

1980

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

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2

 Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

J. KENT HOLLAND; Attorney for Plaintiff-Appellant PAUL R. FRISCHKNECHT; Attorney for Defendants/Respondents

Recommended Citation

Brief of Respondent, *Entwistle v. Wilkins*, No. 16879 (Utah Supreme Court, 1980).
https://digitalcommons.law.byu.edu/uofu_sc2/2139

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT OF THE STATE OF UTAH

ENTWISTLE COMPANY and
HOME INSURANCE COMPANY,)
)
)
 Plaintiffs and)
 Appellants,)
)
 vs.)
)
)
 JERRY M. WILKINS and)
 INDUSTRIAL COMMISSION OF UTAH,)
)
)
 Defendants and)
 Respondents.)
)

Case No. 16879

RESPONDENTS' BRIEF

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

PAUL R. FRISCHKNECHT
Attorney for Defendant/Respondent
Jerry M. Wilkins,
50 North Main Street
Manti, Utah 84642

J. KENT HOLLAND
HANSON, RUSSON, HANSON & DUNN
Attorneys for Plaintiffs/Appellants
702 Kearns Building
Salt Lake City, Utah 84101

FILED

JUN 4 1980

IN THE SUPREME COURT OF THE STATE OF UTAH

ENTWISLITE COMPANY and
HOME INSURANCE COMPANY,

Plaintiffs and
Appellants,

vs.

JERRY M. WILKINS and
INDUSTRIAL COMMISSION OF UTAH*

Defendants and
Respondents.

Case No. 16879

RESPONDENTS' BRIEF

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

PAUL R. FRISCHKNECHT
Attorney for Defendants/Respondents
50 North Main Street
Manti, Utah 84642

J. KENT HOLLAND
HANSON, RUSSON, HANSON & DUNN
Attorneys for Plaintiff/Appellants
702 Kearns Building
Salt Lake City, Utah 84101

TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF THE NATURE OF THE CASE.	1
DISPOSITION BY THE INDUSTRIAL COMMISSION OF UTAH .	1
NATURE OF RELIEF SOUGHT ON APPEAL.	2
STATEMENT OF THE FACTS.	2
ARGUMENT.	5
POINT I. THE ADMINISTRATIVE LAW JUDGE AND INDUSTRIAL COMMISSION DID NOT ABUSE THEIR DISCRETION IS AWARDING COMPEN- SATION FOR TEMPORARY TOTAL DISABILITY,	5
CONCLUSION.	7

AUTHORITIES CITED

<u>United Park City Mines Co. vs. Prescott</u> , 393 P.2d 800.	5
<u>Morrison-Knudsen Construction Co. vs. Industrial Commission</u> , 424 P.2d 138.	6
<u>McPhie vs. Industrial Commission</u> , 567 P.2d 153. . .	6
Larson, <u>Workmen's Compensation</u> , (Desk Edition). . .	6

IN THE SUPREME COURT OF THE STATE OF UTAH

ENTWISTLE COMPANY and
HOME INSURANCE COMPANY,)

Plaintiffs and)
Appellants,)

vs.)

Case 16879)

JERRY M. WILKINS, and)
INDUSTRIAL COMMISSION OF UTAH)

Defendants and)
Respondents.)

RESPONDENTS' BRIEF

NATURE OF THE CASE

This is a Workman's Compensation case seeking review of an order issued by the Utah State Industrial Commission granting defendant, Jerry M. Wilkins, compensation for temporary total disability. The plaintiffs were ordered to pay to the defendant \$169.00 per week from May 23, 1977 to January 1, 1978, for a total of 37 weeks for temporary total disability compensation. It was further ordered that the defendant receive \$3,515.30 for permanent partial disability compensation.

DISPOSITION BY THE INDUSTRIAL COMMISSION OF UTAH

The plaintiffs filed with the Industrial Commission of Utah a motion for review dated December 24, 1979, which was denied by an order dated January 16, 1980, thereby affirming the orders of the administrative law judge.

NATURE OF RELIEF SOUGHT ON APPEAL

It is respondent's position that the award of temporary total disability was within the discretion of both the Administrative Law Judge and the Commission, and should be upheld on appeal.

STATEMENT OF THE FACTS

Respondent, Jerry M. Wilkins, was working for the Appella Entwistle Company, on April 15, 1977, when he was injured while on company business and in the proper and normal course of his employment. Mr. Wilkins' specific duties for the Entwistle Company included prolonged sales trips for the purpose of selling the trailers manufactured by appellant, (TR 7). While enroute from Sacramento, California to Kennewick, Washington, Mr. Wilkins was traveling east from Portland, Oregon on I-84 (sic) under adverse weather conditions, when the truck and 26 foot fifth wheel trailer, he was driving was blown off the road. In order to re-enter the flow of traffic Mr. Wilkins had to unhook and reconnect the trailer. While attempting to do so, he fell over the side of the pickup onto the rocks below injuring his tailbone and lower end of the spine (TR 9, 10). Although after twenty or thirty minutes the pain had lessened enough for Mr. Wilkins to re-enter the highway traffic, his left leg was still numb, (TR 11, 12). He proceeded to Kennewick, and stayed the night with friends. Upon arriving at Kennewick Mr. Wilkins was experiencing considerable pain which caused him to lay on the floor the rest of the evening until he went to

bed (TR 12). The following day his left leg was still numb though the pain had lessened and he decided to continue the sales trip due to the expense to the company should he return early. However, within a week the situation had become so bad, he called his employer and told him he had to come home (TR 14). As Mr. Wilkins was no longer doing sales shows but only light calling he returned home via Clarkston and Lewiston Idaho and arrived several days later on the 27th day of April (TR 14, 15). By the time he arrived home, he was suffering considerable pain and again had to lay on the floor the rest of the evening. In the morning, he felt better but had decided to report to his employer and see a doctor (TR 15). At one o'clock p.m. in the afternoon, Mr. Wilkins, prior to talking with his employer, checked on the progress of workmen hired by his wife to build a cement stairway. At this time, one of the workmen said the cement was watery and needed to be thickened. Mr. Wilkins thereupon attempted to shovel several spadefuls of loose sand into the mixer, but upon scooping up the third spadeful he was unable to straighten up (TR 15, 16). Immediately, Mr. Wilkins was taken to the doctor by his wife, where, because of his lack of feeling during urination, the doctor sent him to a specialist at Utah Valley Hospital. Although no operation ensued, Mr. Wilkins had to return several times for evaluation (TR 16, 17).

On May 20, 1977, he returned to work, but because of the pain and numbness he was unable to continue and thinking he was being given a leave of absence was terminated (TR 18, 19).

Following his termination with Entwistle, Mr. Wilkins was unable to continue his prior character of employment as it required long hours of work on his feet, sometimes as much as twelve hours, which caused his leg to become numb and buckle under him (TR 21). Although there were and are periods of time without pain, these times are always after prolonged periods of rest. Following several hours of work or walking around the numbness and weakness would return (TR 21, 22).

Mr. Wilkins at this time was involved in a camper shell manufacturing business with his son. He was to provide outside financial support while his son ran the business. Mr. Wilkins never received any payment for employment (TR 24, 25). However, due to his termination, he was unable to provide this support and instead became lightly involved in the business by making out payroll checks, paying bills and in making two short trips to Ogden and Vernal, Utah (TR 31, 32). In August of 1977 a fire destroyed part of this business, however it remained a functional business and continued selling camper shells (TR 24). During the aftermath of the fire, while surveying the damage, Mr. Wilkins reinjured his back walking amidst the debris (TR 38). The Administrative Law Judge findings were that Mr. Wilkins had suffered temporary total disability during the period of May 23, 1977 to January 1, 1978. It was also found that he had suffered a 10% permanent partial disability as a result of the April 15, 1977 accident. This finding was affirmed by the Utah Industrial Commission.

ARGUMENT

POINT I

THE ADMINISTRATIVE LAW JUDGE AND INDUSTRIAL COMMISSION DID NOT ABUSE THEIR DISCRETION IN AWARDING COMPEN- SATION FOR TEMPORARY TOTAL DISABILITY

The respondent, Jerry M. Wilkins, was not able to continue making prolonged sales trips nor pursue an ordinary sales day as he had been able to prior to the injury. He instead was forced to engage in very limited activity which was found to constitute temporary total disability for which compensation was granted and affirmed.

Although the Utah Supreme Court had denied compensation for permanent total disability to an employee who continued to perform the same character of work as which he had been performing at the time of the injury, the court has also emphasized the importance of weight given to the trier of fact's findings. In United Park City Mines Co. vs. Prescott, 393 Pd. 800, (cited by the appellants), the court held that when considering an attack on a compensation order two principles should be kept in mind. The first principle was that a workman may be found totally disabled if by reason of his injury he cannot perform work of the same character of what he was doing prior to the injury. The second principle was that the court, in reviewing the evidence, should not disturb the findings of the trier of fact if there was a reasonable basis for them. The court then at the end of its opinion further defined the second principle by saying that the findings should be affirmed absent any

"capricious" or "arbitrary" actions by the Industrial Commission. These principles have been affirmed again and again by this court. Morrison-Knudsen Construction Co. vs. Industrial Commission, 424 P.2d 138, 140, and McPhie vs. Industrial Commission, 567 P.2d 153, 155.

However, all of these cases have involved permanent total disability claims, not temporary total. The rationale behind the temporary total as opposed to the permanent total differs. In Larson, Workmen's Compensation (Desk Ed.) Sec 57.10, temporary total was defined as follows:

"Temporary total (although the majority of claims are in this group) and temporary partial occasion relatively little controversy, since they are ordinarily established by direct evidence of wage loss."

Larson, further explained that permanent total involved a discussion of physical injury and capacity for rehabilitation as opposed to the temporary total requirement of proof of wage loss (ibid).

In the case at bar, the respondent Mr. Wilkins, suffered a compensable injury which caused him a total wage loss from May 23, 1977 to January 1, 1978. Although doing light duty in a joint business totally run by his son, Mr. Wilkins received no payment. This cannot be considered employment as Mr. Wilkins responsibility to the fledgling business was to provide financial support; and when prevented from doing so by the injury, his contribution was writing out some of the payroll checks and an occasional business errand within a days drive (TR 25, 31, 32). The injury had prevented him from participating in the regular job market as evidenced

by his firing by Entwistle Company, the appellant (TR 18).

Mr. Wilkins could no longer perform the general character or scope of his work due to his inability to make the prolonged sales trips, work ten to twelve hours a day at the sales conventions or even sit comfortably at his desk, (TR 18, 19, 21). As a consequence of the industrial injury, Mr. Wilkins did not draw any salary or other remuneration from any job from May 23, 1977 to January 1, 1978.

CONCLUSION

The trier of fact in this case at bar found that the respondent, Jerry M. Wilkins, was entitled to temporary total disability and a partial disability. The Industrial Commission affirmed this finding and slightly altered it in granting 32 weeks of temporary total disability at \$169.00 per week (instead of the original 37 weeks granted) and a 10% partial permanent disability. The respondent, contends that the discretion placed in these lower tribunals was not abused and that their findings are well taken under the law. Therefore, the respondent requests the affirmation of these findings based on the merits of the case.

DATED this 4th day of June, 1980.

Respectfully Submitted

PAUL R. FRISCHKNECHT
Attorney for the Defendants/
Respondents
50 North Main Street
Manti, Utah 84642

MAILED TWO COPIES of the foregoing Respondents' Brief to, J. Kent Holland, Hanson, Russon, Hanson & Dunn, Attorneys for the Plaintiffs/Appellants, 702 Kearns Building, Salt Lake City, Utah 84101.
