

1978

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

Utah Supreme Court

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## Recommended Citation

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

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JERRY R. PROBST,

Plaintiff,

vs.

Case No. 15425

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

Defendants.

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BRIEF OF DEFENDANT-RESPONDENTS  
J. BRENT WOOD AND STATE FARM FIRE & CASUALTY

---

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

MAY 19 1970

Clerk, Supreme Court, Utah

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# STATUTES CITED

UTAH CODE ANNOTATED, § 35-1-76	
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\$12,108.58, plus medical expenses but allowing a credit for amounts already paid.

#### RELIEF SOUGHT ON APPEAL

Plaintiff-Appellant seeks to have the Industrial Commission order reversed on the grounds that the Commission acted arbitrarily, capriciously in reducing the Hearing Examiner's award, and seeks to have the Hearing Examiner's original order reinstated.

#### STATEMENT OF FACTS

On January 24, 1976, appellant, Probst was injured when his left hand was crushed by a hydraulic machine. Plaintiff's hand was subsequently amputated. (R.41) At the time of his injury appellant was nearly 22 years of age ( R. 26) and was working for defendant Kitco, Inc.

Appellant applied for Workmens Compensation and on January 31, 1977 a hearing was held in the Industrial Commission of Utah. The issue at that hearing was the calculation of plaintiff's average weekly wage to provide a basis for an award of disability payments, and the second issue was whether appellant was entitled to a 15 percent increase in his award, representing a penalty against the employer for maintaining an unsafe working environment.

The evidence showed that appellant was earning \$2.50 per hour (R. 56, 86) at the time of the injury and had it not been for the injury would have worked approximately 30 hours that week ( R. 28, 31, 32, 35, 54, and 55). Appellant introduced evidence showing that with further training and experience his wages could

reasonably be expected to be raised to \$3.00 to \$3.25 per hour by Kitco. (R. 86, 87) There was no evidence offered by appellant, however, to show how much he might have earned at the same type of employment but for some other employer. In other words there was no evidence offered by plaintiff to show what the prevailing wages were in the industry.

The Hearing Examiner allowed the parties to file memorandums of law subsequent to the hearing. Before either memorandum was filed, however, the Hearing Examiner prepared a preliminary draft of its findings and conclusions ( R. 128) indicating his intent to award the appellant \$9,699.06 in disability payments, based on the amount appellant was earning at the time of the injury. Appellant thereafter filed his memorandum (R. 130) arguing that the Commission had the discretion to award a larger amount so as to more "fairly compensate the claimant for his injuries." Thereafter, but before respondent's memorandum was filed and without the benefit of respondent's memo the Hearing Examiner entered his order (R. 141-147) awarding appellant disability benefits in the amount of \$17,708.00, based not on what the appellant was earning at the time of the injury but on the maximum State average weekly wage at the time of the injury.

Respondent-Defendants thereafter filed a motion for review accompanied by their memorandum of law (R.148-161) and the matter was referred to the Commission. The Commission, on June 24, 1977 entered an order reducing the Hearing Examiner's award to \$12,108.58



less amounts already paid, based on an average weekly wage reflecting not what the appellant was earning at the time of the injury nor the maximum State average weekly wage but an amount in between representing what the claimant might reasonably be expected to have earned in the future through wage increases at the same employment. (R. 176-180).

Plaintiff-appellant relying on Section 35-1-76 U.C.A. (1953 as amended), argues that the Commission acted arbitrarily and capriciously in basing its award for disability payments on the amount that plaintiff might reasonably expect to earn in the future through wage increases in the same employment, and maintains that since the appellant has recently earned as high as \$6.00 per hour in other unrelated employment, the Commission should have based its award on the maximum State average weekly wage.

The Commission found that appellant was temporarily totally disabled for 18 weeks and 2 days, and should have been compensated for the loss of his hand for 168 weeks for permanent partial disability. Neither appellant nor respondent have disputed this particular finding.

#### ARGUMENT

##### POINT I

THE INDUSTRIAL COMMISSION DID NOT ACT ARBITRARILY OR CAPRICIOUSLY WHEN IT BASED ITS AWARD TO APPELLANT ON COMPENSATION APPELLANT MAY HAVE EARNED IN THE FUTURE BUT WITHIN THE SAME EMPLOYMENT.

Appellant's argument is based on Section 35-1-76 U.C.A. (1953 as amended). That Section 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."

Appellant argues that this statute gives the Commission a freehand to calculate an injured person's average weekly wage based on what he might expect to earn in the future in some other entirely unrelated but more lucrative employment. The Commission disagreed, ruling that while this statute was applicable it nevertheless has certain restrictions, and that while the Commission may consider future wage increases they must consider only those wage increases that are reasonably to be expected within the same employment as the claimant is engaged in at the time of the injury.

While it is to be expected that appellant would seek a greater award, it cannot be said that the Commission acted arbitrarily and capriciously in awarding the lesser amount limited to expected wage increases within the same employment. The evidence introduced by appellant himself was that he was earning \$2.50 an hour at the time of the injury but could have expected to earn as much as \$3.25 an hour with further training and experience in the same employment. The Commission in making its award used the higher figure of \$3.25 an hour to calculate plaintiff's average weekly wage. There is clearly substantial evidence therefore to support the Commission's award and appellant has not shown in what respect the Commission was arbitrary or capricious.

Naturally we must sympathize with appellant and we do not intend in any way to minimize the severity of his injury. This

Court, as well as many others, however, have ruled that where statutes such as Section 35-1-76, are applicable, they must be applied with certain restrictions, and that they are not intended to vest the Commission with the broad discretion to disregard the formulas for calculating average weekly wage.

The court should note at this point that a strong argument can be made, and was made in the Industrial Commission by defendants, that Section 35-1-76 is not at all applicable under the facts of this case, and that accordingly the Commission's award should have been based on plaintiff's wages at the time of the injury or \$2.50 an hour. The case of Brewer vs. Industrial Commission, et al 89 Utah 596, 58 P.2d 33 (1936) interpreted this identical statute. In that case an employee was killed in an accident arising out of his employment as a coal miner. The State insurance fund assumed liability and paid benefits to the widow and the six minor children based upon the employee's wage of \$3.00 per day at the time of the injury which resulted in his death. The widow argued that she was entitled to an increased award based on the belief that her husband may reasonably have been expected to earn \$5.00 to \$8.00 per day in the near future. The Court rejected this argument stating that this particular statute has a more restricted application. In support of its position the court quoted with approval from the case of Industrial Commission of Ohio vs. Royer, 122 Ohio St 271, 171 N.E. 337, 338 wherein that Court in interpreting an identical statute stated:

"Manifestly it was not intended that the Commission should have a freehand in awarding compensation in an excess of two-thirds of the average wage at the time of the injury, neither was it intended that a jury should be given the same latitude. The award of compensation is not a matter of discretion, and neither the Commission nor Courts and Juries may disregard the measure of compensation which the statute provides, nor may they be moved by either sympathy or prejudice."

The Utah Supreme Court stated:

"This section must be read in connection with the previous one which definitely makes the basis of compensation the average weekly wage of the employee at the time of injury. The section was intended to have a restricted application. 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 would be expected naturally and normally to reach the wage scale of adults with increasing years and experience." Id. at 36.

The facts and circumstances of the instant case are not, according to Utah Supreme Court appropriate to enlist the aid of Section 35-1-76. Mr. Probst was not a minor or person of immature years at the time of the injury, but was one month short of reaching his 22nd birthday at the time of the injury, was married shortly after the injury and, furthermore, there is no evidence whatsoever that by reason of his age he was earning less than older adults employed at the same work.

The Commission, however, did find that this statute was applicable in this case but that it must be applied in a reasonably restrictive manner and does not open the doors to the Commission

to calculate a claimant's average weekly wage in whatever manner they choose. On this particular point the Brewer case, citing the Royer case is also instructive. The Court stated:

"Unfortunately, the legislature has not clearly fixed the limitations of the consideration to be given to age and experience; yet there must necessarily be certain limitations, because every injured employee has both age and experience to his credit, and greater age and experience in prospect. If it was meant to confer an unlimited discretion, there was no occasion to employ the consideration of age and experience. To permit the Commission or a Jury to so interpret the expression relating to age and experience and to permit liberal awards that discretion would bring the whole subject of awards into a state of uncertainty."

This Court was comfortable in citing the Ohio case Royer supra, since, as this court pointed out, its law is practically identical to ours, and that large portions of our workmens compensation laws were taken from the Ohio law. The Utah Supreme Court, again quoting Royer, stated:

"In the absence of legislative interpretation we are of the opinion that age and experience should only be considered in the case of persons of immature years who have not yet become skillfull in the particular employment in which they were engaged at the time of the injury. Those terms should not be held to apply to all ambitious persons on the sole ground that they aspire to promotion in more important, more skillfull, and more remunerative employment." Id at 35.

The Court in Brewer, also quoted with approval from the case of Raymond Gagnon's Case, 228 Mass. 334, 117 N.E. 321, where an injured employee was an 18 year old boy but where the court in interpreting an almost identical statute limited determination of the weekly wage to the probable natural increase of wages of the

injured party in the same employment in which he was engaged when injured. That court stated:

"This interpretation is confirmed by practical considerations.

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 . . . 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 opened to the employer during the period of employment, that the injured employee might have earned in some other employment or field of activity."

In the case of Gruber vs. Kramer Amusement Corp. et al 207 App. Div. 564, 202 N.Y.S. 413 (1924), the injured employee was a 17 year old boy who was employed as a helper and received \$4.00 per day at an amusement park. While engaged in his regular work his foot was crushed by one of the cars. The employee contended that his average weekly wage should be based on what he might be expected to earn in other employment, as a machinist or a plumber's helper. The court ruled that his compensation must be based on his employment at the time of the injury and stated:

"In the case of a minor as of other employees, we must seek his average weekly wages in the employment in which he was injured, not in some other employment. We may not speculate upon what other more lucrative employment a minor might enter."

In discussing this very issue in 99 C.J.S. Workmens Compensation, Section 65(f) it states, in interpreting statutes similar to Section 35-1-76:

"However the possible increase must be in the wages in the employment in which he was injured and not some other more lucrative employment which he might enter. . ."

In all of the cases cited, the courts recognize that if the average weekly wage was to be increased at all to thereby increase the award, the increase must be limited to the same employment if it was probable and natural that the employee could expect an increase of wages.

Plaintiff-appellant relies heavily on two New York cases, Donnelly vs. Buffalo Evening News, Inc., 174 N.Y.S.2d 361 (1958) and Haldane vs. Buffalo Evening News 174 N.Y.S.2d 365 (1958). The court should note that under either of those cases the plaintiff-appellant in the instant case would have no argument at all since the New York statute applies only to minors, whereas in this case the plaintiff-appellant is a 22 year old adult. Moreover both of those cases emphasize the peculiar and special circumstances of a young news boy delivering newspapers for an employer. The court in Donnelly recognized the rule that a finding of wage expectancy must be limited to the same or similar employment, as well it must in view of its earlier holding in Gruber supra, but stated that this rule should not apply ". . . to the peculiar and unusual sta

of a newsboy." The plaintiff-appellant also cites two Oklahoma cases, Harmon's Texaco Station vs. Kessinger, 365 P.2d 131 (Okla. 1961) and Williamsen vs. Grimm 425 P.2d 992 (Okla. 1967). Again the statutes being construed in those cases applied strictly to minors, and under those statutes the plaintiff-appellant in this case would have had no basis whatsoever for his argument.

Not one of the other many cases cited by plaintiff-appellant have anything whatsoever to do with the issues involved in this action. Those cases dealt with the continuing jurisdiction of the commission, interpretations of Section 35-1-69 U.C.A., definition of employees, admissibility of heresay evidence and other matters, but none of them interpreted the statute here in question, and are not helpful in the instant case.

Significantly, the very action that the plaintiff-appellant now complains of is the action that the plaintiff-appellant urged the Commission to take in the initial proceedings in the Industrial Commission. In his memorandum of law, filed with the Industrial Commission after the hearing on the merits, plaintiff-appellant argued that by virtue of Section 35-1-76 he was entitled to have his average weekly wage increased based on an expected wage of \$3.25 per hour, in light of his age and experience. (R.130-135). Plaintiff-appellant did not at that time claim that Section 35-1-76 authorized the Commission to increase the average weekly wage to the maximum amount permitted by law as he now urges this court to do. Rather plaintiff-appellant argued that this particular section



authorized the Commission to use the \$3.25 per hour figure as a basis for calculating his average weekly wage. The Industrial Commission has now done that and rather than accept their decision plaintiff-appellant has appealed to this court to find that the Commission acted arbitrarily and capriciously. The Industrial Commission did not act arbitrarily and capriciously but simply followed the guideline set down in the cases and other authorities in Utah and elsewhere which have addressed this issue, and accordingly their action should be affirmed.

## POINT II

PLAINTIFF-APPELLANT HAS NOT BEEN DENIED THE OPPORTUNITY TO PRESENT EVIDENCE AS TO WAGES IN THE SAME EMPLOYMENT IN WHICH HE WAS ENGAGED.

Plaintiff-appellant was represented by counsel at the hearing in this matter and had full opportunity to present witnesses and evidence on all of the issues involved in this case. Plaintiff-appellant's counsel had the opportunity to, and did, cross-examine the witnesses produced by the defendants (R. 77). At that time plaintiff-appellant's counsel introduced evidence tending to show the amount of wages that were generally paid by defendant in the same employment that plaintiff-appellant was engaged, and what wages plaintiff-appellant might reasonably be expected to earn should he receive further training and experience in the same employment. There was never any evidence offered by plaintiff-appellant to show that wages were industry-wide in this same type of employment, nor indeed

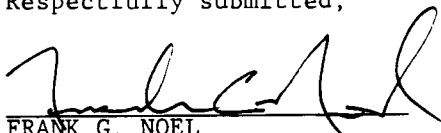
was there any evidence that such measure of wages could be made. There was no evidence to show that the kind of work performed by plaintiff-appellant was performed in other companies, so that an accurate measure could be made. Plaintiff-appellant had every opportunity to present evidence on this issue but failed to do so and cannot now be heard to complain.

#### CONCLUSION

For the reasons stated above defendant-respondents respectfully request that the Industrial Commission's actions be affirmed.

Dated this 18th day of May, 1978.

Respectfully submitted,



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Delivered a copy of the foregoing Brief to Bryce D. McEuen, Attorney at Law, 56 North State Street, Orem, Utah 84601, this 18th day of May, 1978.

