2007

Dale T. Smith & Sons v. Utah Labor Commission, and Jeffrey D. Smith : Brief of Appellee

Utah Supreme Court

IN THE SUPREME COURT OF UTAH

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DALE T. SMITH & SONS and WORKERS' COMPENSATION FUND,	:	
	:	Supreme Court No. 20070848
Appellants,		
v.	:	
UTAH LABOR COMMISSION and JEFFREY D. SMITH,	:	
Appellees.	:	

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BRIEF OF APPELLEE JEFFREY D. SMITH

On Writ of Certiorari from the Utah Court of Appeals

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JURISDICTION OF THIS COURT

The Utah Court of Appeals has discretionary appellate jurisdiction by writ of certiorari on decisions of the Utah Court of Appeals in this matter pursuant to Utah Code Ann. §78A-3-102(3)(a) and (5).

STATEMENT OF ISSUES AND STANDARD OF REVIEW

The Appellee agrees with the Statement of Issues and the Standard of Review provided in the Appellant's brief. Does the term "compensation" as used in Section 34A-3-110, U.C.A. include medical benefits payable under the Occupational Disease Act.

CONSTITUTIONAL OR STATUTORY PROVISIONS

The interpretation of Section 34A-3-110, U.C.A. is of central importance in this appeal:

> The compensation payable under this chapter shall be reduced and limited to the proportion of the compensation that would be payable if the occupational disease were the sole cause of disability or death, as the occupational disease as a causative factor bears to all the causes of the disability or death when the occupational disease or any part of the disease:
>
> 1. Is causally related to employment with a non–Utah employer not subject to commission jurisdiction;
> 2. Is of a character to which the employee may have had substantial exposure outside of employment or to which the general public is commonly exposed;
> 3. Is aggravated by any other disease or infirmity not itself compensable; or
> 4. When disability or death from any other cause not itself compensable is aggravated, prolonged, accelerated, or in any way contributed to by an occupational disease.

STATEMENT OF THE CASE

PROCEDURE

1. Respondent Jeffrey D. Smith filed an Application for Hearing with the Utah Labor Commission on August 11, 2005 wherein he sought coverage for a low back condition brought on by years of hard work, including heavy lifting and constant bending in his job as a meat packer in a family owned business. (R. 16).

2. The Labor Commission held an evidentiary hearing in this matter on July 7, 2006. Findings of Fact, Conclusions of Law and Order were entered by the Administrative Law Judge on September 6, 2006 wherein the ALJ awarded payment of all reasonable and necessary medical care related to Mr. Smith's low back condition. (R. 53-57).

3. The Workers' Compensation Fund filed a Motion for Review with the Utah Labor Commission on or about October 5, 2006 contesting the full award of medical expenses as set forth in the ALJ's decision. (R. 59-61).

4. On November 30, 2006 the Labor Commission issued its Order Affirming ALJ's Decision wherein it determined there should be no apportionment of injury related medical expenses in occupational disease claims, as set forth in the Labor Commission decision of Edmonds v. Epixtech, et al (Labor Commission Case No. 02-0969). (R. 68-69). That case was appealed to Utah Court of Appeals and was decided on September 20, 2007 in *Ameritech Library Services (DYNIX), et al, v. Labor Commission and Tamara Edmonds*,

2007 UT App 305, 169 P.3d 784. That case is also before this Court on Writ of Certiorari, case 20070856.

FACTS

The underlying facts of Mr. Smith's employment and the nature of his occupational disease are not in dispute. The Findings of Fact of the Utah Labor Commission have not been contested. In relevant part, they are as follows:

1. The Respondent has worked since age 16 as a meat cutter in a family business. His employment required him to regularly lift and manipulate quarters of beef weighing from 100 to 200 pounds, haul live cattle, including "downer cows" that required the Respondent to prod, shock, push, pull, lift and twist to get these cows into trailers for transport. He is now 40 years old and suffers from lumbar degenerative joint disease. (R. 54).

2. In 2003 he began having increasing problems with his lower back and sought medical care for his condition. (R. 54).

3. His treating physician, Dr. Gordon Kimball, attributes the Respondent's low back problems to "years of rigorous work ex: lifting, turning, pulling." (Medical exhibit 13).

4. The Petitioner's medical expert, Dr. Steven Marble, opined in one report that 75% of the back problems at L5-S1 are related to work and 25% is due to non-work related activities. In a subsequent part of his report, he stated that 25% of other degenerative back conditions is due to work and 75% is non-industrial. (Medical exhibit 9).

5. The Administrative Law Judge did not send the case to a medical panel but awarded coverage for medical treatment for the low back, without apportionment in light of the medical reports in the file and based upon the Labor Commission ruling in the Edmonds v. Epixtech case. (Labor Commission Case 02-0969). This was affirmed by the Labor Commission upon Petitioner's Motion for Review. (R. 68-69) and affirmed at the Utah Court of Appeals in the *Ameritech* decision.

SUMMARY OF THE ARGUMENT

The plain language of Section 34A-3-110, U.C.A. provides a formula for determining apportionment based on disability or death, making no mention of medical expenses. If the term "compensation" were defined to include medical benefits, then in cases where there is no disability or death but only medical expenses, the statute could not be applied to determine apportionment for any pre-existing conditions because the formula in the statute is based on making apportionment for disability or death benefits.

The term "compensation" as used throughout the Utah Labor Code is used to reference disability benefits and medical benefits are referred to separately.

This Court has interpreted compensation to mean something separate from medical expenses and the Utah Legislature in subsequent legislation has not taken action to change or overturn the Court's conclusions, hence presuming satisfaction with prior judicial constructions of the unchanged portions of the statute.

To hold that the term "compensation" includes payment of medical expenses would result in an unconstitutional interpretation of the law by treating similarly situated persons - injured workers under the Workers Compensation Act and under the Occupational Disease Act - differently, without a rational basis for the dissimilar treatment.

ARGUMENT

POINT I

Utah case law supports the conclusion that the term "compensation" does not necessarily include medical benefits, and that has not been overturned by subsequent statutory changes to the Utah Code

The Appellants have argued that the case of *Taylor v. Industrial Commission*, 743 P.2d 1183 (Utah 1987), stands for the proposition that the term "compensation" includes medical benefits. A careful reading of *Taylor* shows that their reliance is misplaced.

In Taylor, a case dealing with subrogation interests, the portion of the statute in question was former Section 35-1-62(3), U.C.A. The language in question is the same as in the current statute as codified at 34A-2-106(5), U.C.A. It provides as follows:

> The balance shall be paid to the injured employee, or the employee's heirs in case of death, to be applied to reduce or satisfy in full any obligation thereafter accruing against the person liable for compensation.

The issue before the Court in *Taylor* was whether or not the phrase "any obligation" is limited only to compensation and does not include medical

expenses, or whether it encompasses all obligations, and benefits payable under the workers compensation act.

The decision in *Taylor*, upheld the Labor Commission's interpretation of the statute. It was concluded that "the language of the statute does not, as claimant insists, provide an offset for the amount of 'compensation' only; rather, the statute provides an offset for 'any obligation accruing in the future against the person liable for compensation', i.e., the employer." *Taylor* at 1186.

This interpretation would prevent an injured worker who also receives a settlement in a third-party action from obtaining a double recovery by allowing a full offset against anything that was paid by the insurance carrier in the workers compensation claim. Hence, *Taylor* does not stand for the proposition that compensation includes medical expenses specifically, but rather that there is an offset for 'any obligation' that may accrue in the future against the person liable for compensation. The term 'any obligation' includes medical expenses.

We submit that depending upon the context of a specific section in the workers' compensation or occupational disease acts that compensation may implicitly include medical expenses.

However, there are times in the statute where it is clear that medical expenses are something separate from what is meant by the term 'compensation'. Rather compensation in some instances means only money paid for periods of disability. This will be discussed more fully later in this brief.

Other case law in Utah supports the conclusion that compensation does not necessarily include medical expenses or benefits.

In 1979, this Court in *Kennecott Copper Corp. v. Industrial Commission*, 597 P.2d 875 (Utah 1979), concluded that under Section 35-1-99, U.C.A., the term "compensation" did not include medical benefits. In that case, it was also seen that Sections 35-1-45 and 35-1-81 also treated medical expenses as being separate from compensation.

In *Christensen v. Industrial Commission*, 642 P.2d 755 (Utah 1982), it was affirmed that Section 35-1-99 does not include medical expenses within the meaning of the term compensation. This was notwithstanding the fact that Section 35-1-44(6) provided that "(6) 'Compensation' shall mean the payments and benefits provided for in this title."

In *Christensen*, this Court noted that despite the clear statement of the Court in *Kennecott* (also referred to as *Bilanzich* in the Christensen case) in 1979 in differentiating medical benefits from compensation, the Utah legislature did not subsequently amend Section 35-1-99 of the Workers' Compensation Act to specify that compensation includes medical benefits.

Since that time in all subsequent substantial amendments to the Act in 1988, 1991, 1994, as well as in amendments in other years, the legislature has not changed the statutes to specify a definition of compensation that specifically includes medical expenses.

It is important to note that there is no definition of the term "compensation" in the Occupational Disease Act itself.

Hence, the meaning of compensation, as interpreted by this Court, has been allowed to stand, notwithstanding the many substantial changes to the Workers' Compensation and Occupational Disease Acts over the years.

As cited in *Christensen*, "a well-established canon of statutory construction provides that where a legislature amends a portion of a statute but leaves other portions unamended, or re-enacts them without change, the legislature is presumed to have been satisfied with prior judicial constructions of the unchanged portions of the statute and to have adopted them as consistent with its own intent. *State v. Roberts,* 56 Utah 136, 190 P. 351 (1920); *Quaremba v. Allan,* 67 N.J. 1, 334 A.2d 321 (1975); *Ladd v. Board of Trustees,* 23 Cal. App.3d 984,100 Cal. Rptr. 571 (1972); *People v. Mills*, 40 Ill.2d 4, 237 N.E.2d 697 (1968)." *Christensen* at 756.

Despite the argument by the Appellants to the contrary, the Taylor case is not on point, and hence does provide a basis for a contrary conclusion.

POINT II

The plain language of the statute requires apportionment only for disability or death from an occupational disease and not for expenses for medical care and treatment

The only issue before this Court is whether an injured worker's right to payment of medical expenses for treatment of injuries sustained in an

occupational disease claim is subject to, and reduced by, Section 34A-3-110, U.C.A.

In considering whether the Labor Commission correctly applied the law in this matter we should first look to the plain language of the statute itself to determine if the meaning of the term "compensation" can be determined from the section itself.

This section, 34A-3-110, U.C.A., provides that "compensation payable under (the occupational disease act) shall be reduced and limited to the proportion of the compensation that would be payable if the occupational disease were the sole cause of disability or death, as the occupational disease as a causative factor bears to all the causes of the disability or death." The degree of apportionment under Section110 depends upon the application of the ratio of work-related disability to non-work disability. Here there wasn't any disability (not TTD or PPD) and only medical benefits are due.

If compensation under Section 110 was 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.

Hence, in order for the section to have consistent meaning, the term "compensation" must mean something related to disability benefits and not medical benefits.

Had the legislature intended to apportion medical expenses as well, it would have been a simple matter to have worded the statute to read something like this, where the bold print is the added language: "...limited to the proportion of the compensation that would be payable if the occupational disease were the sole cause of disability, death **or need for medical care and treatment**, as the occupational disease as a causative factor bears to all the causes of the disability, death **or need for medical care and treatment**."

Giving proper meaning to all words in the section means to not lump in medical expenses into the meaning of the term "compensation." This is also an important consideration in light of the inconsistent use of the term throughout the workers' compensation act.

POINT III

Use of the term 'compensation' throughout the Utah Labor Code is used inconsistently but may apply to disability compensation benefits that are separate from medical expenses

The overall usage of the term 'compensation' throughout the statutory language itself of Title 34A, the Utah Labor Code, as well as throughout the Commission's decisions over the years, is used inconsistently. It sometimes is

used to read to mean all benefits payable for a work injury, not just disability benefits. See, for example, 34A-3-111, U.C.A.

However, there are numerous examples throughout the Code in which the statutory usage of the term 'compensation' cannot be deemed to include medical benefits, or the statute speaks of medical benefits separately from disability compensation. A few examples, although not exhaustive, illustrate this usage:

1. §34A-2-401(1), U.C.A. specifically recognizes the distinction between 'compensation' and medical benefits. It provides that the benefits injured employees shall be paid include

(a) compensation . . . and

(b) the amount provided in this chapter for:

(i) medical, nurse and hospital services;

(ii) medicines; and

(iii) in case of death, the amount of funeral expenses.

2. §34A-2-401(2), U.C.A. specifically recognizes this distinction when it refers to compensation and medical benefits as separate items: "The responsibility for compensation and payment of medical, nursing and hospital services and medicines, and funeral expenses provided . . ." shall be on the employer and not the employee.

3. §34A-2-408, U.C.A. similarly makes that specific distinction. Paragraph (1)(a) provides that 'compensation' may not be allowed for the first

three days after an injury is received. Paragraph (1)(b) provides that disbursements for medical, nurse and hospital services and for medicines and funeral expenses are payable for the first three days. This clarifies that medical expenses are not included in what is mean as compensation. Paragraph (2) of that section provides that, if temporary total disability lasts more that 14 days, 'compensation' shall be payable for the first three days.

4. §34A-2-413(1)(a), U.C.A. provides: "In cases of permanent total disability resulting from an industrial accident or occupational disease, the employee shall receive compensation as outlined in this section."

The section then outlines all of the 'compensation' to be paid. In doing so, no mention is made of medical benefits or expenses. Nevertheless, an injured employee is unquestionably entitled to such medical benefits, although they are not part of the 'compensation' the employee is to receive.

5. §34A-2-413(5), U.C.A. provides, "the compensation payable" after "312 weeks of compensation" shall be reduced by 50% of the Social Security retirement benefits. If compensation included medical benefits, this Social Security offset would apply against medical expenses incurred as well as the PTD benefits that are payable. However, medical benefits in an industrial injury or disease claim are not and have never been reduced in our State once an injured worker begins receiving Social Security retirement benefits.

6. §34A-2-422, U.C.A. provides: "Compensation before payment shall be exempt from all claims of creditors . . . and shall be paid only to employees or their dependents . . ." Again, if medical benefits were included in the definition, this would mean that all medical expenses must be paid directly to the employees themselves, rather than directly to the medical providers.

7. §34A-2-301, U.C.A. provides that places of employment are to be safe and that, for the willful failure of an employee to comply with applicable provisions or safety requirements, "Compensation as provided in this chapter shall be increased 15% . . ." Under Appellants' argument that compensation includes medical expenses, this would mean that if an employer's safety violation impacted the employee, the employer would have to pay the medical providers an additional 15%, something which has never been done and which would not serve the purpose intended or, for that matter, any other logical purpose.

8. In addition to the foregoing, §34A-3-107, U.C.A. emphasizes that there is nothing under the occupational disease act which is intended to treat an employee's right to medical benefits any differently than he would be treated for a similar workers compensation injury. In paragraph (2) of §34A-3-107, it specifically provides that, "The disabled employee is entitled to medical, hospital and burial expenses equivalent to those provided in Chapter 2," with no mention of apportionment or reference to Section 110.

There would be no equivalence if the payment of medical benefits were reduced by whatever percentage of pre-existing conditions were related to the occupational disease with no reduction of medical benefits in a regular workers compensation claim where there are related pre-existing conditions.

POINT IV

To require apportionment of medical expenses under the Occupational Disease Act, with no apportionment in the Workers' Compensation Act, would amount to an unconstitutional violation of the uniform operation of laws/equal protection clauses of the Utah and United States Constitutions

There is no question that there is no apportionment of medical expenses in workers' compensation cases. Injured workers are entitled to coverage for payment of all injury related care, even if the injury aggravates a pre-existing condition. The Appellants assert that Section 34a-3-110 should be interpreted to include medical expenses as part of compensation so that in occupational disease cases, apportionment of medical expenses could occur when there are pre-existing or independent conditions.

If the Occupational Disability Act were to be interpreted to treat occupational disease claimants differently than workers' compensation claimants, based solely upon whether the work-related illness or injury was a workers' compensation claim rather than an occupational disease claim, it would be subject to being struck down as being in violation of the Utah State Constitution, Article I, Section 24 wherein all laws of a general nature shall have uniform operation, or

in violation of the equal protection provisions of the United States Constitution, as has been done in some other states. See, for instance, *Schmill v. Liberty Northwest Insurance Corp.*, 67 P. 3d 290 (Mont., 2003).

Article I, Section 24 of the Utah Constitution, the Uniform Operation of Law Clause, is considered to be the Utah equivalent of the federal equal protection guarantee in the 14th Amendment that "persons similarly situated should be treated similarly, and persons in different circumstances should not be treated as if their circumstances were the same." *Wood v. Univ. of Utah Medical Center*, 67 P.3d 436 (Ut. Ct. App. 2002), and *Malan v. Lewis*, 693 P.2d 669 (Utah 1984).

Under Article I, Section 24 of the Utah Constitution, a two-part test is used in the analysis of ensuring uniform operation of the laws: "First, a law must apply equally to all persons within a class. Second, the statutory classifications and the different treatment given the classes must be based on differences that have a reasonable tendency to further the objectives of the statute. *Malan* at 670.

The first prong of the analysis presupposes the creation of classes within a law and requires a consideration of the level of scrutiny applied to the discrimination inherent in any classification. In *State v. Merrill*, 2005 UT 34 (UT 2005), the Utah Supreme Court affirmed that:

> Every legislative act is in one sense discriminatory. The Legislature cannot in one act legislate as to all persons or all subject matters. It is inclusive as to some class or group and as to some human relationships, transactions, or functions and exclusive as to the

> remainder. For that reason, to be unconstitutional, the discrimination must be unreasonable or arbitrary. A classification is never unreasonable or arbitrary in its inclusion or exclusion features so long as there is some basis for the differentiation between classes or subject matters included as compared to those excluded from its operation provided the differentiation bears a reasonable relation to the purposes to be accomplished by the act.

Here we have the Workers' Compensation Act and the Occupational Disease Act, both part of an integrated system providing for injured workers and their families. This system provides the exclusive remedy for injured workers for on-the-job injuries and illnesses.

For this analysis, we may assume that all injured workers entitled to workers compensation or occupational disease benefits are similarly situated. They have all suffered a work place injury resulting in the need for medical care and possibly resulting in periods of disability. Their recourse for compensation due to the impact of that injury is limited solely to the provisions of the Utah Workers' Compensation or Occupational Disease Acts. There is no civil action available against the employer.

The first group or classification consists of those injured workers eligible for workers compensation benefits under Chapter 2 of Title 34A of the Utah Code. The second class consists of injured workers whose injuries are in the nature of an occupational disease, Chapter 3 of Title 34A of the Utah Code, rather than a one-time work accident. Both injuries are work related. Only the

nature of how the injury or illness occurred distinguishes between the two classes. These classes are similarly situated for equal protection/uniform operation of law.

In the first group, which consists of workers compensation claimants, if the "accident, injury or death in any way contracted, sustained, aggravated, or incurred by the employee in the course of or because of or (arose) out of the employee's employment," 34A-2-105, U.C.A., then the injured worker is entitled to payment of certain temporary or permanent disability benefits based upon the period of medical recovery or upon the extent and permanency of the disability. Full lifetime medical benefits are available for injury related health problems to the extent the injury caused the problem or was a permanent aggravation of a pr-existing condition. There is no apportionment of any kind of benefit, but for PPD benefits, when there is a pre-existing condition that was aggravated by an otherwise compensable injury. Medical expenses are paid in full for injury related care and treatment, even if the injury aggravated a pre-existing condition - at least to the extent of the aggravation.

In the second group, which consists of occupational disease claimants, the claim is similarly compensable where the claimed occupational disease arose "out of or in the course of employment and is medically caused or aggravated by that employment," 34A-3-103, U.C.A. Benefits payable consist of disability benefits for periods and amounts of temporary and permanent disability, as well as payment of medical benefits for treatment and care for the injury or illness.

We submit there is no substantial difference between the two classes other than the legal theory under which compensation is awarded. In fact, it is possible for some illnesses or injuries to qualify under either the Workers' Compensation Act or the Occupational Disease Act. But, in any event, both arise out of the employment relationship and both are the exclusive remedy for injured workers under Utah law.

If the appellants were to be correct in their assertions that medical benefits should be considered compensation and should be apportioned under Section 110 of the Occupational Disease Act, then we have to determine whether there is a rational basis for treating these two similarly situated classes of injured workers differently.

The second prong of the analysis pertains to whether this different treatment has a reasonable tendency to further the purposes of the statute.

What are the legitimate purposes of the statute? What are the purposes of the Workers' Compensation Act and the Occupational Disease Act? While the Acts themselves do not contain a description of the objectives, the early case of *Park Utah Consolidated Mines v. Industrial Commission*, 36 P.2d 979 (Utah 1934) provides a good description. It explains that the Act is a "beneficent law" that affords injured workers "simple, adequate, and speedy means of securing compensation, to the end that the cost of human wreckage may be taxed against the industry that employs it." It is intended to indemnify injured workers when

they cease to earn wages and pay for the cost of injury related medical care and treatment.

There exists no rational basis for treating the two groups differently. In both groups the injured worker was gainfully employed before the injury or illness. In both groups, as a result of a workplace accident or exposure of one kind or another, which either wholly caused an injury or aggravated a pre-existing condition, injured workers come to need medical care and in some cases become disabled and in need of compensation for the period he or she is unable to work because of the industrial accident or exposure.

In one class, full medical benefits are paid for the extent of the work related injury/illness or aggravation. If it is a permanent aggravation of a pre-existing condition, coverage for medical care is permanent and is still paid in full.

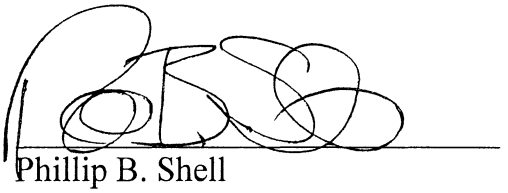
In the other class, under the appellants' contentions, then despite a permanent aggravation of a pre-existing condition, medical benefits are to be limited proportionately to the amount of the aggravation when considered with all causes and condition - even when no medical care was needed before the work related aggravation.

We submit such an interpretation has no rational basis or any reasonable tendency to further the objectives of the statute or of the Occupational Disease Act.

CONCLUSION

The Supreme Court of Utah should uphold the order of the Utah Court of Appeals and find that the Labor Commission correctly interpreted the law by concluding that the term 'compensation' in Section 34A-3-110, U.C.A. does not include medical benefits. This conclusion also allows for constitutional application of the law to injured workers and their families.

Dated this 31st day of March, 2008.



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CERTIFICATE OF MAILING

I hereby certify that on the 31st day of March, 2008, I caused to be mailed by first class mail, postage pre-paid, two (2) copies of the foregoing BRIEF OF APPELLEE to each of the following:

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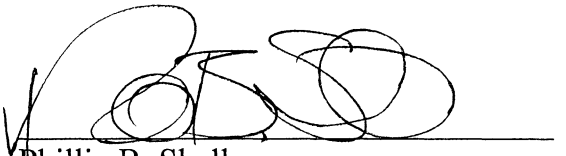

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