

1963

Western Contracting Corp et al v. Industrial Commission of Utah and Leo A. Davis : Plaintiffs' Brief

Utah Supreme Court

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APR 16 1964

IN THE SUPREME COURT
OF THE STATE OF UTAH

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WESTERN CONTRACTING
CORPORATION (Employer)
and EMPLOYERS MUTUAL
LIABILITY INSURANCE
COMPANY OF WISCONSIN,
(Carrier),

Plaintiffs,

— vs. —

INDUSTRIAL COMMISSION OF
UTAH and LEO A. DAVIS,

Defendants.

FILED

SEP 30 1963

Clerk, Supreme Court, Utah

Case
No. 9970

PLAINTIFFS' BRIEF

Appeal from Decision of
The Industrial Commission of Utah

CLYDE, MECHAM & PRATT

By FRANK J. ALLEN

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PLAINTIFFS' BRIEF

NATURE OF THE CASE

This is a review of a decision of the Industrial Commission of Utah granting to defendant Leo A. Davis compensation for permanent partial disability under the provisions of Section 35-1-66 Utah Code Annotated 1953 as amended. The Commission granted compensation for 100 weeks, the period prescribed by the statutory sched-

ule for total loss of function of one eye. The questions presented on appeal relate to the propriety of that award on the facts in this case.

STATEMENT OF FACTS

The facts are stipulated. Defendant Leo A. Davis injured his right eye in an industrial accident. The injury is such that, without a corrective optical lens, the right eye is essentially blind. Approximately 50% of the eye's function is restored by the use of glasses.

DISPOSITION BELOW

The Commission awarded defendant Leo A. Davis compensation for total blindness of one eye in accordance with the schedule incorporated in Section 35-1-66 (100 weeks).

RELIEF SOUGHT ON APPEAL

Plaintiffs seek an order of this court declaring that the Industrial Commission improperly assessed the disability under the statute, and that the loss of visual function should be assessed on a binocular basis with correction.

ARGUMENT

**TOTAL BLINDNESS OF AN EYE HAS NOT
OCCURRED IF SUBSTANTIAL FUNCTION
CAN BE RESTORED BY THE USE OF OPTI-
CAL AIDS.**

The Utah Act is silent as to the recognition which should be given to the fact that some kinds of sense impairment can be greatly ameliorated by the use of appliances commonly prescribed by physicians and in general use in our society.

The difference in disabling effect between a correctible and an incorretible impairment of vision is so manifest in our every-day experience, however, that we can hardly assume the legislature intended the two kinds of impairment to be equally compensable. The basic premise of the compensation laws is that industry should provide a substitute for lost earning power. The need to wear glasses does not, in our society, put a workman at appreciable disadvantage in the labor market, but a visual deficiency which cannot be restored by glasses clearly disqualifies him for many types of employment.

The Utah Act has, from the beginning, given recognition to the importance of prosthesis in reducing disability. Where industrial injury results in the loss of a leg, for instance, a substantially lesser award is provided where the stump is sufficient to permit the use of an artificial leg (Sec. 35-1-66). It appears to be the position of the Commission that, since the Legislature failed to make similar provision for monocular blindness where the mechanism of the eye can be restored to function by a lens, it is the legislative mandate that compensation be awarded for this impairment without reference to correctibility.

We believe the Commission erred in equating the

loss of function in this case with the kinds of losses which the schedule really treats. Compensation is awarded for loss of an arm, for instance, only if the arm is amputated or rendered useless. If an arm, otherwise useless, can be restored to function by the insertion of a pin or plate, compensation is awarded only upon an appraisal of the disability after the appropriate orthopedic procedure has been completed. While the inserted metal part may take the place of a section of bone or joint, it is not considered that the arm restored to function by the insertion is an artificial arm.

The analogy between an arm so restored to use and an eye restored to use by a lens would appear to be a valid one. In each case, it is the injured anatomical member which is made to function, not an artificial substitute for it. It is not generally considered that a man who can see only with glasses is blind any more than it is considered that a man who can walk only because of a pin in his hip is paraplegic. The legislature did not specifically provide for the situation where monocular blindness can be relieved by a lens simply because that kind of blindness is not blindness, in the popular concept, at all.

The view that visual impairment should be evaluated on a corrected basis is the one taken by almost every court which has considered the problem. Schneider's statement of the legal proposition is this:

“Where an injured eye is, with the aid of a proper glass, nearly normal for many purposes, it does

not amount to the loss of an eye, even though it is undisputed that there is permanent impairment of the vision of the eye as the result of the injury''¹

and the editors of American Jurisprudence say:

“Although there is some authority to the contrary, according to most authorities, the extent of the impairment of vision will be determined in view of the use of glasses or such other corrective means as are practicable; in other words, the extent of loss of vision due to an injury may be computed on the basis of the pre-injury vision as corrected by glasses.”²

This subject has been frequently annotated (8 ALR 1330; 73 ALR 716; 99 ALR 1507; 142 ALR 832) and there is no dearth of judicial expression on the point which concerns us. The case most frequently cited in later decisions (and one which seems on all fours with the instant case) is *Washington Terminal Co. v. Hoage, et al.*, 79 F2d 158, heard by the Circuit Court of Appeals for the District of Columbia in 1935. In that case, the injured employee demonstrated a 100% loss of vision of the left eye and a 25% loss of vision of his right eye. There being no evidence before the deputy commissioner as to the remedial effect of glasses, he made findings of disability without correction. The employee, having received compensation for the 100% left eye and 25% right eye impairment, then consulted an oculist who pre-

¹ Wm. R. Schneider, *The Law of Workmen's Compensation*, Second Edition, Volume II, Section 409, p. 1385.

² 58 Am Jur 785

scribed glasses which restored the vision of the right eye almost completely and the left eye to 50% efficiency.

The act under which benefits were sought included a schedule, much like the Utah schedule, which provided:

“(5) Eye lost, 140 weeks compensation . . . (16) Compensation for loss of . . . 80% or more of the vision of the eye shall be the same as for loss of eye.”

The employer applied for relief from the original award on the basis of the changed condition. In reversing the denial of relief by the trial court, the Circuit Court said:

“In our opinion this decision was erroneous for the reason that the deputy commissioner, when passing upon the extent of Poff’s vision, should not have excluded from consideration the assistance which he could receive from the use of glasses.

The use of eyeglasses as an aid to vision is so commonly understood and employed that no person would be considered as having lost 80 per cent of normal vision if at the same time by the use of glasses he would possess 50 per cent of normal vision. Therefore, according to the reasonable construction of the statute, it should be held that one possessing 50 per cent efficiency of vision in an injured eye when using glasses cannot be classified as having lost the use of 80% of the vision of such eye.

It must be remembered that the award payable to the employee under the statute is for “disability” which means incapacity because of injury to earn the wages which the employee was receiving

at the time of injury in the same or any other employment (section 2, subsec. 10 of the act, 33 USCA § 902 (10). The intention of the law is to provide compensation for loss or disability in earning power and not indemnity or damages for injury to a member of the body. It is consistent with the purpose of that act that the disability of an employee resulting from an injury to his eyes should be considered with reference to the benefit resulting from the use of glasses.”

Whenever there has been deviation from the principle expressed in the Washington Terminal case, it has been explained on the basis of some peculiar phrasing of the statute under which benefits are to be paid which will not permit a construction in accordance with common sense. There is no such peculiar phrasing of the Utah Act. The schedule, so far as it relates to eye injuries, reads as follows :

“One eye by enucleation.....120 weeks
Total blindness of one eye.....100 weeks”

This language is entirely susceptible to the construction that the fact of blindness vel non will be determined on a corrected basis. This court has had only one previous occasion to rule on this point, and it held squarely with the authorities we have cited above. In the 1921 case of *Moray v. Industrial Commission*, 58 Utah 404; 199 Pac. 1023, this court considered a claim of an employee for benefits for loss of visual function. Beginning at page 416 of the Utah Reporter, the court cited with approval the opinion of the Supreme Court of Michigan in the case of *Cline v. Studebaker Corporation*, 189 Mich. 514; 155 NW 519, where that court said :

“It is unnecessary to determine whether the loss of 90% of the sight is substantially the loss of the eye, because that is not the present case. *Ninety percent of the sight is not lost when it can be diminished to 50% by use of common appliances.* And it is the duty of the sufferer to minimize the injury as much as he reasonably may.” (emphasis added)

CONCLUSION

The order of the Industrial Commission in this case that benefits be paid for impairment of vision on an uncorrected basis is out of harmony with compensation philosophy and the specific pronouncements of this Court. The decision should be voided by this Court.

Respectfully submitted,

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