You did see Dr. Noonan about this injury?

A. Yes..

Q. Did you return to work during that period from 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 then I may have missed a day or two in between, but I don't really know. I'm not sure. R-16

Notes taken by personnel at St. Marks Hospital on admission and discharge for the two surgeries by Dr. Noonan in January and December of 1980 contain no reference to the incident of November 5th. The discharge summary dated 2-6-80 after his January surgery reads in part:

BRIEF HISTORY: This 59-year-old white male from Salt Lake City has had a history of back pain for 13 years, was reinjured while changing a tire, with radiation to the left leg. He claims he has reinjured it multiple times and mostly responded to conservative treatment; however, this time he has noted increased severity and numbness and dragging of the left foot over the past six months, and admitted at this time for evaluation and treatment. R-159

And the history taken at time of his admittance to the hospital in December of 1980 reads:

HPI: The patient is a 67 year old white married male from SLC, who has had problems with his neck and back for multiple years. The patient has complained of low back pain intermittently for a number of years, became much worse in January, 1980. He had lumbar disectomy at L4 at this time. R-128

Dr. Noonan made hospital notes before the surgery in January, 1980 and wrote:

Readmission for this gentleman who has had a several year history of recurrent low back pain with radiation into his legs with some associated numbness and tingling. In general he has responded to the conservative measures although the past six months have gradually increased in severity.

He had had an anterior cervical disc excision and interbody fusion in June of 1965. He has had no cervical complaints since that time.

He is being admitted at this time for further investigative studies including a lumbar myelogram and possible lumbar nerve root decompression. R-135

The medical panel after reviewing such records as noted said: "We do not believe that the surgery done in January of 1980 was a result of that (November, 1979) injury but was the result of the progression of pre-existing disease". R-116.

ARGUMENT

POINT I

THE ORDER OF THE COMMISSION MUST BE CONFIRMED WHEN SUPPORTED BY SUBSTANTIAL EVIDENCE AND ITS FINAL ORDER HAS WARRANT IN THE RECORD AND A REASONABLE BASIS IN THE LAW.

The standard of review is as pronounced in Kaiser Steel Corp. v. Monfredi, 531 P.2d 888 (Utah 1981)

[The reviewing court's inquiry is whether the Commission's findings are "arbitrary and 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.

The Order of the Commission in this case affirming the Order of the Administrative Law Judge and the conclusions reached by the Medical Panel and the applicants treating surgeon, Dr. Noonan, is all verified by the facts as related above. The conclusion reached by all these parties was that no permanent partial impairment resulted from the incident of November 5, 1979. As the Order is supported overwhelmingly by the record it must be affirmed.

POINT II

1.2% INCREASE IS NOT "SUBSTANTIALLY GREATER UNDER § 35-1-69 U.C.A.

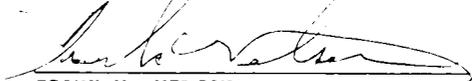
Appellant State Insurance Fund is seeking to have this Court approve a 5% permanent partial impairment for the incident of November 5, 1979. As Moyes had a total impairment of 76%, the Appellants would receive a 93% reimbursement of all benefits they have paid Moyes.

If it were somehow to be concluded that the Order of the Commission was arbitrary and capricious the appellants must still fail as they claim only a 5% permanent partial impairment. Using the formula adopted in Jacobsen Construction v. Hair, 667 P.225, and more recently used in Second Injury Fund v. Lamoreaux, filed June 28, 1984, results in 5% impairment of the 24% whole man which equals 1.29% increase, 1.2 is hardly even minimally greater, and it surely is not "substantially greater than he would have incurred if he had not had the pre-existing incapacity" under § 35-1-69 U.C.A.

CONCLUSION

The Order of the Industrial Commission on questions of fact shall be conclusive and final and shall not be subject to review unless they acted arbitrarily and capriciously. The record overwhelmingly supports the Order.

RESPECTFULLY SUBMITTED this 27th day of July, 1984.



FRANK V. NELSON.
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that on this 27th day of July, I mailed a true and correct copy of the above and foregoing Brief of Respondents Second Injury Fund and Industrial Commission of Utah to:

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