

1992

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

Utah Supreme Court

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DOCKET NO.

920247

IN THE UTAH SUPREME COURT

GARY E. CROSLAND,

Applicant/Respondent,

v.

INDUSTRIAL COMMISSION OF
UTAH, YOUNG ELECTRIC SIGN
COMPANY and SMITH
ADMINISTRATORS,

Defendants/Petitioners.

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920247

Court of Appeals No. 910291-CA

Priority No. 16

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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This Brief in Opposition to the Petition for Writ of Certiorari is submitted by Applicant/Respondent, Gary E. Crosland, who urges this Court not to accept Certiorari in this case.

JURISDICTION OF THE SUPREME COURT

Respondent does not dispute that this Court has jurisdiction to consider the Petition for Writ of Certiorari pursuant to Article VIII, Section 3 of the Utah Constitution; Utah Code Annotated, Section 78-2-2(3) and (5) (1989); and Rule 45 of the Utah Rules of Appellate Procedure. The fact that this Court has jurisdiction to entertain this Writ does not, however, mean that it should or must. Rule 46 of the Utah Rules of Appellate Procedure makes clear that "Review by a writ of certiorari is not a matter of right, but of judicial discretion...."

CONTROLLING STATUTES AND RULES

Utah Code Annotated, Section 35-1-66 (1988) is the controlling statute. Rule 46 of the Utah Rules of Appellate Procedure is the controlling Rule containing the considerations governing review by Writ of Certiorari. There was no controlling definition of the phrase "prior impairment" at the time governed by the facts of this case.

STATEMENT OF THE CASE

Respondent does not dispute the Statement of the Case contained in the Petition for Writ of Certiorari.

STATEMENT OF FACTS

Respondent does not dispute the Statement of Facts contained in the Petition for Writ of Certiorari with the exception that it must be underscored that the industrial injury which Mr. Crosland suffered on February 9, 1989, aggravated and made symptomatic a previously non-ratable, asymptomatic medical condition.

Dr. Robert H. Horne, Mr. Crosland's treating physician, in a report dated September 28, 1989, stated that although Mr. Crosland had a pre-existing spondylolisthesis, the industrial injury caused the pre-existing spondylolytic defect to become acute and symptomatic. (R. at 59).

On September 19, 1989, Dr. John F. Lilly, a physician for the carrier, examined Mr. Crosland and indicated that in his opinion Mr. Crosland had asymptomatic spondylolysis and spondylolisthesis prior to the industrial injury; and, significantly, that all of the symptoms suffered by Mr. Crosland were occasioned by the occurrence of the industrial injury. (R. at 59).

Following the hearing, this matter was referred to a Medical Panel appointed by the Administrative Law Judge which reported its conclusions on May 8, 1990, including the finding that Mr. Crosland had a 20% permanent, partial impairment of the whole body, attributing 10% to the industrial accident and 10% to "pre-existing conditions." (R. Vol. II at 194). It also concluded that the industrial accident aggravated Mr. Crosland's "pre-existing condition." (R. Vol. II at 184). Significantly,

it further commented as follows:

a. It is the panel's position that the Applicant did probably have a developmental abnormality which had been asymptomatic up to the point of onset of symptoms from the twisting, lifting [industrial] injury. It is entirely possible he could have gone on for an indefinite period had it not been for the event described.... [Emphasis added] (R. Vol II at 182).

b. The industrial injury did medically aggravate a pre-existing condition of the Applicant. Comment: As indicated previously, this was an asymptomatic condition, but an abnormal status was present to a sufficient degree to be contributory to his present impaired status. [Emphasis added] (R. Vol II at 184-185).

The Order of the Administrative Law Judge of August 14, 1990 adopted the Medical Panel Report and awarded compensation benefits to Mr. Crosland, but limited them to the 10% whole body permanent, partial impairment exclusively attributable to the industrial accident. She denied benefits for the additional 10% whole body permanent, partial impairment attributable to the asymptomatic, non-ratable condition which was aggravated and made symptomatic by the industrial accident (R. at 76-77).

SUMMARY OF ARGUMENT

The Utah Supreme Court should not accept Certiorari in this case. The Utah Court of Appeals has been the Court of last resort in Workers Compensation matters for many years, and although review of a Decision of the Utah Court of Appeals is available by way of Writ of Certiorari, such review should be strictly limited and only granted in the most important matters in order to maintain the integrity of the Utah Court of Appeals and promote judicial economy.

The decision below, from which review is sought is also a very narrow one spanning a period between 1988 and 1991. The Utah Court of Appeals recognized that in 1991, the Utah Legislature amended the Worker's Compensation Act to precisely define the term "impairment" by statute which was not the case when Mr. Crosland was injured. The decision below is strictly limited to those injuries occurring between 1988 and 1991 and in all likelihood constitutes law of the case only.

And finally, the Decision below by the Utah Court of Appeals (which was unanimous) is a correct one. A cursory reading of it will confirm its reasonableness and logic.

A R G U M E N T

**THIS COURT SHOULD NOT EXERCISE ITS
DISCRETION TO REVIEW THE DECISION OF THE
UTAH COURT OF APPEALS IN THIS MATTER.**

A. A PANEL OF THE UTAH COURT OF APPEALS HAS NOT RENDERED A DECISION IN CONFLICT WITH A DECISION OF ANOTHER PANEL OF THE COURT ON THE SAME ISSUE OF LAW, AS SPECIFIED UNDER RULE 46(A) OF THE UTAH RULES OF APPELLATE PROCEDURE.

Petitioners allege that the decisions of different panels of the Utah Court of Appeals in the cases of Crosland v. Board of Review, 183 Utah Adv. Rep. 35 (March 20, 1992) and Nyrehn v. Industrial Commission, 800 P.2d 330 (Utah Ct. App. 1990) are in conflict and that such conflict warrants review by this Court pursuant to Rule 46(a) of the Utah Rules of Appellate Procedure. This alleged conflict arises, as Petitioners read Nyrehn to require apportionment of permanent, total disability compensation between asymptomatic, pre-existing conditions and

the industrial injury, while they allege that Crosland stands for the proposition that there is no apportionment. In so arguing, Petitioners misinterpret the true holdings in each of those cases.

As Respondent argued before the Court of Appeals, the sole issue in Nyrehn was whether the claimant had suffered a compensable injury and could prove legal causation under the rule announced in Allen v. Industrial Commission, 729 P.2d 15 (Utah 1986). The issue of any apportionment of the claimant's disability between pre-existing incapacity and the industrial injury was neither briefed nor argued by any of the parties in that case.

The holding of Nyrehn is that "when an accident is the climax of repeated exertions, as in Nyrehn's case, work-related 'exertion', for purpose of proving legal causation, is the aggregate exertion of the repetitive exertions that establish the accident." Id. at 336. The Court's cursory statement that "...the case is remanded with instructions to grant Nyrehn benefits for total permanent disability as calculated by the Administrative Law Judge" [Id. at 337] did not judicially adopt an apportionment rule in workers compensation cases.

While it is true that the Petitioner in Nyrehn also had an asymptomatic pre-existing condition of spondylolysis and that the Medical Panel apportioned 75% of her total permanent impairment to the industrial accident and 25% to a pre-existing incapacity, she was awarded permanent, total disability benefits without an offset for her pre-existing asymptomatic condition.

The apportionment specified in that case was for the purpose of allocating the liability for payments between the employer and the Employers' Reinsurance Fund (formerly the Second Injury Fund). Crosland, on the other hand, did not involve any issue as to apportionment with the Employers Reinsurance Fund. The "apportionment" issue discussed in those two cases was not on the "same issue of law" as that phrase is used in Rule 46(a) of the Utah Rules of Appellate Procedure. As the Utah Court of Appeals noted in Crosland:

This reliance is misplaced because the Nyrehn case merely apportions between the employer and the fund under this section and does not address the issue of apportionment between the employer and the employee. Id. at 38, footnote 6.

Nyrehn received the full value of her disability with no reduction for pre-existing injury. She, like Mr. Crosland, had an asymptomatic, pre-existing condition of spondylolysis. Her Medical Panel found that 75% of her permanent impairment was due to the industrial accident while 25% was due to pre-existing conditions. Nevertheless, she received 100% compensation, including the 25% prior asymptomatic condition which only became symptomatic by reason of the industrial injury.

If Nyrehn stands for any relevant proposition in this case, it is that the worker is not penalized for the aggravation of an asymptomatic pre-existing injury which only becomes symptomatic by reason of an industrial accident. Nyrehn is not an authority by which a claimant's award can be reduced by the degree of disability which can be apportioned to an asymptomatic pre-existing injury.

Not only is there no conflict between Crosland and Nyrehn, but, in fact, as Respondent successfully argued to the Utah Court of Appeals, Nyrehn is actually persuasive authority for the proposition that in workers compensation matters one does not apportion between the employer and the employee, but only in appropriate cases between the employer and the Employers Reinsurance Fund, pursuant to the provisions of Utah Code Annotated, Section 35-1-69 (1988). McPhie v. Industrial Commission, 567 P.2d 153 (Utah 1977).

There is no conflict in the decisions of the Utah Court of Appeals dealing with "apportionment." Petitioners only seek to create one by confusing the concepts of "apportionment" between the employer and the employee and the statutory "apportionment" between the employer and the Employers' Reinsurance Fund that arises pursuant to Utah Code Annotated, Section 35-1-69 (1988).

The Utah Court of Appeals has recently examined the interpretation that is to be given that statute. In Virgin v. Board of Review, 803 P.2d 1284 (Utah Ct. App. 1990) the Court noted:

In 1988, Section 35-1-69 was repealed and a new Section 35-1-69 was reenacted. Under the current version, the test for apportioning liability for compensation requires at least a ten percent pre-existing whole person permanent impairment with additional impairment caused by accident from employment resulting in permanent total disability before liability for compensation is apportioned. Id. footnote 5 at 1288.

There is no reasonable basis for asserting that there is presently any confusion as to when and under what circumstances "apportionment" applies in Utah workers compensation matters.

If there were, the Virgin case answers it.

B. THE UTAH COURT OF APPEALS HAS NOT DECIDED A QUESTION OF STATE LAW IN A WAY THAT CONFLICTS WITH A DECISION OF THE SUPREME COURT, AS SPECIFIED UNDER RULE 46(B) OF THE UTAH RULES OF APPELLATE PROCEDURE.

Petitioners allege that the Utah Court of Appeals decision in Crosland is in conflict with this Court's rulings in Morton Int'l., Inc. v. Auditing Division, 814 P.2d 581 (Utah 1991) and Holloway v. Industrial Commission, 729 P.2d 31 (Utah 1986). Once again, Petitioners are guilty of misreading case law since no conflict in fact exists. Since Morton and Holloway deal with different issues of law they will be discussed separately.

1. THE HOLDING IN CROSLAND DOES NOT CONFLICT WITH MORTON.

In Morton this Court stated as follows:

Therefore, in cases dealing with statutory construction, the Utah Administrative Procedure Act does not change the standard of review when the Court is in as good a position as the agency to determine the issue or when the agency has been granted discretion in interpreting the statute. However, nothing in the language of Section 63-46b-16 or its legislative history suggests that an agency's decision is entitled to deference solely on the basis of agency expertise or experience. Indeed, there is no reference to agency expertise or experience in the statute or the statute's legislative history. Rather, in granting judicial relief when an 'agency has erroneously interpreted or applied the law,' the language of Section 63-46b-16(4) clearly indicates that absent a grant of discretion, a correction of error standard is used in reviewing an agency's interpretation or application of a statutory term. Id. at 588.

The Court of Appeals in Crosland recognized this Court's ruling in Morton by stating as follows:

This proceeding is governed by the Utah Administrative Procedures Act (UAPA), Utah Code Ann. Section 63-46b-1 to-22 (1989 & Supp. 1991). Section 63-46b-16(4)(d) governs the scope of our review of the Industrial Commission's Order, allowing relief if Crosland has been 'substantially prejudiced' because 'the agency has erroneously interpreted or applied the law.' In Morton Int'l, Inc. v. Auditing Div. of the Utah State Tax Commission, 814 P.2d 581, 587-89 (Utah 1991), the Supreme Court held that under this section we may review for correctness and need not defer to the agency's interpretation unless there is "a grant of discretion to the agency concerning the language in question, either expressly made in the statute or implied from the statutory language. Id. at 589. When legislative intent can be discerned, however we give the agency's interpretation, no deference. Id.; accord Mor-Flo Indus. v. Board of Review, 166 Utah Adv. Rep. 17 (Utah App. 1991). This case requires an interpretation of the 1988 amendment to the Workers' Compensation Act and thus presents a question of statutory construction and legislative intent which we may review for correctness. Under this higher standard, to afford relief we must find that the Commission erroneously interpreted the law to Crosland's substantial prejudice. (Footnotes omitted.) Id. at 36.

The Court of Appeals thus properly cited and followed the standard of review announced by this Court in Morton.

The most glaring defect in Petitioner's argument is that even if the Court of Appeals was required to defer to the agency's interpretation of the statutory term "permanent impairment" (a fact which Respondent disputes), it is clear that the Industrial Commission in Crosland never attempted, in the first instance, to interpret that term. The Industrial Commission's Order Denying Motion for Review is based entirely on an erroneous interpretation of the holding in Nyrehn. Nowhere in the "Order Denying Motion for Review" is there any attempt to interpret the phrase "prior impairment." In fact, the Order fails to even cite any statute, with the exception of

those governing appeals.

2. THE HOLDING IN CROSLAND DOES NOT CONFLICT WITH HOLLOWAY.

The sole issue on appeal in Holloway was whether his injury was the result of an "accident" as that term is used in the Workmen's Compensation Act. This Court noted that the case was controlled by its prior decision in Allen v. Industrial Commission, 729 P.2d 15 (Utah 1986) and remanded to the Commission for reconsideration in light of Allen.

Petitioners place great reliance on the concurring opinion of Justices Zimmermann and Howe:

The sole question is whether the worker came to the workplace with a condition that increased his risk of injury. If he did and that condition contributed to the injury, then Allen's higher standard of legal causation comes into play to place that worker on the same footing as one who did not come to work with a preexisting condition. See Id. at 25-26. To rule otherwise would create the strong likelihood that a worker who has a pre-existing condition and whose virtually inevitable injury simply happens to occur at work will be able to foist the cost of that injury on his employer when the workplace had little to do with causing the injury. (Emphasis added) Id. at 32.

Without addressing whether a concurring opinion states sufficient precedent to create a sufficient conflict to warrant review by Writ of Certiorari as required by Rule 46(b) of the Utah Rules of Appellate Procedure, it is clear that the conditions referred to in Holloway simply do not apply in Crosland. Even if the higher standard of legal causation set forth in Allen applies, Petitioners do not allege that Crosland would be unable to show that the employment contributed something substantial to the risk he already faced in everyday

life because of his condition.

The record clearly indicates that the Medical Panel in Crosland found that the higher standard had been met:

It is the Panel's position that the Applicant (Crosland) did probably have a developmental abnormality which had been asymptomatic up to the point of onset of symptoms from the twisting, lifting [industrial] injury. It is entirely possible he could have gone on for an indefinite period had it not been for the event described.... [Emphasis added]. (R. Vol II at 182).

There was no evidence before the Industrial Commission or the Utah Court of Appeals (and Petitioners do not cite any in their Petition to this Court), that Respondents' injury "simply happened to occur at work" or that the "workplace had little to do with causing the injury" as cautioned by Justices Zimmermann and Howe in the Holloway decision. Indeed the undisputed evidence is that he did suffer an "accident" as that term is used in Allen.

C. THE UTAH COURT OF APPEALS HAS NOT RENDERED A DECISION WHICH HAS DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THE SUPREME COURT'S POWER OF SUPERVISION, AS SPECIFIED UNDER RULE 46(C) OF THE UTAH RULES OF APPELLATE PROCEDURE.

The essence of Petitioners' argument here is that the Court of Appeals in Crosland announced a "sweeping change in the accepted and usual course of claims before the Commission".

Amicus allege that:

The final decision will have a significant impact on not only the amount of compensation injured employees may receive, but may also significantly affect the premiums employers will have to pay to provide workers compensation insurance coverage. The decision may also significantly impact the costs of providing compensation benefits for those employers which

qualify as self-insureds" (Brief of Amicus Workers' Compensation Fund of Utah at 9-10).

Once again Petitioners, in an attempt to find an accepted basis for a Petition for Writ of Certiorari, have misstated the holding and implications of the Utah Court of Appeal's decision in Crosland. Crosland did not announce any "sweeping change" in the law concerning pre-existing injuries, but rather followed an existing body of law.

Crosland only stands for the proposition that under 1988 - 1991 law, the aggravation of a pre-existing, asymptomatic condition is compensable since there is no apportionment of liability as between the employer and the employee for symptoms resulting from the industrial accident. That holding is in conformance with a long line of prior decisions of this Court. See Giles v. Industrial Commission, 692 P.2d 743 (Utah 1984), Johnson v. Industrial Commission, 657 P.2d 1259 (Utah 1982), reh'g granted, 660 P.2d 244 (Utah 1983), Nuzum v. Roosendahl Constr. & Mining Corp., 565 P.2d 1144 (Utah 1977), and Tintic Milling Co. v. Industrial Commission, 60 Utah 14, 206 P. 278 (Utah 1922).

In addition, Professor Larson in his oft-cited treatise on Workmens Compensation speaks directly to this point when he states:

Nothing is better established in compensation law than the rule that, when industrial injury precipitates disability from a latent prior condition,... the entire disability is compensable,... No attempt is made to weigh the relative contribution of the accident and the pre-existing condition to the final disability or death. Apportionment does not apply in such cases, nor in any case in which the prior

condition was not a disability in the compensation sense. 2 Larson, Workers Compensation Law, Section 59.22(a) (1989). (Footnotes omitted.)

Further evidence of the fact that the Utah Court of Appeal's decision in Crosland does not call for an exercise of this Court's power of supervision is its extremely limited value as precedent. Crosland was decided on the basis on the law in effect in 1989, when the claimant suffered his industrial injury. The Workers Compensation statutes in effect at that time did not define the term "prior impairment". In 1991 the Utah Legislature enacted amendments to Utah Code Annotated, Section 35-1-44 (1991), which for the first time defined the terms "impairment" and "disability." The Utah Court of Appeals noted specifically in Crosland:

Because these statutory definitions were not in effect at the time of Crosland's injury, we need not decide their applicability to the wording of the 1988 amendment. Instead we rely on the law as it existed at the time of the injury. Id. at 38, footnote 5.

The decision in Crosland is thus strictly limited to pre-1991 law. It does not, and cannot, open the "floodgates for an invidious form of Industrial Commission litigation" as Amicus hysterically argue. All new claims for compensation will be governed by the new statutory language. The particular facts in Crosland, involving a pre-1991 claim, may never arise again and the decision, rather than being a "sweeping change in the law" is merely an award of benefits to a single claimant under old law.

D. THE DECISION OF THE UTAH COURT OF APPEALS IN CROSLAND DOES NOT CONSTITUTE AN IMPORTANT QUESTION OF STATE LAW WHICH HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT, AS SPECIFIED UNDER RULE 46(D) OF THE UTAH RULES OF APPELLATE PROCEDURE.

In their Petition for Writ of Certiorari, Petitioners argue: "... that the Crosland opinion is an issue of first impression to this Court and vitally affects all Utah employers and employees." (Petition for Writ of Certiorari, page 16.) This vague attempt to qualify under Rule 46(d) is not fully developed by either Petitioners or Amicus. No new arguments are advanced in order to establish a basis for review under this subsection; rather, Petitioner and Amicus merely rehash their prior arguments.

CONCLUSION

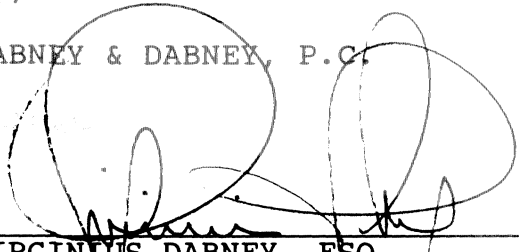
The Court of Appeals has been historically the Court of last resort in Workers Compensation matters. This Court should not exercise its discretion to grant a Writ of Certiorari except in the most significant matters. Petitioners and Amicus have wholly failed to satisfy any of the bases provided in Rule 46 of the Utah Rules of Appellate Procedure, indicating the "character of reasons that will be considered" in a decision to accept review by way of a Writ of Certiorari.

The decision in Crosland was a proper, logical and reasonable interpretation of the law as it existed at the time Mr. Crosland was injured. The 1991 definitions were not in effect at the time of Mr. Crosland's industrial injury, and the legislature did not make them retroactive and neither should this Court.

Therefore, Respondent respectfully requests that this Court
enter an Order Denying the Petition for a Writ of Certiorari and
allow the decision of the Utah Court of Appeals to stand.

DATED this 13th day of July, 1992.

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I hereby certify that true and correct copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari were mailed, postage pre-paid, on this the 13th day of July, 1992 to the following:

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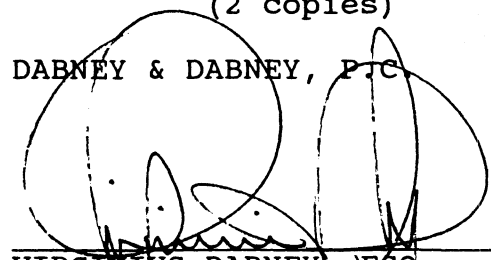
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