

1956

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

Utah Supreme Court

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

**MAX MARKUS,**

*Plaintiff,*

—VS.—

**THE INDUSTRIAL COMMISSION  
OF UTAH, and KENNECOTT COP-  
PER CORPORATION, Utah Copper  
Division,**

*Defendants*

**DEFENDANTS' BRIEF**

**FILED**

AUG 15 1956

Clerk, Supreme Court, U

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**DEFENDANTS' BRIEF**

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**STATEMENT OF FACTS**

It is not here disputed that plaintiff, Max Markus, while employed by Kennecott Copper Corporation, Utah Copper Division, a self-insurer, and on or about June 17, 1952, sustained a compensable injury. The sole question presented to the Industrial Commission was the extent, if any, of the permanent partial disability (R. 47).

The Medical Advisory Board on June 30, 1955, found

“\*\* we believe that he has reached an essentially fixed state of recovery and that the permanent partial disability amounts to 25% loss of bodily function.” (R. 40, 41).

Plaintiff declined to accept that finding and insisted upon his right to a full hearing before the Commission. Upon that hearing the said report was stipulated in evidence. (R. 47).

Among the witnesses called at the hearing was Dr. Reed Smoot Clegg, called by Plaintiff. He testified (R. 75):

A. I have an opinion as of a present estimate of what it will be, and it will be somewhere from 15 to 25% permanent partial disability, but I think it is too early to state what it will eventually be. I will state that it is at least 25% at the present time.

Q. At least 25% at the present time?

A. Yes. It may improve as time goes by. I don't think it will ever get better than 15% at the very best.

Q. Now from your previous answers, am I correct in assuming that if a back is 25% disabled that his bodily function itself would be 25% disabled.

A. That is correct.

The Referee who heard the case chose "to accept the findings of the Medical Advisory Board of 25% loss of bodily function as the permanent partial disability rating of the applicant" (R. 86), and the Commission "Ordered that the recommended findings of fact and conclusions of law of the Referee on file herein be and they are hereby adopted as the Findings and Conclusions of the Industrial Commission" (R. 87). The award is as follows:

"It is further ordered that defendant pay to applicant 50 weeks of compensation at the rate of \$31.63 per week beginning March 10, 1955 for a total of \$1,581.50 and all medical and hospital expenses incurred in connection with the injury on June 17, 1952." (R. 87)

Plaintiff, in due course filed his petition for rehearing which was denied (R. 90), and thereafter plaintiff began this proceeding to review the award above quoted.

The inquiry sustained by Plaintiff is not one specifically provided for in our statutes and comes under that part of Section 35-1-66, Utah Code 1953, which reads:

"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.”

## **PLAINTIFF'S POINTS**

Plaintiff relies on two points:

### **Point 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 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.**

These two points will be discussed in that order.

## **ARGUMENT**

### **Plaintiff's Point I.**

**The award of the Industrial Commission of 50 weeks' "compensation is grossly inadequate and inequitable for plaintiff's disability and is not supported by evidence."**

Counsel does not contend that the loss of bodily function stated as a percentage, i. e., 25% is inadequate



or inequitable. Such finding is amply supported by the evidence. Counsel is of the opinion that an award of 50 weeks' compensation is inadequate. However, the legislature has placed the duty upon the Commission to determine an equitable award: "such period of compensation as the Commission shall deem equitable" (Section 35-1-66). This court will not disturb such a finding by the Commission unless it has so abused its discretion that it may be said that jurisdiction is lacking. Counsel does not claim that the Commission has abused its discretion, he merely insists that the award is inadequate. The sole support advanced for his argument is that part of the statute reading:

"and in proportion as near as may be to compensation for specific loss as set forth in the schedule in this section."

Whether or not a 25% loss of bodily function is equal to or less than the loss of a thumb is a decision to be made by the Commission and is not a proper subject to medical testimony. A doctor is no better qualified to answer than any one.

### **Plaintiff's Point 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.**

This is, to quote counsel, “the main issue of this appeal.” (Plaintiff’s Brief, p. 10).

The Industrial Commission has for many years followed a liberal practice required by our statutes as interpreted by this court. In those cases referred to as specific loss wherein the legislature itself has prescribed the amount of compensation, or rather the number of weeks for which it shall be paid, the Commission has no discretion. The schedule is followed. Other cases may be presented, i. e., a combination of specific losses or some loss of bodily function not scheduled. Such is the instant case.

In this last mentioned type of case the Commission adopts the liberal interpretation required. Awards are limited as to number of weeks — “but not exceeding in any case two hundred weeks”; and in amount — “in no event shall more than a total of \$6,250.00 be required to be paid.” It is obvious that in this case something less than the maximum should be awarded. How much less? The finding that plaintiff has suffered a loss of bodily function of 25% is not questioned. That finding is not that plaintiff has suffered a 25% loss of function of his back, but that he has suffered a 25% loss of bodily function.

The Commission uses as its starting point the maximum (prescribed by the legislature) and reduced the

award proportionately to the disability found. Nothing more liberal or more favorable to the plaintiff is required.

We have no quarrel with the decision of this court in the case of *Silver King Coalition Mines Company vs. Industrial Commission*, 92 Utah 511, 69 P. 2d 608. In that case this court held that the Commission could make an award greater than that originally recommended on two theories, (1) the recommendation was tentative only, and (2) changed conditions justified the increase. The award, sustained by this court, was for 140 weeks and the fact was that the applicant then "had a loss of bodily function of 70%." 70% of 200 weeks is 140 weeks. The court held that an award of 140 weeks was not erroneous merely because there was evidence that the loss was 50% of the full bodily function.

We do not doubt that on this record and in the exercise of its discretion the Industrial Commission could have made a greater award. But it heard all the evidence offered and made an award of 50 weeks. That award is not enough to satisfy plaintiff because being a laboring man his back assumes greater importance than it would in many other occupations or businesses. But "the vocational factor is not an element in the loss of bodily

function." *Caillet vs. Industrial Commission*, 90 Utah 8, 58 P. 2d 760, quoted in *Silver King Coalition Mines Company vs. Industrial Commission*, 92 Utah at 519.

## CONCLUSION

The Commission has properly exercised its discretion in the matters so entrusted to it by the legislature and the award should be affirmed.

Respectfully submitted,

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