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

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

UNITED PARK CITY MINES COMPANY, a corporation,

Plaintiff,

vs.

THE INDUSTRIAL COMMISSION OF UTAH & JOHN W. PRESCOTT,

Defendants.

Case No. 10061

BRIEF OF DEFENDANT

Appeal From Order of the Industrial Commission of Utah

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STATUTES CITED

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STATEMENT OF FACTS

Defendant, hereinafter referred to as Prescott, disagrees with plaintiff's statement that "the injury of real consequence" was a traumatic amputation of his left leg etc. The Medical Advisory Board did not attempt to segregate the effects of, or allocate relative importance to, his many injuries to the chest, shoulder, abdomen and limbs, but rather considered their cumulative effect. Prescott agrees that the Board found that he sustained a 90% loss of body function as a result of multiple injuries, but disagrees with the further "statement of fact" by plaintiff, which is a sweeping conclusion that such language was used solely in the sense, "as that term is employed in the next to the concluding paragraphs of Sec. 35-1-66 U.C.A. 1953, the section relating to perma-

nent partial disability. Nowhere in the record is there any such statement or inference.

Prescott disagrees with the statement that "because of his age, mentality and limited ambulation he cannot compete for employment". He cannot compete for employment because of a 90% loss of body function as a result of multiple injuries.

Prescott further believes the facts to be incompletely stated and in view of the nature of this appeal restates the facts on which the Commission based its decision.

Respondent John W. Prescott, born April 15, 1897, (R-58) had been employed by United Park City Mines Company and its predecessors in interest for thirty-three years, (R-59). During the last thirty-one years of this time he had been a motorman on the underground railway hauling ore and waste to the surface, (R-60). On July 31, 1961, while uncoupling cars, the train started and he was run over by the locomotive, suffering crippling injuries hereinafter detailed.

The nature of and concise summary of Prescott's injuries are set forth in the letter of Harold B. Lamb, M.D., his attending physician, from which we quote in part, (R-8, 9).

"A brief list of his injuries include:

1. Comminuted fracture of the right scapula involving the glenoid fossa.
2. Dislocation of the right sterno-clavicular joint.
3. Comminuted fractures of 3 thru 7 ribs on right side.

4. Laceration of right lung with extensive hemothorax and pneumothorax.

5. Traumatic pneumonitis right lung, severe.

6. Severe contaminated avulsion injury of left groin with destruction of most of the lymphatic, subcutaneous tissue, and adductor muscles of the proximal thigh with preservation but denudation of the femoral vessels. In addition the scrotum and perineum was lacerated so that there was exposure of testicular tissue and denudation of the membraneous urethra with diaruption of periosteal tissues of the pubis and ischium. There were full thickness abrasions involving the medial hemicircumference of the thigh from the groin to the knee.

7. Traumatic contaminated amputation of leg through knee joint.

The report of Boyd G. Holbrook, M.D., consulting Orthopedic surgeon, (R-5,6) should be fully considered in context with its concluding paragraph, which we quote:

> "Some permanent disability of the right shoulder girdle is expected as a result of these injuries, but is anticipated that they will heal in a satisfactory manner with a satisfactory end result."

The finding of the Medical Advisory Board consisting of Norman B. Beck, M.D., Chairman, Burke M. Snow, M.D. and Boyd G. Holbrook M.D., should be considered in its pertinent entrirety, which we set forth as follows, (R-15):

> "The Board recommends 90% loss of body function as a result of multiple injuries. The groin scar should be revised."

The report of the attending physician, (R-20) Harold B. Lamb, in response to the suggestion of the Medical Advisory Board relative to scar revision, is also significant as to the nature of the inguinal injuries,

> "There is no doubt but what some improvement of the scarred area over the inguinal region could be achieved. Since there was originally a large area of soft tissue loss which healed by granulation and scarring, there is some tension of the tissues in this area and an adequate revision of the scar would probably require some rotation of tissues into the defect. In addition, it should be noted that the femoral vessels are covered in this area only by the scar tissue just previously described. There is no intervening muscle or fascial structure to protect these vessels. Re section of this area might involve some risk to the competency of these vessels. Since this procedure would be relatively major, it would require some type of block or general anaesthesia. Mr. Prescott has marginal cardio-vascular compensation, as well as poor pulmonary exchange. It is my opinion at this time that he does not have sufficient trouble relative to the scar to warrant the risk required in its revision. If he should have increasing difficulties such that it would not be practical for him to continue to wear his prosthesis, such recommendation would be changed."

The report of consulting physician, (R-101) Roy E. McDonald, M.D., relative to the lung and heart con-

dition of Prescott while he was hospitalized is indicative of the grossness of the multiple injuries and shock suffered by Prescott and their general debilitating effect upon him.

On February 5, 1963 Prescott was referred to Roy E. Darke, M.D. for psychiatric evaluation prior to the reference of his case to the Division of Vocational Rehabilitation of the State Board of Education, (R-23).

The report of Paul T. Furlong of the Division of Vocational Rehabilitation (R-29, 30) and his testimony at the hearing (R-72, 83) result in an opinion that Prescott is not a feasible candidate for vocational rehabilitation and that he be considered totally and permanently disabled for employment.

Factually Prescott was fitted for, and at all times herein, uses an artificial limb. He does have limited ambulation.

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.

Prescott disagrees with the factual basis upon which the plaintiff frames the foregoing argument. We would concede that if Prescott had suffered only the loss of "one leg, at or near the hip joint, as to preclure the use of an artificial limb," his disability would be rated at 180 weeks pursuant to the provision of 35-1-66 U.C.A. 1953. These facts are not so. His leg was traumatically amputated at the knee and was surgically revised by amputation just above the knee and he has been fitted with an artificial limb which he uses. To ignore the detailed medical evidence in this case and to substitute a theory based upon deductive reasoning is novel indeed. The difficulty lies in the fact that there is not a scintilla of evidence to support plaintiff's theory.

The rating of the Medical Advisory Board (R-15) is that "The Board recommends 90% loss of body function as a result of *multiple injuries.*" The groin scar should be revised.

Plaintiff had an opportunity to elicit testimony in support of its theory, but did not so do. Dr. Beck, Medical Advisory Board Chairman, was called as a witness and was asked to state the physical injuries on which the rating of 90% was based; he replied (R-55) "Well, it was on the basis of his amputation and other injuries involving the ribs, the chest and lungs." When asked to elaborate Dr. Beck indicated further that it was based on Prescott's history and the medical records. Plaintiff thought the medical records to be the best evidence of what those injuries were, (R-56).

Again at (R-86) Dr. Beck, in response to question of the referee, indicates that in addition to the aforementioned injuries Prescott suffered a rather severe groin injury detailed in the medical records.

Significant then is the complete lack of inquiry to the Chairman of the Medical Advisory Board as to whether or not the theory offered this Court has any merit. The answer is simple, there is no evidence in the record to sustain it.

No good can be accomplished in rehashing the significance of the various injuries. This is the area of the expert. The expert opinion, uncontradicted, fully supported and documented by the medical records is, "a 90% loss of body function as a result of multiple injuries. The groin score should be revised."

POINT II

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

Again Prescott disagrees with plaintiff's basic premise. Prescott was not rated by the Medical Board upon the basis of 90% loss of body function equivalent to the loss of an arm at the shoulder or the loss of a leg at or near the hip joint. The finding this court must consider must be "a 90% loss of body function as a result of multiple injuries."

Prescott contends that he is not limited to the provisions of 35-1-66 U.C.A. because this is the only place the words "bodily function" appear. Nor does Prescott

concede that the Medical Advisory Board has the final determination of whether or not the defendant is permanently and totally disabled. This is the province of the Industrial Commission.

The position of Prescott in this case is best illustrated and supported by *Silver King Coalition Mining Co. vs. Industrial Commission,* 69 P. 2d 608, (92 *U. 511*) written by Justice Wolfe and concurred in by all members of the Court. In a very similar accident, involving crushing injuries to the chest, the applicant was found by the Medical Committee to have suffered total body disability of 50%. However, after hearings and examination by the Board, the Commission awarded an additional 40 weeks which would interpolate to a loss of 70% of 200 weeks. "There was no direct evidence of a 70% loss by anyone," says Justice Wolfe.

As was typical of Justice Wolfe, the opinion reviews the various authorities cited by both plaintiff and defendant herein. What is most important in the case at hand is Justice Wolfe's analysis in the opinion when the loss of bodily function approaches a total loss. We quote his discussion of the problem in its entirety commencing at page 613:

> "(11, 12) It should be noted that there is a seeming difficulty in the application of the last part of section 42-1-62, (now 35-1-66) above quoted, when the loss of bodily function approaches a total loss. Section 42-1-63 (now 35-1-67) provides that certain loss of bodily members or parts or the total loss of use of them shall in law be

considered as total permanent disability. For such loss the sufferer obtains compensation for 260 weeks at 60 per cent. of his wages, thereafter until death at 45 per cent. of his wages with a maximum of $16 and a minimum of $7 a week provided. The next zone takes into consideration cases which are not in law total permanent, but which the commission finds so as a matter of fact. The question may be well asked, and it is collaterally material in this case, what articulation the Compensation Act makes between those cases where the loss of bodily function is not total but such a great percentage of the full functions as to practically make the applicant industrially or economically totally and permanently disabled.

Under the part of Section 42-1-63, above referred to, the compensation is still based, as in the case of a loss of an arm or leg, on loss of bodily function regardless of earning power. As stated in the dissenting opinion of the Caillet Case, a man might suffer great loss of bodily function under this section and be paid for that loss, although it were shown that he was earning ten times as much as before as a radio announcer, and vice versa, a brilliant pianist who lost a finger would get only compensation for the loss of his finger, although his livelihood was gone. The compensation for permanent partial disability is measured either by the schedule or in proportion thereto and as deemed equitable on the loss of bodily function alone, and the maximum is 200 weeks. But if the applicant claims total and permanent disability the issue is as to whether he is totally and permanently disabled industrially and economically. There is a twilight zone where one blends into the other. That is, the loss of bodily function may be so great as to leave one totally

and permanently disabled industrially. *Thus a person with* 90 *per cent loss of bodily function might be able to prove himself totally and permanently disabled. If so, he would take himself out of the class of applicants limited to recover under the paragraph of section* 42-1-62, *above quoted, and put himself in the class where his compensation should be determined by his total lack of industrial or economical ability.* But until that point is reached, the permanent partial disability is seemingly compensated for on loss of bodily function alone with a maximum of 200 weeks. The fact that a workman may stop in the zone of permanent partial, not quite going over into the zone of permanent total, and therefore obtain a maximum of only 200 weeks, whereas, a trifle more disability would bring him into what the commission might find as a fact to be an industrial or economic permanent total giving him 260 weeks plus 45 per cent. for the remainder of his life, leads us to wonder whether this 200 weeks' maximum is supposed to be the equivalent to a total loss of bodily function as the commission seemed to conceive it in this case. The applicant had a loss of bodily function of 70 per cent. The commission, therefore, gave him 140 weeks' compensation on the theory evidently that if he had 100 per cent. loss of bodily function he would have been totally permanently disabled industrially and economically and therefore be entitled to compensation for the rest of his life."

It is submitted that Justice Wolfe's analysis is a complete answer to plaintiff's proposition discussed under Point II.

Consider further Justice Wolfe's dissent in *Caillet vs Industrial Commission, 58 P. 2d 760 at page 763* (*90*

U. S) wherein he considers what constitutes total disability:

> "When we get to section 42-1-63 dealing with total permanent disability, we are once more back in the field of actual loss of ability without conclusive presumptions of law as in section 42-1-62, except in the case of the loss or complete loss of both hands, or both arms, or both feet, or both legs, or both eyes, or any two thereof. In all other cases there must be a proof of permanent total disasbility. What is 'total disability?' It does not mean total loss of bodily function. If so, a man would have to be hopelessly paralyzed. It does not mean such disability which would prevent any person from doing any work. If that were so, it would mean loss of mind, for some persons have energy and will to re-train themselves to earn so long as their minds are good. It means disablement of the particular applicant to earn wages in the type of work (not just the particular work he did do) he was trained for or any other type work which a person of his mentality and attainments could do. It cannot depend on whether or not the economic situation prevents him from getting a job. The test is his capacity, not whether the economic situation permits that capacity to be applied in industry."

We submit that Prescott meets the stricter test laid down by Justice Wolfe in his dissent. We cannot help but mention also in passing that Justice Wolfe, in his dissent, concluded that,

> "If the Commission in this case had come to the conclusion that the applicant was totally disabled under the evidence, the award would have had to be upheld, because the Commission was the

> one to judge of applicant's ability to earn in any field of human activity, and if it had held that this particular man with his particular makeup and impairment was totally unable to earn substantially his living, we would have upheld it because still within the zone of reasonable conclusions. But it is equally qualified to conclude under its knowledge and experience that this man is not totally disabled and, in my opinion, that decision should be upheld."

Prescott also satisfies the requirements of this court enunciated by Justice Wolfe in his main opinion in *Babick vs Industrial Commission, 65 P. 2d 1133.* (91 U. 581)

Admittedly Prescott, with 90% loss of body function as a result of multiple injuries, is in the zone between 35-1-67 and 35-1-66. There is no showing that Prescott has "a fair field of economic activity open to the applicant of the sort which can return him to a fair living. The Commission did not act arbitrarily. We cannot disturb the findings," to quote the Courts conclusion in the Babick case.

The best Prescott might expect if he lived in the Salt Lake area, which he does not, would be some type of non-competitive employment such as Deseret Indutries where people are given work on a charitable basis and did not have to compete with others to get the job. (R-81, 82).

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.

Agree we respectfully disagree with plaintiff's counsel. It is true that the Caillet case is mentioned in the findings, but as we view the evidence and the record Prescott satisfies all of the requirements heretofore laid down by this court in all cases mentioned by plaintiff.

The sole issue to be determined herein is whether or not there is competent evidence to support the findings of the Commission. There is no conflict in the evidence. The cumulative weight of the medical opinion, the determination of the Division of Vocational Rehabilitation and the testimony adduced at the hearing lead logically to a finding by the Commission of permanent total disability. Had the finding been any other we submit that under the principle enunciated in *Thomas v. Industrial Commission,* 72 P. 2d 1, (95 U. 32), the Commission would be reversed.

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.

This proposition is novel to say the least. We are unable to agree, "that the Commission found and everyone agrees that the disability from injury is essentially the same as the loss of a leg at the hip." The Commission found, and we agree, that the applicant is permanently and totally disabled.

The function of this court is to determine from all of the evidence if the Commission's finding can be sup-

ported. We submit that there is no evidence the other way. To a 90% loss of body function from multiple injuries add Prescott's mentality, training, education, age or in essence his capacity, the conclusion of the Commission is inescapable — permanent and total disability, fully supported by the evidence.

Respectfully sumitted

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