8-29-2008

Christensen v. S.L. Start & Associates, Inc. Appellant's Reply 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 REPLY 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

CASES

STATUTES

The Employer and Special Indemnity Fund have filed briefs responsive to Christensen's opening brief and have argued, respectively (1) that the rule announced in *Page vs. McCain Foods, Inc.*, docket no. 33158, does not apply in this case and (2) that there can be no disability assessed in any event without an assessment of impairment which the Commission specifically did not award.

1. The Commission Erroneously Failed to Apply *Page vs. McCain Foods, Inc.*

The position taken by the Employer is that the doctrine announced in *Page vs. McCain Foods, Inc.*, requiring a two tiered analysis of disability is inapplicable to cases where the Commission finds a person to be totally disabled **prior to** the accident in question. Appellant disagrees. In all cases, whether a person is adjudicated to be totally and permanently disabled, whether they are adjudicated partially disabled, or any other fact pattern, if there are facts in the record demonstrating that there is a disablement from a prior condition and there are facts in the record showing that there is disability from a totality of circumstances, then the Commission is obliged to enter into a two tiered analysis of that disability. *Page.*

The record in this case is devoid of any such analysis. In fairness to the Hearing Officer, *Page vs. McCain Foods, Inc.* was not announced by this Court at the time the briefing of the Christensen case was before the Commission. The only remedy appropriate then, is to remand this case to the Commission to conduct an inquiry as to the extent of the disability that Ms. Christensen suffers from from all sources and then for analysis of the extent to which any prior difficulties Ms. Christensen suffered from are contributory.

2. The Commission erred by not awarding impairment and such error was manifest injustice.

It is succinctly argued by the Industrial Special Indemnity Fund that Appellant's argument concerning whether or not disability should be apportioned between the total picture as it existed at hearing and her prior disability is moot, the Commission having awarded no impairment. Since the Commission did not award any impairment, the argument goes, there is no disability awardable.

This analysis is proffered by the Industrial Special Indemnity Fund for the simple reason that the typical case involves an assessment of impairment, both pre-existing and from the complained of accident and an apportionment of how that impairment should be spread between the Employer and the Industrial Special Indemnity Fund a la *Carey*. *Carey v. Clearwater County Rd. Dep't*, 107 Idaho 109, 686 P.2d 54 (1984).

Thus, the argument of the Industrial Special Indemnity Fund is simply that since there was no impairment awarded by the Commission, then there is no need to apportion. This analysis, however seductive at first blush, fails to appreciate the circumstances under which the Commission below should have, nonetheless, applied *Page vs. McCain Foods, Inc.* In other words, not all cases where a claimant is asserting total and permanent disability need be subject to a *Carey* analysis.

Indeed, the claimant may assert total and permanent disability status and fall short of that mark but be entitled to an award of a substantial disability in excess of impairment. In those fact patterns, *Carey* is never implicated. Having written the foregoing, it is acknowledged that the failure of the Commission to enter any impairment award is a significant obstacle for Ms. Christensen to overcome on this appeal.

That the Commission failed in any meaningful analysis of the evidence when the decision was first written should be abundantly clear. The Hearing Officer spent several pages analyzing how many hours the Claimant had worked following her recuperation from her early bout of Charcot Marie Tooth Disease and opined that since she was only working somewhere between 10-24 hours a week she was not "employed" or that her limitations weren't any greater before and after the 2002 accidents.

This wayward analysis left out any discussion of impairment. This, in turn, lead to the utter failure of the Hearing Officer to even consider the testimony of Dr. Carraher, who testified live before the Commission and who gave ample evidence of his credentials regarding impairments. To wit:

> Q. Also in your CV, I noticed that you have some credentials relating to ratings. Can you tell us about that a little bit?
>
> A. I performed independent medical examination, also. Is that what you 're implying? I understand your question correctly?
>
> Q. Okay. And by whom were you certified to perform these independent medical examinations?
>
> A. I've taken classes through the American Board of Occupational Medicine. I've taken classes - I guess certification through the American Academy of Disability Evaluating Physicians, and also through the American Board of Independent Medical Examiners.

Tr. p. 31, ln. 24 - p. 31, ln. 11.

Again, it was this certified physician who testified before the Commission who ultimately opined that Betty Christensen suffered from an 18% whole man impairment by virtue of the **combination** of the injuries that she suffered on the two accidents in December, 2002. Dr. Carraher, for example, opined that her foot injury from the documented 2002 injuries resulted in a 4% impairment of the whole person. He further opined that her shoulder was rated at 10% of the whole person and he further gave her 5% for her back injuries. *Tr. p. 41, ln. 23 - p. 42, ln. 15.* The doctor further went on to describe in detail how multiple injuries are subject to, under the AMA Guides of Impairment, a combined value table, which the doctor went on to explain at page 42 of the transcript. *See also, Claimant's Exhibit 1, pgs. 10 - 11.*

Contrarily, the physicians from Spokane, Washington opined that Ms. Christensen had no permanent impairment due to the incidents in questions. *Special Indemnity Fund, Exhibit 18, pg. 95.* That the Commission in the first order failed to even address the impairment ratings given by either the treating physician who testified live (Carraher) or the retained witnesses whose report was received into evidence demonstrates a bizarre lack of orientation with respect to the gravamen of this case. *R. pp. 31-50.* The Referee stated:

> In light of the finding that Claimant was totally and permanently disabled as an odd-lot worker prior to the accident that gave rise to this proceeding, all other issues are moot.

R. p. 50.

To throw further salt in the wound, after the undersigned filed a Motion for Reconsideration *(R. pp. 55-58)*, the Hearing Officer glibly responded by essentially saying "oh, by the way, I find the opinions of these two Spokane doctors whom I haven't seen to be more persuasive than the certified examiner who testified live.

That this finding is not only not supported by the record, but that it amounts to manifest injustice should be plainly evident. Nowhere in the record, either from the original decision by the Hearing Officer or by the decision following the Motion for Reconsideration is there any analysis of why this Hearing Officer found Drs. Bozarth and Adams more persuasive than a certified examiner. Nowhere in the record is it stated that there is any familiarity with Idaho law with respect to principles physicians are to utilize in assessing impairment. Nowhere in the record is there any familiarity or acquaintanceship by either of the Spokane doctors that they are familiar with *Urry v. Walker & Fox Masonry Contractors,* 115 Idaho 750, 769 P2d. 1122 (1989).

The *Urry* case stands for the proposition that a doctor should take complaints of pain into account when reaching an opinion regarding impairment. Drs. Bozarth and Adams, through their lengthy opus, displayed almost studied ignorance in Idaho law and, moreover, failed to separate the various and sundry injuries that Ms. Christensen suffered in 2002.

It should be reiterated at this point that Ms. Christensen suffered back, shoulder and foot injuries in connection with these December, 2002 incidences. It appears as though Drs. Bozarth and Adams related **all** her problems to her Charcot Marie Tooth Disease. What is troubling about that approach from these physicians is that the Charcot Marie Tooth Disease only affects the **lower extremities**. It does not affect the back, and does not affect the shoulder. There is nothing in the record that would stand for the proposition that Ms. Christensen did not suffer a discrete injury to her low back owing to her 2002 injuries.

The fact that doctors Bozarth and Adams missed this subtlety in medicine is not of great moment. What is, however, troubling, however, is the utter failure of the Hearing Officer to analyze

why she apparently thought Drs. Bozarth and Adams were more worthy of belief that Dr. Carraher, particularly when a great deal of time in this hearing went to discussing the specifics of how the Charcot Marie Tooth Disease affects the distal lower extremities and that, in no way could the acceleration of her pre-existing disease entity be responsible for or related to her shoulder or back injuries.

Again, it is understandable for hired guns to "overlook" this issue, but it is expected that a neutral hearing officer would correctly view the evidence and rule accordingly. This Hearing Officer did not do so, and it is humbly submitted that the reason for that failure is her conclusion driven decision that since Ms. Christensen was not "fully employed" at the time of her 2002 injuries, she should not be considered for any impairment or disability.

This failure by the Hearing Officer amounts to manifest injustice. The fact that the Hearing Officer totally ignored impairment in the initial opinion is sad but not irreparable. That she failed to analyze and opine why Drs. Bozarth and Adam's opinions should have been more persuasive is palpably reversible. *I.C. §72-719(3), cf. Banzhaf v. Carnation Co.,* 104 Idaho 700, 662 P2d. 1144 (1983).

3. Claimant was gainfully employed at the time of her accident and was not an odd lot worker.

Of course, Ms. Christensen has taken great exception to the erroneous finding that Ms. Christensen was an odd-lot worker prior to her industrial accident of 2002. Briefly reiterating, it is urged that the finding of odd-lot status is based upon the number of hours worked per week, rather than the actual physical and intellectual challenges of the part-time work in which Claimant was employed following her historic lower extremity injury that was complicated by the CMT.

There was no testimony offered by any person that the six different jobs Claimant had prior to her work at SL Start, **after** she re-entered the workforce following her partial recuperation from CMT were offered by sympathetic employers. In fact, the only testimony on the record by any

employer was that of Dr. Carraher, who stated clearly and unequivocally that Claimant provided quality service in a specialty area for which he was extremely grateful.

> Q. Did you ever feel in your own mind that when you employed her for the approximate 4 year period between 1997 and 2001 that you were doing her a favor?
>
> A. I'm not sure what you mean. Are we talked sympathy again?
>
> Q. Yea. Sympathy.
>
> A. I hired her because she could do the job that needed to be done and I knew from prior experience what her abilities were.

Tr. p. 50, ll. 3 - 12.

Betty Christensen was employed for several years before the 2002 accident. She worked in a skilled technical field. She wasn't employed because someone felt sorry for her or because she employed any superhuman efforts. In the medical community, word gets around that there are quality people available to work either on a full-time or part-time basis. The stigma that Betty Christensen had in this case that colored the reasoning of the Hearing Officer, was that she was a part-time employee receiving social security.

The opening brief has already addressed the dynamics of and interplay of the Social Security Act upon Worker's Compensation. It is strongly urged that the Referee's decision subscribed to by the Industrial Commission was one that is wholly unsupported by the law and, in fact, it turns the odd-lot doctrine on its head.

CONCLUSION

In conclusion, it is respectfully submitted that the Hearing Officer committed grievous error in failing to award impairment in the initial decision and then compounded that error by not focusing correctly on the evidence received in this case, which, under proper review, would have resulted in an award of impairment. Since impairment was not awarded, there was no meaningful analysis of disability under the *Page Doctrine* and the entire analysis of the Commission is fatally flawed. This case should be reversed and remanded.

Respectfully submitted this 26th day of August, 2008.

MICHAEL J. VERBILLIS
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CERTIFICATE OF SERVICE

I certify that on the 26 day of Aug, 2008, a true and correct copy of the foregoing was sent via U.S. mail to:

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