7-9-2008

Christensen v. S.L. Start & Associates, Inc. Appellant's Brief Dckt. 35169

IN THE SUPREME COURT OF THE STATE OF IDAHO

BETTY S. CHRISTENSEN,

Appellant,

vs.

STATE INSURANCE FUND,

Respondent.

DOCKET NO. 35169

APPELLANT'S BRIEF

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Appeal from the Idaho Industrial Commission.

Hearing Office Rinda Just presiding.

Michael J. Verbillis
Residing at Coeur d'Alene, ID for Appellants.

Paul J. Augustine
Residing at Boise, ID for Respondent.

Thomas W. Callery, Esq.
Residing at Lewiston, ID for Respondent.

TABLE OF AUTHORITIES

III.
STATEMENT OF THE CASE

i. **Nature of the Case.** This is Worker's Compensation case appealed from the Industrial Commission ("the Commission"), involving two injuries, four days apart, to Betty Christensen, which occurred on December 5 and December 9, respectively, 2002. Hearing was held before the Industrial Commission hearing officer on November 29, 2006. Findings of Fact and Conclusions of Law were entered by the Commission on November 20, 2007. Thereafter, an Order on Reconsideration was entered by the Commission on March 30, 2008.

ii. **Course of the Proceedings.** The Commission below approved the recommended Findings of Fact and Conclusions of Law by Referee Rinda Just that Claimant had not met her burden of establishing that her accepted injuries of 2005, combined with her previous impairments and disability to render her totally and permanently disabled.

iii. **Statement of the Facts.** At the time of the hearing, Betty Christensen was a 47 year old single mom with grown children. She had graduated from high school and had worked in various entry level jobs including electronic assembly and daycare, before completing post secondary schooling to become a medical assistant and medical secretary, which field she worked in steadily for approximately 12 years until she suffered a significant injury to her right leg in 1992. *Tr. p. 96 - Tr. p. 99, Claimant's Exhibit 8.*

The 1992 injury was also marked by complications owing to a disease which coincidently was diagnosed while Betty was healing from this right lower leg injury. This disease was known as Charcot Marie Tooth Disease, which is characterized as a severe degenerative neurological illness affecting the distal lower extremities. She underwent a triple fusion of her right ankle in Seattle, Washington due to the injury and the effects of the disease. *Tr. p. 73, l. 20 - p. 34 l. 8.*

The 1992 injury was characterized by her friend and physician, as one that clearly constituted a hindrance or obstacle to resumption of employment. *Tr. p. 39, l. 23 - p. 40, l. 2.* As a consequence

of the 1992 injury and its sequalae, Betty withdrew from full-time work and applied for Social Security. *Tr. p. 105, l. 25 - p. 106, l. 1.*

The injuries of record that have been accepted by the Defendant/Employer, the State Insurance Fund, took place, as previously indicated, four days apart, the first on December 5, 2002 and the second on December 9, 2002. Both injuries are marked by one unifying theme. Betty Christensen was attempting to avoid injury to patients that she was caring for in her job with S.L. Start, where she was working as a community support specialist. In the first, she was attempting to assist a patient being lifted out of a bus who was paralyzed from the waist down. During the transfer, she injured her back and right leg and lower extremity when the weight from the gait belt pulled her in this awkward position toward the patient. *Tr. p. 115, l. 1 - p. 117, l-5.* Four days later, while assisting another client, who was about to faint, she injured herself in trying to prevent injury to this client, who had become light headed while entering the hospital. She immediately experienced severe pain in the right shoulder, the neck, lower back, across both hips, and down the right leg. *Tr. p. 118, l. 10 - p. 119, l. 18.*

The treatment for these two injuries consisted of surgery to her right great toe and shoulder surgery. She had also been worked up by a neurosurgeon for complaints in her low back, but was felt by her attending physician to not be a surgical candidate. Ultimately, her attending physician, Dr. Carraher, issued a combined rating of 18%, giving various values for the surgically fused foot, the shoulder difficulty and her low back impairment. *Plaintiff's Exhibit 1, p. 10 - 11, Tr. p. 41, l. 10 - p. 43, l. 19.*

Her vocational history, after her hiatus from work and prior to the 2002 injuries, consisted of approximately 5 years of steady, albeit part time employment in the medical community. Her resume is documented by exhibit (*Claimant's Exhibit 8*), which lists the several jobs that she held on a part time basis between July of 1997 through February of 2002. These jobs include medical assistant, office nurse, patient care, assisting with minor procedures, and a variety of medically related jobs in the Coeur d'Alene medical community. *Id.* Not one of these jobs was full time and,

as indicated previously, Betty had been receiving Social Security. Under applicable Social Security rules and regulations, Betty was allowed to earn as much as $700 per month in part time work and still obtain her Social Security. *20 CFR §404.1744(b)(II)(ii)(B).* Betty Christensen has not returned to any employment, part time or full time, since the 2002 injuries.

Vocational experts testified on both sides of this case, as well as a Physical Therapist who performed a physical capacities exam (P.C.E.). Mark Bengtson, a physical therapist with Summit Rehabilitation Associates, testified that Claimant could not sustain even a 4 hour sedentary workday on a sustained basis. *Deposition Transcript, Mark Bengtson, p. 47, lns. 11-14.* Claimant's vocational expert, Tom Moreland, opined that, based upon his review of the medical evidence, including Mr. Bengtson's testimony, that Betty Christensen had lost the residual capacity to even engage in the work she had enjoyed pre-accident; to wit part time employment. The defense made the argument that Betty Christensen was already totally disabled based upon the ravages of her 1992 injury and the impact of the Charcot Marie Tooth Disease, notwithstanding the fact that Betty was actively involved in the workforce for 5 years as a valuable member of the medical community before being injured at S.L. Start.

From this evidence, the hearing officer concluded, and the Commission agreed, that Betty Christensen was **already** totally disabled before her 2002 injury and was, thus, not entitled to disability benefits. As an epilogue to the hearing, the Undersigned filed a Motion to Reconsider asking that the Commission award impairment based upon the essentially undisputed evidence of her treating physician. The Referee, again, concurred by the Commission, determined that the opinions of the consultants retained by the Defendant were more precisive and, accordingly, no impairment was awardable. *R. pp. 67 - 70.*

IV.
QUESTIONS PRESENTED

1. Whether the Commission erred by not following the teachings of *Page vs. McCain Foods, Inc.*, docket no. 33158, requiring a two-tiered analysis of disability.

2. Whether application of the *Hamilton - Bybee Doctrine.* in this case was properly invoked?

3. Whether the *Hamilton - Bybee Doctrine* should be overruled by this Court?

V.
DISCUSSION

1. Introduction.

The central issue in this case revolves around whether or not a person is receiving Social Security disability benefits and working part-time can become eligible for total and permanent disability benefits under the Worker's Compensation Act. The standard to be utilized by this Court regarding evidentiary issues is very familiar. This Court will not reweigh the evidence or the credibility thereof relied upon by the Commission and it will not disturb any findings regarding the weight and credibility unless they are clearly erroneous. *Hutton vs. Manpower, Inc.*, 143 Idaho 73, 149 P.3d. 848 (2006). This Court, however, exercises free review over legal issues. *Id.*

In this case the Claimant contended she was totally disabled on the basis of the odd lot doctrine. It is thus governed by the provisions of *Idaho Code §72-332(1)*, which provides:

> **Payment for second injuries from industrial special indemnity account.** – (1) If an employee who has a permanent physical impairment from any cause or origin, incurs a subsequent disability by an injury or occupational disease arising out of and in the course of his employment, and by reason of the combined effects of both the pre-existing impairment and the subsequent injury or occupational disease or by reason of the aggravation and acceleration of the pre-existing impairment suffers total and permanent disability, the employer and surety shall be liable for payment of compensation benefits only for the disability caused by the injury or occupational disease, including scheduled and unscheduled permanent disabilities, and the injured employee shall be compensated for the remainder of his income benefits out of the industrial special indemnity account.

Idaho Code §72-332(1).

This Court has held that the Claimant seeking to obtain contribution from the ISIF must provide: (1) that there was a pre-existing impairment, (2) that the impairment was manifest; (3) that the impairment was a subject hindrance; and (4) that the pre-existing impairment and the subsequent

injury in some way combine to result in total and permanent disability. *Dumaw vs. J.L. Norton Logging,* 118 Idaho 150, 795 P.2d 312 (1990).

2. The Commission erred by not making separate findings of disability and then allocating those elements of disability to pre-existing and post accident conditions.

Less than two months following the decision of the Referee in this case, the Supreme Court announced a decision long awaited by Worker's Compensation practitioners. *Page vs. McCain Foods, Inc.* (January 2008, Supreme Court docket no. 33158). This case stands for the proposition that in any worker's compensation case where there is the issue of permanent disability that may be impacted in part upon a prior impairment, as well as the impairment reflective of the injury under examination, the Commission must engage in a two-tiered analysis. First, the Commission must make a separate finding as to the degree of permanent disability from all sources, then the Commission must apportion that disability between pre-existing injuries and the current injury. *Id.* It is evident in this case that the hearing officer did not engage in such an analysis. Indeed, the hearing officer seemed to have been seemed to have been fixated upon how many hours and how many dollars the Claimant earned during the five years period of time prior to the accident(s) rather than analyzing whether or not this was meaningful employment. A proper analysis of the evidence would have involved a finding of the level of disability of Claimant and a corresponding assessment of physical restrictions, limitations and abilities contrasted between her pre-2002 condition and her condition following the accident(s). For example, how long could she walk, sit, stand, etc. before and after the 2002 injury? How much could she lift and/or carry? Then, an analysis as to how those impairments affected Claimant to earn a competitive wage should have been done. .

It is evident on this record that the Claimant was **unable** to work in a full time capacity and could only work in a part time capacity doing sedentary work. That to some would be considered a substantial disability. Indeed, it is conceded by the Undersigned that such would be an accurate portrayal of the overall employability of Betty Christensen as of December of 2002.

Having said that, she was, in fact, engaged in work in a competitive world, even if it was only part time. That is what has been taken from her as a result of these last two injuries. There is no debate that she lacks the capacity to work in any setting; part time, full time, sedentary, etc. What little ability that she had and what she persevered with is no longer viable.

3. The Commission Improperly Applied *Hamilton - Bybee.*

Two cases have come out of the Supreme Court in the last several years concerning fact patterns where a previously disabled worker re-enters the workforce and is then injured, only to find that they can no longer work again. These two cases both focus on the subtleties of the language appearing in Idaho Code §72-332. Reference is made to the portion of the statute that indicates that the disability must be from the "combined effects" of the pre-existing impairment **and** the subsequent injury. *Hamilton vs. Ted Beamis Logging & Const.*, 127 Idaho 221, 899 P.2d. 434 (1995); *Bybee vs. State, Indus. Special Indem.*, 129 Idaho 76, 921 P.2d. 1200 (1996).

It appears as though the underlying analysis in *Hamilton* and *Bybee* are that sympathetic employers do exist. Indeed, Mr. Hamilton went back to work for his previous employer after a lengthy recuperation following a relatively severe injury that had predated the one that brought him before the Court. As the Court framed the issue, it was obliged to:

> Consider whether a Claimant, who was totally and permanently disabled at the time of an industrial accident and employed only because of the sympathy of his employer, is entitled to an award of total disability benefits.

127 Idaho 221 @ 223.

It is clear that the Supreme Court in reversing the Industrial Commission was moved by the fact that the Claimant had only been offered a job by the employer "because they were friends and Beamis was attempting to help Hamilton out." *127 Idaho 221 @ 224.* This is, indeed, the classic sympathetic employer.

Bybee vs. State, Indus. Special Indem., supra, involved slightly different but analogous facts to *Hamilton*. In *Bybee*, the Commission had determined that the injured worker, even though she

was employed at the time of the "second injury," was involved in employment that was "essentially the equivalent of that of a sympathetic employer or friend." *129 Idaho 76 at 83.*

Bybee sets forth the analytical framework for tribunals to follow in analyzing the factors set forth in *Idaho Code §72-332*, with particular emphasis on the "combined with" element. In order for a Claimant to establish odd lot status, per *Bybee*, he must first demonstrate that he was employed at the time of his second injury. Thereafter, the party seeking to invoke *Hamilton* must then show that the Claimant's actual employment was due to "a business boom, the sympathy of a particular employer or friends, temporary good luck, or a superhuman effort on her part." 129 Idaho Code 76 at 129, quoting from *Lyons vs. Indus. Special Indem,* 98 Idaho 403 at 406. Thus, it appears that this Court, in analyzing fact patterns where a partially disabled worker suffers a subsequent injury and contends that the combined effects render him totally disabled, will not condone the award of total and permanent disability benefits if the employment during the second injury was due to the factors listed above. *Id.*

Here, there is no evidence in this record that the employment Claimant held with S.L. Start was due to a business boom, the sympathy of a particular employer, temporary good luck, or a superhuman effort on her part. Moreover, the fact that she had held five previous jobs where she was allowed to use a combination of her post secondary education and perseverance to be employed separates this case rather dramatically from the fact patterns in *Hamilton* or *Bybee*. Her lengthy employment record with a variety of employers and letters of recommendation take Betty Christensen's case out of the *Hamilton - Bybee* context.

It appears as though the hearing officer improperly analyzed the combined with requirement of *Idaho Code §72-332* and based the decision entirely on the fact that the Claimant was only involved in part-time work and that she was receiving Social Security.

The logic of the hearing officer is somewhat seductive. After all, why should a person on Social Security seek total and permanent disability benefits? Hasn't that person, in fact, told the

world that she is unable to work and, hence, is receiving the safety net provided by the Social Security Administration? The answer is yes and no.

As previously mentioned, the Social Security system in this country recognizes that certain workers should have the right to earn a modest amount of money on a monthly basis and not be deemed disqualified from Social Security benefits. As mentioned, infra, $700 a month at times material was the threshold amount that the Social Security Administration deems as "substantial gainful activity" within the meaning of the federal statutory scheme and the regulations interpreting the same.

Against the implicit suggestion that Betty Christensen would be "double dipping" by receiving Social Security and total and permanent disability benefits consider the fact that the amount of benefits she shall receive would be greatly capitated in her case owing to her previous average monthly earnings. This ceiling is part and parcel of the entire fabric of the Worker's Compensation Act in this state.

As the Undersigned attempted to point out to the tribunal below, the fact that Betty was on Social Security and that she would attain a markedly reduced amount of disability benefits were she to prevail below is already punishment enough, if you will, for the fact that she wasn't "fully" employed.

The Worker's Compensation Act has within it numerous seemingly arbitrary caps on benefits. First of all, unless a person is totally and permanently disabled, a person that is severely injured will only receive compensation for a percentage of 500 weeks. Thus, the 20 year old person with a below knee amputation receives the same amount as the 65 year old worker with the same injury, even though the 20 year old person has a longer time to endure his disability. *Idaho Code §72-426, 428.*

Additionally, there is a cap on the monetary amount a person can receive as a percentage of his previous earnings. Thus, even if a person was earning over $100,000, such as a Supreme Court

Justice, that person, when receiving worker's compensation, would only get a portion of the average state wage, which is somewhere in the neighborhood of $32,000. Idaho Code §72-409.

Thus, there are seemingly arbitrary limits of the amount of and duration of impairment and disability payments that can be received by an injured workers. Betty Christensen's life plays into this drama in the sense that she would only receive a bare minimum of worker's compensation benefits were she to have prevailed below.

Indeed, Betty Christensen will receive no more than 45% of the average weekly wage and it is possible that she could be receiving somewhere between 15% of the state wage and 45%. As of October of 2005, the average weekly state wage in Idaho was $543.

4. Hamilton and Bybee Should be Overruled.

The *Hamilton/Bybee Doctrine*, as is has become known by practitioners of worker's compensation, is a modern anachronism. It stands for the proposition that the safety net granted to employers in the form of Idaho Code §72-332 and, coincidentally, to employees, is really not there. Anyone who attempts to pull himself up by the bootstraps, turn off Oprah and get a job, is subject to being found to be a total by an *ex post facto* ruling of a referee.

There must be some line that can be drawn between the superhuman effort of an employer that re-enters the workplace following a partially disabling injury and the bittersweet finding by a tribunal, **several years after the fact,** that that person was deemed to be a "walking total." The Undersigned would propose a modification of the *Hamilton - Bybee Doctrine*. This modification would bar the employer who has knowingly employed a partially disabled worker from asserting odd lot status in the event of a subsequent injury. After all, that employer benefitted from the labor of the partially disabled employee, as do all other employers in this State. Moreover, the Industrial Special Indemnity Fund should likewise be barred from asserting the doctrine.

Such a rule would not be a dramatic departure from the statutory scheme as it exists. The entire statute is written as to the employee who is seeking benefits. Nothing in the statute

specifically creates the so-called *Hamilton - Bybee* defense, save and except the combined with language in the statute. *Idaho Code §72-332.*

On such a narrow wisp was this judge made defense created. As the dissent in *Bybee* pointed out, the Commission based its finding of the sympathetic employer on the basis of expert testimony, to wit "that only with a sympathetic employer would she be employed." *129 Idaho 76 at 84.*

Although Justice Silak's dissent turned on substantial competent evidence, the debate inherent in *Bybee* leads one to conclude that *Hamilton* started this Court on a slippery slope in attempting to over analyze and perhaps give some extra statutory judicial immunity to the Second Injury Fund. What one finds most galling with this thinly veiled immunity is that there is no sound policy reason for the same. The Industrial Special Indemnity Fund is created by and maintained by a tax on worker's compensation settlements. *Idaho Code §72-327.* This Fund is for the benefit of those employers that would be otherwise reluctant to hire partially disabled employees and certainly for the benefit of those employees who seek work with a disability.

This Court has done a disservice to the working men and women of this State who have attempted to re-enter the workforce following severe injuries. It is time to put an end to this injustice with a bright line ruling that creates estoppel principles with respect to which party can assert the combined with element. Having written the foregoing, the Undersigned is soberly aware that the purported judicial activism of Justice Trout in the *Hamilton* and *Bybee* decisions may well be interpreted by this Court as simply thoughtful analysis of the statute.

The response would be that the hallmark of the Worker's Compensation Act is so that the statute can provide "sure and certain relief for injured workmen and their families." *Idaho Code §72-332.*

CONCLUSION

In conclusion, it is respectfully submitted that the Commission erred in the first instance by not following the recently announced two-tiered analysis of disability and, more profoundly, by

improperly fitting this case into the *Hamilton - Bybee* rubric. This Court is further invited to discard into the trash can of history the holdings of *Hamilton* and *Bybee*.

Respectfully submitted this 7 day of July, 2008.

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CERTIFICATE OF SERVICE

I certify that on the 7 day of July, 2008, a true and correct copy of the foregoing was sent via U.S. mail to:

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