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

Utah Supreme Court

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

IN THE SUPREME COURT OF THE STATE OF UTAH

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

Plaintiffs,

— vs. —

INDUSTRIAL COMMISSION OF UTAH and LEO A. DAVIS,

Defendants.

Case No. 9970

PLAINTIFFS' PETITION FOR REHEARING AND BRIEF

Appeal From Decision of
The Industrial Commission of Utah

CLYDE, MECHAM & PRATT
By FRANK J. ALLEN
Attorneys for Plaintiffs

INDEX

Authorities Cited

Additional Cases Cited

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PETITION

Plaintiff now petitions the Court, under Rule 76 (e) (1), Utah Rules of Civil Procedure, for rehearing of the above entitled matter, initially decided by this Court on March 6, 1964, and plaintiff cites as error the following:

1. The statement in the decision to the effect that the statutory awards for permanent disability are intended as recompense for "inconvenience" and "pain and suffering" is entirely without support in the literature of Utah compensation law, and constitutes a change in judicial attitude of such serious implication that it should not casually be adopted as the law of this state.

2. The statement in the decision to the effect that the Commission had made a *finding* ("determination") of total blindness in this case is incorrect; and the *conclusion* of the Commission that the stipulated facts justify an award for total blindness is not properly accorded the judicial tribute that it must stand unless found to be "arbitrary and capricious."

3. The statement in the decision to the effect that the Legislature, by merely providing a specific award for "total blindness", expressed an intention that correctible and uncorrectible impairment of vision should be deemed equally disabling is contrary to common sense and common understanding.

Respectfully submitted.

CLYDE, MECHAM & PRATT
By: Frank J. Allen
Attorneys for Plaintiff

BRIEF

POINT I

THE STATEMENT IN THE DECISION TO THE EFFECT THAT THE STATUTORY AWARDS FOR PERMANENT DISABILITY ARE INTENDED AS RECOMPENSE FOR "INCONVENIENCE" AND "PAIN AND SUFFERING" IS ENTIRELY WITHOUT SUPPORT IN THE LITERATURE OF UTAH COMPENSATION LAW, AND CONSTITUTES A CHANGE IN JUDICIAL ATTITUDE OF SUCH SERIOUS IMPLICATION THAT IT SHOULD NOT CASUALLY BE ADOPTED AS THE LAW OF THIS STATE.

The fourth paragraph of the Decision herein reads as follows:

> "The contention that these compensation awards were created only as compensation for loss of bodily functions which reduce earning capacity is clearly not correct. Our statute expressly provides that the scheduled awards for loss of bodily parts and functions shall be in addition to the compensation provided for temporary total disability. Further, everyone knows that total blindness of one eye, if the other eye functions properly, usually does not reduce the earning capacity but does create great handicap and inconvenience and often pain and suffering."

With reference to that paragraph, we would assert these propositions:

A. The position that permanent disability compensation awards are not to be based upon actual or theoretical loss of earning capacity is a clear departure from the traditional view of this Court and American courts in general.

B. The fact that permanent partial disability compensation is payable in addition to temporary total disability compensation has no relevance to the question which here concerns us.

C. There is no basis upon which the Court can judicially notice that "total blindness" of one eye does not reduce earning capacity.

We shall develop these propositions separately.

A

The whole concept of the workmen's compensation movement is that industry should assume the burden of (1) replacing *income* lost by workmen while they are convalescing from industrial injury (temporary disability compensation) and (2) replacing the potential future income *which it is presumed a workman will have lost the opportunity to realize* if he sustains, from industrial injury, a *permanent loss of industrial function* (permanent disability compensation). Temporary disability compensation, therefore, compensates for lost *earnings;* permanent disability compensation compensates for lost *earning capacity.*

It is true that a certain segment of the American Bar has ceaselesly urged judicial acceptance of the idea that the compensation acts *fix the blame* upon the employer for all industrial injuries so that a compensation hearing is a proceeding upon the issue of *damages only.* This idea has *not* been accepted. We have, in previous briefs, presented the views of Arthur Larson and William Schneider. We would now refer the Court to the standard reference works:

American Jurisprudence, Volume 58, page 778, *Workmen's Compensation,* Section 282.

> "Meaning of 'Incapacity' and 'Disability' in General. — The terms 'disability' and 'incapacity' as used in workmen's compensation statutes, seem to be regarded as practically synonymous. The term 'disability,' as so used, ordinarily means loss or impairment of earning power, and has been held not to mean loss of a member. However,

as used in some statutes, the word 'disability' is not restricted to mere loss of earning power; and the mere fact that an injured workman is employed at the same work and at the same wages as before the injury will not disentitle him to compensation under the act, if his physical efficiency has been substantially impaired. 'Incapacity,' within the meaning of the statute, may exist by reason of inability to procure employment, as well as by reason of incapacity to perform the service. In such cases, however, the failure to obtain work must be because of inability resulting directly from the injury, and not from a depressed condition of business, and consequent slackness of the demand for labor."

Corpus Juris Secundum, Volume 99, page 61, Workmen's Compensation, Section 13:

"Except as appears below, compensation under the workmen's compensation acts is based on incapacity or disabiilty for work, and hence on the loss or impairment of the employee's earning capacity in the employment at which he was engaged when injured, the compensation payments being in lieu of wages, or based on the loss thereof, and on the idea of providing means of subsistence to the employee during a time when his earning capacity has been partially or entirely destroyed.

"Correspondingly, except as appears below, compensation is not based on the idea of indemnity for physical ailment or impairment as such, or compensation for mere disability that does not incapacitate, or in the theory of compensation or damages for pain and suffering.

"It has been further said that the law was designed to compensate the injured employee for

the loss of earning capacity, and not merely for the loss of earnings."

This Court itself has frequently rejected the argument that common law damages doctrines should be applied in a compensation case. (See *Broderick* v. *Commission,* 63 Utah 210, 224, Pac. 876; *Spencer* v. *Commission,* 87 Utah 336, 40 P.2d 188.)

In *Silver King Coalition Mines Co. v. Commision,* 92 Utah 511, 69 P.2d 608, this Court seemed to have dispelled any doubt or confusion about its position on this question. At page 519 of the Utah Report, this statement appears:

> "There still seems to be considerable confusion among the bar as to the basis of compensation. The writer perhaps cannot state it any better than it was put in the dissenting opinion in the case of *Caillet v. Industrial Commission,* 90 Utah 8, 58 P. (2d) 760, at page 763, where it was said:
>
> > 'Compensation is payable for disability to earn caused by accident in employment. Temporary total disability is founded on actual disability. Permanent partial is founded theoretically on loss of earning ability, but is absolute in law whether loss of earning ability is actually suffered or not. The law presumes the loss of earning power. It is presumed on loss of bodily function. I an arm, or leg, or eye is lost, the employee gets compensation even though he earns ten times as much as formerly as, for instance, a radio announcer. The vocational factor is not an element in the loss of bodily function. *Broderick* v. *Industrial Commission*, 63 Utah 210, 224 P. 876; *Amalgamated Sugar Co. v. Indus-*

> *trial Commission*, 76 Utah 556, 286 P. 959. The complete loss of use vocationally (this word should be omitted) was equivalent to a loss of the member because if a member left on is no more use than a member off, but rather an impediment, the law treats it as if it were off. *Broderick* v. *Industrial Commission*, supra; *Spring Canyon Coal Co.* v. *Industrial Commission*, 74 Utah 103, 277 P. 206. Any loss of bodily function not provided for in the schedule in section 42-1-62, R. S. Utah 1933, is to be based on 'proportion to the compensation in other cases' provided in the schedule. That results in the necessity for evidence on the remaining function in terms of the original or full physical function of the member.' "

The decision of March 6th herein contains the first statement by this Court out of harmony with the compensation concept as expounded by the authorities above quoted.

There is some suggestion in the March 6th opinion that the Court, in taking this new position, believes it is aligning itself with some modern movement in the compensation field. This is a curious delusion when it is considered that the most recent polemical writing cited by defendant or the Court is a 1947 article by Samuel Horovitz, and the most recent case cited by defendant is a 1943 Colorado case (Jewel Colleries v. Kenda, 110 Colo. 394). The idea that compensation should be measured by pain, suffering or inconvenience has been sharply criticized (see Arthur Larson's comment on page 5 of plaintiff's Reply Brief) and has had no regnancy (refer again to the excerpts from Am. Jur. and C.J.S., supra).

All the recent eye cases (plaintiff has already cited *Yureko* v. *Prospect Foundry Company,* 115 N.W. 2d 477 (May 11, 1962); *Lambert* v. *Industrial Commission,* 104 N.E. 2d 783 (1962); and *Walsh Construction Company* v. *London,* 80 S.E. 2d 52 4(1962)) adopt the established view that permanent disability must be appraised in terms of loss of *industrial* function, i.e., earning *capacity.*

B

The Court's assertion, in the March 6th decision, that "the *contention that these compensation awards were created only as compensation for loss of bodily functions which reduce earning capacity is clearly not correct,*" which seems to unravel some forty years of judicial knitting, is astonishing to say the least, and one would expect such an abrupt change of view to be fully explained in the decision. All that is offered in the way of explanation, however, is the statement that permanent disability compensation is payable in *addition* to temporary disability compensation, a precept we consider to be apodictic but hardly relevant to the question of whether permanent disability compensation is payable for presumed loss of earning capacity. In Utah, as everywhere, it has always been the policy to wait until an injured employee has returned to work (or determined to be as ready to return as he is likely to become) before attempting to evaluate his loss of industrial function. Obviously the payments made to compensate for loss of *earnings* during convalescence are in addition to the payments made to compensate for loss of *earning capacity*

thereafter. How this fact compels the Court to conclude that permanent disability compensation is intended to compensate for pain, suffering and inconvenience is what we cannot comprehend.

C

In the March 6th opinion, the Court makes another astonishing assertion: "Everybody knows that total blindness of one eye" . . . "does not reduce earning capacity." Certainly there was no evidence before the Court on which such a finding could be based, and we are forced to suppose that this is a fact of economic life which the Court has judicially noticed. If so, we submit that it is not a proper subject for judicial notice. Abundant evidence could be adduced that one-eyed men are limited in their fields of economic activity. No such evidence was attempted to be adduced because the Legislature has already made for us the determination that permanent visual impairment reduces earning ability. In the words of the Caillet case (supra), "The law presumes the loss of earning power. It is presumed on loss of bodily function. If an arm, or leg, or eye is lost, the employee gets compensation even though he earns ten times as much as formerly."

Against the background of Utah's law and the clear statutory presumption that the loss of an eye reduces earning capacity, it is strange indeed that this Court should suddenly declare, without evidence, that the contrary is true.

POINT II

THE STATEMENT IN THE DECISION TO THE EFFECT THAT THE COMMISSION HAD MADE A *FINDING* ("DETERMINATION") OF TOTAL BLINDNESS IN THIS CASE IS INCORRECT; AND THE *CONCLUSION* OF THE COMMISSION THAT THE STIPULATED FACTS JUSTIFY AN AWARD FOR TOTAL BLINDNESS IS NOT PROPERLY ACCORDED THE JUDICIAL TRIBUTE THAT IT MUST STAND UNLESS FOUND TO BE "ARBITRARY AND CAPRICIOUS."

There have been a great many occasions for this Court to remind the Bar that findings of fact made by the Commission will not be disturbed if there is any evidence to support them. This policy is in accord, of course, with the basic principle of administrative law that the administrative agency is best qualified to make fact determinations not only because it receives the evidence and can assess the credibility of the witnesses but also because it has developed expertise by its constant concern with a particular subject matter.

In the instant case, however, there is no "finding" of blindness. The findings are contained in the stipulation of the parties. This procedure was followed so there would be no question as to the nature of the function the Court was asked to perform. Defendant Davis's eye is approximately 50% efficient with glasses. Whether that eye is "totally blind" or not is a pure question of statutory construction, and statutory construction is the peculiar business of the judiciary. This point is discussed at some length by the editors of American Jurisprudence in Section 530 of their treatise on Workmen's Compensa-

tion (58 Am. Jur. 905), and they there make the categorical statement that:

> "The legal conclusions or decisions of the commission or other tribunal, based upon its findings of fact, are reviewable, the correctness or propriety thereof constituting questions of law."

There is before this Court, then, the simple question of whether or not a man who can see well with glasses but not at all without glasses is afflicted with "total blindness" within the meaning of Utah's compensation act. The Commission's decision in the matter is reviewable as a conclusion of law and need not be shown to be arbitrary or capricious. Since there was only dictum from this Court (Moray v. Commission, 58 Utah 404) to guide the Commission, this matter was referred on stipulation so that this Court could clearly announce the controlling doctrine in a proceeding where only a question of law was posed.

POINT III

THE STATEMENT IN THE DECISION TO THE EFFECT THAT THE LEGISLATURE, BY MERELY PROVIDING A SPECIFIC AWARD FOR "TOTAL BLINDNESS," EXPRESSED AN INTENTION THAT CORRECTIBLE AND UNCORRECTIBLE IMPAIRMENT OF VISION SHOULD BE DEEMED EQUALLY DISABLING IS CONTRARY TO COMMON SENSE AND COMMON UNDERSTANDING.

We believe the Court has erred in holding, against its previous dictum, that eye impairment should be evaluated on an uncorrected basis. Webster says a man is blind

when he is "*destitute* of the *sense* of seeing."[1] Destitute means "devoid," and "devoid, void and destitute agree in the idea of entire want or lack."[2] Sense is defined as "the faculty of receiving mental impressions through the actions of certain organs."[3] We submit that it is error to conclude that a man who can receive sharp mental impressions through the action of his eye by merely holding a piece of glass before it is "totally blind." If there is one thing that "everyone knows" about blindness, it is that people who see well but only with glasses are not blind.

The inequities which the Court's decision of March 6 would propogate are as obvious as they are unnecessary. As instances, we cite these:

1. A workman who cannot see without glasses but sees perfectly with them will have sustained no *compensable* functional loss if he later really and truly loses his sense of sight by industrial accident.

2. A workman whose injury results in a sight impairment such that he cannot see without glasses but sees perfectly with them must be deemed permanently and totally disabled. There is a conclusive statutory presumption of such disability.

Workmen's compensation is a liability-without-fault system designed to restore earnings and give recompense for earning power lost by reason of industrial accident.

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1. Webster's New International Dictionary of the English Language, G & C Merriam Company, 1925.
2. *Ibid* (page 611)
3. *Ibid.*

The system is contorted out of recognition by the adoption of a doctrine which would, on the one hand, require compensation to be paid for life to a person who has no disability at all (the workman whose industrially caused blindness is fully correctible) and, on the other hand, require the denial of any benefits to a person who becomes totally disabled from industrial accident (the work man whose congenital eye defect is fully corrected by glasses until an industrial accident robs him of the faculty of sight in the true sense).

These absurd results are entirely avoided by adopting what is the prevailing doctrine in this country either by judicial or legislative construction. Visual impairment should be evaluated on a corrected basis with due regard to the inconvenience, if any, of wearing glasses.

In its March 6 decision, the Court says the Utah provision is among the most favorable to allowing a complete award even though substantial restoration of function is easily effected. Section 35-1-66 U.C.A. is, in fact, typical of the compensation acts throughout the country (although some legislatures have belatedly made *certain* that eye evaluation will be done on a corrected basis). The language of our act does not compel either a narrow or a broad construction.

Further, the March 6 opinion expresses the notion that the legislature could, had it so intended, have provided one schedule for blindness which is correctible and another schedule for blindness which is not. We submit that the legislature's failure to do so (since it is mani-

festly ridiculous to compensate a man whose sight can easily be restored equally with a man whose sight cannot be restored) merely demonstrates a legislative recognition of the popular concept that a man who can see with glasses is not blind and a legislative assumption that the act would be administered in accordance with that concept. There is no such thing as "correctible total blindness." The phrase is a contradiction in terms.

CONCLUSION

For the reasons above stated, we respectfully request that the Court reconsider its decision of March 6, grant rehearing and enter its order voiding the Commission's award for total blindness.

Respectfully submitted,

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