1983

Richard H. Shepherd v. Diversa-Cycle Products, Inc., Utah Industrial Commission, And State Insurance Fund : Brief of Respondent Industrial Commission Of Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

RICHARD H. SHEPHERD, Applicant/Petitioner,	)	Case No. 19100
vs.	)	
DIVERSA-CYCLE PRODUCTS, INC., UTAH INDUSTRIAL COMMISSION, and STATE INSURANCE FUND, Defendants/Respondents.	)	

BRIEF OF RESPONDENT INDUSTRIAL COMMISSION OF UTAH

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BRIEF OF RESPONDENT
INDUSTRIAL COMMISSION OF UTAH

NATURE OF THE CASE

Applicant is seeking compensation for pre-existing impairments suffered while he was in military service and for which he has received compensation.

DISPOSITION BY THE INDUSTRIAL COMMISSION

The Industrial Commission in their Amended Order (R-179) awarded 10% permanent partial impairment benefits attributable to pre-existing conditions to the neck and also 5% permanent partial impairment benefits for the accident of December 1, 1979. The Order reimbursed on a proportionate basis the State Insurance Fund by the Second Injury Fund. The Commission, in the Order (R-168) and the Amended Order (R-179) denied compensation that would provide Applicant with double payment, as he had been compensated for the pre-existing injuries by the military.

RELIEF SOUGHT ON APPEAL

The Respondent, Utah Industrial Commission, asks that the Judgment be affirmed.

STATEMENT OF FACTS

Respondent accepts the "Statement of Facts" as in Appellant's Brief.

ARGUMENT I

THE ORDER OF THE COMMISSION IS 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 (1981), and reaffirmed in Sabo's Electronic Service v. Sabo, 642 P.2d 722 (1982), and in Kincheloe v. State Insurance Fund, 656 P.2d 440, (1982), the scope of review in Industrial Commission cases is limited to:

> [W]hether the Commission's findings are "arbitrary or capricious," 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.

ARGUMENT II

THERE IS NO "DOUBLE" COMPENSATION FOR AN EMPLOYEE FOR PERMANENT IMPAIRMENT FOR WHICH HE HAS ALREADY BEEN COMPENSATED.

The Order of the Administrative Law Judge, affirmed in the greater part by the Commission, correctly denied double payment for the previously incurred impairment received while in the military service.

In addressing the prior military accident, the Order said:

> In reviewing the file, it would appear to the Commission that the position taken by the Applicant is unsupportable in view of the recent Supreme Court decisions concerning double compensation. The Applicant was compensated for his earlier injuries through a Federal disability plan rather than a workman's compensation plan. But common sense would dictate that the same rules precluding double compensation from workmen's compensation should apply for pre-existing problems which were fully compensated and were not exacerbated by the industrial accident. (R-179)

And the original Order explains the military accident and rating:

> By way of history, while in the military service the applicant was thrown from a truck and suffered back, shoulder, hip and leg injuries about June 3, 1943, from which he was disabled until about December 1945. In 1946 he received a 20% disability rating from the Veteran's Administrative and then in 1977 he received a government combined rating of 60% which included 40% for his back. (R-169) (Empnasis added.)

So we have a veteran who has an industrial accident causing a 5% permanent partial disability; he receives compensation for that 5% and in addition the Commission awarded 10% pre-existing on the theory his neck was further injured;

although it is a little difficult to reconcile this action by the Commission. The Applicant, happy of course to get the 10% pre-existing for which he has already been compensated, would like still more compensation in the amount of 22% for which he has not received a double payment. This is computed on the basis or the medical panel report that he had 35% pre-existing impairment, which combined to 32%. 10% was awarded for pre-existing and that leaves 22% remaining. The compensation he has and is receiving from the military is for 60% disability. As he has and is receiving 60% compensation for this pre-existing disability, it is readily apparent why, in the Findings or Fact, the Order stated:

> The applicant has been compensated for more than that amount in pre-existing permanent partial impairment benefits and is not entitled to additional benefits from the Second Injury Fund for that purpose. (R-170)

In David v. Industrial Commission, 649 P.2d 82 (1982) this Court, in denying double compensation, quoted from 2 A. Larsen, Workmen's Compensation Law §59.32(g):

> It has always been accepted without question that the situation to which the Second Injury Fund applies consists of prior noncompensable injury followed by and combining with a subsequent compensable injury. (Emphasis in original.)

The Court in David goes on to say:

> The purpose of the special fund is to promote the hiring of disabled persons, by excluding an employer from liability for pre-existing injury.

> However, there is no statutory purpose to be served in allowing what is essentially a double recovery for the same injury.

And in Paoli v. Industrial Commission, 656 P.2d 420, this Court said:

> The Commission was correct in concluding that the Second Injury Fund should not be required to compensate the plaintiff for permanent impairment caused by any injury for which he had already been compensated. (Emphasis added.)

The Court then cited the David case, supra, as authority for that position.

Neither by statute or logic or the theory of workmen's compensation should an employee be paid twice, or three times or more for the same injury. That possibility surely exists under the argument of the Applicant.

CONCLUSION

The Order of the Industrial Commission should be affirmed.

DATED this 10th day of August, 1983.

Frank V. Nelson

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MAILING CERTIFICATE

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