

1984

Theodore Hodges v. Western Piling & Sheet Company, State Insurance Fund And Second Injury Fund : Petitioner's Brief

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

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

Recommended Citation

Brief of Appellant, *Hodges v. Western Piling & Sheet Co.*, No. 19248 (1984).
https://digitalcommons.law.byu.edu/uofu_sc2/4164

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

IN THE SUPREME COURT
OF THE STATE OF UTAH

THEODORE HODGES,)
)
 Petitioner,)

vs.)

Case No. 19248

WESTERN PILING & SHEET COMPANY,)
STATE INSURANCE FUND and
SECOND INJURY FUND,)
)
 Respondents.)

PETITIONER'S BRIEF

Writ of Review from
Industrial Commission of the State of Utah

JAMES A. BLACK
Suite 500
Ten West Broadway
Salt Lake City, UT 84101
Attorney for State
Insurance Fund

GIAUQUE & WILLIAMS
Roger D. Sandack
500 Kearns Building
Salt Lake City, UT 84101
Attorney for Petitioner

FRANK V. NELSON
Assistant Attorney General
State Capitol Building
Salt Lake City, UT 84114
Attorney for Industrial
Commission of Utah

GILBERT MARTINEZ
160 East 300 South
P. O. Box 5800
Salt Lake City, UT 84111
Attorney for Second Injury Fund

FILED

FEB 2 1964

Clark, Supreme Court, Utah

IN THE SUPREME COURT
OF THE STATE OF UTAH

THEODORE HODGES,)
)
 Petitioner,)
)
 vs.) Case No. 19248
)
 WESTERN PILING & SHEET COMPANY,)
 STATE INSURANCE FUND and
 SECOND INJURY FUND,)
)
 Respondents.)

PETITIONER'S BRIEF

Writ of Review from
Industrial Commission of the State of Utah

JAMES A. BLACK
Suite 500
Ten West Broadway
Salt Lake City, UT 84101
Attorney for State
Insurance Fund

GIAUQUE & WILLIAMS
Roger D. Sandack
500 Kearns Building
Salt Lake City, UT 84101
Attorney for Petitioner

FRANK V. NELSON
Assistant Attorney General
State Capitol Building
Salt Lake City, UT 84114
Attorney for Industrial
Commission of Utah

GILBERT MARTINEZ
160 East 300 South
P. O. Box 5800
Salt Lake City, UT 84111
Attorney for Second Injury Fund

TABLE OF CONTENTS

| | <u>Page</u> |
|--|-------------|
| NATURE OF CASE | 1 |
| DISPOSITION IN LOWER ADMINISTRATIVE BODY | 1 |
| RELIEF SOUGHT ON APPEAL. | 2 |
| STATEMENT OF FACTS | 2 |
| ARGUMENT | 6 |
| I. HODGES' BENEFITS MUST BE BASED ON THE AVERAGE WEEKLY WAGE FORMULA PROVIDED BY LAW | 6 |
| II. HODGES IS ENTITLED TO AN AWARD OF PERMANENT TOTAL DISABILITY BENEFITS BASED UPON THE FINDING OF 35% IMPAIR- MENT, EXCLUSIVE OF HIS ARTHRITIC CONDITION | 9 |
| III. THE ADMINISTRATIVE LAW JUDGE ACTED ARBITRARILY BY FAILING TO CONSIDER CLAIMANT'S ARTHRITIC CONDITION AS A PRE-EXISTING IMPAIRMENT | 11 |
| CONCLUSION | 13 |

TABLE OF AUTHORITIES

| <u>Cases</u> | <u>Page</u> |
|---|-------------|
| <u>Brundage v. IML Freight, Inc.</u> , 622 P.2d 790 (Utah 1981) | 10, 11 |
| <u>Buxton v. Industrial Commission</u> , 587 P.2d 121 (Utah 1978) | 11 |
| <u>Millard County v. Industrial Commission</u> , 62 Utah 46, 217 P. 974 (1923) | 8 |
| <u>Morrison-Merrill & Co. v. Industrial Commission</u> of Utah, 81 Utah 363, 18 P.2d 295 (1933). | 8 |
| <u>Northwest Carriers, Inc. v. Industrial Commission</u> of Utah, 639 P.2d 138 (Utah 1981) | 10 |
| <u>Park Utah Consol. Mines Co. v. Industrial Commission</u> , 84 Utah 481, 36 P.2d 179 (1934) | 8, 9 |
| <u>Texas Employers' Insurance Association v. McMahon</u> , 509 S.W.2d 665 (Tex. Civ. App. 1974). | 8, 9 |
| <u>United Park Mines Company v. Prescott</u> , 15 Utah 2d 410, 393 P.2d 800 (1964). | 10 |
| <u>Statutes and Regulations</u> | |
| 42 U.S.C. §403(f)(3) | 6 |
| <u>Utah Code Ann. §35-1-75(1)</u> | 7, 9, 14 |
| 20 C.F.R. §404.435(a)(3) | 7 |

0697L

IN THE SUPREME COURT
OF THE STATE OF UTAH

THEODORE HODGES,)

Petitioner,)

vs.)

Case No. 19248

WESTERN PILING & SHEET COMPANY,))

STATE INSURANCE FUND and)

SECOND INJURY FUND,)

Respondents.)

PETITIONER'S BRIEF

NATURE OF CASE

This is a review of a final order of the Industrial Commission of Utah which awarded Petitioner partial benefits under Utah's worker compensation laws, but denied Petitioner permanent and total benefits.

DISPOSITION IN LOWER ADMINISTRATIVE BODY

The Industrial Commission of Utah affirmed the Administrative Law Judge's Supplemental Order, which reversed and denied a previously entered award of permanent total disability benefits. The Supplemental Order also reduced Petitioner's weekly benefit amount on the assumption that Petitioner could only earn \$5,500.00 per year without curtailing his Social Security benefits, thus resulting in a weekly benefit based upon annualized earnings of \$5,500.00 rather than substantially higher actual weekly earnings.

RELIEF SOUGHT ON APPEAL

Petitioner requests this Honorable Court to review, reverse and remand the order of the Industrial Commission for the purpose of awarding permanent total disability benefits at the appropriate, higher weekly compensation rate.

STATEMENT OF FACTS

Petitioner, Theodore Hodges ("Hodges"), a 68-year-old welder, was injured on February 23, 1981, during the course of his employment with Western Piling & Sheet Company ("Western Piling"). Hodges was loading a length of heavy 12-inch wall pipe when the pipe suddenly fell, striking him in the right shoulder. (R.23-26.)

Prior to this accident, Hodges had been in the employ of Western Piling for about a decade. (R.23.) As reflected in the testimony of a co-employee at Western Piling, Hodges was a man of pronounced vigor and energy:

- Q. I'd like you to tell us, before that accident, your opinion of Mr. Hodge's physical condition to do the work he was doing.
- A. I felt he was capable and a real good man to work with really.
- Q. Physically, though, was he active?
- A. Physically, he was really active. He could keep up with the rest of us young guys, and I thought he was a super worker.
- Q. Did he move quickly and swiftly?
- A. Swiftly and accurately. (R.61.)

At age 65, Hodges began to receive Social Security retirement benefits. He continued, however, to work for

Western Pilot. Although conscious that his Social Security benefits might be reduced if he earned over a certain amount per annum, Hodges continued to work for additional compensation and to keep fit:

- Q. Now, since you have been on Social Security, you have continued to work? Is that correct?
- A. Well, you're entitled to work--well, like this year, I can make \$5,500 and stay on Social Security.
- Q. So you work just enough to--
- A. I try to keep working to keep in shape. Because if you lay around, you're not going to be worth a shit. So I try to keep working. I could use the money. That's about what it amounted to. (R.42.)

Accordingly, at the time of his accident on February 23, 1981, Hodges was working a full 40 hours per week (R.24) with no present intention to quit or reduce his workload.

On the day following his accident, Hodges consulted his chiropractor, who referred him to Dr. Gordon R. Kimball. (R.30-31.) Dr. Kimball began treatment with Cortisone injections. Within three days of receiving a full injection of Cortisone to the left shoulder on April 6, 1981, Hodges experienced severe body swelling and pain in his joints. His weight suddenly ballooned from 165 pounds to 195 pounds. (R.30-32.) This dramatic flare-up of his previously asymptomatic arthritic condition remained so serious that on June 19, 1981, Dr. Kimball admitted Hodges to the hospital and obtained additional consultation from Dr. Paul Miner. (R.32-33, 76.) Four days later, while incapacitated and under medication

in the hospital, Mr. Hodges was interviewed by Dr. Frank Dituri, a medical consultant hired by the State Insurance Fund to evaluate the Fund's liability. (R.43-44.) As a result of this interview, the State Insurance Fund denied liability for medical treatment received by Hodges after June 23, 1981. (R.9.) Hodges was then released from the hospital because he could no longer afford the cost. (R.52.)

Application was made to the Industrial Commission of Utah for hearing on Hodges' claims. At the conclusion of the hearing on March 11, 1982, Dr. Boyd G. Holbrook was appointed to head a medical panel and make an impartial evaluation of the medical aspects of the case, including the effects of pre-existing conditions. Dr. Holbrook's report concluded, in pertinent part, (1) that Hodges was 100% physically impaired; and (2) that Hodges "total impairment excluding the generalized arthritis is 35% permanent loss of body function", 26% attributable to pre-existing conditions, and 9% attributable to the accident on February 23, 1981. (R.91.) (Emphasis added.) In testimony, Dr. Holbrook reiterated his evaluation that Hodges' permanent disability is "35 percent . . . excluding the generalized arthritis." (R.111.) On August 24, 1982, the Division of Rehabilitation Services submitted its report, concluding that in light of his age and substantial physical impairment: "Mr. Hodges is not a good candidate for rehabilitation." (R.99.)

After receipt of these reports from Dr. Holbrook and the Division of Rehabilitation Services, the Administrative Law

Judge entered Findings of Fact, Conclusions of Law and Order finding a total of 35% impairment of Hodges' bodily functions, exclusive of his arthritic condition:

His functional disability is unquestionably due to his generalized arthritis but there is no doubt that the applicant is also significantly affected by the 35% impairment attributable to the earlier injuries combined with this accident. This would most probably render him permanently and totally disabled when considered in conjunction with his age, education and experience. The Division of Vocational Rehabilitation has clearly indicated that he is not a candidate for rehabilitation. . . . [T]he applicant's impairment combined with employment problems incident to age, education and experience, are sufficient to render the applicant permanently and totally disabled irrespective of any consideration of his generalized arthritis. (R.101-02.) (Emphasis added.)

The Administrative Law Judge accordingly awarded Hodges permanent total disability benefits, the maximum provided under Utah's compensation laws.

Within a few days of this finding, the Administrative Law Judge reversed his conclusion that Hodges was permanently and totally disabled and entered a Supplemental Order. He left intact Finding No. 4 that "[Hodges'] overall permanent physical impairment attributable to conditions exclusive of the generalized arthritis is 35%". The Administrative Law Judge then ruled that Hodges' permanent total disability was due to his generalized arthritis which became symptomatic after the industrial injury and thus not compensable as a post-existing condition.

The Administrative Law Judge's Supplemental Order

also recomputed Hodges' wages. Inferring that Mr. Hodges had only been working long enough each year to earn the maximum of \$5,500 allowed before his earnings would be offset against Social Security benefits, the Administrative Law Judge selected the figure of \$106.00 (\$5,500.00 divided by 52 weeks) as representing Hodge's weekly earnings. (R.138-39.) This was in the face of uncontroverted testimony that at the time of his accident, Hodges was working a full 40-hour week and earning \$655.20 per week (36 hours at \$15.60 per hour; four hours at \$23.40 per hour). (R.23-24.)

After the applicant timely filed a motion to review, the Industrial Commission of Utah summarily affirmed the Administrative Law Judge's Supplemental Order on May 17, 1983. (R.152-53.) A petition for a writ of review was thereupon filed with this Court.

ARGUMENT

I. HODGES' BENEFITS MUST BE BASED ON THE AVERAGE WEEKLY WAGE FORMULA PROVIDED BY LAW.

The Commission acted arbitrarily and capriciously when it disregarded statutory and factual wage calculations and substantially reduced Hodge's benefits because of his age or other assumptions not supported by the record.

The Commission mistakenly asserts that Hodges could only earn up to \$5,500.00 per year before suffering an offset against his Social Security benefits. This is simply not true. Current Social Security law provides that after age 70, there is no offset against wages earned. 42 U.S.C. §403(f)(3);

30 C.F.R. §404.405(a) (3). Thus, a man of Hodge's age (he was 58 years old at the time of his accident and now over 70) may earn an unlimited income and still receive his full Social Security benefits. It is unjust to deny Hodges workmen's compensation benefits based upon a false assumption about income limitations in the Social Security laws, especially in light of Hodges' pre-accident physical vigor and his abhorrence of being idle.

At the time of his February 23, 1981, accident, Hodges was a full-time employee of Western Piling, working 40 hours per week. Under these circumstances, Hodges' benefits are required by statute to be calculated upon the basis of his weekly earnings at the time of the accident. Utah Code Ann. §35-1-75(1), provides in pertinent part:

{T}he average weekly wage of the injured employee at the time of injury shall be taken as the basis upon which to compute the weekly compensation rate and shall be determined as follows:

* * *

(e) If at the time of the injury the wages are fixed by the hour, the average weekly wage shall be determined by multiplying the hourly rate by the number of hours the employee would have worked for the week if the accident had not intervened. . . .

"The statute clearly fixes the basis upon which benefits are to be computed, and when that basis is capable of being definitely ascertained, . . . the benefits may not be enlarged or diminished because the injured employee may have had larger or smaller earnings prior to the time of his injury in some other

or the same employment." Millard County v. Industrial Commission, 62 Utah 46, 217 P. 974, 976 (1923).

Significantly, the statute presumes that an injured employee's weekly wages would have continued indefinitely but for the injury. Park Utah Consol. Mines Co. v. Industrial Commission, 84 Utah 481, 36 P.2d 979, 982 (1934). Because of this presumption, an injured worker who had previously been engaged in intermittent employment such as construction may receive more in benefits than he would have received in wages had he not been injured. Such a consequence is entirely proper. Morrison-Merrill & Co. v. Industrial Commission of Utah, 81 Utah 363, 18 P.2d 295, 298 (1933). Yet the reduced benefits awarded to Hodges ignore the statutory presumption for the precise reason rejected in Morrison-Merrill & Co., *supra*, *viz.*, because Hodges might have received more in benefits than he would have earned in wages.

In a similar case, a Texas court held that the fact that a pulpwood hauler had intentionally limited his earnings to protect his Social Security benefits in the previous year did not otherwise remove him from the clearly expressed statutory formula for determining benefits on a weekly wage basis. Texas Employers' Insurance Association v. McMahon, 509 S.W.2d 665 (Tex. Civ. App. 1974). The court stated:

It is the wage-earning capacity which is protected by the compensation act. Even though the claimant in the case before us may have been limiting his earnings at the time this cause of action arose, he should be free to change his mind. . . .

509 S.W.2d at 559 (emphasis supplied).

To conclude that Hodges would only have earned \$5,500.00 per year but for his injury is sheer speculation. Even aside from the fact that deductions from his Social Security benefits would have ceased at age 70, Hodges was free at any time to earn as much as possible beyond the base level of subsistence offered by Social Security. Hodges was an energetic worker who enjoyed work for its own sake. Nowhere, indeed, does the record show that Hodges limited his earnings to \$5,500.00 per year even before his accident. It indicates only that he was aware of the consequences of earning more than this amount, and that he preferred working despite the consequences.

Utah Code Ann. §35-1-75(1), supra, presumes that Hodges' weekly wages earned at the time of his injury would continue indefinitely into the future. Park Utah Consol. Mines Co. v. Industrial Commission, supra, at 982. The Commission ought not be allowed to engage in speculation as to what a claimant might do in a future year. Not only does such speculation disregard the statutory presumption, but it has resulted in predictions wholly at odds with the evidence. Hodges' benefits should have been computed, as was correctly done in the Administrative Law Judge's original order, on the basis of his average weekly wage at the time of his injury.

II. HODGES IS ENTITLED TO AN AWARD OF PERMANENT TOTAL DISABILITY BENEFITS BASED UPON THE FINDING OF 35% IMPAIRMENT, EXCLUSIVE OF HIS ARTHRITIC CONDITION.

The medical panel clearly and unequivocally found

that petitioner had a 35% permanent physical impairment from the industrial injury and pre-existing conditions, exclusive of his arthritic condition. (R.136.) The Administrative Law Judge found likewise, both in his original and supplemental orders.

The test for determining total disability under the Utah Workmen's Compensation Law is well established:

[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 by other work which a man of his capabilities may be able to do or learn to do. . . .

United Park Mines Company v. Prescott, 15 Utah 2d 410, 393 P.2d 800, 801-02 (1964). In determining an injured employee's degree of disability, it is appropriate to consider factors extrinsic to an industrial injury such as "age, mental ability, prior training, and job market". Northwest Carriers, Inc. v. Industrial Commission of Utah, 639 P.2d 138, 141 (Utah 1991). The Division of Rehabilitation Services found that in view of his age and physical impairment, there were no prospects for Hodges' rehabilitation. Thus, in his original order, the Administrative Law Judge found that Hodges' "35% impairment attributable to the earlier injuries combined with this accident . . . would probably render him permanently and totally disabled when considered in conjunction with his age, education and experience". (R.101-02.)

The present case is almost identical to the situation before this Court in Brundage v. IML Freight, Inc., 622 P.2d 790 (Utah 1981). In Brundage, the medical testimony

established the claimant's 20% permanent physical disability. The rehabilitation counselor testified that based upon the claimant's limitations, there were no occupations presently available to him. This Court properly held that in view of such uncontradicted evidence, the Commission "could not have formed the bona fide opinion that plaintiff was not then incapable of re-entering the labor market by reason of his physical disabilities". Id. at 792, (quoting Buxton v. Industrial Commission, 587 P.2d 121, 123-24 (Utah 1978)). Similarly in this case, the uncontradicted evidence is that Hodges' 35% impairment is permanent and that there is no occupation presently available to him. Accordingly, the finding of 35% total impairment, when combined with Hodges' age, education and experience, entitles him to an award of permanent and total disability benefits.

III. THE ADMINISTRATIVE LAW JUDGE ACTED ARBITRARILY BY FAILING TO CONSIDER CLAIMANT'S ARTHRITIC CONDITION AS A PRE-EXISTING IMPAIRMENT.

All of the medical evidence demonstrates the existence of a severe osteoarthritic condition becoming symptomatic shortly after the industrial injury and concurrent with the initial treatments. No amount of permanent partial disability was assigned to this condition. The medical panel and the Administrative Law Judge simply found that this condition alone was significant enough to render the claimant permanently totally disabled from employment. The medical panel found that this diffuse severe arthritic problem had its

onset subsequent to the accident of February 23, 1981, but was not related to those events. The panel did not find that the severe arthritic problems were totally post-existing. In fact, they noted "previous multiple records in this patient indicate pre-existing arthritic changes in the right shoulder, back and left knee". (R.91.)¹ While the severe symptomatic condition may have occurred after the industrial injury of February 1981, it is clear that the arthritic condition itself pre-existed this industrial injury and had created significant enough modifications to have been previously noted.

The Administrative Law Judge's initial determination that Hodges was permanently and totally disabled from gainful employment was made without reference to this arthritic condition. If the arthritic condition is considered, however, as a pre-existing condition, whether or not it was symptomatic, the Administrative Law Judge would presumably assign permanent total disability to this condition alone, as well as to this condition when considered together with all previous injuries.

The fact that the Administrative Law Judge simply changed his mind was in and of itself an arbitrary and capricious act in that it deprived claimant of an opportunity

¹See also, (1) R.84: November 30, 1957 x-rays showing "fairly extensive hypertrophic arthritis in the lower dorsal and lumbar spine"; (2) R.85: July 25, 1965 note showing "suggestion of definite acromio-clavicular arthritis"; (3) R.85: 1956 report from Dr. Howard re associated traumatic arthritis and "marginal osteophytic spurring", and 1973 report showing traumatic arthritis of the left knee; (4) R.86: 1974 report showing "two arthritic shoulders and one arthritic knee may render further employment unlikely".

to hold additional or further hearings requesting clarification of the medical panel report. Had the claimant believed that his 35% disability would not in and of itself have been deemed to render claimant totally disabled, the claimant would have objected to the medical panel report and thus sought clarification of the panel's feeling that had claimant not had an arthritic condition, he probably would have stabilized on or about June 23, 1981, and may or may not have then been totally and permanently disabled. All of the panel's statements, as well as the Administrative Law Judge's findings, are based upon speculation as to what could or could not have occurred had he not had osteoarthritis. The fact remains that the claimant was hospitalized on the date he was supposedly stabilized from his industrial injury and was totally incapacitated from any work whatsoever.

CONCLUSION

It is respectfully submitted that the Industrial Commission committed the following errors of law in this matter:

1. Failing to find that Theodore Hodges is permanently and totally disabled, despite uncontroverted evidence that he is at least 35% impaired due to the industrial accident and pre-existing conditions (exclusive of arthritic conditions);
2. Failing to consider the pre-existing arthritic condition in a determination of his total disability benefits;
3. Failing to calculate Hodges' benefits based upon his actual average weekly wage at the time of his industrial

accident;

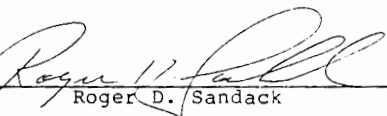
4. Failing to apply the statutory presumption in Utah Code Ann. §35-1-75 that Hodges' average weekly wage at the time of his industrial accident would have continued indefinitely but for the accident; and

5. Engaging in speculation, unsubstantiated by law or by the evidence in this case, concerning the amount of work Hodges would have chosen to perform had he not been injured.

Accordingly, the Commission's order denying benefits should be reversed and remanded for the purpose of awarding benefits for permanent total disability to Theodore Hodges, and to properly calculate benefits in the manner contained in the Administration Law Judge's original order.

RESPECTFULLY SUBMITTED this 5th day of February, 1984.

GIAUQUE & WILLIAMS
500 Kearns Building
Salt Lake City, UT 84101
Telephone: 533-8383

By 
Roger D. Sandack

Attorneys for Petitioner

0698L

CERTIFICATE OF SERVICE

A true and correct copy of PETITIONER'S BRIEF was placed in the United States mail, postage prepaid, to the following persons on this 5th day of February, 1984:

James A. Black
Suite 500
Ten West Broadway
Salt Lake City, UT 84101

Frank V. Nelson
Assistant Attorney General
State Capitol Building
Salt Lake City, UT 84104

Gilbert Martinez
160 East 300 South
P. O. Box 5800
Salt Lake City, UT 84111

