

2001

# Jeff Shipley v. The Industrial Commission of the State of Utah, C and W Contracting company and the Travelers Insurance Company : Brief of Appellee

Utah Supreme Court

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## Recommended Citation

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BRIEF

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OF THE STATE OF UTAH  
BRIGHAM YOUNG UNIVERSITY  
J. Reuben Clark Law School

JEFF SHIPLEY, *Plaintiff,*  
  
vs.  
  
THE INDUSTRIAL COMMISSION  
OF THE STATE OF UTAH,  
C & W CONTRACTING COMPANY  
and THE TRAVELERS  
INSURANCE COMPANY,  
*Defendants.*

Case No.  
13639

BRIEF OF DEFENDANTS

Answer of Defendants to Brief of Plaintiff on the Final  
Order from the Industrial Commission of the State of Utah

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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JEFF SHIPLEY,

*Plaintiff,*

vs.

THE INDUSTRIAL COMMISSION  
OF THE STATE OF UTAH,  
C & W CONTRACTING COMPANY  
and THE TRAVELERS  
INSURANCE COMPANY,

*Defendants.*

Case No.  
13639

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## BRIEF OF DEFENDANTS

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**Answer of Defendants to Brief of Plaintiff on the Final  
Order from the Industrial Commission of the State of Utah**

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### DEFENDANTS' STATEMENT OF FACTS

Plaintiff's brief states that Dr. Ward B. Studt's opinion was that Mr. Shipley is "unemployable". Plaintiff failed to point out that the doctor's opinion is based upon his examination of the plaintiff conducted in 1971. He testified at the Commission hearing that the disability rating he gave in his letter was based upon

the Colorado standard and “represents a permanent responsibility of the [Colorado] Industrial Commission.” [Tr. 173]. Upon cross examination, Dr. Studt stated that he has “no disagreement” with the Utah Panel’s finding of 50% permanent disability for Mr. Shipley. [Tr. 176]. It is of interest to note that Dr. Studt’s medical report filed with the Industrial Commission of Utah states that the x-rays disclose an old fracture of the D-12 vertebra of Mr. Shipley. [Tr. 3].

The Statement of Facts in plaintiff’s brief also calls for clarification on other points. A substantial part of the so-called disability and physical condition of Mr. Shipley, as set forth in the plaintiff’s brief, is based upon Mr. Shipley’s self-serving statements. That is true of the opinions of Mr. Karl F. Kraync and Mr. Lynn Greenwood, stressed in plaintiff’s brief. Even the Medical Panel had to rely somewhat on Mr. Shipley’s complaints made to the members of the panel. Incidentally, it is to be noted that Mr. Kranyc’s letter of August 15, 1972, addressed to the Commission, failed to mention Dr. Pemberton’s medical report on file there. [Tr. 114].

In plaintiff’s brief it is claimed that Travelers did nothing to prove Mr. Shipley’s employability. Contrary to that statement, Travelers, in an effort to learn the complete medical facts in the case, sent Mr. Shipley to Dr. Pemberton for examination in February, 1971. [Tr. 87]. Also, in January of 1972, Travelers recommended to Dr. Munsey, plaintiff’s family doctor, that Mr. Shipley be sent to another orthopedic

physician. Dr. Sherman S. Coleman's examination is summarized in the Medical Panel's report. [Tr. 127]. Both Dr. Pemberton and Dr. Coleman are outstanding orthopedists. Dr. Pemberton's report states that his examination of Mr. Shipley "shows him to walk without a limp. He has some moderate restrictions of motion in the lumber spine." [Tr. 7]. In his report, Dr. Pemberton estimated that Mr. Shipley's "present permanent partial disability rating" if he has no back surgery, to be about 40% of the body, whereas if Mr. Shipley were to have a spinal fusion, "he could go back to work with probably 20% permanent partial disability." [Tr. 8]. Dr. Studt's report of April 3, 1971, recommends that Mr. Shipley probably would do well to accept Dr. Pemberton's disability estimate. [Tr. 12]. In his letter of April 12, 1971, to Travelers, Dr. Studt stated that his estimate of the permanent disability rating for Mr. Shipley under the Colorado law would "seem compatible with Dr. Pemberton's rating." [Tr. 2].

Plaintiff's Statement of Facts also failed to mention that Dr. Coleman's report of January 26, 1972, addressed to Dr. J. P. Munsey, stated the x-rays of Mr. Shipley disclosed an old deformity of the left hip, existing prior to the subject accident; and it is difficult to explain why Mr. Shipley had a series of lumbar spine x-rays in 1967. [Tr. 71]. Dr. Coleman further commented in his letter that after reviewing Mr. Shipley's case, "it becomes increasingly difficult to explain his persistent pain on the basis of residuals of the injury." [Tr. 71].

For defendant to have investigated further the condition of Mr. Shipley's disability would be a practical impossibility. To verify his claim of disability would no doubt have required the bugging of his home and the shadowing of his activities, and even those might have proven inadequate.

The medical examinations and undisputed reports of the doctors in this case are the most reliable and proper means of determining the degree of Mr. Shipley's permanent disability.

In line with the medical reports contained in the case, Travelers has paid Mr. Shipley the sum of \$6,-053.54 for temporary total disability and \$2,168 for permanent partial disability pending the final decision in this case; and additional sums for the hospital and medical expenses of Mr. Shipley, including medications [Tr. 105-113, 217].

The findings in the report of the Medical Panel appointed by the Industrial Commission are to be considered factual evidence in each case, and this court so holds; *Jensen v. United States Fuel Co.* 18 U 2d 414, 424 P.2d 440 (1967).

Finding No. 1. covers the temporary total disability item [Tr. 131].

Finding No. 2 is as follows:

"As a reasonable medical probability, there is 50% permanent partial disability of the body as a whole as a result of this accident of October 27, 1969.



Finding No. 3 refers to Mr. Shipley's peripheral vascular disease.

Finding No. 4 states that there is no evidence of a respiratory or cardiac problem.

Finding No. 5 states that Mr. Shipley "is taking an inordinate amount of medication" in view of the objective physical findings. [Tr. 131].

In Finding No. 6 the Panel found that Mr. Shipley "reached a fixed state some time ago. . ." [Tr. 131].

The Medical Panel had before it all of the physicians' reports contained in the record; and conclusions of the Utah Board of Education on the subject of employability of Mr. Shipley. Defendants respectfully call attention to the results of the Panel physical examination of Mr. Shipley, which certainly does not call for more than a finding of 50% permanent partial disability. It is immaterial whether or not the hearing examiner submitted to the Panel an explicit question as to the total disability, since the Panel is empowered to find and could find such disability if it believed the facts so warranted. More important, the decision as to the disability of a claimant is reserved by law to the Commission. Sec. 35-1-85, U.C.A., 1953; *Crittendon vs. Industrial Commission*, 25 U2d 193, 479 P.2d 347 (1971).

Plaintiff would have the case turn upon Mr. Shipley's claim of "unemployability", but that is not the proper measure of a disability rating under the Workmen's Compensation Act. See 35-1-66, UCA, 1953,

annotated; and *Wilstead v. Industrial Commission*, 17 U2d 214, 407 P2d 692 (1965). The findings of the Industrial Commission do contain a reference to the unemployability factor. Also see 35-1-67, UC A, 1953. That statute refers to "loss of bodily function". And see the case of *Markus v. Industrial Commission*, 5 Utah 2d 347, 301 P2d, 1804, (1956). In that decision, involving a back injury and an appeal by the employee, this Court ruled upon section 35-1-66, UCA, 1953, on partial disability as follows:

"This section gives the commission discretion in its rating of loss of bodily function, which we cannot disturb unless clearly arbitrary. When the legislature authorized awards for other disfigurements or losses of bodily function which are not scheduled in the act, it apparently had in mind awards of proportionate amounts for disfigurements or losses of bodily function of similar nature to those scheduled."

Also, it is to be noted that certain parts of Mr. Shipley's testimony and evidence relating to the employability aspect of the claim cast serious doubts on that contention.

Let us see what Mr. Shipley and his wife stated at the Commission hearing concerning his condition of disability. He testified at both Commission hearings that he has made no attempt or effort to find employment since the subject accident. [Tr. 90, 195]. At the hearing of September 12, 1973, he stated that he drove his car from Moab to Salt Lake on the previous day and that after about two hours of driving he "usually

stops and walks around some.” [Tr. 192]; that at such times he has some pain in his back. He works in his garden at home, and sleeps “pretty good.” He further testified that he does not take a nap in the day time because he would then not sleep at night; that he does rest some after lunch. [Tr. 193, 194]. He can tolerate the pain he occasionally has without medication most of the time but that he takes Demerol and a Soma compound “as a muscle relaxer” [Tr. 194]. When asked if his wife gave him assistance in moving around and doing things for him he answered, “Oh, not a whole lot. I help myself mostly. I can do a lot of things. I don’t lift heavy things, if I can keep from it.” He said that he does not use his cane when in the house but he uses it pretty much. [Tr. 195]. Mrs. Shipley testified that her husband goes down to the coffee shop and then back to his house, and that is his “usual daily pattern.” [Tr. 203]. She also stated that Mr. Shipley turns the water on the lawn and goes out to the garden and “fools around awhile.” [Tr. 202].

Mr. Shipley further testified that social security payments received on behalf of himself, his wife, and boy at the time of the September 1973 hearing amounted to \$458.00 per month, of which \$242.00 is for Mr. Shipley’s disability. (Tr. 200).

Defendants question the reliability of Mr. Kraynac’s opinion concerning Mr. Shipley’s condition. That opinion was based “somewhat on which Mr. Shipley told him”. Mr. Kraynac stated that he is no medical expert, and that he was furnished only medical records

by "the disability determination unit of Social Security." [Tr. 180]. Evidently he did not have before him or even consider the reports of Dr. Pemberton or Dr. Coleman.

Mr. Lynn Greenwood testified on behalf of plaintiff. He stated that he is employed by the Utah Department of Employment Security as a vocational counsel and that his opinion of Mr. Shipley's condition results from a one hour interview, and he had never seen any medical records in the case. He further testified that his opinion is based "substantially" upon plaintiff's statement to him.

The Court's attention is called to the fact that both 35-1-66, U.C.A., 1953 (partial disability) and Section 35-1-67, U.C.A. 1953, speak of "loss of bodily function." Section 66 clearly indicates that the measure of disability is the particular loss of bodily function whether it be covered by the types of injuries therein listed or by any other type of injuries. Section 67, pertaining to total disability, shows that the function of the rehabilitation division follows the commissions' findings of permanent total disability. In plaintiff's brief he is trying to reverse the procedure by saying that if the vocational rehabilitation division finds that plaintiff is unemployable, then the commission must so find. Plaintiff would substitute the opinions of the rehabilitation people, who are really untrained in medical matters, for the expert opinions of the members of the medical panel and for the findings of the Industrial Commission.

Defendants respectfully submit that the evidence in this case is more than adequate to support the order of the Industrial Commission, and calls for the affirmation of its award.

## DEFENDANTS' ARGUMENT AND AUTHORITIES

Plaintiff's contention is that the order of the Commission denying plaintiff recovery in this case is beyond the power of the Commission and is arbitrary and capricious. An important factor in this case is the report of the Medical Panel. Plaintiff never made an objection to the panel report and, in fact, in his letter to the Commission, plaintiff accepted the report "on the condition that the Medical Board finding of a 50% permanent partial disability is viewed only as a medical finding of physical impairment, reserving for the Commission the legal conclusions as to whether or not the Claimant is permanently and totally disabled by considering in addition to the physical impairment the economic and employment-related factors." [Tr. 139]. In the Findings and Conclusions of the Commission the hearing examiner comments that plaintiff has accepted the Panel report. [Tr. 219]. In Sec. 35-1-77, U.C.A. 1953, the duties and the purpose of the Medical Panel are stated. It is obvious they are just as the aforesaid letter of the plaintiff sets out: that the report is deemed evidence and "the commission may base its findings and decision on the report of the panel, but shall not be bound by such report if there is other

substantial conflicting evidence in the case which supports a contrary finding by the commission.”

In the case of *Jensen v. United States Fuel Company and the Industrial Commission of Utah*, *supra*, this Court acknowledged the value of an impartial medical panel:

“ . . . Its proper purpose is limited to medical examination and diagnosis, the evidence of which is to be considered by the Commission in arriving at its decision.”

As this court has often held, the rule in such a case as we have here is that the plaintiff has the burden to affirmatively establish his claim. See the case of *Garner v. Hecla Mining Company*, 19 U2d 367, 431 P.2d 794; (1967) where the court stated:

“It is the prerogative of the Commission, and not of any individual witness, or even of the medical panel, to judge the credibility of the evidence, and upon the basis of the whole evidence to determine the facts. The plaintiff having failed to so persuade the Commission, it is the duty of this court to survey the evidence in the light most favorable to the findings and order; and we cannot reverse and compel an award unless there is credible evidence without substantial contradiction which points so clearly and persuasively in plaintiffs’ favor that failure to so find must be regarded as capricious and arbitrary. Conversely, if there is any reasonable basis in the evidence, or from the lack of evidence, which will justify the refusal to so find, we must affirm.”

The Garner opinion then cited in support of its ruling the case of *Kent v. Industrial Commission*, 89

Utah 381, 57 P.2d 724 (1936) and *Vause v. Industrial Commission*, 17 Utah 2d 217, 407 P.2d 1006 (1965).

The statute setting forth the authority of the Industrial Commission of Utah is stated in Section 35-1-85, U.C.A., 1953. That provision, construed by this court in many decisions, is as follows:

“The findings and conclusions of the commission on questions of fact shall be conclusive and final and shall not be subject to review; such questions of fact shall include ultimate facts and the findings and conclusions of the commission.”

The court’s attention is called to the extensive annotations in that section.

In *Wilstead v. The Industrial Commission of Utah*, supra, this court was asked to review an order of the Industrial Commission to have a disability award increased to give plaintiff further compensation. The Commission had found the plaintiff sustained severe back injuries and was unemployed for more than a year, and that he was finally re-employed in his former position. Plaintiff claimed that he should have total disability for additional time until the medical advisory board give him a disability rating. The court observed:

“The important point to note here is that compensation during total disability does not necessarily mean until the employee is able to do his former work.”

This court affirmed the award of the Commission, thus denying plaintiff’s claim for the disability payments.

The rule of law well established by this court in reviewing the orders of the Industrial Commission is well stated in the case of *Vause v. The Commission*, supra. While the facts involve an occupational disease, the decision is applicable here. We quote from the decision affirming the award:

"This court cannot properly reverse the Commission and compel an award unless there is credible evidence without substantial contradiction which points so clearly and persuasively in plaintiff's favor that failure to so find would justify the conclusion that Commission acted capriciously, arbitrarily or unreasonably in disregarding or refusing to believe the evidence."

The opinion of Justice Crockett in the above decision also contains this statement:

"The weakness in plaintiff's position is one not uncommon in appeals to this court: of becoming so absorbed in his own contentions and so pre-occupied with the assumed righteousness of his own case that he is unable or unwilling to give proper consideration to the countervailing evidence. Such an intransigent approach is certainly of no help to the court, nor is it of any advantage to the party involved. It is a disserve to to any cause to make unsupportable claims for it, because discovery of the fallacy tends to discredit and weaken the entire case and thus to impair whatever merit it may have. Our statutory and decisional law require us to look at the evidence in the light most favorable to the Commission's finding, and it is the obligation of the parties involved to so present the matter to the court."



A later decision of this court approved the aforesaid rule set forth in the *Vause* case, *supra*, and *Garner vs. Hecla Mining Company, supra*. See *Duaine Brown Chevrolet Co. v. Industrial Commission*, 511 P.2d 743, 29 Utah 2d 478 (1973).

### PLAINTIFF'S AUTHORITIES

Plaintiff's brief cites in support of his total disability argument, *Spring Canyon Coal Company vs. Industrial Commission*, 74 Utah 103, 277 P. 206; *United Park City Mines Company vs. Prescott*, 15 Utah 2d 410; 393 P.2d 800 and *Morrison Knudsen Construction Company vs. Industrial Commission*, 18 Utah 2d 390, 424 P.2d 138.

In the *Spring Canyon* case the plaintiff suffered a very serious leg disability, with partial paralysis in both legs so that he needed two canes for getting about; the finding was that he could really use his body only from the waist up. In spite of those injuries, this court reversed the commission's award and reduced the percentage of disability. The *United Park City* case and the *Morrison Knudsen* decision are readily distinguishable from the instant case. In both decisions this court *affirmed* the order of the commission awarding permanent total disability. In each case the injuries were much more serious and severe than those suffered by Mr. Shipley. In the *United Park City* case the employee suffered an amputation of the leg at the knee,

and it was very difficult to apply an artificial limb. In each case the employee attempted or performed some work after the industrial accident.

Plaintiff also cites and quotes from *Caillet v. Industrial Commission of Utah*, 90 Utah 8, 58 P.2d 760 (1936). That decision involved much more serious injuries than we have here and is a case in which this court affirmed the order of the Industrial Commission. The said quote used by plaintiff shows that decision to be no authority for plaintiff's argument since the case refers to a situation where "the evidence conclusively shows that the employee is permanently and totally disabled." We do not have that situation with Mr. Shipley. The decision also points out that the employee must make a real effort to obtain work after the accident if he is at all able to perform some work.

Plaintiff's argument also relies upon the text known as Larson's Workmen's Compensation Law, Section 5750, and speaks of an "odd-lot" doctrine. An examination of Mr. Larson's annotations in support of that section discloses that the cases nearly always involve much more serious injuries than we have here, and usually refer to decisions affirming the particular state's industrial commission. Some of Larson's cases involve a jury. Many of the decisions he cites point out that the particular employee made a real effort to obtain some work after the accident. He cites the Utah case of *Caillet v. Industrial Commission, supra*. The facts and the law in each case Mr. Larson cites

must be examined because the applicable statute in each state varies from state to state. In fact, his text does not mention the type of procedure now existing in Utah where the award of the Industrial Commission cannot be disturbed except as provided in Section 35-1-84, U.C.A. 1953.

Plaintiff's argument, especially at page 11 and 12 of his brief, ignores the findings of the Medical Panel and the authoritative decision handed down by the Industrial Commission. Plaintiff states that in our case the examiner and the commission appear to have decided the case by some compromise "not permitted by law and the undisputed facts here." In view of the Medical Panel's report, the reports of the examining physicians, Drs. Coleman and Pemberton, as well as the testimony of Dr. Studt that he has no disagreement with the panel's finding of 50% permanent disability, how can it be said that the examiner and the commission acted arbitrarily or resorted to compromise in arriving at the award. It is apparent that plaintiff ignores the standard for review by this court as set out in the aforesaid section, 35-1-84, U.C.A. 1953.

## CONCLUSION

Defendants respectfully submit that neither the record in this case nor plaintiff's argument establishes that the Industrial Commission has exceeded its powers or acted in an arbitrary or capricious manner under the

law by its order denying plaintiff's application for a compensation award of permanent total disability.

The Workmen's Compensation laws of Utah and the decisions of this court clearly establish that the Industrial Commission's Order and its award of 50 percent permanent partial disability should be affirmed.

Respectfully submitted,

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