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Utah Apex Mining Co and United States Fidelity and Guaranty Company v. The Industrial Commission of Utah and Clarence Petersen : Brief of Appellants

Utah Supreme Court

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Case No. 7282

**IN THE SUPREME COURT
of the
STATE OF UTAH**

UTAH APEX MINING COM
PANY and

UNITED STATES FIDELITY and
GUARANTY COMPANY,

Plaintiffs,

vs.

THE INDUSTRIAL COMMISSION
of UTAH and CLARENCE PETER-
SEN,

Defendants.

FILED
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CLERK, SUPREME COURT, UTAH

BRIEF OF PLAINTIFFS

Utah Apex Mining Company
and

United States Fidelity and Guaranty Company

**EARL GROTH AND ROBERT SPOONER,
SKEEN, THURMAN AND WORSLEY,**

Attorneys for Plaintiffs.

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Defendants.

CASE NO.
7282

BRIEF OF PLAINTIFFS

STATEMENT OF FACTS

(All italics, unless otherwise noted, are plaintiffs')

On May 20, 1931, applicant Clarence Petersen was injured in the course of employment at the Utah-Apex Mining Company at Bingham Canyon, Utah, and sustained, among other injuries, a fractured left knee. The Mining Company at the time of accident carried work-

men's compensation insurance with the United States Fidelity & Guaranty Company, and reported the accident to the Industrial Commission of Utah on May 29, 1931. On December 8, 1933, Clarence Petersen appeared before a Medical Advisory Committee at the Industrial Commission offices at the State Capitol, Salt Lake City, Utah (R.4). The testimony at that time indicated permanent partial disability of fifty per cent as the result of injuries sustained in the accident.

Thereafter, on December 19, 1933, a settlement agreement was executed between Petersen and the Mining and Insurance companies in full compromise of all payments due and to become due for said injuries (R. 51, plaintiffs' exhibit 1). Petersen received from the insurance company on or before December 19, 1933, a total of \$5,197.36, which sum included compensation payments of \$3,076.48 and medical, hospital, nursing, and transportation payments of \$2,120.88 (R. 13).

On July 17, 1948, more than 14 years after the date of the settlement agreement and completion of payments thereunder and more than 16 years after the accident, Petersen for the first time filed an application for compensation resulting from the injury of May 20, 1931. The insurance company declined liability (R. 19), and on August 25, 1948, a hearing on this application was conducted by the Industrial Commission. Thereafter, on November 8, 1948, the Commission filed its decision in the case, the findings and order (R. 28) reading as follows:

FINDINGS

“After hearing the testimony in the case and reviewing the same as set forth in the transcript and other documentary evidence received and made a part of the record, the Commission finds that the applicant became temporarily disabled on December 6, 1947, because of a moderate osteomyelitis at the old point of fusion of the knee joint; that this disability was a result of the injury to the applicant’s left knee on May 20, 1931; that the applicant is therefore entitled to the benefits under the Workmen’s Compensation Act, i.e. payment for temporary total compensation from December 6, 1947 to June 13, 1948; that his permanent partial disability following his release from the hospital and treatment by the doctor was 50% loss of bodily function which was not in excess of the disability rated following the injury on May 20, 1931.

IT IS THEREFORE ORDERED that the defendants pay for all hospital and medical expense incurred in the recent recurrence of the effects of the old injury of May 20, 1931, and compensation as follows:

27 weeks at \$13.41 — 12-6-47 to 6-13-48 — \$362.07”

Mr. Earl J. Groth appeared for the defendants at the hearing on August 25, 1948, and at the outset of the proceedings and prior to the introduction of evidence, objected to the hearing on the ground that the Commission was without jurisdiction because of the statute of limitations, and further because the settlement agree-

ment precluded further claim. The details of the objections are set forth at pages 32 to 34 of the record.

Apparently Petersen returned to work for the Mining Company after the settlement in 1933, and continued to work for that company until April of 1938, although whether this employment ceased because of discharge or the closing of the Utah-Apex Mining Company operations is not clear from the record (R. 40); neither is it clear as to just what he did during the years from 1938 to 1945, although he apparently left Bingham (R. 45). In 1945, he did some leasing work (R. 37), and between that year and December, 1947, he operated a card room at Eureka (R. 40). On December 6, 1947, Petersen entered a hospital at Bingham, Utah, for further treatment to the left knee and leg, and was discharged on June 13, 1948 (R. 47).

The injuries sustained in the accident of May 20, 1931, were of a serious nature and resulted in a permanent partial disability of fifty per cent. During all of the years from 1933 to 1947, when he reentered the hospital, he had had constant trouble with his knee which bothered him all the time (R. 35), and had been operated on in a General Hospital two different times (R. 40) for this knee injury.

Dr. Paul S. Richards of Bingham, Utah, was the attending physician at the time of the original injury, and during the period between the time Petersen returned to work after the accident and the year 1938, treated Petersen's knee every month (R. 44). Dr.

Richards did not again see applicant until September, 1947, when the leg was infected under the area of the old operations at time of injury, which latter infection the Doctor attributed to the old injury (R. 43). The Doctor also testified that upon discharge from the hospital on June 27, 1948, Petersen's condition was about the same as that of the time of discharge immediately after the accident, with the same amount of disability (R. 46).

In confirmation of the file of the Industrial Commission, Petersen testified that the application of July 17, 1948, was the only application he had ever made with the Industrial Commission for compensation (R. 40).

STATEMENT OF ERRORS

Plaintiffs rely upon the following errors:

Error No. 1

That the Industrial Commission of Utah erred in awarding compensation and hospital and medical expense, since claim was not made by defendant within three years from date of accident or date of last payment of compensation, and the claim therefore was barred by the statute of limitations.

Error No. 2

That the Industrial Commission of Utah erred in awarding compensation for 27 weeks at \$13.41 per week

from December 6, 1947, to June 13, 1948, since all temporary total disability must arise within six years of the date of injury and this award was therefore barred by statute of limitations.

ARGUMENT

Error No. 1

For the convenience of the court, section 42-1-92, *Utah Code Annotated* 1943, which is believed to be one of the applicable statutes of limitations of Title 42, is set forth:

“When an employee claiming to have suffered an injury in the service of his employer fails to give notice to his employer of the time and place where the accident and injury occurred, and of the nature of the same, within forty-eight hours, when possible, or fails to report for medical treatment within said time, the compensation provided for herein shall be reduced fifteen per cent; provided, that knowledge of such injury obtained from any source on the part of such employer, his managing agent, superintendent, foreman or other person in authority, or knowledge of any assertion by the injured sufficient to afford an opportunity to the employer to make an investigation into the facts and to provide medical treatment shall be equivalent to such notice; and no defect or inaccuracy therein shall subject the claimant to such reduction, if there was no intention to mislead or prejudice the employer in making his defense, and the employer was not, in fact, so misled or prejudiced thereby. If no notice of the accident and injury is given to the employer within one year

from the date of the accident, the right to compensation shall be wholly barred. If no claim for compensation is filed with the Industrial Commission within three years from the date of the accident or the date of the last payment of compensation, the right to compensation shall be wholly barred''.

The facts of the instant case are free from conflict. Clarence Petersen sustained an injury in the course of employment on May 20, 1931, and pursuant to settlement agreement the last compensation was paid on December 19, 1933. Presumably the matter was closed, until July 17, 1948, at which time *and for the first time*, an application for compensation was filed by Petersen, after a lapse of more than fourteen years.

It will be noted that the statute above quoted provides that a claim for compensation must be filed within three years from the date of the accident or the date of the last payment of compensation. The statute seems clear and unambiguous, and the right to compensation under the facts of the case had long since expired, by July 17, 1948.

A point of inquiry arises relative to the time at which Petersen became aware of a disability as a result of the accident. The evidence clearly establishes that he was not only aware of it from the time of the injury in 1931, but continued to be fully cognizant of his difficulties at all times until he entered the hospital in December of 1947. It will be noted that the settlement agreement itself recognized a disability of fifty percent

in 1933. Between that time and the year 1938, Petersen consulted Dr. Paul Richards monthly for the same injury and complications for which compensation is now asked. After the year 1938, he testified that he was hospitalized at least once in addition to the initial hospitalization. In addition to these undisputed facts, Petersen also stated that during all of the period of time between 1933 and entering the hospital in December of 1947, his knee was constantly bothering him and in a condition which interfered with his employment. This case is clearly one where the employee at all times knew that he had an injury and appreciated the effect of that injury on his employment. It is not a case where the injured employee suddenly discovers that an injury has resulted from an accident, some years after the date of the accident.

The case of *Hallstrom v. Industrial Commission of Utah*, 96 Utah 85, 83 P. 2d 730 (1938) is very similar factually. In that case, Plaintiff Hallstrom was employed as a deputy warden by the State Fish and Game Department, and injured his ankle on April 20, 1931, while cleaning some ponds. He consulted Dr. T. A. Dannenburg and received treatment, although nothing was said of any pain or injury to the left hip. Hallstrom continued his work, and was paid a regular salary, with the result that the compensation awarded was turned over to the Fish & Game Department, and the Doctor bill paid by the State Insurance Fund.

Hallstrom, however, noticed some pain in his left hip a month or so after the accident, which continued

thereafter and also the leg seemed to get shorter. A year later, he obtained a special shoe for the left foot because of this shortening. Nothing was done about the continued hip pains until X rays were taken in February, 1938, which showed a degeneration in the left hip. Compensation was denied, and the court stated at page 730:

“The first question to be determined is whether plaintiff’s application for compensation was filed within the statutory period. Plaintiff asserts that the statute did not commence to run until he discovered that he might be entitled to compensation for the injury to his hip. This discovery was made shortly before the X-ray pictures were taken. Plaintiff claims that as long as he was unaware that he might be entitled to compensation the statute did not run. He relies on the recent decision of this court in *Salt Lake City v. Industrial Commission*, 93 Utah 510, 74 P. 2d 657 to support his argument. The decision in that case held that the statute did not begin to run until there was a disability. The disability or compensable injury as it is sometimes called, gives rise to a duty to pay compensation if the disabled person is entitled to compensation at all. It is not necessary in this case to determine at what stage of the disability the statute would commence inasmuch as the evidence is conclusive that the disability complained of was apparent more than three years before application for compensation was made. According to plaintiff’s own testimony he became aware of pain in his left hip soon after the accident. He testified that this pain continued and his left leg commenced to get shorter until it became necessary to have a special

shoe made for his left foot. This occurred back in 1932, the application was not made for compensation until March, 1938. The mere fact that an applicant does not deduce from an apparent physical infirmity the conclusion that it came from a former accident occurring in industry does not prevent the statute from running.”

The case in effect held that the statute begins to run from the date the disability is known to the employee. While this decision was in 1938, and the statute quoted above was amended in 1939 by the addition of the last sentence thereof, the same reasoning as to the commencement of the right to claim compensation has been followed in subsequent cases. See *Salt Lake City v. Industrial Commission*, 104 Utah 436, 140 P. 2d 644 (1943), although the facts are distinctly different from those of the instant case.

See also *Edwards v. Industrial Commission*, 189 P. 2d 124 (Utah, 1948).

Error No. 2

There is another aspect of the time limitation which deserves consideration. Section 42-1-61 *Revised Statutes of Utah*, 1933 (which so far as we are here concerned is unchanged to the present time, although amendments have been made in some details) reads as follows:

“In case of temporary disability, the employee shall receive 60 per cent of his average

weekly wages so long as such disability is total, not to exceed a maximum of \$16 per week, and not less than a minimum of \$7 per week; provided, that where the wage earned at the time of injury is less than \$7 per week, the amount of wages earned shall be the amount of compensation to be paid. *In no case shall such compensation continue for more than six years from the date of the injury or exceed \$5,000.'*

The *Hallstrom* case, *supra*, clearly indicates that the right to compensation commences at the time the effect of the accident is so apparent as to indicate an injury which is compensable. As has been previously pointed out in detail, Clarence Petersen clearly possessed such knowledge during the early part of the 1930's, and the injury within the meaning of the Compensation Act occurred at that time. The decision of the Industrial Commission rendered November 8, 1948, seems clearly to attempt to provide for compensation for temporary disability more than six years from the date of the injury.

It will be noted that this statute above is a limitation as to the extent, both as to time and amount, on compensation payment. It limits compensation to a six year period following the injury, *or* to the sum of \$5,000 in the event payments during the six years happened to make an award in excess of that sum. It does not, however, permit payments for temporary disability at a time some fourteen years after the injury as the Commission has attempted to do in the instant case.

We are unable to find a Utah case interpreting this statute from the standpoint of the problem here involved, and have likewise been unable to locate a case from another jurisdiction interpreting a similar statute. For this reason, we are unable to refer the court to previous authority. The statute, however, seems so clear that citation of authority is, in any event, unnecessary.

In conclusion, it is submitted that the award of the Industrial Commission cannot be sustained, and that the same should be annulled and set aside.

Respectfully submitted,

Earl Groth and Robert Spooner
Skeen, Thurman and Worsley
Attorneys for Plaintiffs.