1983

American Coal Co., Emery Mining Corp., And State Insurance Fund v. Terry W. Sandstrom, Industrial Commission of Utah, And Second Injury Fund : Brief of Plaintiff

IN THE SUPREME COURT

OF THE STATE OF UTAH

AMERICAN COAL CO., EMERY MINING CORP., and STATE INSURANCE FUND,	:	
Plaintiff/appellant,	:	Case No. 19134
vs.	:	
TERRY W. SANDSTROM, INDUSTRIAL COMMISSION OF UTAH, and SECOND INJURY FUND,	:	
Defendant/respondent.	:	

BRIEF OF PLAINTIFF

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BRIEF OF PLAINTIFF

STATEMENT OF THE NATURE OF THE CASE

Plaintiffs seek review of an Order of the Industrial Commission of Utah awarding Worker's Compensation benefits to Mr. Terry W. Sandstrom, but refusing plaintiff's request for reimbursement from the Second Injury Fund of the Industrial Commission.

DISPOSITION BY THE INDUSTRIAL COMMISSION

An initial hearing was held before Administrative Law Judge Richard G. Sumsion at 1:00 p.m. on the 11th day of January, 1983. At that time the parties, Terry Sandstrom, The State Insurance Fund, and the Second Injury Fund, entered into a stipulated compensation agreement, stipulating to a 20% permanent partial disability, 10% from a pre-existing condition and 10% from an accident incurred

While Sandstrom was in the employ of the plaintiff in this case. On January 21, 1983, the Administrative Law Judge, Richard G. Sur entered his Findings of Fact, Conclusions of Law and Order in the On January 31, 1983, plaintiffs herein filed a Motion for Review challenging the Administrative Law Judge's failure to award contri to the State Insurance Fund from the Second Injury Fund for medica expenses and temporary total compensation paid. On March 18, 198 the Industrial Commission denied plaintiff's Motion for Review.

RELIEF SOUGHT ON APPEAL

Plaintiffs are requesting that the portion of the Order o the Industrial Commission denying plaintiffs recovery from the Seco Injury Fund for 50% of the temporary total disability compensation and 50% of the medical expenses paid during total temporary disabil be vacated and the case remanded to the Industrial Commission. A n Order of the Commission should be entered granting plaintiff reimbursement from the Second Injury Fund of 50% of total temporary disability compensation paid and 50% of the medical expenses that the State Insurance Fund has paid to the applicant herein.

FACTS

Mr. Terry W. Sandstrom, the applicant herein, sustained personal injury in four separate accidents arising out of or in the course of his employment. The dates of these accidents are as follows: November 21, 1977, May 4, 1979, December 17, 1980, and November 23, 1981. (R. at 39)

At the time of the January 21, 1977 accident and the Ma 1979 accident, Sandstrom was employed by American Coal Company. 1980, applicant was employed by Emery Mining Corporation and in November of 1981 he was employed by Gusco, Inc., (R. at 39).

As a result of these accidents, applicant has suffered a total overall impairment of 20% permanent partial disability of the whole man to his back and 10% permanent partial disability of the whole man to his neck. (R. at 39). The injury to plaintiff's back is the subject matter of this appeal. The State Insurance Fund and the Second Injury Fund have stipulated that 10% of permanent partial disability to the back results from the 1981 accident and 10% is attributable to the 1977 accident. (R. at 39, 43).

ISSUE ON APPEAL

Is the State Insurance Fund entitled to reimbursement for 50% of the temporary total disability compensation and medical expenses which it has paid the applicant as a result of the November 23, 1981, injury to his lower back?

ARGUMENT

IN ORDER TO EFFECTUATE THE LEGISLATIVE PURPOSE OF ENCOURAGING EMPLOYERS TO HIRE HANDICAPPED PERSONS, UTAH CODE ANNOTATED § 35-1-69, MUST BE INTERPRETED AS MANDATING THAT THE SECOND INJURY FUND REIMBURSE THE EMPLOYER OR ITS INSURANCE CARRIER FOR A SHARE OF MEDICAL EXPENSES AND TOTAL TEMPORARY DISABILITY COMPENSATION EQUAL TO THE PERCENTAGE OF PERMANENT PARTIAL DISABILITY ATTRIBUTABLE TO ANY PRE-EXISTING MEDICAL CONDITION.

This Court's pre-1981 interpretation of Section 35-1-69, allowing contribution from the Second Injury Fund for all types of Worker's Compensation claims, is still applicable since the relevant language of that statute remains basically the same. McPhie v. United States Steel Corp., 551 P.2d 504 (Utah 1976); Intermountain Health Care Inc. v. Ortega, 562 P.2d 617 (Utah 1977); White v. Industrial Commission, 604 P.2d 478 (Utah 1979); Intermountain Smelting Corp. v. Capitano, 610 P.2d 334 (Utah 1980).

Furthermore, this Court's interpretation of Section 35-1-69, subsequent to the 1981 amendments thereof, demonstrates that the Court's interpretation has not changed. Paoli v. Cottonwood Hospital, 656 P.2d 410 (Utah 1982); Unites States Fidelity & Guara Co. v. Industrial Commission of Utah, 647 P.2d 754 (Utah 1983).

In Intermountain Health Care, Inc. v. Ortega, 562 P.2d 6 (Utah 1977), this court held that 35-1-69 required proportionate contribution from the special fund (now the Second Injury Fund) fo compensation and medical benefits in cases involving pre-existing injuries. In Intermountain Health Care, the Commission found that claimant had a permanent partial disability of 30%, 10% attributabl to her pre-existing psychological condition and 20% attributable t accident which occured while on the job. The Commission failed, however, to require the Special Fund to pay its proportionate shar of medical expenses. This Court found that 35-1-69 required the Commission to pay one-third of the medical expenses and compensati because one-third of the employee's permanent partial disability wa attributable to her pre-existing condition. In the instant case, t parties stipulated that 50% of Sandstrom's disability is due to a pre-existing injury. Therefore, under the holding of Intermountai Health Care, the Second Injury Fund should reimburse the State Ins Fund for 50% of the medical expenses and temporary total disabilit compensation that it has paid to Sandstrom. This Court extended th holding in Intermountain Health Care, to cover temporary total disability compensation, in the case of White v. Industrial Commis of Utah, 604 P.2d 478 (Utah 1979). In White, the court consolida several cases, each of which depended upon judicial construction § 35-1-69. In each case this Court held that the Second Injury Fu

must reimburse the insurance carrier for the proportion of medical expenses and temporary total disability compensation equal to the percentage of permanent partial disability applicable to the pre-existing injury. Though § 35-1-69 has since been amended, the language upon which this court relied in both White and Intermountain Health Care remains basically the same. That language, as quoted in White, follows:

> If any employee who has previously incurred a permanent incapacity by accident or 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, which medical care and other related items are 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 shall be for the industrial injury only and the remainder shall be paid out of the special fund provided for in §35-1-68 (1) hereinafter referred to as the "special fund".

Id. at 479.

That language, even after the amendments, remains basically the same:

> 35-1-69. Combined injuries resulting in permanent incapacity - Payment out of second injury fund - Training of employee. (1) 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 agravated by such pre-existing incapacity, compensation ~~and~~ medical care, ~~which medical care~~ and other related items ~~are~~ as outlined in Section 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 Section 35-1-68 (1) ~~hereinafter referred to as the "special fund"~~.

Utah Code Ann. §35-1-69(Supp. 1981).

Both versions of the statute provide that the employer shall be responsible for the industrial injury only and that the remainde shall be paid out of the Second Injury Fund. In the instant cas requiring the State Insurance Fund to pay 100% of the temporary total disability compensation and the medical expenses incurred is requiring the State Insurance Fund to incur liability for more than just the industrial injury.

Essentially, the State Insurance Fund is being required to pay for the medical expenses and total temporary disability compensation attributable to the employee's pre-existing incapaci as well as those attributable to the industrial injury. Such a requirement clearly discourages the hiring of handicapped employee since medical expenses for such persons are likely to be larger and the period of temporary total disability longer than for injured employees not suffering from pre-existing medical conditi Discouraging employers from hiring handicapped workers defeats the legislative purpose of § 35-1-69.

In Intermountain Smelting Corp. v. Capitano, 610 P.2d 334 (Utah 1980), this Court again held that the Commission erred in ordering the employer to pay all medical compensation and temporary total disability benefits when a portion of the disabil was attributable to a pre-existing injury. Again, the language of § 35-1-69 upon which the Court relies remains basically the same. Discussing the language, the Court stated:

> We think that the reasonable conclusion to be drawn therefrom is that the employer is responsible for only the percentage of compensation and medical care which the injury occurring in the employment bears to the applicant's total disability. This conclusion is also born out by the final provision that any amount which has been paid by the employer in excess of the portion

> attributable to said industrial injury shall be reimbursed to him out of the special fund. (Emphasis added)

Id. at 337.

In 1981 the Legislature added two paragraphs to § 35-1-69. The Second Injury Fund, apparently, relies on the second paragraph to argue that the Second Injury Fund is not liable for its proportionate share of temporary total disability compensation and medical expenses paid out. That paragraph is as follows:

> Where the payment of temporary disability benefits, medical expenses, or other related items are required as a result of the industrial injury subject to this section, the employer or its insurance carrier shall be responsible for all such temporary benefits, medical care, or other related items up to the end of the period of temporary total disability resulting from the industrial injury. Any allocation of disability, benefits, medical care, or other related items following such a period shall be made between the employer or its insurer and the second injury fund as provided for herein, and any payments made by the employer and its insurance carrier in excess of its proportionate share shall be recoverable at the time of the award for combined disabilities if any is made hereunder.

Utah Code Ann. § 35-1-69 (Supp. 1981).

The only logical reading of that paragraph, the only reading which preserves the legislative purpose of 35-1-69, is that the employer or its insurance carrier shall pay benefits and expenses during the period of temporary total disability compensation and then shall be reimbursed from the Second Injury Fund after the stabilization date when determination of the percentage of permanent partial disability attributable to each accident can be made. The language in that paragraph, ". . . the employer or it's insurance carrier shall be responsible . . . ", requires that interpretation. The Legislature has purposely used the word "responsible" and not the word "liable", which indicates that the purpose of adding this paragraph was to clarify the administrative process by which the

employee would be paid. This paragraph simplifies that procedure by mandating that the employer or insurance company pay all benefits to the employee and that allocations be made afterwords in order to avoid a denial of liability by the employer to force the allocation issue before the Commission. Furthermore, the statute clearly states that any allocations shall be made after the period of temporary total disability and that any payment "made by the employer or the insurance carrier in excess of its proportionate shares shall be recoverable." The statute states: "Any allocation of disability benefits, medical or other related items following such period shall be made between the employer or his insurer and the second injury fund as provided for herein, . . . " That statement provides that the allocation shall be made following the period of total temporary disability. Apparently the Second Injury Fund, has misinterpreted that statement to read that the allocation will be made of benefits and medical care following the period of temporary total disability compensation. Further, that sentence provides that allocation shall be made between the employer and the Second Injury Fund as "provided for herein". The statute provides that allocation shall be made according to the proportionate share of disability attributable to the industrial injury and that attributable to the pre-existing condition. In this case, that allocation would be 50% of the temporary total compensation and medical expenses to be paid by the State Insurance Fund, and 50% to be paid by the Second Injury Fund. Therefore, the State Insurance Fund is entitled to a reimbursement of 50% of the temporary total disability compensation and the medical expenses it has paid to the employee in this case. In Intermountain Smelting Corp, this court reversed the Commission's order apportioning all medical expenses and temporary total disabil-

to the insurance carrier: ". . . the refusal to require contribution from the special fund for temporary total disability and medical and hospital expenses, as discussed in this opinion, is reversed." Id.

A recent decision by this Court, indicates that the interpretation of § 35-1-69, even after the 1981 ammendments, still requires reimbursement by the Second Injury Fund for temporary total disability compensation and medical expenses. In United Stated Fidelity & Guaranty Co., v. Industrial Commission of Utah, 657 P.2d 764 (Utah 1983), this court interpretated § 35-1-69 as amended. Though that case involved several statutes and a fairly complicated fact situation, this court did discuss the implication and purpose of § 35-1-69:

> Explicit statutory authority exists to apportion compensation awards and medical costs between employers and the Second Injury Fund, provided pertinent conditions are met. Basically, those conditions are three in number: 1) permanent incapacity occassioned 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 incurred if there had been no pre-existing incapacity. Those conditions having been met, the liability of the employer is assessed "on the basis of the percentage of permanent physical impairment attributable to the industrial injury only and the remainder shall be payable out of the said special (second injury) fund." (Emphasis added)

Id. at 767.

In the instant case, as in United States Fidelity, all three conditions have been met to allow apportioning of compensation awards and medical costs between the State Insurance Fund and the Second Injury Fund. Moreover, nowhere in the Court's discussion of 35-1-69 has the word compensation been modified, in such a way, as to suggest that total temporary disability compensation is not to be apportioned between the employer or the insurance carrier and the Second Injury Fund. Furthermore, it is clear from the Court's

discussion of this statute that medical expenses are to be apport... between the employer and its insurance carrier and the Second In... Fund. Finally, the Court, again, discussed the purpose of § 35-1-...

> Furthermore, encouragement of an employer to retain an injured or disabled employee after an injury without the risk of further liability for payment of compensation and medical expenses should a subsequent injury occur, seems wholly consistent with the recognized statutory purpose which is to encourage employers to hire disabled persons.

Id.

CONCLUSION

The Industrial Commission's refusal to order the Second Injury Fund to reimburse the State Insurance Fund for it's proportionate share of medical expenses and temporary total compensati... rests on a faulty interpretation of Utah Code Ann. § 35-1-69 (Supp. 1981) which tends to defeat the Legislative purpose of encouraging employers to hire handicapped workers. Therefore, plaintiffs respectfully requests that this Court vacate that portion of the Order of the Industrial Commission denying plaintiff's recovery from the Second Injury Fund for 50% of the temporary total disabil... compensation and 50% of the medical expenses paid Mr. Sandstrom dur... the period of total temporary disability.

DATED THIS 6th Day of July, 1983.

BLACK & MOORE

BY 
FRED R. SILVESTER

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing BRIEF was sent this 7th day of July, 1983, to the following:

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