1992

Gary E. Crosland v. Board of Review of the Industrial Commission of Utah, Young Electric Sign Company, and Smith Administrators : Reply to Brief in Opposition

Utah Supreme Court

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Benjamin A. Sims; Industrial Commission of Utah; Michael A. Peterson; Richards, Brandt, Miller, Nelson; James R. Black; Callister, Duncan & Nebeker; J. Angus Edwards; Purser, Okazaki & Berrett; Attorneys for Petitioners.

BRIEF

IN THE UTAH SUPREME COURT

GARY E. CROSLAND, Applicant/Respondent, v. BOARD OF REVIEW OF THE INDUSTRIAL COMMISSION OF UTAH; YOUNG ELECTRIC SIGN CO. and SMITH ADMINISTRATORS, Defendants/Petitioners.	Court of Appeals No. ~~910291CA~~ 920247 Priority No. 16

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

I. 1988 AMENDMENTS TO THE WORKERS' COMPENSATION ACT DID NOT TRANSFER LIABILITY FOR PRE-EXISTING CONDITIONS FROM THE EMPLOYERS' REINSURANCE FUND TO THE EMPLOYER. THE AMENDMENTS ONLY ELIMINATED THE EMPLOYERS' REINSURANCE FUND'S LIABILITY IN PERMANENT PARTIAL DISABILITY CLAIMS.

The 1988 amendments to § 35-1-69, Utah Code Annotated (1953, as amended), eliminated apportionment between the employer and the Employers' Reinsurance Fund in permanent partial disability claims, but had no other effect on apportionment except in permanent total disability cases. Section 35-1-69 only requires that the employer pay for impairment that is caused by the industrial injury and the 1988 amendments removed the Employers' Reinsurance Fund responsibility to compensate claimants for preexisting impairment aggravated by industrial injuries in permanent partial disability claims. Thus, the 1988 amendments to § 35-1-69 did not transfer the liability for preexisting conditions from the Employers' Reinsurance Fund to the employer. Indeed, the 1988 amendment to § 35-1-66 completely eliminated all liability for preexisting conditions in cases of permanent partial disability.

II. THE COMMISSION AND COURTS ARE NOT MEDICAL EXPERTS QUALIFIED TO INTERPRET THE TERM "IMPAIRMENT" AS THIS TERM WAS DEFINED PRIOR TO 1991 AND AS CODIFIED IN THE 1991 AMENDMENTS TO § 35-1-44.

Respondent claims that Crosland v. Board of Review of Industrial Commission, 183 Utah Adv. Rep. 35 (Utah App. 1992), is

not a "sweeping" change in the law, since the opinion will only cover claims for injuries from 1988 to 1991. Respondent's claim is wrong.

The Crosland court suggested and respondent argues that the 1991 amendments to § 35-1-44 define the terms "impairment" and "disability" for the first time. Obviously, the Industrial Commission had interpreted these medical concepts for decades before the 1991 amendments. Moreover, the definitions in § 35-1-44 merely codified the well-settled meanings of the terms "impairment" and "disability." These definitions were exclusively medical matters for physicians prior to 1991 and remain that way after the 1991 amendments. The definitions of "impairment" and "disability" in the American Medical Association Guides to the Evaluation of Permanent Impairment (A. Engelberg 3rd ed. 1988), are substantially similar to the provisions of § 35-1-44 and require that the assessment of impairment be made solely by medical means, while disability may be assessed by non-medical means.

Even if this Court concludes that the Crosland decision constitutes only a limited, rather than a sweeping, change in the law, the decision is still wrong and contrary to the well accepted Industrial Commission doctrine that employers are not held liable for the employees' non-industrial injuries and conditions. The Court of Appeal's Crosland opinion cannot be allowed to stand

because it inequitably places the burden of employees' non-industrial illnesses and conditions on the shoulders of Utah's employers.

Respondent argues that the most glaring defect in petitioners' petition is that the Industrial Commission never attempted to define the term "permanent impairment" and, therefore, the Court of Appeals could not defer to the Commission's interpretation. Respondent fails to recognize that the interpretation of the term "permanent impairment" is exclusively a medical matter that was necessarily included in the respondent's permanent impairment rating by the Medical Panel.[1] The Commission and the Utah Court of Appeals are not medical experts that are qualified to interpret the term "permanent impairment" or reject the Medical Panel's opinion on the amount and apportionment of permanent impairment. The Crosland decision permits the court to assign meanings to medical terms of the Workers' Compensation Act which directly clash with

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[1] In his brief, respondent concedes that the controlling statute is § 35-1-66, but on several occasions respondent refers to the phrase "prior impairment." § 35-1-66 does not contain the phrase "prior impairment," it only contains the terms "physical impairment" and "permanent impairment." Additionally, respondent repeatedly argues that the preexisting asymptomatic condition was "non-ratable." The Workers' Compensation Act does not contain the term "non-ratable." Moreover, the Medical Panel assigned to this case expressly found that the preexisting asymptomatic condition accounted for 10% of Mr. Crosland's permanent impairment rating. Thus, the argument that the condition was "non-ratable" contravenes the Medical Panel's express findings.

the meanings assigned those terms by medical doctors. This is why Crosland is such a sweeping change in the law. Furthermore, Crosland establishes completely inappropriate precedent that will be controlling authority when the Commission and courts are required to apply or interpret the 1991 amendments.

Therefore, petitioners respectfully request that a Writ of Certiorari be granted pursuant to Rule 46, Utah Rules of Appellate Procedure.

DATED this 30 day of July, 1992.

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CERTIFICATE OF SERVICE

I, J. Angus Edwards, certify that on July 30, 1992, I served a copy of the attached BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI upon the following, by mailing it first class U.S. mail with sufficient postage prepaid to the following addresses:

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