

1941

# Royal Canning Corporation and Continental Casualty Company v. Industrial Commission of Utah and Dorothy Marie Hughes : Brief of Plaintiffs

Utah Supreme Court

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Shirley P. Jones; Attorney for Plaintiffs;

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# In the Supreme Court of the State of Utah

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ROYAL CANNING CORPORATION, a  
corporation, and CONTINENTAL  
CASUALTY COMPANY, a corpor-  
ation,

*Plaintiffs,*

vs.

INDUSTRIAL COMMISSION OF UTAH  
and DOROTHY MARIE HUGHES,

*Defendants.*

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## PLAINTIFFS' BRIEF

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SHIRLEY P. JONES,

*Attorney for Plaintiffs.*

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INDUSTRIAL COMMISSION OF UTAH  
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No. 6383

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## PLAINTIFFS' BRIEF

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### STATEMENT OF THE CASE.

This is an original proceeding in this court for the purpose of reviewing the award made by the Industrial Commission of the State of Utah against these plaintiffs and in favor of the defendant Dorothy Marie Hughes, granting her compensation and ordering these plaintiffs to pay said compensation; and the findings and conclusions of the Commission upon which said award is predicated, dated April 9, 1941, in the matter designated by

the Commission as Claim No. 4345. After petition for rehearing had been filed within the time prescribed by law by the plaintiffs herein and after the same had been denied, plaintiffs herein, within due time, applied to this court for the issuance of writ of certiorari, which was issued by this court and to which return has been made to this court.

The case involves the question of whether or not Dorothy Marie Hughes is entitled to the amount of compensation awarded her by the Industrial Commission. It is the contention of the plaintiffs that Dorothy Marie Hughes is not entitled to double compensation, nor to compensation in the amount awarded her by the Commission.

#### STATEMENT OF FACTS.

The hearings in this matter occurred on three different dates, October 23, 1940 at Ogden, January 29, 1941 at Salt Lake City, and on March 18, 1941 at Salt Lake City. The reports of the hearings are numbered 12, 25, and 30 in the certificate of the Industrial Commission to this court, and for the purpose of convenience and to avoid confusion we will refer to No. 12 as 1 T., No. 25 as 2 T., and No. 30 as 3 T., since the pages of the hearings are each numbered from 1 on consecutively. Where the remainder of the record is referred to, it will be referred to by the letter R.

There is practically no dispute in the facts in this case. Dorothy Marie Hughes, a minor, sixteen and a

half years old, was employed by the plaintiff Royal Canning Company at its canning factory in Ogden, Utah, July 3, 1940. She worked eight hours on July 3, three and a half hours on July 4, did not work July 5, eight hours on July 6, ten hours July 7, ten hours July 8, and three and a half hours July 9. July 3, the date of her employment, came on a Wednesday. Most of the time she was engaged in sorting cherries. On July 9, which was Tuesday, the forewoman put her to work sorting cherries on the side of the belt where there were proper guards and barricades to protect the workmen from moving machinery. Miss Hughes however, moved to the other side of the belt, which was unguarded. Sometimes the cherries became stuck in the chute and when this occurred, the girls had to loosen them and were provided with a stick for the purpose, which stick was between eighteen and twenty inches long. On the day in question the cherries became stuck in the chute and Miss Hughes, instead of using the stick, tried to loosen the cherries with her hand and her dress got caught in the shaft and in trying to loosen it, both of her hands were drawn into the shaft and the injury in question occurred. (1 T. 35-44)

The only injury with which we are here concerned is the injury to her right hand. She received injuries to her left arm, but with those we are not here concerned. As a result of the injury to her right hand, it was necessary to operate the thumb at the proximal joint. This was done by Dr. Dumke of Ogden, Utah (R. 20). Actually the thumb was not operated exactly

at the proximal joint, there being a remnant of proximal phalanx (R. 26), but for all practical purposes we concede the operation of the thumb at the proximal joint. The thumb was pronounced healed and she was released from the doctor on August 26, 1940 (1 T. 15 and 21). The applicant, defendant here, testified that at the time of the first hearing the thumb was better than at the time she was released as surgically healed on August 26 (1 T. 15).

The applicant, as heretofore stated, was employed on July 3, 1940 and was allowed to go to work without the employment certificate provided by Section 14-6-5, Compiled Laws of Utah, 1933 as amended by Session Laws of Utah, 1933, page 17. The reasons given from the evidence for this situation are found in the transcript of the first hearing, pages 25-29, and show that in 1939 the Department or Division of Unemployment of the Industrial Commission called the Manager of the Royal Canning Company and requested him to secure his employees through that department. This he did through the season of 1939 by phoning the Department his needs and the Department would then send him the girls and women required. When the season of 1940 began, the Department again requested that he use its services in securing employees, which he consented to do. The Department would comply with his request and send him sufficient employees to answer his purposes. This applied equally to minors and adults. In the first part of July, 1940, he phoned the Department and requested it to send him some employees to work

in the cherries and apricots. None of the minor employees showed up with the employment certificates required by law. On Saturday, July 6, the girls tried to get their employment certificates from the Superintendent of Schools of Ogden as required by the Child Welfare statute heretofore referred to, Chapter 11, Session Laws of Utah, 1933, and were told that they would have to come to the office between 8:00 and 9:00 as there was nobody there other than at that hour to issue the permits; that they would have to first secure employment, then apply to the office for an application for certificate, take it home, secure the signature of their parents, come to the plant and secure the approval of the management, then return to the Superintendent's office and get the permits. This situation with the school office open only one hour would cause the girls two days loss of time. The Manager of the Royal Canning Company on Monday, July 8, called the office of the Superintendent of Schools and was told he would not be back until the afternoon. The Manager called again Tuesday morning and the Superintendent was again out. That afternoon the Superintendent called the Manager, who asked him why they could not get the permits and he told the Manager that the person in charge was out of town but that he would have someone come to the plant on Wednesday and issue the applications. A representative of the Superintendent's office came to the plant on Wednesday, issued the applications, returned on Thursday noon and wrote the permits. So the Manager had been trying for a week to get the office of the Superintendent



of Schools to perform its duty under the statute and had been unable to do so. In the meantime, on Tuesday, July 9, the applicant was injured and after that Mrs. Shupe of the Industrial Commission came to Ogden and told the Superintendent that they must keep their office open between 9:00 and 5:00 as required by law, in order that these minors might secure their employment certificates. This also appears in a detailed report to the Industrial Commission found at R. 1, 2, and 3. It thus appears that a department of the State through the Industrial Commission urged the employment of these minors by the Royal Canning Company and sent them there without employment certificates and another division of the State, the Superintendent of Schools, by failing to perform his duty as required by law, made it impossible for the minors to secure their employment certificates and in the meantime an accident happened to Miss Hughes.

As heretofore stated, the applicant's right thumb was amputated at approximately the proximal joint, which was surgically healed August 26, 1940. Between the first and second hearings, on its own motion, the Industrial Commission held a hearing before a medical advisory board appointed by it, although there was no question at the first hearing concerning the exact extent of the injuries sustained by the applicant. At the medical advisory hearing certain arbitrary conclusions were arrived at with nothing to support them that the applicant had suffered a disability of approximately seventy-five per cent at the wrist (R. 16). As a result

of these conclusions the second hearing was held and medical testimony introduced, which shows that the applicant has suffered a normal amputation of the thumb at approximately the proximal joint.

The Commission later held the third hearing and although the evidence is undisputed that the applicant's weekly wage was only \$12.90 and that this was about the average earned by other employees doing the same work, regardless of their age or experience, the Commission found with no evidence whatever to support the finding, that because of the applicant's age and experience she might reasonably be expected to earn sufficient to entitle her to compensation at the rate of \$16.00 per week, which would bring her wages somewhere in the neighborhood of \$26.00 or \$27.00 a week, or more than double what she was actually earning.

As a result of these hearings the Commission awarded the applicant compensation against the Royal Canning Company under Section 14-6-27 of Chapter 11, Session Laws of Utah, 1933, and a like amount against the Continental Casualty Company, as the carrier of the Workmen's Compensation for the Royal Canning Company. The Commission found that her wages at the time of injury entitled her to compensation at the rate of \$8.31 per week for the period of temporary total disability ending August 25, 1940, in the sum of \$54.61 against each of the plaintiff's (we shall hereafter discuss the matter of wages) and in addition, instead of awarding her the thirty weeks provided by the statute

for loss of the thumb at the proximal joint, found that she had a seventy-five per cent disability at the wrist and gave her an additional one hundred and twelve and a half weeks, not at the rate of \$8.31 per week, but at the rate of \$16.00 per week, making a total award against each of the plaintiffs for the additional period of \$1800.00.

#### STATEMENT OF ERRORS.

It is the plaintiffs' contention that there is no justification for the award of double compensation; that the statute provides a fixed and definite sum for the loss of the thumb at the proximal joint and that the Commission was without authority to increase the weekly period beyond that provided by statute; and that there is absolutely no evidence to justify the finding that the applicant after August 25, 1940 would earn sufficient money to entitle her to compensation at the rate of \$16.00 per week.

#### ARGUMENT.

At the outset may we state that we have no quarrel with the Commission's findings that the applicant, Miss Hughes, was earning sufficient to entitle her to compensation at the rate of \$8.31 per week. The testimony shows, however, that during the six days she worked she actually earned \$12.90, which was about the same average of the other girls who were working with her in the same kind of work (Defendants' Exhibits 3 and

4; R. 31, 32). It is true that the first report of injury (R. 7) states that she was working seven days a week at 30 cents per hour, but this report, the testimony shows, is not true (3 T. 11, 12). The testimony all through the case shows that the girls received 30 cents an hour only while they were working and the time they worked depended entirely upon the availability of fruit. We shall discuss the wage question, however, in more detail under subdivision III hereafter.

## I.

We feel there is absolutely no justification for a double award in this case. It is true that the Child Labor Law, Chap. 11, Session Laws of 1933, subdivision 5, provides that minors under eighteen shall not be employed without an employment certificate. The chapter, however, makes it the duty of the school authorities to issue the certificate. They may refuse to issue the certificate, but that was not done with any of these girls. The Industrial Commission is charged with the duty of enforcing the provisions of the chapter. In construing the law we must take into consideration all of its provisions and construe them altogether to accomplish the purposes desired. Section 11 provides that if a certificate of employment is not on file, the enforcement officers may demand the employer to secure the certificate within seven days or refuse to employ the minor. It thus seems apparent that under facts such as we have here, where the Industrial Commission itself sends the minors to work without certificates and

therefore has knowledge of the situation, that it is the duty of the Industrial Commission, before any liability can attach to the employer, to allow him to produce the certificate upon seven days notice. So far as the employer is concerned in this case we have an even more favorable situation. The Industrial Commission requested the employer to employ the girls to assist in the unemployment situation in the state. The employer was engaged in the canning of perishable fruits, which must be handled immediately in order to prevent them from spoiling. The employer consented to assist the Industrial Commission in its efforts to relieve unemployment and whenever it desired employees, it so notified the Commission and the Commission itself sent the employees to the employment. The Commission knew that employment certificates were required and that they could only be secured from the school authorities and yet it made no effort until after the accident in question to require the school authorities to perform their duties in the premises. The failure to have employment certificates on file was not the fault of the employer. It was the fault primarily of the school authorities in failing to perform their duties, and secondarily, of the Industrial Commission employment department, first in failing to see that the people it sent to work had certificates, and secondly in not requiring the school authorities to perform their duties. So that if any wrong was committed by the employer it was entirely induced by the public authorities with whom the employer was trying to cooperate.

It must be remembered that this accident did not happen because the minor had no employment certificate. Had she worked on the side of the belt where she was placed and used the stick provided for her to dislodge the cherries from the chute, she would not have been injured. The school authorities did not think that the employment was injurious to the minors because they issued certificates to the other girls engaged in the same class of work.

It is established doctrine in this state that the public authorities cannot induce the commission of an offense and then hold the offender liable. *State v. McCornish*, 59 Utah 58, 201 P. 637. In this case this court quotes:

“When it is made to appear that the offense charged was induced by a *detective or other person*, \* \* \* both the prosecuting officers and the trial courts should carefully scrutinize the evidence and should permit no conviction to be had, or, if had, to stand, in case the offense was induced as aforesaid.” (Italics added).

This is the law generally as is shown in the recent case of *Sanders v. State*, (Oklahoma) 113 P. (2d) 198, wherein the court says:

“It has been held that where officers or those acting under them first suggest the commission of the criminal act *or lure the accused into the commission of such acts*, that sound public policy will not uphold a conviction.” (Italics added).

It is true that these are actual criminal cases, but the Child Welfare statute under consideration here is also

a penal statute and the employer has been subjected to a penalty thereunder by the Industrial Commission. He has been subjected to a penalty for no fault of his own and for doing a thing he was induced to do by officers of the state and because other officers of the state failed and neglected to perform their duties under the law.

We did everything that we could to cooperate with the public authorities to relieve unemployment and everything that we could to secure the employment certificates and it was through no fault of ours that the permits were not secured and it was through no fault of ours that the girl was injured. It seems highly unjust and inequitable that we should be penalized when we have done no actual wrong. There is no question involved here of employing girls who had been refused employment certificates. Had the school authorities been on the job, this girl would have had her certificate, the same as the rest of them got theirs. So that the purposes of the act were not frustrated by anything that we did and this court could very well say, under Section 11, that under the circumstances it was the duty of the Industrial Commission, after it had sent the girls to work, to give us seven days within which to secure their certificates.

Even should this court hold that we are liable for the penalties prescribed by Section 27 of the chapter, there is nothing in the record to justify any award against the Royal Canning Company other than the period of temporary total disability, which expired Au-



gust 25, 1940, plus 30 additional weeks at \$8.31 per week for the loss of the thumb at the proximal joint.

We earnestly insist, however, that under the facts in this case the penalty against us is unauthorized and unjust and as to the Royal Canning Company the award should be annulled; that the statute is penal and the commission of any offense, if any was committed, was induced by public officials, and that we were lured into it by their conduct.

## II.

As heretofore shown, the claimant suffered the loss of the right thumb at approximately the proximal joint. Our statute, Section 42-1-62, Revised Statutes of Utah, 1933, as amended by Chapter 41, pages 80 and 81, Session Laws of Utah, 1937, provides: "For loss of \* \* \* one thumb at the proximal joint, 30 weeks." There are numerous other specific provisions and at the end of the section appears the following:

"For any *other* disfigurement or the loss of bodily function *not otherwise* provided for herein, such period of compensation as the commission shall deem equitable and in proportion to compensation in other cases, not exceeding two hundred weeks." (Italics added).

Another specific provision of the chapter is that for the loss of one hand the payments shall be 150 weeks. In spite of the fact that this claimant has not lost her hand and has all of the digits of the right hand with the exception of the right thumb, the Commission pro-



ceeded upon the theory that she had lost seventy-five per cent of the use of the hand.

The statute is clear and explicit that for the loss of the thumb at the proximal joint the additional compensation shall be 30 weeks and it is only for any loss or disfigurement not otherwise provided for that additional compensation may be awarded. In other words, where there is a specific and definite loss, the Legislature has arbitrarily fixed the amount of compensation and it is beyond the power of the Commission to change it. If this were not true, then medical experts upon whom the Commission might call would fix the amount of compensation by their opinions and the definite legislative enactment would be overthrown by the medical experts, whose judgment would be substituted for that of the Legislature. The probable reason the Legislature fixed these definite amounts for specific losses was to take them out of this realm of speculation so that the amounts of compensation would be certain and sure. All the courts hold that compensation statutes are not designed to grant exact compensation for injuries, but to make it certain and sure that an injured employee will receive a definite and precise amount. If the Industrial Commission for the loss of a thumb may conclude that there has been a loss of seventy-five per cent of the use of the hand at the wrist, it might also conclude that if the thumb was on the left hand, there had been no loss of the use of the hand and therefore refuse to award any compensation, or determine that there was only five per cent loss and make its award on that basis. Assume for

purposes of illustration that one in the legal profession lost his thumb on the left hand. The Industrial Commission might very well assume that he had suffered little or no loss and medical experts might so testify, but that would not deprive him, if he was an employee of someone, of a definite amount prescribed by the Legislature for the loss of his thumb. A pianist might lose his little finger at the proximal joint and nearly every doctor would testify that he thereby had lost the complete use of his hand and upon such testimony, if the Industrial Commission is right in this case, it could award him 150 weeks instead of 9 weeks as provided by the statute. Of course, the loss of the thumb tremendously impairs the use of the hand, but it is not the loss of the hand and there is no loss of the hand in this case, although the Commission has based its award upon that basis. Sex or vocation are not the determining factors in the question of use. Because this applicant is a girl and can't peel potatoes or sew is not the determining factor in fixing her compensation.

Dr. Dumke is the man who performed the operation. He did not testify. But at R. 20 is found his report to the Industrial Commission, in which he states: "She has an amputation of her right thumb at the proximal joint. She uses her hand well, but her entire thumb is gone, giving her the *usual* disability which you have with the loss of the entire thumb." Thus the doctor who performed the amputation is on record to the effect

that the claimant has only the usual loss that comes with the loss of a thumb.

At the first hearing Dr. Dumke's assistant, Dr. J. L. Price, testified that Dr. Dumke's report was correct (1 T. 19) and that there were no cords broken above where the scar extends (1 T. 20). He also testified that applicant's Exhibit B (R. 14), which is another report by Dr. Dumke, was also correct (1 T. 20) and in that report Dr. Dumke says that the result of the amputation is good. The applicant herself testified at the time of the hearing the thumb was in better condition than when she was discharged on August 26 (1 T. 15). Dr. Price further testified that the loss of the thumb would not impair the arm aside from discomfort (1 T. 21): He was personally familiar with the applicant from the time of the injury all through her period of convalescence. We thus have the testimony of these two doctors, who personally attended the case, that we have here simply the usual case of the amputation of the thumb.

Next comes the Commission on its own motion and has the applicant appear before its own medical advisory board in Salt Lake City (R. 16). The medical advisory board, without stating any reasons therefor, conclude that her disability is approximately seventy-five per cent at the wrist. It gave absolutely no reason for this conclusion, and neither this court nor anyone else can determine why they made such an estimate—a clear case of substituting their judgment for that of the Legislature. The medical advisory board did say, however,

that she was able to clench the fist and extend and abduct all the fingers within normal range. The only reason they gave for their conclusion of seventy-five per cent is that she is right-handed and has lost the use of the right thumb. This bald conclusion of the medical advisory board was unsatisfactory to the plaintiffs here and the Commission again on its own motion held a second hearing at Salt Lake City, Utah. This, in spite of the fact that both sides rested at the first hearing and neither side asked for a rehearing or a reopening of the case. Both sides were represented by counsel at the first hearing and both sides introduced all the evidence that they desired. Notwithstanding this, the Commission on its own motion conducted a second hearing at Salt Lake City, Utah, at which time nobody but doctors testified. The Commission called two of the doctors who acted on its medical advisory board, Dr. Hicken and Dr. Capener. Dr. Hicken again stated that his opinion was that the applicant had lost seventy-five per cent of the use of the hand at the wrist, but when asked to give his reasons he had none, other than that the thumb was the most valuable one of the digits. He said (2 T. 4): "The applicant has free use of the second, third and fourth digits and grasps things well. There is apparently no change of thermal sensation or signs of atrophy of these muscles." He testified that the proximal joint is not gone and the metacarpal bone is still there. He testified that if she had lost the metacarpal bone completely, she would be worse off than she is now. (2 T. 7).

The statute for the loss of the thumb and the metacarpal bone only allows 60 weeks, Session Laws of Utah, 1937, page 80, and yet the Industrial Commission here has awarded her 112½ weeks when she is better off than if she had lost the metacarpal bone completely. This clearly indicates the vice of permitting the Industrial Commission to do what it has done in this case. If it can do so, then there is no way by which employers or insurance carriers can fix their rates and as a result not only they, but their employees as well, suffer from such uncertainties. We think this is one of the reasons that the Legislature intended to and did remove these specific injuries from the realm of speculation.

Dr. Hicken did testify that she had some scar tissue which interfered with the function of the wrist, but only because she has no phalanges on the thumb to get a good grasp of the hand. That is true in any amputation of the thumb, so that there is nothing more unusual in this case than there is in any amputation of the thumb.

Dr. Capener testified substantially the same as Dr. Hicken. He, however, said that he based his estimate of seventy-five per cent on the fact that she had scar tissue which might at some future time be injured by some slight accident. He said (2 T. 15) that his answer was based on this scar tissue being present and because of what might happen in the future, but not for anything that had now occurred. His opinion is pure speculation and conjecture and such opinion, this court has re-

peatedly held, as we shall hereafter show, is not evidence.

Dr. James P. Kerby, an expert in X-ray, also testified at the second hearing. He testified that he had not only examined the applicant but had a picture of her right hand and that the right hand and the wrist region were normal with the exception that the thumb had been amputated at approximately the proximal joint. He stated that she had not sustained as complete a loss as she would have done had she lost the thumb completely at the proximal joint. He further testified that the thumb presented the usual appearance when there is a good surgical amputation and that there was no injury to the metacarpal bone (2 T. 11). His report was received in evidence as Defendants' Exhibit 2 (R. 26) and shows that there is normal appearance of the lower half of the radius and ulna and of the carpal and metacarpal bones, and no bony pathology.

Also testifying at the second hearing was Dr. Martin C. Lindem, who had examined the applicant and her X-rays. He also testified that the metacarpal bone is intact and that the muscle attachments to it are all intact and that her injury is well healed; that she has only the usual situation in an amputation of the thumb at the proximal joint; that she has normal movement of the hand (2 T. 16, 17). The Commissioner conducting the hearing insisted on the doctor giving his opinion as to the question of percentage of loss as compared to a normal hand. The doctor did not care to answer the



question and clearly indicated that it is impossible to answer such a question, stating that that depends on what she does—would be one hundred per cent loss to some people and no loss to others. When pressed, however, by the Commissioner, for an answer, the doctor answered:

“I would have to put an arbitrary estimation on that and I don’t think it can be compensated but I would say between 50% and 100%.

COM. JUGLER: 50% actual loss?

A. I think it should be put down at about 50%, and that would be arbitrary.

MR. JONES: That would be true in every case?

A. I should put that arbitrary estimate and call it 50%.”

This clearly indicates that any estimate made by the doctors is purely arbitrary and guesswork and it is for that very reason that the Legislature provided a specific amount. The testimony shows without dispute that all the applicant has is the usual loss of a thumb at the proximal joint. Of course, it would be very difficult to compensate her at all for this loss but the wisdom of the statute is not for our discussion but is solely within the discretion of the Legislature. The only time the Industrial Commission can grant additional compensation is for disfigurement and losses not otherwise provided for. But in this case we have a loss that is specifically provided for. The cases are uniform in holding that where there is provision for a specific

loss the Commission has no power or jurisdiction to grant any compensation other than that specifically provided for.

In *Spring Canyon Coal Co. v. Industrial Commission*, 57 Utah 208, 193 P. 821, the employee lost the use of his leg, which was specifically provided for in the statute. This case was decided before the 1919 amendment, but the principle involved there is the same as is involved here. This court said, referring to loss of members where there is a fixed and definite amount, at page 212 of the Utah Reports:

“As to these amounts the commission has no discretion; when the loss of the member is ascertained the law specifically determines the compensation.”

And further on, on page 213, this court states:

“We are constrained to hold that the language last quoted is mandatory in both form and substance, that it definitely fixes the compensation to be paid for the loss of specific members of the body, and that the compensation thus fixed is exclusive of any other compensation for disability arising solely from the loss of the particular member in question.”

In the case of *North Beck Mining Co. v. Industrial Commission*, 58 Utah 486, 200 P. 111, where the employee lost more than one finger, this court clearly shows that it is only when there is a loss of more than one finger that the decreased usability of the hand is a fair method of compensation. The court pointed out that it is a



matter of common knowledge that if only one finger is lost, the adjoining fingers begin to function for the missing member and soon acquire the power to a great extent of taking place of the lost finger, but if more than one finger is lost this situation is not true.

The Commission in arriving at its conclusions here apparently considered the vocational aspects of the case. This the Commission may not do, as this court has held in *Broderick v. Industrial Commission*, 63 Utah 210, 224 P. 876. In that case, page 217 of the Utah Reports, the court also said:

“Then again, in the event that the employee has suffered a specific injury, he is entitled to a specific amount fixed by statute for such injury, and this is so although he suffered no diminution of loss of wages or earnings.”

In that case the court referred to the Spring Canyon Case, *supra*; pointed out that in that case the statute made a specific allowance for a specific injury, and that the Commission can not add anything to the amount fixed by statute.

In *Aetna Life Insurance Co. v. Industrial Commission*, 64 Utah 230, 228 P. 1081, the court said at page 236 of the Utah Reports:

“the injury resulted in the loss of a member of the body, the compensation must be fixed in accordance with the schedule, which provides a specific compensation for the loss of a particular member of the body. That is, if, as in this case, the injury results in ‘the loss of one leg at or so

near the hip joint as to preclude the use of an artificial limb,' the payment of the weekly amount must continue for 180 weeks, and no more."

It is true that the court in that case did say that if other injuries occurred in addition to the specific one, the Commission might have some discretion. But this court continued:

"When the loss of the leg occurs, or the loss of function is complete, he would then receive the amount fixed by the statute for the loss of the leg."

In that case the court pointed out, as we have above, that if the Commission can increase the statutory compensation, it can likewise decrease it and thus deprive an injured employee of what is legally due him. The court on page 241 again approved the Spring Canyon Case, *supra*.

That the disfigurement caused here by the amputation is not compensable other than for the loss of the thumb would appear from the case of *Denver & R. G. W. R. Co. v. Industrial Commission*, 73 Utah 86, 272 P. 239, wherein this court at page 91 of the Utah Reports says:

"The term 'other disfigurement' appearing in the statute does not seem to have any practical significance. There is unquestionably a disfigurement when the hand is entirely lost and when the Legislature allowed, for such injury, compensation for 150 weeks it must be assumed that it took into consideration disfigurement as well as loss of function."

Again in the *Vukelich v. Industrial Commission* case, 62 Utah 486, 220 P. 1073, this court at page 490 of the Utah Reports said:

“By providing a different basis of compensation for particularly described injuries, those injuries are to be excluded from general provisions which would otherwise include them.”

While it is true that this court has held that it is not necessary for the Commission to make findings, in the case of *American Smelt. & Ref. Co. v. Industrial Commission*, 79 Utah 302, 10 P. (2d) 918, at pages 306-7 of the Utah Reports it held that when the Commission does make findings, this court can test the sufficiency of the findings and that they must be based upon competent evidence. There is no competent evidence in this record that the applicant sustained anything more than the usual loss of the thumb. As we have pointed out, an examination of Dr. Capener's evidence shows that his conclusion is based upon a possibility of what might happen in the future and Dr. Hicken's testimony is a mere guess or conjecture.

In a very recent case, *Pennock v. Newhouse Realty Co.*, 97 Utah 408, 93 P. (2d) 482, this court pointed out the vice of such evidence, and rules out the medical testimony on the ground that it was purely speculative. The question is not what might happen, but the situation as it actually exists. The court says at page 415 of the Utah Reports:

“To state what generally happens in such cases leaves it entirely to the speculation of the jury

as to whether or not it is happening to the plaintiff.”

The evidence here clearly shows that the plaintiff has a good recovery, an excellent surgical amputation, the pictures show a normal hand and wrist except for the loss of the thumb. In every amputation there would be scar tissue and to speculate that at some future time the scar tissue might become involved is entirely beyond the province of the Industrial Commission. The testimony of Dr. Lindem clearly illustrates the vice of permitting speculation in a case such as this. When compelled to testify, he said his evidence was purely arbitrary and clearly indicated that he did not think it was a matter of his opinion.

The courts in other states are in accord with the rule for which we are contending to the effect that where there is a specific schedule, no additional payment may be exacted. The Supreme Court of Minnesota in the case of *Sheldon v. Gopher Granite Co.*, 219 N. W. 867, says at page 868:

“The statute takes no account of the fact that certain of the fingers on the hand are of more use or service than others, or that the thumb is, perhaps, more indispensable than any other finger.”

and continuing:

“The instant case is for the loss of a member or part of a member specifically compensated. By 44 relator is likewise excluded, for his loss is enumerated in the preceding subdivision 6 (c).”

The Pennsylvania Supreme Court in the case of *Lentee v. Lucci*, 119 Atl. 132, says:

“In other words, this legislative mandate fixed the amount to be paid in such cases, without considering, but including, all incapacity to labor that may be connected therewith, whether such incapacity be total, partial, or no incapacity at all.”

And further:

“The compensation mentioned is restricted by precise language, regardless of the fact that a permanent injury might otherwise affect capacity to work. The standard thus fixed is in the nature of compensation for the damage resulting from the loss of the members there named, without regard to personal capacity to labor, or loss of earning power.”

The Pennsylvania Supreme Court continues:

“But, in these cases, where it is claimed that some other part of the body is affected, it must definitely and positively appear that it is so affected as a direct result of the permanent injury; the casual connection must be complete, and, further, the disability must be separate and distinct from that which normally follows an injury under paragraph (c), and must endure beyond the time therein mentioned. There must be a destruction, derangement, or deficiency in the organs of the other parts of the body. *It does not include pain, annoyance, inconveniences, disability to work, or anything that may come under the term ‘all disability,’ or normally resulting from the permanent injury.*” (Italics added).

The court again says:

“Appellant’s argument is based on a wrong theory—that incapacity, and not injury, controls this section.”

The Supreme Court of Ohio in the case of *State v. Industrial Commission*, 183 N. E. 871, says:

“For loss of member the award has no relation to the ‘impairment of his earning capacity during the continuance thereof,’ but, on the contrary, is arbitrarily fixed by the statute.”

Likewise, the Supreme Court of Oklahoma in *Southland Gasoline Co. v. Bowlin*, 3 P. (2d) 663, says:

“Where the statute fixes the number of weeks that the payment for various specific injuries shall continue, it is, of course, error to award compensation for a longer time.”

The Supreme Court of Colorado in *Colorado Fuel & Iron Co. v. Industrial Commission*, 298 Pac. 955, announces the same rule, as does also the Supreme Court of Arizona in the case of *Ujevich v. Inspiration Cons. Copper Co.*, 25 P. (2d) 273, wherein the court says:

“The Legislature selected certain kinds of injuries or losses that employees suffer and fixed a definite sum or a rule for ascertaining that sum and said, in effect, such sum together with the temporary total disability compensation shall be in full satisfaction of the employee’s loss. It provided compensation for such loss whether any permanent disability to earn wages followed or not. It assumed that every loss enumerated



would cause some permanent loss of earning power, and arbitrarily fixed the compensation therefor."

It would appear, therefore, under the facts in this case, that the Legislature, having fixed an additional thirty weeks for the loss of a thumb at the proximal joint, has precluded the Commission from awarding any further compensation for such loss. The evidence fails to sustain the Commission in its award of seventy-five per cent of the loss of the hand at the wrist, since it conclusively appears that all there is here is the usual amputation of the thumb.

### III.

Our statute, Section 42-1-71, Revised Statutes of Utah, 1933, provides:

"If it is established that the injured employee was of such age and experience when injured that under natural conditions his wages would be expected to increase, that fact may be considered in arriving at his average weekly wage."

Because of this section the Commission held the third hearing and awarded the applicant compensation after August 25, 1940, at the rate of \$16.00 a week.

In our opinion it is somewhat fruitless to discuss this phase of the case because there is no semblance of evidence to support this phase of the award. The evidence shows without conflict that the applicant and those engaged in similar occupations, regardless of age

or experience, earned approximately the same wages as the applicant did at the time of injury (Defendant's Exhibits 3 and 4; R. 31, 32). The record shows without conflict that the applicant was being paid the maximum wages for the work in which she was engaged (3 T. 9 and 10); that 1940 was a good year and it would be pure speculation as to whether she would earn more or less in other years (3 T. 15, 16, 20, 21, 22). The evidence further shows without conflict that age and experience are not controlling factors in this industry in earning capacity. The law is well settled that the increase in wages contemplated is the increase in the occupation pursued at the time of injury. It seems somewhat unnecessary to discuss this phase of the case, but inasmuch as the Industrial Commission went out of its way to award this applicant far more than she was entitled to, such discussion becomes necessary.

There is not a word of evidence in the record that she would ever have earned or ever be able to earn sufficient to entitle her to compensation at the rate of \$16.00 per week. As we have heretofore stated, compensation at that rate would be based upon wages earned by her of \$26.00 or \$27.00 per week. The evidence shows that the applicant is under-nourished, has had an operation for the removal of gall stones, and that since her injury has had her gall bladder and tonsils removed, and that she is in very poor physical condition, none of which had reference to the accident (3 T. 23 and R. 11).



The Commission found that her actual wages entitled her to compensation at the rate of \$8.31 per week. With this finding we have no quarrel, although it is somewhat higher than the statute provides. As heretofore stated, the first report of injury that she was working seven days per week at thirty cents an hour is not true (3 T. 12). The girls only worked when there was fruit for them to work on and they were only paid the actual time that they worked, and the evidence shows without dispute that none of them earned as high as \$21.00 per week and could not have done so in the year in which they were employed, which year was a good year (3 T. 21, 22).

A statute similar to ours has seldom been construed, but the courts that have construed it hold that any increase in wages is to be considered only in the occupation in which the employee was engaged and is not to be based upon the probable wage, but actually what was earned in the industry at the time the employee reached majority. *Western Pac. R. Co., v. Industrial Accident Commission*, (Cal.) 181 P. 787. And in the Massachusetts case of *In re Gagnon*, 117 N. E. 321, the court said:

“The scheme of the act is that the employer shall be insured against the losses from personal injury to employees arising out of and in the course of their employment. The cost of such insurance can be determined so long as the basis on which compensation is to be reckoned is wages paid by the employer. It can readily be determined so long as the standard fixed by the definition of average weekly wages in part 5, Sec. 2,

above quoted, is followed. But it would be a matter of utter uncertainty if the compensation to be paid should depend, not upon wages paid, but upon wages which the Industrial Accident Board after an injury may find upon independent evidence, perhaps not readily open to the employer during the period of employment, that the injured employee might have earned in some other employment or field of activity.

“ ‘Wages’ as used in the statute must be taken to refer to the only wages referred to anywhere in the act (with the exception noted), namely, the wages earned in the particular employment out of which the injury arose.”

The finding of the Industrial Commission that the applicant would have earned sufficient money to entitle her to compensation at the rate of \$16.00 per week is based upon mere surmise and conjecture. This court has repeatedly held that such a finding can not be sustained. *Continental Casualty Co. v. Industrial Commission of Utah*, 75 Utah 220, 284 P. 313, wherein the court says: “An award cannot rest upon mere conjecture or possibility.” See also *Aetna Life Insurance Co. v. Industrial Commission*, 64 Utah 415, 231 P. 442, where the same rule is announced in the following language on page 420 of the Utah Reports:

“A finding of a material fact cannot sustain an award, unless the finding is supported by substantial evidence.”

We respectfully submit that there is not a word of evidence in this record to show that this applicant would ever have earned one cent more than she was earning

at the time of the injury. There is not a word of evidence to support the Commission's finding that she would ever earn sufficient money to entitle her to compensation at the rate of \$16.00 per week. In fact, her physical condition, which has no reference whatever to the accident, would indicate that she would not be in a position to work at all in the occupation that she was pursuing at the time of the injury.

We, therefore, respectfully submit that any one of the three propositions we have advanced is sufficient to annul the award of the Industrial Commission. The insurance carrier has no objection whatever to paying compensation for temporary total disability at the rate of \$8.31 per week to August 25, 1940, and an additional 30 weeks thereafter, together with proper medical costs, but beyond this plaintiffs earnestly insist they have no legal liability. It is true that the applicant has sustained a serious injury; but the Legislature has seen fit to provide definite schedules for the compensation for such an injury. The insurance rates have been based upon such legislative enactment and if the Industrial Commission is permitted to disregard the legislative mandate, then all employees and employers will suffer by the uncertainty thus created. It is, therefore, respectfully submitted that the award of the Industrial Commission should be annulled.

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