

1964

# United Park City Mines Company v. The Industrial Commission of Utah and John W. Prescott : Brief of Plaintiff

Utah Supreme Court

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Clyde, Mecham & Pratt; Frank J. Allen; Attorneys for Plaintiff;

Brayton, Lowe & Hurley; Attorneys for Defendant John W. Prescott;

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# IN THE SUPREME COURT OF THE STATE OF UTAH

UNITED PARK CITY MINES COM-  
PANY, a corporation,

*Plaintiff,*

- vs. -

THE INDUSTRIAL COMMISSION  
OF UTAH & JOHN W. PRESCOTT,

*Defendants.*

MAR 25 1964

Supreme Court, Utah

Case No.  
10061

UNIVERSITY OF UTAH

JUN 30 1964

## BRIEF OF PLAINTIFF

Appeal From Order of the  
Industrial Commission of Utah

CLYDE, MECHAM & PRATT

By FRANK J. ALLEN

351 South State Street

Salt Lake City 11, Utah

*Attorneys for Plaintiff*

BRAYTON, LOWE & HURLEY,

Andrew R. Hurley

Walker Bank Bldg.

Salt Lake City, Utah

*Attorneys for Defendant, John W. Prescott*

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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10061

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## BRIEF OF PLAINTIFF

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### NATURE OF CASE

This is an appeal from an order of the Industrial Commission of Utah granting defendant Prescott (herein called "Prescott") compensation for permanent total disability on the basis of injuries which, plaintiff contends, are properly compensable as being only partially disabling under Section 35-1-66, *Utah Code Annotated* 1953.

### DISPOSITION BY INDUSTRIAL COMMISSION

The Industrial Commission ordered payment of compensation for permanent total disability in accord-

ance with the provisions of Section 35-1-67, *Utah Code Annotated* 1953.

## RELIEF SOUGHT ON APPEAL

Plaintiff seeks vacation of the aforesaid order of the Industrial Commission on the grounds (1) that the Commission acted arbitrarily and in excess of its powers in finding and concluding that the injuries sustained by defendant Prescott in his employment resulted in permanent total disability, and (2) that the findings do not support the award under review.

## STATEMENT OF FACTS

Prescott was involved in a tragic mine accident on July 13, 1961. His injuries included fractures of right ribs and shoulder blade and right lung puncture. He complains of some residuals from these injuries, (soreness of his right arm and a sensation of numbness in his right side (R-62) ), but there is no medical evidence of significant functional impairment or failure of these injured members to heal (R-5, 15, 23, 83, 88, 89; and refer to comments in Argument).

The injury of real consequence (so far as disability evaluation is concerned) was a traumatic amputation of Prescott's left leg with associated avulsion of soft tissue in the inguinal area. Further surgical amputation and debridement have left little soft tissue with which a prosthetic device can make contact (R-20), and Prescott has very limited ambulation with an artificial leg.

Prescott was referred to a Medical Advisory Board appointed by the Commission for evaluation of the disability from his work-related injuries. The Board found Prescott to have sustained a 90% loss of "bodily function" as that term is employed in the next to concluding paragraph of Section 35-1-66, U.C.A. 1953, the section relating to permanent *partial* disability (R-15).

Prescott does not contest or disagree with the 90% rating of the Medical Advisory Board. He merely contends that a 90% "loss of bodily function" is tantamount to total disability (R-52, 54).

Finally, Prescott is more than sixty-six years of age (R-58) and of lower average mentality (R-23, 83). Because of his age, mentality and limited ambulation, he cannot *compete* for employment (R-82). He has made a good psychological and emotional adjustment to his injury (R-23, 84).

## ARGUMENT

### POINT I

THE ONLY SIGNIFICANT LOSS OF FUNCTION IN THIS CASE IS THE LOSS ATTENDANT UPON LEG AMPUTATION, AND THE RULE THAT PERMANENT TOTAL DISABILITY MAY BE PRESUMED FROM INABILITY TO RESUME PRE-INJURY TYPE OF WORK DOES NOT APPLY WHERE THE LOSS SUSTAINED IS ONE OF THOSE IN THE STATUTORY SCHEDULE OF SPECIFIC AWARDS.

We would not attempt to minimize the functional loss Prescott sustained by reason of the amputation of his leg. The trauma and subsequent surgical procedures have clearly left Prescott in essentially the position of an amputee whose stump is not sufficient to permit the use of an artificial leg. This was his testimony, and

the rating given him by the Medical Advisory Board entitles him to exactly what the statute provides for amputation at the hip.

The error we see in the Commission's position is that it has found permanent total disability on this loss of function coupled only with the fact that Prescott is too old, in view of his lower average mentality, to be employable. We submit that such a finding constitutes an administrative construction of the statute which is in direct conflict with the construction given it by this Court.

We must agree that this Court, by its decisions beginning with *Caillet v. Industrial Commission* (90 Utah 8, June 18, 1936) and concluding with *Thomas v. Commission* (95 Utah 32, May 11, 1938), evolved a rule of law that permanent total disability is established, *in a proper case*, by a showing that the injured workman cannot perform work of the kind he was performing when injured or any other work which a man of his mentality or attainments might do. The first problem is to determine what is a proper case.

The decision which best states the philosophy of the Court as it applies to the instant case is *Babick v. Industrial Commission* (91 Utah 581, 65 P.2d 1133). Justice Wolfe there reconsidered the language of the Caillet decision (which announced the general principle of law to which we have referred) and refined the judicial statement by this commentary:

“In the Caillet Case, the applicant had one hand off and two fingers of the other hand ampu-

tated almost to the wrist, which gave him 100 per cent loss of function of one hand and 60 per cent of the other. He had a 20 per cent loss of knee action. The evidence showed that his ability to do any work substantially renumeration was so negligible as to approach the vanishing point. Moreover, the opportunity to secure the very few types of work he could do was nil. Perhaps the language from that case above quoted is a little too inclusive. It would fit the person who had one leg or an arm off. A workman who had done manual labor who lost an arm or leg could not 'perform the work of the general character that he was performing when injured,' and yet under a strict following of this rule he would establish a prima facie case. In the first place, the rule was not meant to operate in any case where specific compensation for a loss of a member or loss of function of a member was provided by statute for permanent partial disability."

The Commission's determination that this is a proper case for the application of the Caillet doctrine is the first error we would cite. Prescott's injury-related disability is essentially that which attends the loss of a leg. No one who has evaluated this disability has attached any importance to the residuals from the fractures and lung lesion. We believe the following is a fully revealing summary of the medical evidence with reference to the final disabling result of the injuries to the upper torso:

1. As early as July 26, 1961, (less than two weeks after the injury) Dr. Boyd Holbrook, an orthopaedic specialist, examined Prescott and reported his findings in a letter dated August 2, 1962 (R-p. 5). The gist of the re-



port is that there should be no significant disability from the fractures, there being no neurological or circulatory impairment to the injury sites. We believe one paragraph of the report can be quoted as fairly summarizing the medical opinion:

“This type of injury ordinarily heals with little if any disability. In view of the many injuries he has sustained, I would advise continued conservative treatment in this area, and would not recommend operative repair. If his symptoms persist in this area after sufficient time for healing, the inner one inch of the clavicle can be excised.”

There is nowhere in this record any indication that Prescott thereafter consulted Dr. Holbrook or any other physician with reference to “continued symptoms in this area” or that such symptoms could not be relieved in the manner Dr. Holbrook suggests if they persisted.

2. The Medical Advisory Board evaluated Prescott's permanent disability on August 25, 1962. The Board found (R-15) that the multiple injuries resulted in a “90% loss of bodily function.” Significantly, the compensation payable for this percentage loss of function is exactly the same as that payable for amputation of a leg where prosthesis is not feasible. It is obvious that the Board (while making its rating inclusive of all injuries as it must) considered the upper torso problem to be de minimis and the only consequential disability to be that related to the amputation, *a kind of loss for which the statutory schedule specifically provides.*

3. Dr. Roy A. Darke, after an examination of Prescott on January 22, 1963, reported (R-23) that Prescott "could likely do well with any manual training that did not require fine precise movements." He suggests no impairment of manual dexterity from injury.
4. Prescott was evaluated by the Division of Vocational Rehabilitation of the State Department of Public Instruction, and a report was made by Mr. Paul T. Furlong (R-29, 30) who also testified (R-72 through 83). Mr. Furlong's opinion of unemployability is based unequivocally on these factors:
  - a. Age.
  - b. Loss of effective ambulation.
  - c. Past job history and education.
  - d. Mentality.

This was his concluding testimony as Prescott's witness (R-83), and not a word was elicited from him on redirect as to his attachment of any importance to the injuries of the upper torso.

5. Pursuant to a Commission order made during the course of the hearing in this matter, Prescott was examined by Dr. L. E. Viko, an internist, for evaluation of heart and lung pathology. In a two page report (R-88, 89), Dr. Viko said he "found, then, no specific lung pathology." "He (Prescott) does have myocardial changes presumably on an arteriosclerotic basis." Arteriosclerosis is not, of course, an incident of trauma. Dr. Viko further found the "lungs and abdomen were negative" for pathology except for diminished heart sounds, and the "lungs were surprisingly

negative for a man who had been 33 years at mining work.”

On the whole record, therefore, it must be conceded that the fractures and lung lesion, however strongly they may have contributed to the general discomfort and the management problem, are not significant in the final evaluation of disability. We are evaluating a man who, because of injury, has lost a leg and cannot use an artificial one. This is a kind of loss for which the statutory schedule specifically provides. Except for that, the factors which make him unemployable (his advanced age, his inability to learn, his limited work experience) are entirely unrelated to his injury.

We submit that this is not a proper case for application of the Caillet doctrine. That doctrine has only been applied where there have been two or more anatomical members or vital systems substantially impaired. The decisions in point and the members or systems involved are these:

*Caillet v. Commission* (supra) — Amputation of one hand — 60% loss of function of the other hand — 20% loss of knee action.

*Standard Coal Co. v. Commission* (91 Utah 549; 65 P.2d 640) — Loss of use equivalent to amputation of one leg — disabling circulatory disturbance of other leg (from which bone was taken) presumably injury related—injury-related obesity.

*Carbon Fuel Co. v. Commission* (92 Utah 410; 68 P.2d 894) — Drop foot — lordosis, right hip irreparably out of socket — left femur frac-

tured at neck — both hips unstable — inch separation of symphysis pubis.

*Thomas v. Commission* (supra) — Loss of use of one leg — phlebitis causing 50% loss of other leg and requiring extensive bed care from time to time.

To apply the Caillet doctrine in a case where the only significant disability results from a loss of function covered by a specific statutory provision is a manifest departure from the rule of the Babick case. It would create a climate in which the first objective of any permanently injured workman would be to demonstrate his inability to learn or be rehabilitated.

## POINT II

**90% LOSS OF FUNCTION UNDER SECTION 35-1-66, U.C.A. 1953, IS NOT TANTAMOUNT TO TOTAL DISABILITY.**

We would emphasize, at the outset, that Prescott has conceded the accuracy of the Medical Advisory Board disability rating (R-15) which was "90% loss of bodily function." Counsel so stated at page 52 and again at page 54 of the Record. Prescott's only contention is that 90% loss of function is so close to total loss that it should be considered the equivalent. If the term "bodily function," as it is used in Section 35-1-66, U.C.A., meant "total of bodily functions," we would concede that Prescott's position in this case is unassailable. A person who has only 10% of his life processes in function is helpless and totally disabled by any standard. The term cannot rationally be assigned such a meaning, however, and this Court has expressed itself on the point.

In the first place, the phrase “loss of bodily function” appears only in the section on permanent *partial* disability (35-1-66), and that section contemplates that, in the event there is a *total* loss of a bodily function not specifically provided for, the limit of compensation should be 200 weeks. The paragraph in which the term appears is this:

“For any other disfigurement or the loss of bodily function not otherwise provided for herein, such period of compensation as the commission shall deem equitable and in proportion as near as may be to compensation for specific loss as set forth in the schedule in this section but not exceeding in any case two hundred weeks.”

When the Medical Advisory Board makes a rating in terms of “loss of bodily function,” then, it is orienting to the only section of the Workmen’s Compensation Act which employs that term and equating the loss it finds with the specific losses set forth in the schedule preceding the quoted paragraph. What the Medical Advisory Board found in fact was that the loss of function Prescott sustained from his injuries was 90% as disabling as the loss of an arm at the shoulder. It did not find that Prescott’s disability was 90% of permanent total disability. *Prescott admits that this rating is accurate.*

We have previously herein said that this Court has already construed 35-1-66 as we contend it must be construed. In *Babick v. Commission* (supra), a clear distinction was drawn between two “zones” of disability. Disabilities to be appraised in terms of permanent total

disability under Section 35-1-67 are in one zone; those to be appraised in terms of permanent partial disability under section 35-1-66 are in another. We would refer the Court to the discussion at 91 Utah 585. In this case, the Commission (R-16), Prescott (R-54, 56) and the plaintiff all acknowledge that Prescott's disability falls within the latter zone. *Everybody recognizes that Prescott is not totally disabled from his injuries.*

If we labor this point, we do so to illuminate the central issue in this case: It is proper to award permanent total disability compensation to a workman, whose permanent disability is admittedly rated properly at 90% of the loss of an arm, because he had reached, at the time of his injury, an age where one of his mentality cannot compete successfully in the labor market?

### POINT III

THE COMMISSION ERRONEOUSLY APPLIED, AS THE TEST OF TOTAL DISABILITY, THE DOCTRINE OF THE CAILLET CASE, AND THAT DOCTRINE HAS BEEN SUBSTANTIALLY MODIFIED.

There is little question about the basis upon which the Commission decided this case. Commissioner Wiesley, during the course of the hearing, accurately stated the doctrine of *Caillet v. Commission* (supra) and further expressed his belief that it constituted the law of the case. At the bottom of page 77 of the Record, we find this:

“THE REFEREE: The last decision of the Supreme Court that I can recall, written by Justice Moffat, says that the test of total permanent disability is can the man do the same kind

of work he did before, or by reasonable effort prepare himself for similar work. But whether that will stand up, Mr. Allen, or not, I don't know. But that's the last word that I know. So I think he may answer."

In the order itself (R-104, 105), only one Utah case is cited, and that case is *Caillet v. Commission*.

As we have previously pointed out, the Caillet doctrine has been substantially modified. Even in a proper case (which we have already argued this is not) the test is not whether the employee can return to the same or similar employment, but whether he can function in an economic activity which one of his mentality and attainments can perform. We quote the following from Justice Wolfe's dissenting opinion in the Thomas case (*supra*):

"The language of *Caillet v. Industrial Comm.*, 90 Utah 8, 58 P.2d 760, quoted by the prevailing opinion, was so broad as to take in cases of the loss of a hand. In such case an employee might show that he was unable without a hand to do work of the general character he had been doing, and this made out a *prima facie* case. And if the other side could not show that he could *secure and perform* work of a special nature, he would be as a matter of law, under that rule, permanently and totally disabled. The rule was too narrow and too wide. It was too narrow in that it made the *prima facie* test in law of permanent and total disability purely the question of whether he could perform work of the general character that he had been performing when injured. It did not add the phrase, 'or any other work which a man of his mentality or attainments might do.' It was too wide in that it brought in the eco-

nomie situation as a factor in overcoming the prima facie case. It might be impossible in a depression to obtain work of a special nature or any kind of work for a fully able man, whilst in war times, when every available man is utilizable, any number of cripples could obtain jobs. This would mean that the prima facie case would be met successfully only accordingly to the varying economic situations. The statute never contemplated such a thing."

In the instant case, there is competent evidence by a medical expert, Dr. Darke (R-23), that Prescott "would likely do well with manual training that did not require fine, precise movements or attention to fine complicated details." The inescapable conclusion to be drawn from the Record is that the Commission never considered this evidence as having relevance because of its conviction that the "test" is ability to return to the *same or similar* employment.

The Record clearly establishes that Prescott is limited, physically, to sedentary occupation. This would be true by reason of his arteriosclerosis (R-88, 89) even if he had not lost a leg, and the sclerosis is not work-related. Within that limitation, he is capable of carrying on any activity which an uneducated man of lower average mentality can do. All that Mr. Furlong added to our understanding of Prescott's situation is that there aren't any jobs for 66 year old, uneducated, untrained men who have little mobility and lower average mentality. It is also true that there aren't any jobs for such men who do have mobility (R-80, 81). If employers have a choice, they will hire a man who is young,



trained, intelligent and mobile over one who has none of these virtues. Therefore, says Mr. Furlong, Prescott could not find a job for which there was "competition" (R-81). Mr. Furlong nowhere says, however, that Prescott *could not perform* if he were given such a job. By Mr. Furlong's standards, a man becomes permanently and totally disabled when he reaches sixty-five unless he can demonstrate a skill, a talent or a mental facility which will overcome prospective employers' natural preference for younger men.

We submit that most of the factors to which Mr. Furlong gives weight (Prescott's age, mentality, lack of education or training and his wife's arthritis (R-29, 30)) have no relation to his injury. To predicate employer liability to pay benefits for total disability upon those factors violates a basic principle of compensation law which is, as stated by the editors of *Corpus Juris Secundum* (99 C.J.S. 1067), that "in order to warrant compensation for total disability, the inability to work must be due to the injury."

#### POINT IV

THIS IS NOT A CASE WHERE A FINDING OF COMMISSION IS UNDER ATTACK. THE ISSUE ON WHICH REVIEW IS SOUGHT IS PURELY AN ISSUE OF LAW.

We are aware of the Court's strong reluctance to disturb a *finding of fact* made by the Industrial Commission, and the Court's justified belief that it can rely on the Commission's expertise in evaluating the evidence and the credibility of witnesses. We yield to

none in our respect for the Commission's competence and the soundness of its judgment in this regard. The facts are not in dispute in this case, however. The Commission found and everyone agrees that the disability from injury is essentially the same as the loss of a leg at the hip. Everyone agrees and the Commission presumably found that Prescott, because of factors of age, mentality, training and education, is not likely to win in competition for jobs. Whether or not this kind of unemployability amounts to permanent total disability within the meaning of the Compensation Acts is a pure question of law. We concur in the findings of fact; we believe the Commission's conclusion of law cannot properly be drawn from those facts.

Respectfully submitted,

CLYDE, MECHAM & PRATT

By FRANK J. ALLEN

351 South State Street  
Salt Lake City 11, Utah

*Attorneys for Plaintiff*