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IN THE SUPREME COURT OF THE STATE OF UTAH

EUDORA MECHAM, Plaintiff-Appellant, vs. THE INDUSTRIAL COMMISSION OF UTAH, EITEL McCULLOUGH, INC., and SECOND INJURY FUND, Defendant-Respondent.	)	Supreme Court No. 19337

BRIEF OF PLAINTIFF-APPELLANT

Appeal from the Order of the
Industrial Commission of the State of Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

EUDORA MECHAM, Plaintiff-Appellant,	)	
vs.	)	Supreme Court No. 19337
THE INDUSTRIAL COMMISSION OF UTAH, EITEL McCULLOUGH, INC., and SECOND INJURY FUND, Defendant-Respondent.	)	

BRIEF OF PLAINTIFF-APPELLANT

STATEMENT OF THE NATURE OF THE CASE

This case is an appeal from an order of the Industrial Commission denying plaintiff's Motion For Review and affirming the Findings of Fact, Conclusions of Law and Order of the administrative law judge.

DISPOSITION BY THE INDUSTRIAL COMMISSION OF UTAH

The administrative law judge ruled that the plaintiff was not entitled to permanent total workers compensation benefits from the defendant Second Injury Fund for the

reason that he had "no other alternative or option but to dismiss the claim for permanent total disability as being barred by the Statute of Limitations as contained in Section 35-1-99, Utah Code Annotated."

RELIEF SOUGHT ON APPEAL

Plaintiff seeks a reversal of the Order made by the administrative law judge and affirmed by the Industrial Commission.

STATEMENT OF FACTS

Plaintiff filed a "Petition For Consideration of Permanent Total Disability and Re-imbursement of Medical Expenses" in December 1982. The matter was set for hearing on April 27, 1983. At the hearing the administrative law judge refused to allow plaintiff to offer any evidence, to testify in her behalf and refused plaintiff's counsel the opportunity to argue substantial issues of law by oral argument or post-hearing briefs. (R. 175-180). Plaintiff was totally denied any opportunity to present evidence or otherwise in her own behalf.

The Findings of Fact, Conclusions of Law and Order issued by the administrative law judge on the 10th day of May 1983 was wholly unsupported by any viable evidence of any kind (R. 182-186). The purported hearing consisted of 5

pages of transcript of the proceedings which was a recitation by the judge of documents appearing in the file.

The findings referred to (R. 182) as a preface to the so-called Findings of Fact the administrative law judge noted, "At the outset of the hearing, after a review of the file, the Administrative Law Judge found that the Petition...should be denied. The reasons for the same will be set forth more fully hereinafter." (Underscoring added.)

The administrative law judge used as Findings of Fact his review of the records in the file of the commission--picking and choosing the records that supported his position.

With reference to the facts surrounding the original proceedings in this matter from 1961 to the present time the administrative law judge has correctly summarized this from the records of the commission (R. 182, 183). Plaintiff sustained an injury by accident on October 31, 1961, received temporary total compensation benefits until September 1963. On or about October 14, 1963 the Applicant filed an Application for Physical Examination by the Medical Advisory Board (R. 25.) (Underscoring added) which was the predecessor of the present Disability Rating Panel. The Chairman of the commission advised the Applicant that she would receive benefits commencing September 1963. On or about May 4, 1964 through counsel a "Petition For Rehearing" was filed. By letter of May 7, 1964 the Chairman, Otto Wiesley, advised

"We will accept your Petition For Re-Hearing as an application for a formal hearing." (R. 40) (Underscoring added). A hearing was held on September 13, 1965. The matter was then referred to a special medical panel. An Application For Additional Compensation and/or Medical Benefits was filed on May 10, 1965. (R. 74). A report of the panel was received, objected to by the plaintiff and a further hearing held on June 6, 1966. On August 3, 1966 an Order of the commission issued signed by all three commissioners (R. 136).

On July 6, 1970 the plaintiff filed a form Application For Hearing, pro se, requesting additional compensation based upon continued pain and further surgery in 1969 (R. 144). The response from the Hearing Examiner was that the wrong form was filed. (R. 145). In 1972 in answer to a telephone inquiry the same response was made by another hearing examiner--wrong forms and no supporting medical evidence. In July 1975 a treating physician advised the commission that "Her disability rating is totally disabled as it has already been rated and will be on a permanent basis." (R. 156).

ARGUMENT.

POINT I.

DO ADMINISTRATIVE LAW JUDGES OF THE INDUSTRIAL COMMISSION HAVE AUTHORITY TO ISSUE FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER BASED UPON A REVIEW OF THE RECORD ONLY AND DENY PLAINTIFF A HEARING OR OPPORTUNITY TO BE HEARD?

The record as summarized by the administrative law judge and plaintiff are not in substantial disagreement. However, the plaintiff believes the administrative law judge exceeded his authority in characterizing this summary as "Findings of Fact" based upon a hearing which was never held, testimony produced or arguments of law presented.

The administrative law judge's exact statement appears as follows:

> "With the file in its present posture, the administrative law judge has no other alternative or option but to dismiss the claim for permanent total disability as being barred by the statute of limitations as contained in section 35-1-99 Utah Code Annotated, and also that section has been interpreted and permanent total disability indicated by the Utah Supreme Court and that Beverly R. Buxton case." (R. 78).

In the body of the decision prior to the purported findings in the judge's opinion appears the following:

> "At the outset of the hearing, after a review of the file, the Administrative Law Judge found that the Petition For Consideration of Permanent Total Disability and Re-imbursement of Medical Expenses should be denied. The reasons for the same will be set forth more fully hereinafter."

The judge, before the hearing, made an ex-parte determination to deny the claim without benefit of one word of testimony or the offering of any evidence by any party to the proceeding. In fact the administrative law judge not

only refused testimony but refused to allow proffers of evidence or arguments by counsel against his pre-conceived interpretation of Supreme Court decision.

As counsel for plaintiff I was allowed to make a one sentence statement to clarify the dissertation of the judge (R. 179). The response of the judge was:

> "The Court: Well, I will enter my order and you can argue your brief in the form of a Motion For Review, since it is a legal issue anyway." (R. 179).

The authority and jurisdiction of administrative law judges is found in Section 35-1-82.52 Utah Code Ann. 1953. This section provides in part:

> "35-1-82.52. Hearings may be held before the commission sitting as administrative law judges or any administrative law judge of the commission...The commission shall appoint one or more administrative law judges and the commission or any administrative law judges shall have power and authority to call, preside at, and conduct hearings, including the power to issue subpoenas....A full and complete record of all proceedings before the commission or administrative law judge and all testimony shall be taken down by a reporter employed by the Commission...Upon the conclusion of a hearing the administrative law judge or the commission, as the case may be, shall make findings of fact which shall include all evidential and ultimate facts necessary to support his order...Such findings of fact and order of the administrative law judge or commission shall be in writing and copies thereof shall be furnished to each of the parties in interest."

The jurisdiction of the commission and the administrative law judges is to conduct hearings, prepare findings of fact and orders based upon testimony or evidence adduced at

a hearing. In the instant case there is no viable evidence before the administrative law judge or the commission. There is no "evidence" to support any findings of the administrative law judge let alone the commission. The "record" consists of documents, forms, letters, applications, orders, (etc.) in the file. These were selected by the administrative law judge as facts upon which his findings were based.

In effect the administrative law judge and the commission (by its denial of the Motion For Review) have taken upon themselves the power and authority of a court of general jurisdiction in granting Motions For Summary Judgment. In the instant case the administrative law judge exceeded this authority by refusing counsel the opportunity to be heard.

Section 35-1-82.51 Utah Code Annotated provides for the question of the nature of a hearing:

> Section 35-1-82.51--Hearings shall be held by the commission upon reasonable notice to be given to each interested party, by service upon him personally or by mailing a copy to him at his last known post-office address...<u>All parties in interest shall have the right to be present at any hearing, in person or by attorney or by any other agent, and to present such testimony as may be pertinent to the controversy before the commission and shall have the right to cross examine</u>." (Underscoring added.)

This court has stated in <u>Baker v. Industrial Commission 17 U(2d) 141, 405 P2d 613</u>:

> "As a matter of law the industrial commission may not, without any reason or cause, arbitrarily

or capriciously refuse to believe and act upon substantial, competent and credible evidence, which is uncontradicted."

The corollary of the foregoing would also be true that the commission cannot arbitrarily and capriciously act upon no evidence. (Underscoring added.)

In James v. Ogden Auto Body (1982), 646 P2d 703 this court stated:

> "Industrial commission may adopt the findings of an administrative law judge without holding a hearing and making further findings; such procedure does not violate due process of law."

The only basis for the foregoing decision is that the plaintiff in that case had a "hearing" before the administrative law judge. Due process has thus been met. The Supreme Court then held that an additional hearing before the commission is not necessary. Plaintiff agrees to this. Plaintiff's concern is that she has been denied due process on having an opportunity to present her case as far back as 1970. In 1970 and 1972 the decision was administrative--the wrong form or not properly supported by medical evidence (etc.). In truth this case should have been set in 1970 when her first request was made.

At the present time a date, time and place for the hearing was set but no hearing resulted where plaintiff could testify, introduce evidence in her own behalf and subject herself to cross-examination by the defendants.

The industrial commission in allowing the above procedure to stand perverts the total purpose of workers compensation. Permitting the administrative law judges and the commission itself to have greater jurisdiction than even a court of general jurisdiction would do substantial damage to the integrity of the system. In place of making the administrative procedures simpler and more direct the tendency is to make pleading and practice more complex and difficult. What was once a fairly simple procedure--in many cases a worker could handle his own claim--has now become a technical legal jungle so complex that it is virtually fatal for someone to appear without counsel.

In the instant case the presence of counsel was insufficient to prevent an arbitrary and unwarranted denial of due process.

Plaintiff therefore respectfully urges that the Findings of Fact, Conclusions of Law and Order of the administrative law judge and concurred in by the industrial commission is void and of no effect as being a denial of an opportunity for plaintiff to present properly her claim for consideration by the said industrial commission.

POINT II.

DID THE PLAINTIFF COMPLY WITH THE PROVISIONS OF SECTION 35-1-99 UTAH CODE ANNOTATED BY FILING A CLAIM WITHIN THREE YEARS OF LAST RECEIVING COMPENSATION BENEFITS?

Section 35-1-99 Utah Code Annotated provides in part:

> "...If no claim for compensation is filed with the industrial commission within three years from the date of the accident or the date of the last payment of compensation, the right to compensation is wholly barred."

At this stage it is important to review the various dates and filings by the plaintiff. The plaintiff was injured on October 31, 1961. She received compensation benefits until September 1963. Her first application was filed on October 14, 1963. On this date the plaintiff filed a document entitled Application For Physical Examination by the Medical Advisory Board. This filing occurred within thirty days of last receiving compensation. Counsel for the plaintiff having acted as a Hearing Examiner at that time was well aware that the commission's policy was that the making of any kind of a "claim" indicating what was wanted and reciting the employer's name and requesting any kind of a benefit was sufficient to invoke the jurisdiction of the commission.

This position was confirmed by this court in the case of Utah State Insurance Fund v. Dutson (1982):

> "While this section and 35-1-100 require either the filing of a claim for compensation or the filing of a written notice of the accident in order to invoke the jurisdiction of the industrial commission, the claim need not bear any particular formality and is sufficient if it gives notice to the parties and to the commission of the material facts on which the right asserted is to depend and against whom claim is made."

This actually amounts to a restatement of the earlier policy of the commission as well as an extension of Rezaldo v. Ind. Comm. 161 U412, 213 P1083. There the court said:

> "While application for compensation is not required to be formal as is the case with a complaint, yet it should at least contain sufficient information to apprise the commission and the employer that the employee making it was injured in the course of his employment at a certain time and place, and that he makes application for compensation..."

See also Palle v. Industrial Commission 79 U47, 7 P2d 284, 81 ALR 1222.

In further recitation of facts supporting the timeliness of filing a claim, the court's attention is directed to the formal Petition for Rehearing filed by counsel on May 7, 1964. The response from the chairman of the commission was, "We will accept your Petition For Rehearing as an application for a formal hearing." (R. 40) (Underscoring added.)

The above is clearly an application for hearing and acknowledged as such by the commission. The administrative law judge appears to be confused about the above "application for hearing" as not being a claim for compensation. In the early days this was the only way in which a claim for compensation could be made--a worker applied for a hearing.

On May 10, 1965 the plaintiff filed an Application For Additional Medical and/or Compensation Benefits. (R. 74)

A formal order of the Commission thereafter issued signed by all three commission members on August 3, 1966.

(R. 136). Immediately upon the issuance of this Order the jurisdiction of the commission was absolute.

Section 35-1-78 Utah Code Annotated provides:

> "The powers and jurisdiction of the commission over each case shall be continuing, and it may from time to time make such modification or change with respect to former findings, or orders with respect thereto, as in its opinion may be justified, provided, however, that records pertaining to cases, other than those of total permanent disability or where a claim has been filed as in 35-1-99, which have been closed and inactive for a period of ten years, may be destroyed at the discretion of the commission." (Underscoring added.)

It must be remembered in this case that (1) three claims were filed within three years of the last payment of compensation and (2) more than ten years had elapsed without the file being destroyed. It is rather apparent the commission has never treated this as a dead file or destroyed it.

Not to be stopped in her pursuit of the claim the plaintiff, pro se, filed again on July 6, 1970 on the commission's forms claiming additional compensation and medical. The commission advised that "it was the wrong form" and no hearing was set.

A further inquiry was made in 1972 for compensation with the same response--wrong forms and no supporting medical evidence.

In 1975 supporting medical evidence was filed showing extensive deterioration of her condition and still no hearing was set.

Eventually the request for hearing was made by the current petition on file and to which claim a hearing was denied.

The administrative law judge takes the approach that the claim for disability filed in 1970 was not timely since it was nine years from the accident. Inferentially at least, it appears that the judge is saying that somehow the claim for permanent total must be filed within eight years. Such is not the case. The eight year statute of limitations deals with temporary total and permanent partial only. Section 35-1-66.

Therefore it is respectfully submitted that the plaintiff has timely filed on several occasions the necessary applications or claims for compensation to invoke the jurisdiction of the commission and once invoked that jurisdiction is continuous without end. Plaintiff was also the beneficiary of a formal Order of the commission and therefore her claim was protected under the continuing jurisdiction of Section 35-1-78.

POINT III.

IS THERE A STATUTE OF LIMITATIONS IN CLAIMS FOR PERMANENT TOTAL DISABILITY COMPENSATION UNDER SECTION 35-1-67 AND THE INTERPRETATION OF THE BUXTON DECISION?

The administrative law judge correctly stated the background and facts in the case of Beverly R. Buxton v. Industrial Commission of Utah (1978) 587 P2d 121, hereinafter referred to as Buxton. The sequence of events in Buxton closely parallels the facts and events in the instant case almost to the same year.

In Buxton the accident was in 1966--in plaintiff's case the accident was 1961.

In Buxton claimant filed for and was referred to a medical panel in 1971 (the first filing). Plaintiff applied for a Disability Rating Board in 1963--30 days after temporary total stopped.

In Buxton the panel found a 55% loss of bodily function and an Order issued in 1971. Plaintiff was found to have a 20% loss of bodily function and after a formal hearing a final Order issued in 1966.

In Buxton the Application For Additional Compensation was filed in 1975. Plaintiff filed an Application For Additional Compensation in 1965 on the Commission's forms. (R. 74). Because of a pending hearing the matter was merged into that previously set hearing resulting in the Order of 1966.

Plaintiff filed an additional Application For Hearing in 1970. The case was not set because "the wrong form was used." In 1972 after a telephone inquiry plaintiff was

advised that no hearing would be set without supporting medical evidence. Supporting medical evidence was supplied in 1975. (R. 147)

In Buxton a hearing was held in 1975. Plaintiff was denied a hearing based on the 1970 application and again in 1972.

In plaintiff's case, after the filing in 1982, the matter was set for hearing but no hearing was held. The administrative law judge announced his decision denying the claim, then refused plaintiff the opportunity to be heard.

The interpretation of the administrative law judge is not in keeping with what this court actually said in Buxton.

The thrust of the interpretation of the judge is limited to the following language:

> "The only limitations of actions statute which has application to permanent total disability claims is Section 99, of the Act, and the Commission makes no assertion that the subject claim was not filed within three years after the date of injury or last payment of compensation as Section 99, requires. (Emphasis supplied.)
>
> Applying the foregoing to the facts of the instant matter, the Application for Permanent Total Disability Benefits should have been filed no later than December 1967, which would have been three years from the last payment of compensation or it should have been filed within three years from the date of the accident, which would have been October 31, 1964. Obviously the later date is the one to be utilized and even giving the Applicant the benefit of the doubt with regard to the July 6, 1970 filing, it is clear that that filing was three years too late for the purpose of maintaining a claim of permanent total disability. Accordingly in view of the Beverly Buxton deci-

sion and the specific language of Section 35-1-99, the claim for permanent total disability should be dismissed." (R. 185)

The administrative law judge apparently does not understand the facts in the <u>Buxton</u> case. The industrial commission denied <u>Buxton</u> because the Application For Permanent Total Disability occurred nine years after the accident asserting section 66 as the basis. This court reversed the Commission saying:

> "The only limitations of actions statute which has application to permanent total disability claims is Section 99 of the Act and the Commission makes no assertion that the subject claim was not filed within three years after the date of the injury or last payment of compensation as Section 99 requires." <u>Buxton v. Ind. Comm.</u>. (Supra)

Applying the administrative law judge's interpretation to <u>Buxton</u> the Application for Permanent Total benefits should have been filed within three years of the accident--1966, or 1974--8 years from the time of the accident.

The issue that the Supreme Court seemed to point out in <u>Buxton</u> was that no claim for compensation was filed with the commission between 1966 and 1971--the period during which Buxton was suffering from non-industrial problems. It is rather apparent that she did not draw compensation during this period. Had she done so, Buxton would have received over 312 Weeks of compensation. Her permanent partial award alone was over 125 Weeks. It would appear that the court found no evidence of a claim for compensation during that 4

year period. This issue was never raised by the commission nor asserted as a defense.

The second area in which the administrative law judge erred was the restricted interpretation of an "application" or "claim." He has the notion that the claim must be specifically for the benefit requested, i.e. temporary total, permanent partial, permanent total and I assume even death.

The sole purpose of section 99 of the act is to invoke the jurisdiction of the industrial commission over the claim. That is why the commission, in the past, as well as this court, have said anything in writing sufficient to identify the claim, the parties and the date of the accident with some information as to what is wanted, is all that is necessary to invoke the jurisdiction of the commission over the case.

It is for this very reason that the exception is made on the destruction of records after 10 years. Section 35-1-78 Utah Code Anno. provides in part: "...that records pertaining to cases, other than those of total permanent disability <u>or where a claim has been filed as in 35-1-99</u>..... may be destroyed..." (Emphasis added.)

For many years the commission has been advising workers to file a "Claim For Protection of Rights." On the form itself appears the language, "This Claim to Protect Rights has been filed with the Industrial Commission in accordance with Section 35-1-99, Utah Code Annotated 1953." On the

form no request is made for any particular benefit--merely to protect the right of the worker to reopen in the future.

In the record we have several filings with the commission: (1) October 14, 1963, Application For Physical Examination by the Medical Advisory Board (R. 28); (2) May 4, 1964, Petition For Re-Hearing (R. 36); (3) May 7, 1964, acceptance of the foregoing as an application for formal hearing (R. 40); (4) May 10, 1965 Application For Additional Compensation and/or Medical Benefits (R. 74); (5) August 6, 1966, Order (R. 136); (6) July 6, 1970, Application For Hearing (R. 144); (7) December 17, 1982, Petition For Consideration of Permanent Total Disability and Re-imbursement of Medical Expenses.

All of the foregoing were timely with regard to Section 35-1-99 and Section 35-1-78. It is difficult to believe what else could be done on the part of the plaintiff to obtain some kind of a hearing.

Plaintiff refers back again to the powers of the commission under Section 35-1-78 of the Act. This court said in the Buxton (supra) decision:

> "The Commission's jurisdiction to act on an application for modification of a previous order derives from Section 78 of the Act. That section empowers the Commission to make such modification of former findings and orders as 'in its opinion may be justified.' The section has been previously construed to require, as the basis of modification, evidence of some significant or new development in the claimant's injury or proof of the previous award's inadequacy. Kennecott Copper

Corp. v. Industrial Commission, 19 Utah 2d 158, 427 P2d 952.."

By virtue of the denial by the administrative law judge of a hearing, an opportunity to introduce evidence, a refusal to accept medical reports, and denial of the plaintiff to even testify prevented the plaintiff from establishing a claim under Section 78. In Buxton (supra) the Commission had the foresight to allow the claimant to put on her case and establish a record before denying the claim.

Plaintiff was not given such a right. Due process as well as the discretionary powers dictate that in all events no matter how faulty or defective any claim might be, the injured worker at least is entitled to be heard.

CONCLUSIONS

A careful review of the record before the court is all that is possible under these circumstances. Since no hearing was held no real evidence is before the court. However, it is respectfully submitted that the plaintiff has complied with all appropriate statutes and court decision for the Industrial Commission to have jurisdiction over this matter and the commission should be advised that they have no authority to issue an Order against a worker without first giving him an opportunity to be heard.

DATED this ______ day of April 1984.

ROBERT J. SHAUGHNESSY,
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Appellant

MAILING CERTIFICATE

I hereby certify that I hand-delivered ten true and correct copies of the foregoing brief to the Supreme Court and mailed the same to the following parties postage prepaid on this 6th day of April, 1984.

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By Stephanie Syphers