

1981

Harley R. Brundage v. IML Freight, Inc. et al : Brief of Plaintiff

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

HARLEY R. BRUNDAGE,	:	
	:	
Plaintiff,	:	
	:	
vs.	:	Case No. 16972
	:	
IML FREIGHT, INC., SPECIAL	:	
FUND OF UTAH, and THE	:	
INDUSTRIAL COMMISSION OF UTAH,	:	
	:	
Defendants.	:	

WRIT OF REVIEW FROM AN ORDER OF
THE INDUSTRIAL COMMISSION OF UTAH

BRIEF OF PLAINTIFF

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INDUSTRIAL COMMISSION OF UTAH,	:	
	:	
Defendants.	:	

BRIEF OF PLAINTIFF

NATURE OF CASE

This is a Workmen's Compensation Act case dealing with a claim filed by plaintiff on appeal, Harley Brundage, against his defendant employer, IML Freight, Inc., and the defendant Second Injury or Special Fund of §§35-1-68 and 35-1-69 U.C.A. for injuries he suffered on June 18, 1977 (R. 113) arising out of or in the course of his employment. Plaintiff alleges that the combination of a pre-existing physical impairment coupled with the physical impairment from the industrial injury makes him unemployable and therefore permanently and totally disabled pursuant to §35-1-67 U.C.A.

DISPOSITION BY THE INDUSTRIAL COMMISSION

On January 24, 1980, an Administrative Law Judge entered an Order which granted certain benefits to plaintiff but denied the claim for permanent total disability benefits (R. 528-535) Plaintiff timely filed a Motion for Review of that Order. (R. 537-545) The Motion for Review was denied on a review by the Industrial Commissioners in a most unusual manner. One Commissioner concluded that the evidence supported plaintiff's claim of permanent and total disability. One Commissioner was of the opinion the decision of the Administrative Law Judge should be affirmed. The third Commissioner disqualified himself from participation for personal reasons. (R. 548-549)

Plaintiff thereafter filed a Petition for Writ of Review (R. 550-551) and a Writ of Review issued (R. 552-553) bringing this matter before the Supreme Court.

RELIEF SOUGHT ON APPEAL

Plaintiff requests a reversal of the Industrial Commission's denial of benefits plaintiff should be entitled to receive as a permanently and totally disabled workman pursuant to §35-1-67 U.C.A. as the unrebutted and irrefutable evidence makes the denial arbitrary and capricious.

STATEMENT OF FACTS

The plaintiff, Harley Brundage, was born January 30, 1924. (R. 104) He has spent 30 years of his adult life employed as a truck driver, the last 17 years of which he was

employed with defendant IML Freight. (R. 105) He has achieved a formal education of 8 years plus one year of night classes in auto mechanics courses that he did not complete.

(R. 106) His work life has been spent entirely as a manual laborer or as a truck driver. (R. 106)

In August of 1975 in a nonwork related event plaintiff injured his back while starting the motor on his fishing boat. (R. 106) He ultimately was referred to Dr. Charles Rich, a neurosurgeon, who, in October of 1975, operated on plaintiff to remove intervertebral disc material at the L3-4 level in his back. (R. 109-110)

Though he was never completely free from pain following the operation, plaintiff improved enough to be released to return to work and pass the Interstate Commerce Commission physical examination in October of 1976. (R. 110-111) Thereafter, he was able to work regularly until June 18, 1977. (R. 111, 113).

On June 18, 1977 while in the course of his employment with IML Freight, Mr Brundage again injured his back. This time he was in Madison, Iowa unloading 50 pound bags of potatoes from his truck. In the process of taking one particular bag from the top of a 6 foot high stack he twisted while bending to put the bag down. He immediately experienced severe pain in the lower back and into both legs. The pain was grave enough that he was forced to lay on the floor of the trailer for fifteen minutes before his co-driver could assist

him out of the trailer. The next day the company flew him back to Salt Lake. (R. 113-116)

Upon plaintiff's return to Salt Lake, the company doctor referred him to orthopedic surgeon, Dr. A.F. Martin. After a short period of unsuccessful conservative management of his condition, Dr. Martin admitted Mr. Brundage to the Valley West Hospital. A second surgery was performed on August 1, 1977. (R. 117-118)

Following the surgery, the plaintiff's condition began to improve until December of 1977. At that time while walking in a normal manner, he caught his heel in a rug which caused his weight to shift forward. While he didn't fall down or have any dramatic accident, he did experience an increase in his symptoms which have continued to the present. These symptoms, in the plaintiff's opinion, make it so that he cannot return to truck driving. (R. 118-121) Mr. Brundage is personally not aware of any occupation available to a man in his physical condition. (R. 122) No doctor has released him to return to work. (R. 119)

The plaintiff has suffered a 30% physical impairment from all causes. 15% of that impairment is the result of the non-industrial accident and 15% is the result of the industrial accident. (R. 531)

The various physicians who have been involved in either the treatment or analysis of Mr. Brundage's physical impairment imply or directly state that the physical impairment

translates into total disablement or unemployability. Dr. A.F. Martin, the treating physician for the second injury has stated the following at various times:

August 14, 1978 - "It is my feeling that this man should not return to doing long haul driving. . . (R. 65)

August 30, 1978 - Patient will be unable to do previous type of work - that of long haul driving. In order to become part of the work force again, he will have to learn some other trade, but that will be difficult. His sitting and standing capabilities are limited. (R. 202)

December 6, 1978 - His course at the present time is very poor. He continues to take pain medication and muscle relaxants and demonstrates very poor lumbar spine motion with tenderness in the midportion of his back, loss of flexion capability to approximately 30% of what one would expect. He is consequently unemployable at the present time, but by the same token, I don't think he was employable on August 14, 1978 either. (emphasis added)

Because of concern for Mr. Brundage's condition, Dr. Charles Rich, who performed the first operation, was asked to reexamine Mr. Brundage following the second surgery. In total agreement with Dr. Martin, Dr. Rich stated the following in August of 1978:

Sitting or walking are particularly bad for him, I tend to believe his symptoms are valid, and would agree it is best for him not to try to continue in his job as a line driver for IML. Were it possible for him to do work, for instance, in the shop which would not require bending or lifting he might well tolerate this but from a practical standpoint it is difficult to see how he can comfortably perform the work which he is trained to do. It would seem, therefore, to be in his medical best interest to be medically retired. . . . (R. 163) (emphasis added)

In June of 1978 Dr. Robert Satovick was called in for consultation and examination. In a letter addressed to Dr. Martin dated June 13, 1978 Dr. Satovick commented that:

. . . I would agree that because of the persistence of the complaint and the two previous surgeries and the nature of his job with IML that he should go ahead and institute the necessary proceedings for medical retirement. (R. 213)

Dr. A. James McCalister, the doctor for IML Freight addressing the Driver's Personnel Department of IML Freight on September 5, 1978 made the following comment:

It seems to be the consensus of opinion, with which I would agree, that he probably will not be able to return to his former occupation and should seek some other line of work. (R. 217)

With that background the matter was set for evidentiary hearing on January 25, 1979. At that time Dr. William H. Brown, a clinical psychologist with vast experience in analyzing injured workmen for vocational rehabilitation purposes, testified (R. 80) It was Dr. Brown's opinion that without further training Mr. Brundage would not be able to handle any occupation and none were available at the present time to the best of the doctor's knowledge. (R. 91, 95, 103) Dr. Brown further was of the opinion that with Mr. Brundage's I.Q. level he would not be successful in college level educational pursuits. (R. 93-94) Dr. Brown further stated that Mr. Brundage would more than likely fail in attempts at sales type duties because of the emotional state caused by his injuries. (R. 94-95) It was Dr. Brown's recommendation that Mr. Brundage be referred to the experts at the Division of Vocational

Rehabilitation for evaluation and possible retraining for an alternative vocation. (R. 92, 102)

At the time of the hearing it was Mr. Brundage's desire to be retrained to an alternative vocation if his physicians and the Division of Vocational Rehabilitation found him capable. (R. 122)

Following the initial hearing, on January 29, 1979, the Administrative Law Judge referred plaintiff to Richard Olsen, a counselor with the Division of Vocational Rehabilitation assigned to the Industrial Commission. The purpose of the referral was for "Mr. Olsen [to] review possibilities of new job opportunities." (R. 232) Mr. Olsen's professional opinions concerning this case will be discussed in detail further on in this statement of facts.

After the initial hearing in this matter, counsel for defendant IML Freight felt it advisable to have an independent evaluation of the situation by orthopedic surgeon, Dr. Boyd Holbrook. Thereafter, on March 16, 1979, plaintiff was examined by Dr. Holbrook. Dr. Holbrook's opinion was entirely consistent with the prior treating physicians that Mr. Brundage was totally disabled. He stated in pertinent part:

. . . he demonstrated almost complete immobility of the low back. . .

I believe at the present time that the applicant is totally disabled as far as returning to his former occupation is concerned. He might be able to find some sheltered special type of occupation consistent with his present activities. . . .
(R. 405-406)

During the pendency of the workmen's compensation claim Mr. Brundage applied for Social Security benefits. Following a full hearing on the Social Security Administration's original denial of his claim, he was found to be "not able to do [his] previous work . . . [and he is] unable to engage in any other kind of substantial gainful activity"

(R. 444) At that hearing G. Barrie Nielson, a vocational expert called on by the Social Security Administration to evaluate Mr. Brundage, testified that he knew of no work that Mr. Brundage could perform while under his present physical limitations. (R. 446, 448)

Dr. Gordon R. Kimball, an orthopedic surgeon, was also called upon by the Social Security Administration to analyze plaintiff's condition. He examined Mr. Brundage on August 22, 1979. Dr. Kimball found the following limitations on the physical activity that could be performed by Mr. Brundage:

1. During an 8 hour day he could sit no longer than 1 hour, stand no longer than 2 hours, walk no longer than 1 hour.
 2. He could lift no more than 15 pounds.
 3. He cannot use his feet and legs in repetitive movements as in pushing and pulling of leg controls.
 4. He cannot bend, squat, crawl or climb.
 5. He cannot work at unprotected heights or be around moving machinery.
 6. He has mild restriction to marked change in temperatures and humidity.
- (R. 461)

Dr. Kimball's recommendation was that: "This patient is moderately disabled for all practical purposes regarding any type of medium or heavy work. I believe that he could engage in only sedentary activities including, no lifting over 15 pounds, no prolonged sitting, no prolonged standing, or walking and no bending or twisting." (R. 460)

Further hearing was held in this case on January 14, 1980 at which time the medical panel chairman Dr. Nathaniel Nord, Dr. Wayne M. Hebertson and Richard Olsen of the Division of Vocational Rehabilitation testified. Dr. Nord testified that the medical panel made no attempt and was not charged with making a determination of the applicant's disability or employability and only made a determination of the loss of bodily function. (R. 473) At no time at the hearing did Dr. Nord comment on the issue of disability or employability.

Dr. Hebertson was entirely in agreement in his testimony with the physical limitations that Dr. Kimball placed upon Mr. Brundage. (R. 484) He was further of the opinion that there was no physical or manual labor job that Mr. Brundage could perform. He testified that the physical restrictions are permanent in nature. (R. 485)

On cross-examination, Dr. Hebertson testified that:

. . . its even difficult to perceive that he might be able to engage in sedentary vocations. Because very often . . . the degree of sitting and standing for any prolonged period of time becomes a very limited and restrictive factor. (R. 487)
(emphasis added)

Next Richard Olsen, who was assigned to the Industrial Commission from the Division of Rehabilitation Services agreed with the findings of the prior vocational rehabilitation expert regarding the employability and retrainability of Mr. Brundage. (R. 494) It is Mr. Olsen's duty in his capacity with the Industrial Commission to attempt to get industrially injured individuals back into the labor force. (R. 495) Mr. Olsen was familiar with the job market in Utah and with the Dictionary of Occupational Titles. (R. 496) It was his opinion that no job was available to Mr. Brundage under the Dictionary of Occupational Titles and that there was no occupation available with the limitations that Mr. Brundage has. (R. 498-500)

More particularly Mr. Olsen testified that:

It has been my experience that, when you place a person in the labor market, that there are certain minimum requirements in the most sedentary of jobs, and that his limitations preclude him functioning in the labor market as we know it with those kinds of restrictions.

. . . with the set of circumstances that I have seen, I would say that the outcome [of rehabilitation efforts] would be very, very guarded in terms of retraining him to gainful employment. . . . Even though he might be able to do a job as far as his mental capabilities, given the requirements on the job of sitting for periods of time which exceeds what he has been recommended that he can do, would create problems for him in holding the job. So unless the job was flexible enough that they could fit into his set of circumstances he wouldn't be an acceptable candidate in the labor market.

Q Are you talking about a guarded workshop condition?

A Yes.

Q Protected workshop?

A Basically that's what I would say.

Q Do you know of any such that's available to Mr. Brundage currently? In the telephone solicitation for example?

A I know of none.

Q Do you know of any jobs available to Mr. Brundage in the Utah area?

A No, I know of none in the Utah area.

Q I want to make sure I heard you right. Did you say there are no sheltered workshop type jobs available for Mr. Brundage that you are aware of?

A None that I am aware of.

(R. 498-502) (emphasis added)

On cross-examination by counsel for the Special Fund, Mr. Olsen was asked whether the sheltered workshop type job would have a tendency to change constantly as to availability. Mr. Olsen answered that question indicating that there was very little turnover because the people in the sheltered workshop would not qualify for placement in the labor market and therefore there are very few opportunities for new individuals to enter into a sheltered workshop. (R. 504)

No evidence whatsoever was introduced to rebut the evidence of unemployability by the numerous physicians and by the two vocational rehabilitation experts by any defendant to this action.

Nonetheless, the Administrative Law Judge entered an order that was affirmed in a tie vote of one to one of the Industrial Commission denying Harley Brundage benefits under §35-1-67 U.C.A. The sole basis in evidence for such a denial was that the Commission would take:

. . . administrative notice of the literally dozens of brands of home products being sold out of the home wherein the seller can solicit by telephone, by mail or door-to-door and can work as long as he pleases either standing up or sitting down or moving about as may fit his particular case. There are home solicitation jobs and mailing jobs where the solicitor can work as long or as little as he pleases assuming any bodily position he pleases and shifting that position as frequently as need be. I assume we could take administrative notice in this electronic age of many jobs where an employee can stand and sit on a stool and do the hand and finger work within the capabilities of a normally intelligent individual such as Mr. Brundage was found to be by the rehabilitation counselor. The applicant's request for a finding that he is permanently and totally disabled is denied." (R. 532)

It is the position of plaintiffs that not only the weight of the evidence but the only evidence in this case is that as a result of the combination of injuries, advanced age, and rehabilitation potentials that Harley Brundage is permanently and totally disabled. The Industrial Commission acts without or in excess of its authority when it takes administrative notice of evidence not introduced by any party and that is directly refuted by physicians and its own vocational rehabilitation expert and other vocational rehabilitation experts as to a claim of permanent total disability.

Further, plaintiff takes the position that where there is not a majority of the Commission concurring in a denial of

benefits, then the injured employee, under the framework of the Workmen's Compensation Act has fulfilled his burden and should be awarded benefits.

ARGUMENT

POINT I

THE INDUSTRIAL COMMISSION ERRED IN NOT FINDING PLAINTIFF PERMANENTLY AND TOTALLY DISABLED.

In the undisputed fact situation hereinbefore presented, plaintiff finds himself in what has been termed by Professor Arthur Larson and most authorities the "odd-lot" category. Professor Larson discusses the "odd-lot" doctrine in some detail in his learned treatise on workmen's compensation:

"Total disability" . . . is not to be interpreted literally as utter and abject helplessness. Evidence that claimant has been able to earn occasional wages or perform certain kinds of gainful work does not necessarily rule out a finding of total disability nor require that it be reduced to partial

. . . Under the odd-lot doctrine, which is accepted in virtually every jurisdiction total disability may be found in the case of workers who, while not altogether incapacitated for work, are so handicapped that they will not be employed regularly in any well known branch of the labor market. The essence of the test is the probable dependability with which claimant can sell his services in a competitive labor market, undistorted by such factors as business booms, sympathy of a particular employer or friends, temporary good luck, or the superhuman efforts of the claimant to rise above his crippling handicaps. (citations omitted) (emphasis added)

Larson, Workmen's Compensation Law, §57.51 pp. 10-107, 10-109, 10-119.

As cited by Larson, the early English case of Cardiff Corporation v. Hall, 1KB 1009 (1911) was perhaps the first to discuss the import of the "odd-lot" doctrine:

There are cases in which the burden of shewing suitable work can in fact be obtained does fall upon the employer . . . [I]f . . . the capacities for work left to him fit him only for special uses and do not . . . make his powers of labour a merchantable article in some well known lines of the labour market . . . it is incumbent upon the employer to shew that such special employment can in fact be obtained by him [I]f the accident leaves the workman's labour in the position of an "odd-lot" in the labour market, the employer must shew that a customer can be found who will take it (emphasis added)

Judge Cordozo very early in the history of workmen's compensation acts in the United States set the policy for odd-lot determinations:

He was an unskilled or common laborer. He coupled his request for employment with notice that labor must be light. The applicant imposing such conditions is quickly put aside for more versatiel competitors. Business has little patience with the suitor for ease and favor. He is the 'odd-lot' man, the nondescript in the labor market. Work if he gets it, is likely to be casual and intermittent Rebuff, if suffered, might reasonably be ascribed to the narrow opportunities that await the sick and the halt. (emphasis added)

Jordan v. Decorative Co., 130 N.E. 634 at 635-636 (N.Y. 1921)

The unrebutted evidence in the case at bar shows plaintiff to be in that category of "narrow opportunities that await the sick and the halt." He is indeed an "odd-lot" employee.

As Judge Moulton ascribed in Cardiff Corp. V. Hall, supra, the burden should be on the appropriate defendant to affirmatively show employability once prima facie unemployability is shown by the applicant. A number of examples of that burden in practice can be shown from decisions in neighboring jurisdictions to Utah. In Brown v. Safeway Stores, 483 P.2d 305 (N.M. 1971) the plaintiff was an 18 year old boy, had a high school education, was trained to plant cucumbers and potatoes, and suffered from an injured back. The Court concluded that he might be employed at something, but that there was no evidence of that in the record to support such a finding. Therefore, the Court found the injured employee to be totally disabled. The defendant contended that the burden was on the plaintiff to show that he was disabled from doing any work for which he was fitted by age, education, training and previous experience. To that the Court responded:

We agree that the proof of the disability is on the plaintiff, but after plaintiff has introduced evidence as to his age, education, training, and mental capacity, the burden of coming forward is on the defendant. It is much easier for the defendant to prove the employability of the plaintiff for a particular job than for plaintiff to try to prove the universal negative of not being employable at any work. If the defendant chooses to stand on the evidence introduced by plaintiff and not rebut the evidence, he may run a great risk since the issue may become one of substantial evidence, which is not a question of quantity but substance. (emphasis added)

483 P.2d at 308.

Oregon has similiary ruled in the case of Swinson v. Westport Lumber, 470 P.2d 1005 (Or. 1971). Therein, the applicant was a 63 year old man who had a 60% disability of the right leg and sustained a serious low back injury. He was restricted from heavy lifting, stooping, squatting, bending and could not walk more than four or five blocks without experiencing additional pain. He could not sit, stand, or lie in one position for a prolonged period of time. In Oregon, the Supreme Court is given the power to review denovo the entire record. Upon review of the entire record and in response to the defendant's claim that he could be employed in light work the Supreme Court made an award of permanent total disability. The Court commented as follows in supporting its opinion:

Total disability under the Workmen's Compensation Act does not mean permanent utter happlessness. (Case cited) The fact that a claimant is capable of performing some light work or earning occasional wages does not necessarily preclude a finding of total disability. . . . This rule is essentially. . . the so called 'odd-lot' doctrine.

It is a well recognized principle of workmen's compensation law that a claimant - workman must prove that he has sustained a compensable injury. (Cases cited) Where, however, does the burden of proof lie in circumstances such as those before us now? Claimant contends that since he is clearly in the 'odd-lot' category, defendant's have the burden of showing the availability of regular, suitable employment. Defendants argue that the claimant must prove his is an 'odd-lot' employee and that he has not done so.

The Court went on to approvingly cite Larson, Workmen's Compensation Law:

. . . opinions have stressed that the burden is on the employer to prove the availability of steady work, once the claimant has been shown to be in the 'odd-lot' category. There is no presumption that, merely because claimant is physically able to do light work, appropriate employment is regularly available to him. . . .

If the evidence of degree of obvious physical impairment, coupled with other factors, such as claimant's mental capacity, education, training, or age places claimant prima facie in the 'odd-lot' category, the burden should be on the employer to show that some kind of suitable work is regularly and continuously available to the claimant (emphasis added)

The Oregon Supreme Court followed the above decision with a similar opinion favoring a claimant who was 54 years of age when he suffered a back injury resulting in a permanent partial loss of bodily function of 25%. See Barley v. Morrison-Knudsen, 479 P.2d 1005 (Ore. 1971).

In Employers Mutual Life Insurance Co. v. Industrial Comm'n, 541 P.2d 580 (Ariz. 1975), the Arizona Supreme Court found that an employee with similar restrictions to those of plaintiff in the case at bar was permanently and totally disabled. The Court placed the burden on the defendant of showing available and suitable employment:

Absent proof of employment reasonably available to one in the 'odd-lot' category the injured employee may be classified as totally disabled. . . .

We turn next to the question as to whether the employer and carrier met the burden of showing available and suitable employment

in presenting evidence about possible employment as a hoist operator. The evidence reflected that such employment was available in the Tucson area less than 30 days a year. It was not shown that no bending would be required or that hoist operators were always free to change positions at will. Such evidence falls far short of that required to establish available and suitable employment.

The failing in the instant case is far greater than even that in the Employer Mutual Life Insurance case from Arizona. Here no evidence whatsoever was presented to refute the unemployment of Mr. Brundage as a result of the combination of injuries from which he suffers.

In similar circumstances the Idaho Supreme Court has stated that where the evidence is undisputed and is reasonably susceptible to only one interpretation, whether a claimant falls within the odd-lot category is a conclusion of law. In the same case the Court held that where the individual does fall within the odd-lot category the burden is on the defendant to show some kind of suitable work is regularly and continuously available to an injured workman. The Court did so by reversing an Industrial Commission decision denying benefits to an injured employee. Lyons v. Industrial Special Indemnity Fund, 565 P.2d 1360 (Idaho 1977).

At page 10-137 in Larson, supra, on the issue of the burden under the odd-lot doctrine Professor Larson states at footnote 26, "Of course, if claimant . . . can put in evidence affirmatively showing that light work is not available, his case is that much stronger."

With that framework of the law and policy considerations from other jurisdictions, it is now appropriate to discuss the law in Utah.

For the convenience of the Court §35-1-67 U.C.A. upon which a permanent total award is predicated is set out in pertinent part below:

. . . a finding by the commission of permanent total disability shall in all cases be tentative and not final until such time as the following proceedings have been had: Where the employee has tentatively been found to be permanently and totally disabled, 1) it shall be mandatory that the industrial commission of Utah refer such employee to the division of vocational rehabilitation under the state board of education for rehabilitation training and it shall be the duty of the commission to order paid to such vocational rehabilitation division, out of that special fund provided for by section 35-1-68(1), not to exceed \$1,000 for use in the rehabilitation and training of such employee; the rehabilitation and training of such employee shall generally follow the practice applicable under section 35-1-69, and relating to the rehabilitation of employees having combined injuries. If and when the division of vocational rehabilitation under the state board of education certifies to the industrial commission of Utah . . . that such employee has fully co-operated with the division of vocational rehabilitation in its efforts to rehabilitate him, and in the opinion of the division the employee may not be rehabilitated, then the commission shall order that there be paid to such employee weekly benefits 1) for such period of time beginning with the time that the payments (as in this section provided) to be made by the employer or its insurance carrier terminate and ending with the death of the employee.

* * * * *

The division of vocational rehabilitation shall at the termination of the vocational training of the employee, certify to the

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

The first Utah case discussing the relative burdens in proving permanent and total disability is Caillet v. Industrial Comm'n, 58 P.2d 760. (Utah 1936). There the Industrial Commission had denied that the applicant was permanently and totally disabled. The Court found:

The evidence in this case . . . conclusively show[s] that the plaintiff is permanently and totally disabled from either securing or performing work of the general character that he was performing when injured. He by such evidence established a prima facie case, and in the absence of any showing that he is able to secure and perform work of a special nature not generally available, he is as a matter of law, entitled to an award as and for permanent total disability. (cases cited) No evidence was offered or received before the Commission which showed, or tended to show, that plaintiff is able to secure employment of a special nature not generally available or that he is able to perform the duties of such employment. The evidence is all to the contrary.

Upon this record plaintiff as a matter of law is entitled to compensation as and for permanent total disability. . . . (emphasis added)

That is clearly the status of the case before the Court at this point in time. Caillet, supra shows that the law in the State of Utah as early as 1936 placed the burden on the defendants to show availability of special work once the applicant has shown its unavailability. Additionally, "to make out a case of total disability, the applicant is not

required to show that he incapacitated from performing any and all kinds of work." Spring Canyon Coal Co. v. Industrial Comm'n, 277 P. 206 (Utah 1929).

In the Morrison-Knudsen Construction Co. v. Industrial Commission, 424 P.2d 138 (Utah 1967) the Utah Supreme Court again delineated the test of a permanent total disability:

. . . [T]hat 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 to learn to do

In light of the overwhelming and uncontradicted evidence and under the tests of the Utah Supreme Court, the only conclusion that is supported by the evidence is that Harley Brundage is permanently and totally disabled. The case of Beverly R. Buxton v. Industrial Commission of Utah, 587 P.2d 1 (Utah 1978) is precisely in point. Therein the Court succinctly stated the status of a claimant's rights when a combination of injuries takes the individual from the work force. The Court was presented with the factual situation where the applicant, due to a combination of pre-existing as well as industrial injuries, was made unemployable. The testimony of her treating physician to that point was un rebutted. The only additional evidence presented in that case was that of the applicant herself indicating that she was totally disabled. No defendant, as in the case before the Commission now, made any effort to

refute the evidence of her treating physician or herself that she was totally disabled. The Court analyzed the situation as follows:

. . . the Commission is not vested with arbitrary powers; and it cannot simply ignore competent and credible evidence when there is nothing discrediting therein and there is no evidence to the contrary.

. . . it is the Commission's duty to determine whether that loss of function represents total disability in terms of capacity to perform remunerative employment, and the determination must be based on competent evidence.

. . . if after a substantial permanent partial disability award is made, it is discovered empirically that that injured employee is not employable with his disability and it is certified that he cannot be vocationally rehabilitated despite his cooperation there is prima facie justification (subject, of course, to refutation) for changing the disability rating from partial to total.

In the case at bar, it has been certified by Richard Olsen, the Commission's vocational rehabilitation expert that despite the cooperation of Mr. Brundage, he cannot be vocationally rehabilitated. There is no refutation of that evidence.

Further, as in the Buxton case:

Plaintiff's testimony about (her) condition of pain and disability, although admittedly subjective, is corroborated by the medical evidence, and without any indication or suggestion that (her) affliction and inability is other than genuine.

The decision of the Industrial Commission places plaintiff in a very real and tragic dilemma. On the one hand, plaintiff expressed a sincere desire to be employed. He was willing to be rehabilitated through training. (R. 122) He qualified for such training as was statutorily available pursuant to §§35-1-67 and 35-1-69 U.C.A. He was referred to the Division of Vocational Rehabilitation by the Industrial Commission. (R. 232) The vocational rehabilitation expert attached to the Commission testified that the plaintiff, though willing, was not a candidate for rehabilitation. His physical limitations would make it impossible for him to complete the rehabilitation courses. Even if he could complete rehabilitation, no jobs would be available to him. (See Statement of Facts) Other vocational rehabilitation experts concurred in that proposition. (R. 446, 448)

On the other hand, the Commission, contrary to the uncontroverted certification of its own independent expert, denied that plaintiff was permanently and totally disabled. That is completely contrary to the mandate of §35-1-67 U.C.A. that when the Division of Vocational Rehabilitation is of the opinion, " . . . the employee may not be rehabilitated, then the Commission shall . . . order that compensation be paid for the remainder of the employee's life." Not only is the Commission's decision unfair to a man who makes a good faith effort to be rehabilitated, it is cruel - " . . . rebuff, if suffered, might reasonably be ascribed to the narrow opportunities that await the sick and the halt." Jordan,

POINT II

THE COMMISSION CANNOT TAKE ADMINISTRATIVE
NOTICE OF FACTS CONTRARY TO COMPETENT,
CREDIBLE, UNCONTROVERTED, IMPARTIAL
EVIDENCE.

The major premise upon which the Commission based its denial of the benefits claimed by the plaintiff, is that jobs were available in home solicitation and benchwork employment. (R. 532) Though the defendant employer and the defendant Special Fund, did not have or present any evidence; evidence of Dr. Hebertson, Dr. Brown, Richard Olson, the Social Security Administration, G. Barrie Nielson, and the plaintiff himself showed that no such jobs were available to the plaintiff. The Commission wrongfully took administrative notice of facts not in evidence that were directly controverted by competent, substantive evidence most of which could not be claimed to be tainted by bias and prejudice. The Commission stepped out of its impartial fact finder role to become an advocate against the plaintiff by relieving defendants of their burden.

Rule 9 of the Utah Rules of Evidence states in pertinent part:

Judicial notice shall be taken without request by a party . . . of propositions of generalized knowledge as are so universally known that they cannot reasonably be the subject of dispute.

Judicial notice may be taken without request by a party of . . . such facts as are so generally known or of such common notoriety within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute. . . .
(emphasis added)

Rule 12 of the Utah Rules of Evidence states that this Court can review the rulings of the judge under Rule 9, supra. Plaintiff puts it to this Court that it is incredible that the Commission could even remotely find that the uncontroverted evidence of unemployability in this case is so fanciful that it " . . . cannot reasonably be the subject of dispute." It appears probable that this extreme misapplication of administrative notice has crept into these proceedings because the Order was written without reference to the transcript of the second hearing. (R. 465) In fact, the transcript was not even requested by the Commissioners who were to review the record on plaintiff's Motion for Review until March 21, 1980 - ten days after the plaintiff's Motion for Review had been denied. (R. 465, 548)

When one couples all of the above with the hornbook workman's compensation law that reasonable doubt as to statutory and rule construction should be resolved in favor of the injured employee, a grave misjustice has taken place in this case. See, i.e. McPhie v. Industrial Comm'n, 567 P.2d 153 (Utah 1977); M&K Corp. v. Industrial Comm'n, 189 P.2d 132 (Utah 1948); and Park Utah Consol. Mine Co. v. Industrial Comm'n, 36 P.2d 979 (1934).

This Court based on the authoirty of Rule 12 U.R.E. should find the administrative notice of the Commission improper and

remand the case for an order that plaintiff is permanently and totally disabled as the only competent evidence in the record would indicate.

POINT III

IF A MAJORITY OF THE COMMISSION DOES NOT VOTE TO SUSTAIN AN ORDER DENYING BENEFITS, THEN THE BENEFITS SHOULD BE ORDERED.

This case presents a most unique situation. As the Court will recognize, the Industrial Commission is made up of the three Commissioners. In order for the Commission to conduct business a quorum or majority must be present and participating. §35-1-6 U.C.A. In the instant case Commissioner Milton E. Saathoff disqualified himself. Commissioner Carlyle F. Gronning was of the opinion that the decision of the Administrative Law Judge should be sustained. Commissioner Stephen M. Hadley, the Chairman and only attorney of the three, expressed the opinion that an award of permanent total disability should be made.

§35-1-82.54 U.C.A. states that upon referral of a case to it by the Administrative Law Judge, the Commission after a review of the entire record shall enter its award. Nowhere in the Act is there an indication of what is to be done in the event the quorum vote results in a tie.

It is submitted to this Court that just as many of the Commissioners voted for plaintiff as against. The general rule of statutory construction in workman's compensation cases

breaks that deadlock.

A further equally recognized rule of construction resolves any doubt respecting the right of compensation in favor of the injured employee . . . and compensation statutes should be liberally construed in favor of recovery.

McPhie v. Industrial Comm'n, supra.

The plaintiff is entitled to his award.

POINT IV

THOUGH PLAINTIFF ISN'T PARTICULAR ABOUT THE SOURCE OF COMPENSATION, IT APPEARS THAT THE EMPLOYER'S LIABILITY IS LIMITED BY §35-1-69 U.C.A.

Though plaintiff isn't particular about the source of the benefits he receives as a permanently and totally disabled workman, in order to avoid delay in receiving compensation and to avoid a potential future appeal, this Court should make a ruling as to the responsible party or parties.

Plaintiff is of the opinion that the 1977 decision in McPhie v. Industrial Comm'n, supra is determinative. Therein, the Court interpreted §§35-1-67 and 35-1-69 U.C.A. in combination as meaning that the employer would be responsible for the injury incurred during the employee's employment with that particular employer. See also, Intermountain Health Care v. Ortega, 562 P.2d 617 (Utah 1977); White et al. v. Industrial Comm'n, 604 P.2d 478 (Utah 1979); and Intermountain Smelting v. Anthony Capitano, Sup. Ct. No. 16530 (March 24, 1980).

Here, the employer would be responsible for the 15% permanent partial loss of bodily function attributable to the

industrial accident, and his proportionate share of the medical and temporary total benefits. The Second Injury Fund should be responsible for the remainder for plaintiff's lifetime.

CONCLUSION

The uncontroverted facts of this case show that plaintiff has a 30% loss of bodily function with 15% of that predating his industrial injury. All of the witnesses testified that plaintiff is totally disabled from his former employment. A clinical psychologist, at least two vocational rehabilitation specialists, the Social Security Administration, and independent as well as treating physicians were of the opinion that no jobs whatsoever would be available to the plaintiff. Because of that situation and the very severe physical limitations resulting from the combination of injuries, the vocational rehabilitation expert of the Industrial Commission to whom the Commission referred plaintiff, certified under oath that plaintiff was not a candidate for rehabilitation. No evidence whatsoever was introduced by any party to controvert the above facts.

The plaintiff, therefore, falls into the "odd-lot" doctrine placing the burden on defendants to present affirmative evidence that there is a regular job opportunity in the labor market available to the plaintiff. Absent that, §35-1-67 mandates that ". . . the Commission shall order that there be paid to such employee weekly benefits . . . for such period

of time beginning with the time that the payments . . . to be made by the employer . . . terminate and ending with the death of the employee."

The Commission erred in taking administrative notice of the availability to plaintiff of benchwork and telephone and mail solicitation jobs. There was unbiased, competent and uncontroverted evidence to the contrary by plaintiff's witnesses and the Commission's own expert. This Court should review the propriety of the administrative notice as allowed by Rule 12(2) U.R.E. The Court cannot help but find that the availability of such jobs to this plaintiff is not a " . . . proposition of generalized knowledge . . . so universally known that [it] cannot reasonably be the subject of dispute." Rule 9 U.R.E. It was beyond fairness and justice for the Commission to so shift the burden of proof in such an arbitrary and capricious manner.

The Commission sustained the Administrative Law Judge's decision with one Commissioner voting to sustain it, one Commissioner voting to award the benefits, and the third Commissioner disqualifying himself. The statutes are silent on how to resolve such a deadlock. In that event the rules of statutory construction in a workman's compensation case require that any doubt be resolved in favor of awarding compensation.

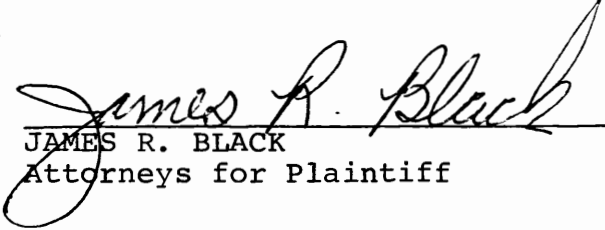
Finally, §§35-1-67 and 35-1-69 U.C.A. would appear

to limit the employer's liability to the industrial injury only. When combined injuries result in permanent total disability, the Second Injury Fund should pay the remainder.

It is respectfully submitted that the Industrial Commission acted beyond its power and authority in a capricious and arbitrary manner in denying plaintiff permanent total compensation contrary to the unequivocal and un rebutted evidence. This case should be reversed and remanded with instructions to the Commission to enter an order for the benefits requested herein.

RESPECTFULLY SUBMITTED this 19 day of May, 1980.

BLACK & MOORE


JAMES R. BLACK
Attorneys for Plaintiff

CERTIFICATE OF MAILING

I hereby certify that two true and correct copies of the foregoing BRIEF were mailed, postage prepaid this 19th day of May, 1980 to the following:

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Sabrina Sabol