

1996

J. David Vigos v. Mountainland Builders Inc., and Workers Compensation Fund of Utah : Petition for Writ of Certiorari

Utah Court of Appeals

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J. DAVID VIGOS,

Applicant and Petitioner,

v.

MOUNTAINLAND BUILDERS
INC. and
WORKERS COMPENSATION FUND
OF UTAH,

Defendants and Respondents

Priority 7

Case No. 970175
960283-CA

PETITION FOR WRIT OF CERTIORARI

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UTAH

J. DAVID VIGOS,

v.

Defendants and Respondents

Case No.

PETITION FOR WRIT OF CERTIORARI

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PARTIES TO THIS PROCEEDING

I.

All parties to this proceeding are listed in the caption.

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ISSUES PRESENTED FOR REVIEW

Petitioner submits the following questions to the Supreme Court for review:

1. Has the Court of Appeals rendered a decision in this case that has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision, when the Court of Appeals, in this case stated that petitioner's claim for permanent total disability compensation was cut off before that claim had actually accrued, thus, stating that Utah Code Ann. §35-1-99(3) is, *de facto* a statute of repose; nevertheless, the Court of Appeals denied Mr. Vigos' claim because it was "bound to follow" the Court of Appeals' prior decision in Avis v. Board of Review, 837 P.2d 584 (Utah App. 1992), which decision some members of the panel disagree with?

2. Is the Court of Appeals' decision in this case in conflict with prior decisions of the Supreme Court and other decisions of different panels of the Court of Appeals on the issue of whether there is continuing jurisdiction and how the Industrial Commission first obtains jurisdiction?

REFERENCE TO OFFICIAL REPORT

The Court of Appeals' opinion in this case was issued on March 13, 1997 and is attached as "Appendix A". The Industrial Commission's Denial of Motion for Review, is attached as "Appendix B". ALJ's order is attached as "Appendix C".

GROUNDS FOR JURISDICTION

The Court of Appeal's decision was filed on March 13, 1997. The time within which to file a Petition for Writ of Certiorari expires on April 15, 1997. The Supreme Court has jurisdiction to review the decision of the Court of Appeals by writ of certiorari under Utah Code Ann. §78-2-2(3) (1992), and pursuant to Rules 45-51 of the Utah Rules of Appellate Procedure.

CONTROLLING PROVISIONS OF LAW

Utah Constitution, Article I, § 7:

No person shall be deprived of life, liberty or property, without due process of law.

Utah Constitution, Article I, § 11:

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

Utah Code Ann. §35-1-67(1):

(1) In cases of permanent total disability caused by an industrial accident, the employee shall receive compensation as outlined in this section. Permanent total disability for purposes of this chapter requires a finding by the commission of total disability, as measured by the substance of the sequential decision-making process of the Social Security Administration under Title 20 of the Code of Federal Regulations as revised. The commission shall adopt rules that conform to the substance of the sequential decision-making process of the Social Security Administration under 20 C.F.R. Subsections 404.1520 (b), (c), (d), and (f) (1) and (2), as revised.

Utah Code Ann. §35-1-78(1):

The powers and jurisdiction of the commission over each case shall be continuing. The commission, after notice and hearing, may from time to time modify or change its former findings and order. Records pertaining to cases that have been closed and inactive for ten years, other than cases of total permanent disability or cases in which a claim has been filed as in Section 35-1-99, may be destroyed at the discretion of the commission.

Utah Code Ann. §35-1-78(3):

(a) This section may not be interpreted as modifying in any respect the statutes of limitations contained in other sections of this chapter or Chapter 2, Title 35, the Utah Occupational Disease Disability Law.

(b) The commission has no power to change the statutes of limitation referred to in Subsection (a) in any respect.

Utah Code Ann. § 35-1-99(3) (1988):

A claim for compensation for temporary total disability benefits, temporary partial disability benefits, permanent partial disability benefits, or permanent total disability benefits is wholly barred, unless an application for hearing is filed with the Industrial Commission within six years after the date of the accident.

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceeding and Disposition of Court below.

On October 13, 1988 Mr. Vigos fell and sustained serious injuries, including a head injury. (R. 1, 13) The Worker's Compensation Fund of Utah was the employer's insurance carrier and it paid all of Mr. Vigos' medical bills and all of his temporary total disability benefits. (R. 38, 39) On June 23, 1995 the Social Security Administration determined that Mr. Vigos was

disabled and had not performed any gainful employment as of January 1, 1993. (R. 23-5) On July 10, 1995, 17 days after he received the social security determination, Mr. Vigos filed his application for hearing with the Industrial Commission for permanent total disability benefits. (R. 13).

Pursuant to defendant's motion to dismiss, the ALJ dismissed the claim because it was filed more than six years after Mr. Vigos fell. (R. 61-2) Mr. Vigos disputed the ALJ's order and filed a Motion for Review within 30 days of the ALJ's Order and in accordance with Utah Code Ann. §§35-1-82.53 (1) (1988) 63-46b-12 (1)(a) (1992). (R. 64) On March 28, 1996 the Industrial Commission affirmed the ALJ's order. (R. 117-9) On April 25, 1996 Mr. Vigos filed his Petition for Review with the Court of Appeals. (R. 121) On March 13, 1997 the Court of Appeals denied Mr. Vigos' Petition.

B. Statement of Facts

Mr. Vigos was employed by defendant Mountainland Builders, Inc. (Mountainland) on October 13, 1988. (R. 1, 13) While working on a plank, Mr. Vigos fell and sustained several injuries, including a head injury, while acting within the course and scope of his employment. (R. 1, 13, 38, and 39) Mountainland's insurance carrier, the Worker's Compensation Fund of Utah (the Fund), last paid medical expenses in July of 1989 and benefits from October 14, 1988 to May 8, 1989 as a result of this accident. (R. 38, 39) Mr. Vigos was given neither an impairment rating for this

injury nor any indication that he was permanently totally disabled by his treating physicians. (R. 65) After Mr. Vigos returned to work he wrote the Fund a letter and stated, "I want to thank you personally for hanging in there with me through my recovery. I'm ready to return to work - finally. Thank you so much." (R. 87 emphasis in original) Over the next six years Mr. Vigos continued to work and he was working as of October 25, 1994, which was six years and two weeks after he fell. (R. 114)

Despite Mr. Vigos' best efforts, he was unable to hold a job. (R. 23-5, 65) At some point, Mr. Vigos realized his head injury could be the source of his problems so he attempted to get additional medical treatment from the Fund. (R. 65, 111) On November 3, 1994 the Fund informed Mr. Vigos that more than three years had lapsed since his last medical treatment and the Fund denied Mr. Vigos' request for additional medical treatment. (R. 11)

Mr. Vigos applied for Social Security benefits on January 25, 1994. (R. 24)¹ The Social Security Administration denied this application on June 14, 1994. (R. 30) Mr. Vigos then asked for reconsideration on October 28, 1994, which was also denied. (R. 30) The second denial was not dated; however, presumably it was

¹ There was a factual dispute as to when Mr. Vigos became permanently totally disabled because the Industrial Commission dismissed Mr. Vigos' claim without a hearing. Applicant asserted it was after the six year statute of limitations and defendants claimed it was about 4½ years after Mr. Vigos fell. The Court of Appeals determined that it was after the six year statute of limitations had run, although the Court of Appeals gave no explanation as to how it came to this conclusion. Nevertheless, the Court of Appeals could have relied on Velarde v. Board of Review, 831 P.2d 123, 124 n.2 (Utah App. 1992), which states that when the Commission dismisses a petitioner's claim without a full hearing on the facts, "we presume, to the extent necessary to resolve the issues on appeal, that the facts are as stated by petitioner."

denied after the October 28, 1994 request. (R. 30) Consequently, it is unclear as to when Mr. Vigos became permanently totally disabled. After a Social Security Administrative hearing in May, 1995, Mr. Vigos was awarded Social Security benefits on June 23, 1995 and the Social Security Administration determined that Mr. Vigos had not been gainfully employed since January 1, 1993. (R. 23-25) On July 10, 1995, Mr. Vigos applied for permanent total disability benefits with the Industrial Commission. (R. 13) The Fund claimed that Mr. Vigos' application was filed after the statute of limitations had lapsed and moved for dismissal. (R. 39) On September 18, 1995 the ALJ dismissed Vigos' application with prejudice. (R. 61-2) Mr. Vigos filed a Motion for Review on October 16, 1995. (R. 64) On March 28, 1996 the Industrial Commission affirmed the ALJ's order. (R. 117-9) On April 25, 1996 Mr. Vigos filed his Petition for Review with the Court of Appeals. (R. 121) The Court of Appeals denied his Petition for Review on March 13, 1997. Mr. Vigos has timely filed this Petition for Writ of Certiorari.

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ARGUMENT

POINT I

THE COURT OF APPEALS DETERMINED THAT IT WOULD BE POSSIBLE TO CONCLUDE THAT UTAH CODE ANN. §35-1-99(3) IS A STATUTE OF REPOSE BECAUSE MR. VIGOS' CLAIM WAS CUT OFF BEFORE IT HAD ACCRUED

A. THE COURT OF APPEALS WAS FORCED TO FOLLOW A POOR PRECEDENT IN RULING THAT MR. VIGOS' COULD NOT BRING A CLAIM FOR PERMANENT TOTAL DISABILITY

The law is well settled in Utah that if a person's right to bring a claim is cut off by statute before that claim has accrued then the statute is a statute of repose. "A statute of repose . . . prevents suit a statutorily specified number of years after a particular event occurs, without regard to when the cause of action accrues." Velarde v. Industrial Comm'n, 831 P.2d 123, 125 (Utah App. 1992); see also, Berry v. Beech Aircraft Corp., 717 P.2d 670 (Utah 1985); Selvage v. J.J. Johnson & Associates, 910 P.2d 1252 (Utah App. 1996); Hales v. Industrial Comm'n., 854 P.2d 537 (Utah App. 1993). A statute of repose violates a person's constitutional rights because it violates the due process provision and the open courts provision of the Utah Constitution, Article I, §§ 7 and 11.

In the case at hand, the Court of Appeals concluded that the controlling statute "cut off petitioner's claim for permanent total disability compensation before that claim had actually accrued, i.e., before petitioner was totally disabled." However, because a different Court of Appeals' panel, in Avis v. Board of Review, 837

P.2d 584 (Utah App. 1992), had determined that the same statute was a statute of limitations, the Court of Appeals deemed itself powerless to rule otherwise in this case. The Court simply stated, "Whether each member of this panel agrees with the rationale and analysis of Avis is beside the point, as we are bound to follow this precedent." Therefore, the Court of Appeals rendered a decision in this case that has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision.

B. UNTIL A PERSON BECOMES DISABLED HE CANNOT SUCCESSFULLY BRING A CLAIM FOR PERMANENT TOTAL DISABILITY IN THE INDUSTRIAL COMMISSION; HENCE, DISABILITY IS THE LAST EVENT TO OCCUR IN THE CAUSE OF ACTION FOR PERMANENT TOTAL DISABILITY

Utah Code Ann. § 35-1-99(3)², states:

A claim for compensation for temporary total disability benefits, temporary partial disability benefits, permanent partial disability benefits, or permanent total disability benefits is wholly barred, unless an application for hearing is filed with the Industrial Commission within six years after the date of the accident.

Id. Permanent total disability differs from temporary total disability, temporary partial disability, and permanent partial disability because permanent total disability has an additional requirement before an injured employee can obtain benefits: the employee must suffer both an injury and the inability to work after medical stabilization. Utah Code Ann. §35-1-67(1) states:

² Since Mr. Vigos' accident, this statute has been repealed; however, the current statute of limitations, Utah Code Ann. §35-1-98(2), uses nearly the same language as Utah Code Ann. §35-1-99(3).

(1) In cases of permanent total disability caused by an industrial accident, the employee shall receive compensation as outlined in this section. Permanent total disability for purposes of this chapter requires a finding by the commission of total disability, as measured by the substance of the sequential decision-making process of the Social Security Administration under Title 20 of the Code of Federal Regulations as revised. (Emphasis added).

Id. The Commission sets forth the required "questions and evaluations to be made in sequence" for a claim of permanent total disability. The questions and evaluations are as follows:

1. Is the claimant engaged in a substantial gainful activity?
2. Does the claimant have a medically severe impairment?
3. Does the severe impairment meet or equal the duration requirement in 20 CFR 404.1509³, amended April 1, 1993, and the listed impairments in 20 CFR Subpart P Appendix 1, amended April 1, 1993?
4. Does the impairment prevent the claimant from doing past relevant work?
5. Does the impairment prevent the claimant from doing any other work?

Utah Administrative Code Rule R568-1-17. Consequently, as long as an employee is still working, despite his injury, he cannot apply for permanent total disability benefits because he is not statutorily disabled.

The legislature did not intend to require an employee to file a claim for permanent total disability within six years of the "accident" if he did not meet the statutory requirements for

³ § 404.1509 states:

How long the impairment must last.

Unless your impairment is expected to result in death, it must have lasted or must be expected to last for a continuous period of at least 12 months. We call this the duration requirement. (Emphasis added).

disability. To require an employee to file before he had a claim runs contrary to the statutory construction and well established Utah law. In Nixon v. Salt Lake City Corp., 898 P.2d 265 (Utah 1995), the Supreme Court stated:

"'The primary rule of statutory interpretation is to give effect to the intent of the legislature in light of the purpose the statute was meant to achieve.'" Although we generally rely on the plain language rule of statutory construction, we note that an equally important rule of statutory construction is that a statute should be construed as a whole, with all of its provisions construed to be harmonious with each other and with the overall legislative objective of the statute. . . . (Emphasis added and cites omitted).

Id. at 268. The statute of limitations for permanent total disability cannot begin to run until the claimant has an injury and can no longer work. Larson's Workmen's Compensation, §78.42(d).

In Larson's treatise, he states that a statute of limitations should not begin to run until a claimant is aware that he has a claim. Larson's Workmen's Compensation, §78.41 states:

The time period for notice or claim does not begin to run until the claimant, as a reasonable man, should recognize the nature, seriousness and probable compensable character of his injury or disease. (Emphasis added).

Id. Larson's Workmen's Compensation, §78.42(a) also states:

A rigid claims period may operate unfairly not only because the nature, seriousness, and work-connection of the injury could not reasonably be recognized by the claimant, or perhaps even by the claimant's doctor, but in many cases because the injury itself does not exist in compensable degree during the claims period. This latent or delayed injury problem presents in the sharpest relief the senselessness of uncompromising time periods. The classic illustration is that of the apparently trivial accident that matures into a disabling injury after the claim period has expired. A worker is struck in the eye by a metal chip, but both he and the company doctors

dismiss the accident as a petty one and of course no claim is made, since there is no present injury or disability. Eighteen months later a cataract develops as the direct result of the accident. If the statute bars claims filed more than one year after the "accident," and if the court applies the statutory language with draconian literalism, the worker can never collect for the injury no matter how diligent he is: he cannot claim during the year, because no compensable injury exists; he cannot claim after the year, because the statute runs from the accident. (Emphasis added).

Id. The language used by Larson applies to all "uncompromising time periods," not just a one year time period. Larson then uses a one year statute of limitation as "[t]he classic illustration" Larson is criticizing every statute of limitation that has uncompromising time periods, not just a one year statute of limitations.

The Court of Appeals stated, in this case, that Mr. Vigos' claim for permanent total disability was cut off before it had accrued; however, because of the decision of Avis v. Board of Review, 837 P.2d 584 (Utah App. 1992), the Court of Appeals felt trapped and denied Mr. Vigos his rightful benefits. Any claim that falls under this statute or the current Utah Code Ann. §35-1-98(2), where the employee has a delayed onset of injury after the "accident" will make both §35-1-99(3) and §35-1-98(2) statutes of repose, especially if the Court of Appeals' decision in Avis and its progeny is allowed to stand, then the Industrial Commission will continue to interpret the statutes with "draconian literalism."

Also, a claim for permanent total disability is more akin to a death benefits claim because the likelihood of delayed onset is

so great. In Hales v. Industrial Comm'n., 854 P.2d 537 (Utah App. 1993), the applicant claimed, and the Industrial Commission agreed with the applicant and stated in its order, "that the statutory provision in section 35-1-68(2) violated the Utah Constitution's open courts provision by extinguishing [the applicant's] constitutional right to litigate a valid claim before [the applicant's] right to file that claim arose." The Court of Appeals came to the same conclusion. Id. at 542. That is exactly the issue in this case. It does not matter if Hales concerned a different statute or different benefits, which is the distinction the Court of Appeals tries to make. Mr. Vigos' right to litigate his valid claim was extinguished before his right to file the claim arose, which makes Utah Code Ann. §35-1-98(2) unconstitutional. The Court of Appeals has left Mr. Vigos with no remedy at all. Therefore, this Court should review Avis and its progeny and grant petitioner's writ of certiorari.

POINT II

ONCE THE INDUSTRIAL COMMISSION HAS JURISDICTION IT CAN MODIFY OR ADJUST AN AWARD IN ACCORDANCE WITH CHANGES IN CIRCUMSTANCES, WHICH COULD INCLUDE A DETERIORATION OF THE FORMER EMPLOYEE'S CONDITION OR THE DISCOVERY OF A PREVIOUSLY UNNOTICED INJURY.

When the Court of Appeals denied Mr. Vigos' petition, it failed to discuss Utah Code Ann. §35-1-78(1), which states, "The powers and jurisdiction of the commission over each case shall be continuing." The Court of Appeals' decision in this case is in

conflict with prior decisions of the Supreme Court and other decisions of different panels of the Court of Appeals on the issue of whether there is continuing jurisdiction and how the Industrial Commission first obtains jurisdiction; therefore, this Court should grant the petition for writ of certiorari.

The language in §35-1-78(1) is clear and unambiguous, once jurisdiction has been invoked over a case, the Industrial Commission has continuing jurisdiction over that case. In Utah State Ins. Fund v. Dutson, 646 P.2d 707 (Utah 1982), the Utah Supreme Court stated:

Notwithstanding the fact that the foregoing statutes [§§35-1-99 -100] require either the filing of a claim for compensation or the filing of a written notice of the accident in order to invoke the jurisdiction of the Commission, this Court has long recognized that a claim for compensation need not bear any particular formality. In fact, "great liberality as to form and substance of an application for compensation is to be indulged." However informal the claim may be, it need only give "notice to the parties and to the Commission of the material facts on which the right asserted is to depend and against whom claim is made." (Emphasis added).

Id. at 709 (footnotes omitted). Although §§35-1-99 and 35-1-100 were repealed and §35-1-99(3) controls in this case, §35-1-99(3) does not overrule Dutson. Dutson is still good law and it applies to this case. In Dutson the applicant had not filed anything with the Industrial Commission. However, in Dutson, the employer filed the "'Employer's First Report of Injury' . . . , the attending physician . . . filed 'Medical Report', . . . and . . . [the] State Insurance Fund filed 'Notice: Payment of Temporary Disability Compensation as per Utah Code (35-1-65)'"

The Commission has continuing jurisdiction over Mr. Vigos' case for the following reasons: 1) the employer filed with the Commission an "Employer's Report of Injury" (R. 001, 035), 2) the treating physician filed a "Physician's Initial Report of Work Injury," (R. 034), and, 3) the Fund paid benefits to Mr. Vigos. (R. 39) In fact, in the Fund's Amended Answer to the Application for Hearing, the Fund stated, "The Workers Compensation Fund acknowledges the occurrence of Mr. Vigos [sic] industrial accident on October 13, 1988, but unfortunately it appears Mr. Vigos [sic] claim for additional benefits was not timely filed." (R. 39) The Fund then states, "The Fund originally accepted liability for Mr. Vigos' accident" (R. 39)

Mr. Vigos acknowledges the language in §35-1-78(3) that states the Commission cannot modify statutes of limitations. However, this does not create a problem. If an employee has an accident and an injury, which does not have a delayed onset, notifies his employer, but fails to make a claim for benefits, then he cannot later try and make a claim through the "back door" by claiming continuing jurisdiction. On the other hand, if a timely claim has been filed and benefits paid, then the Commission has jurisdiction over every subsequent claim, regardless of the onset, and the statute of limitations does not apply.

This is consistent with Stoker v. Workers' Compensation Fund of Utah 889 P.2d 409 (Utah 1994), wherein this Court stated:

Nevertheless, Stoker may still have a remedy under the Act. It would be ironic for the Act to be construed in such a fashion that a worker who undertakes a

conservative course of therapy within the time allowed by the statute, which if effective would save the Fund money and be less risky to the worker, would be denied benefits when that course proves ineffective and a more aggressive therapy must then be pursued, resulting in temporary total disability that occurs outside the eight-year period. Had the more aggressive therapy been undertaken at the time of the less aggressive therapy, Stoker would have met the requirements for additional total disability benefits.

Id. at 412. This Court then concluded that even though it was more than eight years post injury, the Commission had continuing jurisdiction and Stoker could file a claim under §35-1-78(1). Id. Additionally, in Sheppick v. Albertson's, Inc. 922 P.2d 769 (Utah 1996), in footnote 2, the Supreme Court stated:

The provision granting the Commission continuing jurisdiction emphasizes the exclusivity of the Commission's jurisdiction over workers' compensation claims. Under general common law doctrine, the entry of a judgment for damages based on personal injuries would bar subsequent actions based on the same injury. Such is not the case under the Act. The Commission is empowered to adjust the award in accordance with changes in circumstances. See Utah Code Ann. § 35-1-78. Such changes could include a deterioration of the former employee's condition or the discovery of a previously unnoticed injury. See, e.g., Stoker v. Workers' Compensation Fund, 889 P.2d 409, 412 (Utah 1994) (commission can reopen case if previously used conservative method of treatment proved ineffective); Barber Asphalt Corp. v. Industrial Comm'n, 103 Utah 371, 135 P.2d 266 (1943) (commission may reconsider case if there has been some new development that suggests award may have been excessive or inadequate); Spring Canyon Coal Co. v. Industrial Comm'n, 60 Utah 553, 210 P. 611 (1922) (commission authorized to alter award when amputated leg failed to heal sufficiently to use prosthesis). (Emphasis added).

Id. at 775.

It would not only be ironic, but inequitable, for injured workers to return to the work force for six years or more and then

be told that they should not have made a good faith effort, but, instead, should have applied for permanent total disability. Such rulings will have a chilling effect on injured workers to return to the work force because they are punished, instead of rewarded, if they attempt to stay in the work force for more than six years from the date of the initial injury. Alternatively, workers may have to file for benefits before a claim has accrued, which then raises a fundamental question about Rule 11 sanctions for these filings.

For example, suppose I have a client who is a truck driver and he was in a fight on May 21, 1992 while protecting his cargo.⁴ He gets severely beaten, suffers from post traumatic stress disorder (PTSD) and his employer denies benefits. I file an application for hearing for temporary total disability, permanent partial disability, interest, and medical bills, but I do not make the claim for permanent total disability because he has returned to work, even though he was given an impairment rating of 15% for his physical injuries and 15% for his PTSD. Now suppose this case goes all the way to the Court of Appeals, which grants the employee everything that was requested and this Court denies a petition for writ of certiorari. Next, suppose that four years post accident the employee has a relapse that results in him missing three additional months of work and this is medically attributed to the

⁴ The facts of this hypothetical are based upon the case of Commercial Carriers v. Industrial Comm'n of Utah, 888 P.2d 707 (Utah App. 1994). By citing these facts I am not trying to inappropriately supplement the record. With the current status of the Vigos decision applicant attorneys are placed in unenviable position of having to predict if a client will be permanently totally disabled before the six year statute runs. Naturally, if the attorney makes an incorrect evaluation, then the attorney could be faced with a malpractice claim.

May 21, 1992 accident; however, the employee again returns to work. Then suppose, the doctor gives me a letter in January, 1997, nearly five years post injury, that states, in essence:

My prognoses for this gentleman is guarded, at best. Because he suffers from an extreme case of PTSD he may not be able to work again if he has another breakdown. He continues to drive a truck because he loves to drive and he finds comfort in being inside his truck. At the same time, however, the driving of his truck is a strong contributor to his PTSD. I will continue to see him once a month and I hope that he can continue to work.

As the six year anniversary approaches I am placed in a very precarious position. Do I advise my client to continue working, which he loves to do, or do I tell him that he should quit, because if he has a relapse on May 22, 1998 his claim for permanent total disability is gone forever, even though the insurance company has paid all of his medical and all of his benefits? Another possibility is to go ahead and file simply to preserve the claim. Unless the Industrial Commission has continuing jurisdiction, claimants will be at a huge disadvantage. Such a situation runs contrary to the Supreme Court's ruling that:

The Workmen's Compensation Act is to be construed liberally to further the statutory purposes of providing relief from injuries caused by industrial accidents. . . . The Industrial Commission is in the first instance responsible for effectuating the purposes of the Act by construing its provisions to secure its humane objectives. (Cite omitted).

Pinter Constr. Co. v. Frisby, 678 P.2d 305, 306 (Utah 1984).

In the present case, the parties clearly had notice of the material facts and the Industrial Commission was given notice. Once the employee meets this burden then the Commission has jurisdiction. Once it has jurisdiction, it can modify any prior

awards, which would include a "deterioration of the former employee's condition or the discovery of a previously unnoticed injury." Sheppick v. Albertson's, Inc. 922 P.2d 769 (Utah 1996), footnote 2.

When the employer has filed a first report of injury with the Industrial Commission, the doctor's first report of injury is also filed with the Industrial Commission, the insurance company accepts liability and then cooperates with the injured employee, there is no need to file a formal application for hearing. That is why Dutson is still good law and applies to this case. How else would the Industrial Commission ever get jurisdiction in a case where the employer and the employee are cooperating for a full six years after the Industrial Commission has been given written notice? The Court of Appeals' decision in this case would require an applicant to file a formal application for hearing on every claim, regardless of the cooperation between the parties. This is contrary to Utah law. see Stoker, 889 P.2d at 412. Currently, with this decision, the Industrial Commission does not have jurisdiction unless an employee files an application for hearing for every claim.

The Court of Appeals' decision in this case goes far beyond the well established law of Utah concerning the purpose of the Worker's Compensation Act. In Norton v. The Industrial Comm'n., 728 P.2d 1025, 1028 (Utah 1986), the Supreme Court stated, "[i]t need not be restated at great length that the Workmen's Compensation Act is to be liberally construed and that any doubt respective the right of compensation will be resolved in favor of

the injured employee." Id. (emphasis added). Therefore, the Commission should have continuing jurisdiction in this case or else the statute will be construed so narrowly that Mr. Vigos will be left with no remedy. Hence, this Court should grant Mr. Vigos' petition for writ of certiorari.


CONCLUSION

Even though Utah Code Ann. §35-1-99(3) cut off Mr. Vigos' claim before it had accrued, the Court of Appeals, because it felt it was bound by Avis, states it is a statute of limitations. The Court of Appeals has made a distinction without a difference by stating that Utah Code Ann. §35-1-99(3) is a statute of limitations that acts like a statute of repose. It appears as though the Court of Appeals is stating, "It looks like a rose, it feels like a rose, and it smells like a rose; however, it must be a carnation." Yet, a rose, by any other name, is still a rose. Utah Code Ann. §35-1-99(3) looks like a statute of repose, feels like a statute of repose, and acts like a statute of repose; therefore, it must be a statute of repose and this Court must grant certiorari because Avis and its progeny are denying good, hard working people their constitutional right to pursue their benefits.

Likewise, there must be continuing jurisdiction. If the Industrial Commission does not have continuing jurisdiction when the parties cooperate and the employer/insurance carrier accepts liability and pays benefits, then the Industrial Commission will never have jurisdiction. Alternatively, the Industrial Commission

will be deluged with claims even for the slightest of injury, simply to preserve any potential claims. Therefore, this Court should grant the petition for writ of certiorari because the Court of Appeals has departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

RESPECTFULLY SUBMITTED this 14th day of April, 1997.

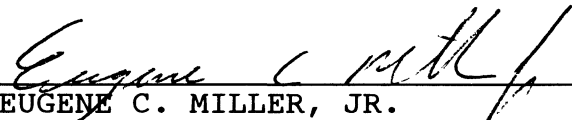

EUGENE C. MILLER, JR.
Attorney for Applicant/Petitioner

CERTIFICATE OF SERVICE

I hereby certify this 14th day of April, 1997 that 4 (to each attorney) true and correct copies of the Petition for Writ of Certiorari were mailed by placing the same in the United States Mail, postage prepaid, addressed as follows:

Richard Sumsion
Teresa J. Mareck
Worker's Compensation Fund of Utah
P.O. Box 57929
Salt Lake City, UT 84157-0929

Alan Hennebold
Industrial Commission of Utah
160 East 300 South
Salt Lake City, Utah 84111



EUGENE C. MILLER, JR.
Attorney for Applicant and Petitioner

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APPENDIX A

FILED

MAR 13 1997

IN THE UTAH COURT OF APPEALS

COURT OF APPEALS

-----ooOoo-----

J. David Vigos,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Petitioner,)	
)	
v.)	Case No. 960283-CA
)	
Industrial Commission of Utah;)	
Mountainland Builders, Inc.;)	F I L E D
and Workers' Compensation Fund)	(March 13, 1997)
of Utah,)	
)	
Respondents.)	

Original Proceeding in this Court

Attorneys: Eugene C. Miller, Jr., Salt Lake City, for Petitioner
Alan Hennebold, Salt Lake City, for Respondent
Industrial Commission
Richard G. Sumsion and Teresa J. Mareck, Salt Lake
City, for Respondents Mountainland Builders and
Workers' Compensation

Before Judges Davis, Greenwood, and Orme.

ORME, Judge:

Employing the logic of Hales v. Industrial Comm'n, 854 P.2d 537 (Utah Ct. App. 1993), it would be possible to conclude that the statute in issue here is a statute of repose because it cut off petitioner's claim for permanent total disability compensation before that claim had actually accrued, i.e., before petitioner was totally disabled. However, Hales concerns another kind of benefit and a different statute. Id. at 539.

The case of Avis v. Board of Review, 837 P.2d 584 (Utah Ct. App. 1992), involves claims for permanent partial disability, id. at 585; essentially the same statute, id. at 586 n.2; and facts which, while different, are not legally distinguishable. See id. at 585. Whether each member of this panel agrees with the rationale and analysis of Avis is beside the point, as we are bound to follow this precedent. See, e.g., State v. Thurman, 846 P.2d 1256, 1269 (Utah 1993).

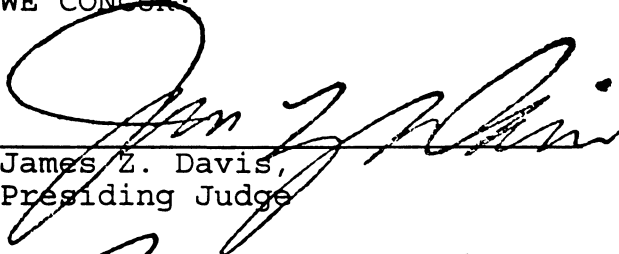
Avis concludes that the statute is a statute of limitations that runs from the time of injury, so long as petitioner knew of the injury, even though petitioner did not realize the extent of the injury and its permanent impact until the statute had run. Avis, 837 P.2d at 588. Given Avis, we are obligated to affirm the Industrial Commission's order denying petitioner's motion for review of the administrative law judge's order of dismissal.

Affirmed.

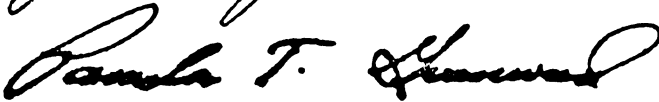


Gregory K. Orme, Judge

WE CONCUR:



James Z. Davis,
Presiding Judge



Pamela T. Greenwood, Judge

APPENDIX B

RECEIVED
95-29-96

THE INDUSTRIAL COMMISSION OF UTAH

J. DAVID VIGOS,	*	
	*	
Applicant,	*	ORDER DENYING
	*	MOTION FOR REVIEW
vs.	*	
	*	
MOUNTAIN BUILDERS, INC.	*	
and THE WORKERS COMPENSATION	*	
FUND OF UTAH,	*	Case No. 95-0597
	*	
Defendants.	*	

J. David Vigos asks The Industrial Commission of Utah to review the Administrative Law Judge's dismissal of Mr. Vigos' claim for benefits under the Utah Workers' Compensation Act.

The Industrial Commission exercises jurisdiction over this motion for review pursuant to Utah Code Ann. §63-46b-12, Utah Code Ann. §35-1-82.53, and Utah Admin. Code R568-1-4.M.

ISSUE UNDER REVIEW

Is Mr. Vigos' claim barred by the statute of limitations found in §35-1-98(2) of the Utah Workers' Compensation Act.

FINDINGS OF FACT

The facts material to the foregoing issue are not in dispute. Mr. Vigos alleges an industrial injury occurring on October 12, 1988. He filed his claim for workers' compensation benefits with the Industrial Commission on July 11, 1995.

ORDER DENYING MOTION FOR REVIEW

J. DAVID VIGOS

PAGE 2

DISCUSSION AND CONCLUSIONS OF LAW

Since July 1 1988, the Utah Workers' Compensation Act has required injured workers to file their claims for disability compensation with the Commission within six years from the date of their industrial accidents. This statute of limitations, now found in §35-1-98(2) of the Act, provides in material part as follows:

A claim for compensation for temporary total disability benefits, temporary partial disability benefits, permanent partial disability benefits, or permanent total disability benefits is barred, unless an application for hearing is filed with the commission within six years after the date of the accident.

Under the plain language of the foregoing statute, Mr. Vigos' claim was barred when he failed to file it with the Industrial Commission within six years from the date of his accident. The Industrial Commission is compelled to conclude, as did the ALJ, that Mr. Vigos claim must be dismissed.

In reaching this conclusion, the Industrial Commission has considered Mr. Vigos' arguments, but finds them unpersuasive. The appellate decisions cited by Mr. Vigos were not decided under the provisions of §35-1-98(2) and are of no value as precedent in this case. As to the argument that the Industrial Commission has continuing jurisdiction over Mr. Vigos' claim, such jurisdiction attaches only when a timely application for benefits has been filed. In this case, Mr. Vigos' application was untimely. Finally, with respect to Mr. Vigos' contention that the time for filing his workers' compensation claim was "equitably tolled" while he pursued his right to Social Security disability compensation, Mr. Vigos admits that this principle has not been accepted before in Utah. The Industrial Commission declines to apply it now, since it is directly contrary to the provisions of §35-1-98(2).


ORDER DENYING MOTION FOR REVIEW
J. DAVID VIGOS
PAGE 3


ORDER

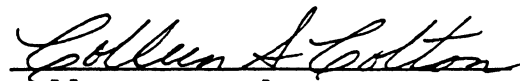
The Industrial Commission affirms the decision of the ALJ and denies Mr. Vigos' motion for review. It is so ordered.

Dated this 28 day of March, 1996.




Stephen M. Hadley
Chairman


Thomas R. Carlson
Commissioner


Colleen S. Colton
Commissioner

NOTICE OF APPEAL RIGHTS

Any party may ask the Industrial Commission to reconsider this order by filing a request for reconsideration with the Industrial Commission within 20 days of the date of this order. Alternatively, any party may appeal this order to the Utah Court of Appeals by filing a petition for review with that court within 30 days of the date of this order.

ORDER DENYING MOTION FOR REVIEW
J. DAVID VIGOS
PAGE 4

CERTIFICATE OF MAILING

I certify that a copy of the foregoing Order Denying Motion For Review in the matter of J. David Vigos, Case No. 95-0597, was mailed first class postage prepaid this 28 day of March, 1995, to the following:

J. DAVID VIGOS
3640 AURORA CIRCLE
SALT LAKE CITY, UTAH 84124

EUGENE C. MILLER JR.
ATTORNEY AT LAW
40 EAST SOUTH TEMPLE, SUITE 300
SALT LAKE CITY, UTAH 84111

RICHARD G. SUMSION
ATTORNEY AT LAW
THE WORKERS COMPENSATION FUND OF UTAH
392 EAST 6400 SOUTH
SALT LAKE CITY, UTAH 84107

Adell Butler-Mitchell
Support Specialist
Industrial Commission of Utah

APPENDIX C

RECEIVED
9-20-95

INDUSTRIAL COMMISSION OF UTAH

Case No. 95599

J. DAVID VIGOS,

Applicant,

vs.

MOUNTAINLAND BUILDERS
INC., and/or WORKERS
COMPENSATION FUND,

Defendants.

ORDER OF DISMISSAL

* * * * *

On July 11, 1995 the applicant filed a claim for temporary total compensation and permanent total disability benefits in the above-entitled matter, alleging the same are the result of the industrial accident of October 12, 1988. Thereafter, the defendant raised the statute of limitations defense of Section 35-1-99(3), Utah Code Annotated. Section 99 requires that a claim for weekly compensation benefits must be filed within six (6) years of the date of the accident or the claim is wholly barred. In this case, the file indicates that the applicant was paid temporary total disability by the defendants for the period October 14, 1988 to May 8, 1989. The defendants also last paid medical expenses for the applicant's claim in July of 1989.

Herein, the applicant filed his claims more than 6 years after the accident, namely on July 11, 1995, when the same should have been filed no later than October 13, 1994. Therefore, as a matter of law the claims for permanent total disability and temporary total disability benefits must be denied as required by the foregoing statute, Section 99.

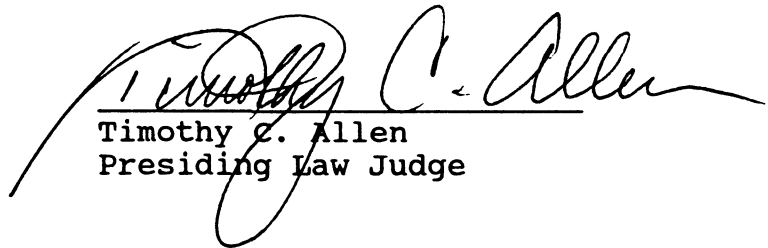
And it appearing that the foregoing constitutes good cause for dismissing the claim,

NOW, THEREFORE, IT IS ORDERED that the claim of the Applicant for permanent total and temporary total disability benefits be, and the same is hereby, dismissed with prejudice.

J. DAVID VIGOS
ORDER
PAGE TWO

IT IS FURTHER ORDERED that any Motion for Review of the foregoing shall be filed in writing within thirty (30) days of the date hereof, specifying in detail the particular errors and objections, and, unless so filed this Order shall be final and not subject to further review or appeal. In the event a Motion for Review is timely filed, the parties shall have fifteen (15) days from the date of filing with the Commission, in which to file a response with the Commission in accordance with Section 63-46b-12(2), Utah Code Annotated.

DATED this 18th day of September, 1995.



Timothy C. Allen
Presiding Law Judge