

1963

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

Utah Supreme Court

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A. Pratt Kesler; Clyde, Mecham & Pratt; Attorneys for Petitioners;

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IN THE SUPREME COURT OF THE STATE OF UTAH

WESTERN CONTRACTING
CORPORATION (Employer) and
EMPLOYERS MUTUAL LIABIL-
ITY INSURANCE COMPANY OF
WISCONSIN (Carrier),

Petitioners,

— vs. —

INDUSTRIAL COMMISSION OF
UTAH and LEO A. DAVIS

Respondents.

FILED

NOV 4 - 1963

Clerk, Supreme Court, Utah

Case
No. 9970

BRIEF OF RESPONDENTS

Writ of Certiorari to Review an Order of the
Industrial Commission of Utah

A. PRATT KESLER

Attorney General

FREDERICK S. PRINCE, JR.

Assistant Attorney General

State Capitol Building

Salt Lake City, Utah

Attorneys for Respondents

CLYDE, MECHAM & PRATT

By Frank J. Allen

Attorneys for Petitioners

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Petitioners,

— vs. —

INDUSTRIAL COMMISSION OF
UTAH and LEO A. DAVIS

Respondents.

Case
No. 9970

BRIEF OF RESPONDENTS

STATEMENT OF THE KIND OF CASE

Petitioners, Western Contracting Corporation (em-
ployer) and Employers Mutual Liability Insurance Com-
pany of Wisconsin (carrier), appeal a decision of the re-
spondent, Industrial Commission of Utah, granting to
respondent Leo A. Davis (employee) 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 schedule for total loss of function of one eye. Petitioners question the propriety of that award on the facts of this case.

DISPOSITION BELOW

After consideration of the facts and the law, the respondent, Industrial Commission, awarded the respondent, Leo A. Davis, compensation of 100 weeks for total blindness of one eye, in accordance with the statutory schedule in Section 35-1-66, Utah Code Annotated 1953, as amended.

RELIEF SOUGHT ON APPEAL

Petitioners seek an order of this court declaring that the Industrial Commission improperly assessed the disability under the statute by reason of the fact that said Commission assessed the loss of visual function without correction by glasses.

STATEMENT OF FACTS

As indicated by the petitioners' brief, the facts are stipulated. Respondent Leo A. Davis injured his right eye in an industrial accident and the eye is essentially blind without corrective optical lens. With such lens, approximately 50% of the eye's function is restored.

STATEMENT OF ARGUMENT

POINT I.

THE UTAH STATUTE PROVIDES FOR COMPENSATION FOR LOSS OF USE OF AN EYE

WITHOUT REGARD TO WHETHER OR NOT SUCH LOSS CAN BE AMELIORATED BY THE USE OF EYEGLASSES.

- A. THE STATUTORY SCHEDULE FOR AWARDS IN THE UTAH WORKMEN'S COMPENSATION ACT MUST BE FOLLOWED IN ALL CASES WITHOUT REGARD TO ARTIFICIAL APPLIANCES.
- B. WHERE THE STATUTE DOES NOT SPECIFICALLY MENTION GLASSES, THE WEIGHT OF AUTHORITY SUPPORTS THE COMMISSION'S POSITION THAT THEIR EFFECT SHOULD NOT BE CONSIDERED IN DETERMINING COMPENSATION.
- C. THE PURPOSE OF THE WORKMEN'S COMPENSATION ACT IS TO PROVIDE COMPENSATION FOR LOSS OF OR DAMAGE TO A BODY MEMBER AND NOT SOLELY TO PROVIDE FOR LOSS OF EARNING POWER.

ARGUMENT

POINT I.

THE UTAH STATUTE PROVIDES FOR COMPENSATION FOR LOSS OF USE OF AN EYE WITHOUT REGARD TO WHETHER OR NOT SUCH LOSS CAN BE AMELIORATED BY THE USE OF EYEGLASSES.

- A. THE STATUTORY SCHEDULE FOR AWARDS IN THE UTAH WORKMEN'S COMPENSATION ACT MUST BE FOLLOWED IN ALL CASES WITHOUT REGARD TO ARTIFICIAL APPLIANCES.

Almost every state, in its Workmen's Compensation Act, provides a statutory schedule which requires compensation for certain periods of time in the case of loss of a member of the body and depending upon which member is lost. The purpose of such a statutory schedule is to make certain that an employee is compensated for loss of a body member even though this loss does not affect the employee's earning capacity. The schedules evaluate the member lost and generally give the results of such evaluation in terms of a specific number of weeks during which payments are to be made. In other words, since the loss of an arm at the elbow appeared to be more significant than the loss of a great toe with the metatarsal bone thereof, the Utah State Legislature provided that weekly payments should be made for the former for 180 weeks and for the latter for only 30 weeks. Section 35-1-66, Utah Code Annotated 1953, as amended. This fixed compensation is then tied into the amount the employee was earning before the accident so as to not put an unwarranted burden upon any specific employer.

The compensation provided by the statutory schedule is automatic. The Industrial Commission of the State of Utah (hereinafter called the "Commission") does not have authority to wait and see if the injured employee gets an artificial arm to replace the real one. It does not inquire as to whether a plain hook or an expensive artificial hand which opens and closes is obtained. The schedule in the statute says that 180 weeks of payments shall be made for an arm lost at the elbow, and this is

what is paid without regard to any appliance which the employee may obtain to ameliorate the loss.

Similarly, in the case of a lost leg, the statute provides that 180 weeks shall be paid where a leg is lost "at or near the hip joint as to preclude the use of an artificial limb." Where "the stump remains sufficient to permit the use of an artificial limb," the statute provides for only 150 weeks of payments. It should be noted, however, that the Commission is not authorized to wait and see if such an artificial limb is in fact obtained, but must require only 150 weeks of payments so long as the use of such a limb is possible. This is true even though such an artificial limb may be so uncomfortable on an employee that he may have to stop wearing it. The language about an artificial limb, then, does not say that more compensation will be awarded if such a limb is not obtained. It simply says that the greater amount will be awarded if the use of such a limb is precluded by the fact that the severance was so high. *The only purpose of the artificial limb language is to show that where more of the leg is lost, the employee gets more compensation. The award is based on the extent of the loss without consideration of appliances which may ameliorate such loss.*

Applying the above reasoning to the eyes, it is easy to see why awards should be based on loss before glasses are obtained. Again, the award is based on loss of the member. Since the Legislature didn't make any further breakdowns after loss by enucleation as distinguished from total blindness of an eye, it is clear

that its intent was to award 100 weeks whenever an eye was blinded without enucleation.

The parties to this case have stipulated, and the law in virtually all jurisdictions confirms, that an eye in the condition of Mr. Davis' eye is "totally blind" within the meaning of the statute. (§ 35-1-66.) As in the case of the artificial arm or leg, the Commission is not authorized to see what can be done with artificial appliances to return some of the use of the injured eye. There is no basis for the claim that the use of the body member should be evaluated after a helpful appliance is used in the case of an eye but before use of such an appliance in all other cases. The Commission must simply base the award on the fact of total blindness.

B. WHERE THE STATUTE DOES NOT SPECIFICALLY MENTION GLASSES, THE WEIGHT OF AUTHORITY SUPPORTS THE COMMISSION'S POSITION THAT THEIR EFFECT SHOULD NOT BE CONSIDERED IN DETERMINING COMPENSATION.

Petitioners state that "the view that visual impairment should be evaluated on a corrective basis is the one taken by almost every court which has considered the problem." Petitioners' brief, page 4. Petitioners quote Schneider, *The Law of Workmen's Compensation*, Volume II, Second Edition, and 58 American Jurisprudence 785 as supporting this position. However, American Jurisprudence has conveniently

cited the only two state jurisdictions, New York and Michigan, which support its statement, and Schneider's statement was written in 1932, long before the great bulk of the states had ruled on the question.

It is true that a few other states besides New York and Michigan have said that glasses should be used when determining loss of eyesight. However, in each case *glasses were required by the statute* and nothing was left to the courts. These states and their statutes which require the use of glasses are as follows: Connecticut — General Statutes of Connecticut, 1958 revision, Section 31-307; Indiana — Burns Indiana Statutes Annotated, § 40-1303; Maine — Revised Statutes of Maine, c. 31, § 13; Rhode Island — Public Law, 1954, c. 3297, Art. II, § 12 (a-d); and Massachusetts — Annotated Laws of Massachusetts, ch. 152, § 36.

States which have statutes similar to the Utah statute, which do not require that glasses be used, have held, almost without exception, that these appliances should not be used in determining the loss suffered by the employee. Some of these states, with cases so holding, are as follows: Colorado (*Jewell Collieries Corp. v. Kenda*, 110 Colo. 394, 134 P. 2d 206 [1943]); Delaware (*Alessandro Petrillo Co. v. Marioni*, 3 W. W. Harr. 99, 131 A. 164 [1926]); Idaho (*McDonald v. State Treasurer*, 52 Idaho 535, 16 P. 2d 988 [1933]); Kansas (*McCullough v. Southwestern Bell Telephone Company*, 155 Kan. 629, 127 P. 2d 467 [1942]); Minnesota (*Livingston v. St. Paul Hydraulic Hoist Company*, 203 Minn. 62, 279 N.W. 829 [1938]); Missouri (*Graf v. National Seal Products Com-*

pany, 225 Mo. App. 702, 38 S.W. 2d 518 [1935]; North Carolina (*Schum v. Catawba Upholstering Company*, 214 N. C. 353, 199 S.E. 385 [1938]; Oklahoma (*Parrott Motor Company v. Jolls*, 168 Okl. 96, 31 P. 2d 925 [1925]; West Virginia (*Pocahontas Fuel Co. v. Workmen's Compensation Appeal Board*, 118 W. Va. 565, 191 S.E. 49 [1937]); Nebraska (*Otoe Food Products Co. v. Cruickshank*, 141 Neb. 298, 3 N.W. 2d 452 [1942]); and New Jersey (*Johannson v. Union Iron Works*, 97 N. J. Law 569, 117 A. 639 [1922]).

It should be noted that the vast majority of these cases which support the Commission's position were decided after 1932, the date in which Schneider's statement quoted in petitioners' brief was written.

Most of the states not covered in the last two paragraphs have statutes worded similar to the Utah statute but have no case law interpreting the same. The states given, however, are sufficient to show that the great weight of authority is contrary to petitioners' stated position. The two above-mentioned states, the District of Columbia, and an occasional federal court in *dictum*, are the only authorities to the contrary.

The case of *Otoe Food Products Co. v. Cruickshank*, *supra*, purports to rely on cases going both ways from twenty-nine jurisdictions and, although the court's impression of the rule in various jurisdictions is often erroneous, the court's ultimate conclusion has a good deal of merit. The court stated:

"In an analysis of Section 48-121 Comp. St. 1929, we see nothing in the act indicating an inten-

tion on the part of the legislature that disability after correction should be the basis for awarding compensation, where there has been an eye injury. ' * * If the act is faulty, the correction should be made by the legislature and not by the court.' P. 455.

In reaching the conclusion that glasses should not be used in determining the extent of injury, the Indiana court in *Shaw v. Rosenthal*, 112 Ind. App. 468, 42 N.E. 2d 383 (1942), said that while the "general purpose of the Workmen's Compensation Act is to compensate for functional loss, nevertheless those parts of the act which fix a definite amount of compensation for a specific injury are arbitrary in nature and are based not on loss of earning capacity but on actual physical loss." P. 384. The court ignored a reference to glasses in another section of the statute in making its award.

Petitioners have raised the question of the holding in the case of *Moray v. Industrial Commission*, 58 Utah 404, 199 P. 1023 (1921). It is true that the Utah Supreme Court cited the Michigan and New York view stated in *Cline v. Studebaker*, 189 Mich. 514, 155 N.W. 519 (1915), but this was only for the purpose of supporting the Utah Industrial Commission's award based on an injury to eyes and determined without correction by glasses. The Commission in *Moray*, as in the instant case, had awarded compensation based on complete loss of one eye despite the fact that substantial vision could be gained by the use of glasses. The injured employee appealed, contending that the award was too small. In upholding the Industrial Commission's

award, the court cited *Cline* to show that it would be easier to find that the award was too large than it was too small. It should be noted that *Cline* was one of the few cases on this point on the books in 1921. Thus, the *Moray* court had no other available authority and could not yet see how the weight of authorities would ultimately be lined up. Secondly, the *Cline* position was simply stated to show the employee the absurdity of his appeal. The actual holding of the *Moray* case upheld the Industrial Commission's award which was arrived at without the use of glasses.

Contrary to the *dicta* in *Moray*, the Kansas court in *McCullough v. Southwestern Bell Telephone Co.*, 155 Kan. 629, 127 P. 2d 467 (1942) said:

“The cases bearing upon the question as to whether compensation for injury to an eye should be computed without or with the aid of corrective lens are collected in 99 A.L.R. 1507, and in previous annotations and in the subsequent decisions. Each of these annotations has noted a conflict in the authorities, which it is said continues to exist. This conflict for the most part results from differences in the statute being considered. Some statutes, it is said, make a specific provision with regard to the question. Where the statute does not specifically or indirectly require a holding that the use of corrective lens must be taken into account the great weight of authority is that the compensation should be computed without the use of such corrective lens. (Citations omitted.)

“It is conceded we have no statute in this state which requires the commissioner or the court, in considering the amount of compensation due for an injury to an eye, to take into consideration the

aid which might be furnished by corrective lens. On the contrary our statute with respect to scheduled injuries has been uniformly construed as being the sole guide to determine the amount of compensation when the injury is once determined." (Citations omitted.) P. 470.

C. THE PURPOSE OF THE WORKMEN'S COMPENSATION ACT IS TO PROVIDE COMPENSATION FOR LOSS OF OR DAMAGE TO A BODY MEMBER AND NOT SOLELY TO PROVIDE FOR LOSS OF EARNING POWER.

Petitioners place a good deal of reliance in the case of *Washington Terminal Company v. Hoage, et al.*, 79 F. 2d 158 (1935), from the Circuit Court of Appeals for the District of Columbia. The court held that the employee's injury should have been determined after correction from eyeglasses. This case is representative of the state minority view of New York and Michigan in that it stresses the proposition that the intention of the Workmen's Compensation Law is to provide compensation for loss or disability of earning power and not indemnity or damages for injury to a member of the body. It is submitted that this view of the purpose of the Workmen's Compensation Law is demonstrably in error.

Samuel B. Horovitz, in his work entitled "Current Trends in Basic Principles of Workmen's Compensation," published in May, August and November, 1947, issues of *The Law Society Journal*, Vol. XII, Nos. 6, 7, and 8, has an excellent chapter on the history and theory

of the Workmen's Compensation Acts. On page 470, Mr. Horovitz states:

“Unquestionably, compensation laws were enacted as a humanitarian measure to create a new type of liability — liability without fault — to make the industry that was responsible for the injury bear a major part of the burdens resulting therefrom. It was a revolt from the old common law and the creation of a complete substitute therefor, and not a mere improvement therein. It meant to make liability dependent on a relationship to the job, in a liberal, humane fashion, with litigation reduced to a minimum. It meant to cut out the narrow common law methods of denying awards.” (Citations omitted.)

Horovitz continues on page 478 with a quote from Mr. Justice Sutherland of the United States Supreme Court, who wrote in 1932:

“The modern development and growth of industry, with the consequent changes in the relations of employer and employee, have been so profound in character and degree as to take away, in large measure, the applicability of the doctrine upon which rests the common law liability of the master for personal injury to a servant, leaving of necessity a field of debatable ground where a good deal must be conceded in favor of forms of legislation, calculated to establish new bases of liability more in harmony with these changed conditions.” *Cudahy Packing Company v. Parra-*
more, 263 U. S. 418, 423, 44 S. Ct. 153 (1923).

Horovitz concludes that this new theory of compensation which now prevails in all but one state was “that industry (and ultimately the consumer) should bear its

fair share of the cost of injuries of workers without trying to place the blame on either party. The relation of the injury to the job was to be the test, not the relation of the injury to fault or blame or negligence." Page 479. It is clear from Horovitz's thorough analysis of the Workmen's Compensation Laws that their purpose was in fact to provide compensation, indemnity or damages for injuries to a member of the body, rather than, as stated in the minority views, to provide compensation for loss of earning power as such.

Mr. Horovitz's theory is further substantiated by the fact that, as pointed out in Point IA, *infra*, almost all the states which have workmen's compensation laws have statutory schedules for the loss of various limbs and members of the body, and that these statutory schedules are always followed in any given cases. For example, the Utah statute provides that compensation is to be paid weekly for one hundred and forty weeks for the loss of one leg between the knee and ankle. If the theory of the Workmen's Compensation Law were to provide compensation for loss or disability of earning power, the Commission would have to decrease this award where the injured person was a watchmaker. On the other hand, it would appear that the award should be increased where the person was a professional tennis player. Since these adjustments cannot be made under our statute, nor under the statutes of the vast majority of the other states, it is obvious that the statutory purpose is not to compensate for loss of earning power. Rather, the thought is that a monetary value should be assigned to each mem-

ber of the body and that this value should be paid to the person regardless of whether there is an impairment of earning power. It is submitted that the *Washington Terminal*, New York, and Michigan courts have misinterpreted the purpose and spirit of the acts.

CONCLUSION

The order of the Industrial Commission in this case awarding compensation based on uncorrected loss of visual function is in harmony with sound reasoning and with the vast weight of authority from states with similar statutes, and should be affirmed by this court.

Respectfully submitted,

A. PRATT KESLER

Attorney General

FREDERICK S. PRINCE, JR.

Assistant Attorney General

State Capitol Building

Salt Lake City, Utah

Attorneys for Respondents