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Recommended Citation
Brief of Respondent, *Vause v. Indus. Comm'n of Utah*, No. 10376 (1965).
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IN THE SUPREME COURT OF THE STATE OF UTAH

LAURENCE VAUSE,
Plaintiff-Appellant,
vs.
INDUSTRIAL COMMISSION OF UTAH, OLSEN WELDING AND MACHINE SHOP, and the STATE INSURANCE FUND,
Defendants-Respondents.

Case No. 10376

FILED
AUG 16 1965
Clerk, Supreme Court, Utah

RESPONDENT'S BRIEF

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

---

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INDEX

Page

STATEMENT OF FACTS 1

ARGUMENT 6

POINT I.
THE INDUSTRIAL COMMISSION OF UTAH DID NOT ERR IN FINDING THAT THE CLAIM OF APPELLANT WAS BARRED BY THE STATUTE OF LIMITATIONS, 35-2-48(b), U.C.A., 1953 6

POINT II.
INDUSTRIAL COMMISSION DID NOT ERR IN FINDING THAT APPELLANT'S DISABILITY IS NOT THE RESULT OF OCCUPATIONAL DISEASE 13

POINT III.
THE INDUSTRIAL COMMISSION OF UTAH DID NOT ERR IN FAILING TO FIND THE PLAINTIFF'S DISABILITY COMMENCED MARCH 2, 1963 AND SAID INDUSTRIAL COMMISSION DID NOT ERR IN FAILING TO FIND ANY SPECIFIC DATE OF DISABILITY AT WHICH TIME THE STATUTE OF LIMITATIONS COMMENCED TO RUN 18

POINT IV.
THE APPELLANT DOES NOT QUALIFY FOR COMPENSATION UNDER (35-2-27) (27) AND (28), U.C.A., 1953 20

POINT V.
INDUSTRIAL COMMISSION AND THE MEDICAL PANEL DID NOT ERR IN FAILING TO COMPLY WITH 35-2-29 AND 35-2-50, U.C.A., 1953 22

POINT VI.
THE INDUSTRIAL COMMISSION DID NOT ERR IN FAILING TO MAKE A FINDING AS TO WHETHER OR NOT THE CONDITION OF THE APPELLANT IS SILICOSIS OR THE OTHER DISEASE AS IS COMPENSABLE UNDER THE UTAH STATUTE UNDER 35-2-27 (27) AND (28), U.C.A., 1953; THAT THE INDUSTRIAL COMMISSION DID NOT ERR IN FAILING TO MAKE A FINDING AS TO THE EXACT DATE OF THE DISABILITY OF THE PLAINTIFF 24

CONCLUSION 25

Page

Cases Cited

American Mud & Chemical Co. v. Industrial Commission (1965), 16 Utah 2d 246, 398 P. 2d 889 12-13

Ban v. Kariya Co. v. Industrial Commission (1926), 67 Utah 301, 247 P. 490 7

Burton v. Industrial Commission (1962), 13 Utah 2d 353, 374 P. 2d 439 18

Edlund v. Industrial Commission (1952), 122 Utah 238, 248 P. 2d 365 .... 18, 22

Higgins v. Department of Labor and Industries (1947), 27 Wash. 2d 816, 180 P. 2d 559 17

Looser v. Industrial Commission (1959), 9 Utah 2d 81, 337 P. 2d 965 19

State Insurance Fund v. Industrial Commission (1949), 116 Utah 279, 209 P. 2d 558 10

Utah Delaware Mining Company v. Industrial Commission (1930), 76 Utah 187, 289 P. 94 7

Statutes Cited

Utah Code Annotated 1953:

35-1-85 18-19

35-2-6 11-12

35-2-27 .... 20, 21, 24

35-2-28 21

35-2-29 22-23

35-2-48 .... 6, 7, 9, 25

35-2-50 22-23

35-3-3 8-9

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RESPONDENT'S BRIEF

STATEMENT OF FACTS

An application was filed with the Industrial Commission on June 8, 1963, stating that the appellant contracted the occupational disease of "severe pulmonary emphysema, heart condition and severe angina" and that he was unable to work after March 2, 1963 (R. 3). The carrier of his employer, Olsen Welding and Machine Shop, is the defendant herein, the State Insurance Fund. The Fund denied liability on July 30, 1963, setting forth in a letter to the Commission two reasons:

(a) That the claimed disease was not an occupational disease; and

(b) That the claim was barred by Section 35-2-48 (b), U.C.A., 1953, as amended (R. 18).

Upon denial of the claim by the Fund, the Industrial Commission referred the appellant to a medical panel. The medical panel examined the appellant and in a report of its study dated October 5, 1963, stated that it found that he was one hundred percent disabled from combined non-occupational causes. It specifically found that the plaintiff was suffering from the following diseases (R. 30):

> Arteriosclerosis, arterial hypertension, sclerotic and hypertensive heart disease, angina pectoria, chronic bronchitis and lung fibrosis and pulmonary emphysema.

Again, on August 15, 1964, the medical panel reported on a further study and examination made by it and stated a "Review of added information submitted, gives no evidence for change in the Chest Disease Panel's former conclusions" (R. 46).

Objections to the panel's findings were made, and on December 16, 1964, a hearing was had upon said objections. Dr. Kilpatrick, chairman of the medical panel making the report on appellant's condition, was the initial witness of said hearing. The doctor reaffirmed the position of the medical panel reports, stating that the appellant's disabilities were due to non-occupational conditions and delineated the causes of these disabilities as reflected in the panel's reports. He stated that the appellant was examined on October 5, 1963, and that after its initial report the panel again re-evaluated its fndings, in view of additional information, and on August

15, 1964, reaffirmed its earlier conclusions in a supplemental report (R. 58). The panel, when it examined the appellant, had the following factual information according to Dr. Kilpatrick's testimony:

> . . . letter reports from physicians who had seen him, reports of previous examinations for employment, a previous claim to the insurance carrier regarding an attack of asthma that he had had while at work and was treated, but was apparently not off work. We had on our own — through the Industrial Commission — new chest X-rays, blood counts, electrocardiogram, and examination of the urine, of the sputum; all of which go into the general pattern of things seemingly necessary for evaluation of someone with alleged heart and lung conditions.
>
> We took into account the copy of his examination which was recorded when he applied for a Government position, and we noted during his time of life through the dates following this examination that he had gained considerable weight. We learned that he started to work for the welding company in 1955, and then as the history evolved he stated that he had been short of breath sometime back as early as 1958, and that his real complaint for why he did not work was pain in his chest. The secondary complaint was shortness of breath (R. 59, 60).

He further testified that heart disease is the primary disabling condition of people past middle age and that bronchitis and emphysema, considered under the heading of chronic respiratory disease, is the most common disorder that people have past middle age (R. 61). More specifically, he framed the question of whether or not the inhalation of fumes in the applicant's work

produced his condition of bronchitis and emphysema and answered that this is a common disease which many people have and is not related to the welding trade at all (R. 62). He also stated that the appellant's condition started ". . . long before he ever started working for the Ogden Welding Company" in 1955 (R. 64). He reiterated that the welding fumes were of minimal significance in regard to the appellant's condition (R. 64, 65).

> We concluded that of course he had some irritating features of welding some, but the over-all comparison of this single feature, compared to all the other things to which he was subjected to in his own living — infections, daily exposure to fumes, smokes, irritants — that we could not come to a real percentage disability of his work causal relationship. Seemingly it would be so small to consider as a major feature for his disability.

On cross-examination by Mr. Taylor, appellant's attorney, Dr. Kilpatrick stated that pulmonary emphysema is never a primary disease; rather, it is secondary to some other conditions and though it can be a total disabling disease, it is never the primary cause of one's disability.

The appellant then called Dr. Ernest Wilkinson who stated that he saw the applicant on only one occasion, January 19, 1960 (R. 84, 85). He diagnosed the appellant's condition at that time as:

(a) Chronic asthmatic bronchitis;

(b) Pulmonary emphysema; and

(c) Several unrelated gastrointestinal problems.

At no time was the doctor asked whether or not the condition that he found in January, 1960, was directly related to his occupation. The doctor did testify that the pulmonary emphysema could have been a contributing factor to the heart disability and that working in the welding trade could have aggravated his pulmonary emphysema. The doctor emphasized that the work environment, however, would only be contributing factors (R. 92).

The appellant then called Dr. Douglas C. Barker who had initially examined the applicant on the 17th day of August, 1961, and who had treated him twenty or thirty times subsequent to this occasion (R. 99, 101). The doctor testified he had first diagnosed pulmonary emphysema on the 17th day of August, 1961 (R. 99). The doctor testified, however, that the appellant's heart condition did not become apparent to him until the applicant was hospitalized in February, 1963.

After a rather involved hypothetical question to Dr. Barker, the question was posed to him whether or not the environmental conditions of the applicant's employment would either cause or aggravate pulmonary emphysema (R. 106-108). The doctor in reply, stated that he could give a qualified "yes" as to the aggravation but did not feel he could answer as to cause (R. 106). He further testified that he told the applicant in August, 1961, that he had the disease of pulmonary emphysema (R. 110).

Mr. Trottier, respondent's attorney, then recalled Dr. Kilpatrick who was asked that if after he had heard

the testimony already adduced, including the facts set forth in his hypothetical question relating to the working conditions of the applicant, whether or not his opinion had changed. The doctor stated that his opinion remained the same (R. 114, 115).

ARGUMENT

POINT I.

THE INDUSTRIAL COMMISSION OF UTAH DID NOT ERR IN FINDING THAT THE CLAIM OF APPELLANT WAS BARRED BY THE STATUTE OF LIMITATIONS, 35-2-48(b), U.C.A., 1953.

On March 2, 1963, the appellant was working for Olsen Welding and Machine Shop as a welder. He had worked in this capacity since May of 1955 (R. 56). On March 2, the appellant suffered what appeared to be a heart attack and was subsequently unable to work. Three months later on June 8, 1963, he filed an application with the Industrial Commission stating that he had contracted the occupational disease of "severe pulmonary emphysema, heart condition, and severe angina" (R. 56).

In 35-2-48(b), U.C.A., 1953, the statutory limitation barring claims not filed in a timely manner is set forth as follows:

> . . . The right to compensation under this act for disability of 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) * * *

(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.

Respondent submits that the provision of the above quoted statute bars appellant's claim for compensation, since the appellant claimed disability from an occupational disease other than silicosis or a disability arising from benzol or its derivatives, and said claim was not filed within the sixty day limitation.

It is appellant's contention that because he notified the State Insurance Fund of his claim on March 24, 1963, that he compiled with the requirements of 35-2-48(b), U.C.A., 1953. He cites as authority *Ban v. Kariya Co. v. Industrial Commission* (1926), 67 Utah 301, 247 P. 490; *Utah Delaware Mining Company v. Industrial Commission* (1930), 76 Utah 187, 289 P. 94. These cases both construe notice to the Insurance Fund as notice to the Industrial Commission. However, both decisions were rendered at a time when the Insurance Fund was within the jurisdictional purview of the Industrial Commission. As stated in the Kariya case at 247 P. 490, 491:

> The state insurance fund is not a body corporate, public, quasipublic, or private. Can it be said to have any legal existence as a distinct entity independent of and not as a part of the (I)ndustrial (C)ommission? The sections of our statutes creating the state insurance fund in no way attempted to clothe such fund with any right distinct, independent or separate from the Industrial Commission. It is not authorized to sue or be sued. It is not clothed with any power

to contract or be contracted with. The policies or contracts of insurance issued to the employers are not made by or with the fund, but are made by and with the Industrial Commission. The rate of premiums to be paid by the employers insured in the state insurance fund are fixed by the commission.

The same opinion quotes from Section 3096 of Comp. Laws of Utah 1917, at 247 P. 491:

> It shall be the duty of the commission to conduct the business of the state insurance fund, and it is hereby vested with full authority over the said fund, and may do any and all things which are necessary or convenient in the administration thereof, or in connection with the insurance business to be carried on by it under the provisions of this title.

This decision was subsequently affirmed in the Delaware Mining Company case wherein it was held that the State Insurance Fund was but an arm or department of the Industrial Commission.

While it is clear that the cases cited by appellant have not been overruled, the statutory basis upon which the cases were decided has changed. The State Insurance Fund is no longer an arm or department of the Industrial Commission. As stated in 35-3-3, U.C.A., 1953, the State Insurance Fund is presently under the jurisdiction of the Department of Finance.

> 35-3-3. Commission of finance to administer. — The commission of finance shall administer the state insurance fund, write compensation insurance therein, conduct all business thereto appertaining and belonging, and do any and all things in connection with all insurance business

> to be carried on, supervised or controlled by the commission of finance agreeably to the provisions of this title, and it is vested with full authority over said fund. It may do any and all things whether herein specifically designated or not which are necessary or convenient in the administration thereof or in connection with the insurance business carried on by it under the provisions of this title as fully and completely as the governing body of a private insurance carrier. * * *

Appellant appears to be aware of this change in jurisdiction because he indirectly raises without argument a question of estoppel by stating the initial claim made to the State Insurance Fund ". . . was made upon the advice of the state employees that this was the place to file a claim for this type of disability" (appellant's brief, page 11). However, there is nothing in the record to substantiate this assertion and no evidence was introduced by the appellant on the matter. He raises the question for the first time on appeal.

Appellant also contends that the Industrial Commission made no finding whatsoever as to whether the condition of the appellant was that of silicosis, in which event subsection (a) of 35-2-48 would apply as the statute of limitation.

> 35-2-48
>
> (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.

Respondent submits that appellant's stance with regard to this contention is without merit. The appellant did not claim silicosis in his appilcation and there is no

testimony or evidence in the record to support a finding of said disease.

Respondent's argument thus far assumes the appellant's cause of action began running from March 3, 1963, said construction being the time most favorable for the appellant and, indeed, what he claims. However, the record clearly indicates that appellant had knowledge of his disabilty several years prior to March 2, 1963. In a similar case, *State Insurance Fund v. Industrial Commission* (1949), 116 Utah 279, 209 P. 2d 558, the employee discontinued his work as a welder after 22 years of continuous employment on account of difficulty in breathing. He had been almost continuously exposed to harmful fumes during the last five or six years of this employment, and he had suffered from a shortness of breath which had become progressively worse. The Court found the applicant's disease was not silicosis nor benzol or its derivatives and that the statute of limitations was the sixty day period after the cause of action arose. The Court held that in such a situation the cause of action would arise when an ascertainable and compensable disability resulted at 209 P. 2d 558, 560, it said:

> The cause of action arises in this kind of a case when the employee suffers compensable disability under the act and could by reasonable diligence ascertain that his disability was employment caused and by its nature compensable. But ignorance of the requirements of the law does not postpone the accrual of a cause of action.
>
> Here, as in the California case, the evidence does not fully disclose whether applicant used due diligence to ascertain whether his disability was

compensable or not. While it is evident that he believed that his disability was caused by the harmful fumes which he was exposed to in the course of his employment, and that he obtained and took to his doctor certain blanks from the Industrial Commission to be filled out in connection with a claim for compensation, it is not clear why a thorough examination was not made at that time. If he failed to discover at that time that his disability was compensable because the doctor did not correctly diagnose his case, and he was thereby misled into believeing that his disability was not occupationally caused or by its nature was not compensable, and he acted reasonably under the circumstances in not having a complete examination made sooner, then his cause of action is not barred. But if on account of his own failure to press his case or have a complete examination made under circumstances which would reasonably put him on notice that he was probably entitled to compensation, he failed to discover that his disability was compensable, then the fault is his own and he cannot recover.

It is respondent's contention that appellant knew of his lung condition prior to the date of his heart attack on March 3, 1963, and that he believed this disability was caused or aggravated by his working conditions. Certainly he was aware of it as early as January 19, 1960 (R. 84, 85). Thus, within the guidelines drawn by the above cited case, the respondent submits that the statute of limitations would preclude appellant's claim for compensation in any event, even though it is held that his claim filed with the State Insurance Fund on March 24, 1963, was in compliance with 35-2-6, U.C.A., 1953:

> 35-2-6 Claims to be filed with commission.— Claims filed under this act shall be filed with the (Industrial) commission in triplicate, and immediately after such filing one of such triplicate copies shall be forwarded by mail to the employer and insurance carrier.

In *American Mud & Chemical Co. v. Industrial Commission* (1965) 16 Utah 2d 246, 398 P. 2d 889, the Court affirmed an Industrial Commission award granting compensation on an occupational disease claim of silicosis. The Court upheld the Industrial Commission's determination that the claimant filed his claim within one year after his cause of action arose. The Court held that total disability from occupational disease, for the purpose of computing limitations on claims, refers to a disability affecting claimant's ability to perform any work with which to support himself and his dependents; in each case the effect of physical injury or illness differs according to abilities of applicant and the statute should not be construed so as to penalize independent or versatile workers . Further, it held that the claimant knew earlier that he had silicosis but did not establish as a matter of law that he knew that he had a compensable disease, for the purpose of computing the limitation on his claim.

It would appear that the American Mud case is in conflict with the State Insurance Fund v. Industrial Commission case cited above excepting that the Court may have found in the Mud case that the Commission had sufficient evidence to support its finding and that as stated on 398 P. 2d 891 of the American Mud case:

> Although there is little conflict in the evidence, the inferences to be drawn from them are within the peculiar province of the Commission and will not be overturned in absence of a clear abuse or misinterpretation, U.C.A. 1953, 35-1-84; Tintic Standard Min. Co. v. Ind. Comm., 100 Utah 96, 110 P. 2d 367.

Respondent submits that if the cases above cited are to be construed together, circumstances of the case at bar are more similar to the facts set forth in State Insurance Fund than those set forth in the American Mud, and that the evidence supports a finding by the Industrial Commission that the applicant had knowledge of his disability, believed it to be one which was compensable, and having this knowledge failed to file his claim within sixty days.

POINT II.

INDUSTRIAL COMMISSION DID NOT ERR IN FINDING THAT APPELLANT'S DISABILITY IS NOT THE RESULT OF AN OCCUPATIONAL DISEASE.

Appellant's contention that the order of the Industrial Commission, wherein it found that the applicant's disabilities were caused by non-occupational diseases, was not rendered upon the evidence cannot be substantiated by the record. The medical testimony presented to the Industrial Commission was not only adequate but uncontradicted in establishing the non-occupational origins of the disease causing the applicant's disability. Dr. Kilpatrick, chairman of the medical

panel examining the applicant, stated that his disabilities were due to non-occupational conditions. He stated that the panel after an examination of the appellant on October 5, 1963, found the disorders to be "arteriosclerosis, arterial hypertension, sclerotic and hypertensive heart disease, with angina pectoris, chronic bronchitis and lung fibrosis, and pulmonary emphysema." (R. 58). He further testified that the panel reconsidered its preliminary findings on August 15, 1964, and on the basis of the facts that were available, determined that there existed no reason for the panel to modify its previous opinion. As to which of the listed conditions were determative in producing the applicant's disability, the doctor had this to say:

> Now if we consider the diagnoses — as I read, and as are listed in this Panel Report — by far his disability feature was his heart disease, his hardened arteries — the arteries of the heart muscle — producing what we concluded was a condition of impaired circulation through the heart, producing then pain which was his reason for quitting work, directly attributable to a degenerative process of hardening of the arteries, which had been developing a long time. Now this certainly is not an occupational disease.
>
> We concluded that of course he had some irritating features of welding smoke, but the overall comparison of this single feature, compared to all the other things to which he was subjected to in his own living — infections, daily exposure to fumes, smokes, irritants — that we could not come to a real percentage disability of his work causal relationship. Seemingly it would be so small to consider as a major feature for his disability. (R. 64, 65.)

Testifying as to the applicant's lung condition of bronchitis and emphysema, Dr. Kilpatrick stated that this condition develops over a long number of years. "It is not developed in a matter of two or three years. It's a slow slow process." (R. 63.)

On cross-examination, an exchange occurred between Mr. Taylor, counsel for the appellant, and the doctor which is relevant to the point under consideration.

> MR TAYLOR: Q. Doctor, as I understand your testimony, is it your opinion that the inhalation of metal fumes and welding somke would aggravate the condition that you have described as pulmonary emphysema?
>
> A. Well, pulmonary emphysema is never a primary disease. That is secondary to some other condition. (R. 74.)

Later, in response to Mr. Taylor's questioning regarding the assignment of percentages to the various disease responsible for the applicant's disability, Dr. Kilpatrick answered:

> A. Well, that is a real job. For an analysis, to put interwoven disease conditions on a percentage basis, would be a wide range where you might be wrong. But we attempted to list the diagnoses in order of their importance. So—with chronic bronchitis, and lung fibrosis of pulmonary emphysema at the end—it implied that we thought he was disabled more for his heart and blood vessel disorder than he was from his lung condition. (R. 83.)

Dr. Ernest Wilkinson testified that the applicant's pulmonary emphysema and chronic lung disease could

be a contributing factor to the applicant's coronary insufficiency. However, he testified that it would not effect a coronary vessel disease (R. 90). At no time was Dr. Douglas C. Barker asked whether the condition that he found at the time he examined the applicant in January of 1960 directly related to his occupation. He did, however, state that the disease of pulmonary emphysema could be aggravated by the applicant's working conditions.

Dr. Douglas C. Barker testified that he attended the applicant upon his hospitalization on the 22nd day of February, 1963, and again on the 29th day of April, 1963. He stated that he had hospitalized the applicant because of his heart condition. When asked if the work environment could have aggravated or caused the condition described as angina pectoris, the doctor said it would not but would, however, aggravate the condition of pulmonary emphysema (R. 108, 109). "I can state a qualified yes, as far as aggravation. Cause again, as has been reiterated by the other two physicians, is a complicated interrelated problem, so I can't give you an answer on that."

Appellant at page 16 of his brief suggests that Dr. Barker stated the applicant's working environment would either cause or aggravate pulmonary emphysema. This is misleading because the reading of the doctor's testimony clearly indicates the condition could at most aggravate the disease. Again, on page 18 of appellant's brief, he suggests that Dr. Kilpatrick testified "that pulmonary emphysema can either be caused or aggra-

vated by the inhalation of silica dust, metal dust, welding fumes, and other things of this nature." A review of the doctor's testimony in its entirety indicates that the doctor's opinion regarding the applicant's case was to the effect that his working environment could only have aggravated the pulmonary emphysema which was determined to be of non-occupational origin.

In *Higgins v. Department of Labor and Industries*, 1947, 27 Wash. 2d 816, 180 P. 2d 559, 560, 561. Claimant, a fireman for stationary boilers, with a condition diagnosed as pulmonary emphysema, appealed from a denial of his claim. He described his "accident" as follows:

> Shoveling coal firing b(a)ttery of five to seven boilers, (nine foot) fire box. Examining doctor said I had a week heart before going to work on this job. The heavy work shoveling and firing with intense heat prevailing on the job and continued sandstorms caused my heart to give out completely could not breathe and strength gave out.

The doctors produced testified, as in the case at bar, that his lung condition was not *caused* but only aggravated by his work. The Court affirmed the denial of applicant's claim.

It is clear then that the Industrial Commission had the unanimous opinion of the medical experts that the appellant's disability was primarily due to his heart condition which had some relationship to his lung condition, but that the lung condition was a slowly progressive situation only aggravated but not caused by the

working environment of the applicant. The Commission's conclusion, therefore, that the applicant's disability was non-occupational is substantiated overwhelmingly by the evidence and should be affirmed by the Court. *Edlund v. Industrial Commission* (1952), 122 Utah 238, 248 P. 2d 365; *Burton v. Industrial Commission* (1962), 13 Utah 2d 353, 374 P. 2d 439.

POINT III.

THE INDUSTRIAL COMMISSION DID NOT ERR IN FAILING TO FIND THE PLAINTIFF'S DISABILITY COMMENCED MARCH 2, 1963 AND SAID INDUSTRIAL COMMISSION DID NOT ERR IN FAILING TO FIND ANY SPECIFIC DATE OF DISABILITY AT WHICH TIME THE STATUTE OF LIMITATIONS COMMENCED TO RUN.

Respondent submits that there were sufficient facts upon which to base the conclusion that the statute of limitations had run on the appellant's claim. This point was argued by respondent in Point I of this brief. The only additional issue raised is whether or not the Commission was bound in its order denying applicant's claim to set forth findings specifically denoting from what exact period appellant's cause of action began to run. The applicable statute in effect at the time the Commission's order was entered reads as follows:

> 35-1-85. Duty of commission to make findings of fact and conclusions of law — Filing — Conclusiveness on questions of fact — Review — Court judgment. — After each formal hearing it shall be the duty of the commission to make

> findings of fact and conclusions of law in writing and file the same with its secretary. The findings and conclusions of the commission on questions of fact shall be conclusive and final and shall not be subject to review; such questions of fact shall include ultimate facts and the findings and conclusions of the commission. The commission and every party to the action or proceeding before the commission shall have the right to appear in the review proceeding. Upon the hearing in the court shall enter judgment either affirming or setting aside the award.

Respondent respectfully submits that the Commission's order did include "ultimate facts and the findings and conclusions of the commission." As stated in *Looser v. Industrial Commission* (1959), 9 Utah 2d 81, 337 P. 2d 965, 966:

> . . . it is obvious from the record that although the Commission did not denominate its recitation of facts as "Findings of Fact," the facts were recited in its order as extensively as they would have been set forth under a separate caption. Findings of fact, however denominated, and although not as articulate as to nature and form as we might choose to have them, are not doomed for those reasons only, if substantial compliance with the letter and spirit of the statute has been effectuated, as we think they have here, where, but for an appellation the findings in the order would have sufficed.

Finally, respondent contends that if error exists it was harmless, for appellant's claim must fail even upon consideration of its substantive merits.

POINT IV.

THE APPELLANT DOES NOT QUALIFY FOR COMPENSATION UNDER (35-2-27) (27) and (28), U.C.A., 1953.

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 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.

Appellant asserts that the Industrial Commission erred because it did not expressly find the appellant *did not* have silicosis. Respondent submits that appellant did not claim to have silicosis, and he is raising this issue for the first time on appeal. However, the contention is without merit in any event because the evidence conclusively indicates that the appellant suffered from diseases other than silicosis and the Commission so found. Further, it is obvious that the Commission is not obligated to set forth a list of diseases which were found not to exist. Indeed, such an enumeration could be virtually unexaustable.

Appellant's claim for compensation must rest upon meeting the qualifications set forth in 35-2-27 (28), U.C.A., 1953, a section providing compensation for occupational diseases not specifically enumerated. Such a disease must "directly arise as a natural incident of the exposure occasioned by the employment" and in addition meet all of six other conditions enumerated by the section. Based upon the evidence submitted to the Commission it cannot be said the Commission was un-

reasonable and arbitrary in finding the appellant's disease did not meet the prerequisites of this section. In *Edlund v. Industrial Commission* (1952), 122 Utah 236, 248 P. 2d 365, 366, 367, the Court held in affirming the Industrial Commission order denying petitioner compensation for permanent disability on a claim that osteo-arthritis was a disease common to typists:

> . . . The Commission was not compelled to find petitioner's ailment to be a disease or injury "which *directly arise(s)* as a *natural incident* of the exposure occasioned by the employment" or that it otherwise fulfilled the six requirements of Subsection (28). (Italics ours.) There was competent evidence of a substantial character supporting the findings of the Commission. * * *

Indeed the evidence clearly reveals that there was no (1) direct causal connection between the appellant's work environment and the diseases; (2) nor were they the natural incident of exposure occasioned by the employment; (3) nor proximately resulting from the employment; (4) nor from exposure to conditions unique to the employment; (5) nor incidental to the particular character of the business; (6) nor from a work source wherein the disease would flow as a natural consequence of such employment; (7) nor were these diseases of such a nature as to not be characteristic of the general public.

POINT V.

INDUSTRIAL COMMISSION AND THE MEDICAL PANEL DID NOT ERR IN FAILING 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.

Appellant's argument that the Industrial Commission and Medical Panel erred and failed to comply with the statutes hereinabove set forth has no foundation in view of the evidence adduced in the record. 35-2-29, U.C.A., 1953, requires as a minimum requisite for reduced compensation that silicosis be present. As was argued by respondent in Point II and Point IV, the applicant was never found to have silicosis, therefore 35-2-29, U.C.A., 1953, is neither relevant nor material to the case at bar; likewise, neither is 35-2-50, U.C.A., 1953, wherein a method is set forth by which reduced compensation can be awarded upon a finding that an occupational disease

was present, but was acted upon or was affected by a non-compensable disease.

While it is true, as appellant suggests, that "it was difficult to put a percentage basis on each single item of his (appellant's) diagnosis," it is nevertheless true that the Commission found from the evidence that the combined diseases from which the appellant suffered were *all* non-occupational (R. 58).

POINT VI

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

Appellant asserts that it was incumbent upon the Industrial Commission a duty to make a specific finding by preponderance of the evidence that the appellant contracted the occupational disease of silicosis or some other disease coming under the protection of 35-2-27 (28), U.C.A., 1953. Respondent respectfully submits that this point was argued under Point II and Point IV of the briefs submitted and that further argument on the matter would simply be redundant. Likewise, respondent submits the appellant's contention that the Industrial Com-

mission was bound to find March 2, 1963 as the exact date of the plaintiff's disability was argued under Point I and III of the respective briefs submitted in the case at bar.

CONCLUSION

Respondent respectfully concludes that the claim of the appellant herein was not filed within the statutory period allowed under 35-2-48(b), U.C.A., 1953. Further, that consideration as to whether or not the application was timely made as required by subsection (a) of 35-2-48, U.C.A., 1953, has neither relevance or materiality because the applicant did not claim nor was there evidence upon which to base a finding of silicosis. Respondent likewise submits that the evidence clearly shows the Industrial Commission did not err in finding appellant's disability to be derived from non-occupational diseases. That such a finding being based on a clear preponderance of the evidence was not a misinterpretation or abuse resulting from a disregard of the evidence. That in view of the foregoing, respondent submits that the ruling of the Industrial Commission denying liability on appellant's claim be affirmed:

Respectfully submitted,

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