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New Park Mining Company and Pacific Employers Insurance Company v. Industrial Commission of Utah et al : Brief of Appellants

Utah Supreme Court

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**IN THE SUPREME COURT OF
THE STATE OF UTAH**

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NEW PARK MINING COMPANY
and PACIFIC EMPLOYERS IN-
SURANCE COMPANY,

Appellants,

— vs. —

INDUSTRIAL COMMISSION OF
UTAH and LLOYD REMUND,
Minor son of CHARLES L. RE-
MUND, Deceased.

Respondents.

Case No.

8121

APPELLANTS' BRIEF

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Appellants'
Brief

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8121

This Appeal is from an Order of the Industrial Commission of Utah, in favor of Lloyd Remund (one of the respondents herein) and against New Park Mining Company and Pacific Employers Insurance Company (appellants herein). New Park Mining Company and Pacific Employers Insurance Company, will hereinafter be referred to as appellants and defendant, Lloyd Remund, will sometimes hereinafter be referred to as respondent.

STATEMENT OF FACTS

The New Park Mining Company is a Nevada Corporation, qualified to do business in the State of Utah, with its principal place of business at Keetley, Wasatch County, State of Utah, and at all times herein mentioned, was an employer subject to the Workmen's Compensation Act of the State of Utah, and at all times herein mentioned, carried its workmen's compensation and occupational

disease coverage with Pacific Employers Insurance Company, a company lawfully engaged in the writing of workmen's compensation and occupational disease coverage in the State of Utah. The controversy herein involved, arises out of the death of Charles L. Remund which occurred on August 21, 1951, following an injury which occurred on July 25, 1951, said accident arising out of and in the course of his employment while working for New Park Mining Company.

The deceased was survived by his wife, Lottie Remund and one son, Lloyd Remund, the respondent herein, who was sixteen years of age at the time of his father's death, having been born December 19, 1934. (SR1, SR4).

Thereafter, based upon the admissions of the appellants, the Industrial Commission issued its Order dated October 22, 1951, wherein the New Park Mining Company and Pacific Employers Insurance Company were ordered to pay,

"to applicant, Lottie Remund, for the use and benefit of herself and Lloyd Remund, compensation at the rate of \$28.88 per week, beginning August 22, 1951, and continuing through December 18, 1952, thereafter at the rate of \$27.50 per week, until a total amount of \$8,080.44 compensation at both rates has been paid." (SR 4).

Compensation was paid to Lottie Remund by the Pacific Employers Insurance Company in accordance with the Order of the Commission until September 14, 1953, inclusive. The compensation rate was \$28.88 per week until December 18, 1952, inclusive, the day before Lloyd Remund became eighteen years of age, and thereafter at the reduced rate of \$27.50 (SR 4).

On October 5, 1953, the Industrial Commission of Utah, without formal hearing and without having taken additional evidence, issued its Order wherein it is recited that the above mentioned Lottie Remund, widow of Charles L. Remund,

“was on the 1st day of September, 1953, married to Karl Batty, Heber City, Utah, and it further appearing that Lottie Remund (Batty) has received compensation in the amount of \$3,065.81, and inasmuch as she has remarried, she is entitled under the terms of Section 35-1-73, Utah Code Annotated, 1953, to one-third of the unpaid balance of \$5,014.63, or \$1,671.56 in a lump sum, the remaining two-thirds of said balance to be paid to Lloyd Remund, Heber City, Utah, who was dependent upon Charles L. Remund, at the time of his injury and death.” (R 1).

The said Order of the Commission further required the “New Park Mining Company and/or the Pacific Employers Insurance Company to pay Lottie Remund Batty, \$1,671.56 in a lump sum.”

The Order further required payment of

“the balance of the award to Lloyd Remund at the rate of \$18.33, beginning September 14, 1953, and every two weeks thereafter until \$3,343.07 has been paid.” (R 1).

The New Park Mining Company and Pacific Employers Insurance Company on the 29th day of October, 1953, filed with the Industrial Commission of Utah, an Application and Motion for Rehearing as to that portion of the Commission’s Order requiring the payment of compensation to Lloyd Remund, (R 3) which was denied by the Commission on the 9th day of November, 1953. (R 6, 7, 8).

There is no dispute as to that part of the Commission's Order which required compensation to be paid to Lottie Remund Batty. There has been paid to her, the sum of \$1,671.56 in accordance with the Order of the Industrial Commission. (R 2).

The Appeal is from the Order of the Commission only as it directs and orders compensation to be paid to Lloyd Remund, now nineteen years of age.

STATEMENT OF POINTS

I. The Decision of the Industrial Commission is Contrary to Law.

- A. *Dependency Awards may be Changed or Reduced after the Original Order.*
- B. *In Ordinary Cases Dependency Ceases at Age Eighteen.*
- C. *There must be Evidence of Actual Dependency if Dependency is Claimed for Children over the Age of Eighteen Years.*

ARGUMENT

- A. *Dependency Awards may be Changed or Reduced after the Original Order.*

In order to avoid misunderstanding as to appellants' position, it is herewith stated: Appellants have not and do not now take the position that in dependency cases in which the dependents are a widow and several children under the age of eighteen years, or in which there are several young children only, that the unit award must be reduced proportionally as the widow or children marry, reach the age of eighteen or dependency ceases. Appellants do, however, contend that under the particular facts and circumstances existing in the case now under consideration, that dependency has ceased and that compensation payments to Lloyd Remund should be discontinued.

The facts briefly stated are that the deceased left surviving him, a wife and a son who, at the time of his father's death, was a few months under seventeen years of age. The widow remarried and under the provisions of Section 35-1-73, Utah Code Annotated, 1953, she was entitled to and did receive " $\frac{1}{3}$ of the benefits remaining unpaid at the time of such remarriage." At the time of the widow's remarriage, the son was over the age of eighteen years. The position taken by the appellants, under these specific facts, is that the son, now over eighteen years of age, is not entitled to compensation as he is over the presumptive age of dependency and being over the age under which dependency is presumed, there must be evidence of his physical or mental incapacity or evidence of other facts upon which the Commission might find him to be a dependent in fact.

Had the widow not remarried or had there been other children under eighteen years of age, there would be no basis for this appeal.

As far as is known, the question raised in this appeal has not been before the Supreme Court of the State of Utah.

The Industrial Commission by its Order dated October 22, 1951, found that at the time of the injury sustained by Charles L. Remund, that there were dependent upon him, "Lottie Remund, his wife, and Lloyd Remund, born December 19, 1934, his son." (SR 4). The Order required the payment of \$8,080.44 as compensation. Although the Order does not so state, it would appear that the sum of \$8,080.44 includes \$8,000.00 as the basic award and \$80.44 as the additional 5% allowed for Lloyd Remund until he reached the age of eighteen years.

A question which presents itself is whether once the Industrial Commission has made its findings as to dependency in a case such as this one, may the so called unit award be reduced by subsequent events. Appellants submit that there should be a review and amendment by the Industrial Commission of the original Order awarding compensation if there are subsequent changing events and conditions.

The pertinent part of Section 35-1-73 which relates to death benefits under the Workmen's Compensation Act, is as follows:

*"35-1-73. Benefits in case of Death-Distribution of award to dependents-Death of dependents- Remarriage of widow. . . . Should any dependent of a deceased employee die during the period covered by such weekly payments, the right of such dependent to compensation under this title shall cease. Should a widow, who is the sole dependent of a deceased employee and who is receiving the benefits of this title, remarry during the period covered by such weekly payments, her sole right after such remarriage, to further payments of compensation shall be the right to receive in a lump sum $\frac{1}{3}$ of the benefits remaining unpaid at the time of such remarriage. Should a widow, who is a dependent but not the sole dependent of a deceased employee, remarry during the period covered by such weekly payments she shall be entitled to receive in a lump sum $\frac{1}{3}$ of the benefits remaining unpaid at the time of such remarriage and the remaining $\frac{2}{3}$ of such benefits shall be paid to such person as the commission may determine, for the use and benefit of the *other dependents*, the weekly benefits to be paid at intervals of not less than four weeks." (Emphasis ours).*

The above statute provides that the remaining two-thirds of the unpaid compensation, after payment to the widow upon her remarriage, shall be paid for the use and benefit of *the other dependents*.

The requirement that the remaining two-thirds of the unpaid compensation should be paid to *the other dependents* presupposes it would logically appear that there are, at the time of the new Order of the Commission, other presumptive dependents or that evidence has been offered and received showing that there are other persons who are dependents in fact.

At the time of the Commission's Order of October 5, 1953, Lloyd Remund was not within the presumptive class of dependents as established by Section 35-1-71, neither had there been a determination of his mental or physical incapacity or dependency based upon other facts and circumstances.

It has been suggested by the Industrial Commission that because this court has stated in *Davis vs. Industrial Commission*, 109 Utah 87, 164 Pac. 2d, 740, "It is apparent that the children have no divisible interest for their marriage, becoming of age or even death has no effect on the unit award," that the unit award may not, under any circumstances be reduced.

We submit that in the *Davis case, supra* the court was considering a case in which there were several presumptive dependents at the time the Commission's Order was made, and under such circumstances, it was proper that the unit award be left undisturbed.

There are many circumstances under which the so called unit award may be reduced due to events which occur subsequent to the original finding of dependency.

A sole surviving widow who later marries receives her one-third of the unpaid compensation and the balance lapses. Where there is a surviving wife and a minor child, who later dies and the wife remarries, a lapse of the balance of the compensation occurs. The balance lapses if a sole surviving widow dies before the full amount of the compensation is paid. Lapses occur when there is no dependent within the meaning of the Workmen's Compensation Act to whom the balance of the compensation should go.

Appellants' theory that the Industrial Commission may amend its Order pertaining to the "unit award," is supported by statute.

Section 35-1-78, Utah Code Annotated, 1953, provides that the Industrial Commission shall have continuing power to modify and change its former orders and findings.

"35-1-78. *Award — Continuing jurisdiction to modify.*—The powers and jurisdiction of the commission over each case shall be continuing, and it may from time to time make such modification or change with respect to former findings, or orders with respect thereto, as in its opinion may be justified."

This statutory power of review has been considered by this court on many occasions. The cases uniformly hold that the Commission may review or amend its former orders or findings where there has occurred a substantial change in the conditions found at the time of the original order.

In *Hardy vs. Industrial Commission of Utah*, 89 Utah 561, 58 Pac. 2d 15, 18 the court said with reference to the purpose of the review section set out above.

“The purpose of section 42-1-72 (now 35-1-70), supra, is to take care of changed conditions or developments of some kind justifying a modification of a previous award. This may be in favor of the applicants or against him or in favor of the insurance carrier or against it or him.”

A rather complete annotation relating to the modification and review of an award under the above quoted section of our Workmen's Compensation Law is found in 165 A.L.R. commencing at Page 108.

To consider that once an order has been made in a dependency case that the Commission cannot in the proper case, as changing circumstances may dictate, amend or alter the original award, is contrary to the theory of modification and review as established by Section 35-1-78. Not to permit such review and modification, if found proper, would be in effect to declare a prior order of the Industrial Commission *res adjudicata*.

See *Carter vs. Industrial Commission*, 76 Utah 520, 290 Pac. 776, 781, 782.

“This court further approvingly quoted from the opinion in the case of *Bartlett Hayward Co. vs. Industrial Accident Commission*, 203 Cal. 522, 265, Pac. 195, where, under the California Statute, which this court stated was similar to our statute, it was held that, “the power of the Industrial Accident Commission as to its continuing jurisdiction is not limited to consideration of changes in physical condition of workmen, but is extended to right to rescind, alter, or amend orders, decisions, or awards on good cause appearing therefor,” and that the doctrine of *res adjudicata* and other common-law doctrines as incorporated in the Code of Civil Procedure was not applicable to industrial cases.”

The court, after reviewing other decisions, restated the law that the doctrine of *res adjudicata* has no application to industrial cases.

The purpose of the Workmen's Compensation Act is to provide for needy dependents as defined by Statute. To hold that an individual, by reason of the fact that he was just under eighteen at the time of the original determination of dependency is entitled to compensation for years after he reaches eighteen years of age, without a factual showing of actual dependency, is inequitable. As an example of this point, consider a case in which the dependents were a surviving wife and one child, aged seventeen years and 11 months. Under the theory that the award may not be changed by reason of subsequent changes, if the wife should remarry within a few weeks or a few months following the date of the death of her husband, the surviving child who was only a few days under the age of eighteen years at the time of his father's death, would receive compensation until he is over the age of twenty-three years. In contrast, consider a case in which the survivor was only a child a day or two over eighteen years. In the latter case, the child would receive nothing without evidence as to actual dependency, whereas, the other child just a few days younger, would receive compensation for several years after reaching the age of eighteen years without having to present evidence as to physical or mental incapacity or dependency in fact. The result would appear to be inequitable and not in accord with the spirit of the Workmen's Compensation Act.

There appears to be no reason why, given proper facts, the Commission might not amend its previous orders made in death cases involving dependency awards.

B. *In Ordinary Cases Dependency Ceases at Age Eighteen.*

As pointed out in the Statement of Facts, Lloyd Remund, the respondent herein, reached eighteen years of age on the 19th day of December, 1952. At the time of his mother's remarriage, he was nearly nineteen years of age and is now past his nineteenth birthday. The respondent was just under the age of seventeen years at the time of his father's death. In accordance with the Order of the Industrial Commission dated October 22, 1951, compensation was paid to Lottie Remund, the mother of the respondent and the surviving wife of the deceased, at the basic compensation rate of \$27.50 per week plus an increase of 5% for one dependent child until the respondent, Lloyd Remund, reached eighteen years of age, thereafter, in accordance with the said Order of the Commission, the compensation rate was reduced to \$27.50 per week. The reduction in the rate of compensation to be paid after the respondent reached eighteen years of age was proper and is in accordance with the requirements of the Workmen's Compensation Act.

Section 35-1-74, Utah Code Annotated, 1953, provides as follows:

"Increase of award to children-Effect of death, marriage, majority, or termination of dependency. —In all cases where the award of compensation is increased 5 per cent of the amount of such award for each dependent minor child, as provided in this title, such increase in the amount of the award shall cease at the death, marriage, attainment of the age of eighteen years, or termination of dependency of each such child."

The above quoted section provides for the termination of the increase in compensation whenever a child dependent reaches the age of eighteen years. Although this section refers only to the increase of 5% allowed for dependent children, it is nevertheless persuasive of the apparent legislative intent in all ordinary cases to consider children as being dependent only until they reach the age of eighteen years. The above section was added to the Workmen's Compensation Act in 1945, which is a further indication of legislative intent.

The Workmen's Compensation Act is consistent in that eighteen years of age is used throughout the Workmen's Compensation Act as the age at which the presumption of dependency ceases and the age at which the increase in compensation is terminated. Section 35-1-65, pertaining to temporary disability; Section 35-1-66, pertaining to partial disability and Section 35-1-67, pertaining to permanent total disability, contain the identical provision that compensation should be increased by "5% of such award for each dependent minor child *under the age of 18 years. . . .*" (emphasis ours).

It is not by chance that each section of the Statutes pertaining to compensation limits the increase in compensation payments only to those cases where the children are under eighteen years of age. Section 35-1-71 specifies that the presumption of dependency shall apply only to those children under the age of eighteen years.

"35-1-71. *Dependents-Presumption.*—The following persons shall be presumed to be wholly dependent for support upon a deceased employee:

"(2) Children under the age of eighteen years or over such age, if physically or mentally incapacitated, upon the parent, with whom they are

living at the time of the death of such parent, or who is legally bound for their support.

"In all other cases, the question of dependency, in whole or in part, shall be determined in accordance with the facts in each particular case existing at the time of the injury resulting in the death of such employee. . . ."

When all the provisions of the Workmen's Compensation Act pertaining to the payment of compensation and the payment of benefits are considered as a whole, it is clear that the Legislature intended that in all ordinary cases, compensation for dependent children shall cease upon those children reaching the age of eighteen years.

C. *There Must Be Evidence of Actual Dependency if Dependency is Claimed for Children over the Age of Eighteen Years.*

If the facts do not bring this case within the provisions of the first paragraph of subdivision (2) of Section 35-1-71, then the fact of dependency cannot be presumed from the relationship of parent and child, but must be determined by facts existing at the time the Commission, as required by Section 35-1-73, must determine who are the "other dependents."

The Utah Supreme Court said in *Utah Fuel Co. vs. Industrial Commission, et al*, 80 Utah 301, 15 Pac. 2d 297, 298,

"Dependency is something different from the right to have support or the duty of a parent to support his children. The word "dependent" ordinarily means the need of aid or support, not self-sustaining. A dependent person is one who has not the means of his own to support himself. A total dependent is one who has no means whatever by which to support himself. A partial dependent is one who has some means but not sufficient for

his support. *Kennedy vs. Keller*, 225 Mo. App. 561, 37 S.W. (2d) 452. This definition is not intended to be exclusive. Under other circumstances and conditions, the definition may be broader. *Utah Galena Corporation vs. Industrial Commission* (Utah) 5P. (2d) 242. The question of dependency is one of fact which the commission must find from evidence introduced before it."

In the case now before this court there is no conflict in the evidence. Lloyd Remund is over the age of eighteen years. There is no evidence as to his physical or mental incapacity nor as to his dependency in fact. Therefore, as a matter of law, the Industrial Commission should not have found him to be a dependent and the decision of the Industrial Commission should be reversed. The Supreme Court, in the case of *Globe Grain & Milling Co. et al vs. Industrial Commission of Utah*, 57 Utah 192, 193 Pac. 642, 643 said,

"As before stated, this court will examine into the evidence only to determine whether there is any substantial competent evidence in support of the findings of the commission. If there is such evidence the findings will be sustained, but if there be no substantial competent evidence to support the findings this court, on application of the aggrieved party, is required to annul the award which is based on such findings. It is elementary that if there is no conflict in the evidence and no conflicting inferences may be drawn therefrom the question of whether a particular finding is supported by the evidence or not is purely a question of law. The rule is well stated by the Supreme Court of Appeals of West Virginia in the headnote to the case of *Poccardi vs. State Comp. Com'r*, 79 W. Va. 684, 91 S.E. 633, in the following words:

"The question of dependency in England and in this country, under Workmen's Compensation Law, is one of fact and not of law, to be determined by the evidence in each particular case; but where the evidence is all certified and there is no conflict, a question of law, and not of fact, may be thus presented."

CONCLUSION

We respectfully submit that the Industrial Commission was in error in denying appellants' Motion for Rehearing and in awarding compensation to Lloyd Remund. It is respectfully urged that the award of the Industrial Commission herein be annulled and set aside.

Respectfully submitted,

CHARLES WELCH, JR.,
JACK FAIRCLOUGH,
Counsel for Appellants.