

1940

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

Utah Supreme Court

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Wm. A. Hilton; Attorney for Plaintiff and Appellant;

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

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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 BRIEF

DeVINE, HOWELL & STINE and
NEIL R. OLMSTEAD

Plaintiff's Attorneys

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CALIFORNIA PACKING CORPORATION,
a corporation,

Plaintiff,

vs.

INDUSTRIAL COMMISSION OF UTAH,
and JUANITA LEWIS JOHNSON,

Defendants.

No. 6305

PLAINTIFF'S BRIEF

STATEMENT OF THE CASE

This is an original proceeding in this court for the purpose of reviewing an award made by the Industrial Commission of the State of Utah against this plaintiff and in favor of Juanita Lewis Johnson, and the findings and conclusions of said Commission upon which said award is predicated, dated July 29, 1940, in the matter designated by said Commission as Claim No. 4270. After petition for rehearing had been duly filed by the plaintiff herein within the time allowed by law, and after the same had been denied by the Commission, plaintiff herein, within due time, applied to this court for the issuance of a writ of certiorari, which writ was issued by this court, and to which writ return has been made to this court.

It having been admitted that J. Frank Johnson, the deceased, suffered injuries arising out of and in the course of his employment with the plaintiff, and that from said injuries he subsequently died, there is no question but that his widow, Juanita Lewis Johnson, is entitled to benefits for herself and minor children. This case, accordingly, involves the sole question as to the extent of the benefits the said Juanita Lewis Johnson is entitled to for herself and said minor children. The Commission awarded benefits to her in the sum of \$21.84 a week. It is the contention of the plaintiff that there is no evidence to support the award of the Commission in such an amount per week, and that the uncontradicted evidence shows that the award should not have been in any sum greater than \$19.73 per week.

STATEMENT OF THE FACTS

While this matter was pending before the Commission the respective parties filed with the Commission an agreed statement of the material facts, and submitted the matter to the Commission for decision upon such agreed statement. By such statement the following facts were agreed:

1. That the deceased died as a result of an injury suffered by him on October 13, 1939, while in the course of his employment with the plaintiff.
2. That at the time of his injury and death, his widow, the defendant, Juanita Lewis Johnson, and eight minor children were wholly dependent upon him for their support and maintenance.

3. That plaintiff was subject to the Workmen's Compensation Act of Utah, and that it was a self-insurer.

4. That plaintiff operated its business each week from the week ending October 8, 1939, to the week ending October 14, 1939, the following number of days :

Week ending October 8, 1938, 5½ days.
 Week ending October 15, 1938, 5½ days.
 Week ending October 22, 1938, 5½ days.
 Week ending October 29, 1938, 5½ days.
 Week ending November 5, 1938, 5½ days.
 Week ending November 12, 1938, 5½ days.
 Week ending November 19, 1938, 5 days.
 Week ending November 26, 1938, 5 days.
 Week ending December 3, 1938, 5 days.
 Week ending December 10, 1938, 5 days.
 Week ending December 17, 1938, 5 days.
 Week ending December 24, 1938, 5 days.
 Week ending December 31, 1938, 6 days.
 Week ending January 7, 1939, 5 days.
 Week ending January 14, 1939, 5½ days.
 Week ending January 21, 1939, 5 days.
 Week ending January 28, 1939, 5 days.
 Week ending February 4, 1939, 5 days.
 Week ending February 11, 1939, 5 days.
 Week ending February 18, 1939, 5 days.
 Week ending February 25, 1939, 5 days.
 Week ending March 4, 1939, 5 days.
 Week ending March 11, 1939, 5 days.
 Week ending March 18, 1939, 5 days.
 Week ending March 25, 1939, 6 days.
 Week ending April 1, 1939, 5½ days.
 Week ending April 8, 1939, 5½ days.
 Week ending April 15, 1939, 5 days.
 Week ending April 22, 1939, 5½ days.
 Week ending April 29, 1939, 5½ days.

Week ending May 6, 1939, 5½ days.
 Week ending May 13, 1939, 5½ days.
 Week ending May 20, 1939, 5½ days.
 Week ending May 27, 1939, 5½ days.
 Week ending June 3, 1939, 6 days.
 Week ending June 10, 1939, 5 days.
 Week ending June 17, 1939, 5½ days.
 Week ending June 24, 1939, 6 days.
 Week ending July 1, 1939, 6 days.
 Week ending July 8, 1939, 7 days.
 Week ending July 15, 1939, 7 days.
 Week ending July 22, 1939, 6 days.
 Week ending July 29, 1939, 5 days.
 Week ending August 5, 1939, 6 days.
 Week ending August 12, 1939, 6 days.
 Week ending August 19, 1939, 6 days.
 Week ending August 26, 1939, 6 days.
 Week ending September 2, 1939, 6 days.
 Week ending September 9, 1939, 7 days.
 Week ending September 16, 1939, 7 days.
 Week ending September 23, 1939, 7 days.
 Week ending September 30, 1939, 7 days.
 Week ending October 7, 1939, 7 days.
 Week ending October 14, 1939, 7 days.

5. That plaintiff's record showed the following work record of the deceased with plaintiff :

WORK RECORD OF J. FRANK JOHNSON
SEC. No. 529-01-3273

One year period—Oct. 15, 1938 to Oct. 14, 1939, Inc.

1938	Week End.	Amt.	Hrs. Worked	Days Worked
	10-15	\$ 3.80	8	1
	10-22	9.99	21	3
U.I.S.	10-19 to 31	54.60	Two wks. period less 3 days above	
“	11-1 to 15	63.00	Two wks. period	

1938	Week End.	Amt.	Hrs. Worked	Days Worked
U.I.S.	10-16 to 30	63.00	Two wks. period	
"	12-1 to 15	63.00	"	"
"	12-16 to 31	58.00	"	"
C.P.C.	12-31	7.13	16	2
1939				
	1-7	15.20	32	4
	1-14	20.90	44	5½
	1-21	19.00	40	5
	1-28	19.00	40	5
	2-4	3.80	8	1
	2-11	None		
	2-18	None		
	2-25	18.28	38½	5
	3-4	19.00	40	5
	3-11	19.12	40½	5
	3-18	19.00	40	5
	3-25	19.00	40	5
	4-1	19.00	40	5
	4-8	3.80	8	1
	4-15	19.00	40	5
	4-22	19.00	40	5
	4-29	19.00	40	5
	5-6	19.00	40	5
	5-13	19.01	40	5
	5-20	19.00	40	5
	5-27	19.00	40	5
	6-3	15.20	32	4
	6-10	19.00	40	5
	6-17	19.36	40¾	5
	6-24	20.90	44	5½
	7-1	24.58	51¾	6
	7-8	44.31	93¼	6
	7-15	30.53	64¼	7
	7-22	19.24	40½	5
	7-29	17.10	36	4½
	8-5	17.10	36	4½

1939	Week End.	Amt.	Hrs. Worked	Days Worked
	8-12	20.90	44	5½
	8-19	23.04	48½	6
	8-26	32.18	67¾	6
	9-2	36.11	76	6
	9-9	32.54	68½	6
	9-16	43.10	90¾	7
	9-23	47.16	99¼	7
	9-30	39.90	84	7
	10-7	32.43	68¼	6
	10-14	29.92	63	6
		<hr/>	<hr/>	
		\$913.63	1895¼	

6. That the deceased, at the time of his injury and prior thereto, was being paid 47½ cents per hour for his labor.

STATEMENT OF ERRORS

In making its award the Commission based the same upon its finding that the plaintiff's business "was being carried on 7 days per week." Plaintiff contends that there is no evidence to support such finding, and further that such a finding will not support an award using as the basis thereof seven day employment per week; that the uncontradicted evidence and the only evidence, namely, the stipulation of facts, shows that the usual operation of plaintiff's business was less than six days per week, and the basis for determining "average weekly wage," which in turn is the basis used in determining benefits, is not the number of days plaintiff's business was operated at the time of the injury, but on the contrary is the "usual operation" of plaintiff's business.

ARGUMENT

Section 42-1-64, Revised Statutes of Utah, 1933, as amended by Chapter 51, Laws of Utah, 1939, provides as follows:

“In case injury causes death within the period of three years, the employer or insurance carrier shall pay the burial expenses of the deceased as provided herein, and further benefits in the amounts and to the persons as follows:

(1) *****

(2) If there are wholly dependent persons at the time of the death, the payment shall be 60 per cent of the average weekly wage, but not to exceed a maximum of \$16 per week, plus 10 per cent of said award for each dependent minor child under the age of eighteen years, up to and including five such dependent minor children, to continue for the remainder of the period between the date of the death and six years after the date of the injury, and shall not amount to more than a maximum of \$7,500 or less than a minimum of \$2,000.00.

(3) *****

(4) *****”

It being agreed that there were wholly dependent persons upon the deceased at the time of death, the foregoing is the statute applicable to the instant award. Pursuant to it, the award in the instant case should have been 60 per cent of the average weekly wage, plus an additional 50 percent of such award for the minor children. Accordingly, in reaching the amount of the award it is necessary that “the average weekly wage” be determined.

Section 42-1-70, Revised Statutes of Utah, 1933, as amended by Chapter 41, Laws of Utah, 1937, provides as follows:

“The average weekly wage of the injured person at the time of injury shall be taken as the basis upon which to compute benefits. Employment shall mean pursuit in the usual trade, business or profession of the employer. Five and one-half or six day employment shall mean pursuit in the usual trade, business or profession, the usual operation of which is six days or less per week. Seven-day employment shall mean pursuit in the usual trade, business or profession, the usual operation of which is seven days per week. The average weekly wage shall be determined as follows:

(1) Determine the contract of hire existing at the time of the injury, whether upon year, month, week, day, hour or piece basis.

(2) Determine whether the employment is operated on a five and one-half, six or seven day basis.

(3) Determine daily wage as follows:

(a) If the wage is on an annual basis, and the employment is seven days per week, divide the amount of the annual salary by 364. Result—daily wage. If the employment is five and one half or six days per week, divide the amount of the annual salary by 312. Result—daily wage.

(b) If the wage is on a monthly basis, multiply monthly salary by 12 and proceed as above, in (a) to determine daily wage.

(c) If the wage is on a daily basis no rule is required.

(d) If the wage is on an hourly basis, multiply the pay per hour by the number of hours employment regularly operates or, if operation is not regular, use eight hours as a day.

(e) If the wage is on a piece basis, use the average daily earnings for a reasonable period in which employment has been regular, and divide the amount earned by the number of days worked in such period. If the duration of employment has been too short to determine as above, then use the wage of an average employee, taking into consideration the experience of such employee, and determine as above in (a).

(f) If the wage is on part-time basis, and the employment is regular, extend the wage to full-time basis, or use the wage the injured would earn if working full time in such employment, and determine as above, in (a).

(g) The minimum number of days per year to be used in determining the average weekly wage shall be 240. Where the number of days of employment exceeds 240 days per year the average weekly wage shall be determined as provided in Paragraph 4 hereof.

(4) To determine average weekly wage, if the employment is five days per week multiply the daily wage as determined by the foregoing method by 250 and divide by 52. If the employment is five and one-half or six days per week, multiply the daily wage, as determined by the foregoing method, by 300 and divide by 52. If the employment is seven days per week, multiply

the daily wage, as determined above, by 332 and divide by 52.

(5) To determine weekly compensation, let D represent daily wage:

$$\begin{array}{r} \text{If } 5\frac{1}{2} \text{ or } 6 \text{ days of employment per week—} \\ \text{D x } 300 \text{ x } .60 \\ \hline \text{52} \end{array} = \text{ weekly compensation}$$

$$\begin{array}{r} \text{If } 7 \text{ days of employment per week—} \\ \text{D x } 332 \text{ x } .60 \\ \hline \text{52} \end{array} = \text{ weekly compensation}$$

(6) To determine daily compensation, divide weekly compensation by 7.”

The stipulation shows that the deceased was paid an hourly wage of 47½ cents, and that the number of hours per day he worked was irregular. Accordingly, subsection (3) (d) above applies; namely, his daily wage is to be determined by multiplying 47½ cents an hour by eight hours. This results in a daily wage of \$3.80, and is the amount used by the Commission in determining weekly compensation. Plaintiff does not dispute the correctness of using \$3.80 as the “D” in the formula. The formula used by the Commission in arriving at the amount of deceased’s weekly compensation, however, is the formula for seven day employment per week, namely, $\frac{\text{D x } 332 \text{ x } .60}{52}$. By using this formula (the D being

the daily wage of \$3.80) the Commission found, upon increasing the result of the formula 50 percent for the minor children, the amount of weekly compensation in the sum of \$21.84. Plaintiff contends that the formula the Commission should have used is the formula for 5½ or 6 day employment per week, namely, $D \times \frac{300}{52} \times .60$,

the D being the daily wage of \$3.80. The use of thus formula results, when such result is increased by fifty percent for the minor children, in weekly compensation of \$19.73, which amount, plaintiff submits, is the correct amount of weekly compensation that the Commission should have awarded.

As to whether the formula for 5½ or 6 days of employment per week should be used, as claimed by the plaintiff, or whether the formula for 7 days of employment per week, as used by the Commission, should be used as the basis of determining weekly compensation, depends upon the interpretation of Section 42-1-70, supra. It will be noted that such section contains the following language:

“Five and one-half or six-day employment shall mean pursuit in the usual trade, business or profession, the usual operation of which is six days or less per week. Seven-day employment shall mean pursuit in the usual trade, business or profession, the usual operation of which is seven days per week.”

In other words, if the *usual operation* of plaintiff's business is six days or less per week, the deceased's employment in connection therewith is “five and one-half

or six day employment," while if the *usual operation* of plaintiff's business is seven days per week, the deceased's employment in connection therewith is "seven day employment," as those terms are used in the foregoing section of the statute. In order to determine the usual operation of plaintiff's business reference need only be made to the stipulation of facts, wherein the work record of plaintiff for 54 weeks immediately prior to the deceased's injury is set out. It therein appears that during such 54 week period the operation of 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. But eight weeks out of such 54 week period did plaintiff's business operate seven days per week, while 46 weeks out of such 54 week period plaintiff's business operated six days or less per week. A simple mathematical calculation shows that the average operating week for plaintiff during such period was less than 5.69 days per week. It is obvious, therefore, that the *usual operation* of plaintiff's business was less than six days per week, and the formula that should have been used by the Commission is $\frac{D \times 300 \times .60}{52}$, and the amount of compensa-

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tion that should have been awarded per week is \$19.73. It is true that plaintiff's business was operating 7 days per week at the time of the injury to deceased, but the statute does not make that the test. The test is the *usual operation*, not the factual operation at any particular time.

There can be no question as to the meaning of the word "usual." It does not mean that which is out of

the ordinary, but rather that which is customary. This plaintiff, at the time of the injury, as well as prior and subsequent thereto, was engaged in canning, and it is a matter of common knowledge that in the very nature of things a canning business involves a seasonal operation. Concerned as it is with seasonal and highly perishable agricultural products, which when ripe must be speedily processed, it has on that account periods of operation, even during the canning season, which are out of the ordinary course of business and which are usually spoken of as peak periods. Such peak periods, one of which is shown by the stipulation as occurring at the time of the accident in question, cannot, by any stretch of language, be contrued to be the plaintiff's normal period of operation even during the canning season itself, much less its usual annual operation.

That the Commission, in making its award, misconstrued the statutory test is apparent in its findings of fact. The only fact found by the Commission relative to the operation of plaintiff's business is found in Paragraph IV of such findings of fact, namely:

“The employer's business (at the time of deceased's injury) was being carried on 7 days per week.”

No finding as to the usual operation of plaintiff's business was made—but only the finding with respect to the operation at the time of the injury.

CONCLUSION

Accordingly, we respectfully submit that the findings of fact will not support the award made, nor any award for that matter, for the reason that there is a total failure on the part of the Commission to find with respect to the "usual operation" of plaintiff's business; and we further submit, that if the finding made by the Commission should be construed as a sufficient finding of the necessary fact, the same will not support the award made for the reason that the uncontradicted evidence shows that the usual operation of plaintiff's business was less than six days per week.

Respectfully submitted,

DeVINE, HOWELL & STINE
NEIL R. OLMSTEAD

Attorneys for Plaintiff.