1967

E. Halvorson, Inc., and The State Insurance Fund v. Theodore L. Williams and The Industrial Commission of Utah : Plaintiffs' Brief

IN THE SUPREME C
OF THE STATE OF

E. HALVORSON, INC., and
THE STATE INSURANCE
FUND,

Plaintiffs

— vs. —

THEODORE L. WILLIAMS,
and THE INDUSTRIAL
COMMISSION OF UTAH

Defendants

PLAINTIFFS'

Writ of Certiorari to
of the Industrial Com

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Plaintiffs,

— vs. —

THEODORE L. WILLIAMS, and THE INDUSTRIAL COMMISSION OF UTAH

Defendants.

Case No. 10743

PLAINTIFFS' BRIEF

STATEMENT OF THE KIND OF CASE

This was a proceeding under the Utah Workmen's Compensation Act wherein the defendant, Theodore L. Williams, was awarded permanent total disability as against the plaintiffs.

DISPOSITION BEFORE THE INDUSTRIAL COMMISSION

The Industrial Commission heard evidence on the defendant's claim and awarded against the plaintiffs the maximum allowed for a permanent total disability.

RELIEF SOUGHT ON APPEAL

This case is before this Court on a Writ of Certiorari. The plaintiff seeks a reversal of the Order of the Industrial Commission and a determination requiring the Commission to have a medical panel appointed pursuant to the requirements of 35-1-69 U.C.A. 1953, as amended.

STATEMENT OF FACTS

The defendant, Theodore L. Williams, on October 13, 1964, was injured during the course of his employment with Halvorson Construction Co. The defendant experienced a 20-foot fall which resulted in a bilateral ankle fracture, as well as a fracture of the lumbar vertebrae. (T12) Subsequent to the defendant's admission to the hospital, the defendant experienced extreme cardial vascular insufficiency. It was supposed that he suffered from an acute myrocardial infarction. (T2) The plaintiff, The State Insurance Fund, paid the defendant's hospitalization and medical bills, and on October 15, 1965, an application was filed for a physical examination by the Medical Advisory Board. (T22) On November 20, 1965, the defendant, Theodore L. Williams, appeared before the Medical Advisory Board to determine the permanent disability caused by the injury of October 13, 1964. The Board found 50% loss of bodily function due to muscular-skeletal injuries. However, it did not make a finding as to permanent disability rating in regard to the defendant's cardiac and pulmonary status and its relationship to the accident. (T 27)

On December 3, 1965, the Commission notified Mr. Williams that The State Insurance Fund was liable for permanent disability amounting to 50% loss of bodily function and informed him that a special board would be appointed by the Commission to evaluate the cardiac and pulmonary problems. Dr. Vikel, chairman of the newly designated panel, asked Dr. F. Clyde Null, a treating physician, to evaluate for the panel the medical aspects of the case in regard to the heart, lung and kidney. Pursuant to said request, Dr. Null filed a report (T 35-39, inclusive) wherein he concluded that the patient's pulmonary disease is unrelated to the ankle injury and antedated the accident and the recent period of hospitalization. (T39) The doctor also noted in his report that the patient had similar chest pains in 1955, and was treated by the Veterans Administration Hospital for bronchitis. On February 1, 1966, the panel filed its report (T41).

The medical panel, after reviewing the history of the defendant, Williams, made a finding that the myrocardial infarction plus the kidney difficulties were causally related to the accident in question. They stated that Mr. Williams had had a long standing chronic obstructive airway disease and emphysema. The panel made the following statement:

> "The panel finds that Mr. Williams has severe, chronic pulmonary disease which in itself would be sufficient reason for total and permanent disability. To this is added, the panel finds, chronic cardiac disease as evidenced by angina which would be a 10%-20% additional cause of disability. These disabilities from pulmonary and cardiac diseases are, of course, in addition to his

orthopedic disabilities which have been previously rated by the Medical Advisory Board."

Thus, the medical panel found that the defendant had a long-standing pre-existing problem; further, that the accident precipitated certain events which would make the pulmonary disease, standing by itself, totally and permanently disabling. Then the panel added 10%-20% additional disability. Within the time provided, The State Insurance Fund objected to the medical panel report and stated in its objection that the same was made "for the purpose of clarification of permanent partial disability relating specifically to the industrial accident of October 13, 1964." (T66) The position of The State Insurance Fund was further amplified in a subsequent letter dated March 10, 1966, wherein The State Insurance Fund stated that the amount assigned appeared to be an additional 10% - 20% and wanted a clarification as to its liability. This confusion was felt by the defendant's attorney in his letter of April 13, 1966, wherein he wrote requesting a hearing so that the applicant may be found 100% totally and permanently disabled. (T72) At the onset of the hearing, the plaintiff clearly stated the dilemma with which it was faced in determining the rating the panel has assigned. (T76-77)

Dr. Crockett testified at the hearing on June 16, 1966, on behalf of the medical panel. The doctor testified in substance as follows: The defendant-applicant had been under treatment for angina pains and for pulmonary problems and chronic bronchitis at the Veterans Administration prior to the accident in question.

The panel did not make a determination as to the percentage of disability attributable to the pre-existing disease and further stated that they had insufficient information on which to arrive at the determination of the pulmonary disability prior to the injury. It was admitted, however, that the defendant had a serious pre-existing condition. The medical history of the defendant-applicant showed that disability rating had been assigned by the Veterans Administration as a result of the prior condition; however, the panel was unsure what said rating was. On cross-examination the doctor stated that he did not have an opinion as to the defendant's disability prior to the accident in question and could not even state whether or not it was less or more than 5%. It was explained that the medical panel's report which stated that the applicant was 10% - 20% additionally disabled was in addition to his pulmonary problem which rendered him, in and of itself, permanently disabled. It was admitted that the panel report in regard to percentage of disability was ambiguous and that it was the doctor's hope that the same could be clarified at the time of the hearing.

After the hearing, the plaintiffs objected to the procedure followed by the Industrial Commission. The plaintiffs specifically asked that this matter be referred to a medical panel pursuant to the provisions of 35-1-69 U.C.A. 1953, as amended, and stated in its Motion that the plaintiffs could not understand the position of the medical panel until the same was clarified by Dr. Crockett. Notwithstanding the above, the Commission made an Order dated August 11, 1966, which assessed liability

for 100% disability to the plaintiff, The State Insurance Fund, and stated that the plaintiff had been misled as to the effect of Section 35-1-69 U.C.A. 1953, as amended. The plaintiff filed a Motion for Review and set forth six bases as to why the Commission acted without authority of law in not complying with the above mentioned statute.

ARGUMENT

POINT 1

THE COMMISSION ERRED IN FAILING TO REFER THIS MATTER TO A MEDICAL PANEL TO DETERMINE THE PERCENTAGE OF PERMANENT PHYSICAL IMPAIRMENT ATTRIBUTABLE TO THE INDUSTRIAL INJURY AND TO THE PREVIOUSLY EXISTING CONDITION.

The issues presented by this appeal does not involve the question of whether or not the Industrial Commission acted arbitrary and capricious in making its findings. For the purpose of this argument the defendant does not object to the finding of the Commission that the defendant-applicant is 100% totally and permanently disabled. The issues presented here are whether or not the Commission erred in failing to comply with Section 35-1-69 U.C.A. 1953, as amended, under the circumstances of this case. It is fundamental, and this Court has stated, that the Commission's decision will be reversed if said decision is based upon a misapplication of law. *The State Insurance Commission of Utah* v. *The Industrial Commission of Utah*, 395 P. 2d 541, 16 U. 2d 50. It is elementary that on review this Court will not disturb

disputed findings of fact made by the Commission, but will review errors of law.

It seems clear that in this case, Section 35-1-69 U.C.A. 1953, as amended, applies. This statute provides that if an employee who has previously incurred a permanent incapacity prior to the accidental injury, which results in permanent incapacity which is greater than he would have had if the pre-existing incapacity was not present, he shall be awarded benefits based upon the combined injuries; however, "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 . . ." If the above circumstances exist, then the statute specifically requires that the matter be sent to a medical panel, which must make three determinations:

1. The total permanent physical impairment resulting from all causes and conditions, including the industrial injury (which was accomplished by the medical panel report). (T41)

2. The percentage of permanent physical impairment attributable to the industrial injury. (This was not accomplished by the medical panel.)

3. The percentage of permanent physical impairment attributable to the previously existing conditions, whether due to accidental injury, disease or congenital causes. (The medical panel admittedly did not examine into this question.)

There is no doubt that Mr. Williams had a long-standing history of pulmonary problems which precipitated a disability rating by the Veterans Administration.

The panel report is admittedly ambiguous, which fact is evidenced by the plaintiff's attorney's letter, the doctor's statement, the hearing examiner's statement and by an examination of the report. After the matter was "clarified" at the hearing in question, the plaintiff timely requested The Industrial Commission to comply with 35-1-69, U.C.A. 1953, as amended.

There can be no reasonable basis on which to deny the plaintiff the right to the appointment of a medical panel to determine the percentage of disability attributable to the pre-existing condition and to assess the liability for such disability to the special fund. Dr. Kilpatrick testified in this matter in regard to the pre-existing condition and states as follows: (T80)

> "Q. But there is no doubt there was a serious pre-existing condition?
>
> A. There is no doubt about that.
>
> Q. Can you describe the condition that he had prior to the injury, to the best of your recollection?
>
> A. He had emphysema and chronic bronchitis.
>
> Q. And what do you mean by 'emphysema'?
>
> A. This is an over-distention of the little alveoli, or the little compartments of the lung. So that the lung is larger than normal, and the air can't get in and out as readily as the normal lung.
>
> Q. At this type of condition — I think it is a condition, rather than a disease, isn't it?

A. It's a disease.

Q. It's a disease?

A. Yes, sir.

Q. This type of disease can have a material effect on the heart, can it not?

A. Yes. After it gets severe enough, it can affect the heart.

Q. And generally isn't this disease a developing type of situation?

A. Over many years."

It is clear that the 100% rating was based not only on the accident but upon the pre-existing condition, according to the doctor's testimony. (T 81-82)

"Q. In other words your 10 to 20% was taken into consideration as if he would not have had this pre-existing condition?

A. Correct.

Q. With the pre-existing condition, he was 100%?

Q. With the pre-existing condition, in the condition of his lungs at the time that we examined him — or we saw him, and went over his records — he was 100% disabled pulmonary wise."

It is also clear from the record that the medical panel was not instructed of, nor did it determine, the percentage of disability due to the pre-existing condition, as follows: (T88)

"Q. Would it be a fair statement to say that you had insufficient evidence then to arrive at a disability evaluation prior to his injury?

A. That is correct. I had no evidence for disability prior to his injury.

Q. But you knew there was some?

A. I knew that he had pulmonary emphysema and chronic bronchitis, due to his history. Due to the Veterans' Hospital records."

POINT II

THE COMMISSION ERRED IN ITS INTERPRETATION AND DESCRIPTION OF THE LEGISLATIVE HISTORY OF 35-1-69 U.C.A. 1953, AS AMENDED.

The Commission's Order on file herein does not comply with 35-1-85 U.C.A. 1953, as amended, in setting forth findings of fact and conclusions of law. However, it appears clear that the Commission held that Section 35-1-69 U.C.A., as amended, does not apply to this particular case. The Commission's reasoning, it is respectfully suggested, is clearly erroneous. The Order states that the section in question was substantially changed in the year 1965. This is not the fact of the matter. The section was, however, substantially changed by the 1963 Legislature. Prior thereto, the statute in question spoke about an employee being "permanently partially disabled." This wording has been replaced by the phrase "permanent incapacity." Also, the second paragraph of the existing statute was added, which provided for a determination of certain facts by a medical panel. It is agreed that the Commission's statement, that the amendment has the effect of relieving the employer from assuming liability for an injury aggravated by pre-existing disabilities and, as amended, the special fund is liable for the percentage of permanent incapacity attributable

to the pre-existing condition, is correct. Prior to the 1963 amendment, the "special fund" was only liable when there was a previous permanent partial disability. The phrase "permanent partial disability" is used in the Workmen's Compensation Act in those situations where a rating has occurred. Thus, the legislative amendment, by substituting the phrase "a permanent incapacity by accidental injury, disease or congenital cases" clearly means that the second injury or the "special fund" is liable for that percentage of physical impairment attributed to such previously existing accidental injury, disease or congenital causes. In light of the addition of the requirements of a special medical panel to determine the percentage of disability, it is apparent that it is the duty of the Industrial Commission to instruct the medical panel to arrive at such percentage. The only amendment in 1965 was the dollar amount, increasing the same from $735 to $830 for rehabilitation.

Initially, the Commission held that 35-1-69 U.C.A. 1953, as amended, was not applicable because the injury occurred on October 13, 1965, and the effective date of the legislation was July, 1965. The Commission, subsequent thereto, amended its Order and found that the injury occurred on October 13, 1964. One is at a loss to determine what the Commission meant when it referred to the fact that the statute is not applicable because there would be retroactive legislation and it would be unconstitutional. If the Commission was referring to the injury of October 13, 1964, the Commission is mistaken in its assumption that the amendment occurred in 1965. In fact, as stated above, the

amendment was passed in 1963. Therefore, under this theory, the section is clearly applicable. If, however, the Commission's Order may be construed to hold that "permanent incapacity" must have occurred prior to the effective date of the legislation, it is respectfully urged that the Commission has misinterpreted the clear legislative intent of the statute. For the Legislature, in stating "one who has previously incurred permanent incapacity," sets no limits as to time. This question has been decided in Utah in *Marker* v. *Industrial Commission,* 84 U. 587, 37 P. 2d 785. This case involved a situation where an employee had previously incurred permanent partial disability prior to the enactment of the Workmen's Compensation Act and, pursuant to the special injury fund, brought an action for combined injuries. The defense raised was that the permanent partial disability must have occurred subsequent to the enactment of the statute. The Court held that the Legislature, in imposing no limitation or condition as to time or place of the occurring of the previous disability, clearly meant that the prior disability must not have occurred subsequent to the enactment of the statute.

POINT III

THE COMMISSION ERRED IN ADOPTING THE MEDICAL PANEL REPORT ON FILE HEREIN.

Subsequent to the filing of the medical panel report, the plaintiff, pursuant to 35-1-77, U.C.A. 1953, as amended, objected to said report. Once written objections are so filed, according to the statute, upon a hear-

ing "... the written report of the panel may be received as an exhibit but shall not be considered as evidence in the case, except insofar as it is sustained by the testimony admitted."

Since the panel report was ambiguous and the same needed clarification by the doctor's further testimony, the same could not be the basis for an award since the testimony of Dr. Crockett did not sustain the medical panel report but rather by amplifying the same changed the meaning of the report. See *Hockford* v. *Industrial Commission,* 358 P. 2d 899, 11 U. 2d 312.

CONCLUSION

The Commission erred in failing to provide that the medical panel should assess the permanent incapacity of the defendant and charge the same to the special fund pursuant to 35-1-69 U.C.A. 1953, as amended.

Respectfully submitted,

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