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IN THE SUPREME COURT OF THE STATE OF UTAH

NOLAN W. MARSHALL, Plaintiff, -vs- THE INDUSTRIAL COMMISSION OF THE STATE OF UTAH, EMERY MINING CORPORATION [Employer], THE STATE INSURANCE FUND [Insurance Carrier for the Employer] and THE SECOND INJURY FUND OF THE STATE OF UTAH, Defendants.	:	Case No. 19153

BRIEF OF THE PLAINTIFF

A WRIT OF REVIEW FROM THE FINAL ADMINISTRATIVE DECISION

OF THE INDUSTRIAL COMMISSION OF THE STATE OF UTAH

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STATEMENT OF THE KIND OF CASE

This case involves a Writ of Review which is being taken from a denial of a Motion for Review by the Industrial Commission arising out of an industrial accident and essentially involves the question of whether the statutory scheme for permanent total disability benefits requires that physical impairment be the prime factor for a worker's disability in order to qualify for such benefits.

DISPOSITION IN LOWER COURT

This case involves review of the final administrative decision of the Industrial Commission of March 23, 1983 denying permanent total disability benefits to the Employee on the exclusive basis that the primary reason for his unemployability was his age rather than his physical impairment. The Petition for a Writ of Review dated April 21, 1983 of the Denial of a Motion for Review by the Industrial Commission involving the Employee's Workers' Compensation claim was timely filed pursuant to Utah Code Annotated, §35-1-83 (1953, as amended), Rule 72 _et seq._ of the Utah Rules of Civil Procedure, _inter alia_.

RELIEF SOUGHT ON APPEAL

The Employee seeks reversal of the final administrative decision of the Industrial Commission with a decision holding that the Employėe is entitled to permanent total disability benefits.

STATEMENT OF FACTS

On January 25, 1980* the Employee, a 67-year-old underg coal miner at the time, was injured in an industrial ac while working for Emery Mining Corporation. Record, pp. 1 and He was riding on a mantrip at the end of his shift when it hi bump (or lump of coal) in the roadway jarring his back. Record, pp. 1, 4-5, 23, 55 and 65. An Application for Hearing was subsequently filed, answered, a hearing held and referral to a Medical Panel made. Record, pp. 6-9, 11-12, 18-52 and 129-31. The Medical Panel found that he suffered from a permanent partial impairment attributable to his orthopedic problems** and his loss of hearing equivalent to 27% of the whole body which was subsequently reduced to 26% after objections were filed by the Claimant, and corrections made by the Administrative Law Judge. Record, pp. 140-41 and 154-56.

The file in this case contains the following matters relevant to a permanent total disability claim:

1. The Utah State Board of Education, Division of Rehabilitation Services written certification of July 9, 1982 of the

---

* There is some question in the record about whether the date of the industrial injury was January 25, 1980, January 27, 1980 or January 28, 1980, but resolution of it is not material to this appeal. <u>See</u> Record, pp. 1, 4, 9, 22, 43, 89, 123-25 and 127-28.

** The Employee's most recent operation on his back occasioned by the industrial injury involved lumbar decompression L4-5 laminectomy with foramenotomy at L5-S1 and L4 Record, pp. 71, 75, 77 and 81.

Employee's inability to qualify for rehabilitation or re-employment. Record, p. 97.

2. The Employee's treating physician's suggestion to the Employee "... it would be better to retire instead of going back to work"; and his medical reports of July 14, 1980 expressing his opinion that he did "... not think this patient should attempt to work in the mine..."; of March 5 1981 indicating that he felt that he "... would be better off not working in the mine" and recommending that "... he take a retirement"; and of September 9, 1981 reiterating his suggestion that the Employee "... retire because he is unable to go back to work." Record, pp. 28, 81, 86 and 93.

3. The Employee's 40 year work history exclusively limited to heavy labor, specifically, coal mining, approximately 85% of which involved underground employment. Record, p. 30.

4. The Employee's testimony that he could no longer perform the duties of a mechanic in the coal mines -- his main job the last 25 years that he worked -- due to the work requirements of the job and his physical impairments. Record, pp. 31-34.

5. The Employee's age at the time of the his injury (67), and limited formal education (third year of high school). Record, pp. 1, 21 and 30.

6. The Employee's description of his present physical limitations including sitting, standing, lifting, carrying and bending, in conjunction with his limited daily activites occasioned by his physical impairments. Record, pp. 33-35.

At the time of the Employee's industrial injury, he "...
hadn't even thought of retiring..." and even commented at
hearing that he "... knew one guy out there, that was in
Canyon, who was seventy-five and still working. They d
require you to retire at any certain age." Record, pp. 30 a
45.

The record in this case does not contain any rebuttal evidence whatsoever to indicate that the Employee could engage in any form of meaningful employment given his overall physical condition, work experience, education and age. The Division of Rehabilitation Services written certification that the Employee could not be re-trained or re-employed complies with the requirements of Utah Code Annotated, §35-1-67 (1953, as amended) for purposes of permanent total disability claims, and is uncontroverted in this Record. Record, p. 97..

Nevertheless, in the Order of the Administrative Law Judge of February 4, 1983, the following finding with regard to the Employee's claim to permanent total disability* benefits was made:

> Regarding the issue of permanent total disability, the Administrative Law Judge has reviewed the file, and finds that the Applicant is not entitled to a tentative finding, since it appears to the Administrative Law Judge that <u>his prime reason for being unemployed at the present time is age rather than physical impairment</u>. Record, p. 156. (Emphasis added.)

---

* Although the Application for Hearing did not identify claim for permanent total disability benefits, it was su sequently raised by motion on February 9, 1982 -- prior the administrative hearing -- and by letters to the Adm istrative Law Judge on January 19, 1983 and July 14, 198 prior to the issuance of the Findings of Fact, Conclusi of Law and Order. Record, pp. 14-17, 98 and 150-51.

On February 10, 1983 the Employee filed a Motion for Review with the Industrial Commission challenging this finding arguing that a permanent total disability claim is based upon a combination of factors, including age, education, work experience and physical impairment; that the standard for establishing a permanent total disability claim is whether the Employee is totally disabled from engaging in any line of gainful employment; and that whether his inability to perform any manner of employment is primarily caused by a physical impairment as distinguished from age or some other factor is immaterial. Record, pp. 159-61.

On March 23, 1983, the Commission summarily denied the Motion for Review without comment. Record, pp. 169-70.

The Petition for a Writ of Review was timely filed with the Utah Supreme Court on April 21, 1983. Record, pp. 171-75.

STATEMENT OF POINTS

The sole issue presented in this case is whether Utah Code Annotated, §35-1-67 (1953, as amended) requires a finding that physical impairment be the primary factor for a worker's unemployability in order for him to qualify for permanent total disability benefits.

It is the Employee's position that Utah Code Annotated, §35-1-67 (1953, as amended) does not require that physical impairment be the primary factor for a worker's unemployability in order to qualify for permanent total disability benefits, and to deny such a claim on the basis that age is the primary factor contributing to his disability is contrary to law. It is also

the position of the Employee that to the extent that ambiguity exists in the permanent total disability statute, that ambiguity should be resolved in favor of the claim due to remedial nature of Workers' Compensation legislation.

ARGUMENT

I

THE UTAH INDUSTRIAL COMMISSION ERRED IN DENYING THE EMPLOYEE PERMANENT TOTAL DISABILITY BENEFITS BECAUSE AGE IS A RELEVANT FACTOR TO SUCH A DETERMINATION

The Employee submits that age is a relevant factor to be considered in a permanent total disability claim, and that the degree to which it contributes to such a determination is irrelevant and cannot be utilized to deny a permanent total disability claim where it constitutes a substantial or primary factor in such a disability determination.

Although this Court has not specifically passed on this particular question, several neighboring jurisdictions have concluded that age is in fact a factor in permanent total disability claims, while other courts have additionally held that elderly members of the working force who sustain industrial injuries are entitled to permanent total disability benefits notwithstanding their advanced years.

In Brown v. Safeway Stores, 483 P.2d 305 (N. Mex. 1971), the plaintiff, an 18-year-old high school graduate, was trained to plant cucumbers and potatoes, but suffered from an injured back. The New Mexico Supreme 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 and, therefore, 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 work experience to which the Court responded:

> We agree that the proof of the disability is on the plaintiff, but after plaintiff has introduced evidence as to his <u>age</u>, 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 introducted 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. <u>Id</u>. at 308. (Emphasis added.)

Oregon has similarly ruled in the case of <u>Swanson v. Westport Lumber Co.</u>, 479 P.2d 1005 (Ore. 1971) where a 63-year-old man possessing a 60 percent disability of the right leg had sustained a serious low back injury. He was restricted from heavy lifting, stooping, squatting, bending, could not walk more than four or five blocks without experiencing additional pain, and could not sit, stand or lie in one position for a prolonged period of time. In response to the Defendant's claim that the Applicant could be employed in light work, the Oregon Supreme Court commented as follows:

> Total disability under the Workmen's Compensation Act does not mean permanent utter haplessness. [citation omitted.] 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....

****

> . . . [O]pinions 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. . . . *Id*. at 1006-08. (Emphasis added.)

The final administrative decision of the Utah Industrial Commission strongly infers the existence of a different standard of unemployability for elderly workers than exists for younger workers. In effect, the position appears to be that elderly workers because of their age would be in a more difficult position to obtain such benefits than would a younger employee. However, such is not the case as many decision of other jurisdictions recognize.

Furthermore, Congress has enacted the Age Discrimination in Employment Act [ADEA] 29 USCS §§621 *et*. *seq*., to insure equal treatment and to prohibit discriminatory conduct of older persons. Through the ADEA, Congress has attempted to promote the employment of older persons based upon ability to work rather than age. In 1978, Congress amended the ADEA by raising the mandatory retirement age from sixty-five to seventy. This amendment further reflects public policy and Congressional intent

older persons should be allowed to work as long as they have the ability. Thus, if the intent is to encourage older persons to continue working by enacting laws which prohibit discrimination based upon age, then the intent must also be to award older persons the benefits to which they are entitled in accordance with the same standards provided younger members of the work force.

In M. D. Thompson & Son Co. v. McCuan, 502 S.W.2d 93 (Ark. 1973), evidence that a 68-year-old claimant who had worked on a farm and in logging was an able-bodied manual worker prior to spinal fracture and after injury was unable to perform any remunerative sevices supported a finding of total disability.

In Eagle Indemnity Co. v. Hadley, 218 P.2d 488 (Ariz. 1950), evidence that a 66-year-old claimant who had performed electrical work on airplanes as a manual laborer who had enjoyed extraordinarily good health prior to his industrial injury but who subsequently was unable to perform any remunerative employment supported a finding of total disability.

And, finally, in Furlong v. Northwestern Casket Co., 252 N.W. 656 (Minn. 1934), evidence that a 71-year-old claimant [77 at the time of the hearing] who had worked for many years for a casket company and who after his industrial injury was unable to do even light work for any sustained period of time, supported a finding of total incapacity.

In conclusion, the Employee submits that age is an employment-related factor which must be considered in all permanent total disability determinations. In addition, because the stat-

ute does not provide that any factor need be a primary factor and no decision of this or any other Court has so held, it also the Employee's position that age may in an appropriate -- such as this perhaps -- be a primary factor which such determination would not prevent a finding of permanent total disability.

II

THE UTAH INDUSTRIAL COMMISSION ERRED IN DENYING THE EMPLOYEE PERMANENT TOTAL DISABILITY BENEFITS ON ACCOUNT OF AGE BECAUSE A PERMANENT TOTAL DIABILITY DETERMINATION DOES NOT REQUIRE THAT HIS IMPAIRMENT BE THE PRIMARY FACTOR OF HIS DISABILITY

Utah Code Annotated, §35-1-67 (1953, as amended) generally provides for lifetime weekly benefits to injured workers who are permanently and totally disabled. The Code provides that procedurally a finding by the Industrial Commission of permanent total disability shall be tentative pending referral of the injured worker to the Division of Vocational Rehabilitation under the State Board of Education for rehabilitation training. Id. If the Division of Vocational Rehabilitiation certifies in writing to the Industrial Commission that the employee has fully cooperated with the Division in its efforts to rehabilitate him, and in its opinion he may not be rehabilitated, then the Commission shall order permanent total disability be paid to him for life. Id. No employee, however, shall be entitled to such benefits if he fails or refuses to cooperate with the Division. Id.

In addition, although not relevant here, the loss or permanent and complete loss of use of both hands or both arms, or bo

feet or both legs, or both eyes, or of any two thereof, constitutes permanent total disability, and no tentative finding of permanent total disability is required in such instances. Id.

In reviewing this particular statute, it is interesting to note at the outset two characteristics: first, the statute does not require that physical impairment be the primary factor in a permanent total disability determination; and second, age is not a factor which is statutorily excluded as a relevant factor in such a claim.

Generally speaking, the standard applicable to permanent total disability claims is whether the Applicant is unable to engage in his usual work or work which a person of his capabilities could perform. The Utah Supreme Court in United Park City Mines Co. v. Prescott, 393 P.2d 800, 801-02 (Utah 1964) set forth the basic definition of total disability in this state as follows:

> [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 person] of his capabilities may be able to do or to learn to do....

This definition has been subsequently cited by the Court with approval. E.g., Brundage v. IML Freight, Inc., 622 P.2d 790, 792 (Utah 1980). Clark v. Interstate Homes, Inc., 604 P.2d 937, 938 (Utah 1979). Morrison-Knudsen Construction Co. v. Industrial Commission, 424 P.2d 138, 140 (Utah 1967). See Caillet v. Industrial Commission, 58 P.2d 760 (Utah 1936). With regard to the generally accepted definition set forth by this Court in the

United Park City Mines Co. case, it should be noted that the Court defined total disability in terms of "disability" rather than "impairment", the former term relating to a combination of generally accepted job-related factors such as education, training, work history and age.

Similarly, Professor Larson in his treatise on workmen's compensation has described total disability as follows:

> '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). 2 Larson, The Law of Workmen's Compensation, Section 57.51 (Supp. 1983).

The first Utah case discussing the relative burdens of proving permanent total disability was Caillet, supra. There the Court reversed an Industrial Commission denial of permanent total disability holding:

> The evidence in this case . . . conclusively [shows] 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. [Citations ommitted] 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. 58 P.2d at 762-63.

More recently, in Buxton v. Industrial Commission, 587 P.2d 121 (Utah 1978) this Court was presented with a factual situation where the applicant, due to a combination of pre-existing as well as industrial injuries, was made unemployable. The Court analyzed the situation as follows:

> [T]he 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. Id. at 123-24.

In the present case the employee suffers from a permanent partial overall impairment which combines for a total loss of body function of 26%. Record, pp. 154-56. In addition, the Employee's treating physician recommended retirement because he felt the Employee could not return to his former work in the mines and would be better off not doing so. Record, pp. 28, 81,

86 and 93. The Utah State Board of Education, Division of Rehabilitation Services, certified in writing that the employee unable to qualify for rehabilitation or re-employment. Rec. p. 97. This certification satisfies the statutory requirement for changing his disability rating from partial to total. Utah Code Annotated, §35-1-67 (1953, as amended). Brundage, supra. This certification was unquestionably based upon, at least in part, the Employee's age at the time of his industrial injury (67), his limited formal education (third year of high school) as well as his limited and heavy, manual labor work history involving 40 years of coal mine work, approximately 85% of which was underground. Record, pp. 1, 21 and 30. The conclusion is, therefore, inescapable that the employee is unable to work, cannot qualify for rehabilitiation or re-employment and, as a result thereof, is permanently totally disabled.

The law is quite clear that once an employee demonstrates his inability to do his previous work, the burden shifts to the opposing parties to rebut the prima facie case appropriately raised. As the Utah Supreme Court stated in Caillet, supra at 763, once the Claimant demonstrates that he is unemployable, it is incumbent upon the Defendants to show that he "... is able to secure employment of a specific nature not generally available or that he is able to perform the duties of such employment."

In Employers Mutual Life Insurance Co. v. Industrial Commission, 541 P.2d 580 (Ariz. 1975), the Arizona Supreme Court found that when an employee was permanently and totally disabled, ...

burden was placed on the Defendant to show 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. [citation omitted.]
>
> 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. Id. at 583.

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. Lyons v. Industrial Special Indemnity Fund, 565 P.2d 1360, 1364 (Idaho 1977). In the same case the Court also held that where the individual does fall within the odd-lot category, the burden is on the Defendant to show that some kind of suitable work is regularly and continuously available to an injured workman. Id. Since the Industrial Commission failed to meet its burden, the Court reversed its decision denying benefits to the injured employee.

It is the Employee's position that various employability factors, including physical and mental impairment, education, work experience, retrainability -- and age -- must be considered in making a permanent total disability evaluation. In the present claim, it is undeniable that the Employee suffers from a 26%

whole body impairment; that the Utah State Board of Education, Division of Rehabilitation Services certified that there is no reasonable expectation that such services would benefit the Employee as required by Section 67; and that his treating physician encouraged him to retire since he would not be able to return to work in the mines. Record, pp. 28, 81, 86, 93, 97 and 154-56. In addition, the Employee's current age (70) and limited formal education (third year of high school) coupled with his approximately 40-year history of heavy underground coal mine work, approximately 85% of which was involved in underground employment, further substantiate such a finding in this case. Record, pp. 1, 21, 30.

It is also interesting to note that neither the Employer nor the Second Injury Fund contested such a finding in this case and neither proffered any evidence to rebut the unemployability of the Employee. In Brundage, supra, the plaintiff offered uncontroverted evidence that demonstrated he was unable to sit or stand for prolonged periods of time. This Court in that case stated that the Commission "... could not have formed a bona fide opinion that plaintiff was not then incapable of re-entering the labor market by reason of physical disabilities." It is the Employee's position here that the Industrial Commission could not have a "bona fide" opinion regarding this Employee's ability to re-enter the labor market without any evidence whatsoever from either the Employer or the Second Injury Fund challenging the Board of Education's written certification of non-rehabilitability, which such certification was placed into evidence at the

time of the hearing and the parties were well aware of that certification, and chose not to request a hearing on it or attempt to refute it in any way. Therefore, it stands unrebutted in this record at this time. Such a situation is very similar to the Brundage decision.

In conclusion, the Employee respectfully requests that the final administrative decision of the Industrial Commission be reversed since it contains a legal proposition which is contrary to Workers' Compensation law generally and to the law of this jurisdiction specifically; namely, that permanent total disability awards must include the specific finding that the primary factor of that disability is impairment rather than some other factor. Neither the Utah statute nor any decision of this or any other Court requires that impairment be a primary factor in a permanent total disability claim. In essence, there is absolutely no statutory or case law support for the Industrial Commission's position in this claim. In fact, the case law of various cited decisions of neighboring states specifically holds age as a relevant factor in such determinations, without any references to analysis of any factor as being a primary factor in such determinations since to do so would be contrary to the very definition of permanent total disability.

III

THE UTAH INDUSTRIAL COMMISSION ERRED IN FAILING TO FIND THAT THE REMEDIAL NATURE OF WORKERS' COMPENSATION LEGISLATION REQUIRES THAT ANY AMBIGUITY INHERENT IN THE PERMANENT TOTAL DISABILITY STATUTE BE RESOLVED IN FAVOR OF THE CLAIM

The overriding principle which governs adjudication of Workers' Compensation disability claims is that such claims are

to be liberally construed in favor of awarding benefits and that any doubts or ambiguities from the evidence are to be resolved in favor of the claim. Prows v. Industrial Commission, 610 P.2d 1362, 1363-64 (Utah 1980), citing Chandler v. Industrial Commission, 184 P. 1020, 1021-22 (Utah 1919). The Church of Jesus Christ of Latter-Day Saints v. Industrial Commission, 590 P.2d 328, 332 (Utah 1979) (Dissenting opinion). McPhie v. Industrial Commission, 567 P.2d 153, 155 (Utah 1977). Askrew v. Industrial Commission, 391 P.2d 302, 304 (Utah 1964). M & K Corp. v. Industrial Commission, 189 P.2d 132, 134 (Utah 1948). The Employee respectfully requests that to the extent that any ambiguity exists in the statutory or case law relative to total permanent disability claims, that all such doubts be resolved in favor of the claim.

CONCLUSION

In conclusion, the Employee respectfully requests that the final admministrative decision of the Industrial Commission be reversed and that the Commission be directed to enter an award to him for permanent total disability benefits commencing from the date of his industrial accident, namely, January 25, 1980.

DATED this 22nd day of July, 1983.

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CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing document, postage prepaid, on this the 22nd day of July, 1983, to the following:

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