1984

American Coal Co., Emery Mining Corp., And State Insurance Fund v. Terry W. Sandstrom, Industrial Commission of Utah, And Second Injury Fund : Response Brief To Defendant Second Injury Fund's Brief In Support Of Petition For Rehearing

IN THE SUPREME COURT OF THE STATE OF UTAH

AMERICAN COAL COMPANY, EMERY MINING CORPORATION and STATE INSURANCE FUND,	:	
Plaintiffs-Appellants,	:	
-v-	:	Case No. 19134
TERRY W. SANDSTROM, INDUSTRIAL COMMISSION OF UTAH and SECOND INJURY FUND,	:	
Defendants-Respondents.	:	

RESPONSE BRIEF TO DEFENDANT SECOND INJURY FUND'S BRIEF IN SUPPORT OF PETITION FOR REHEARING

Fred R. Silvester
BLACK & MOORE
261 East Broadway, Suite 300
Salt Lake City, UT 84111

Frank V. Nelson
Assistant Attorney General
236 State Capitol
Salt Lake City, UT 84114

Virginius Dabney
136 South Main, #412
Salt Lake City, UT 84101

Gilbert A. Martinez
Second Injury Fund
160 East 300 South
Salt Lake City, UT 84111

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NATURE OF THE CASE

The Second Injury Fund for the State of Utah is requesting this Court rehear and reverse its decision filed May 1, 1984 in the matter of American Coal Co., Emery Mining Corp., and the Utah State Insurance Fund v. Terry W. Sandstrom, Industrial Commission of Utah, and Second Injury Fund. In interpreting the provisions of Utah Code Ann., Section 35-1-69 (1953, as amended 1981), this Court held that:

> The third paragraph then, read in light of the first paragraph, provides that the insurance carrier, while initially responsible for all temporary disability benefits and expenses, must be reimbursed for that percentage of the temporary disability expenses attributable to the pre-existing disability once the determination of combined disability is made. Not only does this interpretatio provide a consistent reading of the Section, but it also meets the recognized statutory purpose,

> which is to encourage employers to hire disabled persons. To make an employer and its insurance carrier not only initially, but also finally, liable for all temporary disability expenses, even though directly attributable to a pre-existing injury, would undeniably defeat this purpose.

Id. at pp. 4-5 (citation omitted).

The Second Injury Fund now requests rehearing on this decision based on numerous affidavits from legislative members and members of the Advisory Board for the Industrial Commission which are offered to show that this Court misinterpreted the legislative intent in making its determination of the issues on appeal.

RELIEF SOUGHT BY THE UTAH STATE INSURANCE FUND ON REHEARING

The Utah State Insurance Fund requests this Court uphold its decision previously entered in this matter.

ARGUMENT

POINT I

THE LEGISLATIVE PURPOSE OF AN ENACTMENT IS TO BE DETERMINED FIRST OF ALL FROM THE LANGUAGE OF THAT ENACTMENT.

The Second Injury Fund, in its brief, goes through a lengthy discussion supported by the affidavits of legislators and Advisory Board members which is intended to show that the interpretation this Court made of Section 69 based on the language of the 1981 enactments is in contrast with the actual intent of individuals involved in the drafting and support of the legislative enactment. This Court has determined on numerous occasions prior to the 1981 amendments to Section 69 that medical expenses and temporary

total disability compensation were items that should be apportioned between an employer and its insurance carrier and the Second Injury Fund where there are combined disabilities resulting from both pre-existing conditions and the industrial accident in question. See Intermountain Smelting Corp. v. Capitano, Utah, 610 P.2d 334 (1980); White v. Industrial Commission, Utah, 604 P.2d 478 (1979); Intermountain Health Care, Inc. v. Ortega, Utah, 562 P.2d 617 (1977). The determination in each of those cases was based on the language included in Section 69 that reads as follows:

> . . . 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 a special fund provided for in Section 35-1-68(1).

As this Court adequately pointed out in its decision on May 1, 1984 in this case, that language was left substantially intact in 1981 with minor wording changes which are not relevant to this appeal. It presently reads:

> . . . but the liability of the employer for such compensation, medical care, and other related items shall be for the industrial injury only and the remainder shall be paid out of the Second Injury Fund provided for in Section 35-1-68(1).

This Court, citing to Christensen v. Industrial Commission, Utah, 642 P.2d 755 (1982), determined that "absent substantial evidence to the contrary, the Legislature is presumed to have been satisfied with prior judicial constructions of the unaltered portions of the statute and to have adopted those constructions as consistent with its own intent." American Coal Co. v. Sandstrom, ____ P.2d ____ (filed May 1, 1984), p. 3.

It is still undisputed in this case that were this Court to uphold the decision of the Industrial Commission which disallows any contribution from the Second Injury Fund to the State Insurance Fund for Mr. Sandstrom's pre-existing conditions; the Utah State Insurance Fund would, in fact, be paying for more than the amounts caused by the industrial injury. A person's amount of temporary disability subsequent to an industrial accident is a combined function of the extent to which that person had pre-existing injuries or impairments and the extent to which the industrial incident affected those pre-existing conditions.

If the intent of the Utah State Legislature in passing the 1981 amendments to Section 69 was to saddle the employer with the entire liability for temporary total compensation and medical benefits, it was within the prerogative of the Utah State Legislature to change the above cited language. Such a change was not made; therefore it is this Court's responsibility in determining the intent of the Legislature to first look to the language used by the Legislature. The legislative body is deemed to have spoken as a group and not as individual members; therefore legislative intent itself is contained in the enactment. Provisions of the 1981 enactment are directly in line with the language that existed in Section 69 prior to that enactment, and the provisions clearly limit the liablity of an employer to medical expenses and compensation payments resulting from the industrial injury only.

POINT II

DEPOSITIONS OR AFFIDAVITS OF INDIVIDUAL LEGISLATORS OR DRAFTERS OF THE LEGISLATION ARE NOT COMPETENT OR ADMISSIBLE EVIDENCE TO DETERMINE LEGISLATIVE INTENT.

It is an unassailable rule of statutory construction that what individual legislators, legislative drafters, lobbyists, or other individuals involved in the legislative process believe as to the intent of a specific enactment is not competent evidence for establishing legislative intent and will not be referred to by a court in making such determination. In a recent Washington case in which the Washington State Supreme Court was asked to interpret the provisions of an osteopath licensing bill, the Court made the following statement:

> Woodson (appellant therein) provided this Court with affidavits from some members of the 1959 Legislature. It was done in an effort to establish that they were under the impression that the holders of "limited certificates" could employ drugs. Legislative intent in passing the statute cannot be shown by depositions and affidavits of individual state legislators, however.

Woodson v. State, 623 P.2d 683, 686-87 (Wash. 1980) (citation omitted). In another Washington case the Washington Supreme Court, in addressing legislative appropriations involved in a general assistance welfare program, expressed its opinion of the effect of an affidavit of a legislator as follows:

> What one legislator may have believed does not establish that the Legislature intended something contrary to its express declaration. . . .

Pannell v. Thompson, 589 P.2d 1235, 1237 (Wash. 1979).

The Oregon Court of Appeals also addressed the issue of what effect the impressions of individual legislators or lobbyists had in determining legislative intent in their construction of an employment agency licensing enactment in the State of Oregon. In that case the Oregon Court noted:

> The Commissioner, in trying to determine legislative intent, took testimony from persons interested in the legislation (possibly lobbyists) about their observations of what occurred and what the legislators were intending. Such evidence is incompetent for this purpose, just as the testimony of an individual legislator would be. See 2A Sands, Sutherland, Statutory Construction, Sections 48.10 and 48.17 (4th Ed. 1973).

Murphy v. Nilsen, 527 P.2d 736, 738 (Ore. App. 1974). It would appear that the Oregon Court was addressing the type of testimony that the Second Injury Fund attempts to present herein through the affidavits of members of the Advisory Board to the Industrial Commission. It is the contention of the Utah State Insurance Fund that such evidence, as the Oregon Court indicated, is incompetent for such purpose.

The Kansas Court of Appeals was asked to determine the meaning of legislative language defining survivor's benefits in a personal injury protection endorsement of an automobile liability insurance policy in the case of Hand v. State Farm Mutual Auto Insurance Company, 577 P.2d 1202 (Kan. App. 1978). After being presented an affidavit of the chairman of the House subcommittee responsible for the legislation, the Kansas Court stated as follows:

> We are unable to square the affiant's statements with the facts of the legislative action. We believe the latter speaks more loudly

> and we are unaware of precedent for judicial ascertainment of legislative intent through statements of legislators made years after the event.

Id. at 1205. The Kansas Court did state that the proper considerations of legislative history a court can consider are "historical background, legislative proceedings, and changes made in a proposed law during the course of its enactment may be properly considered in determining legislative intent" (citations omitted). Id.

In 1976 the California Supreme Court was asked to construe the meaning of a statute of limitations in a medical malpractice act. The defendants in that case attempted to establish the intent of the Legislature by introducing affidavits of three members of the Legislature who were involved in the passage of the provision the Court was construing. The California Court was very clear regarding the effect of such affidavits when it stated:

> The declaration of individual legislators as to the intent of the Legislature in enacting a statute are afforded little weight.

Larcher v. Wanless, 557 P.2d 507 (Cal. 1976) at 510-511 (citation omitted).

The Arizona Supreme Court was asked in another case to construe the provisions of a revenue and taxation act passed by the Arizona Legislature in Golder v. Dept. of Revenue, State Board of Taxation, 599 P.2d 216 (Ariz. 1979). In Golder the Court was very explicit regarding the effect of the legislator's statements in determining legislative intent.

> The rule is clearly established in Arizona that one member of a legislature which passes a law is not competent to testify regarding the intent of the legislature in passing the law. Barlow v. Jones, 37 Ariz. 396, 294 P. 1106 (1930); State Tax Commission v. Marcus J. Lawrence Memorial Hospital, 14 Ariz. App. 554, 557, 485 P.2d 277, 280 (1971); Tucson Gas & Electric Co. v. Schantz, 5 Ariz. App. 511, 514-515, 428 P.2d 686, 689-690 (1967). "The intent of the legislature can only be determined by the language used, aided by the canons and rules of construction founded upon reason and experience." Barlow v. Jones, 37 Ariz. at 399, 294 P. at 1107. The same logic which prevents one legislator from putting a gloss on the meaning of a statute based only upon his own individual feelings also prevents a lobbyist or other interested party from doing the same. The testimony of the witnesses Arnold and Killian passing A.R.S. Section 42-123 was completely incompetent and must be disregarded in interpreting the meaning of that provision.

Id. at 221.

The Alaska Court, in Kenai Peninsula Burrough v. Kenai Peninsula Education, 572 P.2d 416 (Alaska 1977), was asked to use the opinion expressed in a letter by a legislator to determine the intent of the Legislature in passing a public employee collective bargaining act. The Court said such evidence was incompetent in making such a determination, and reliance on it would be error impermissible under previous Alaska cases. They finally held:

> Resort to the letter as means of legal interpretation was, therefore, error.

Id. at 423. See also: Haynes v. Caporal, 571 P.2d 430 (Okla. 1977); Southern Railway Co. v. A. O. Smith Corp., 134 Ga. App. 219, 213 S.E.2d 903 (1975); Financial Indemnity Co. v. Cargile, 288 N.E.2d 861 (Ohio 1972); Levy v. State Board of Examiners, 553

S.W.2d 909 (Tenn. 1977).

It is clear that the affidavits appended to the brief of the Second Injury Fund in support of its petition for rehearing in this case are not competent evidence to establish the intent of the Utah Legislature in drafting the 1981 amendments to Section 69. While counsel for the Utah State Insurance Fund has been unable to find a Utah case adopting the above cited rule of law, it is clear from the language used by courts making such a determination that there is a strong policy against allowing the testimony of individual legislators to be used in determining the intent of an entire legislative body. Such policy should be adopted by this Court as the policy of the State of Utah in order to avoid plunging Utah state courts into the impossible position of weighing conflicting testimony of individual legislators, and in determining the credibility of individual legislators when conflicts arise in individual affidavits. The Legislature has the full capacity to specify its intent by a clear and concise drafting of the statutory language itself which should express the intent of the body.

The Legislature, by its clear and unequivocal language, intended that an employer not be liable for any compensation or medical benefits in excess of that amount attributable to an industrial injury. The Second Injury Fund cannot contradict that legislative intent embodied in the enactment itself. Any other interpretation of Section 69 requires an extremely tortured interpretation of that requirement.

POINT III

EVIDENTIARY SUPPLEMENTATION OF THE RECORD AT THIS POINT IS UNTIMELY.

From the time of the evidentiary hearing, during which the Administrative Law Judge rejected the Utah State Insurance Fund's contention that it be entitled to reimbursement for temporary total compensation and medical benefits paid to Mr. Sandstrom, the Second Injury Fund has been aware that the issue involved in this case would be what the Legislature intended in its 1981 amendments to Utah Code Ann., Section 35-1-69. At no time in its response to the Utah State Insurance Fund's Motion for Review did the Second Injury Fund introduce the affidavits of individual legislators to explain the intent of Section 69. In its responsive brief on the initial appeal in this action the Second Injury Fund did rely on statements contained in the official records of the Utah Legislature which this Court could properly take judicial notice of in support of its position on legislative intent, but at no time did it attempt to introduce the affidavits of individual legislators. It appears contrary to proper appellate practice to, at this late date on petition for rehearing, introduce numerous affidavits of legislators and members of the Advisory Board not contained in any official record of the Legislature and which are not matters of which this Court can take judicial notice; but are, in fact, factual supplementations of the record on appeal.

CONCLUSION

This Court should not reverse the determination previously made in this action granting the Utah State Insurance Fund reimbursement for a portion of temporary total compensation and medical benefits attributable to pre-existing conditions of Mr. Sandstrom. The majority clearly pointed out in the previous decision of this case that the Legislature had continued, even in the 1981 amendments to Section 69, to limit the liability of an employer to that portion of medical benefits and compensation attributable to the industrial injury, and had not made a change to that provision. The Second Injury Fund tries to overturn that decision by introducing inadmissible and incompetent evidence at this late date from individual legislators, contrary to the well established rule of law that such is not admissible to establish legislative intent.

Most importantly, as observed by this Court in its initial decision, determination that an employer would not be reimbursed for temporary total compensation and medical benefits that were attributable to a pre-existing condition would fly in the face of the statutory purpose of Utah Code Ann., Section 35-1-69, which is to encourage employers to hire and retain handicapped workers.

DATED this 10th day of July, 1984.

BLACK & MOORE

Fred R. Silvester

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and exact copy of the foregoing, postage prepaid, this 12th day of July, 1984, to the following:

Virginius Dabney
136 South Main, #412
Salt Lake City, UT 84101

Gilbert A. Martinez
Second Injury Fund
160 East 300 South
Salt Lake City, UT 84111

Frank V. Nelson
Assistant Attorney General
236 State Capitol
Salt Lake City, UT 84114

Susan Patton