

1986

# Johnson v. Harsco & Heckett : Brief of Respondent

Utah Supreme Court

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UTAH SUPREME COURT  
BRIEF

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DOCKET NO. 86 0086

IN THE SUPREME COURT  
OF THE STATE OF UTAH

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KENNETH JOHNSON,	:	
	:	
Plaintiff-Appellant,	:	
	:	
vs.	:	Supreme Court No. 860086
	:	
THE INDUSTRIAL COMMISSION OF	:	
UTAH, HARSCO/HECKETT and	:	
INSURANCE COMPANY OF	:	
NORTH AMERICA/AETNA,	:	
	:	
Defendants-Respondents.	:	

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BRIEF OF DEFENDANTS-RESPONDENTS

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**FILED**

JUL 16 1986

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OF THE STATE OF UTAH

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Utah Code Annotated, 1953	Section 35-1-66
Utah Code Annotated, 1953	Section 35-1-67

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STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Is the Plaintiff entitled to receive additional disability benefits - either temporary total, temporary partial or permanent partial or permanent total - above and beyond the statutory maximum set forth in Section 35-1-67 Utah Code Annotated (1953) which benefit has heretofore been fully paid by the defendants?

2. Has the Plaintiff fully exhausted his administrative remedies before the Industrial Commission by not seeking continuing permanent total disability benefits under the provisions of Section 35-1-67?

STATEMENT OF FACTS

Defendant agrees with Plaintiff's statement of facts insofar as it is supported by the record of this case. In

addition to Plaintiff's statement of facts, the defendants wish to add the following:

The Defendant insurance carrier in response to a disability evaluation by the treating physician who advised that plaintiff's permanent partial impairments totaled 79% determined that because of the severity of the injuries he sustained and the extremely high partial impairments that resulted "... would denote a permanent total disability rating." (R.7)

Plaintiff was fully advised of all of his rights and the benefits he would receive. Defendant explained plaintiff would receive the statutory maximum of \$61,152.00 from the defendants. (R.7). Plaintiff was further advised of the possibility of Second Injury Fund benefits and informed the plaintiff to contact the Second Injury Fund. The letter was dated January 6, 1984. (R.7). After contact in March, 1984, defendant advised plaintiffs counsel of benefits available from defendant and recommended contact with the Industrial Commission. (R.10). The Industrial Commission's legal counsel responding to a letter from the office of the Governor, advised plaintiff of the benefits defendant was required to pay and recommended further the possibility existed for "lifetime benefits." (R.11). In September, 1985, plaintiff filed an Application for Hearing in which defendants Harsco/Heckett and Insurance Co. of North America/Aetna only, were named and in which Plaintiff

claimed "Defendants have denied liability for permanent partial." (R.16). It must be noted that the Second Injury Fund was not named as a party.

Defendant responded to the Application for Hearing by outlining the benefits that have been paid and will be paid in the future and again recommending the claim be processed against the Second Injury Fund. (R.18).

The administrative law judge issued his Findings of Fact, Conclusions of Law and Order on the 18th day of December, 1985 in which Order he declared there was no factual dispute and indicating a hearing was unnecessary (R.24). On December 19, 1985 plaintiffs counsel agreed that a hearing was unnecessary and the matter could be decided on a stipulated set of facts. Plaintiffs statement of the issue in this case "... was whether or not the carrier can be liable for two 312 weeks of compensation, or whether the carrier is liable for one 312 week period of compensation." (R.28).

The administrative law judge made a finding that "to his credit, the Applicant has returned to work and under these circumstances the statute mandates that he be paid permanent partial disability benefits subject to the limitations set forth in section 35-1-67 (R.25).

#### SUMMARY OF ARGUMENTS



1. Assuming the finding of the administrative law judge was correct that the plaintiff was not in fact permanently and totally disabled because plaintiff had returned to work and was only entitled to permanent partial disability benefits, defendant has in fact overpaid plaintiff.

Section 35-1-67 provides in part "... in case the partial disability begins after a period of total disability, the period of total disability shall be deducted from the total period of compensation." Later, this same section provides "... the amounts specified in this section are all subject to the limitations as to the maximum weekly amounts payable as specified in this section, and in no event shall more than a maximum weekly amounts payable as specified in this section, and in no event shall more than a maximum of 66-2/3% of the state average weekly wage at the time of the injury for a total of 312 weeks in compensation be required to be paid."

Plaintiff received 170-3/7 weeks of temporary total through January 16, 1984 or \$39,198.57. The maximum total period of compensation by this section is 312 weeks at 66-2/3% of the states average weekly wage or \$47,736.00. The balance remaining to be paid on January 16, 1984 was the difference between 312 weeks - the maximum permanent partial - and 170-3/7 weeks already paid as temporary total compensation. This amounts to 141-4/7 weeks at the permanent partial rate of \$153.00 per week or \$21,660.00.

2. Plaintiff is not entitled to two periods of compensation totaling 312 weeks for temporary total and 312 weeks of permanent partial.

Section 35-1-65 Utah Code Annotated (1953) limits the periods of temporary total to not over 312 weeks in a period of eight years. The limitation is a restriction as to a time period of 312 weeks which may be paid any time during an eight year period (underscoring added).

Plaintiff must agree that all payments of temporary total must stop on the maximum medical improvement date determined by the treating physician. This date was December 5, 1983 and all payments after that date had to have been something other than temporary total compensation.

3. Plaintiff has failed to exhaust his administrative remedies through failure to join the Second Injury Fund who may well have some liability after the payment of compensation ends by this defendant.

Plaintiff has relied on a statement in the record that plaintiff has been rehabilitated and returned to work and the administrative law judges volunteered finding that plaintiff has returned to work as precluding payments from the Second Injury Fund.

#### ARGUMENT

##### POINT I

##### PLAINTIFF IS ENTITLED TO TEMPORARY TOTAL

AND/OR PERMANENT PARTIAL OR PERMANENT  
TOTAL BENEFITS BUT NOT TO EXCEED A  
COMBINED TOTAL OF 312 WEEKS

Section 35-1-65 Utah Code Annotated (1953) provides in part.

"(1) In case of temporary disability, the employee shall receive 66-2/3% of his average weekly wages at the time of the injury so long as such disability is total .... but not to exceed 100% of the state average weekly wage at the time of the injury. In no case shall such compensation benefits exceed 312 weeks at the late of 100% of the state average weekly wage at the time of the injury over a period of eight years from the date of the injury." (under-scoring added).

The above section is basically the only provision dealing with "temporary disability" and providing a benefit "so long as such disability is total."

In this case, the Plaintiff sustained grievous injuries which required a long period of convalescence. In fact, the period was almost 3-1/2 years.

The treating physician, Dr. Douglas Schow, Jr., determined on December 5, 1983 the Plaintiff to have combined disabilities of "... 79% permanent disability ..." as a "result of a combination of the above injuries as I have tried to outline for you. It is not expected that Mr. Johnson will have any significant improvement in the future in the above injuries." (R.6).

The foregoing statement did two things in this case. (1) temporary total disability no longer existed, and (2) all future benefits would be chargeable to some other section or sections of the workers compensation act.

The defendant elected to use a later date - January 16, 1984 - as the termination date of temporary total. The plaintiff had received continuous payments of temporary total of 170 weeks and 3 days at \$230.00 per week for a total of \$39,198.57.

From this date, January 16, 1984, forward, the plaintiff's remedy for continuing benefits would be under the provisions of Section 35-1-66 Utah Code Annotated (1953), (Partial Disability - Scale of Payments) or Section 35-1-67 Utah Code Annotated (1953), (Permanent Total Disability - Amount of Payments).

Judge Sumsion in his findings determined that "the payments were made at the permanent total disability rate on the assumption the Applicant would be permanently and totally disabled but in fact he is not. To his credit, the Applicant has returned to work and under these circumstances the statute mandates that he be paid permanent partial disability benefits subject to the limitations set forth in Section 35-1-67 Utah Code Annotated." (R.25).

The administrative law judge went outside the section dealing with permanent partial disability and jumped to

section 35-1-67 which deals with permanent total disability. Section 35-1-66 provides in part:

"In case the partial disability begins after a period of total disability, the period of total disability shall be deducted from the total period of compensation."

Applying this section strictly to the facts in the instant case, we have the following:

Maximum period of compensation:	312 weeks.
Less temporary total comp. paid:	170-4/7 wks.
Balance available for permanent partial payment:	141-3/7 wks.

The agreed permanent partial rating was 79% (R.6). This amounts to 79% of 312 weeks or 246-4/7 weeks. However, there are only 141-3/7 weeks of permanent partial available for payment. This totals \$21,660.00. Plaintiff received \$39,198.57 as temporary total and \$21,053.43 in addition as permanent total compensation. It would appear that Plaintiff may well have been shorted \$616.57. However, the additional qualification appears later in Section 35-1-66.

Section 35-1-66 Utah Code Annotated (1953) provides the additional caveat:

"The amounts specified in this section are all subject to the limitations as to the weekly amount payable as specified in this section, and in no event shall more than a maximum of 66-2/3% of the state average weekly wage at the time of the injury for a total of 312 weeks in compensation be required to be paid."

Again, applying the facts in this case, the following calculations appear in terms of dollars:

Maximum available - Section 35-1-66 312 weeks at \$153.00:	\$47,736.00
Paid as temporary total 170-3/7 weeks at \$230.00:	39,198.57
Maximum available for permanent partial:	8,537.43

The defendants herein believed the above interpretation and application of Section 35-1-66 would be unconscionable and in no way reflective of the serious and disabling nature of plaintiffs injuries.

Plaintiff, therefore, elected to skip to Section 35-1-67 (Permanent Total - Amount of Payments) to compensate the plaintiff for the maximum benefits available by law because of the severely disabling nature of plaintiff's injuries.

There is in fact no conflict in the interpretation of Sections 35-1-65, 35-1-66 and 35-1-67 read separately or jointly.

Section 35-1-65 (Temporary Disability) defines what temporary total disability is and the limits of payment. The statutory maximum is 312 weeks of temporary total at the current weekly maximum rate per week. This amount may be collected at any time the worker is totally disabled during an eight year period. The limit is in dollars.

Section 35-1-66 (Partial Disability - Scale of Payments) provides for a schedule of payments for specific losses and the means of arriving at fair percentages of loss. Again, there are the same limitations on dollar amounts and credit to be given for compensation paid as temporary total from the maximum of 312 weeks.

Section 35-1-67 (Permanent Total Disability) again provides for a schedule of payments at a different amount than the other two with credit being given for all payments made of temporary total and permanent partial but with the same limitations of a dollar amount based upon the same 312 week period. This section specifically recognizes the other two and places the same 312 week limit on combined impairments.

The three statutes have been essentially the same since 1917. Some modifications have occurred over the years but almost exclusively with reference to amounts or the schedule of benefits.

The dearth of case law on this subject is the best indication that the language of the statutes is clear, unambiguous or non-contradictory. The administrative agency has no problem in treating all injured workers fairly and equally so that all receive the same benefits provided by law.

If the benefits are inadequate, the remedy is the legislature and not the courts.

Plaintiff has received all of the weekly compensation benefits these defendants are required to pay under any or all of the provisions of Sections 35-1-65, 35-1-66 and 35-1-67 Utah Code Annotated (1953).

## POINT II

### PLAINTIFF HAS FAILED TO FULLY EXHAUST HIS ADMINISTRATIVE REMEDIES BY NOT SEEKING FURTHER AND ADDITIONAL BENEFITS FROM THE SECOND INJURY FUND

Before these defendants had exhausted the permanent total payments, the plaintiff was seeking further and additional benefits.

On January 4, 1984, defendants advised plaintiff of its decision that for all intents and purposes, plaintiff was permanently and totally disabled, agreeing to pay the statutory maximum and advising plaintiff to seek further and possibly additional benefits from the Second Injury Fund (R.7). The Second Injury Fund was copied with the correspondence and supplied copies of everything thereafter.

In two months, plaintiff had sought counsel and began the claim against these defendants. Plaintiff's counsel was advised to discuss the matter with counsel for the Industrial Commission (R.10). In September, 1984 plaintiff sought help through the office of the Governor. Again, the suggestion was made to involve the Second Injury Fund.



In September, 1985, the current action was brought and again the Second Injury Fund was not involved or noticed. (R.15).

By Answer filed on October 3, 1985, the suggestion was made to join the Second Injury Fund (R.19). Again, no response.

The matter was finally submitted without hearing and of course no notice was given to the Second Injury Fund. (R.29).

Plaintiff has simply accepted as fact the statement of the administrative law judge that "the payments were made at the permanent total disability rate on the assumption the application would be permanently and totally disabled but in fact he is not."

The judge presumed something not in evidence. Defendants advised plaintiff in January, 1984 "... we are aware that you have been in a re-training process and may be able to return to some occupation as a result of that re-training; however, based upon the permanent disability rating given, we would need to regard your condition as permanent and total ..." (R.7).

Defendants assumed nothing. Plaintiff had a high impairment rating (79%) and was in retraining. For all intents and purposes, he was in vocational rehabilitation.

Section 35-1-67 provides in part:

"The division of vocational rehabilitation shall at the termination of the vocational training of the employee, certify to the industrial commis-

sion of Utah, the work the employee is qualified to perform and thereupon the commission shall after notice to the employer, and on opportunity to be heard, determine whether the employee has notwithstanding such rehabilitation, sustained a loss of bodily function ...

.... in all other cases where there has been rehabilitation effected but where there is some loss of bodily function, the award shall be based upon partial permanent disability." (under-scoring added).

It is rather obvious that the re-training or rehabilitation has been effective because the plaintiff has returned to work.

There is no question about the loss of bodily function because it is still severe (79%).

There is no question but what these defendants have discharged their liabilities in full having paid 312 weeks of compensation.

There is also no question but what the statute limits the liability of the employer and insurance carrier but does not limit the liability of the Second Injury Fund.

There is also no question but what Section 35-1-67 provides for payments from the Second Injury Fund and has no statute of limitation.


I feel that the plaintiff is pursuing the wrong party in attempting to receive further benefits.

#### CONCLUSION

The Commission's decision should be upheld in denying plaintiff further or additional compensation benefits from

these defendants and that plaintiff seek appropriate administrative steps to pursue other remedies available to him to possibly receive further and additional compensation.

DATED this 15<sup>th</sup> day of July, 1986.

  
ROBERT J. SHAUGHNESSY,  
Attorney for Defendant-Respondent

CERTIFICATE OF MAILING

I hereby certify that I mailed or delivered four (4) copies of the foregoing Brief of Defendant-Respondents postage pre-paid this 15<sup>th</sup> day of July, 1986.

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