DECISIONS, UNDER THE WORKER'S COMPENSATION FOR ACCIDENTS ACT. FILED FOR THE YEAR 1904; VOL. III

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DECISIONS

UNDER THE

WORKERS' COMPENSATION FOR ACCIDENTS ACT

FILED FOR THE YEAR 1904

ISSUED UNDER THE

Direction of the Minister of Labour (Rt. Hon. R. J. Seddon).

VOL. III.

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CASES

UNDER THE

WORKERS' COMPENSATION FOR ACCIDENTS ACT

(From 1st January to 31st December, 1904).

FILED IN FEBRUARY.

MARLBOROUGH INDUSTRIAL DISTRICT.

(1.) HUMFFREYS *v.* MURRAY.—JUDGMENT.

In the Court of Arbitration, Marlborough Industrial District.—In the matter of "The Workers' Compensation for Accidents Act, 1900"; and in the matter of an arbitration between Charles Mostyn Humffreys, of Havelock, labourer, claimant, and Charles Frank Murray, of Wharanui, sheep-farmer, respondent.

UPON hearing Mr. Baillie, of counsel for the claimant, and Mr. McNab, of counsel for the respondent, and having duly considered the matter submitted to us, we do hereby order as follows:—

1. That the sum of £100, paid into Court in this case, be forthwith paid to Thomas Scott Smith, Esq., Stipendiary Magistrate at Blenheim, in the Provincial District of Marlborough and Colony of New Zealand.

2. That the said Thomas Scott Smith shall forthwith pay out of the said sum of £100 amounts as follows:—

(*a*.) To the claimant the sum of £15 7s. for funeral expenses and disbursements made by him, and also the sum of £5 for immediate requirements and maintenance of his infant children of the ages of five years and three years respectively.

(*b*.) To William Grey Hall Baillie, of Blenheim, solicitor, the sum of £7 6s. for costs, including disbursements £1.

(*c*.) The sum of 13s. for filing and sealing this order.

3. The balance of the said sum of £100 shall be held by the said Thomas Scott Smith, upon trust, to pay thereout to the claimant from time to time such sum or sums of money as he, the said Thomas Scott Smith, may, in his absolute discretion, think fit, for the maintenance of the two said infant children of the said claimant.

Dated at Blenheim this 10th day of December, 1903.

FRED. R. CHAPMAN, President.

FILED IN MARCH.

TARANAKI INDUSTRIAL DISTRICT.

(2.) THE PUBLIC TRUSTEE, FOR GEORGE LANGMAN, DECEASED, *v.* ZIMMERMAN.—JUDGMENT.

In the Court of Arbitration, Taranaki Industrial District.—In the matter of "The Workers' Compensation for Accidents Act, 1900"; and in the matter of an application for arbitration between the Public Trustee, administrator of the estate of George Langman, deceased, claimant, and Frank Zimmerman, respondent.

SPECIAL case stated for the opinion of the Arbitration Court, by agreement of the parties.

Langman was killed by an accident arising out of and in the course of his employment while working as a bushfeller for the respondent on the 9th February, 1903. He was employed at a wage of 1s. per hour, payable in respect of days and parts of days only on which he actually worked for respondent. The employment was terminable by either party at any moment

The deceased commenced to work for respondent on Thursday, the 11th September, 1902, and worked for him continuously, in the sense that there were no breaks and he worked for no one else, until the day of the accident, which was a Monday. He thus earned in the months and broken months the following wages, which were paid monthly: 11th September to 30th September, £5 16s. 6d.; 1st October to 31st October, £8 6s. 8d.; 1st November to 29th November, £7 3s.; 1st December to 31st December, £7 0s. 6d.; 1st January to 31st January, £6 17s.; 1st February to 9th February, £2 12s.: total, £37 15s.

We do not find that any question arises out of the date of commencing and ending the week. Apparently the wages were paid to the end of each civil month according to the number of hours worked. The civil week, however, runs for the six working-days commencing with the Monday and ending with the Saturday. There were therefore two broken weeks, in one of which Langman worked three days, and in the other a day or part of a day. Apparently his average day only ran to between six and seven hours.

The question now is, how his average weekly earnings are to be computed. We have not been furnished with figures showing the earnings from week to week; only the wages earned in each calendar month are shown in the case. We infer from the circumstances that Langman had only worked for a few hours on the

Monday on which he was killed. Numerous difficult questions have arisen as to the interpretation of the expression "average weekly earnings." According to the circumstances, they have been based on the civil week or the factory week, or a week computed from the contract between the parties. An illustration of the class of difficulty which arises may be stated thus: If a man works for a week of six days at 8s. per day, his average weekly earnings are clearly 48s.; if the same man worked during the previous Saturday he earned 8s. in that week; and the question arises whether his average is still 48s. per week, or whether it is not one-half of 56s., because he earned that sum in two weeks. A somewhat similar, but not exactly similar, question arises if he works throughout the Monday of the next week, in which case he has earned 64s. in three weeks. This same question would, however, arise in a more acute form if, instead of the whole day, he only worked one hour on that Monday, making a total of 57s. still divisible by three.

We say that the question in the latter case is not exactly similar to that in the previous one, because in that case the 8s. earned in the first broken week cannot be extended by any consideration as to what the man might have earned, whereas in the latter case he might, but for the accident which caused his death, have gone on and earned wages to the end of the week. This discussion cannot be considered fantastic. In Lyons *v.* Knowles and Sons (Limited) (1901, A.C., 79), the deceased worked as a collier on Tuesday and Thursday, earning 6s. on each day. The colliery week commenced on Wednesday. The County Court Judge held that he had worked a week at 12s. per week; the Court of Appeal held that the Act only contemplated an average in the strict sense, arrived at after two weeks' working. The House of Lords held that the "average" was used in a looser sense, but that the collier had worked in two weeks, so that his average weekly wage was only 6s.

In this case deceased worked for twenty-one whole weeks at an hourly wage, his earnings for the week varying with the number of hours worked. He had previously worked a broken week, making twenty-two weeks. Then he entered a twenty-third week, and was killed on the Monday. The problem is to ascertain by what number we have to divide the sum earned to arrive at his average weekly earnings.

This raises the question how the last broken week is to be treated. So far as his contractual relation with the employer is concerned, he might be dismissed or might leave at an hour's notice. We do not think that this consideration wholly disposes of the question. In Ayres *v.* Buckeridge (1902, 1 K.D. 57), in the Court of Appeal, the position of the workman is stated by the Master of the Rolls as follows: "There were special terms arranged whereby he was to have work for sixty hours per week, and, having regard to the fact which further appears that he was living at the time at some considerable distance from this particular work, there is no doubt that special terms were made with him which raised the

inference that he was to be employed for a week, and made it probable that he would be continued in the employment at that rate. There is no doubt that he was liable to be discharged, and could discharge himself at an hour's notice, but still he was to be employed for a week. In fact, the deceased worked for four days including the day of his death." As we read this passage in the judgment we understand it to mean that the actual contract was the same as in this case, but that the Court in ascertaining the average weekly earnings was at liberty to consider the other terms stated as assuring the workman sixty hours per week—presumably at the same wage—and this entitled the County Court Judge to draw the inference that but for the accident the deceased would have worked the rest of the week at that rate.

This we treat as an authority for the proposition that in drawing the proper inference as to the average weekly earnings we are not bound to have regard merely to the letter of the contract, but that we are entitled to look at the surrounding circumstances and consider what it is reasonably probable that Langman would have earned during that week but for the accident. The case is in this respect very different from Lyons *v.* Knowles, where there was no ground for drawing any inference that the miner in question would have continued working.

There is nothing in the case to suggest that the work was giving out, or that there was any ground for anticipating a cessation of the existing relation between the parties. In these circumstances we think that there is no room for any other inference than that Longman would in all probability have earned in that week wages at the rate at which he had been earning them. One mode of computing these wages would be to establish that week's wage as a hypothetical wage by reference to the average of the twenty-one unbroken weeks, because the first broken week may be assumed to have been at approximately the same rate; but, as this might leave room for a minute error, we think that a more absolutely exact method is to reject the last broken week altogether, to deduct from the sum of £37 15s. the few shillings earned on that Monday, and divide the remainder by 22. This, we think, will give the average weekly earnings on the proper assumption—namely, that the average for the twenty-two weeks is ascertained by the history of the case, while the true inference from the facts is that on the Monday on which he was killed, and consequently in the week in which he was killed, Langman was earning wages at the same rate as the period which preceded it.

We do not think that this method conflicts with any cases decided in the English Courts. Apparently it does conflict with some Scotch cases: see Peacock *v.* Niddrie and Benhar Coal Company (4 Fraser [Court of Sessions Cases, 5th Series] 443; reprinted in *Weekly Notes*, 1903, page 162, followed by several other cases in the same volume of *Weekly Notes*). According to these cases, whenever the employment continues so that a new week is com-

menced the portion of the week worked has to be counted as a week. It seems to us that this results in the 365th day of the year counting as a week, and that, according to this mode of computation, the year must be deemed to contain fifty-three weeks.

In Keast *v.* The Barrow Hæmatite Steel Company (15, Times Law Reports, 141) it was held that the words "average weekly earnings" means the amount earned in a year divided by 52. We are not absolutely bound by the decisions of other Courts, and if we find them to be in conflict we must choose the course which seems to us the most reasonable.

The method suggested is rational and convenient, and is in accordance with the common-sense view that most people would take of the words to be interpreted. In Lyons *v.* Knowles, in construing the word "average," the House of Lords set aside the strict meaning of the word in favour of what might be termed a popular view of its meaning, feeling satisfied that the Legislature used it in that sense. We think that we are following this example.

Mr. Beven, in his admirable work on "The Law of Employers' Liability and Workmen's Compensation, third edition, 1902, page 379, lays down a series of rules as his view of the result of the cases. One of these rules is as follows: "(3.) Where more than a week's work has been done the sum earned during the week may still be taken as evidence of the average weekly earnings, and the additional day's work may either be rejected or taken as evidence of the daily increment to the building-up of the weekly sum." We approve of this rule, and, subject to a slight doubt as to whether we ought not also to have rejected the days of the first broken week and the money earned on those days, we decide to apply it here.

Answer: The average weekly earnings of the deceased are to be computed by deducting from his total earnings—namely, £37 15s. —the sum which he earned on the day on which the accident happened by which he was killed, and dividing the remainder by 22.

Dated 23rd January, 1904.

FREDK. R. CHAPMAN, J., President.

WELLINGTON INDUSTRIAL DISTRICT.

(3.) JOHN SMITH *v.* GRIFFIN.—JUDGMENT.

In the Court of Arbitration, Wellington District (Napier).—Under "The Workers' Compensation for Accidents Act, 1900."—John Smith, of Napier, labourer, claimant, *v.* John Griffin, of Napier, contractor, respondent.

THE claimant claimed in respect of an accident thus described: The vessel "Kate Tatham" was discharging coal on a stage, and