

1956

# Max Markus v. The Industrial Commission of Utah and Kennecott Copper Corporation : Brief of Plaintiff

Utah Supreme Court

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Dahl and Sagers; Everett E. Dahl; Victor G. Sagers;

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# In the Supreme Court

of the  
State of Utah

FILED

JUN 15 1956

Clerk, Supreme Court, Utah

MAX MARKUS

*Plaintiff,*

vs.

THE INDUSTRIAL COMMISSION OF  
UTAH, andKENNECOTT COPPER CORPORA-  
TION, Utah Copper Division,*Defendants.*

Case No. 8512

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## BRIEF OF PLAINTIFF

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# In the Supreme Court of the State of Utah

MAX MARKUS

*Plaintiff,*

vs.

THE INDUSTRIAL COMMISSION OF  
UTAH, and

KENNECOTT COPPER CORPORA-  
TION, Utah Copper Division,

*Defendants.*

Case No. 8512

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## BRIEF OF PLAINTIFF

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### STATEMENT OF FACTS

The plaintiff, Max Markus, is a middle aged man of forty seven (47) years with a grammar school education and was, prior to his injury, a laborer by occupation. Plaintiff has no trade or skill with which to earn a living that does not require the use of his back (R. 48 & 49).

On or about the 17th day of June, 1952, plaintiff was in the employ of Kennecott Copper Corporation, Utah Copper Division, one of the defendants herein, at Bingham Canyon,

Utah, as a track hand in the open pit copper mine. While engaged in said employment on said date plaintiff suffered an injury to his back when a rail, which he was carrying together with eleven (11) other men on the track gang, was dropped without warning to the plaintiff (R. 5, 14, 29 & 96). That on October 27, 1952, the Industrial Commission determined that a surgical procedure was necessary to correct plaintiff's complaints of his back injury (R. 16). On or about April 1, 1953, an operation was performed on his back by Dr. Pemberton (R. 29, 31 & 50). Upon return to work, plaintiff suffered injuries to his back on two (2) other occasions: Once while shoveling snow, and again by slipping on a trail (R. 98, 100 & 101).

On June 19, 1954, plaintiff again appeared before the Medical Advisory Board and it was determined that plaintiff must have another operation on his back (R. 33 & 34). The Commission granted to plaintiff his choice of doctor, to wit: Dr. Reed S. Clegg, orthopedic surgeon (R. 35). Another spine fusion operation was performed on the plaintiff on the 8th day of September, 1954, by Dr. Clegg (R. 74). This was the third operation on his back, plaintiff having been operated upon in 1949, arising out of a back injury suffered while working on a construction job prior to his employment by Kennecott Copper Corporation (R. 83).

On July 30, 1955, the Medical Advisory Board determined plaintiff's permanent partial loss of bodily function at twenty-five per cent (25%) (R. 40).

A formal hearing was requested and said hearing was duly held on the 27th day of October, 1955, where the issue to be

determined was plaintiff's extent of permanent partial disability (R. 46 & 47).

The medical evidence adduced at said hearing clearly set forth the basic fact that the back is synonymous and equal to the body as a whole (R. 63 & 74), and a disability rating of twenty-five per cent (25%) of the back is equivalent to twenty-five per cent (25%) disability of total bodily function (R. 75).

The medical evidence further adduced the uncontroverted fact that a twenty-five per cent (25%) permanent partial disability of the back (or bodily function) was a more serious disability than the loss of a person's thumb at the metacarpal bone (R. 64 & 75). The loss of a thumb at the metacarpal bone is a scheduled loss entitling a person to an award of sixty (60) weeks. (Title 35-1-66, Utah Code Annotated, 1953).

Upon conclusion of said hearing, on the 9th day of January, 1956, the Industrial Commission adopted the Recommended Findings of Fact and Conclusions of Law of the Referee and ordered Kennecott Copper Corporation to pay the said Max Markus fifty (50) weeks of compensation, together with medical and hospital expenses. Said fifty (50) weeks' compensation was based on a finding of twenty-five per cent (25%) loss of bodily function (R. 86 & 87).

The Industrial Commission's arrival of fifty (50) weeks' compensation is based solely upon a mathematical calculation of what twenty-five per cent (25%) is to two hundred (200) weeks (the maximum award for permanent partial disability) (R. 86 & 87).

An application for rehearing was duly filed by plaintiff asserting that the award made was based upon a misinterpretation of applicable law and was wholly unsubstantiated by the facts in the case (R. 88). Said application for rehearing was denied (R. 90). Hence plaintiff's present application for Writ of Certiorari for review of the case (R. 104 & 108).

## STATEMENT OF POINTS

### POINT NO. I.

THE AWARD OF THE INDUSTRIAL COMMISSION OF FIFTY (50) WEEKS' COMPENSATION IS GROSSLY INADEQUATE AND INEQUITABLE FOR PLAINTIFF'S DISABILITY AND IS NOT SUPPORTED BY EVIDENCE.

### POINT NO. II.

THE AWARD OF THE INDUSTRIAL COMMISSION IS BASED UPON AN ERRONEOUS INTERPRETATION AND APPLICATION OF THE LAW IN THE DETERMINATION OF THE AMOUNT OF SAID AWARD.

## ARGUMENT

### POINT NO. I.

THE AWARD OF THE INDUSTRIAL COMMISSION OF FIFTY (50) WEEKS' COMPENSATION IS GROSSLY INADEQUATE AND INEQUITABLE FOR PLAINTIFF'S DISABILITY AND IS NOT SUPPORTED BY EVIDENCE.

A careful and complete review of the record will conclusively show an absolute and complete absence of any evidence supporting the Commission's ridiculously low award of only fifty (50) weeks' compensation for plaintiff's twenty-five per cent (25%) loss of bodily function.

The record shows, on the other hand, that the plaintiff is a middle-aged man of forty-seven (47) years, has only a fifth grade education, a laborer by occupation and a man of no skills or training to provide a livelihood without the use of his back (R. 48 & 49). The plaintiff has received extremely unsympathetic treatment and poor diagnosis of injury and recommended treatment from defendant company's doctors (R. 29). He has had to constantly employ all of his legal remedies through the Industrial Commission in order to receive temporary total disability and adequate surgery and medical care (R. 35 & 36). He is now industrially unemployable and is admittedly of great handicap and disability as clearly shown by defendant's own company doctor in a letter written on March 29, 1955, to his superiors and incorporated in the Report of Hearing as Exhibit #1 (R. 83). For your convenience, your writer will quote from this letter, as follows:

" . . . Mr. Max Markus, Payroll Number 1143, was in my office yesterday March 28th, 1955, to obtain a release for light work at the Mines.

"This employee has had three previous fusion operations on his spine. He is now under the care of Dr. Reed S. Clegg, Salt Lake City, Utah, and although I have a letter from Dr. Clegg advising that Mr. Markus be given light work, I feel Dr. Clegg does not appreciate the working conditions here at the Mine.



"It has been my experience that a patient such as Max Markus, could get an exacerbation of his back symptoms by getting on and off a train, slipping or tripping over a rock or a rail, or numerous other ways. Because of this I can not honestly release this man for either regular or light work.

'The above was explained fully to the patient, as well as the reasons on which my opinion was based.

Sincerely,

H. C. JENKINS, M.D."

The only scheduled loss in Title 35-1-66, Utah Code Annotated, 1953, which is at all comparable to a disability rating of fifty (50) weeks is the loss of one (1) thumb and the metacarpal bone thereof which gives rise to sixty (60) weeks' compensation. Both Dr. Jenkins, defendant company's physician, and Dr. Reed S. Clegg, an orthopedic surgeon, clearly expressed opinions that plaintiff's twenty-five per cent (25%) loss of bodily function was more serious than the above named scheduled loss (R. 64 & 75). In fact, plaintiff's loss was more comparable to the scheduled loss of one (1) arm at or near the shoulder which gives rise to an award of two hundred (200) weeks (R. 64 & 75) .

It is common knowledge and established without contradiction of medical evidence adduced at the hearing that a one hundred per cent (100%) loss of function of a person's back is equal to one hundred per cent (100%) loss of bodily function and that twenty-five per cent (25%) loss of function of the back (instant case) is equal to twenty-five per cent (25%) loss of bodily function (R. 63, 74 & 75). The Legislature has recognized that the loss of an arm at the shoulder

is not total disability and has rated said loss at two hundred (200) weeks. The Court can, therefore, actually take judicial notice of the fact that plaintiff's disability rating of twenty-five per cent (25%) loss of bodily function is greater than twenty-five per cent (25%) loss of function of one (1) arm. A proper evaluation of the disability of this man would be to determine the amount of compensation for permanent total disability and then take twenty-five per cent (25%) of said total disability as the award to be made, but not to exceed two hundred (200) weeks, the maximum award for permanent partial disability.

## POINT NO. II.

THE AWARD OF THE INDUSTRIAL COMMISSION IS BASED UPON AN ERRONEOUS INTERPRETATION AND APPLICATION OF THE LAW IN THE DETERMINATION OF THE AMOUNT OF SAID AWARD.

The Industrial Commission has adopted the rule of determining the amount of an award for permanent partial disability in this case involving a back injury of an unscheduled loss by the simple use of an arbitrary and inequitable arithmetical computation. In other words, the Industrial Commission takes the maximum amount of permanent partial disability of two hundred (200) weeks as set up by statute and multiplies said maximum by the amount of determined percentage loss of bodily function. For example, it has been found that the amount of bodily function of the plaintiff herein is twenty-five per cent (25%), therefore, two hundred (200) weeks

multiplied by twenty-five per cent (25%) equals fifty (50) weeks.

The main issue of this appeal is therefore quite clear. Has the Industrial Commission correctly interpreted the law applicable in the determination of the amount of said award in the instant case?

The applicable provision of Title 35-1-66, Utah Code Annotated, 1953, as amended, is as follows:

“For any other disfigurement or the loss of bodily function not otherwise provided for herein, such period of compensation as the commission shall deem equitable and in proportion as near as may be to compensation for specific loss as set forth in the schedule in this section but not exceeding in any case two hundred weeks.

“The amounts specified in this section are all subject to the limitations as to the maximum weekly amount payable as specified in this section, and in no event shall more than a total of \$6250.00 be required to be paid.”

In the case of injuries to the back, injuries to the head, or injuries to other vital organs of the body, not specifically scheduled by the Legislature, an interpretation of the above statute as the Industrial Commission has given to it leads to great inconvenience to persons suffering such injuries and yields apparent inequitable and absurd consequences. To fully illustrate the point, suppose a man had seventy-five per cent (75%) permanent loss of bodily function of the back. For practical purposes such a man would be nearly, or if not so, totally disabled. Yet a single arithmetical computation would yield

only one hundred fifty (150) weeks of compensation, or the same as the loss of one (1) hand in the scheduled losses.

It is stated in 58 Am. Jur. 28 at page 594, as follows:

“When great inconvenience of absurd consequences will result from a particular construction, that construction should be avoided, unless the meaning of the legislature be so plain and manifest that avoidance is impossible.”

It has been clearly enunciated by the Supreme Court of Utah that statutes dealing with the Workmen's Compensation Act must be liberally construed. See *Chandler vs. Industrial Commission*, 55 Utah 213, 184 Pac. 1020, 8 ALR 930, wherein said Act was construed in favor of employees and death beneficiaries.

In another early case of *North Beck Mining Company v. Industrial Commission*, 58 Utah 486, 200 Pac. 111, 112, Justice Weber said in a unanimous opinion, as follows:

“The Industrial Act, including the procedure therein provided, must be liberally construed, and with the purpose of effectuating its beneficent and humane objects.”

This case also stressed the man's occupation (a miner) in determining the award and the Court even took judicial notice of his loss.

A careful reading of the statute with the above legal guides of interpretation in mind clearly shows that the Legislature intended, in the case of unscheduled losses, for the Industrial Commission to arrive at a fair and equitable award and to use the scheduled losses only as a guide as to comparable

seriousness with the limitation that the maximum award for any unscheduled loss should not exceed two hundred (200) weeks. As in the instant case the Industrial Commission should have attempted to compare the seriousness of twenty-five per cent (25%) loss of bodily injury of a laborer to a comparable scheduled loss of equal seriousness and not consider two hundred (200) weeks as equivalent to total loss of bodily function.

We invite the Court's attention to one of its own cases which is directly in point with the instant case and because of its importance we are compelled to quote at length from the case of Silver King Coalition Mines Company vs. Industrial Commission, 92 Utah 511, 69 P. 2d 608, wherein Justice Wolfe in a unanimous decision discusses the issue at hand and very effectively sets forth the correct interpretation of this statute and the reasons therefore. We quote from pages 613 and 614 of the Pacific Reporter citation above:

" . . . The compensation for permanent partial disability is measured either by the schedule or in proportion thereto and as deemed equitable on the *loss of bodily functions alone*, and the maximum is 200 weeks. But if the applicants claims total and permanent disability the issue is as to whether he is totally and permanently disabled *industrially* and *economically*. There is a twilight zone where one blends into the other. That is, the loss of bodily function may be so great as to leave one totally and permanently disabled industrially. Thus a person with a 90 per cent. loss of bodily function might be able to prove himself totally and permanently disabled. If so, he would take himself out of the class of applicants limited to recover under the paragraph of section 42-1-62, above quoted, and put himself in the class where his compensation

should be determined by his total lack of industrial or economical ability. But until that point is reached, the permanent partial disability is seemingly compensated for on loss of bodily function alone with a maximum of 200 weeks. The fact that a workman may stop in the zone of permanent partial, not quite going over into the zone of permanent total, and therefore obtain a maximum of only 200 weeks, whereas, a trifle more disability would bring him into what the commission might find as a fact to be an industrial or economic permanent total giving him 260 weeks plus 45 per cent. for the remainder of his life, leads us to wonder whether this 200 weeks' maximum is supposed to be the equivalent to a total loss of bodily function as the commission seemed to conceive it in this case. The applicant had a loss of bodily function of 70 per cent. The commission, therefore, gave him 140 weeks' compensation on the theory evidently that if he had 100 per cent. loss of bodily function he would have been entitled to 200 weeks. But certainly if he had had a 100 per cent. loss of bodily function he would have been totally permanently disabled industrially and economically and therefore be entitled to compensation for the rest of his life.

"There is nothing in the last paragraph of section 42-1-62 which requires that the number of weeks of compensation to be given under this paragraph for permanent partial disability shall be to 200 weeks as the loss of bodily function is to the full bodily function. The requirement is that it shall be as the 'commission shall deem equitable,' circumscribed by the requirement that it be in proportion to compensation in other cases. The maximum contained in the schedule is 200 weeks for the loss of an arm. The loss of an arm would not be a total loss of bodily function. It is therefore odd that in the unscheduled types of loss of bodily member or loss of bodily function the commission

should assume that the maximum of 200 weeks is to be taken as the equivalent of a total loss of bodily function. It would not seem to be necessary for a person to have a 70 per cent. loss of bodily function to obtain 140 weeks of compensation. He might have such percentage of loss and obtain 200 weeks if the loss of function was comparable to the loss of function suffered by the loss of an arm at or near the shoulder or comparable thereto. And, put in another way, the applicant in this case might suffer a 50 per cent. loss of bodily function and be granted 140 weeks if it was comparable to the loss of a leg between the knee and the ankle, which yields in the schedule 140 weeks, because it must be in 'proportion to the compensation in other cases'; such loss of a leg being one of the other cases. Or, if it were somewhat less than the equivalent of the loss of function entailed by the loss of a hand, which yields 158 weeks, it would be in proportion. The mere fact that there was medical testimony that the loss was 50 per cent. of the full bodily function would not necessarily make an award of 140 weeks erroneous. Perhaps the loss of a leg between the knee and the ankle does not involve more than 50 per cent. loss of total bodily function" . . .

## CONCLUSION

The instant case is of great importance, not only to plaintiff herein, who is seeking his proper and just relief, but also to all other injured employees who may follow him with injuries to vital organs of the body and not listed as a scheduled loss. This is especially true in this era where back injuries are coming before the Industrial Commission with greater frequency

due to better diagnostic and surgical procedures developed by the orthopedic surgeons.

The full use of a person's back is of great importance and especially is this true of a laborer. Once a man has had a back operation and has not been re-employed by his employer, as in this case, he practically finds it impossible to obtain new employment wherein the full use of the back is of any importance. Employers refuse to take chances on employees with back injuries.

Here in this case the Industrial Commission has made an award which is not supported by evidence, and such an award is inequitable and has led to a great injustice to the plaintiff and to an absurd consequence. That the interpretation of the applicable law in this case as made by the Industrial Commission is erroneous and not in keeping with the interpretation as set forth by this Court.

In the interest of justice to the plaintiff and of others to follow him, this writer urges the Honorable Supreme Court to carefully inspect the record and judiciously read the applicable statute and return this case to the Industrial Commission for a determination of a just and equitable award with the proper instructions as to the manner of accomplishing same.

Respectfully submitted,

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