

1992

Gary E. Crosland v. Industrial Commission of Utah, Young Electric Sign Company, and Smith Administrators : Unknown

Utah Supreme Court

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Recommended Citation

Legal Brief, *Crosland v. Industrial Commission*, No. 920247.00 (Utah Supreme Court, 1992).

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IN THE UTAH SUPREME COURT

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GARY E. CROSLAND,)	
)	
Applicant/Respondent.)	Court of Appeals No.
)	910291CA
)	
vs.)	Priority No. 7
)	
INDUSTRIAL COMMISSION OF)	
UTAH; YOUNG ELECTRIC SIGN)	
COMPANY and SMITH)	
ADMINISTRATORS,)	
)	
Defendants/Petitioners.)	

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WORKERS COMPENSATION FUND OF UTAH'S AND
SELF-INSURERS' ASSOCIATION'S REPLY
IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

The Workers Compensation Fund of Utah and the Utah Self-Insurers' Association, as amici curiae, jointly file the following Reply Brief pursuant to Rule 50(e) of the Utah Rules of Appellate Procedure and pursuant to the parties' previously filed briefing stipulation.

1. MR. CROSLAND'S OPPOSITION BRIEF FAILS TO ADDRESS THE SERIOUS STANDARD OF REVIEW CONFLICT BETWEEN CROSLAND AND MORTON.

The amicus curiae briefs filed in support of Young Electric Sign Company's petition for a writ of certiorari demonstrate that the Utah Court of Appeals' opinion in Crosland fails to apply the standard of review set forth in Morton v. Tax Commission, 814 P.2d 581 (Utah 1991). In response to this criticism, Mr. Crosland quotes an extended excerpt from page 36 of the Crosland opinion and then concludes that the Court of Appeals "thus properly cited and followed the standard of review announced by this Court in Morton." (See Mr. Crosland's opposition brief at p. 9.)

Mr. Crosland's tautological Morton analysis is as illusory as is the Court of Appeals' analysis. Indeed, because Mr. Crosland advances no argument to demonstrate how the Crosland court properly applied the Morton standard. The detailed analyses contained on pages 6 through 11 of the Utah Self-Insurers' Association's amicus brief and on pages 6 through 9 of the Workers Compensation Fund's amicus brief are not remotely addressed by Mr. Crosland's extended quotation from the Crosland opinion. Amici's contention that Crosland directly conflicts with Morton stands un rebutted.

Mr. Crosland attempts to skirt the Morton issue by asserting that "it is clear that the Industrial Commission in Crosland never attempted, in the first instance, to interpret [the term "permanent impairment]." (Mr. Crosland's opposition brief, p. 9.) This assertion is not correct. Mr. Crosland's counsel is well aware that the Industrial Commission could never have apportioned Mr. Crosland's disability award without first finding that Mr. Crosland's asymptomatic preexisting condition constituted a non-compensable permanent impairment under Utah Code Ann. §35-1-66 (1988). Both the medical panel and the Industrial Commission unequivocally concluded that Mr. Crosland's asymptomatic preexisting spondylosis condition constituted a preexisting "permanent impairment" within the meaning of

§35-1-66. To argue that this finding is not contained in the Industrial Commission's Order is like arguing that the Industrial Commission is not aware that $2 + 2 = 4$.¹

The fact that the Industrial Commission readily equated Mr. Crosland's preexisting condition with a non-compensable permanent impairment demonstrates the long-standing and (heretofore) automatic Industrial Commission practice of apportioning between preexisting asymptomatic nonwork-related conditions and industrially-caused conditions. The principle is simply too well recognized to even require comment by the Commission that an asymptomatic preexisting condition cannot be compensated under §35-1-66. Accordingly, the fact that the Utah Court of Appeals failed to engage in a proper and thorough Morton standard of review analysis in this case is grounds for reviewing and reversing the Crosland opinion.

2. MR. CROSLAND MISCONSTRUES AMICI'S ARGUMENT AS TO HOW CROSLAND CONFLICTS WITH HOLLOWAY.

On pages 10 and 11 of his opposition brief, Mr. Crosland addresses the conflict existing between the Holloway and Crosland opinions by launching into an Allen higher standard of legal causation argument. This higher standard argument has nothing to do with the conflict analysis contained on pages 11 through 13 of the Utah Self-Insurers' Association's amicus brief. The conflict between Holloway and Crosland lies in the two opinions' radically different treatment of the importance of asymptomatic preexisting conditions. On the one hand, Justices Zimmerman and Howe (in Holloway) advance the public policy of encouraging Utah employers to hire individuals with preexisting disabilities; those Justices announce that employees must not be able to "foist the cost of [the preexisting components of] injur[ies] on [their] employer[s] when the work place had little to do with causing the injur[ies]." See, Holloway v. Industrial Commission, 729 P.2d 31, 32 (Utah 1986). On the other hand, the Utah Court of Appeals' opinion in Crosland expressly defeats the public policy advanced by

¹. Furthermore, it should be observed that the Industrial Commission did expressly equate Mr. Crosland's pre-existing condition with a §35-1-66 "permanent impairment." Administrative Law Judge Barbara Elicerio, in her August 14, 1990 Order entered below, specifically decided "there is no justification for finding that the full [20%] impairment [assigned to Mr. Crosland] is the responsibility of the carrier." (See page 5 of the Order attached as Exhibit "4" to the initial brief filed by the Workers Compensation Fund of Utah.) Accordingly, the Industrial Commission, by and through Judge Elicerio, did specifically find that one-half or 10% of Mr. Crosland's permanent impairment was non-compensable under §35-1-66.

Holloway, because the Court of Appeals expressly held that the Industrial Commission cannot apportion between an asymptomatic preexisting component and an industrially-caused component of a given employee's injury. Because of this clear conflict, the Crosland opinion should be reviewed and reversed on certiorari.

3. CROSLAND FAILS TO RECOGNIZE THAT SINCE THE ORTEGA LINE OF CASES, UTAH HAS PROTECTED EMPLOYERS FROM THE RESPONSIBILITY OF PAYING BENEFITS FOR PRE-EXISTING IMPAIRMENTS BASED ON THE SOUND PUBLIC POLICY OF ENCOURAGING THE HIRING AND RETENTION OF PREVIOUSLY IMPAIRED WORKERS. PROFESSOR ARTHUR LARSON DOES NOT SUPPORT A CONTRARY POSITION.

Crosland and the Court of Appeals erroneously rely upon Professor Arthur Larson's treatise Workers Compensation Law for the proposition that no apportionment should be made between preexisting undiagnosed, asymptomatic injuries and work related injuries in determining the extent of the employer's responsibility for the payment of weekly permanent partial disability compensation.² Crosland chose not to include key language of the Larson quote:

Apart from special statute, apportionable "disability" does not include a prior nondisabling defect or disease that contributes to the end result. Nothing is better established...³

Utah does have a special statute. In pertinent part that statute reads:

...Permanent partial disability compensation may not be paid for ***any permanent impairment that existed prior to an industrial accident...***⁴

Under this statutory scheme, Utah has chosen legislatively and judicially to apportion permanent partial disability (impairment) compensation.⁵

Professor Larson does not consider a statute such as that found in Utah in connection with the language quoted by Crosland. Larson does not discuss "permanent impairment" at all

². See pages 12 and 13 of Crosland's Brief in opposition to Petition for Writ of Certiorari.

³. 2 Larson, Workers Compensation Law, Section 59.22(a) (1989) (Emphasis added. Italics indicate the portion of quote not included in Crosland's brief.)

⁴. §35-1-66 U.C.A., 1988. (Emphasis added)

⁵. See argument at pages 10 through 16 in WCF's Amicus Curiae Brief in Support of Petition for Writ of Certiorari.

and especially not as that term is used in Utah.⁶ In the Larson treatise, "disability" awards are wage loss compensation benefits for the period of time in which the physical injury has not stabilized medically and the injured worker is unable to return to work. That is in contrast to "permanent partial disability" awards which are based solely on the loss of bodily function regardless of ability to work.⁷

In 1988 the Legislature had before it a long line of cases in which employers had been relieved of the responsibility of paying permanent partial disability benefits for preexisting "impairments" whether they were manifest or quiescent.⁸ An extremely strong thread of public policy ties all of those cases together--employers should be encouraged to hire and retain employees suffering from "...permanent impairment[s] that existed prior to an industrial accident." The 1988 Legislature chose to continue this public policy by limiting the employer's liability to only those impairments which are actually caused by the work environment.⁹

⁶. It is important to look at the context in which Professor Larson makes the statement quoted by Crosland and the Court of Appeals concerning "apportionable disability". Professor Larson discusses "disability" early in his treatise section entitled *Wage Loss Vs. Medical Incapacity*. He distinguishes "disability" from what one might call the medical determination of the loss of physical function. "Disability" is the concept upon which temporary weekly compensation to replace lost wages is based. See §35-1-65 U.C.A. In contrast, loss of physical function is the basis for awards of permanent partial disability compensation in §35-1-66 U.C.A. Larson writes:

§57.00 *Compensable disability* is inability, as the result of a work-connected injury, to perform or obtain work suitable to the claimant's qualifications and training...

§57.13 Permanent disability
Permanent partial awards may be scheduled or unscheduled. Permanent partial scheduled awards are *based on medical condition after maximum improvement has been reached, and ignore wage loss entirely*. Fixed payments for loss of specified members are due even if the claimant during the period is back at work at higher wages than before...

Workers Compensation Law, supra. at 10-1 and 10-62. (Emphasis added.)

⁷. §35-1-66 U.C.A., 1988.

⁸. See citations to Ortega and its offspring at pages 11 and 12 of the Workers Compensation Fund amicus brief.

⁹. Utah employers are still responsible for all periods of temporary total and temporary partial disability compensation. This liability is the employer's even though the compensation period is enlarged by reason of a pre-existing condition. See U.C.A. §§35-1-65 & 35-1-65.1.

It is inaccurate for Crosland to argue Utah has not routinely apportioned the kind of preexisting impairments experienced by him. Prior to 1988, such impairments were apportioned and became the liability of the Employers' Reinsurance Fund pursuant to §§35-1-68 and 35-1-69 U.C.A., and were not a liability of employers. The special language of U.C.A. §35-1-66 as enacted in 1988 codifies that case law and historic practice reaffirming the employer's limited liability. The injured employee now receives no compensation for "impairments" which predate and are not caused by the industrial accident. There is absolutely no evidence that the 1988 Legislature intended to pass a law contrary to Utah's longstanding hiring and retention public policy by placing the burden on employers to pay compensation benefits for impairments not causally connected to job related injuries and illnesses.

CONCLUSION

The Supreme Court should grant certiorari for the reasons stated herein and the briefs previously submitted by Amici Curiae and Young Electric Sign Company.

DATED this 3 day of August, 1992.

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CERTIFICATE OF MAILING

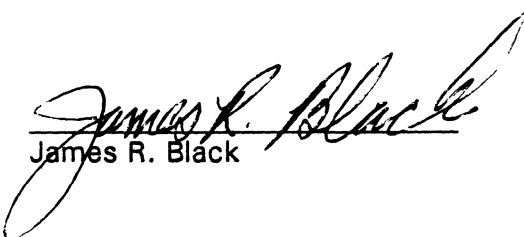
I hereby certify that a true and correct copy of the foregoing WORKERS' COMPENSATION FUND OF UTAH'S AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI was mailed, postage prepaid, on this 30 day of August, 1992 to the following:

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