

1940

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

Utah Supreme Court

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Joseph Chez; Attorney General of Utah; Elias Hansen; Attorney for Juanita Lewis Johnson;

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No. 6305

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In  
The Supreme Court  
of the  
State of Utah

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CALIFORNIA PACKING COR-  
PORATION, a Corporation,  
Plaintiff,

vs.

INDUSTRIAL COMMISSION OF  
UTAH and JUANITA LEWIS  
JOHNSON,  
Defendants.

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**DEFENDANT'S BRIEF**

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Attorney General of Utah.

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Attorney for Juanita Lewis  
Johnson.

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**FILED**  
NOV 30 1940

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DEFENDANT'S BRIEF

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Plaintiff has correctly stated the question which divides the parties to this proceeding, namely: Under the stipulated facts was the Industrial Commission of Utah justified in using the formula

$D \times 332 \times .60$

\_\_\_\_\_ or should it have used the formula  
52

$D \times 300 \times .60$

\_\_\_\_\_ in arriving at weekly compensation?  
52

In plaintiff's brief it is contended that the word "usual" as used in R. S. U. 1933, 41-1-70, as

amended by Chapter 41, Laws of Utah, 1937 during the year immediately preceding the injury resulting in death is equivalent to average weekly days per week. With that argument we take issue. Plaintiff has set out in its brief the statutes which are or may have a bearing on this controversy. We are apparently agreed as to the meaning of all of such statutes except

Section 41-1-70, R. S. U. 1933,

as amended by

Chapter 41, Laws of Utah, 1937.

wherein it is provided:

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

We are agreed the daily wage of Mr. Johnson at the time of his fatal injury was Three and 80-100 (\$3.80) Dollars. It is also agreed that Mr. Johnson was fatally injured in the course of his employment; that is, in the usual business operations of the plaintiff. We divide on whether under the stipulated facts Mr. Johnson should be awarded compensation on the basis of the usual operation of plaintiff's business at the time he was fatally injured on six days or less per week, or on the basis of seven days per week. Plaintiff contends for the

former — defendants for the latter. The word “usual” is defined in Webster’s New International Dictionary as meaning “such as occurs in ordinary practice or in the ordinary course of events; customary, ordinary, habitual, common.”

It appears from the stipulation that at the time Mr. Johnson was fatally injured and for forty days immediately preceding that time the plaintiff operated its business seven days per week and that during the remainder of the year next preceding Mr. Johnson’s fatal injury plaintiff’s business was operated from five to six days per week. Thus the number of days per week that the plaintiff was operating had been increased about six weeks before the deceased received the injury resulting in his death either because the business of the plaintiff justified a longer week of operation, or because, as counsel for plaintiff contends, the business of the plaintiff was seasonal and the fatal injury occurred during the period when the operation of plaintiff’s business was at its peak.

In either event plaintiff’s business, as the commission found and as the stipulation shows, was being carried on seven days per week when Mr. Johnson received the fatal injury. If plaintiff’s business is seasonal in the sense that during some seasons of each year it is operated seven days per week, it may not be said that there is anything unusual about the plaintiff’s business being operated seven days per week. In such case, on the contrary, the operation is usual for that season of the year.

Plaintiff’s argument is based upon the premise that the average time that plaintiff did operate its business during the year next preceding the date that Johnson was fatally injured is of controlling importance. There is no language in the act which

indicates that the average days per week that a business operates during a year preceding an injury should be used as the basis for determining what is the usual operation. The language used in the act nowhere indicates that average days per week during the preceding year shall constitute the basis for determining average weekly wage. As well say that the period of one month next preceding the time in question shall be the basis for determining what is the usual period of operation.

Suppose a business operates seven days per week for only one month a year and is closed down during the remainder of the year. It could not be successfully contended that the usual period of operation of such business is 4-52nds days per week and that compensation should be awarded on such basis. 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 during that week. 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 that he actually received when injured but by the average number of days per week that the plaintiff had been operating its business during the preceding year. There is no language in the act which justifies such conclusion.

Obviously the dependents of Mr. Johnson should not and the law does not permit a reduction of the compensation to which they are entitled because he was employed for a long rather than a short period of time before he was injured. The law has taken

care of any controversy that might otherwise arise by providing that the weekly wage shall be used as the basis and compensation shall be determined by the number of days that the business was operated during the week when the injury occurred.

The clear expression of the legislature does not admit of construction. There is no justification to change that language by a resort to the average weekly time that the plant operated during the year immediately preceding the time he was injured. As well take two or five years or one or six months. There was nothing unusual about the length of time that plaintiff's plant was operated during the week that Mr. Johnson was injured, but on the contrary the business was operated as usual for a period of seven days per week during that week and for six weeks prior thereto.

The case of

Morrison-Merrill Co. v. Industrial Commission, 81 Utah 363; 18 P. (2d) 295,

lends support to fedendants' contention.

The award heretofore made by the defendant Industrial Commission of Utah should be sustained with costs.

Respectfully submitted,

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Attorney General of Utah.

**ELIAS HANSEN,**

Attorney for Juanita Lewis  
Johnson.