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

Utah Supreme Court

Shirley P. Jones; Attorney for Plaintiffs;

Case No. 6383

In the Supreme Court
of the State of Utah

ROYAL CANNING CORPORATION, a corporation, and CONTINENTAL CASUALTY COMPANY, a corporation,

Plaintiffs,

vs.

INDUSTRIAL COMMISSION OF UTAH and DOROTHY MARIE HUGHES,

Defendants.

PLAINTIFFS' REPLY BRIEF

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Defendants have made some assumptions of fact that are not in existence and some conclusions as to the questions involved that do not encompass the issues so that it appears necessary to file a short reply brief.

On page 3 of their brief defendants say:

> "Apparently then, the only questions to be determined in this case are (1) was the award so made by the Industrial Commission based upon substantial competent evidence, and (2) whether the application of the law with respect to illegal

employment in awarding double compensation was proper and within the jurisdiction of the Commission."

Dissected with meticulous intensity this statement might be stretched to cover the issues involved. If read in its general terms, they far from state the matters with which we are concerned.

Firstly, the Commission awarded compensation on two bases, earning capacity to entitle the applicant to compensation in the one instance at $8.31 per week and in the other instance on no basis at $16.00 per week. The defendants objected to neither basis, nor asked for a rehearing as to either one, and, therefore, as we understand the statutes and law of this state, they are precluded from doing anything further than defend the award of the Commission. We did not object to the $8.31 per week to the extent stated in our first brief, although as we view the situation, it is slightly higher than the applicant is entitled to. We did object to the $16.00 per week award. It is not within the province of this court to fix an amount of compensation. It either sustains or annuls an award. Secondly, the Commission in fixing $16.00 went beyond all or any of its powers, and in fixing the loss as seventy-five per cent at the wrist completely disregarded the express mandate of the Legislature. Thirdly, as to a legal employment, this is not a matter between the applicant and the employer but is a matter in which the State, through its various agencies, enters the picture.

Defendants' brief so utterly fails to answer the points raised by us in our original brief and so completely ignores the cases cited that at first we felt no necessity for a reply brief. But since we conceive it our duty to render to this court such assistance as we can, we shall undertake very briefly to point out several matters in which the defendants are completely at error.

Exhibits 3 and 4, pages 31 and 32 of the record, show the hours worked per day, the wages earned per day and per week, and the total number of hours worked each day, not only for Dorothy Marie Hughes, the applicant here, but for the girls who were employed with her in like work. They show a period of two weeks and sustain the Commission in fixing the compensation at $8.31 per week. The defendants seem to place some stress upon the employer's first report of injury found at page 7 of the record. This report does state that she was employed at a rate of pay of 30 cents per hour working seven days per week, but has nothing to say about the number of hours per day. Mr. Stringham, manager of the plaintiff employer, indicated in what we have heretofore designated in our primary brief as 3 T. at pages 9-12 that the report is not true. He clearly pointed out that no one could receive more than 30 cents an hour on cherries and that the girls were only paid and were hired with the express understanding that their compensation was based on the number of hours they actually worked, which was entirely dependent upon the availability of fruit for canning; that in the work that this

applicant was engaged in no one could earn more than 30 cents per hour. He also stated that during the summer involved, no one made more than 30 cents an hour and that no one made more than the average of $15.00 per week and that it would have been impossible to have made as high as $21.00 per week during that summer (3 T. 15-16, 21). That ten hours a day was not a working day is evidenced by Mr. Stringham's testimony that had there been enough fruit, they would have worked the girls twelve hours a day, but there was not enough work (3 T. 8).

As to this particular girl, however, she apparently, from the charts, was able to earn less than the other girls. That is borne out by her own testimony (3 T. 23). She had several serious operations, which had nothing to do with the accident, and one of the doctors in his report indicates that she was very frail and constitutionally inferior (R. 11, Report of Dr. Lindem). As a matter of fact, the applicant herself knew that she was not employed on any basis of 30 cents an hour ten hours a day, seven days a week, in her own testimony (3 T. 6):

> "Q. You actually didn't work seven days a week and you didn't actually work eight hours a day?
>
> A. I think I only worked as long as they had cherries.
>
> Q. You were supposed to be paid for the hours you actually worked?
>
> A. Yes."

When it becomes obvious not only from the testimony of the employer, but from the employee as well, that the first report of injury is erroneous, it can hardly be used as a basis of evidence. Thus we find no support whatever in the record for counsel's contention that her wages should be based upon the basis of $21.00 per week. In addition, counsel is now precluded from raising any such question by their failure to ask for a rehearing and bring the matter properly to the attention of this court.

A good deal is said by counsel, although its relevancy is questionable, about the applicant being placed at work where there were no guards. The testimony is all to the effect that the applicant was placed on the side of the belt that was properly guarded; that had she stayed on the side of the belt where the forewoman placed her, or had she used the stick provided by the employer with which to dislodge the cherries, in either instance she would not have been injured. So there certainly can be no penalty on us for the applicant's own disregard for her safety after she had been placed in a position of safety and given safety appliances which would have protected her had she used them at her work.

The Commission's finding that the applicant, after her period of total temporary disability, would be capable of earning wages to entitle her to $16.00 per week, between $26.00 and $27.00 a week, is almost too absurd for comment. Even counsel for the defendants admit that it is nonsensical and the most that they ask for is compensation based upon the $21.00 a week, or $12.60 per

week. In view of the fact that counsel themselves for the defendants concede the asininity of such a finding, there should need little more be said about it. There isn't a word of evidence in the record that the applicant would ever have been able to earn a dime more than she was earning at the time of the accident. The manager of the plaintiff employer, Mr. Stringham, said that they have girls who have been with them ten years who were just as poor as girls coming in, and that he knows nothing about Miss Hughes' ability. He says that he doesn't know whether the reason some girls made the maximum was because of their efficiency by reason of their long time employment or efficiency by reason of actual ability. He does definitely say, however, that there is a question in his mind that applicant ever could have earned the maximum of $21.00 per week because of her physical condition (3 T. 15-21). Mr. Stringham did state positively that some of the girls who were working with Miss Hughes were experienced and some of them were not and they all made about the same, but that there was no possibility whatever during that summer of any of them making more than as shown they did make by the tables heretofore referred to (Exhibits 3 and 4).

As to the seventy-five per cent loss at the wrist, counsel are a little vague in their reasons why this should be sustained. They clearly point out in their brief that the award is in violation of the statute by showing that the award must be supported by *competent* evidence and then you only apply it for additional compensation to

any *other* disfigurement or the loss of bodily function *not otherwise* provided for herein. The record points out without dispute that the applicant lost her thumb at the proximal joint and for this loss a specific recovery is provided, so it couldn't come under the definition of any other disfigurement not otherwise provided for, because it is provided for. Counsel fail entirely to answer our argument on this point, and of course the argument is unanswerable as is shown by our own statute and the cases we have heretofore cited. Even Dr. Hicken, from whom counsel quotes so extensively, stated at 2 T. 7 that if she had lost the metacarpal bone completely, she would be worse off than she is now and for the loss of the metacarpal bone completely, the statute only awards sixty weeks, Laws of Utah, 1937, Chapter 41, page 80, whereas the Commission here has given nearly double that.

Counsel gives an illustration on pages 10 and 11 of a man who was moving machinery so that it destroyed his hand at the wrist, but the accident so injured the shoulder that the arm became useless. Well, that's no illustration at all because the statute specifically takes care of that situation in the following language: "One arm at or near shoulder, 200 weeks. In the above cases permanent and complete loss of use shall be deemed equivalent to loss of the member." In this case there is no evidence that she has lost the use of her hand but only the use of the thumb. In fact, Dr. Capener, one of her witnesses, stated his estimate of disability was only because of the possibility which might occur in the

future, while Dr. Hicken's whole evidence is shown to be based upon pure speculation and upon no legal tests recognized under our law. As we stated before, if the Commission may do as they have done here, and where the only thing is the loss of a specific member which is specifically provided for, and call in doctors to estimate what the loss of that member means to the rest of the body, then the Legislature may as well repeal the statute and provide that compensation shall be such as estimated by the State Medical Society.

Counsel seemed to feel that in the double compensation award by the Commission only the rights of the applicant are involved. Similar statutes, as we have already pointed out in our former brief, have always been construed as penal statutes. The mere fact that the State has elected that the penalty shall go to the employee instead of to the treasury is of no moment. The Legislature had the power to provide that the penalty be paid into the State Treasury. It did not see fit to do so, but that does not deprive the State of its interest in this controversy. We still insist that it was only by urging and insistence on the part of the State through its agencies that we found ourselves in the present predicament. We tried to cooperate to relieve unemployment. We tried to employ the people the State sent us. We tried to place them in a safe place to work. We paid them the wages fixed by law. We tried to get work permits. We persisted in our efforts to secure proper certificates. We were prevented from complying with the law by agencies of the State and it was not

because the applicant had no work permit that she was injured and it was not because she could not have a work permit that she was injured because her associates, after her injury, secured them, so there is nothing that we have done for which we should be penalized and everything that we have done has been at the request of the State and everything we have been prevented from doing has been prevented by the State through its agencies. We therefore fail to see how Dorothy Marie Hughes, the applicant, has any part in this portion of the controversy. It is solely between us and the State as to whether the State will exact from us a penalty for its own delinquencies incurred in carrying out its own express desires.

Counsel have cited a number of cases, which we have read with care. The Utah case, *North Beck Mining Company v. Industrial Commission of Utah,* 58 Utah 486, 200 P. 111, certainly doesn't sustain any contention made by defendants. It discusses whether or not an award should be made where there is a loss of several fingers on the basis of loss of use or on the basis of the percentage of loss of fingers added together. We feel that the case is an authority for us because it states by inference that it is only when there is a loss of more than one member that the question of loss of use becomes involved. The other Utah case, *Vukelich v. Industrial Commission of Utah,* 62 Utah 486, 220 P. 1073, directly states "By providing a different basis of compensation for particularly described injuries, those injuries are to be excluded from general provisions which would other-

wise include them." That case is directly against defendants.

The two Pennsylvania cases, *Jensen v. Atlantic Refining Company,* 105 Atl. 545, and *Rakie v. Jefferson Coal & Iron Co.,* 105 Atl. 638, are authority for nothing in this case because in those cases a statute provided that in construing total working days should be included days when an employee was prevented from working through no fault of his own. We have no such statute involved in this case and the employee in her contract of employment very definitely knew that she was only to be paid for the hours she worked.

The case of *Accord County Coal Co. of Alabama v. Bush,* 109 So. 151, simply holds that an employer and an employee may make a settlement without the consent of the insurance company. The case does allow payment for days not worked where the employee was willing and able to work and there was no work for him, but concedes that there is a conflict in the authorities on this point and this conflict, as we have already pointed out, is partially statutory, but it has no place in our case because here the employee went to work with a definite, fixed understanding.

We therefore respectfully abide by the prayer of our original brief.

Respectfully submitted,

SHIRLEY P. JONES,
Attorney for Plaintiffs.