1983

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

IN THE SUPREME COURT OF THE STATE OF UTAH

WILMA HALL, CITY CAB CO., INC. and STATE INSURANCE FUND, Appellants, vs. SECOND INJURY FUND and INDUSTRIAL COMMISSION OF UTAH, Respondents.	Case No. 19345

BRIEF OF RESPONDENT SECOND INJURY FUND

WRIT OF REVIEW FROM THE INDUSTRIAL COMMISSION

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vs.	)	
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BRIEF OF RESPONDENT
SECOND INJURY FUND

This is a case on appeal from the Industrial Commission of Utah affirming the Findings of Fact, Conclusions of Law and Order of the Administrative Law Judge.

DISPOSITION BY THE INDUSTRIAL COMMISSION

Respondent accepts the statement on the "Disposition by the Industrial Commission" as in the Brief of the Appellant State Insurance Fund.

RELIEF SOUGHT ON APPEAL

Respondent Second Injury Fund requests that the final Order of the Industrial Commission be affirmed by this Court.

STATEMENT OF FACTS

During the course of employment with City Cab Co. on March 9, 1981, the Appellant Wilma Hall was traveling

northbound on 900 West when her vehicle was hit broadside by another automobile (R.19). The impact spun her Cab around, completely turning her automobile in a southern direction. At the time or the collision, Ms. Hall felt immedite pain to her head, neck, back and other parts of the body (R.19-21).

Ms. Hall testified that she had never had any problems with her neck or back before this industrial event (R.40). She stated that prior to her automobile accident the only parts of her body that caused her problems were her heart condition (R.34) and a weight problem through the years (R.37).

Following the incident, Ms. Hall was treated medically for head injuries and whiplash to the neck and back. Such is documented by the Holy Cross Hospital records (R.3) and her testimony at the hearing (R.19-21):

> Q. What did you experience immediately?
>
> A. I had pain in my neck... and my shoulders, I had a large lump on the left front of my forehead, and my back felt like one part went one way, another part went the other way...
>
> Q. Were you taken to a hospital?
>
> A. Yes, I was..
>
> Q. What did Dr. Romney do?
>
> A. He examined me... then he said the muscles in my neck were injured and I had a concussion...
>
> Q. Were you having any problems at the time you went home?
>
> A. I was having pain in my neck, my back and in my head..."

The early treatment of Ms. Hall does not demonstrate that she was having additional problems with her obesity or heart conditions. Subsequently, Appellant Hall filed a claim for additional benefits.

On April 21, 1983 the Judge entered his Findings of Fact, Conclusions of Law and Order (R.312-319) ruling that Ms. Hall had received all her benefits for the industrial injury to her neck and back and that her claim for compensations benefits for her pre-existing conditions of obesity, heart and degenerative arthritis was denied (R.317). The Judge's ruling was based upon his finding that the previous conditions did not make the industrial injuries substantially greater because of such prior conditions.

On May 5, 1983 the employer's carrier filed a Motion for Review (R.320-321). Applicant Hall joined in the carrier's Motion (R.322).

On May 24, 1983 the Second Injury Fund filed an "Answer to Motion for Review" submitting that the Judge had not acted arbitrary in his ruling (R.324-326) and that the greater weight of the medical evidence clearly supported the Judge's final order.

The Industrial Commission of Utah entered it's final Order on June 29, 1983 (R.336) ruling that the Order of the Judge shall be affirmed. On August 1, 1983 Appellant Hall filed a Petition for Writ of Review to determine whether she

was entitled to Worker's Compensation Benefits based on her previous obesity, heart and arthritis incapacities.

ARGUMENT

POINT I

> Appellant Hall is NOT entitled to Worker's Compensation Benefits for her pre-existing obesity, heart and arthritis problems because such previous incapacities did NOT substantially increase the industrial injury to her cervical area.

The Industrial Commission acted properly in affirming the ruling or the Administrative Law Judge that "the evidence does not support a finding that the industrial accident resulted in permanent incapacity substantially greater than the applicant would have incurred if she had not had a pre-existing incapacity." (R.317)

The controlling statute in providing benefits on the basis or combined injuries is under Utah Code Ann. §35-1-69

> If any employee who has previously incurred a permanent incapacity... sustains an industrial injury... that results in permanent incapacity which is substantially greater than he would have incurred if he had not had the pre-existing incapacity... (benefits) shall be awarded on the basis of the combined injuries...

The above statute requires the Commission to make a finding whether the industrial injury resulted in a "substantially greater" incapacity because of the pre-existing conditions before the combined inquiries can be awarded. This requires a showing from the Appellants that the previous

incapacities had the "effect" of substantially increasing the industrial impairment. No such showing was made in this case.

The test for invoking combined benefits under Section 69 was set forth in U.S.F. & G. v. Industrial Commission of Utah, 657 P.2d 764 (Utah 1983).

> "... statutory authority exists to apportion compensation awards... between employers and the Second Injury Fund, provided pertinent conditions are met... (1) (previous) permanent incapacity occasioned by accidental injury, disease or congenital causes, followed by (2) subsequent injury resulting in further permanent incapacity which is (3) substantially greater than that which would have been incurrred had there been no pre-existing incapacity... therefore... the Commission is statutorily obligated to determine whether the subsequent injuries sustained... have resulted in further permanent incapacity which is substantially greater...

This Court conclusively resolved the issue of "substantially greater than" in Day's Market, Inc. v. Muir, 669 P.2d 440 (Utah 1983). In Muir, the Commission denied the worker combined benefits under Section 69 because he had failed to show that the pre-existing incapacity had the effect of substantially increasing the industrial impairment. Muir held that the "(Second Injury) Fund's only application is where the current incapaciaty is substantially greater ...this language requires a finding as to the effect the pre-existing incapacity has upon the current (industrial) incapacity." (Emphasis added).

In the case at bar, the Commission and Judge ruled that the industrial injury of 10% to her cervical area was not

"substantially greater" because of the pre-existing problems. The decision established in essence that Ms. Hall sustained a 10% neck injury from the automobile accident regardless if she had or didn't have her prior obesity, heart or arthritis problems. The 10% injury of the cervical area was caused by the industrial accident when her cab was hit broadside and that the previous conditions did not cause, contribute to or effect the industrial injury of 10%.

Appellant Hall and Appellant carrier erroneously argue that a mere comparison of numbers is sufficient proof of "substantially greater." These abstract mathematical comparisons that 14% is subtaintially greater than 10% (Brief of Hall, p.13), or that 28% is substantially greater than 10% (same Brief, p.12) does not meet the test of proving substantially greater. The Appellant insurance carrier commits the same error by arguing (Brief of State Insurance Fund p.9) that "mere numbers ... indicate that Ms. Hall's obesity resulted in a permanent incapacity substantially greater". This conclusion was needed when the carrier attempted to compare the obesity incapacity of 30% with the total combined impairment of 52% in concluding that 52% is substantially greater than 22%.

The error of both Appellants is illustrated by this hypothetical example: Mr. X, a paraplegic accountant, is injured on the job. Mr. X is examined by a medical panel,

finding that as a result of the industrial accident Mr. X sustained a 10% injury to his left hand and because of prior problems with his legs, he has a previous incapacity of 100%. It is now illogical for the worker or carrier to combine the 10% industrial injury of the hand with the total impairment of 100% to conclude that 100% is substantially greater than 10% in contending that the hand injury is substantially greater because of his legs. The 10% hand injury was caused by the accidental injury and none of the 10% injury was effected by the prior leg problems.

Regardless of the inaccuracy of such comparisons, the Appellant carrier makes this exact argument when it combined the 10% industrial injury of the cervical area with the total impairment of 52% to conclude:

> "... it is obvious that the disability suffered by Ms. Hall due to the industrial injury is greater because of her pre-existing conditions. Certainly, 52% is substantially greater than 10%." (Brief of State Insurance Fund, p.16 and p.9).

Such mathematical comparisons tend to confuse the Court and distort the issue of "substantially greater." The reasoning of the Appellants is contrary to Day's Market, Inc. v. Muir, supra, that "Findings in the abstract as to the total of pre-existing obesity, heart and arthritis ratings with the industrial neck injury to make a finding of subtstantially greater is entering "Findings in the Abstract" to reach a wrong conclusion.

A more logical comparison would be to state that prior to the accident Ms. Hall had a total combined impairment of 47% and that after the accident she had a 52%. Thus, her impairment rating increased from 47% to 52%.

The method with much more validity is to first examine what effect the industrial accident had upon the worker's cervical area to ascertain what portion of the impairment is attributable to the accident. Secondly, determine what effect, if any, the previous obesity, heart and arthritis conditions had upon the industrial neck injury which might have substantially increased the industrial impairment.

In the instant case, the evidence shows that Ms. Hall first experienced problems with her neck immediately after the accident (R.233, 19-21). Before the accident, this worker did not have pre-existing problems in the cervical area (R.300, 39-40) and never lost time from work because of neck or back problems (R. 29, 300). the record further indicates that she never had any medical care or x-rays for neck or back difficulties prior to the accident (R. 29,35). Even the Appellant's brief does not describe prior problems with her neck or back whatsoever until she sustained the accidental injury:

> "... 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. (R.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..." (Brief of Hall, P.2)

such evidence clearly establishes that the 10% neck injury was caused by the industrial accident and the 10% injury was not affected by her pre-existing conditions.

The Judge acted correctly in asking the Medical panel to address the issue of substantially greater. In the Medical Panel report, Dr. Boyd G. Holbrook answered the Judge's question (R. 296-304).

> "(6) The industrial accident did not result in permanent incapacity substantially greater than the applicant would have incurred had she not had the pre-existing capacity..."

With regard to what effect the obesity problem may have had on the neck injury, Dr. Alan P. Macfarlane, a panel member, stated (R. 285):

> "My conclusions have to be that her obesity is not due to inactivity imposed by the accident and the neck and back pain claims, but rather due to overindulgence in caloric intake... there is no essential finding of unavoidable obesity since the day of the accident..."

The doctor also examined the effects of the prior heart condition (R. 285):

> "In regard to the heart diseases, though there is no objective evidence of heart desease and on none of her several hospitalizations for chest pain has a myocardial infarction occured... I nevertheless will honor Dr. Null's diagnosis of coronary heart disease... but it is important to note from Dr. Null's record that he had not seen her between September 1981 and October 1982 which I would have expected to have occured if her pain was really significantly worse. When he did see her in

> October 1982, electrocardiagram remained normal and unchanged. Therefore, I see no reason to consider that her heart disease is worse..."

Dr. Macfarlane answered the Judge's question on substantially greater as follows (R.285):

> "In particular question 6, seems to me should be answered in the negative in light of my reasoning concerning her obesity and coronary heart symptoms..."

Concerning the prior arthritis in the back and its effect on the industrial neck injury of 10%, Dr. Holbrooke states (R.300-304):

> "There is pain from the base of her skull all the way down her spine to the tailbone. This started six or seven months after the accident... It is possible that had she not had degenerative cervical arthritis of her spine the symptoms in her neck at the time of the accident would have been considerably less... but is speculative." (Emphasis added)

The greater weight of the medical and factual evidence supports the Judge's conclusion that prior conditions did not make the industrial injury substantially greater. Dr. F. Clyde Null's medical report of November 14, 1981 supports the theory that the history of obesity and heart problems have not changed her condition over the years (R.80). The St. Marks Hospital records substantiate that Ms. Hall has never been able to control her weight and has a longstanding history of anginal syndrome (R.160-161). Dr. M. Romney of the Holy Cross Hospital states:

> "This.... lady was involved in a motor vehicle accident on March 9, 1981. She states that immediately after the accident she had the onset of her neck pain...

Based upon the findings of the Medical Panel and all the records in this case, the Industrial Commission of Utah properly affirmed the ruling of the Judge that the claim for combined benefits for obesity, heart or arthritis pre-existing conditions should be denied because the previous incapacities did not effect or make the industrial cervical injury "substantialy greater" than it would have been "but for" the pre-existing incapacities. Day's Market, Inc. v. Muir, supra.

POINT II

> Appellant Carrier is not entitled to a 90% reimbursement of temporary disability or medical benefit paid for the industrial injury because the pre-existing obesity, heart and arthritis conditions did not contribute or effect the need for such benefits.

This point is an important issue that is causing many appeals to this court. The problem of reimbursement has been a primary cause of the increase in litigation at the Commission and appeals to the Supreme Court. Insurance carriers have been denying full payment of temporary total disability and medical benefits because of pre-existing conditions, which may or may not be effecting the accidental injury. Often the issue is not whether these benefits should be paid but who should pay for them.

Larson in his Workmen's Compensation at 59.32(g) says:

> Neccessity that second injury add to prior disability "Although the prior impairment need not combine with the compensable injury in any special way, it must add something to the disability before the special fund can become liable. In other words, it is not enough to show that claimant had some kind of handicap, if that handicap contributed nothing to the final disabilty. For example, pre-existing partial loss of hearing was not a basis for shifting part of compensation liability to the Special Fund when the ultimate disabiliity took the form of silicosis or an injured hand."

This rule applies in this case and would preclude an apportionment of benefits between the State Insurance Fund and the Second Injury Fund when the prior conditions are unrelated and in no way contribute to the problems being treated. The State Insurance Fund, however, reasons that it should be reimbursed at 42/52 or 90% of all such benefits paid based on the findings that Ms. Hall had prior incapacities. This carrier combines all the unrelated previous incapacitites of 30% obesity, 5% heart and 20% arthritis on the combined values chart to find that the total pre-existing condition equals 47%, then the carrier erroneously argues that since Ms. Hall had a total impairment of 52% after the accident from all causes and conditions, the Second Injury Fund is liable for 47/52 or 90% of temporary disability and medical benefits and the State Insurance Fund is liable for 5/52 or 10%.

The statutory language of The Act does not support such a contention where the need of the benefits was caused by the industrial injury. §35-1-50 requires that the carrier State Insurance Fund shall pay for compensation and medical services for injuries arising out of the course of employment. §35-1-45 provides that every worker injured on the job shall be entitled to compensation and medical treatment from the carrier for said industrial injuries.

It was never the intent of the Act to require the Second Injury Fund to pay for medical costs and temporary disability solely necessitated by an industrial accident. Section 35-1-69 provides that the liability of the employer's carrier shall be for the industrial injury and that portion made substantially greater by prior incapacities shall be the liabilty of the Second Injury Fund. If as in this case, the previous incapacities consists of obesity, heart and arthritis and the industrial injury is to the cervical area, such benefits should <u>not</u> be apportioned because of obesity, heart and arthritis problems. The remibursement of benefits based on overweight, heart and arthritis becomes an adjudicative nightmare in deciding who should pay for what, thereby causing a tremendous increase in litigation.

This Court ruled that "if the requirement of the statute is met, that is, if the resulting permanent incapacity is substantially greater than if the permanent incapacity had not existed, proportional causation must be found."

Intermountain Health Care Inc. v. Ortega, 562 P.2d 617 (Utah 1977). Consequently, if it is reasonable for the Law Judge to conclude from all the evidence that the worker did not sustain an industrial incapacity which is substantially greater, there is no apportionment and no application of the Second Injury Fund. Kincheloe v. Coca-Cola Bottling Co., 656 P.2d 440 (Utah 1982). Intermountain Health Care held that the requirement that the pre-existing combines with the later industrial injury to cause a substantially greater means that the increase caused by the prior conditions must be some definite and measurable portion of the causation. Such was not the case with Ms. Hall who had no prior problems with her cervical neck area before the accident and who had all her neck and back problems caused by the industrial accident. Therefore, the party (City Cab and State Insurance Fund) who created the problem should pay for it.

The Respondent Secondary Injury Fund prays that temporary disbaility and medical benefits should not be reimbursed at 90% where the previous conditions did not contribute to the lost time from work or need for medical care. That the employer's carrier, State Insurance Fund, is the sole responsible party to pay for such benefits arising out of the course or employement.

POINT III

An overweight condition or obesity does not constitute a permanent incapacity, or disability under the Worker's Compensation Act.

Obesity is not a permanent disability covered under §35-1-66 or a permanent incapacity under §35-1-69 of the Utah Code Annotated, 1953. The applicant has a long history of overweight problems; however, the medical doctors recommend that a proper diet and exercise program can significantly improve this condition.

In Larsen's "Workmen's Compensation" he emphasizes:

> Necessity that prior impairment be permanent in character. "Often by express statutory language, and sometimes by decisional law, the Second Injury Fund is held to apply only when the prior injury is permanent in charater." 59.32(h)

And in Utah the law clearly requires that the pre-existing incapacity be permanent. 35-1-69 UCA.

In Shirley v. Triangle Maintenance Corp., 41 A.D. 2nd 800, 341 NYS 2nd 709 obesity was held not to be a permanent prior disability for which the Second Injury Fund would be held responsible.

POINT IV

The Order of the Industrial Commission shall be affirmed when supported by substantial evidence.

The Order of the Industrial Commission must be confirmed when supported by substantial evidence and reasonable inferences to be drawn therefrom.

As stated in Kaiser Steel Corp. v. Monfredi, 631 P.2d 888 (Utah 1981), and reaffirmed in Kincheloe v. Coca-Cola Bottling Co., 656 P.2d 440 (Utah 1982), the scope of review of Industrial Commission cases is limited to:

> Whether the Commission's findings are "arbitrary or capricous," 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.

CONCLUSION

The Order of the Industrial Commission and Judge denying Worker's Compensation benefits for obesity, heart and arthritis problems and denying remibursement from the Second Injury Fund should be affirmed. Reimbursement and Compensation should not be awarded for obesity, heart and arthritis (or any other previous incapacity) unless it can be found that the current industrial injury of the cervical area is substantially greater than it would have been "but for" such pre-existing incapacities. Day's Market, supra. In the instant case, the Commission found that the permanent incapacity attributable to Ms. Hall's injury was not made substantially greater.

Respectfully submitted this 3rd day of February, 1984.

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CERTIFICATE OF SERVICE

I hereby certify that I caused to be delivered, by depositing in the United States Mail, a true and correct copy of the foregoing Brief this 3rd day of February, 1984.

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