1947

Kennecott Copper Corporation vs. Industrial Commission of Utah : Brief of Appellant

Utah Supreme Court

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In the
SUPREME COURT
of the
STATE OF UTAH

KENNECOTT COPPER CORPORATION,

Plaintiff,

—vs—

THE INDUSTRIAL COMMISSION OF UTAH,

Defendant.

Case No. 7127

STATEMENT OF FACTS

In addition to the facts related by the appellant in his brief before this court, the respondent desires to call attention to the following: there appears to be no dispute about the fact that the applicant in this case for disability benefits, John Kucher, had worked in various

mines for many years and had worked for the plaintiff or appellant from 1935 to July, 1946; and that the applicant had always been able to work without trouble from sickness or other disabilities. It was not until January of 1946 that the applicant started coughing and began noticing something wrong with his health. (Tr. 22-23). In January, 1946, all operations with the appellant were shut down because of strikes and the applicant did not resume working until June, 1946. The applicant worked about three weeks and finally was declared totally disabled and quit work July 15, 1946 (the applicant died August 15, 1947). Even though the applicant coughed in January of 1946 and had trouble with his back during the following months, he did not know he had silicosis until shortly after the beginning of the year 1947 (Tr. 22-23). Prior to this time the applicant had not been sick nor had he missed any working days up until 1946 (Tr. 22).

There is also evidence in the record that said applicant was working continually under conditions at the mine where silicon dioxide dust was present in varying quantities and that the applicant was working under conditions where silicon dust was being taken into his lungs at all times. The appellant admits that silicon dioxide dust was present at all places where the applicant was working during the eleven years that he worked with the appellant (Tr. 105-6 and the appellant's brief, page 4).

The applicant testified that he worked in the shops

for the appellant for fifteen months (Tr. 26). These shops were enclosed buildings and the applicant maintains there was silicon dust blowing around all the time (Tr. 21). Cars with dust on them were brought into these shops for repairs and these cars always had dust on them. That the floor was a cement floor and that frequent sweeping causing dust to fly were engaged in because dirt came out of the cars onto the floor (Tr. 22). The appellant's own witness admitted that dust was present at these operations both in the repair shops and out on the levels where other repair work was to be done. (Tr. 39, 43-4). Undoubtedly wind was almost a perpetual factor to contend with anywhere around the mine so that dust was in the air most, if not all the time, whether in the shops or out on the levels. (Tr. 44-6). Even out in the open there was enough dust so that hats and clothes were always getting dusty. These facts are all given through the appellant's witness (Tr. 46).

Regarding the facts in this case, the respondent would like to call attention to the fact that at none of the hearings was the applicant represented by counsel. The attorneys of the appellant put sufficient evidence into the record to support the claims of the appellant but very little, if any, testimony for the applicant got into the record on one or two important issues in this case. Much more could have been presented on behalf of the applicant to make a more complete picture. This is certainly not a criticism of the appellant nor of its attorneys. They fulfilled their obligations very commendably but it is regrettable that for the interest of the applicant, that the

witnesses could not have been more thoroughly cross-examined in the applicant's interests on these important issues suggested or that evidence could not have been introduced to more completely present the case of the applicant.

For the sake of brevity the respondent is assuming, on the basis of the record and statements in appellant's brief, that there are no issues or controversies in this case on the following points:

1. THAT THE CAUSE OF THE APPLICANT'S DISABILITY WAS SILICOSIS-TUBERCULOSIS, AN OCCUPATIONAL DISEASE, AS DEFINED BY UTAH LAW.

2. THAT THE APPLICANT WAS EMPLOYED BY THE APPELLANT FOR A CONTINUOUS PERIOD OF OVER TEN YEARS PRIOR TO HIS BECOMING DISABLED, AND THAT THE APPELLANT WAS THE APPLICANT'S LAST EMPLOYER PRIOR TO THE APPLICANT'S PERMANENT DISABILITY.

3. THAT THE APPLICANT WAS CONTINUOUSLY EMPLOYED BY THE APPELLANT FOR OVER SIXTY DAYS PRIOR TO JULY 1, 1941, WHICH WAS THE EFFECTIVE DATE OF THE OCCUPATIONAL DISEASE DISABILITY ACT OF THIS STATE.

4. THAT THE PERMANENT DISABILITY OF THE APPLICANT OCCURRED WHILE HE WAS STILL IN THE EMPLOY OF THE APPELLANT

AND THE APPLICATION OF THE APPLICANT WAS FILED IN TIME AND IN DUE FORM AS REQUIRED BY LAW.

It appears therefrom that the only issues remaining are, to-wit:

1. WAS THE APPLICANT EXPOSED TO SILICON - DIOXIDE DUST IN SUCH QUANTITIES WHILE WORKING FOR THE APPELLANT SO AS TO BE CONSIDERED AS HAVING BEEN "INJURIOUSLY EXPOSED" TO THE HAZARDS OF THIS OCCUPATIONAL DISEASE FOR THE PERIODS OF TIME REQUIRED BY LAW?

2. WHAT DOES IT MEAN TO BE "INJURIOUSLY EXPOSED" TO THE HAZARDS OF THE OCCUPATIONAL DISEASE?

3. WAS THE EMPLOYMENT OF THE APPLICANT WITH THE APPELLANT DURING THE PERIOD REQUIRED BY LAW THE PROXIMATE CAUSE OF THE APPLICANT'S DISABILITY?

The respondent feels that all the issues in this case are so closely related that they can easily be discussed all at one time. The statutes of this state designate the employer, who is liable in those cases, of disability where occupational diseases are involved. Section 42-1a-14, Utah Code Annotated 1943, reads as follows:

> "Where compensation is payable for an occupational disease the only employer liable shall be the employer in whose employment the em-

> ployee was last injuriously exposed to the hazards of such disease, provided that in the case of silicosis the only employer liable shall be the employer in whose employment the employee was last exposed to harmful quantities of silicon dioxide (SiO_2) dust during a period of sixty days or more after the effective date of this act."

Respondent maintains that the applicant was injuriously exposed to the hazards of silicosis for the periods of time required by law and that it further occurred while the applicant was employed by the appellant, also, that the appellant was the applicant's last employer.

Silicosis is defined by our statute in Section 42-1a-29, Utah Code Annotated, 1943, as follows:

> "For the purpose of this act 'silicosis' is defined as a chronic disease of the lungs caused by the prolonged inhalation of silicon dioxide dust (SiO_2) characterized by small discrete nodules of fibrous tissue similarly disseminated throughout both lungs, causing a characteristic X-ray pattern, and by variable clinical manifestations."

Supreme Court cases are unanimous in upholding the medical profession in the determination that silicosis under average conditions develops very slowly. Some types of silicon dioxide dust cause it to develop faster than other types of dust, but dust is necessary to develop or cause the disease because it is not a germ disease. It is, therefore, obviously clear why such a wording would be put into our statute. (Sec. 42-1a-29). It is

impossible to determine just when the first reaction to silicon dust takes place in a person's lungs. It is known that a long exposure must normally be necessary before it can even be materially detected. It is again, therefore, obvious for the sake of fairness to the working man, why our law also makes the last employer of the workman liable if the workman is injuriously exposed to silicon hazards while in his employ. This is regardless of any prior exposures on other jobs.

It is also to be noted that statistics quoted as to the amount of silicon dust per cubic foot are only averages at their best. These amounts and statistics are given as the amount of dust needed to *start* the disease on a normal, average, healthy person. Authorities are in dispute even over these figures, but no one knows what amount of dust it takes to keep the disease going, to move the disease from one stage to another, or to cause the disease to develop to a point where tuberculosis would superimpose itself. Each person reacts differently and has his own weaknesses and immunities. In the case of Argonaut Mining Co. vs. Industrial Accident Commission (Cal.) 70 Pac. 2d 216 at page 219 the court held as follows:

> "Some men appear to be immune from the disease, but a large proportion of those who are engaged in such pursuits are susceptible to silicosis. The incurring and development of this disease depend somewhat upon the constitution of the employee and upon the conditions under which he works. The course of the disease may be rapid

> or gradual, sometimes extending over a period of several years before the victim is finally disabled for the performance of manual labor. That was evidently true of the claimant in the present proceeding."

Even medical and engineering authorities are not in accord and also differ on the statistics quoted where it is attempted to show what are and what are not dangerous quantities of silicon dust. One thing is certain, however, that no doctor or engineer knows the minimum amount of silicon dust per cubic foot that is injurious to any particular person. Every person reacts differently. It appears to the respondent that this is the important factor in this case and all other such cases. A worker only need be "injuriously exposed" under our law. It only need be shown that injury resulted in his particular case. The law has set up no amounts to indicate the amount of silicon dust concentration which would be necessary to induce silicosis on any one worker or on workers generally. Certain evidence was introduced uncontroverted at the hearings in this case as to the amount of silicon dust necessary to produce silicosis, also as to the amount of silicon dust which was present where the applicant had been working at the mine. These witnesses, including the doctors who testified, were all employees of the appellant and, as shown above, the applicant had no attorney so that these witnesses were not cross-examined nor was other evidence introduced to controvert the appellant's witnesses. There is, however, available evidence which could controvert the evidence of

the appellant's testimony given by its employees. This honorable body has already passed on one such case, has referred to the particular source of such testimony and has adopted such testimony as a part of its decision. In the case of Uta-Carbon Coal Company vs. Industrial Commission (Utah) 140 Pac. 2d 649, the applicant had worked in various mines in Utah for twelve years and was working for, and had been working with, the plaintiff's mine in that case for seven years prior to his disability. An issue arose as to whether or not the silicon dust in the plaintiff's mine was present in sufficient quantities to be harmful. On page 651 of this decision our Utah court stated as follows:

> "Our legislature has not seen fit to define what amounts of silicon dioxide dust are to be considered harmful. On page 57 of Public Health Bulletin No. 270, appear the following statements of the report of the International Conference on Silicosis held in Geneva in 1938, with reference to the problem of pneumoconiosis of workers in coal mines:
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> > ' (a) Silicosis occurs among workers in coal mines when the dust to which they are exposed contans free silica. *The minimum proportion of silica necessary to produce the disease is not, in the present state of knowledge determinable.*
> >
> > (b) Coal dust alone does not, either in animals or in man produce lesions similar to those of silicosis.'
>
> As we have stated our legislature has not defined what are harmful quantities of silicon

> dioxide dust. The medical profession has not been able to determine what minimum proportion of silica may be breathed by man without harm to himself. That breathing certain amounts of silica over an extended period of time is harmful is self-evident from the effects which produce the disease known as silicosis. In the absence of legislative or medical standards, in order to give effect to the Act, the commission must determine what are harmful amounts of silicon dioxide dust from the facts of each individual case. In the instant case there was sufficient evidence that applicant was suffering from silicosis; that he had worked in coal mines in Utah for over twelve years, 7 of which immediately preceding the date when he ceased to work, were spent in the employment of the plaintiff, Uta-Carbon Coal Co. in its mine; and that silica was present in the mine;"

Also in the case now before this court the applicant was suffering from silicosis, yet it is undisputed that for over ten years this applicant worked for the appellant without a sick day. Silicosis comes and develops only through exposure to silicon dioxide dust. If a case of silicosis is progressive and does develop, the dust inhaled aids in its development and is injurious. The disease would not be progressive if the dust inhaled were not injurious, regardless of the amount. The figures used by the appellant can only be taken as the average found with all employees. We are concerned here with what is harmful to this particular applicant, not what are the universal averages. The appellant by his own admission found traces of silicosis on this applicant in August of 1938. He had been in their employ

at that time about three years, yet they continued to keep him as their employee.

The evidence introduced in this case is conflicting in places regarding the amount of dust present where the applicant was working during his 11 years at the appellant's mine. The applicant himself testified there was considerable dust where he was working at all times. Even though the appellant's own witnesses were put on the stand to controvert the applicant's evidence and testimony, it is interesting to observe that the appellant's witnesses spoke of measures that had been taken to cut down the dust hazard but the appellant's witnesses nevertheless spoke of such dusty conditions that they were compelled to go home with dusty hats and dusty clothes which they had worn at the places they and the applicant had been working. (See the facts stated above). The fact remains that the applicant's condition did get progressively worse and it took eleven years for the applicant to get from the status of a normally average healthy man to the status of total disability. It is a known fact that the employees of the appellant did then (1935) and must now undergo a very strict physical examination when they enter the appellant's employ. This is evidence of the fact that the applicant was normally healthy at the time he was hired in 1935. Since then disabling silicosis developed on the applicant but under our law it is unnecessary to show the date that the first silicon dust became effective.

The decision of the Utah Supreme Court in the

case of Uta-Carbon Coal Company vs. Industrial Commission, supra, holds that the disease of silicosis is contracted the day "the symptoms appear." (Page 652). There is not the slightest evidence in the case before the court that the applicant had any symptoms of silicosis until about January of 1946. The company doctors testified that they discovered silicosis in its third degree on the applicant in 1938. Under the theory of the Uta-Carbon Coal Company case the applicant of the case before this court contracted silicosis not sooner than 1938 and if the symptoms were necessary as proof, it would not be until January of 1946. But with either of these, or a later date controlling, respondent feels that he has sufficiently pointed out that the applicant worked in the presence of silicon dust; that the silicon dust that the applicant did inhale while working for the appellant was injurious to him and was the proximate cause of his disability and that it is unnecessary for the respondent to show that any given amount of silicon dust was present in the air at any given time or over any given period of time.

In the case of Horbison-Walker Refractories Company vs. Turks (Ind.) 39 N. E. 2d 791, a question also arose as to whether or not it had to be shown that the applicant worked under a given quantity of silicon dust. The court simply held that it was unnecessary to make proof of any given amount of dust. The court in that case on page 791-2 held as follows:

> "Appellant contends that there is no evidence that the decedent was exposed to the haz-

> ards of the disease of silicosis while in its employ. While appellant concedes that the evidence shows the presence of silica where the decedent worked, it insists that there is no evidence that the quantity was present necessary to cause silicosis according to the standard of the United States Department of Labor, to-wit: ten million particles of dust per cubic feet, eighty-five per cent silica of the fineness of ten micorns in size over a forty-hour period per week for a period of five years. There is no requirement that such proof be made. The evidence is ample that silica was present where decedent worked and was there continuously breathed by him over a period of more than ten years in sufficient quantity to cause silicosis and result in his death.
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> *****
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> The Workmen's Occupational Diseases Act is a practical statute having for its purpose the accomplishment of a definite humane purpose. It should be mantled in the spirit of the objective, not shrouded in a haze of over-technical interpretations."

(See also Horbison-Walker Refractories Company vs. Harmon, (Ind.) 51 N. E. 2d 398).

Any finding of the Industrial Commission that is reasonably supported by credible evidence should be supported and not disturbed on appeal. The respondent in this case is the ultimate fact-finding body. (See the following: Marquette Granite Company vs. Industrial Commission (Wis.) 240 N. W. 793; Square Dee Company vs. O'Neil (Ind.) 66 N. E. 2d 898; and Jaloneck vs. Jarecki Manufacturing Company (Pa.) 43 Atl. 2d 430).

CONCLUSION

The award made by the respondent should be affirmed and supported for the reasons that: One, the applicant became permanently disabled by an occupational disease; two, the applicant was and had been working for the appellant during the period of time prior to disability required by statute; three, there was silicon dioxide dust present at all times at the places where the applicant was ordered to do his work while employed by the appellant; four, the dust conditions under which the applicant worked for the appellant were injurious to said applicant and caused his case of silicosis to get progressively worse resulting in complications of tubercular silicosis and finally in total disability.

Respectfully submitted,

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