

1949

The State Insurance Fund v. Elbert I. Lunnan and The Industrial Commission of Utah : Brief of Defendant

Utah Supreme Court

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Recommended Citation

Brief of Respondent, *State Insurance Fund v. Lunnan*, No. 7274 (Utah Supreme Court, 1949).

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE INSURANCE FUND,
administered by the Commission of
Finance of Utah,

Petitioner and Plaintiff,

vs.

ELBERT I. LUNNEN and THE
INDUSTRIAL COMMISSION OF
UTAH,

Defendants.

Case No.
7274

Defendant's Brief

FILED

FEB 4 1949

CLERK, SUPREME COURT, UTAH

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INTRODUCTION

Mr. Elbert I. Lunnan had worked for a period of over twenty years as a welder for Lundin & May Foundry and Machinery Company. In the course of his duties he was placed in a position where he frequently and continually inhaled noxious fumes arising from welding operations. About five years ago he began to experience a shortness of breath and without medical diagnosis assumed that this was in some way connected with the inhalation of the welding fumes. He made complaint to his employer

at that time and on frequent occasions thereafter. The shortness of breath became more pronounced and the claimant had several periods when it was necessary for him to lay off work for several days. In 1947 he contracted pneumonia which resulted in his being away from work for about six weeks. Finally on the 8th day of February, 1948 his shortness of breath became so pronounced that he left work and reported for treatment to Doctors Bauerlein and Hatch. He was advised by Doctors Bauerlein and Hatch that his shortness of breath probably in some way resulted from his inhalation of the welding fumes and he was advised by them that he should not return to his occupation as a welder. However, no specific diagnosis of his trouble was ever made at that time and he was never advised by Doctors Bauerlein and Hatch that his condition would not clear up so that he could carry on some gainful occupation other than as a welder.

At their suggestion he reported to the Industrial Commission and secured certain blanks to be filled out by his physicians. These he turned over to Drs. Bauerlein and Hatch but as a complete diagnosis was never made, these forms were not filed with the Commission at that time. When Drs. Bauerlein and Hatch did not make a complete diagnosis, Mr. Lunnen reported to Dr. Vernon Stevenson on July 9, 1948. After a course of observation, including x-rays, Dr. Stevenson determined on the 28th day of July, 1948 that the claimant's disability arose from certain injury to the lungs and diaphragm which he determined was caused by the inhalation of gasses from

welding operations containing, among other things, chlorine, manganese, phosphorous and chrome. Dr. Stevenson also determined and advised the claimant that his disability was permanent and total and that he would never again be able to carry on gainful employment either as a welder or in any other capacity.

On August 5, 1948 Mr. Lunnen filed a written claim for compensation with the Industrial Commission of Utah. Thereafter a hearing was held on such claim and award was made to Mr. Lunnen. This appeal is taken from such award by the Industrial Commission.

CLAIM WAS MADE WITHIN SIXTY DAYS AFTER DISCOVERY OF THE DISABILITY

In the plaintiff's brief it is maintained that Mr. Lunnen was aware of the cause of his disability at the time he quit work on February 8, 1948. It is true that he was aware in a general way that his illness resulted from the inhalation of welding fumes. This opinion was confirmed almost immediately by Drs. Bauerlein and Hatch. However, such general knowledge is not such knowledge as would advise the defendant of his right to recover under the Occupational Disease Act for two reasons. It will be noted from an examination of Section 42-1a-28 Utah Code Annotated, 1943, that only certain types of industrial diseases are brought within the coverage of the Occupational Disease Act. As no complete diagnosis of the cause of his disability was ever made by Drs. Bauerlein and Hatch, Mr. Lunnen had no means of know-

ing that he was within the scope of the Act. It was not until his examination by Dr. Stevenson that it was determined and he was advised that the chemicals causing his trouble were, among other things, chlorine, manganese, phosphorous and chrome, all of which are included within the list contained in 42-10-28. Furthermore, not until the reports of the x-rays were obtained on July 28th was there anything to indicate that Mr. Lunnen's disability was permanent and total. In order to qualify a claimant for an award under the Occupational Disease Act he must come within the definition "Disablement" as set forth in Section 42-1a-12, Utah Code Annotated, 1943, sub-section 1a. Only where disability is permanent and total may a claimant qualify for an award. It will be observed from an examination of the record that Mr. Lunnen had had to quit work on several other occasions because of irritation of his lungs. However, after a few days rest he had always been able to return to the job and resume his work. There was nothing at the time he quit work on Feb. 8th to indicate that this was not another such occasion and that he would not be able to return to work of some kind after a period of rest.

When he was examined by Drs. Bauerlein and Hatch they advised him not to return to his work as a welder and advised him it would be best for him to move to some warmer and dryer climate. However, there was no indication given to him at this time that his condition would not clear up if he stayed away from the welding operations nor was there any indication that he would not be able to earn a livelihood in some pursuit other than that

of a welder. When the x-ray findings were made known to him it was evident that he had adhesions on his diaphragm which were permanent, that his condition would not clear up and that he could not work in any capacity. Therefore, not until July 28, 1948 was Mr. Lunnen able to determine that he was eligible for an award under the Industrial Disease Act.

Certainly it cannot be said that there was any lack of diligence on his part. He consulted doctors as quickly as he left his employment and when he became dissatisfied with the progress he was making under the first physicians consulted he changed to another doctor.

THE CAUSE OF ACTION UNDER THE INDUSTRIAL DISEASE ACT DOES NOT ARISE UNTIL A CLAIMANT WITH DUE DILIGENCE IS ABLE TO DETERMINE THAT HE HAS A DISABILITY WITHIN THE CONTEMPLATION OF THE STATUTE.

The plaintiff in its brief states that there are no cases decided directly in point with the case now before the court. The defendants are unable to agree with this contention. While there are no cases yet decided by this court there are a number of cases from other jurisdictions passing directly upon the point as to when a cause of action arises and the time begins to run in Workmen's Compensation cases. A case directly in point is the California case of *Marsh v. Industrial Commission of California*, 18 Pac. (2d) 933. In that case the Supreme

Court of California had before it three claims, two death claims and one disability claim. In each case the employee had been engaged in the processing of silica products and had developed a related disease to silicosis. In each case the claim for allowance had been made beyond the statutory period after the last date of employment. The court disallowed one of the death claims on another ground but in passing on the question as to when the time began to run in an occupational disease case so far as the filing of the claim is concerned the court stated:

“From our study of the subject we are brought to the conclusion that in the case of a latent and progressive disease such as pneumoconiosis it cannot reasonably be said that the injury dates necessarily from the last day of exposure to a dust laden atmosphere and that the prescriptive period begins to run from that day. Rather, according to our view, should the date of the injury be deemed the time when the accumulated effects culminating in a disability traceable to the latent disease as the primary cause, and by the exercise of reasonable care and diligence it is discoverable and apparent that a compensable injury was sustained in the performance of the duties of employment.”

Again in the same case the court states:

“Our Compensation Act expressly provides that it shall be liberally construed for the protection of persons injured in the course of their employment, and the purpose of such laws is to protect workmen, in proper cases, from economic insecurity. It is not surprising to find, therefore, that in those jurisdictions where occupational diseases are compensable, it is almost universally

the rule that the injury is not deemed to occur until ascertainable disability results. And it may be noted that in our own state it has been held that an employee is not to be deprived of compensation because he fails to make a correct medical diagnosis.”

In the Nebraska case of *Selders vs. Cornhusker Oil Company*, 1946 N. W. 316, the applicant was injured in the back by debris violently thrown against him by a flood of water. Although the injury was painful and noticeable the claimant, apparently assuming that he had merely been bruised, continued at his work as best he could. The situation got worse and about nine months later he reported to an x-ray technician, who disclosed the fracture of a lumbar vertebra. Application for compensation was made and granted the court holding in spite of a six months limitation that the time began to run not from the date of the injury or disability but from the time of the discovery of the nature and extent of the disability.

In the Nebraska case of *Kostron vs. American Packing Company*, 197 N. W. 615, in awarding compensation after the running of the statute if the time of the running were considered to be at the time of the injury the court stated:

“Accidents frequently occur where the true nature of the injury and the resulting disability are not discernible for a considerable time even with the aid of scientific skill. When latent injuries from accidents do not at first indicate disabilities which are compensable, an employee is not necessarily deprived of compensation under

the Workmen's Compensation Act Compiled Statutes 1922, No. 3056, for failure to demand his rights under the Act before they can reasonably be ascertained."

A Louisiana case almost exactly in point as the case now being considered by the Court is Carroll vs. International Paper Company, La. App., 137 So. 907.

In that case the employee suffered a burn on his lip. The burn itself cleared up but a rather painful lump remained. After a considerable period of time beyond the running of the statute if considered from the date of the injury or from the time of the first appearance of the lump it was determined that the lump was cancer. The court in allowing compensation held that the statute did not begin to run until the nature and extent of the disability was ascertained.

In the Utah case of Salt Lake City vs. Industrial Commission, et al, 140 Pac. (2d) 644 the court is concerned under the Occupational Injury Act with the date of notice to the employer and not with the time of filing of the claim and so the case is not exactly in point. However, it is certainly persuasive in the case now before the court in that case a fireman while playing hand ball in the firemen's gymnasium was struck in the eye with the ball on October 22, 1940. The injury was not thought to be serious and the immediate symptoms cleared up. About six months later, however, he began to have trouble with his eye and about fourteen months after the injury consulted a physician when it was determined that

he was suffering from sarcoma of the choroid and that the only possible treatment was removal of the eye. Application for compensation was filed on March 18, 1942, notice to the employer also being given at about the same time. It was contended by the employer that the compensation should be reduced because of the fact that notice to the employer was not given within the statutory period. The court nevertheless upheld the award in this case.

Another Utah case which is very persuasive in this case now before the court is Salt Lake City vs. Industrial Commission, 74 Pac. (2d) 657:

In that case the caretaker of a golf course was struck in the eye by a golf ball. The injury at first was thought to be not serious. However, later it began to develop and some years later resulted in blindness. It was contended that the date of the injury was the date on which the cause of action arose and the statute began to run. The Supreme Court admitted that such had formerly been the rule in the State of Utah but went on to say:

“This line of cases is based on the Utah Consolidated Mining Company case, which held that the applicant must file his application for compensation for disability within one year from the date of the accident. In this regard we think the opinion in that case and the cases which followed it were in error. Since it does not involve a rule of property on which rights were acquired and maintained we think the error should at this time be rectified. We think Section 104-2-28 Revised Statutes of Utah, 1933, which was at the time of

the decision of the Utah Consolidated Mining Company case known as Section 6468 Compiled Laws of Utah, 1917, was applicable as a statute of limitations but that it begins to run not from the time of accident but from the time of the employer's failure to pay compensation for disability when the disability can be ascertained * * * ”

An interpretation of when disability can be ascertained is contained in the Connecticut case of *Bremmer vs. Mark Edlitz & Sons*, 174 Atl. 172. In that case the court holds that the disability is apparent not when it is obvious that the claimant is disabled but when it is obvious that he is disabled from a particular identifiable disease. The language of the court is as follows:

“The other implication arising out of the case in question is that there must be a clear recognition of the symptoms as being that of the occupational disease in question. However plain is the presence of the symptom itself unless its relationship to the particular disease also appears there can not be said a manifestation of an assumption of that disease.”

While in an ordinary tort case it is true that the general rule is that a cause of action arises at the time of the negligent or wilful act, a clear distinction exists between this case and a tort case as in a tort case the liability is predicted upon the wilful or negligent act or omission of the defendant and therefore his act has come to rest when the act is done. In the case of an occupational disease, however, the liability is not predicted upon any particular act or omission upon the part of the defendant but rather merely upon the ultimate disability

of the employee whether or not there is any fault on the part of the employer. However, even in tort cases there are well recognized exceptions to the general rule. For example in malpractice cases in many jurisdictions the cause of action arises not at the time the doctor commits the wrongful act but at the time of discovery. The following language is found at 54 Corpus Juris Secundum, 143:

“In some jurisdictions an exception to the general rule founded on ignorance of the patient of the disability is recognized, so that limitations do not run until the patient knows, or with reasonable diligence should know, of the injury or cause of disability.”

In support of this position see the California cases of Huysman vs. Kirsch, 57 Pac. (2) 908 and Ehlen vs. Burrows, 124 Pac. (2) 82.

In the case of Huysman vs. Kirsch above cited the California Supreme Court quotes with approval its own decision in the case of March vs. Industrial Commission of California mentioned above with the following language:

“We annulled the awards and held that the date of the injury was not the date of the exposure nor even the date of the last exposure to the dust laden atmosphere but rather the time when the employees became aware that their injuries were due to such exposure or when by the exercise of reasonable care and diligence they might have ascertained that fact. In other words we held that the statute of limitation did not run against these employees until they knew the causes of their

injury or by reasonable care and diligence should have known the cause of their injury. Our decision was amply supported by authorities from many jurisdictions. The principle running through all these authorities and approved by our decision was that the statute of limitation should not run against an injured employee's right to compensation during the time said person was in ignorance of the cause of his disability and could not with reasonable care and diligence ascertain such cause."

If this court were to hold that the time of the running of the statute is when the claimant ceases to work even though the exact nature of this incapacity had not been diagnosed, the only safe course for a person becoming ill and having to quit his job would be to file a claim immediately even though he had no knowledge that his disease was within the scope of the statute. Such certainly could not be the requirement of the legislature. If a man is aware that he has an occupational disease that is within the statute and that he is totally and permanently disabled thereby he should make immediate claim in order to be fair to his employer and to the insurance carrier. If he does not make this claim within the statutory period his right to make it is and should be cut off. Furthermore his right to make such claim should be cut off if he is not diligent in his efforts to determine the nature and extent of his trouble. However, to require a man to submit a claim stating that he is permanently and totally disabled from an occupational disease which is within the scope of the statute before he is, with reasonable diligence, able to determine such facts is merely

requiring a man to perjure himself in order to protect his rights.

One of the occupational diseases recognized by said section 42-1a-28, Utah Code Annotated, 1943, is Dermatitis. Counsel is advised by medical experts that in order to properly diagnose a case of Dermatitis a series of skin tests often extending over a period of several months is required. If it were to be held that a cause of action arises immediately upon the incurrence of the disease the legislature, in the case of Dermatitis, would be giving a man a right of recovery and then immediately taking it away from him by a statute of limitations for the reason that the nature of the disease would prevent him from determining whether or not he could properly make a claim prior to the time his claim was barred by the statute. Such does not appear to be a reasonable interpretation.

This court and many other courts have held that workmen's compensation acts should be liberally construed. Certainly a construction that would require claimant to make a perjured claim in order to protect his rights would not be a liberal construction. Furthermore, if in order to protect their rights every person who becomes ill on the job should be forced to make an immediate claim before he has discovered whether or not his illness was merely temporary and would clear up, the mountainous pile of applications which would necessarily come into the Industrial Commission would place an enormous burden on that commission which it could not bear.

CONCLUSION

There is no question but that Mr. Lunnen is suffering permanent and total disability resulting from the inhalation of fumes containing chlorine, manganese, phosphorous and chrome during the course of his employment nor is there any question that such occupational disease is within the scope of 42-1a-28, Utah Code Annotated, 1943. The only point raised by the petitioner is as to the date of filing of the claim. As Mr. Lunnen's claim was filed in writing with the Industrial Commission well within the sixty days after he had with due diligence been able to discover that he was suffering from an occupational disease within the scope of the statute the award was clearly proper and should be upheld by this court.

Respectfully submitted,

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