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California Packing Corporation v. Industrial Commission of Utah and Juanita Lewis Johnson : Reply Brief of Plaintiff

Utah Supreme Court

DeVine, Howell & Stine; Neil R. Olmstead; Plaintiff's Attorneys;

6305

In the Supreme Court
of the State of Utah

CALIFORNIA PACKING CORPORATION,
a corporation,
Plaintiff,

vs.

INDUSTRIAL COMMISSION OF UTAH,
and JUANITA LEWIS JOHNSON,
Defendants.

No. 6305

PLAINTIFF'S REPLY BRIEF

DEVINE, HOWELL & STINE and
NEIL R. OLMSTEAD,
Plaintiff's Attorneys.

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In view of the fact that defendants apparently fail to comprehend the position taken by the plaintiff in this matter, we feel constrained to file this reply to defendants' brief to the end that there may be no doubt as to just what plaintiff is contending.

We do not urge that the average daily operation of plaintiff's business during the year next preceding the injury, or for any other period, is the basis for determining what is "usual operation." What we do urge is that the Commission must find from the evidence before it what is the usual operation, and in making that finding, all of the competent evidence

must be considered. Here the parties entered into a stipulation showing the operation of plantiff's business over a period of fifty-four weeks prior to the injury. It is by reason of this showing of the fifty-four week operation that we say that the Commission must use the same as the basis in making its determination as to what was plaintiff's usual operation. Had the evidence before the Commission been limited to a showing of the operation for but a four week period, or a one week period, or a six month period, or a five year period, we would say that the determination of plaintiff's usual operation must be based upon that evidence, and that the Commission would not be justified in basing it upon anything other than all of the evidence before the Commission in that regard. Here the evidence disclosed the operation over a fifty-four week period. The Commission is not justified in disregarding that evidence and basing its determination upon the operation of the business at the time of the injury.

Nor do we urge, as suggested by defendants, that plaintiff's usual operation consists of the average weekly operation over this fifty-four week period, which average weekly operation is approximately 5.69 days per week. All we urge is that the evidence relates to a fifty-four week period—that during such fifty-four week period, plaintiff's business consisted of 19 five day weeks, 16 five and one-half day weeks, 11 six day weeks, and 8 seven day weeks; that it is apparent upon the face of this evidence that the usual operation of plaintiff's business was not seven days per week, but, on the contrary, was six days or less per week. Had the evidence disclosed simply that for a period of six weeks prior to the injury, plaintiff's business had been operating seven days per week, we would then agree with the Commission that upon the

evidence, the usual operation of plaintiff's business was seven days per week. But here, the evidence discloses that plaintiff had forty-six weeks of six days or less per week, as compared to eight weeks of seven days. The only finding that can be made from that evidence is that the usual operation of plaintiff's business was six days or less per week.

Defendants, however, argue that the evidence discloses that seven days per week was a usual operation of plaintiff's business for this season of the year. This assertion is made with absolutely no evidence to support it, and directly in the teeth of the uncontradicted evidence. The deceased was injured on October 13, 1939. The evidence shows that at this season of the preceding year, plaintiff's business operated but 5½ days per week. We specifically direct the Court's attention to the stipulation which shows that during the week ending October 8, 1938, plaintiff's business operated but 5½ days a week, and that during the week ending October 15, 1938, plaintiff's business operated but 5½ days per week, and that it was not until the week ending July 8, 1939, that plaintiff's business operated for more than six days per week. To now assert that seven days per week was the usual operation of plaintiff's business for this season of the year is to do so with absolutely no evidence to support it, and in the face of the uncontradicted evidence.

Defendants further apparently take the position that it is the number of days per week that the injured is employed at the time of his injury that controls as to which formula is to be used. That is, if he is in fact working seven days per week when injured, his compensation should be based upon seven day employment per week. This is evidenced by the following appearing at page 4 of the defendants' brief:

> "To take another example: Suppose Mr. Johnson had been employed only a week or two before he was fatally injured. If plaintiff's contention is to prevail, his compensation would not be fixed by the weekly wage he actually received when injured, but by the average number of days per week that the plaintiff had been operating the preceding year. There is no language in the act which justifies such conclusion."

It is not apparent why the defendants inject the matter of weekly wage into the foregoing, because, so far as plaintiff is concerned, there is no question with respect thereto. The only question is whether the formula for seven day employment per week or whether the formula for five and one-half or six day employment per week shall be used. We do not, and never have, disputed that the wage at the time of the injury is the wage to be considered, but it does not follow therefrom that the number of days per week of operation at the time of injury is controlling. The statutes are specific on this. As to weekly wage, the statute provides:

> "The weekly wage of the injured person at the time of injury shall be taken as the basis upon which to compute benefits."

There is no similar provision with respect to determining employment per week. On the contrary, the statute provides that five and one-half, six, or seven day employment per week shall be based upon the "usual operation" of plaintiff's business. It is significant that these two matters are dealt with by the legislature in the same paragraph of the statute (Section 42-1-70, Revised Statutes of Utah, 1933, as amended by Chapter 41, Laws of Utah, 1937; page 8 of plaintiff's brief). With respect to weekly wage, the legislature provided that the

time of the injury should govern, while as to the number of days employment per week it provided that the usual operation of the business should govern. With this in mind, it is impossible to conceive that the legislature intended the same rule to govern, else there would have been no occasion to make any distinction as to the wage and the weekly period of employment; indeed, the word "usual" might as well have been omitted. Had the legislature not meant "usual" operation, it certainly would not have used that word. And the fact that the deceased was working seven days per week at the time of the injury certainly does not establish that seven days per week constituted plaintiff's usual operation.

We heartily agree with defendants' statement near the bottom of page 4 of their brief that the length of the deceased's employment by plaintiff is immaterial in determining whether the employment is five and one-half, six or seven day employment per week. Whether the employee has been employed but a week, a year, or ten years, it is still necessary to determine the usual operation of the employer's business. The length of time the individual has been employed therein, is absolutely immaterial. The amount of compensation to which an injured employee is entitled, or his dependents in the event of his death, is neither increased nor reduced by length of service.

It leads us nowhere to pose hypothetical situations as defendants do on page 4 of their brief, wherein they "Suppose a business operates seven days per week for only one month a year and is closed down during the remainder of the year"; or "Also, if a business is operated only one week of seven days during a given year * * *." The answer to such suppositions must be the same as in the case before us. The formula to

be used in determining compensation must be the one in accord with the "usual operation" of the employer's business. The writer is frank to state that he would have considerable difficulty in finding that a business that operates but one week a year, and during that week for seven days, is a business that "usually operates" seven days per week. The obvious answer is that such a business does not "usually" operate seven days a week. The same difficulty would be encountered with a business that has fifty-one five day weeks and one seven day week. It would take a considerable stretch of the imagination to hold that such business usually operates seven days per week.

Defendants have continuously throughout their brief referred to the question of weekly wage, and assumed that some question involving the same was raised by these proceedings. At page 4 of their brief, they say:

> "Also, if a business is operated only one week of seven days during a given year, it may not be successfully maintained that a person who is injured or killed during that week shall be entitled to compensation on the basis of 1/52nd of his actual weekly wage."

The writer does not know who is seeking to maintain such a proposition. Certainly not the plaintiff. We agree that the weekly wage at the time of the injury is to be used as the basis; not 1/52nd thereof, nor any other fraction. But the question of days of employment per week is something entirely different. That depends on the usual operation of the employer's business, not upon a factual situation at the time of the injury.

The defendants further assert:

> "The case of Morrison-Merrill Co. v. Industrial Commission, 81 Utah 363; 18 P. (2d) 295, lends support to defendants' contention."

If defendants' contention is that the weekly wage as of the date of the injury is to be used in determining compensation, plaintiff agrees therewith, because such case specifically so holds. On the contrary, if defendants' contention is that the Commission was right in using the formula for seven day employment in determining benefits, then plaintiff denies that such case supports in any wise such contention, because that matter is not considered by the Court in that case.

Respectfully submitted,

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