

1980

Entwistle Company and Home Insurance Company v. Jerry M. Wilkins and Industrial Commission of Utah : Appellants' Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

ENTWISTLE COMPANY and
HOME INSURANCE COMPANY,

Plaintiffs and
Appellants,

vs.

Case No. 16879

JERRY M. WILKINS and
INDUSTRIAL COMMISSION OF UTAH,

Defendants and
Respondents.

APPELLANTS' BRIEF

ORIGINAL ACTION TO REVIEW THE
PROCEEDINGS AND ORDERS OF
THE INDUSTRIAL COMMISSION OF UTAH

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CASES CITED

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denied by an order dated January 16, 1980, thereby affirming the orders of the administrative law judge.

RELIEF SOUGHT BY ENTWISTLE COMPANY
AND HOME INSURANCE COMPANY

Entwistle Company and Home Insurance Company seek to have the portion of the order of the Industrial Commission which granted the defendant an award of temporary total disability compensation reversed. It is the plaintiffs' position that such an award was an abuse of discretion on the part of the administrative law judge.

STATEMENT OF FACTS

Defendant, Jerry M. Wilkins, was working for the plaintiff, Entwistle Company, on April 15, 1977, when he claims to have suffered an industrial accident. Mr. Wilkins' specific duties for Entwistle Company included traveling to various dealers for the purpose of selling trailers manufactured by the plaintiff (TR,p7). While traveling on business, Mr. Wilkins' truck, which was towing a demonstration trailer, slipped off the road near Portland, Oregon. While attempting to get the truck and trailer back on the road, Mr. Wilkins claims to have fallen out of the back of the pickup truck he was driving. As a result of the fall, Mr. Wilkins bumped his back on the rocks below, causing the alleged injury in this case (TR,p9-10). Although Mr. Wilkins claims to have felt great pain at the time, he was able to get the truck and trailer back on the road. He continued to complete the sales trip which took an additional 12 days. He admitted that after a few days the pain

had somewhat subsided (TR,p12-15).

On April 29, 1977, after Mr. Wilkins had arrived home from his sales trip, while shoveling sand into a cement mixer at his home, Mr. Wilkins felt great pain in his back and could not straighten up (TR,p16). Following this accident, he consulted a physician for the first time. The doctors then started treatment on Mr. Wilkins' back, but did not feel that the injury was severe enough for hospitalization or operation (TR,p17)

Mr. Wilkins continued to work for Entwistle Company until May 23, 1977. At that time he claimed he was unable to perform the duties required of him on the job and was therefore terminated (TR,p18).

Following his termination of employment at Entwistle Company, Mr. Wilkins began doing identical work for the Wilkins Manufacturing Company (TR,p30-34), a company owned by Mr. Wilkins and his son (TR,p24). The Wilkins Manufacturing Company was engaged in the manufacturing of camper shells. Mr. Wilkins admitted on cross-examination to making two or three sales trips for the Wilkins Manufacturing Company (TR,p35) and also delivering camper shells to a Vernal dealer (TR,p36). This was done in a three month period from May to August of 1977, the period in which he was awarded temporary total disability. The Wilkins Manufacturing Company was destroyed by a fire on August 29, 1977. As a result Mr. Wilkins no longer sold or delivered camper shells since they were destroyed in the fire. Mr. Wilkins claims to have reinjured

his back at the fire at the Wilkins Manufacturing Plant (TR,p32).

The administrative law judge determined that the defendant suffered temporary total disability during the period of May 23, 1977, to January 1, 1978. It was also determined that he suffered a 10% permanent partial impairment for the whole body as a result of the April 15, 1977 accident.

ARGUMENT

POINT I

SINCE DEFENDANT CONTINUED EMPLOYMENT OF THE SAME GENERAL CHARACTER IMMEDIATELY FOLLOWING HIS TERMINATION WITH ENTWISTLE COMPANY, THERE CAN BE NO AWARD OF COMPENSATION FOR TEMPORARY TOTAL DISABILITY.

The defendant, Jerry W. Wilkins, immediately following his termination with the plaintiff, Entwistle Company, continued performing duties for Wilkins Manufacturing Company of the same general nature performed at Entwistle Company. He continued selling and delivering camper shells for Wilkins Manufacturing which was his identical duty at the Entwistle Company.

The Utah Supreme Court has specifically denied any compensation for temporary total disability to an employee who continued performing employment of the same general character as the employee in which he was working when his claimed injury was suffered. In the case of Morrison-Knudson Construction Company v. Industrial Commission, 18 Ut.2d 390, 424 P.2d 138, in quoting United Park City Mine Company v. Prescott, et al., 15 Ut.2d 410, 393 P.2d 800, the Court stated:

In considering the attack upon the order made these principles are to be kept in mind: That a workman may be found totally disabled if by reason of the disability resulting from his injury he cannot perform work of the general character he was performing when injured, or any other work which a man of his capabilities may be able to do or learn to do.

According to this case, the defendant, Jerry Wilkins, in order to receive temporary total disability compensation, could not perform duties on a new job of the same general character he was performing when injured. Mr. Wilkins did perform work of the general character he was performing when injured. In fact, the work he performed for Wilkins Manufacturing was almost identical to his duties at Entwistle Company. This fact was admitted by Mr. Wilkins during the hearing held before the administrative law judge on this case (TR,p35). Plaintiff also introduced an affidavit to support that in addition to making sales calls, Mr. Wilkins delivered camper shells to dealers. By affidavit, the plaintiff also established that Mr. Wilkins aided in the electrical wiring of a new house. These activities are not those contemplated to be done by a man who is temporarily totally disabled.

Since Mr. Wilkins continued employment of the same general character he was engaged in when his alleged accident occurred, any compensation for temporary total disability would not only ignore prior Utah case law, but would totally disregard the policy reasons for temporary total disability compensation. The policy of temporary total disability compensation is to compen-

sate a worker for the loss of ability of performing work of the same general character in which he was engaged when his injury was suffered. The facts in this case show conclusively that Jerry Wilkins was able to continue performing work of the same general nature. Therefore, the policy reasons for awarding temporary total disability compensation are totally absent. The reward of temporary total disability compensation to Jerry Wilkins should be reversed.

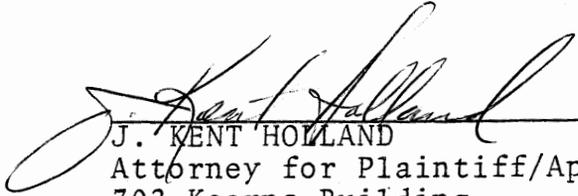
CONCLUSION

During the period which the defendant, Jerry W. Wilkins, is claiming temporary total disability he continued performing work of the same general character as when the accident complained of occurred. This fact alone is dispositive of this case. The defendant cannot claim to be totally disabled on the one hand, and continue work of the same general nature on the other. If under these circumstances the defendant is to be compensated, he would be receiving the benefits of both the same general type of employment and compensation for an injury which by his conduct does not exist. On this basis, plaintiffs Entwistle Company and Home Insurance Company, pray that the order of the administrative law judge granting the defendant, Jerry W. Wilkins, compensation for temporary total disability be reversed.

DATED this 21st day of April, 1980.

Respectfully submitted,

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MAILED TWO COPIES of the foregoing Appellants' Brief
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84642, this 21st day of April, 1980.

