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Jerry R. Probst v. the Industrial Commission of Utah, J. Brent Wood dba Kitco, Inc. and State Farm Fire & Casualty : Brief of Plaintiff-Appellant

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

JERRY R. PROBST,

Plaintiff,

vs.

THE INDUSTRIAL COMMISSION
OF UTAH, J. BRENT WOOD
d/b/a KITCO, INC. and STATE
FARM FIRE & CASUALTY,

Defendants.

Case No. 15425

BRIEF OF PLAINTIFF-APPELLANT

ACTION FOR REVIEW OF MODIFICATION OF AWARD AND DENIAL
OF MOTION FOR REVIEW BY THE INDUSTRIAL
COMMISSION OF THE STATE OF UTAH

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FILED

MAR 10 1978

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Plaintiff,)	
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)
Defendants.	:
)

BRIEF OF PLAINTIFF-APPELLANT

NATURE OF THE CASE

This is an action for review of a decision of the Industrial Commission of Utah, and is brought pursuant to Utah Code Annotated, Section 35-1-83 (1953, as amended). The appellant claims that the Industrial Commission erred in reducing the award previously entered by the Administrative Law Judge.

DISPOSITION IN THE LOWER COURT

On April 5, 1977, the Industrial Commission of Utah acting through its Administrative Law Judge, Keith E. Sohm, issued Findings of Fact, Conclusions of Law and Award in this matter, which awarded the plaintiff a sum total of \$17,708.00 plus medical expenses as compensation for the loss of his left hand, which was crushed and subsequently amputated. These injuries were found to have occurred in the course of his employment by the defendants. On June 24, 1977, the Commission, pursuant to a Motion to Review filed

by the defendants, entered a Modification of Award, reducing the award to \$11,198.58, plus medical expenses.

RELIEF SOUGHT ON APPEAL

The appellant seeks to have the decision of the Industrial Commission reversed and to have the original award reinstated.

STATEMENT OF FACTS

On January 24, 1976, the plaintiff-appellant, Jerry Probst, was severely injured when his left hand was crushed in a hydraulic press while working for the defendants. As a result of the accident, the appellant's hand had to be amputated and he is now required to wear a prosthetic device. At the time of the injury, the appellant was a full-time student at Brigham Young University and was twenty-one years old. He worked for the defendants on a part-time basis at night and on the weekends and was being paid \$2.50 per hour, which amount would have been increased to \$3.00 or \$3.25 per hour after the initial training period, probably thirty days. The injury occurred after the appellant had worked for the defendants for only four days. (R.141-142)

Following the injury, the appellant has worked at other unskilled occupations which have paid him \$500.00 per month and \$6.00 per hour as compensation and has continued his college education. (R.53, 68-69)

The Administrative Law Judge found that the facts as proven constitute "a classic case" directly in point with the intent of Sections 35-1-76 and 35-1-75(3), Utah

Code Annotated (1953, as amended) and, pursuant to those

statutes, specifically found that the appellant:

was of such age and experience when injured that under natural conditions his wages would be increased to the extent that he is entitled to the maximum allowable weekly wage in effect at the time of his injury. The severity of the injury both as to appearance and to inconvenience for life and further considering the cost of replacing and maintaining the artificial arm appliance further convinces the Law Judge that the claimant is entitled to the maximum average weekly wage for computation of permanent partial disability which means he is entitled to compensation at the wage of \$103.33 per week for 168 weeks for a total of \$17,359.44. (R.144)

The Administrative Law Judge denied the appellant's claim for a 15% increase based on the defendant's negligence in maintaining on unsafe working place.

On the 24th of June, 1977 the Industrial Commission modified the appellant's award and reduced the amounts previously decreed. This modification was based on the conclusions that the legislature has intended a narrow application of Section 35-1-76, Utah Code Annotated, and that "the wage of the claimant should be determined on the wage within the same employment." (R.176-180)

ARGUMENT ON APPEAL

The appellant's contention is that the Industrial Commission acted arbitrarily and contrary to well-established Utah law when it modified the appellant's award and gave a narrow construction to the interpretation of Utah Code Annotated, § 35-1-76 (1953, as amended).

POINT I

THE INDUSTRIAL COMMISSION ACTED IN AN ARBITRARY AND CAPRICIOUS MANNER AND MISAPPLIED THE PROVISIONS OF UTAH CODE ANNOTATED, § 35-1-76 (1953, AS AMENDED) WHEN IT REDUCED THE APPELLANT'S AWARD FOR THE LOSS OF HIS HAND.

The appellant's main contention on appeal concerns Section 35-1-76 of the Utah Code, which reads as follows:

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.

This humanitarian statute was found to be applicable to this case by each of the preceding tribunals, and this Court is asked to interpret the statute for the first time in more than forty years. It is the appellant's belief that the humanistic intentions of this law have been violated by the "narrow" construction given by the Industrial Commission.

By its very language, it is clear that this statute was intended to provide relief under certain circumstances to those who are injured at an immature age and who have not had adequate training. The appellant respectfully asserts that the Administrative Law Judge properly set the average weekly wage at \$103.33 per week. This conclusion gave proper consideration to the facts that the plaintiff was a person of immature years, had no training or skills, was employed on a temporary basis only, and intended to graduate from college and increase his earning capacity. Judge Sohm also properly found that the appellant had earned far in excess of the maximum amount allowed (subsequent to

the injury) without any additional training or experience. All of these factors were considered (and properly so) in setting the rate of compensation. The Judge heard all of the evidence first-hand and was able to consider all of the factors.

In reversing the Administrative Law Judge's decision, the Industrial Commission gave the following as its basis for modification:

The applicant was working part-time at the time of the mishap. Prior to 1971, Section 35-1-75 (f), U.C.A. contained the following provision:

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

The above provision extended part-time employment to full-time for calculation purposes. The extension of full-time employment is what the applicant now urges we should do. Prior to 1971, any part-time employment, as long as the employee was regular and regardless of age and experience, the wage would be extended to full-time. The elimination by the legislature of sub-section (f) would indicate an intent to prohibit the extension of all part-time employees to full-time basis. If this was the intent, then the application of Section 35-1-76 would be narrowed if not eliminated. The legislature did not eliminate Section 35-1-76; therefore, we must assume the intent was to narrow its application.

Even prior to 1971, the Supreme Court in our opinion cited the narrower application of Section 35-1-76 in the case of Brewer v. Industrial Commission, 89 Utah 596 58 P.2d 33 when they stated:

The provision is peculiarly adapted to apply in case of minors or persons of immature years whose wages are usually less than that of adults in like employment, but who could be expected naturally and normally to reach the wage scale of adults with increasing years and experience. Where such persons are killed or injured, they would be placed on a comparable basis with adults, particularly where the injury is such as will reach into a period beyond majority.

We conclude the applicant in this case was one of immature years who could be expected to reach a higher wage scale and that his injury will reach into a period long beyond his current age.

Having so concluded what consideration should be used in extending his current wage of \$2.50 per hour. We believe the Court in the Brewer case has also set the bounds for consideration. The Utah Court cited with approval the case of Industrial Commission v. Olive V. Royer 122 Ohio St 271, 171 N. E. 337 quoting the following language:

Those terms (age and experience) should not be held to apply to all ambitious persons on the sole ground they aspire to promotion in more important, more skillful and more remunerative employment.

We conclude that the wage of claimant should be determined on the wage within the same employment. Otherwise, in nearly all cases, it could be shown the injured employee had hopes of future changes in employment leading to conclusions based on speculation. Claimant in this case has shown his ability to earn a higher wage, as he is currently earning \$6.00 per hour. However, we do not believe this fact should be considered in determining the permanent partial disability. In this regard, we believe the Administrative Law Judge was in error. (R.177-178)

These conclusions are in direct contradiction to previous decisions of this Court and the law as established in several other states.

The Commission's citation of the dictum from the Brewer and Royer decisions (supra) is clearly inappropriate because those were cases in which it was found that the statute in question did not apply. It is most contradictory because the Commission also specifically found that Section 35-1-76 did apply to the facts of this case. Therefore, the rationale is clearly inconsistent and, in fact, undermines the conclusions reached by the Commission.

The Commission's conclusions based on the repeal

of Section 35-1-75 (f) of the Code are also clearly erroneous. As late as last year, this Court has repeatedly stated that all doubts respecting the right of compensation are to be resolved in favor of the claimant. McPhie v. Industrial Commission, 567 P.2d 153 (1977). This confirms the holdings of many previous cases that the Workmen's Compensation Act is to be liberally construed in favor of recovery.

No state has been more humane or consistent in its application of these principles than has the State of Utah. In Barber Asphalt Corp. v. Industrial Commission, 103 Utah 371, 135 P.2d 266 (1943), this Court stated:

. . . workmen's compensation acts are intended: "to substitute a more humanitarian and economical system of compensation for injured workmen or their dependents in case of death which the more humane and moral conception of our time requires," and that such acts are "intended to afford injured industrial workmen or their dependents simple, adequate, and speedy means of securing compensation, to the end that the 'cost of human wreckage may be taxed against the industry which employs it' and that society be relieved of the support of unfortunate victims of industrial accidents." It is further stated that "If there is any doubt 'respecting the right to compensation, such doubt should be resolved in favor of the employee or of his dependents as the case may be,'" citing Chandler v. Industrial Comm., 55 Utah 213, 184 P.1020, 8 A.L.R. 930.

"The Industrial Act, including the procedure therein provided, must be liberally construed, and with the purpose of effectuating its beneficent and humane objects." North Beck Mining Co. v. Industrial Comm., 58 Utah 486, 200 P.111, 112.

These precepts of humanitarianism and beneficence have been strongly established in other cases.

In Spencer v. Industrial Commission, 4 U.2d 185, 290 P.2d 692 (1955) the Court stated:

The concept upon which the Industrial Compensation Act is based represents a departure from the rules of common law in regard to compensation for injuries suffered in employment. Underlying the Act is the idea that industry should bear its fair share of the burdens it creates through injuries to those who serve in it, regardless of who was at fault in causing them. Its objective is to alleviate hardships upon workers and their dependents due to industrial injuries, and it has been wisely observed that the Act should be liberally construed to accomplish its purposes. 290 P.2d at 693-694.

In speaking of the Act, Chief Justice Larson gave the following rationale in Ortega v. Salt Lake Wet Wash Laundry, 108 Utah 1, 156 P.2d 885 (1945):

It is a beneficent act, passed to protect employees and those dependent upon them, and to tax the costs of human wreckage against the industry which employs it, such burden being added to the price of the produce and thereby spread over the general consuming users of the product of the industry. Park Utah Mines v. Ind. Comm., supra. The general rules of liberal statutory construction govern the act, keeping in mind the purpose of its adoption. Industrial Comm. v. Daly Min. Co., 51 Utah 602, 172 P.301. It is to be liberally construed in favor of the injured workman. Ogden City v. Ind. Comm., 57 Utah 221, 193 P. 857; Chandler v. Ind. Comm., 55 Utah 213, 184 P. 1020, 8 A.L.R. 930. These are all different ways of saying that the purpose of the act is to view the workman as a part of the industrial setup and impose upon the industry the costs and burdens of the breakage, wreckage or destruction of the human part of the industrial machinery, the same as of the inanimate and mechanical parts thereof. 132 P.2d at 379.

This case is a striking example of the breakage and destruction of the human part of the machinery.

In speaking directly to the issue of interpretation of the Act, this Court stated in Ogden Iron Works v. Industrial Commission, 102 Utah 492, 132 P.2d 376 (1942) that:

Legislation such as this Act, made with a view to further social interests, must be interpreted

not only from the juridical, but also the social point of view, and so as to give material justice its due, while formal jurisprudence has to stand back. There should be no anxious clinging to a dead letter; the interpretation should be liberal and in keeping with the spirit of the legislation.

This view has been repeated emphasized in other decisions such as Salt Lake City v. Industrial Commission, 104 Utah 436, 140 P.2d 644 (1943); M & K Corp. v. Industrial Commission, 112 Utah 488, 189 P.2d 132 (1948); Looser v. Industrial Commission, 9 U.2d 81, 337 P.2d 965 (1959); and Askren v. Industrial Commission, 15 U.2d 275, 391 P.2d 302 (1964). In Jones v. California Packing Corp., 121 Utah 612, 244 P.2d 640 (1952), this court stated that if there is any doubt, it should always be resolved in favor of the employee.

In light of these many holdings the decision of the Industrial Commission is practically inexplicable. To specifically give a "narrow" application to the statute is directly contrary to the decisions of this Court. The ruling of the Commission is even more difficult to understand in light of the nature of Section 35-1-76. This statute was clearly intended to help young people, particularly those who are as seriously injured as the appellant, and the action of the Commission would serve to effectively destroy its humanitarian intent. Such an effect is clearly contrary to legislative and judicial intent.

It would appear that the Commission gave some weight to the experience factor but made no allowance whatsoever for the age factor provision of Section 35-1-76. Despite the explicit finding that the claimant was a person of

immature years, the Commission reduced the award to the hourly wage he would have received in less than one month on the same job and in the same employment. This is clearly contrary to its own findings and good conscience, as well as the laws of this State.

Although there are no Utah cases which interpret the statute in question under analogous circumstances, there are two excellent Oklahoma cases which are almost identical and which reach what the claimant considers to be a just result. These cases are helpful because the fact situations are very similar to this case and the Oklahoma statute is almost identical to Section 35-1-76.

In Harmon's Texaco Service Station v. Kessinger, 32 P.2d 131 (Okla 1961), the Oklahoma Supreme Court affirmed a decision to increase the benefits paid to a minor on the grounds that his wages were likely to increase. In so doing the Court stated that: "Obviously, this provision was for the benefit of a minor. It should be liberally construed in favor of the minor."

Subsequent to the Kessinger decision, the Oklahoma Supreme Court has re-affirmed its position in Williamson v. Grimm, 425 P.2d 992 (Okla. 1967). In that case, as in this one, the permanent partial disability benefits were set at the maximum statutory amount. This again was based on the statute and the rule of law that it should be liberally construed in favor of the minor.

Several New York cases also support the Administrative

Law Judge's award.

In Donnelly v. Buffalo Evening News, Inc., 1974 N.Y.S.2d 361 (1958), the New York Supreme Court considered the case of a minor newsboy who sustained a permanent, work-related injury. The New York law, which is similar to § 35-1-76, applies only to minors.

In the Donnelly case, the appellate court upheld a decision which increased the claimant's award approximately 600%. This case, which will be more completely analyzed under Point II, set forth the rationale for increases of wages in cases where the employee is immature and working at a temporary, low-paying job.

The reasoning and holding of the Donnelly decision was reaffirmed in the case of Haldane v. Buffalo Evening News, 174 N.Y.S.2d 365 (1958), in which the average weekly wage was increased by more than 900% by employing the statutory equivalent to U.C.A. § 35-1-76. These figures compare to an increase of only 19% in the present case (\$3.25 as opposed to \$3.87, which is the base rate for the state maximum figure of \$103.33 per week). If an increase of 600% to 900% can be justified by consideration of the age and experience of an employee, it should not be offensive to grant an increase of 19% in light of the facts in this case. As previously stated, if § 35-1-76 does not apply in this action, it is unlikely that it can be applied under any circumstances. The use of the section in this case was clearly intended by the legislature and was not an abuse of discretion.

These cases stand in direct opposition to the

holdings in the Brewer and Royer decisions cited by the Industrial Commission. It is curious that these cases should be cited to discover the guidelines to implement a decision that was directly contrary to findings. It is the appellant's contention that the rationale of the New York cases should have been applied to reach the proper conclusions.

In modifying the Law Judge's award, the Industrial Commission clearly violated the spirit of Section 35-1-76 and many prior rulings of this Court. Their decision should be rescinded and the original award reinstated.

POINT II

THE INDUSTRIAL COMMISSION ACTED ARBITRARILY AND UNREASONABLY WHEN IT LIMITED APPELLANT'S COMPENSATION TO THE SAME EMPLOYMENT.

The appellant also contends that the Industrial Commission erred when it concluded that:

. . .the wage of claimant should be determined on the wage within the same employment. Otherwise in nearly all cases, it could be shown the injured employee had hopes of future changes in employment leading to conclusions based on speculation. (R.178)

Such a conclusion amounts to no more than an assertion by the Commission that they will not abide by the spirit and intent of Section 35-1-76. To limit the claimant's recovery for the loss of his hand to that wage which he was receiving in a part-time job working his way through college is contrary to the well-established rules with regard to interpretation of the Workmen's Compensation Act. This is

supported by the rationale in the New York cases previously cited.

The Donnelly case thoughtfully analyzed the rule that the increase should be limited to the same employment and recognized the harshness of that rule in certain jobs and situations:

The rule that a finding of wage expectancy must be limited to the same or a similar employment should have no application to the peculiar and unusual status of a newsboy. The statute does not require it, and no judicial decision has gone that far. In the Rose case, supra, we said: "We do not reach the question whether the rule is so inflexible as not to yield to peculiar or unusual circumstances when the salutary purpose of subdivision 5 might otherwise be thwarted, * * *." We now say that the rule is not so "inflexible" that it must be applied to the peculiar status of a newsboy and thus deprive him of fair and adequate compensation for an injury simply because he was injured in a temporary and part-time employment. (Emphasis added) 174 N.Y.S.2d at 363-364.

The Court then went on to explain the reasoning underlying the distinctions:

It appears without dispute that newsboys are hired only between the ages of twelve and eighteen, and they must relinquish the employment upon attaining the age of eighteen. It is a matter of common knowledge that it is a temporary, part-time employment, and never intended by the employer or the employee to be permanent. It is also a matter of common knowledge that the vast majority of newsboys enter other walks of life upon attaining majority, and that most of them attain substantial success. The rule in question undoubtedly emanated from the fact that most minor employees enter a field of employment in which they expect to continue and in which they would normally be advanced and receive increased earnings. In such cases it would be unfair to base a wage expectancy upon some other and more lucrative type of employment. However, a newsboy never expects or intends to continue in the same employment, and it would be equally unfair to confine his wage expectancy to employment as a newsboy or even in the newspaper business.

This claimant has a permanent disability, sustained in his employment, which he will carry with him through

life and will be as much present and as much of a handicap after he attains majority as it is now. He should not be limited to compensation based upon a paltry \$9.29 a week, earned as a part-time newsboy, because of a rule which was never intended to apply to such an unusual and peculiar class of employees. (Emphasis added) 174 N.Y.S.2d at 374.

The underlined portions demonstrate the striking similarities between a youthful newsboy and a part-time college employee: (1) both employments were temporary and part-time, (2) the employment was never intended to be permanent, (3) a vast majority of the class in question enter other fields and attain substantial success (this is even more true with regard to college students) as opposed to those who enter a field of employment in which they expect to continue (apprentices), and (4) the rule was not intended to apply under the above circumstances. The clarity and persuasiveness of this reasoning, together with the basic unfairness of the situation, clearly point to the decision reached by Administrative Law Judge as one that is equitable and just under the circumstances.

This line of reasoning was re-affirmed in the late Haldane decision, supra, and the appellant believes that it should be applied in this case for the reason that the situations are practically identical.

It would certainly be contrary to the spirit of the statute in question and the cases cited in Point I if a young man's award for the loss of his hand were predicated on the wages he was receiving in a part-time, temporary job that was only intended to last a very short time.

POINT III

THE INDUSTRIAL COMMISSION ACTED IN AN ARBITRARY AND UNREASONABLE MANNER WHEN IT REFUSED TO HEAR EVIDENCE AS TO THE WAGES IN THE SAME EMPLOYMENT IN WHICH THE APPELLANT WAS ENGAGED.

In his Motion for Review of Modification of Award, the claimant asked the Industrial Commission for permission to present additional evidence on what constituted the average weekly wage within the same employment. (R.186). The Commission had previously found that this was the basis upon which the average weekly wage rate was to be computed. (R.178). In ascertaining the wage rate to be used in computing the claimant's benefits, the Commission used the figure of \$3.25 per hour. It is the appellant's contention that this figure is totally arbitrary. It represents the rate to which the appellant would have been raised in a very short time at the same job, but it certainly has very little to do with the wages in that type of employment.

This very issue was confronted in the Williamson case, supra, and the Oklahoma Supreme Court made the following finding:

The prevailing rate scale in the industry in which the injury was sustained, in the geographical area in which it was sustained, while persuasive, is not controlling, as it is reasonably to be supposed that a minor will change his employment at a later date. 425 P.2d at 994.

On that same page, the Court said:

In Harmon's Texaco Service Station v. Kessinger, Okl., 365 P.2d 131, we held this statute should be liberally construed in favor of the minor. The

court in the Harmon's Texaco case cites with approval the earlier case of Snoemake Station v. Stephens, Okl., 277 P.2d 998. The Snoemake case is in turn based on the New York Appellate Division decision in Szmuda v. Percy Kent Bag Co., 214 App. Div. 341, 212 N.Y.S. 139, which holds that the wages received by the minor in the particular employment does not necessarily control, and points out the strong probability that a minor worker will change his employment.

It is the appellant's belief that, taking into consideration all of the factors and the intent of the law, this is a much better-reasoned result and urges the Court to consider it in interpreting Section 35-1-76. In any event, the plaintiff should certainly be allowed the opportunity of presenting evidence as to the average wages in the same type of work.

CONCLUSION

In enacting § 35-1-76, the Utah State Legislature has clearly provided that, in circumstances similar to those in the present case, the Industrial Commission may, and indeed should, increase the injured employee's award in light of his age and experience. This case is a classic example of the circumstances anticipated by that section. Jerry Probst was a college student training for a professional degree. The job was a temporary, part-time means to a much better paying job. He never intended to do that work on a permanent basis and certainly did not anticipate the horrible injury which occurred. The evidence clearly showed that he is capable of and, indeed, already has earned wages far beyond the maximum amount allowed under the Workmen's Compensation statutes for compensation purposes. To increase the award on behalf of his age and experience

dictated by the facts in the case and was not an abuse of discretion by the Administrative Law Judge. In modifying that award, the Industrial Commission acted in an arbitrary and capricious fashion and contrary to the established law of the State of Utah. For these reasons, the Commission's holding should be reversed and the previous award reinstated.

If the Court should find that the acts of the Commission were not arbitrary, the appellant believes that the matter should be remanded to receive evidence of the appellant's earning capacity, either within or out of the same type of employment, there being no valid evidence upon which the Commission could reasonably have reached the conclusion it did.

DATED at Orem, Utah, this 17th day of March, 1978.

Respectfully submitted,



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DELIVERED a copy of the foregoing Brief to
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Boston Building, Salt Lake City, Utah 84111, this 17th
day of March, 1978.