

1965

Laurence Vause v. Industrial Commission of Utah, Olsen Welding and Machine Shop, and the State Insurance Fund : Brief of Plaintiff

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FILED

Supreme Court of Utah

**In the Supreme Court of the
State of Utah**

LAURENCE VAUSE,

Plaintiff,

vs.

INDUSTRIAL COMMISSION OF UTAH,
OLSEN WELDING AND MACHINE SHOP,
and the STATE INSURANCE FUND,
Defendants.

CASE
NO. 10876

BRIEF OF PLAINTIFF

Petition for Review of Decision and Order of the
Industrial Commission of the State of Utah

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TABLE OF CONTENTS

	Page
STATEMENT OF KIND OF CASE	1
DISPOSITION IN INDUSTRIAL COMMISSION ...	1
RELIEF SOUGHT IN SUPREME COURT	2
STATEMENT OF FACTS	2
STATEMENT OF POINTS.....	9
ARGUMENT	10

POINT I

THE INDUSTRIAL COMMISSION OF UTAH ERRED IN FINDING THAT THE CLAIM OF THE PLAINTIFF HEREIN, LAURENCE VAUSE, WAS BARRED BY THE STATUTE OF LIMITATIONS, §5-2-48(b), U.C.A., 1953.....	10
--	----

POINT II

THE INDUSTRIAL COMMISSION ERRED IN FINDING THAT PLAINTIFF'S DISABILITY IS NOT THE RESULT OF AN OCCUPATIONAL DIS- EASE	15
--	----

POINT III

THE INDUSTRIAL COMMISSION ERRED IN FAILING TO FIND THAT THE PLAINTIFF'S DIS- ABILITY COMMENCED MARCH THE 2nd, 1963, AND SAID INDUSTRIAL COMMISSION ERRED IN FAILING TO FIND ANY SPECIFIC DATE OF DIS- ABILITY AT WHICH TIME THE STATUTE OF LIMITATIONS COMMENCED TO RUN.....	22
--	----

POINT IV

THE PLAINTIFF QUALIFIES FOR COMPEN- SATION UNDER 35-2-27(27) and (28), U.C.A., 1953	24
--	----

TABLE OF CONTENTS (continued)

Page

POINT V

INDUSTRIAL COMMISSION AND THE MEDICAL PANEL ERRED AND FAILED TO COMPLY WITH 35-2-29 AND 35-2-250, U.C.A., 1953.....	30
---	----

POINT VI

INDUSTRIAL COMMISSION ERRED IN FAILING TO MAKE A FINDING AS TO WHETHER OR NOT THE CONDITION OF MR. VAUSE, THE PLAINTIFF, IS SILICOSIS OR THE OTHER DISEASE AS IS COMPENSIBLE UNDER THE UTAH STATUTE UNDER 35-2-27(27) AND (28), U.C.A., 1953; THAT THE INDUSTRIAL COMMISSION ERRED IN FAILING TO MAKE A FINDING AS TO THE EXACT DATE OF THE DISABILITY OF THE PLAINTIFF	31
CONCLUSION	32

CASES CITED

American Mud & Chemical Co. and American Surety Co. vs. Industrial Commission of Utah, 398 P. 2d 889	20
Ban & Kariya Company vs. Industrial Commission, 67 Utah 301, 247 P. 490.....	14
Brown vs. St. Joseph Lead Co., 887 P. 2d 1000, 60 Idaho 49	26
Mercatant vs. Michigan Steel Casting Company, 31 NW 2d 712	26
Silver King Coalition Mine vs. Industrial Commission of Utah, 268 P. 2d 689.....	28
Specific Employers Insurance Company vs. Industrial Commission of Utah, 108 Utah 123, 157 P. 2d 800	27
State Insurance Fund vs. Industrial Commission of Utah, 209 P. 2d 558.....	23

TABLE OF CONTENTS (Continued)

	Page
Svoboda vs. Mandler, 275 NW 599.....	26
Utah Carbon Coal Company vs. Industrial Commission, 104 Utah 567, 140 P. 2d 469.....	27
Utah Delaware Mining Company vs. Industrial Com- mission, 76 Utah 187, 289 P. 94.....	14
STATUTES CITED	
Utah Code Annotated 1943, 42-la-49.....	23
Utah Code Annotated 1953:	
35-2-12(a)	13
35-2-27(27) and (28)	24
35-2-28	25
35-2-29	27, 30
35-2-48(a) and (b)	12
35-2-50	30

In the Supreme Court of the State of Utah

LAURENCE VAUSE,

Plaintiff,

vs.

INDUSTRIAL COMMISSION OF UTAH,
OLSEN WELDING AND MACHINE SHOP,
and the STATE INSURANCE FUND,
Defendants.

**CASE
NO. 10376**

BRIEF OF PLAINTIFF

STATEMENT OF KIND OF CASE

This was a claim of an occupational disease under the Industrial Act filed by the plaintiff herein, with the Industrial Commission of Utah. The claim of the plaintiff is that of an occupational disease known as silicosis under 35-2-27 (27) U.C.A., 1953, or other occupational diseases as provided for in 35-2-27 (28) U.C.A., 1953.

DISPOSITION IN INDUSTRIAL COMMISSION

The Industrial Commission adopted a medical panel report which found, after examination of the plaintiff,

that the plaintiff was 100% disabled from arteriosclerosis, arterio hypertension, sclerotic and hypertensive heart disease, angina pectoris, chronic bronchitis and lung fibrosis and pulmonary emphysema. The Medical Panel reports stated that the disability was combined non-industrial causes. The Industrial Commission in its order and findings ruled that the disabilities of the plaintiff were non-occupational diseases. The Industrial Commission further ruled that plaintiff's claim was barred by the statute of limitations, 35-2-48, U.C.A., 1953. The Industrial Commission failed to make a finding as to the date of the disability of the plaintiff.

RELIEF SOUGHT IN SUPREME COURT

The plaintiff seeks a review of the decision and order of the Industrial Commission of the State of Utah and petitions the Supreme Court, that upon a review of the records and the merits of this case to make an Order granting plaintiff compensation under the Industrial Act under the State of Utah as provided by law, and making an Order that the plaintiff is entitled to compensation under the Industrial Act of the State of Utah by virtue of the occupational diseases suffered by the plaintiff in the course of his employment, and to remand the matter to the Industrial Commission of the State of Utah to comply with said Order.

STATEMENT OF FACTS

On January the 28th, 1953, the plaintiff was given a medical examination for employment with the Wheelwright Construction Company for work at the Hillfield Air Force

Base near Ogden, Utah; said physical examination disclosed the lung and heart of Mr. Vause to be in good condition, that he could work around dust, fumes, smoke or gases, and the only impairment was the potential bilateral hernia (R. 3, 5, 6, 7). Plaintiff commenced working for Olsen Welding & Machine Shop Company in the capacity of a welder in the month of May, 1953, in which he continued to March the 2nd, 1963 (R. 3). On August 17, 1961, plaintiff visited and made an office call to Douglas C. Barker explaining of a primary problem of progressive inability to breath for over three years (TR. 99). Dr. Barker saw and examined Mr. Vause many times subsequent to August the 17th, 1961. The primary problem which was sought to be treated was shortness of breath with exertion while he was working around the fumes of his welding occupation (TR. 101). Plaintiff continued to work at his employment despite his physical condition. It was not until March 2nd, 1963, that Dr. Barker examined the plaintiff by reason of severe chest pains and that there had been no previous complaints by the plaintiff to Dr. Barker concerning said plaintiff until March 2nd, 1963 (TR. 101). Dr. Barker was not aware of any heart condition of Mr. Vause, the plaintiff, until the month of February, 1963 (TR. 103). Plaintiff was hospitalized on February 22, 1963, and again on April 29, 1963 (TR. 104). On April 24, 1963, plaintiff filed a statement regarding accident with State Insurance Fund of the State of Utah describing the date of the accident as of March 2nd, 1963, and describing a lung and heart condition (R. 4). This application to the State Insurance Fund was made upon advice of state employees that this was the place to file a claim of this type of dis-

ability. After a prolonged period of not having heard from the State Insurance Fund on his application, the plaintiff sent a letter, together with a printed occupational disease claim of employee which was filed with the Industrial Commission of Utah and dated June 7th, 1963, and received by the Industrial Commission of Utah on June 8th, 1963, in which Mr. Vause, the plaintiff, described the same conditions and also the same information that he submitted to the State Insurance Fund on April 24, 1963; that said letter requested Industrial Commission to meet with the State Insurance Fund on the matter and advise Mr. Vause the status thereof (R. 2, 3). On June 18th, 1963, the State Insurance Fund advised the Industrial Commission by letter that it was still investigating the case and would notify the Industrial Commission of its position after it had completed its investigation (R. 10). On August 21, 1963, Thomas S. Taylor, attorney for the plaintiff, wrote to the Industrial Commission of the State of Utah reciting that the plaintiff, Mr. Vause, had not heard from the State Insurance Fund until May 31, 1963, at which time Mr. Vause was informed by State Insurance Fund that they did not know whether his condition was under a Workmen's Compensation Law or under the Occupational Disease Law; and during this interim of time, several medical report statements had been quoted to the State Insurance Fund and requesting an opportunity to be heard before the Industrial Commission (R. 19, 20). On September 12, 1963, the Industrial Commission wrote to the State Insurance Fund advising them that the plaintiff, Mr. Vause, would be examined by its medical panel on October 5, 1963 (R. 22). On September 12, 1963, Mr. Vause, plaintiff, was

advised and requested by the Industrial Commission of Utah to report to the Wasatch Pathologic Laboratories for a series of laboratory tests and to report on October the 5th, 1963, in Salt Lake City for a complete physical examination by the Medical Panel (R. 23). On August 5, 1963, the Medical Panel made its report on the plaintiff, which report stated that the plaintiff was 100% disabled but that the disability was caused by non-occupational causes and that his medical condition was arteriosclerosis, arterio hypertension; sclerotic and hypertensive heart disease; angina pectoris; chronic bronchitis and lung fibrosis, and pulmonary emphysema. That said disability was from combined industrial causes (R. 30). Plaintiff was advised of the findings of the medical panel and a copy of the same sent to the plaintiff on October 25, 1963 (R. 33). On November 8, 1963, plaintiff through his attorney, timely objected to the medical panel findings except that no exception was made to the 100% disability found by the medical panel; stating that it was the plaintiff's position that his disability was industrially caused and requesting a formal hearing before the Industrial Commission (R. 35, 36). On June 3, 1964, plaintiff's attorney once again requested a hearing before the Industrial Commission, reciting factual information and enclosing a copy of the previous medical report of Mr. Vause, the plaintiff, which shows his lungs and heart condition to be good at the time that he worked for Wheelwright Construction Company at Hillfield Air Force Base near Ogden, Utah (R. 43, 44, 45). On August 15, 1964, the medical panel sent down another medical report reciting the same information as the former medical panel report (R. 46). On September 21, 1964, the plain-

tiff, through his attorney, timely filed a second objection to the medical panel report except that no objection was made to the 100% disability found and, once again requesting before the Industrial Commission (R. 49). A hearing was finally granted by the Industrial Commission and was heard September the 16th, 1964, in Salt Lake City, Utah (R. 53). At the time of the hearing, Dr. Barker testified for and on behalf of the plaintiff and testified that in his opinion it was within the realm of reasonable probability that pulmonary emphysema would contribute to or aggravate the condition diagnosed as angina pectoris (TR. 106). Dr. Barker further testified that the environment in which the plaintiff, Mr. Vause, was working as a welder in the fumes and the dust that existed during his employment, that such a condition and environment would either cause or aggravate pulmonary emphysema (TR. 107, 108). Dr. Barker further testified that pulmonary emphysema and angina pectoris are both disabling conditions so far as the welding trade occupation of the plaintiff is concerned. Dr. Barker further testified that there was a relationship between the pulmonary emphysema and angina pectoris (TR. 109). Dr. Elmer M. Kilpatrick, one of the medical panel experts, testified that one can not entirely divorce the respiration system from the circulatory system because they work together as a unit to produce the necessary ingress and egress of air, diffusion of gases, circulation of blood, diffusion of waste products and gases, and etc (TR. 61). Dr. Kilpatrick further testified that it was difficult to figure out exactly the percentage attributable to each diagnosis in the case of the plaintiff, Mr. Vause, that is pulmonary emphysema and angina pectoris (TR. 61). Dr.

Kilpatrick further testified that it was very likely that the plaintiff would not dwell on the infections he had had, which would be infections in the lungs developing pulmonary emphysema (TR. 62). Dr. Kilpatrick further states that the things like dust, field dust, house dust, chemical and physical agents, car exhaust fumes, paints, various things in a category of inhalents aggravate and cause such respiratory conditions; that these chemicals and physical irritants can be an aggravator to the end product on the bronchial condition (TR. 64). Dr. Kilpatrick states that a disease such as pulmonary emphysema becomes disabling as a matter of degree and depending upon the person's own motivation to work (TR. 75). Dr. Kilpatrick admits that pulmonary emphysema is a disabling disease and can be a totally disabling disease (TR. 74). Dr. Kilpatrick testified that pulmonary emphysema can either be caused or aggravated by inhalation of silicate dust, metal dust, welding fumes, and other things of this nature (TR. 76). Dr. Kilpatrick testified that chronic bronchitis and lung fibrosis, either of them can be caused or aggravated by the inhalation of silicate dust, metal dust, welding fumes and things of that nature (TR. 77). Dr. Kilpatrick testified that in the case of the plaintiff, the pulmonary emphysema did aggravate the condition described as angina pectoris (TR. 79). Dr. Ernest Wilkinson testified for and on behalf of the plaintiff at the Industrial Commission hearing that in his opinion the pulmonary emphysema and chronic lung disease slowly progressed over the years and that employment environment of dust and fumes was a contributing factor and an aggravating cause of the coronary insufficiency (TR. 89). Dr. Wilkinson further testified that

in his opinion welding fumes, metal dust, silicate dust, infection, environment did aggravate the condition known as pulmonary emphysema and angina pectoris (TR. 92). Mr. Ross D. Holmes, a fellow employee of plaintiff, testified for and on behalf of the plaintiff as to the environment in which Mr. Vause was working for 8 years, which consisted of a poorly ventilated building in which welding fumes, metal dust, and silicate and sand dust were present during the working hours of the plaintiff (TR. 120). Mr. Holmes observed the necessity for the plaintiff to stop working intermittently and go outside and get fresh air and observed on March the 2nd, 1963, that Mr. Vause became violently ill and had to leave work; that Mr. Olsen, the employer, was there at the time and observed the same (TR. 120, 121, 122). Mr. William Deamudeen, a fellow employee of plaintiff, testified that the work performed by the plaintiff consisted of grinding upon metal which had considerable cement and had sand and gravel on the same (TR. 125). Mr. Deamudeen described in detail the difficult working conditions and the poor ventilation in which there was dust and fumes also continuously present during the working hours of the plaintiff (TR. 126). The plaintiff himself testified the grinding wheels used to grind down the welding projects in which dust and fumes emitted during the working hours consisted of silicate carbide and other types containing silicate that created dust and filled the lungs of the plaintiff during his working hours (TR. 129, 130). Plaintiff testified that he never had any heart problems that he was aware in his lifetime except after working for Olsen Welding and Machine Shop Company, that his lungs did not bother him until he commenced work.

ing for Olsen Welding & Machine Shop Company (TR. 131, 132).

STATEMENT OF POINTS

POINT I

THE INDUSTRIAL COMMISSION OF UTAH ERRED IN FINDING THAT THE CLAIM OF THE PLAINTIFF HEREIN, LAURENCE VAUSE, WAS BARRED BY THE STATUTE OF LIMITATIONS, 35-2-48 (b) U.C.A. 1953.

POINT II

THE INDUSTRIAL COMMISSION ERRED IN FINDING THAT PLAINTIFF'S DISABILITY IS NOT THE RESULT OF AN OCCUPATIONAL DISEASE.

POINT III

THE INDUSTRIAL COMMISSION ERRED IN FAILING TO FIND THAT THE PLAINTIFF'S DISABILITY COMMENCED MARCH THE 2nd, 1963, AND SAID INDUSTRIAL COMMISSION ERRED IN FAILING TO FIND ANY SPECIFIC DATE OF DISABILITY AT WHICH TIME THE STATUTE OF LIMITATIONS COMMENCED TO RUN.

POINT IV

THE PLAINTIFF QUALIFIES FOR COMPENSATION UNDER (35-2-27) (27) AND (28) U.C.A 1953.

POINT V

INDUSTRIAL COMMISSION AND THE MEDICAL PANEL ERRED AND FAILED TO COMPLY WITH 35-2-29 AND 35-2-50 U.C.A. 1953.

POINT VI

INDUSTRIAL COMMISSION ERRED IN FAILING TO MAKE A FINDING AS TO WHETHER OR NOT THE CONDITION OF MR. VAUSE, THE PLAINTIFF, IS SILICOSIS OR THE OTHER DISEASE AS IS COMPENSIBLE UNDER THE UTAH STATUTE UNDER 35-2-27 (27) AND (28) U.C.A. 1953; THAT THE INDUSTRIAL COMMISSION ERRED IN FAILING TO MAKE A FINDING AS TO THE EXACT DATE OF THE DISABILITY OF THE PLAINTIFF.

ARGUMENT

POINT I

THE INDUSTRIAL COMMISSION OF UTAH ERRED IN FINDING THAT THE CLAIM OF THE PLAINTIFF HEREIN, LAURENCE VAUSE, WAS BARRED BY THE STATUTE OF LIMITATIONS, 35-2-48 (b) U.C.A. 1953.

On March the 2nd, 1963, Mr. Laurence Vause was working for Olsen Welding & Machine Shop, and had been working for said employer in the capacity of a welder from May of 1955 to and including March the 2nd, 1963 (R. 3). On August the 17th, 1961, Mr. Vause visited and made an office call to Dr. Douglas C. Barker, complaining of a primary problem as progressive inability to breathe for over three years (TR. 99). Dr. Barker saw and examined Mr. Vause many times subsequent to August the 17th, 1961. The primary problem which was sought to be treated was shortness of breath with exertion when he was working around the fumes of his welding occupation (TR. 101). It was not until March the 2nd, 1963, that Dr. Barker ex-

amined Mr. Vause by reason of severe chest pains and that there had been no previous complaints by Mr. Vause to Dr. Barker concerning chest pains until March the 2nd, 1963 (TR. 101). Dr. Barker was not aware of any heart condition of Mr. Vause until the month of February, 1963 (TR. 103). Mr. Vause was hospitalized on February the 22nd, 1963, and again on April the 29th, 1963, for his heart condition and the pain in his chest (TR. 104). On April 24th, 1963, Mr. Laurence Vause filed a statement regarding accident with the State Insurance Fund of the State of Utah describing the date of accident as of March the 2nd, 1963, and describing a lung and heart condition (R. 4). This application to the State Insurance Fund was made upon advice of the state employees that this was the place to file a claim for this type of disability. After a prolonged period of not having heard from this State Insurance Fund on his application, Mr. Vause sent a letter together with a printed occupational disease claim of employee which was filed with the Industrial Commission and dated June the 7th, 1963, and received by the Industrial Commission on June the 8th, 1963, in which Mr. Vause described the same conditions and also the same information that he submitted to the State Insurance Fund on April the 24th, 1963; that said letter requested the Industrial Commission to meet with the State Insurance Fund on the matter and advise Mr. Vause the status thereof (R. 2, 3). On June the 18th, 1963, the State Insurance Fund advised the Industrial Commission by letter that it was still investigating the case and would notify the Industrial Commission of its position after it had completed its investigation (R. 10).

35-2-48, U.C.A. 1953 reads as follows:

35-2-48 Limitation — Rights barred if not filed within limits. The right to compensation under this act for disability or death from the occupational disease shall be forever barred unless written claim is filed with the commission within the time as in this section hereinafter provided:

(a) If the claim is made by an employee and based upon silicosis it must be filed within one year after the cause of action arises.

(b) If the claim is made by an employee based upon a disease other than silicosis it must be filed within sixty days after the cause of action arises, except in case of benzol or its derivatives when it must be filed within ninety days.

The Industrial Commission has made no finding whatsoever on the question as to whether or not the medical condition of Mr. Vause, the plaintiff, was that of silicosis in which subsection (a) of 35-2-48 would apply as to the statute of limitations, or whether the medical condition of Mr. Vause was a disease other than silicosis in which subparagraph (b) of 35-2-48 would apply so far as the statute of limitations is concerned.

Plaintiff earnestly submits to the Court that the plaintiff has complied with the statute of limitations, 35-2-48 (a) and (b). Dr. Barker, the attending physician, testified that there were discussions and examinations of Mr. Vause prior to March the 2nd, 1963, concerning a lung condition and emphysema condition but that Mr. Vause did not quit and did not terminate his work as a result of these conditions until March the 2nd, 1963 (TR. 111, 112). The disability, occurring at the time of the heart attacks, is the time for the commencement of the running

of the statute of limitations. There is no question but what Mr. Vause, the plaintiff, had a lung condition build up and develop gradually during the time of his employment with Olsen Welding and Machine Shop, but that he was not disabled until March the 2nd, 1963. The testimony of the medical doctors examined at the time of the hearing are replete with information which indicate that the breathing of the fumes and the dust and the dirt at the place of employment activated a condition in the lungs of Mr. Vause that had been building up over a period of time. March the 2nd, 1963, being the date of disability, the sixty-day period under 35-2-48 (b) would not expire until sixty days after March the 2nd, 1963, or May the 2nd, 1963. The application was filed by the plaintiff with the State Insurance Fund on April the 24th, 1963, within this sixty day period. 35-2-12 U.C.A., 1953, reads in part as follows:

- (a) " 'Disablement' means the event of becoming physically incapacitated by reason of an occupational disease as defined in this act from performing any work for remuneration or profit. Silicosis, as defined in this act, when complicated by active pulmonary tuberculosis, shall be presumed to be total disablement. 'Disability,' 'disabled,' 'total disability,' or 'totally disabled' shall be synonymous with 'disablement,' but they shall have no reference to 'partial permanent disability.' "

It is clear from the above Statute that the Plaintiff herein, Mr. Vause, was not actually "disabled" until he was in fact physically incapacitated by reason of the occupational disease from performing any work for remuneration or profit. This did not occur to Mr. Vause until March

2, 1963, the date that he finally terminated from Olsen Welding and Machine Shop Company. Even though there was a progressive deterioration in the lungs over a period of his employment with Olsen Welding and Machine Shop Company, he was not in fact "disabled" as provided by the Statute until he was in fact terminated from his employment and in fact received no remuneration from his work or any other source that he was entitled to under the Industrial Act. The evidence is uncontroverted and undisputed that Mr. Vause, the Plaintiff, was not disabled until March 2, 1963.

This Court has held in the case of *Ban & Kariya Company vs. Industrial Commission*, 67 Utah 301, 247 P. 490, that the State Insurance Fund is not itself a corporation nor any other legal entity; it is but a quorum of the department of machinery set up by the Workmen's Compensation Act under the control and management of the Industrial Commission.

In the case of *Utah Delaware Mining Company vs. Industrial Commission*, 76 Utah 187, 289 P. 94, this Court has ruled that an application for compensation filed with the State Insurance Fund within the statutory period of one year after the accident, addressed to both the State Insurance Fund and to the Industrial Commission setting forth all necessary jurisdictional facts with the State Insurance Fund, so called, and making claim for compensation, this has the same effect as if it had been directly filed with the Industrial Commission or with its secretary or clerk.

It is clear from the above authority, which has not been overruled, that the filing of the claim of the plaintiff

herein with the State Insurance Fund on April the 24th, 1963, does comply with 35-2-48 (b) U.C.A. 1953. The filing of the claim with the Industrial Commission by the plaintiff on June 7th, 1963, complies with 35-2-48 (a), the disability period beginning March the 2nd, 1963. The plaintiff respectfully submits to the Court that the plaintiff has complied with the statute of limitations as provided for in 35-2-48 (a) and (b) U.C.A. 1953. That the plaintiff was not "disabled" as defined by 35-2-12 (a) U.C.A. 1953 until March 22, 1963.

POINT II

THE INDUSTRIAL COMMISSION ERRED IN FINDING THAT PLAINTIFF'S DISABILITY IS NOT THE RESULT OF AN OCCUPATIONAL DISEASE.

In the order of the Industrial Commission there is no factual information recited upon which the order of the commission was made and that it found that the applicant's disabilities was caused by non-occupational diseases. The plaintiff, Mr. Vause, went to work for Olsen Welding & Machine Company in May, 1955, and continued his employment to March 2, 1963 (TR. 3). In January 28, 1953, the plaintiff was given a medical examination for employment with the Wheelwright Construction Company for work on the Hill Airforce Base near Ogden, Utah (TR. 3, 5). The physical examination reported the lungs and heart of Mr. Vause to be in good condition and that he could work around dust, fumes, smoke or gases, and the only impairment being a potential bilateral hernia. The report specifically states his lungs to be clear and in good condition (R. 5, 6, 7). Dr. Barker first saw Mr. Vause, the plaintiff, on August 17, 1961. Dr. Barker states that

on that date, August 17, 1961, Mr. Vause had considerable symptomatology so far as pulmonary emphysema was concerned; that the first time Dr. Barker was aware of any heart condition was in February, 1963 (TR. 103). The symptomatology for pulmonary emphysema was after Mr. Vause had worked for Olson Welding & Machine Company for five years. The heart condition of Mr. Vause was not apparent until just prior to the time Mr. Vause terminated with Olson Welding & Machine Shop Company on March 2, 1963. Dr. Barker testified that in his opinion, within the realm of reasonable medical probability that pulmonary emphysema would contribute to or aggravate the condition diagnosed as angina pectoris (TR. 106). Dr. Barker states that it is even possible pulmonary emphysema can produce anginal pain in and of itself, with underlying sclerotic heart disease, it aggravates it, and it can produce angina pectoris in and of itself (TR. 106). Dr. Barker was asked to give his opinion on whether or not the environment in which Mr. Vause, the plaintiff, was working for Olson Welding & Machine Company for approximately eight years, would either cause or aggravate pulmonary emphysema. Dr. Barker testified that in his opinion such an environment would either cause or aggravate pulmonary emphysema (TR. 107, 108). Dr. Barker further testified that pulmonary emphysema and angina pectoris are both disabling conditions so far as the welding trade and occupation of Mr. Vause, the plaintiff. He further testified that there was a relationship between the pulmonary emphysema and the angina pectoris (109). Dr. Elmer M. Kilpatrick, one of the medical panel experts, stated that one cannot entirely divorce the respiration sys-

tem from the circulatory system because they work together as a unit to produce the necessary ingress and egress of air, diffusion of gases, circulation of blood, diffusion of waste product gases and so forth (TR. 61). Dr. Kilpatrick further states that it is difficult to figure out exactly the percentage attributable to each diagnosis in the case of Mr. Vause, that is pulmonary emphysema and the angina pectoris (TR. 61). Dr. Kilpatrick further testified that it is very likely that Mr. Vause, the plaintiff, would not dwell on the infections he had had, which would be the infections in the lungs developing pulmonary emphysema (TR. 62). Dr. Kilpatrick states that things like dust, field dust, house dust, chemical and physical agents, car exhaust fumes, bud fumes, paints, various things in the category of inhalents aggravate an inherent sensitive respiratory condition. He further states that they know these chemicals and physical irritants can be an aggravator to the end product on this bronchial condition (TR. 63). It is very apparent in reading the testimony of Dr. Kilpatrick that he and the medical panel, in their deliberations on the plaintiff, were considering only the environment in which Mr. Vause, the plaintiff, was welding as a producer or an original cause, and did not consider in their medical findings the environment and working conditions as an aggravating condition for any pre-existing condition. On page 64 of the transcript Dr. Kilpatrick talks about "the actual work exposure for a producer of chronic bronchitis". Dr. Kilpatrick did admit that he and the medical panel found

"we concluded that of course he had some irritating seizures of welding smoke, but the overall comparison of this single feature, compares to all other things to

which he was subject to in his living, infections, daily exposure to fumes, smokes, irritants—that we could not come to a real percentage disability of his work caused relationship." (TR. 65).

There is no evidence before the Court or before the Industrial Commission that Mr. Vause was in any environment outside his employment so far as fumes, smokes, or irritants are concerned. This is clearly an assumption by the medical panel that is not based upon fact on the record. At the time of the hearing of the medical panel on both occasions, the medical panel did not have the hospital records of Mr. Vause before them (TR. 71). At the time of the deliberations of the medical panel they had not examined the premises and did not in fact know the physical condition and environment in which the plaintiff, Mr. Vause, had been working (TR. 71, 72). Dr. Kilpatrick admits the pulmonary emphysema is a disabling disease and can be a totally disabling disease (TR. 74). Dr. Kilpatrick states that a disease such as pulmonary emphysema becomes disabling as a matter of degree and dependent on the person's own motivation to work (TR. 75). Dr. Kilpatrick states that pulmonary emphysema can either be caused or aggravated by the inhalation of silica dust, metal dust, welding fumes, and other things of this nature (TR. 76). Dr. Kilpatrick further states that chronic bronchitis and lung fibrosis, either of them, can be caused or aggravated by the inhalation of silicate dust, metal dust, welding fumes and things of that nature (TR. 77). Dr. Kilpatrick further states that in his opinion in the case of Mr. Vause, the plaintiff, the pulmonary emphysema did aggravate the condition described as angina pectoris in the case of Mr. Vause (TR.

79). According to the records of the medical panel and Dr. Kilpatrick, Mr. Vause became disabled in the medical panel's opinion on March the 2nd, 1963 (TR. 82).

Dr. Ernest Wilkinson first examined Mr. Vause, the plaintiff, on January the 19th, 1960; at that time a physical examination made by Dr. Wilkinson did not disclose any abnormal or unusual condition about the heart of the plaintiff, Mr. Vause (TR. 87, 88). Dr. Wilkinson further testified that the examination showed that the vital lung capacity of Mr. Vause, the plaintiff, was only 70% of the average normal at time of his examination. In the opinion of Dr. Wilkinson he states that the reduction in the oxygen content of the blood as a result of the bronchial and pulmonary emphysema condition of Mr. Vause that the heart is overworked and in an attempt to get additional oxygen and this can aggravate the underlined coronary disease (TR. 88, 89). In the opinion of Dr. Wilkinson the pulmonary emphysema and chronic lung disease slowly progressed over the years and that this was a contributing factor and an aggravating cause of the coronary insufficiency (TR. 89). Dr. Wilkinson further testified in his opinion the welding fumes, metal dust, silicate dust, infection environment did aggravate the condition known as pulmonary emphysema and angina pectoris (TR. 92). Mr. Ross D. Holmes, a fellow employee, testified for and in behalf of the plaintiff, Mr. Vause, as to the environment in which Mr. Vause was working for 8 years consisting of a poorly ventilated building in which welding fumes, metal dust, and silicate and sand dust were present during the working hours of Mr. Vause (TR. 120) Mr. Holmes observed the necessity for Mr. Vause, the plaintiff, to stop

work intermittently and go outside to get fresh air and did in fact observe that on March the 2nd, 1963, Mr. Vause became violently ill while working in the welding shop for Olsen Welding and Machine Shop Company, at which time he was stricken with a severe pain and left the shop; that Mr. Olsen, the employer, was there at that time and observed the same (TR. 120, 121, 122). Mr. William Deamudeen, a fellow employee of Mr. Vause, the plaintiff, testified that work that Mr. Vause performed for Olsen Welding and Machine Shop Co., consisted of grinding wells upon metal which had considerable cement on it which consisted of sand and gravel (TR. 125). Mr. Deamudeen, a fellow employee, described in detail the difficult working conditions and the poor ventilation in which there was dust and fumes almost continuously present during the working hours of the plaintiff, Mr. Vause (TR. 126). Mr. Vause himself testified that the grinding wheels used to grind down the wells in which the dust and the fumes emitted during the working hours consisted of silicate carbide and other types containing silicate that created dust that filled the lungs of Mr. Vause during his working hours (TR. 129, 130). The plaintiff testified that he never had any heart problems that he was aware of in his lifetime except after working for Olsen Welding and Machine Shop Company, and that his lungs did not bother him until after he commenced working for Olsen Welding and Machine Shop Company (TR. 131, 132).

In the recent case of American Mud & Chemical Co. and American Surety Co. vs. Industrial Commission, Feb. 9, 1965, 398 P.2d 889, this Court construed 35-2-48 (a) in a case of silicosis and ruled as follows:

"2. That claimant knew earlier that he had silicosis.

did not establish as matter of law that he knew he had a compensable disease, for purpose of computing limitations on claim."

- "1. Total disability from occupational disease, for purpose of computing limitations unclaimed, refers to disability effecting claimants ability to perform any work with which to support himself and dependents; in each case affect a physical injury or illness differs according to abilities of applicant and statute should not be construed so as to penalize independent or versatile worker."

The facts of the case presently before the Court are clear that the plaintiff, Mr. Laurence Vause, did not discontinue his work when he first found that he had pulmonary emphysema, but continued on working up to the point where he could work no longer; and certainly he should not be penalized for his continuing to work when he was once told by his doctor that he had pulmonary emphysema. In spite of this condition, Mr. Vause continued to work to the point where he became totally disabled. Plaintiff submits that he should not be penalized by his ability and desire to continue working even though he had the physical condition. As the Court pointed in the above case of American Mud & Chemical Co. vs. Industrial Commission, Mr. Vause should not be penalized for his continuance on the job and the important rehabilitation features of the Workmen's Compensation Law should be furthered and encouraged, not discouraged.

In the instant case, as in the case of American Mud & Chemical Co. vs. Industrial Commission, there is no medical opinion that Mr. Vause was totally disabled until about

March 2, 1965, and he was terminated from Olsen Welding & Machine Shop Company.

Plaintiff earnestly submits that the facts and the law are undisputed that plaintiff's 100% disability is a result of an occupational disease to which plaintiff is entitled to compensation.

POINT III

THE INDUSTRIAL COMMISSION ERRED IN FAILING TO FIND THAT THE PLAINTIFF'S DISABILITY COMMENCED MARCH THE 2nd, 1963, AND SAID INDUSTRIAL COMMISSION ERRED IN FAILING TO FIND ANY SPECIFIC DATE OF DISABILITY AT WHICH TIME THE STATUTE OF LIMITATIONS COMMENCED TO RUN.

In its final order dated February the 26th, 1965, the Industrial Commission failed to find the specific date of disability of the plaintiff. It recites specific dates at which time the plaintiff allegedly knew and was informed that he had pulmonary emphysema. It makes no express finding whatsoever as to the date of the cause of action of the plaintiff herein first accrued in order that we can determine how the Industrial Commission reasoned as to its finding that the claim was barred by the statute of limitations. The evidence is clear to the effect that the disease pulmonary emphysema did not reach a disabling stage until the heart attack that occurred at and near March the 2nd, 1963. The plaintiff continued to work on his job during this period of time up to March the 2nd, 1963, except for one week's hospitalization during the month of February, 1963.

In the case of *State Insurance Fund vs. Industrial Commission of Utah*, 1949, 209 P. 2d 558, this Court discussed in some detail the question of the statute of limitations under the 1943 version of 35-2-48 U.C.A., 1953, which is identical to the 1943 statute Section 42-1a-49, U.C.A. 1943. In that case the Court found that the applicant's disease was neither silicosis nor benzol or its derivatives and that the statute of limitations was the 60-day period after the cause of action arose. In that case the applicant was a welder who had been continuously exposed to harmful fumes for the past five or six years in which he has suffered shortness of breath from exposure which had progressively become worse. In that case the applicant laid off work on February the 8th, was advised by his doctor on July 28, that his disability was total and permanent, was the result of his employment exposure and compensable under the act. On August the 2nd, the applicant in that case filed his claim with the commission. The Supreme Court in the above case, 209 P. 2d, at page 560, states as follows:

"The Cause of action arises in this kind of case when the employee suffered compensable disability under the act and could by a reasonably diligence ascertain that his disability was employment cause and by its nature compensable."

In the above case the Supreme Court ruled the facts before the commission were insufficient to determine when the cause of action arose, the award was set aside and the matter was remanded to the Industrial Commission for further action.

Plaintiff earnestly submits to the Court that the evi-

dence before the Court is sufficient to determine that the cause of action arose March the 2nd, 1963; that the Industrial Commission failed to find this as the disability date or any other disability date. The plaintiff in this matter continued to work, and was not in fact disabled even though he had a progressive pulmonary emphysema condition until approximately March the 2nd, 1963. The employer in this case did not refuse to pay the money until after the plaintiff herein was terminated from his employment and until after application was made by the plaintiff to the Industrial Commission. So under the ruling of the State Insurance Fund vs. Industrial Commission, 209 P. 2nd 558, 1963, Mr. Vause was not disabled until March 2, 1963; the date he was terminated from his employment, which date is within the sixty-day period of the statute of limitations and certainly within the one-year period of statute of limitations. Plaintiff submits the cause of action under the above authority does not commence until there is a disability, him being unable to work, and a duty there arising upon the employer to pay the compensation as required by law. This did not occur in the instant case before the Court until about March the 2nd, 1963. The employer did not discontinue payments as an employee until about that date. That under 35-2-12 (a) U.C.A., 1953, plaintiff was not "disabled" until March 2, 1963.

POINT IV

THE PLAINTIFF QUALIFIES FOR COMPENSATION UNDER (35-2-27) (27) AND (28) U.C.A 1953.

35-2-27, U.C.A., 1953, reads in part as follows:

35-2-27. Occupational diseases. For the purposes of this act only the diseases enumerated in this Section shall be deemed to be the occupational diseases;

(27) silicosis

(28) Such other diseases or injuries to health which directly arise as a natural incident of the exposure occasioned by the employment, provided however, that such a disease or injury to health shall be compensable only in those instances where it is shown by the employee or his dependents that all of the following named circumstances were present: (1) a direct causal connection between the conditions under which the work is performed and the disease or injury to health; (2) the disease or injury to health can be seen to have followed as a natural incident of the work as a result of the exposure occasioned by the employment (3) the disease or injury to health can be fairly traced to the employment as to the proximate cause; (4) the disease or injury to health is not of a character to which the employee may have had substantial exposure outside of the employment; (5) the disease or injury to health is incidental to the character of the business and not independent of the relation of the employer and employee; and (6) the disease or injury to health must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a natural consequence, though it need not have been foreseen or expected before discovery. No disease or injury to health shall be found compensable where it is of a character to which the general public is commonly exposed.

35-2-28, U.C.A., 1953. "silicosis defined.

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.

Plaintiff respectfully submits to the Court that the grinding material used in the welding occupation of the plaintiff, Mr. Vause, contained silicon dioxide dust, as well as other materials. That in addition to the silicon dioxide dust there was metal dust, and other fumes caused from the welding operation (TR. 125, 126, 129, 130). The medical panel in its report to the Industrial Commission did not define whether or not the condition of Mr. Vause was silicosis, apparently for the reason that they erroneously concluded the disability was from non-industrial causes (TR. 30). There is not evidence to controvert and there is substantial and a preponderance of the evidence to prove that silicon dioxide was a part of the dust and fumes in the environment which would qualify the condition known as "silicosis" under the above statute.

In the case of Svoboda vs. Mandler, 275 N. W. 599, Nebraska, holds that the whole term of the disease silicosis covers most metallic and mineral particles and describes them as "Tneumoconiosis". In the case of Brown vs. St. Joseph Lead Co., 887 P. 2nd 1000, 60 Idaho 49, the Court there ruled that silicosis defined as Tneumoconiosis is due to the inhalation of the dust of stone, sand or flint. It further states that Tneumoconiosis is a lung disease attended by fibroid induration and pigmentation. In the case of Mercatant vs. Michigan Steel Casting Company, 1948 Michigan, 31 N. W. 2nd, 712, the Court held a claimant who was totally disabled from silicosis was properly awarded compensation for disability due to Tneumoconiosis, caused by

cutting, crushing, grinding or polishing metal on ground that term "Pneumoconiosis" as used in the Workmen's Compensation Act, and included "silicosis" as against employers contentions that silicosis is not compensable unless contracted in mining. The Utah act, 35-2-28, U.C.A., 1953, defines a condition that appears to be compatible in line with the medical condition as described by the doctors in this case.

In the case of Specific Employers Insurance Company vs. Industrial Commission, 108 Utah 123, 157 Pacific 2nd 800, this Court held that 35-2-28, U.C.A., 1953, applied to a case of silico-tuberculosis contracted from exposure to silicon dioxide dust. In the case of Utah Carbon Coal Company vs. Industrial Commission, 104 Utah 567, 140 Pacific 2nd 469, the Supreme Court ruled that there was ample evidence to support the commission in its finding that there was silicosis and the symptoms of silicosis with super imposed tuberculosis. Plaintiff respectfully submits the same factual situation is here and that there is ample evidence and a preponderance of the evidence that the condition of Mr. Vause, the plaintiff, is and does qualified under 35-2-28, U.C.A., 1953, as silicosis.

35-2-29, U.C.A., 1953, states as follows:

"In case of disability or death from silicosis complicated with tuberculosis of the lungs, compensation shall be payable as for disability or death from uncomplicated silicosis. In case of disability or death from silicosis when complicated with any disease other than pulmonary tuberculosis, compensation shall be reduced as provided in Section 35-2-50."

Plaintiff further testified that he was in the hospital in March, 1963, he coughed up out of his lungs foreign ma-

terials that looked like rust and black dirt (TR. 135). Plaintiff testified that prior to the time that he went to work for Olsen Welding & Machine Shop Company he did not have any similar dust environment that he had while working for Olsen Welding & Machine Shop Company (TR. 135). Mr. Vause, the plaintiff, testified that the dust that he breathed while on the job for Olsen Welding and Machine Shop Company consisted of cast iron and silicate dust from the grinding materials (TR. 138). The exhibits in the form of photographs in the transcript at page 139 and 140 illustrate the poor working conditions and the poor ventilating conditions under which Mr. Vause worked for Olsen Welding & Machine Shop Company. Dr. Barker submitted his medical reports illustrating and describing the emphysema, bronchitis and bronchial asthma developed secondary to inhalation to fumes from electric welder (TR. 142, 143, 144).

Plaintiff respectfully submits to the Court that the evidence before the Industrial Commission and before this Court is uncontroverted both medically and otherwise that the environment and working conditions while working for Olsen Welding and Machine Shop Company did in fact aggravate and produce the disability that is now before this Court; that this disability occurred and came to head on March the 2nd, 1963 That there is no evidence to controvert the fact that the disability is directly related to the work of the plaintiff for Olsen Welding & Machine Shop Company.

In the case of Silver King Coalition Mine vs. Industrial Commission, Utah 1954, 268 Pacific 2nd 689, this Court rules as follows:

"Workmens' compensation act should be liberally construed in favor of the employee or his dependents."

"Occupational disease act provisions governing recovery for silico tuberculosis were intended as a guide rather than his hard and fast rules that must be met before recovery can be had, and award may be made even though disease does not conform to text book description."

"In proceedings for benefits, under occupational disease act, for death of workmen, evidence was sufficient to sustain finding that cause of death was silico-tuberculosis, even though X-ray examinations did not reveal characteristic silicotic pattern."

From the above authorities and from the factual evidence in the transcript before this Court, the plaintiff respectfully submits the condition of the plaintiff, Mr. Vause, is that of silicosis and that he is entitled to compensation as a result thereof.

The plaintiff qualifies under 35-2-27 (28) U.C.A., 1953 for compensation. In the event it is finally determined by this Court or the Industrial Commission that the condition of Mr. Vause, the plaintiff, was not caused by "silicosis" as defined by the statute, then certainly the plaintiff qualifies under 35-2-27 (28) U.C.A., 1953. In the case of *State Insurance Fund vs. Industrial Commission*, Utah 1949, 209 Pacific 2nd 558, it was determined that the welding profession of the applicant in that case was not that of silicosis but that of some other condition which is covered by 35-2-27 (28) U.C.A., 1953. The evidence certainly preponderates in favor of the plaintiff herein and is actually uncontroverted that his physical condition is as a result of his employment. The medical panel and the Industrial Commis-

sion has not determined or made any finding as to whether or not this condition is "silicosis" or "such other diseases" under the above statute. That it is the duty and responsibility of the Industrial Commission and the medical panel to make such a finding.

POINT V

INDUSTRIAL COMMISSION AND THE MEDICAL PANEL ERRED AND FAILED TO COMPLY WITH 35-2-29 AND 35-2-50 U.C.A. 1953.

35-2-29, U.C.A., 1953, states as follows:

"In case of disability or death from silicosis complicated with tuberculosis of the lungs, compensation shall be payable as for disability or death from uncomplicated silicosis. In case of disability or death from silicosis when complicated with any disease other than pulmonary tuberculosis, compensation shall be reduced as provided in section 35-2-50."

35-2-50, U.C.A., 1953, reads as follows:

"Where an occupational disease is aggravated by any other disease or infirmity not itself compensable, or where disability or death from any other cause not itself compensable is aggravated, prolonged, accelerated or in any wise contributed to by an occupational disease, the compensation payable under this act shall be reduced and limited to such proportion only of the compensation that would be payable if the occupational disease were the sole cause of the disability or death, as such occupational disease as a causative factor bears to all the causes of such disability or death."

It is clear from the above statutes that it is the duty and responsibility of the medical panel and the Industrial Commission from the testimony of the medical doctors in

the transcript, and in particular the testimony of Dr. Kilpatrick prove that the requirements of 35-2-29 and 35-2-50, U.C.A., 1953, are present in the case now pending for this Court. Dr. Kilpatrick testified in referring to the medical panel that "we felt that his disability was due to these combined diseases. It was difficult to put a percentage basis on each single item of his diagnosis" (TR. 58). He further states that it is very difficult to divorce the respiration system from the circulatory system that it is difficult to figure out exactly the percentage attributable to each diagnosis (TR. 61).

It is clear from the testimony of Dr. Kilpatrick for the medical panel and the Industrial Commission that it was necessary for the medical panel to comply with the above statute; but by reason of the alleged difficulty in doing so, they failed to do so. But under all the evidence the plaintiff is entitled to such a finding and that a finding will support his industrially caused disability to which the plaintiff is entitled to compensation. Plaintiff respectfully submits that the medical evidence now before this Court justifies and preponderates in favor of Mr. Vause, the plaintiff, for an award of compensation for the total disability he now has sustained.

POINT VI

INDUSTRIAL COMMISSION ERRED IN FAILING TO MAKE A FINDING AS TO WHETHER OR NOT THE CONDITION OF MR. VAUSE, THE PLAINTIFF, IS SILICOSIS OR THE OTHER DISEASE AS IS COMPENSIBLE UNDER THE UTAH STATUTE UNDER 35-2-27 (27) AND (28) U.C.A. 1953; THAT THE INDUSTRIAL

COMMISSION ERRED IN FAILING TO MAKE A FINDING AS TO THE EXACT DATE OF THE DISABILITY OF THE PLAINTIFF.

Plaintiff respectfully submits to the Court that there is a duty upon the Industrial Commission to make a specific finding, by a preponderance of the evidence herein, that the occupational disease contracted by the plaintiff is silicosis or some other disease as complies with 35-2-27 (28) U.C.A., 1953. That the evidence clearly preponderates to the benefit of the plaintiff herein as described in points I through V herein above stated. That it is incumbent and the duty upon the Industrial Commission to find by a preponderance of the evidence that the exact date of the disability of the plaintiff was March the 2nd, 1963; that the Industrial Commission erroneously failed to make a finding as to the exact date of the disability of the plaintiff.

CONCLUSION

Plaintiff respectfully contends and asserts that the claim of the plaintiff herein, Laurence Vause, was timely filed with the Industrial Commission as required by 35-2-48 (a) and (b) U.C.A., 1953. That the service of the claim and filing of the complaint with the State Insurance Fund on April 24, 1963, was in fact and did comply with the above statute for the filing of a claim with the Industrial Commission and that said filing was within the Statute of Limitations under all circumstances. That the disablement required under 35-2-12 (a), U.C.A., 1953, did not commence until March 2nd, 1963. The Industrial Commission erred in finding the plaintiff's disability is not the result of an occupational disease. The uncontroverted evidence, which

clearly preponderates in the plaintiff's favor herein, is to the effect that the 100% disability of the plaintiff is a result of the occupational disease under 35-2-48 (a) and (b), U.C.A., 1953. Plaintiff is entitled to compensation as a result of his 100% disability. That the Industrial Commission erred in failing to find plaintiff's disability commenced on March the 2nd, 1963, and in fact erred in failing to find any specific date of disability which should substantiate its claim that the Statute of Limitations bars the action of Mr. Vause.

The evidence before the Industrial Commission and before the Court is uncontroverted, both medically and otherwise, that the employment and environment and working conditions of Mr. Vause in the Olsen Welding & Machine Shop Company premises did in fact aggravate and produce the disability now before this Court, and that the disability did occur on March the 2nd, 1963. That there is no evidence to controvert such a finding and ruling. That the evidence is clearly preponderating in favor of the plaintiff that the disease he received is that of "silicosis" or if not silicosis then an occupational disease as provided for in 35-2-27 (28) U.C.A., 1953. The Industrial Commission erred in finding from a clear preponderance of the evidence, to comply with 35-2-29, U.C.A., 1953, and 35-2-50, U.C.A., 1953, which requires compensation for aggravated conditions and for a separation, if any, of uncompensable disability from compensable disability.

Respectfully submitted,

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