1983

Wilma Hall v. The Industrial Commission of the State of Utah, City Cab Company, State Insurance Fund, and Second Injury Fund : Brief of Plaintiff

IN THE SUPREME COURT

OF THE STATE OF UTAH

Case No. 19345

WILMA HALL,

Plaintiff,

vs.

THE INDUSTRIAL COMMISSION OF THE STATE OF UTAH, CITY CAB COMPANY, STATE INSURANCE FUND, and SECOND INJURY FUND,

Defendants.

BRIEF OF PLAINTIFF

Appeal from Order of the Industrial Commission of the State of Utah

---

SUSAN DIANA, BLACK & MOORE
500 Ten Broadway Building
Salt Lake City, Utah
Attorney for Defendants
City Cab and State Insurance Fund

JAY A. MESERVY
820 Newhouse Building
Ten Exchange Place
Salt Lake City, Utah
Attorney for Plaintiff

DAVID L. WILKINSON, Attorney General
FRANK V. NELSON, Asst. Attorney General
236 State Capitol Building
Salt Lake City, Utah
Attorneys for Defendant
Industrial Commission of
the State of Utah and Second
Injury Fund.

IN THE SUPREME COURT

OF THE STATE OF UTAH

Case No. 19345

WILMA HALL,

Plaintiff,

vs.

THE INDUSTRIAL COMMISSION OF THE STATE OF UTAH, CITY CAB COMPANY, STATE INSURANCE FUND, and SECOND INJURY FUND,

Defendants.

BRIEF OF PLAINTIFF

Appeal from Order of the Industrial Commission of the State of Utah

---

SUSAN DIANA, BLACK & MOORE
500 Ten Broadway Building
Salt Lake City, Utah
Attorney for Defendants
City Cab and State Insurance Fund

JAY A. MESERVY
820 Newhouse Building
Ten Exchange Place
Salt Lake City, Utah
Attorney for Plaintiff

DAVID L. WILKINSON, Attorney General
FRANK V. NELSON, Asst. Attorney General
236 State Capitol Building
Salt Lake City, Utah
Attorneys for Defendant
Industrial Commission of
the State of Utah and Second
Injury Fund.

TABLE OF CONTENTS

CASES CITED

STATUTES CITED

AUTHORITIES CITED

IN THE SUPREME COURT

OF THE STATE OF UTAH

Case No. 19345

WILMA HALL, :

Plaintiff,

vs. :

THE INDUSTRIAL COMMISSION OF THE STATE OF UTAH, CITY CAB COMPANY, STATE INSURANCE FUND, and SECOND INJURY FUND, :

Defendants. :

BRIEF OF PLAINTIFF

NATURE OF THE CASE

This is a review of the proceedings before the Industrial Commission of Utah culminating in an Order by the Commission denying additional Workman's Compensation benefits to the Plaintiff Wilma Hall.

STATEMENT OF FACTS AND DISPOSITION BELOW

On March 9, 1981, the Plaintiff was involved in an automobile accident during the course of her employment with the Defendant City Cab Company. Plaintiff sustained injuries to her neck, back and other parts of her body. The Plaintiff was 62 years

of age as of the date of the accident. The Plaintiff has weighed approximately 275 lbs. for most of her life (Record p. 28). She has been under a doctor's care for this and other problems relating to her heart for some 20 years (Record p. 30). She has been given various diets by treating physicians all her life with minimal success (Record p. 38). In spite of her weight problem, she was remarkably active--working regularly, bowling in three leagues, hunting, fishing and doing her own shopping and housekeeping (Record, p. 27). Although the medical panel gave her 20% permanent partial pre-existing impairment for her degenerative arthritis of the entire spine, she had no problems with pain in her neck or back prior to the accident and had never seen a doctor for neck or back problems prior to the accident (Record p. 29).

Within a very short period following the accident she gained even more weight so that she now weighs in the vicinity of 400 lbs., although this cannot be verified because the doctors' scales do not go over 350 lbs. (Record p. 27). As of the date of the hearing on November 22, 1982, she had not been released by a doctor to return to work (Record p. 35).

Since the accident, she has had continuous pain in her neck and low back, loss of strength in her arms and legs, difficulty holding objects, problems walking, falling episodes to the point

she has resorted to a wheel chair, which she gave up only bec
she could not afford to make the rental payments (Record pp. 24,

The employer paid medical expenses and temporary tot
disability benefits to September 15, 1981, and permanent partia
disability benefits for 10% of the whole person. The Plaintif
applied for additional benefits and the matter was duly schedule
for hearing and subsequently referred to a medical panel fo
evaluation. The medical panel found she had a 10% impairmen
due to the industrial injury. They found she had a pre-existin
impairment due to degenerative arthritis of the spine equa
to 20%. They did not distinguish or break down this figure
as between the cervical, thoracic or lumbar spine, though al
were affected. They found she had a pre-existing impairment
due to hypertensive cardiovascular disease equal to 5%. They
also found she had an impairment equal to 30% due to her hypothyroidis
and obesity. The medical panel then "found" that: "The industria
accident did not result in permanent incapacity substantiall
greater then (sic) the applicant would have incurred had sh
not had the pre-existing capacity (sic)."

The administrative law judge adopted the findings of the
medical panel as his own, over the objections of the Plaintiff,
and entered an order denying additional benefits. Motion fo
Review was filed and the Commission upheld the decision
law judge.

Plaintiff made a motion for referral to the Department of Rehabilitation for determination as to whether or not the Plaintiff was a candidate for training for any other job skills or was, in fact, unemployable due to her advanced age, prior education, job skills and physical impairments. This motion was also denied.

The Utah Legislature in its 1981 session amended §35-1-69 in such a manner that its application would make the additional award mandatory. It did not take effect, however, until approximately two months after the date Plaintiff's accident occurred.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks an Order of this Court directing a reversal of the denial of benefits, the award of appropriate benefits from the Second Injury Fund, and referral to the Department of Rehabilitation for determination of the Plaintiff's employability and capacity for retraining, and if then appropriate, for an award of permanent total disability.

ARGUMENT

POINT I THE COMMISSION ERRED IN ITS HOLDING THAT THE ACCIDENT DID NOT RESULT IN PERMANENT INCAPACITIES SUBSTANTIALLY GREATER THAN THE APPLICANT WOULD HAVE INCURRED HAD SHE NOT HAD THE PRE-EXISTING INCAPACITIES.

On March 9, 1981, relevant parts of §35-1-69, Utah Code Annotated (1953 as amended) read as follows:

> If any employee who has previously incurred a permanent incapacity by accidental injury, disease, or congenital causes, sustains an industrial injury for which compensation and medical care is provided by this title that results in permanent incapacity which is substantially greater than he would have incurred if he had not had the pre-existing incapacity, compensation and medical care, . . ., shall be awarded on the basis of the combined injuries, but the liability of the employer for such compensation and medical care shall be for the industrial injury only and the remainder shall be paid out of the special fund provided for in section 35-1-68(1) hereinafter referred to as the "special fund."

This Court has clearly established by judicial interpretation the meaning of §35-1-69 as it existed on March 9, 1981. In the case of Intermountain Smelting Corporation v. Capitano, 610 P2.d 334, (Utah 1980), this Court held the employer to be responsible only for the percentage of compensation and medical care which the industrial injury bears to the applicant's total disability. The administrative law judge in the instant case cites the Capitano case, but distinguishes it on the basis

the two injuries in Capitano had an inter-relationship. In his Findings of Fact and Conclusions of Law he states:

> Furthermore, the Administrative Law Judge is unaware of any Supreme Court case that has required the payment of Second Injury Fund benefits for pre-existing conditions where the pre-existing conditions have been unrelated to the industrial accident.

In the case of Kincheloe v. Coca Cola Bottling Company of Ogden, 656 P.2d 440, (Utah 1982), this Court cited the Capitano case and then quoted from the administrative law judge's reasoning in Kincheloe as follows:

> Furthermore, the subsequent injury of February 12, 1980 in which the Applicant sustained a herniated disc on the left side of L5-S1 is unrelated to the prior injury.

The same argument, in effect, is set forth here. The Court upheld the Commission in denying benefits in that case but on different grounds entirely, and in the course of their reasoning at Page 442 of the P.2d Reporter stated as follows:

> Under the reasoning of Capitano, the fact that the 1980 injury is unrelated to the 1974 injury is not dispositive. Irrespective of any causal connection, the second injury fund is to compensate one who sustains "permanent incapacity which is substantially greater than he would have incurred if he had not had the pre-existing incapacity."

It is clear that the status of the law as of March 9, 1981, was that the combined disabilities if substantially greater would be compensible.

In the case of Intermountain Health Care, Inc. v. Ortega, 562 P.2d 617, this Court stated that the term "substantially greater"

> . . . simply means that it be some definite and measurable portion of the causation of the disability.

The case did not require that there be a relationship between the two. At page 619, this Court stated:

> Consequently, inasmuch as it appears that the pre-existing condition increased the resulting disability by one third, it follows that under the requirements of the statute, the medical expenses as well as the compensation award should have been apportioned two thirds from the employer and one third from the special fund.

Since the one third considered was 10%, the Court clearly stated that 10% pre-existing condition was substantial.

The Utah Legislature amended §35-1-69 in its 1981 session which, although it did not take effect until after this accident, is relevant in ascertaining the status of the law at the time of the accident. The amended sections as relevant are as follows:

> If any employee who has previously incurred a permanent incapacity by accidental injury, disease or congenital causes, sustains an industrial injury for which either compensation ~~and~~ or medical care, or both, is provided by this title that results in permanent incapacity which is substantially greater than he would have incurred if he had not had the pre-existing incapacity, or which aggravates or is aggravated by such pre-existing incapacity, compensation ~~and~~ , medical care, ~~which medical care~~ and other related items ~~are~~ as outlined in §35-1-81, shall be awarded

on the basis of the combined injuries, but the liability of the employer for such compensation ~~and~~ , medical care , and other related items shall be for the industrial injury only and the remainder shall be paid out of the ~~special~~ second injury fund provided for in §35-1-68(1) ~~hereinafter referred to as "special fund"~~.

For purposes of this section, (a) any aggravation of a pre-existing injury, disease, or congenital cause shall be deemed "substantially greater", and compensation, medical care, and other related items shall be awarded on the basis of the combined injuries as provided above; provided, however, that (b) **where there is no such aggravation**, no award for combined injuries shall be made unless the percentage of permanent physical impairment attributable to the industrial injury is 10% or greater and the percentage of permanent physical impairment resulting from all causes and conditions, including the industrial injury, is greater than 20%. [e.a.]

It is clear by the fact that the Legislature added, in the first paragraph above, the words "or which aggravates or is aggravated by such pre-existing incapacity, . . ." that they considered the interpretations of the prior law by this Court to clearly state that the pre-existing condition did not need to aggravate or be aggravated by the industrial injury but merely that the resultant combined disability be "substantially greater" than would have been the result but for the pre-existing incapacity.

Further, by way of restriction, not by way of expansion of the law, the second paragraph sets forth the threshhold that from the effective date of the law, pre-existing conditions which did not aggravate or were not directly aggravated by the

industrial injury would not be compensated for unless the industrial injury itself resulted in at least a 10% permanent physical impairment and the combined impairment is greater than 20%. Thus, the Legislature clearly understood the Ortega, Capitano and Kincheloe decisions of this Court consistent with Plaintiff's interpretation above.

With these preliminary concepts, it is now a simple matter to apply the law as it existed on March 9, 1981, to the facts of the present case.

A. THE DEGENERATIVE ARTHRITIS OF THE SPINE RESULTED IN SUBSTANTIALLY GREATER INCAPACITY.

The medical panel found the degenerative arthritis of the spine to constitute a pre-existing impairment equivalent to 20% of the whole person. Under the reasoning of the administrative law judge, the pre-existing condition would have to be related in some way to the injuries sustained in the industrial accident. In the Medical Panel Report at page 303 of the Record, x-rays of the spine were reviewed and the following impressions noted:

> Impression: Early degenerative changes in the lower cervical spine.
>
> Impression: Degenerative disc disease of the thoraco-lumbar spine as described above.

The medical panel then concluded on page 9 of its report (Record p. 304), that applicant suffered permanent partial impairment

- a result of the degenerative arthritis of the spine in an amount of 20% of the whole person.

There was no breakdown by the medical panel as to what part of the spine resulted in what part of that 20%. The Plaintiff complained of pain in both her neck and low back subsequent to the accident. It would, therefore, be presumed that the disability must relate to those two areas.

On page 9 of the Medical Report (Record, p. 304), the medical panel stated:

> (6) . . . . It is possible that had she not had degenerative cervical arthritis of her spine the symptoms in her neck at the time of her accident would have been considerably less, would not have been so prolonged and would not have rendered any permanent physical impairment. This would be anticipated . . . .

But then, the medical panel adds:

> . . . but is speculative.

If it is to be anticipated, then the speculation comes on the side of denial, not on the side of acceptance. This Court has clearly stated on numerous occasions that doubts as to coverage should be resolved in favor of the employee (Jones v. California Packing, 244 P.2d 640, (Utah 1952). In the Jones case, this Court stated:

> This court has repeatedly held that the Workman's Compensation Act should be liberally construed to effectuate its purposes, and where there is doubt, it should be resolved

> in favor of coverage of the employee. [citations omitted]

The medical panel goes on and in the following paragraph states:

> . . . . Except for the cervical area there is no relationship between the industrial accident and the other medical problems and physical impairment that she has . . . .

and again in the following paragraph:

> Except for the cervical area there is no relationship between the industrial accident and the other medical problems and physical impairment that she has.

Thus, the medical panel has effectively found and stated in three separate statements on the same page under the same numbered paragraph (6), in three separate subparagraphs of that division, that there is a relationship between the industrial accident and the pre-existing problems of the cervical spine.

The administrative law judge concluded at page 5 of the Findings of Fact (Record p. 316):

> . . . . Had the applicant not had her pre-existing problems, the medical panel speculated that she may not have sustained any permanent physical impairment as a result of her industrial accident. Because of the pre-existing problems, at least to a **substantial extent**, the applicant does now have a 10% residual impairment in her cervical area . . . . [e.a.]

The error the administrative law judge makes at this point is that the medical panel found pre-existing conditions of the of the spine, part of which was obviously relating to the cervical

[illegible] due to the degenerative arthritis. The 10% awarded by the medical panel is clearly identified and based on the severe degree of fibrositis and the difficulty she has in that function. (Record p. 299). This is summarized out of Dr. Dituri's evaluation and is clearly the basis on which the medical panel awarded the 10% arising out of the industrial accident. There is definitely a pre-existing arthritic condition of the spine which directly relates to the soft tissue injury sustained in the accident.

Under the cases of Ortega, supra p. 7, Capitano, supra p. 5, and Kincheloe, supra p. 6, however, there does not have to be a relationship. It cannot be said, particularly in light of the figures in Ortega, that 20% pre-existing impairment is not substantial. It is also clear from Ortega, that 10% arising out of the accident is substantial. The 20% combined with the 10% through the Combined Values Chart of the Guides to Evaluation of Permanent Impairment, American Medical Association, Chicago, Illinois, attached hereto as Appendix A, would result in 28% permanent impairment. If this in turn, without any other consideration, translated directly into disability, she would be entitled to 18% in addition to what was awarded.

B. THE HYPERTENSIVE CARDIOVASCULAR DISEASE RESULTED IN SUBSTANTIALLY GREATER INCAPACITY.

The medical panel found the Plaintiff had a disability of 5% as a result of hypertensive cardiovascular disease. Cardiovascular

disease affects the entire function of the body. It would be difficult to understand how the disability of the cardiovascular system did not relate to any subsequent injuries or impairments. But again, under Ortega, Capitano and Kincheloe, it is not necessary that there be a relationship between the two impairments; merely that the resultant disability is substantially greater. The medical panel found that she had 5% pre-existing impairment due to her cardiovascular disease absent all other considerations. The pre-existing 5% combined with 10% from the accident according to the Combined Values Chart, attached as Appendix A, would result in a total impairment of 14%. Thus, there would be an increase of 9%. The Ortega case dealt with 10% and 20%. The question then becomes: Is 14% substantially greater than 10%? It is noted in the case of Northwest Carriers Inc. v. Industrial Commission-Ingersoll v. Camp, 639 P2.d 138 (Utah 1981)--there were actually two cases heard together by the Court--this Court approved the combining of a 3% pre-existing impairment with a 65% industrial impairment for purposes of dividing responsibility between the Second Injury Fund and the industrial carrier. It is clear then, and dictated by logic, that 4% is a substantial increase in physical impairment.

C. THE HYPOTHYROIDISM AND OBESITY RESULTED IN SUBSTANTIALLY GREATER INCAPACITY.

The medical panel found Mrs. Hall 30% disabled for her

obesity. They do not identify this as concurrent, but suggest it to be pre-existing; however, under paragraph 5 of the Medical Panel Report, they state: "Previously existing and concurrent physical impairment is 47%." [e.a.] (Record, p.304). Since there is no question as to the hypertensive cardiovascular disease and the degenerative arthritis of the spine pre-existing, the only concurrent "disability" would be a portion of the obesity. In any event, the obesity constitutes 30% disability which the medical panel finds, by implication of its inclusion, to be permanent. There should be no question that her weight "problem" is permanent. The only question could be as to whether or not the excess weight is permanent. It has now been with her for two and one-half years.

If the total obesity problem were to be ignored, the remaining disabilities found by the Panel to pre-exist the accident total 32% after adjustment by the American Medical Association's Guides to Evaluation to Permanent Impairment, Combined Values Chart, Appendix A. If this 32%, which includes the unquestioned pre-existing impairment for cardiovascular disease and degenerative arthritis, and the 10% from the accident is combined with the 30% for the obesity, part of which is obviously pre-existing, under the Combined Values Chart, the total obesity increases her total impairment by 20%. If the 10% found in Ortega is substantial, then the 20% in the instant case must also be substantial. It

is clear under the Ortega, Capitano and Kincheloe cases that at least the pre-existing weight problem "is compensible." It seems incredible to argue that an obesity problem that has been in existence for 62 years is not permanent.

D. THE COMBINED EFFECTS OF ARTHRITIC SPINE, HYPERTENSIVE CARDIOVASCULAR DISEASE, HYPOTHYROIDISM AND OBESITY RESULTED IN SUBSTANTIALLY GREATER INCAPACITY.

It is elementary logic that if each of the elements of disability pre-existing discussed in Points I A, B, and C above, are substantially greater, the combined whole and effect of the whole is substantially greater. The more appropriate question, perhaps, relates to the total overall effect of the combined pre-existing conditions.

For purposes of argument, we take the 20% pre-existing degenerative arthritis of the spine, combine it with the 5% hypertensive cardiovascular disease, we have 24%. If we assume that one-half of the 30% obesity related to pre-existing and one-half is concurrent, this combines with the 24% for 35% pre-existing impairment. Thus, she would be a 65% person as of the date of the accident. As a 65% person, she was functional. By adding 10% from the accident for cervical injury, combined values to 42% and at 42% she was a 58% person. As a 58% person she did not function. The reality of the situation is that, based on her inability to function and her lack of activity imposed by

the injury, she lost an additional 15%, bringing her total disability to 51%.[1] Very few 62 year old workers could be retrained to function in the competitive job market with only 48% or 49% of their capacity.

The administrative law judge states the relationship between the cervical injury and pre-existing cervical problem is "speculative." The medical panel stated the relationship would be expected but then raised the question of "speculation." I am compelled here to express a problem which has arisen with a number of regularly used medical panel members. It is not speculation which causes the medical panel to shy away from a conclusion of "substantially greater" effect. But rather, a basic disagreement and philosophy of the panels frequently expressed outside the panel reports and reflected by their reports, between the panel and the law itself as interpreted by this Court and promulgated by the Legislature. It involves a self-assumed responsibility on the part of the panel members to protect the Second Injury Fund from the effects of this Court's decisions and the dictates of the Legislature. It has been more recently reflected within the panel reports by findings of 9% disability in cases where panels have previously granted the standard 10%, thus avoiding

---

[1] By combining the 30% in two halves, we lose 1%. Thus, it appears the Medical Panel treated the entire 30% for obesity as pre-existing in arriving at their 52%.

the threshhold set forth in §35-1-69, Utah Code Annotated (1953, as amended). The obvious effect of the 9% disability rating, as well as the panel's repetitious findings in the present case of "no greater effect" is to avoid the interaction with pre-existing impairments and the mandatory compensation from the Second Injury Fund for the disability resulting therefrom.

Mrs. Hall was working prior to the accident. She has not worked since. She was active prior to the accident: bowling, hunting, fishing, shopping, doing all her own housework. She does not now accomplish any of these things with the exception of minimal shopping and minimal housekeeping. Prior to the accident, Mrs. Hall could walk without fear of falling; she cannot now. She was relegated to a wheelchair, which she in turn gave up only because she could not afford the rental payments.[2]

No one has raised any questions as to Mrs. Hall's veracity and yet her testimony has been totally ignored. The Commission does not have the right "to disbelieve or disregard uncontradicted, competent, credible evidence, as it appears to have done here." (Jones v. California Packing, supra p. 10).

No effort was made to evaluate Mrs. Hall psychologically to determine if her symptoms are real to her in fact. The medical panel and the administrative law judge seemed to accept [illegible]

[2]Mrs. Hall has now been able to purchase a used wheelchair of her own and is again utilizing it.

eracity, her symptoms, and her disability; and yet conclude that her problems are no worse than if she had been a 100% person before the accident. One hundred percent persons are not forced from the job market by a 10% disability. Mrs. Hall has been forced from the job market because she was in fact not a 100% person. This is accepted and confirmed by the medical panel.

POINT II THE COMMISSION ERRED IN ITS HOLDING THAT CONCURRENT OBESITY DID NOT RELATE TO THE ACCIDENT

A substantial increase in weight occurred within the first four months of her inactivity following the accident (Record p. 27). Although she has had the weight problem throughout her life, she has maintained her weight in the area of 275 lbs. and has never, prior to the accident, reached the approximation of 400 lbs. Dr. Allen MacFarlane's letter dated February 11, 1983, included in the Record at pages 284-285, was not made available to the Plaintiff along with the Medical Panel Report. The third paragraph shows a definite misunderstanding by Dr. MacFarlane of the facts relating to her weight when he states:

> . . . . At one time, in recent years, she was able to get her weight down to as low as 275 pounds but since the accident of March 1981, it has been up to more than 400 pounds. . . .

The doctor obviously believes she weighed well over 275 lbs. prior to this accident, whereas 275 lbs. was an average weight for

most of Mrs. Hall's life.

The doctor concludes on his second page (Record p. 295) that her obesity is not due to inactivity imposed by the accident but rather due to overindulgence in caloric intake. There is nothing in the record to support Dr. MacFarlane's gratuitous conclusion. Although there is nothing in the record relative to overindulgence in caloric intake, the doctor states it would be "a simple matter for her to readjust her caloric intake to compensate for the lowered physical activity . . ." There has been no investigation or evaluation by the panel to determine if excess caloric intake is in fact the problem, and no psychological evaluation to determine if the applicant is capable of adjusting her caloric intake if such would help.

The fact of the matter is that hypothyroid obesity is simply obesity due to hypothyroidism. One of the principal characteristics of hypothyroidism is a decrease in the basal metabolic rate. It is most common in women. The basal metabolic rate, in turn, is the minimal energy required to be expended for the "maintenance of respiration, circulation, peristalsis, muscle tonus, body temperature, glandular activity, and the other vegetative functions of the body." (See Dorland's Illustrated Medical Dictionary, W.B. Saunders, Philadelphia, PA.).

In the present case, we have taken a woman with a reduced energy requirement to maintain the "at rest" functions of her

body and put her at rest. The Commission has then argued that although her daily activities are no longer burning up what is already a reduced caloric intake and on which she is already obese, the forced inactivity does not relate to the weight problem because she can still eat less.

My father told me of an old horse he had which he broke of the habit of eating entirely by gradually reducing its daily ration of hay. The problem was, Dad complained, that the horse gradually reached a point where it "refused" to work for him and shortly after he had completely weaned the horse from hay, the darned thing up and died on him. I have often thought, if the horse had been burdened with human thought processes and emotions the experiment would have turned out different. Wilma Hall is burdened with such human "advantages," and if a life-time of medically supervised efforts to reduce her weight did not succeed while she was maintaining a relatively high activity level, we would have to abandon our own mental advantages to conclude her condition now is not permanent. Dr. MacFarlane's simplistic solution of "let her eat less" smacks loudly of a well-known historical quip.[3] Now, as then, it provides no answer.

Even if diet could be established as a solution to the excess obesity, she still had the obesity problem prior to the

---

[3] "Let them eat cake"

accident. It was the obesity "problem" that resulted in the excess weight gain. The problem itself pre-existed. The effect only is concurrent and then only in part because she was already obese prior to the accident.

POINT III THE COMMISSION ERRED IN DENYING Plaintiff'S MOTION FOR REFERRAL TO THE DIVISION OF REHABILITATION FOR EVALUATION AS TO EMPLOYABILITY

Section 35-1-67 Utah Code Annotated, as amended, provides for referral to the Division of Vocational Rehabilitation and states:

> . . . . If and when the division of vocational rehabilitation under the state board of education certifies to the industrial commission of Utah and in writing that such employee has fully co-operated with the division of vocational rehabilitation in its efforts to rehabilitate him, and in the opinion of the division the employee may not be rehabilitated, then the commission shall order that there shall be paid to such employee weekly benefits . . . out of that special fund provided for by section 35-1-68(1), for such period of time beginning with the time that the payments (as in this section provided) to be made by the employer or its insurance carrier terminate and ending with the death of the employee. . . .[4]

In the reality of the situation, Mrs. Hall is only a 48[illegible] woman, and under the facts is entitled to a tentative finding

---

[4]Since March 9, 1981, certain minor amendments have been made to this section and to the language quoted above but without changing the effect of the quoted language.

and a referral to the Department of Rehabilitation for evaluation to determine if she can be retrained at her age and with her impairments to function in any occupation. I don't think there is any doubt in anyone's mind that such an evaluation would conclude she is not retrainable by virtue of her age, past education, work history and impairments and that she is, in fact, unemployable.

If the record could sustain a finding that her excess weight since the accident results from overindulgent caloric intake and that she was psychologically and emotionally able to control that intake and, therefore, that her excess weight is not permanent, she is still unemployable in the competitive job market due to her other pre-existing disabilities combined with the 10% found by the medical panel to relate to the industrial injury.

This Court clearly found in the case of Northwest Carriers v. Industrial Commission of Utah, 639 P.2d 138 (Utah 1981), that nonphysical factors are to be considered by the Division of Rehabilitation in evaluating the employability or unemployability of the employee. The Court made reference to the Industrial Commission's distinction between impairment and disability as adopted by the Guides for Evaluation of Permanent Impairment, supra p. ?, and on page 141 of the P.2d Reporter stated:

> Factors extrensic to an industrial injury, such as age, mental abilities, prior training, and job market, are appropriate factors in determining an injured employee's earning power and degree of disability. . . .

Further, on the same page, this Court stated:

> In workman's compensation law, a disability is an "impairment of earning capacity." [citations omitted]

It is clear the Division of Rehabilitation will rely upon more than the intrinsic factors of the industrial injury. In the circumstances of the instant case even if all of the pre-existing impairments were ignored for purposes of determining the impairment resulting from the industrial accident, taking into effect the age, mental abilities, prior training, physical capacities, and the job market of this particular Plaintiff, the 10% constitutes such an impairment to the earning capacity of Mrs. Hall that she is permanently and totally disabled.

There is still another consideration, however. With the pre-existing weight problem, cardiovascular disease and arthritic spine disease, combined with the injuries sustained with this accident, the increased obesity since the accident, even if not permanent as Dr. MacFarlane claims, still causes her to be temporarily totally disabled until it can be controlled. As of this date, no viable medical treatment has been offered her, and is, in fact, denied her by the medical panel to assist her in accomplishing that purpose. She is entitled to temporary total disability at least until a valid effort has been made to reduce her weight and a determination made following such medical effort as to whether or not the weight is permanent

See Moctezuma v. the Industrial Commission of Arizona, 509 P.2d 227 (Arizona 1973).[5]

CONCLUSION

It is clear the Commission erred in concluding there was no relationship between the pre-existing arthritic condition and the cervical injury resulting from the accident. It is also clear the Commission erred in its conclusions that there was no relationship between the pre-existing cardiovascular disease and the obesity problem and the accident itself. The Commission also erred in its conclusion that there must be a relationship between the pre-existing impairment and the impairment resulting from the industrial accident. It is clear that under the Ortega, Capitano and Kincheloe cases, Mrs. Hall's resultant incapacity was substantially greater than without the pre-existing conditions. It is also clear that the Commission erred in denying Plaintiff's motion for referral to the Department of Rehabilitation for evaluation as to employability.

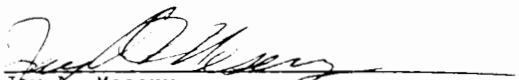
Under the law as it existed on March 9, 1981, the Plaintiff is entitled to additional compensation and to evaluation to determine if she is, in fact, employable in any occupation.

---

[5] In Moctezuma, temporary total disabilty was finally terminated after various attempts and a finding and conclusion that the employee was not cooperating with the doctors and was repeatedly violating her diet.

DATED this 28th day of November, 198

Respectfullly Submitted,

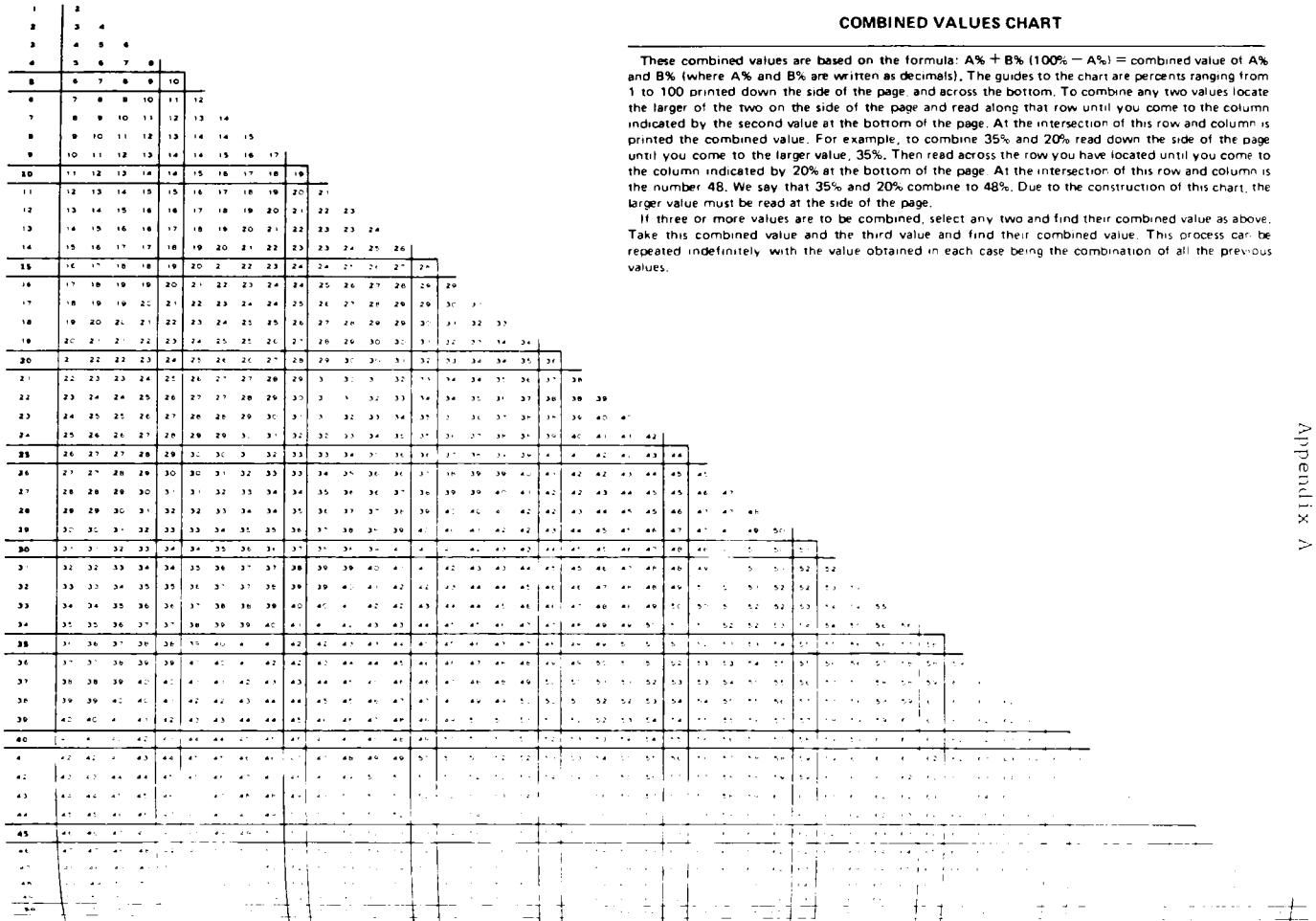


Jay A. Meservy
Attorney for Plaintiff Wilma Hall

COMBINED VALUES CHART

These combined values are based on the formula: A% + B% (100% − A%) = combined value of A% and B% (where A% and B% are written as decimals). The guides to the chart are percents ranging from 1 to 100 printed down the side of the page and across the bottom. To combine any two values locate the larger of the two on the side of the page and read along that row until you come to the column indicated by the second value at the bottom of the page. At the intersection of this row and column is printed the combined value. For example, to combine 35% and 20% read down the side of the page until you come to the larger value, 35%. Then read across the row you have located until you come to the column indicated by 20% at the bottom of the page. At the intersection of this row and column is the number 48. We say that 35% and 20% combine to 48%. Due to the construction of this chart, the larger value must be read at the side of the page.

If three or more values are to be combined, select any two and find their combined value as above. Take this combined value and the third value and find their combined value. This process can be repeated indefinitely with the value obtained in each case being the combination of all the previous values.



COMBINED VALUES CHART *(Continued)*