1984

Eudora Mecham v. The Industrial Commission of Utah, Eitel Mccullough, Inc., and Second Injury Fund : Brief of Defendant-Respondent

IN THE SUPREME COURT OF THE STATE OF UTAH

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

BRIEF OF DEFENDANT-RESPONDENT

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

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POINT I.

THE RECORD SHOWS AS A MATTER OF LAW THAT BASED UPON SECTION 35-1-99 UTAH CODE ANNOTATED AND THE DECISION OF THIS COURT IN THE CASE OF BEVERLY R. BUXTON v. INDUSTRIAL COMMISSION OF UTAH, 587 P2d 121, THE CLAIM OF THE APPLICANT IS BARRED BY THE STATUTE OF LIMITATIONS

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IN THE SUPREME COURT OF THE STATE OF UTAH

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

BRIEF OF DEFENDANT-RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

This is an appeal from an Order of the Industrial Commission denying plaintiff's Motion for permanent-total disability, the same having been affirmed by the adoption of 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 disability benefits because her application for the same was barred by the Statute of Limitations contained within Section 35-1-99 Utah Code Annotated.

RELIEF SOUGHT ON APPEAL

Defendants seek affirmance of the Order of the Administrative Law Judge as affirmed by the Commission.

STATEMENT OF FACTS

The Respondent will briefly summarize the facts as contained

within the Administrative Law Judge's Findings of Fact, with the appropriate references to the record, as the same are accurate. (R. 182)

On or about December 17, 1982, the Applicant, through her counsel, filed a "Petition for Consideration of Permanent-Total Disability and Reimbursement of Medical Expenses". She requested a finding of permanent and total disability as well as an accounting of the reimbursed medical expenses paid by her husband and Medicare. (R. 161)

The Applicant sustained a low back injury on October 31, 1961, while employed by defendant, Eitel McCullough, Inc. (R. 1) As a result of the injury, she received temporary-total disability benefits commencing the day of her injury and continuing for 82 weeks and two days thereafter. She returned to work on September 19, 1963. On or about October 14, 1963, the Applicant filed an Application for Physical Examination by a Medical Advisory Board, which was the predecessor of the present Disability Rating Panel. (R. 25). On January 25, 1964, the Applicant was examined by the Advisory Board and found to have sustained a 20% permanent-partial impairment of the whole body due to her back injury of October 31, 1961. (R. 32)

She was again examined by the Advisory Medical Panel on April 4, 1964, and the original findings confirmed. The Commission advised the Applicant she would receive 40 weeks of permanent-partial impairment benefits commencing September 26, 1963, and would be paid until a total of $1,560.00 had been paid.

(R. 34). On or about May 4, 1964, the Applicant, through her counsel, filed a Petition for Rehearing with the Commission, claiming the permanent-partial impairment found by the Medical Advisory Board, was without evidentiary foundation. (R. 36). The Commission treated the Petition as one for an Application for Formal Hearing. A hearing was held on September 13, 1965. She was sent to a Medical Advisory Board for further physical examination on October 16, 1965. (R. 78). She was examined by the Board and found to have a 20% permanent-partial impairment of the whole body. Because of an objection, she was required to return to the Medical Advisory Board on November 20, 1965, and, at that time, the Board recommended that the file be referred to a medical panel. She now was claiming psychiatric expenses.

On December 2, 1965, Commissioner Wiesley appointed Dr. Boyd G. Holbrook as chairman of the medical panel and also associated Dr. Wayne M. Hebertson, Dr. Jack Tedro and Dr. Chester B. Powell as members of the panel. On or about February 21, 1966, the panel report was received. It indicated that the Applicant's psychiatric treatment, medications and hospitalization were the primary result of an independent process rather than attributable to the industrial accident. (R. 109). Her 20% disability rating heretofore given the Applicant by two prior medical advisory boards was affirmed. The Applicant then filed an objection to the medical panel report and a hearing was held on the objections on June 6, 1966. (R. 122). The Commission thereafter entered its Order of August 3, 1966, finding that there was no apparent

change in the testimony of the panel chairmen and that the Applicant had submitted no new testimony. (R. 136). The Commission further found that the Applicant was entitled to receive from the defendants 40 weeks of compensation totaling $1,560.00, all of which had heretofore been paid. The Order also indicates that the Applicant was paid compensation to and including December, 1964.

On July 6, 1970, the Commission received an Application for Hearing filed by the Applicant indicating that defendants had refused to pay any and all benefits in that they had refused to pay medical expenses. (R. 144). On July 10, 1970, Judge Peter Marthakis, II, informed the Applicant, by mail, that she should file an Application for Additional Benefits instead of requesting a hearing and enclosed the proper forms for her to use. (R. 145). He also directed the applicant to Paragraph 6 of the forms providing:

> Applicant alleges a substantial change in her physical condition and requires additional medical, hospital and compensation benefits based on the following change: (Note, it is absolutely essential that this allegation be supported by current medical reports from treating physicians indicating) :
>
> a. The present disability is greater than the disability stated in part (B) of Paragraph four.
>
> b. The higher disability is due to the accident stated in Paragraph (1) above.
>
> c. Additional medical, hospital and treatment is required because of the accident stated in Paragrah (1) above. This matter will not be set for hearing or other action taken until this report is filed.

following this letter from Judge Marthakis, nothing further was received from the Applicant Until December, 1982. (R. 161)

ARGUMENT

POINT I

The record shows as a matter of law, that based upon Section 35-1-99 Utah Code Annotated and the decision of this Court in the case of Beverly R. Buxton v. Industrial Commission of Utah, 587 P2d 121, the claim of the Applicant is barred by the Statute of Limitations:

At the last hearing of the above matter on April 27, 1983, the attorney representing the Applicant admitted that no medical bills or information of any kind had ever been submitted to any of the respondent-defendants for their approval, payment or otherwise, and to this day, none have been received. The Applicant, through her counsel, sought to characterize the July 6, 1970 filing as timely for the purpose of obtaining permanent-total disability benefits. As pointed out in the Memorandum Decision of the Administrative Law Judge:

> However, counsel's reasoning in this regard is flawed in certain respects. First, the filing of July 6, 1970, was not timely in any form or fashion. The file clearly indicates that the Applicant last received any compensation from the defendants in December, 1964. Pursuant to 35-1-99, Utah Code Annotated, as amended, effective May 9, 1961, provided that a claim for compensation must be filed in three years from the date of the accident or the last date of payment. In the instant manner, the last payment was made in December, 1964, and accordingly, Mrs. Mecham's claim should have been filed no later than December, 1967. In the alternative, if we apply the six-year Statute of Limitations found in Section 35-1-66, Utah Code Annotated, as amended May 9, 1981, the Applicant's claim of July 6, 1970, was still not timely in that, if the injury occurred on October 31, 1961, six years from that date would have been October 31, 1967, which is three years earlier than the Applicant's filing of 1970. (R. 184)

The judge then correctly concluded that by virtue of the statute, cited above, and the decision of this Court in the case of Beverly Buxton v. Industrial Commission of Utah, 587 P2d 121, her claim for permanent disability is barred. The Court correctly held that the only Limitations of Actions Statute, which has application to permanent-total disability claims is Section 99 of the Act.

The facts in the instant case clearly reflect that the Applicant should have made application for permanent-total disability benefits and filed the same no later than December, 1967, which would have been three years from the last payment of compensation or within three years from the date of the accident, which would have been October 31, 1964. Obviously, as pointed out by the Administrative Law Judge, 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 was clear that her filing was three years too late for the purpose of maintaining her claim for total disability.

Inasmuch as no medical expenses had ever been submitted to the defendants for review nor were they supported by any record as such, the Court appropriately indicated to the Applicant that as far as medical expenses were concerned, there was nothing before the Administrative Law Judge for consideration.

The judge then appropriately pointed out to counsel for the Applicant, that before any additional medical expenses were made an issue in additional proceedings, he should review the Medical

Panel Report of February 21, 1966, which specifically found:

> Under these circumstances it would appear that the psychiatric treatment, medications and hospitalizations are primarly the result of an independent process rather than attributable to this alleged accident.

To this date, no medical expenses or claims for medical expenses have ever been presented to the defendants.

CONCLUSION

A review of the record, which is very ably summarized in the Findings of Fact, Conclusions of Law and Order of the Administrative Law Judge dated May 10, 1983, clearly reflects that the Applicant's position cannot be maintained and that her claim is barred by the Statute of Limitations as explained in the Buxton decision heretofore cited.

The Order of the Commission should be affirmed.

Respectfully submitted this _____ day of June, 1984.

Wallace R. Lauchnor
Attorney for Eitel McCullough, Inc. and Fidelity Casualty Co.

CERTIFICATE OF MAILING

On the _____day of_____1984, I hereby certify that I hand-delivered _____ true and correct copies of the foregoing brief to the Supreme Court and mailed the same to the following parties postage prepaid.

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