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Emil Schocknmyer v. The Industrial Commission Of Utah And Kaiser Steel Corporation : Brief of Defendant Kaiser Steel Corporation

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IN THE SUPREME COURT OF THE STATE OF UTAH

EMIL SCHOCKNMYER,

Plaintiff,

vs.

THE INDUSTRIAL COMMISSION
OF UTAH and KAISER STEEL COR-
PORATION,

Defendants.

Case No.
11451

BRIEF OF DEFENDANT KAISER STEEL CORPORATION

Appeal from Decision of
The Industrial Commission of Utah

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NATURE OF THE CASE

This is a review, as provided by Section 35-1-83 Utah Code Annotated 1953 as amended, of an order of the Industrial Commission of Utah, dated November 13, 1968, denying plaintiff's claim for compensation on the grounds that the claim was barred by the statutes of limitation and/or foreclosed by his failure to appeal from a final order of the Commission denying his claim.

DISPOSITION BELOW

The Commission denied plaintiff's claim as being (1) foreclosed by his failure to appeal from a final order denying his claim, and/or (2) barred by the statute of limitations, Section 35-1-99 Utah Code Annotated, 1953.

RELIEF SOUGHT ON APPEAL

Defendants ask that this Court uphold the findings and order of the Industrial Commission of Utah.

STATEMENT OF FACTS

The plaintiff unquestionably sustained injury in the course of his employment with the defendant Kaiser Steel Corporation on June 19, 1958. In view of the fact that the claim currently before the court was denied by the Commission on limitations of actions principles, it is not entirely appropriate to review the medical aspects of the claim. Nevertheless, the plaintiff's brief is devoted entirely to a review of his symptoms and a statement of his contention that, whether or not there have been technical deficiencies in the presentation of his claim from time to time, he now suffers disability by reason of industrial accident. It is at least relevant, therefore, to point out that all medical problems in connection with Mr. Schockumyer's claim were referred to a medical panel, constituted as provided by Section 35-1-77 Utah Code Annotated 1953, on April 4, 1961. The panel issued its report on May 12, 1961 (Record pages 62 through 66) in which it stated, among others, its conclusions that "this panel is unable to relate this appli-

cant's low back problem to his industrial injuries, studies or treatment," and "there is no permanent disability as a result of these injuries."

The plaintiff objected to the findings of the medical panel, and hearing on the objections was held on October 2, 1961 at which time the plaintiff was given an opportunity to examine the panel chairman at length and to present any other medical testimony he desired. Thereafter the referee filed his findings that the plaintiff's problems were not the result of industrial injury, and the Commission denied the claim. The order was dated October 26, 1961 (Record page 130). No appeal from that decision was ever taken nor was application for rehearing or review filed within the period required by Section 35-1-82 Utah Code Annotated as it read at the time the order denying the claim was issued.

On August 9, 1962 (Record page 142) a new claim seeking compensation for disability related to pathology attributable to injury of June 19, 1958 was filed with the Industrial Commission. No formal order was entered in response to that application, but the plaintiff and his attorneys were advised that the Commission had concluded it had no statutory authority to reopen the claim (Record page 150). Nevertheless, by reason of the plaintiff's persistence in asserting his claim through the offices of two governors and Utah's congressional delegation, the matter was scheduled for reconsideration, and a pre-trial conference was held on August 8, 1968. Plaintiff's attorney was then given thirty days within which to submit a memorandum on the jurisdiction and

statutes of limitation questions (Record page 168). On September 10, 1968, plaintiff was advised that no memorandum had been submitted and that, unless one were submitted within ten days, it would be concluded that plaintiff desired to submit the matter on the record. No memorandum having been submitted within the additional ten days, the Commission entered its order on November 13, 1968 denying the plaintiff's claim. It is of primary significance in considering the subject claim that there has been no injury sustained or claimed to have been sustained by the plaintiff since June of 1958. It is also noteworthy that plaintiff has been represented by competent counsel at every stage of the proceedings.

ARGUMENT

POINT I

BY REASON OF PLAINTIFF'S FAILURE TO APPEAL FROM THE ORDER OF OCTOBER 26, 1961, THE COMMISSION HAS NO JURISDICTION TO CONSIDER THE SUBJECT CLAIM.

The original application in this matter was filed on March 1, 1961 for injury sustained on June 19, 1958. The injury was described as "right shoulder injury resulting into ruptured disc in the back; three crushed discs removed." It appears from that application that the plaintiff had been paid temporary total disability compensation or wages from the date of the alleged injury until February 5, 1960, a period of approximately twenty months. The medical panel concluded that there was no permanent disability from the June 19th injury and that any discernable back pathology could not be

attributed to the injury. These medical conclusions were adopted as findings of the Commission, and an order denying compensation was entered. No appeal was taken.

Since the application for hearing filed March 1, 1961 was formally denied after the complete procedure for administrative consideration had been followed, any question related to that claim must be considered res judicata. The Court should require no citation of authority for the proposition that, in the absence of a fraud upon the court, no litigant can reopen a claim which has once been formally and finally decided after a statutory period for seeking review has expired. In 1961 and until 1965, the only procedure for precipitating judicial review of an order of the Industrial Commission was the filing of a petition for review under Section 35-1-82 Utah Code Annotated. No petition for review was ever filed.

On August 9, 1962, the plaintiff filed a separate application for hearing. This application alleged disability resulting from the same injury (the injury of June 19, 1958) described in the application of March 1, 1961. Again, on January 24, 1963, the plaintiff filed an application. This third application for hearing describes the same injury of June 19, 1968, and the same pathology, disc degeneration, as the previous two applications. We submit that the plaintiff's failure to appeal from the denial of his original application within the thirty-day period then required by Section 35-1-82 Utah Code Annotated 1953, as amended, completely precluded the possibility of administrative or judicial re-

view. This court so held in *State Insurance Fund vs. Industrial Commission*, 61 Utah 579 in 1923, and the court has not infrequently restated that position. See *Ferguson vs. Industrial Commission*, 63 Utah 112, 221 Pac. 1099; *Utah Fuel Company vs. Industrial Commission*, 73 Utah 199, 273 Pac. 306; *Woldberg vs. Industrial Commission*, 74 Utah 309, 279 Pac. 609. It is obvious that an applicant for compensation whose claim has been denied and who has filed to seek administrative or judicial review cannot revive the Commission's jurisdiction or the Court's jurisdiction by the simple expedient of filing a new application. The basic problem presented by all the applications is whether or not disc pathology which required surgical correction resulted from an industrial accident. This issue was resolved against the applicant by a medical panel and by the Commission itself. There was no statutory procedure for reconsideration of this issue once the appeal period has expired. There should be no such procedure; the principle of *res judicata* is as valid in the field of workmen's compensation as in any other area of law.

POINT II

DISABILITY PERSISTING MORE THAN SIX YEARS AFTER THE DATE OF AN INDUSTRIAL INJURY CANNOT BE THE BASIS OF AN AWARD FOR TEMPORARY TOTAL AND PERMANENT PARTIAL DISABILITY COMPENSATION.

The only injury plaintiff alleges is an injury of June 19, 1958. On January 23, 1968, in the case of *U.S. Smelting, Mining & Refining Co., vs. Nielsen*, 20 Utah

2d 271, 437 P.2d 199, this Court held that the right to receive compensation for temporary total and permanent partial disability terminates six years after the date of the injury. In no event, therefore, could the plaintiff here be awarded compensation for any period of disability after June 19, 1964.

CONCLUSION

The plaintiff's brief in this matter is essentially a review of his symptoms since his injury and an indictment of the attorneys and physicians who have served him since 1958. The brief does not indicate on what theory the plaintiff predicates his contention that the Commission or the Court have jurisdiction. We have attempted to anticipate the theories which might be advanced and to demonstrate to the Court that no jurisdiction still exists.

Respectfully submitted,

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