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Ameritech Library Services (Dynix) v. Utah Labor Commission and Tamara Edmonds : Reply Brief

Utah Court of Appeals

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AMERITECH LIBRARY SERVICES (DYNIX), and/or AMERICAN MANUFACTURING MUTUAL/KEMPER, Appellants, vs. UTAH LABOR COMMISSION, and TAMARA EDMONDS, Appellees.	**REPLY BRIEF OF APPELLANTS** *REQUEST FOR PUBLICATION* Appeal No.: 20060870-CA Agency Case No.: 2002-969
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I. APPORTIONMENT OF MEDICAL EXPENSES IS PROPER UNDER UTAH LAW AND IS ALREADY PERMISSIBLE IN THE OCCUPATIONAL DISEASE ACT

Ms. Edmonds argues in her brief that apportionment of medical expenses would not work in a case where no TTD or PPD payments were awarded. Specifically, Ms. Edmonds argues

> Here there wasn't any disability (not TTD or PPD) and only medical benefits are due ... If compensation under Section 110 were to mean medical benefits as well as disability benefits, then apportionment under this section would be impossible to apply when there is no disability or death, but only medical expenses, because the apportionment formula as worded specifically requires apportionment based upon a comparison of work and non-work related disability, making no mention of what medical care is related to the industrial injury or aggravation. (Appellee Brief, Page 9).

Ms. Edmonds' reading of Utah Code Ann. §34A-3-110 is inconsistent when the benefits would be subject to causative apportionment, but the medical benefits would not be apportioned. Given this example, if TTD or PPD benefits were awarded they would be apportioned according to the 10% causative apportionment in this case, but medical benefits would be paid at 100% despite causative apportionment. This reading of the statute is inconsistent with the intent of the Legislature to only have the employer be responsible for their portion of the occupational disease caused by the employer. Otherwise, the employer is the general insurer of the petitioner's non-industrial conditions.

To give meaning to the Legislature's directive with causative apportionment as found in Utah Code Ann. § 34A-3-110 and spelled out in 34A-3-105, the applicable

statutes should be read to allow for apportionment of medical benefits. Otherwise, this Court's longstanding policy of avoiding coverage for conditions not caused or exacerbated by industrial factors would go by the wayside and the employer would be left paying for the employee's non-industrial medical expenses.

In essence, Ms. Edmonds is arguing that she is entitled to have her Carpal Tunnel Syndrome covered 100% by her employer even though Ameritech was found to have contributed only 10% to her non-industrial conditions. Under Allen v. Industrial Commission, 729 P.2d 15 (Utah 1986), the Supreme Court has ruled the employer should not be made to be the general insurer of an employees underlying, non-industrial conditions. If the Commission's decision holds true, this does not comply with the mandate laid out in Allen and shifts the burden of Ms. Edmonds' non-industrial conditions over to the employer.

In order for consistent application of the causative apportionment principles found in § 110, causative apportionment must be applied to medical benefits along with other benefits received by Ms. Edmonds. The Legislature did not abandon the causative apportionment found in § 110 and § 105. Ms. Edmonds essentially argues that regardless of causative apportionment between industrial and non-industrial factors, medical benefits should be paid at 100% regardless of industrial exposure. This is inconsistent with the Industrial Accident Chapter, and inconsistent with the Occupational Disease Chapter's insistence of causative apportionment in §§ 105 and 110.

As for Industrial Accidents, Utah Courts generally have recognized the nature of the traumatic injury that aggravates a non-industrial, pre-existing condition. Specifically,

in Giesbrecht v. Board of Review of State Indus. Comm'n, 828 P.2d 544 (Utah Ct. App. 1992), the Utah Court of Appeals provided the following:

> Utah law recognizes the aggravation rule such that where an industrial injury aggravates, accelerates, or combines with a preexisting condition, the entire resulting injury is compensable *so long as the claimant can show that the employment contributed something substantial to increase the risk he already faced in everyday life because of his condition.*

Giesbrecht, 828 P.2d at 547 (quotations omitted) (emphasis added).

This is the long-standing rule in traumatic industrial injuries. Under this analysis for occupational disease claims, Ms. Edmonds' medical benefits would be wholly denied as she has failed in her burden of proof given Ameritech's 10% causative apportionment as found by the Commission. Ms. Edmonds would have had to show the employer's causative contribution exceeded 10% to show that it substantially increased the risk she already experienced in her day-to-day life given the 90% causative contribution attributed thereto.

Given the differing nature of traumatic injuries versus long-standing occupational exposures, it is appropriate to apportion medical benefits based upon causative contribution. Otherwise, it would be inappropriate to require a substantial showing of causation to cover a non-industrial condition for traumatic injuries in Chapter 2, but then allow 100% coverage of medical benefits in the event the employer is found to have contributed even 1% towards the underlying condition. Apportionment of medical benefits would reconcile these inconsistencies or adopting a similar rule with respect to occupational diseases would reconcile the inconsistencies of Ms. Edmonds' position on appeal.

Because the Legislature enacted the Utah Occupational Disease Act with causative apportionment principles as the mode of recovery, this Court should allow causative apportionment to medical benefits. Otherwise, this Court would allow the burden-shifting Ms. Edmonds seeks for her non-industrial conditions and would make the employer a general insurer of an employee's pre-existing condition.

II. APPORTIONMENT OF MEDICAL EXPENSES WOULD NOT BE CONTRARY TO MS. EDMONDS' EQUAL PROTECTION RIGHTS

The underlying argument for differing treatment under the equal protection law is the nature of the injuries. Without taking into account the nature of the injuries, Ms. Edmonds' arguments for equal protection ring hollow. Ms. Edmonds treats occupational exposures and traumatic injuries the same, despite the fact the nature of the injuries are different and require differing treatment.

With a traumatic industrial injury, you have an identifiable accident or series of activities that lead to an injured back or other body part that is identifiable and concrete. From this you would be able to apportion between what is industrial and non-industrial under a series of tests under Allen to determine whether it was more likely than not, both legally and medically, that the injuries were caused by industrial factors. Given the nature of the traumatic injury, the Commission would also have to apply the exacerbation principles, as discussed in Giesbrecht, to the injury to determine whether the employer was responsible for the intertwined pre-existing conditions and traumatic industrial injury.

With occupational diseases, there is a difference in the nature of the injury where the employee, as in this case, has numerous non-industrial factors that are causing the majority of the person's alleged disability. The question then changes from whether it was more likely than not that her injuries were related to industrial factors, to a question regarding the percentage of the injury caused by industrial factors. The problem arises out of the nature of the injury in general, where industrial factors and non-industrial factors are closely intertwined and must be determined on a percentage basis. Given the nature of the exposure, be it chemical or physical, there is such a difference as to allow for the disparate treatment between the two Chapters.

In one example, because there is a back condition or a leg condition or some other condition where the courts have ruled that if the industrial factors 'lit up' the condition, the employer was responsible for the entirety of the injury and related benefits. In the occupational disease case, the difference is that industrial and non-industrial are intertwined to a degree that is not easily determined or separated and is separated on a percentage basis.

As for a rational basis for allowing the treatments of two groups of injured workers to differ, the petitioner does not take into account the nature of the injuries and attempts to lump all injured parties into the same categories. The differences between the two groups are apparent when dealing with occupational exposures.

An example is someone with asthma who is exposed to a chemical. The underlying condition is apparent, but there has been some exposure to the harmful chemical that has caused the condition to worsen, which would depend on the level of

exposure. The employee is tested and medical opinion provides that her condition has slightly worsened and so she is found to have a 65% pre-existing condition with only 35% related to industrial factors. The only way to measure her industrial injury is through a percentage basis as she already had underlying conditions that had similar symptoms to her industrial exposure.

This example is far different than an employee with degenerative disc disease in her low back and who suffers an injury to her back as a result of lifting a heavy object. If the employee had ruptured a disc in her low back there can be no percentage apportionment, except in permanent partial disability, because the injury is definable and definite. In recognition of this problem, Utah Courts have determined that if the accident 'lit up' or more than likely caused the condition to worsen, the underlying condition along with the industrial condition would be covered.

Again, the nature of the injury mandates that if the underlying condition was exacerbated by industrial factors, there is no way to separate the injury to the body part and the employer is left to cover the industrially caused injury. As long as the industrial injury substantially caused the need for additional treatment or surgery, the non-industrial and industrial conditions are covered by the employer.

In occupational disease cases, however, there must be a separation of underlying conditions and industrial conditions on a percentage basis because oftentimes one is looking at an exposure that is not easily definable. For instance, looking at the facts of the instant case, the medical panel and ALJ both determined that Ms. Edmonds' occupational exposure amounted to 10% of her overall problem. Her overall problem

had been defined as carpal tunnel syndrome caused by over-utilization of her hands in everyday life or for non-industrial activities was found to be 90% of the problem in her hands and wrists. This fact has not been appealed or challenged by Ms. Edmonds.

The difference between the two examples is one of a long exposure that has been mixed with numerous non-industrial exposures, such as in the instant case, and a traumatic exposure that has turned a condition symptomatic. The differences between a long-term exposure and traumatic exposure should be treated differently due to their natures and their effect on the human body.

If Ms. Edmonds' opinion is allowed to stand, she could have any carpal tunnel surgery, which ranges in cost up to $10,000, covered by her employer even if her employer was only 1% responsible on a causative basis for her condition. If this were a case of traumatic injury, none of the conditions would be covered as the Commission would have to find the underlying condition was more likely than not exacerbated by the traumatic industrial injury.

The legislature recognized this dichotomy between injuries and the fundamental differences in the types of injuries by allowing apportionment between industrial and non-industrial factors for injuries. Utah Code Ann. §34A-3-110. Similarly, the Legislature has already allowed the split of benefits between employers on a percentage basis. Utah Code Ann. § 34A-3-105. This Court, as a result, should allow the apportionment of medical benefits as it is already allowed pursuant to statute. If the Court does not allow apportionment, the petitioner will have been allowed to shift the entirety of her non-industrial/pre-existing burden onto the employer.

In the alternative, the Court should adopt the reasoning of Giesbrecht to determine whether the industrial conditions substantially caused the need for surgery. If this principal is applied to the instant case, benefits must be denied as the Commission found that only 10% of Ms. Edmonds' condition was related to industrial factors. This solution would allow for equal application of the law between Chapter 2 and Chapter 3. Ameritech, however, believes that apportionment is allowed and consistent with the nature of the injury. Given the differing nature of the injuries related to Chapter 2 and Chapter 3, Ameritech believes that apportionment of medical expenses would not violate Ms. Edmonds' equal protection rights.

In sum, employers should be allowed to apportion medical benefits in occupational disease cases pursuant to the language in Utah Code Ann. § 34A-3-110, which already is allowed in 34A-3-105. In the alternative, this Court should apply the test in Giesbrecht, or similar test, if it rules that apportionment is not permissible with medical benefits.

CONCLUSION

Based upon the foregoing, Ameritech respectfully request this Court overturn the Labor Commission Order On Motion for Review and allow Ameritech to apportion its liability for Ms. Edmonds' medical benefits based upon its percentage of liability. In the alternative, this Court should reconcile the case law regarding industrial accidents to case law regarding occupational disease claims. This would avoid the inconsistent outcome of an employer paying for 100% of the industrial and non-industrial medical benefits when the employer is found only to be 10% at fault.

DATED THIS 26 day of March, 2007.

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CERTIFICATE OF MAILING

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