1984

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

IN THE SUPREME COURT OF THE STATE OF UTAH

AMERICAN COAL CO., EMERY MINING CORP., and STATE INSURANCE FUND,	:	
Plaintiff-Appellant,	:	
-v-	:	Case No. 19134
TERRY W. SANDSTROM, INDUSTRIAL COMMISSION OF UTAH, and SECOND INJURY FUND,	:	
Defendant-Respondent.	:	

REPLY BRIEF OF STATE INSURANCE FUND AND AMERICAN COAL COMPANY

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PROCEDURAL POSTURE OF CASE ON APPEAL

Plaintiffs State Insurance Fund and American Coal Company brought this appeal to determine whether the 1981 amendments to Utah Code Ann., § 35-1-69, allow an employer and its compensation carrier to recoup sums expended for temporary total compensation and medical benefits expended prior to an applicant's stabilization but attributable to pre-existing conditions. The parties stipulated before the Industrial Commission that the applicant in this case, Terry Sandstrom, had a 20% permanent partial impairment to his back from all causes, of which 10% was attributable to pre-existing conditions and 10% was attributable to the industrial injury which brought the applicant before the Commission (R. 39, 43). The plaintiff, at hearing and in a motion for review before the Industrial Commission, preserved the issue of its entitlement to reimbursement for monies expended in temporary total compensation and medical benefits prior to the applicant's stabilization.

The Attorney General's Office, in favor of the Industrial Commission and the Second Injury Fund, filed a brief in response (hereinafter "Commission Brief"). The brief was signed by an Assistant Attorney General and, as will be pointed out later, raises issues which were not raised in plaintiff's appeal or by a cross-appeal. The Commission Brief asks that this Court overturn the Commission's findings that Utah Code Ann., § 35-1-99 (statute of limitations provision) does not apply to claims against the Second Injury Fund.

Thus, the Commission is asking this Court to overturn the Commission's own findings. Later, a Respondents' Brief was filed on behalf of the Second Injury Fund only (hereinafter "Second Injury Fund Brief") asking that the order of the Industrial Commission be affirmed.

Plaintiffs are now in a position to reply.

ARGUMENT I

REPLY TO THE POSITION OF THE INDUSTRIAL COMMISSION.

The Commission Brief misinterprets all of the applicable law from this Court on the Second Injury Fund and raises issues not properly raised in this appeal. The Statement of Facts contained in the Commission Brief is confusing and inaccurate. There was a settlement agreement entered into by the State Insurance Fund, Second Injury Fund, and Mr. Sandstrom agreeing that Mr. Sandstrom

had suffered permanent partial disability of 20%, 10% of which was attributable to the industrial accident for which plaintiff was liable, and 10% which was attributable to pre-existing conditions (conditions which in this case resulted from prior industrial accidents which were not compensated or were not actionable at the time the claim was brought) (R. 39, 43, 95, 212). The claim in the Commission Brief that Utah Code Ann., § 35-1-99 should be applied to bar claims against the Second Injury Fund is an issue neither preserved in motion for review nor in a petition for a writ of review before this Court, and should be disregarded.

The argument in the Commission Brief that the order of the Commission is supported by substantial evidence clearly shows a lack of understanding of the claims of plaintiffs on appeal. The cases cited in the Commission Brief (p. 4) all address the scope of this Court's review of findings of the Industrial Commission. Plaintiffs are not claiming here that the findings of fact of the Industrial Commission are without substantial evidence in the record. Rather, plaintiffs' claim is that the Commission misapplied the statutory language of Utah Code Ann., § 35-1-69 (1953, as amended 1981). Therefore, that argument in the Commission's Brief goes to no issue before this Court.

The second argument in the Commission's Brief is the only argument going to the merits of this appeal, and clearly

takes this Court to task for improperly rewriting the law regarding the Second Injury Fund. It is very apparent from reading the interpretations given in the Commission Brief to the cases, beginning with McPhie v. United States Steel Co., 551 P.2d 504 (Utah 1976) and Intermountain Health Care Inc. v. Ortega, 562 P.2d 617 (Utah 1977) applying the Second Injury Fund law in this State, that the respondents disagree with this Court's application of Utah Code Ann., § 35-1-69. Describing that line of cases, the Commission Brief states:

> One of the severe changes was in giving reimbursement to the insurance carrier for medical expenses and temporary total disability compensation.

(Brief, p. 5). This argument shows an absolute lack of understandi of the underlying reasons for the Second Injury Fund enactment which this Court has so clearly stated in both McPhie and Ortega. Those cases hold that the purpose of the statutory provisions in Utah Code Ann., § 35-1-69 are to encourage employers to hire workers with pre-existing incapacities or disabilities. The Commission Brief further claims that the legislative intent behind the 1981 amendments to that Section was to "bring back some logic to this direction forced upon the Commission" (p. 5) (presumably by this Court). This statement clearly points out the present conflict built into the structure of administration of the Utah Second Injury Fund, an issue which will be discussed later.

The legislative intent argument in the Commission Brief is an insult to the integrity of the appellate process. The

respondent lectures this Court on the intent the Advisory Council for the Industrial Commission had for the 1981 amendments, but that position has absolutely no support in the record and no basis in legislative history.

Finally, the Commission Brief argues that settlement was reached by the parties on July 30, 1983, to which Second Injury Fund was not made a party. Provisions of the record cited in plaintiffs' brief and in the brief of defendant Second Injury Fund (p. 3) clearly show that the applicant, the State Insurance Fund, and the Second Injury Fund were all parties to the settlement, and both the Second Injury Fund and the State Insurance Fund knew that the issue of reimbursement for temporary total compensation and medical benefits was an issue being preserved for the appeal process. The settlement provided that the applicant could be paid what he was clearly entitled to be paid under the statutory provisions, and the rights of the employer to reimbursement would not hamper the applicant's right to compensation. Again, this respondent's clear misunderstanding of the record adds nothing but confusion to the matter before this Court.

ARGUMENT II

THE POSITION OF DEFENDANT SECOND INJURY FUND FAILS TO PRESERVE THE UNDERLYING LEGISLATIVE INTENT OF UTAH CODE ANN., § 35-1-69.

The 1981 amendments to Utah Code Ann., § 35-1-69 are shown in Appendix A to the Second Injury Fund's brief, and the first three paragraphs are set out here for the Court's convenience.

> 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 aggravated 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"~~.
>
> 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%. Where the pre-existing incapacity referred to in subsection (1)(b) of this section previously has been compensated for, in whole or in part, as a permanent partial disability under this act or the Utah Occupational Disease Disability Law, such compensation shall be deducted from the liability assessed to the second injury fund under this paragraph.
>
> 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 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 or 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.

It is the contention of the plaintiffs that the plain meaning of the first paragraph of this provision controls interpretation of the remainder of the Section. After defining what a pre-existing injury is in the first paragraph, the legislation goes on to state:

> 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) (emphasis added).

The plain meaning of that section must be read as congruent with the plain meaning of the third paragraph, relied upon by the Second Injury Fund, which states:

> 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 herein, and any payments made by the employer or its insurance carrier in excess of its proportionate share shall be recoverable at the time of the award for combined disability if any is made hereunder (emphasis added).

As stated in plaintiff's earlier brief, the plain meaning of this language is that the employer and insurance carrier are in no way liable for funds expended for temporary total compensation, medical expenses, permanent partial disability, or other related items which are not a result of the industrial injury. Therefore, for the provision that the carrier be responsible to the end of the period of temporary total disability to make sense in the context of the section, it must be interpreted as requiring the employer or its insurance carrier to pay the applicant's medical expenses and benefits upon which to live, but with the proviso that once the determination of combined disability is made, the employer is allowed to recover that percentage of amounts paid

in temporary total compensation and medical benefits that are not attributable to the industrial injury. Not only does this interpretation provide a consistent reading of all the language of the section, but it clearly meets the underlying purpose of the statute to spread the risk among all employers of hiring or retaining workers with pre-existing conditions. Clearly, the more significant a pre-existing condition, the more risk an employer has that subsequent aggravation will result in an extensive period of temporary total disability and more costly medical care. To say as does the Second Injury Fund, that it is the plain meaning of the statutory language that such risks should be borne by employer rather than apread broadly through the Second Injury Fund is to ignore the underlying purpose of the statute.

Before the enactment of the 1981 amendments there was incentive for employers and their insurance carriers to deny liability where it appeared that a significant amount of the disability was a result of some pre-existing condition. Such a denial meant the applicant did not receive benefits, even though all parties recognized that the applicant was due the compensation. Plaintiffs' interpret the Legislature's intent in changing Utah Code Ann., § 35-1-69 to require that the employer make payments during the initial period of disability and/or receive reimbursement for amounts not attributable to the industrial injury. Such an interpretation is more congruent with the underlying purpose of the statute than the interpretation urged by the Second Injury Fund.

Finally, the Second Injury Fund's brief relies on statements made during the Senate debate on the bill which resulted in all of the changes cited above to Section 69. The Second Injury Fund brief emphasizes comments made by Senator Cornaby stating that the purpose of the bill was "to more equitably allocate the compensation for workmen's injuries between the fund and the insurance companies." In Appendix B attached to the Second Injury Fund brief, a transcript of the entire proceeding is contained, and Senator Cornaby goes on to state:

> It is a fairly technical item, but I think it is fairly straightforward. If there are any questions, I would be glad to try to respond to them, if not I call for the question.

(See Second Injury Fund Brief, Appendix B, p. 2). An examination of the entire amendatory language made to Section 69 by the 1981 Legislature reveals the second paragraph of Section 69 was revised in great detail to define situations where pre-existing injury, disease, or congenital problems should be deemed to make an applicant's impairment "substantially greater". That paragraph's definition of what is to be determined "substantially greater" is of major impact on the allocation of benefits between employers and the Second Injury Fund, and does appear to be a highly technical amendment as Senator Cornaby indicated in the transcript of the debate on the Senate floor. There

was no indication, however, in any of the debate cited in the Senate argument which would show a desire on the part of the Legislature to change the underlying purpose of the statute. However, the interpretation of the amendments made by the Commission placing the entire burden for the initial period of total disability and attendant medical expenses on the employer substantially alters the underlying purpose of the provisions of Utah Code Ann., § 35-1-69.

ARGUMENT III

FAILURE OF THE COMMISSION TO AWARD REIMBURSEMENT TO THE PLAINTIFFS WAS PROMPTED BY BIAS AND WAS A DENIAL OF PLAINTIFFS' RIGHT TO AN IMPARTIAL HEARING.

This Court has long held that all parties before the Commission are entitled to a fair and impartial hearing, See Ocean Accident & Guarantee Corp. v. Industrial Commission, 66 U. 600 245 P. 343, 346 (1926). Recently this Court held that in order for the Second Injury Fund to be protected, it should have notice of actions affecting the Fund, a right to present evidence, and the right to object to findings of the Commission; Paoli v. Cottonwood Hospital, 656 P.2d 420 (Utah 1982).

Because Utah Code Ann., § 35-1-68, 69 (1953, as amended 1981) provides for a "Fund" to be administered by the Commission, the Commission is able to decide on an interpretation of the applicable statutes and impose that interpretation on both the administration of the fund and the adjudication of claims against

the fund. In order for this Court to give effect to the language in Paoli, Id., at 422 stating:

> To implement the legislative intent as we have interpreted and applied it, the Second Injury Fund needs to have independent administrative direction within the Industrial Commission from some official not responsible for the adjudicative functions of the Commission that "direct its distribution",

the Commission's interpretation of the statutory provisions governing the Fund should be strictly scrutinized; or this Court should declare that the Commission's conflict between administration of the Fund and adjudication of its liability denies other parties appearing before the Commission due process of law and equal protection of the laws provided for in both the Constitution of the United States, Amendment V and XIV(81) and the Constitution of Utah, Article 1, §§ 7 and 24. During a period of time when the Utah State Insurance Fund was administered by the Commission, this Court refused to order they be separated to afford parties a fair and impartial hearing; Ellis v. Industrial Commission, 91 U. 432 64 P.2d 363 (Utah 1937). However, during the time such structure existed this Court found that the Utah State Insurance Fund was not a legally cognizable entity and could not prosecute an action to contest a Commission award; See Ban & Kariya Co. v. Industrial Commission, 67 U. 301, 247 P. 490 (1926).

Justice Straub, citing Ban & Kariya approvingly, pointed out the difficulty when the Commission has adjudicatory power over an entity it administers:

> The fund itself is under the exclusive management and control of the commission. It is given power to make and it makes all contracts with respect thereto, including the issuing of all policies of insurance payable out of the fund. The commissioner has what is called a manager of the fund and a claim adjuster who are appointed by the commission and who are subject to the exclusive control and direction of the commission. It, among other things, is the duty of the manager and the claim adjuster to investigate all alleged claims for compensation payable out of "The State Insurance Fund" and to report the result of their investigation to the commission, and, if in their judgment the claim is unmeritorious, to resist its payment; and, where applications for compensation are made payable out of the state insurance fund, the commission employs, and here employed, counsel to represent "The State Insurance Fund" to resist payment of the claim. Counsel so employed also like the manager and claim adjuster are subject to the control and direction of the commission . . .
>
> I refer to such proceedings as I have only for the purpose of showing that, whenever a tribunal, whether a judge, court, board, or other body, sits in judgment in a cause or controversy in which it is either directly or indirectly interested, and where it employs counsel to resist the claim, it is but natural for it as triers of fact to look with more or less favor to what is adduced or represented in harmony with its interests, and with more or less scrutiny or disfavor to what is adduced or represented against such interests or at least is apt to do so. I do not say such is the case in all instances, for there may be instances where a judge, court, board, or other body so situated, and being conscious of the situation, may be influenced to "lean backwards"; and it may be that in some instances the board may have made awards payable out of the state insurance fund when the making of them may have been doubtful or even unwarranted . . .

> That such conditions or situation has a natural tendency and is calculated to affect and influence a consideration of evidence may not well be doubted; and for such and other reasons it is the general rule that no tribunal ought or is permitted to sit in judgment in any case or controversy in which it is either directly or indirectly interested. But, as heretofore indicated, it is not the fault of the commission that it in such cases so sits in judgment. Under the statute it is required to do so. Nevertheless, because the commission, in a case involving the state insurance fund over which it has the exclusive management and control and in effect is a contracting party every time it writes an insurance policy payable out of the state insurance fund, and whatever award is made is payable out of such fund, so is required to sit in judgment, demands, as I think, a closer scrutiny and consideration of its findings and of the evidence than in other cases where it is not so interested and not a party to the cause (emphasis added).

Hawser v. Industrial Commission, 296 P. 780, 786-87 (1931) (cited in dissent). Justice Straub in Hawser clearly points out the difficulty created when the adjudicator of a claim has administrati control over the fund which the claim is against. Employers and their compensation carriers are equally concerned today over the administration of the Second Injury Fund by the Commission. The very least the Court should do is hold the Commission's interpretation of statutes involving the Second Injury Fund under the ligh of strict scrutiny. The more appropriate solution to guarantee that applicants, employer and compensation insurers are afforded an impartial, unbiased hearing of their cause or defense is to declare that for the Commission to adjudicate compensation claims and also administer a fund against which claims are

asserted is to deny all parties their rights to due process of law and equal protection of the laws, and to require the Legislature to devise a structure that avoids such bias.

CONCLUSION

The 1981 amendments to Utah Code Ann., § 35-1-69, clearly intended to provide that an applicant is paid temporary total compensation while that applicant is undergoing the initial healing period, and to also determine that his medical payments are paid during that period of time. However, the Legislature also intended in those amendments to make certain that the employer pays up to, but not exceeding, its fair share of all temporary total compensation, medical benefits, permanent partial disability, and is entitled to recover any amounts paid in excess of that during any period of time. Such an interpretation of those amendments clearly protects the applicant's rights, and also promotes the purpose of this statute to encourage employers to hire and retain individuals with pre-existing conditions.

Failure of the Utah State Industrial Commission to interpret these amendments in this manner and to award reimbursement to the Utah State Insurance Fund from the Second Injury Fund for one-half of Mr. Sandstrom's temporary

total compensation and medical benefits paid to the date of stabilization is clearly a misapplication of the law in this case. It was done because of its bias in favor of the Second Injury Fund and in direct denial of the employer's and State Insurance Fund's right to a fair and impartial hearing on this issue.

For these reasons this Court should reverse the Industrial Commission's order disallowing reimbursement to the employer for temporary total compensation and medical benefits paid prior to Mr. Sandstrom's stabilization, but which were attributable to Mr. Sandstrom's pre-existing injuries.

DATED this 15th day of February, 1984.

BLACK & MOORE

Fred R. Silvester

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and exact copy of the foregoing Reply Brief, postage prepaid, this 15th day of February, 1984, to the following:

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