

1964

The State Insurance Fund v. Industrial Commission of Utah et al : Brief of Defendant

Utah Supreme Court

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Recommended Citation

Brief of Respondent, *State Insurance Fund v. Industrial Comm. Of Utah*, No. 10095 (Utah Supreme Court, 1964).
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IN THE SUPREME COURT
of the
STATE OF UTAH

FILED
JUN 1 - 1964

THE STATE INSURANCE FUND,
Plaintiff,

vs.

THE INDUSTRIAL COMMISSION
OF UTAH, ALFRED LUND, and
UNITED PARK CITY MINES CO.,
Defendants.

Supreme Court, Utah

Case No.
10095

BRIEF OF DEFENDANT — ALFRED LUND

Appeal from Order of
The Industrial Commission of Utah

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STATEMENT OF FACTS

Defendant Alfred Lund, hereinafter referred to as Mr. Lund, agrees with the statement of facts contained in plaintiff's Brief, but notes certain additions thereto.

Silver King Coalition Mining Company, consolidated with Park Utah Consolidated Mines Company and became the United Park City Mines Company, effective May 8, 1953 (R.58).

Mr. Lund's last employment for United Park City Mines Company included the shift of December 30, 1961 (R.61).

Mr. Lund was hospitalized in the State Tuberculosis Sanatorium, Ogden, Utah, on May 8, 1962. Mr. Lund was examined by the Medical Panel on October 6, 1962, and was found to be 100% disabled from silicosis with active tuberculosis. No objections were filed to such finding.

ARGUMENT

POINT 1.

ALFRED LUND WAS EXPOSED TO HARMFUL QUANTITIES OF SILICON DIOXIDE DUST FOR A TOTAL PERIOD OF MORE THAN FIVE YEARS IN UTAH DURING THE FIFTEEN YEARS IMMEDIATELY PRECEDING HIS DISABLEMENT AS REQUIRED BY SECTION 35-2-13 (3), U.C.A. 1953.

The question of what is exposure to harmful quantities of silicon dioxide dust varies with the individual. The previous exposure of an individual over a long period of time may make him more susceptible to disability from additional exposure than another individual who suffers the same additional exposure without the history of previous exposures. This we believe to be the crux of this case.

Between 1913 and 1931 Mr. Lund, with the exception of six years, followed the employment of a miner. During this period, dry drilling was a common practice and resulted in extremely harmful exposure (R.20-22). This would result in a period of twelve years of the most harmful type of exposure. While it must be conceded, that this exposure is prior to the effective date of the

Occupational Disease Act i.e. July 1, 1941, it is significant in this case. The only other underground exposure suffered by Mr. Lund since the effective date of the Act is the six week period between September and October of 1950 when Mr. Lund worked as a miner doing assessment work for the Silver King Coalition Mines Company (R.23).

Mr. Lund's other work from December 1931 to September 15, 1951 consisted of maintenance work on the Silver King waste dump and maintenance work in the ore and waste haulage ways from the shaft to the crude ore bins in the mill and to the ore bins in the sampler. The record is replete with substantial, competent evidence, having probative value, as to the harmful exposure during this period. His maintenance work on the waste dump, in the haulage way, his presence during the course of dumping operations on the waste dump, crude ore bins in the mill and ore bins in the sampler for a period of nineteen years three months, are persuasive of a conclusion that there was exposure to harmful quantities of silicon dioxide dust in the course of his employment for a period of an additional nineteen years, three months.

With this background and considering only the period from May 8, 1947 to May 8, 1961, his date of disability, Mr. Lund will agree that it is necessary to show exposure for a total period of not less than five years in this State, in order to satisfy the provisions of 35-2-13(3).

Plaintiff, The State Insurance Fund, is willing to concede, for purposes of argument, that Mr. Lund's exposure from May 8, 1947 to September 15, 1951, while employed in waste dump maintenance, would have exposed Mr. Lund to harmful quantities of silicon dioxide dust for a period of three years and nine months.

Plaintiff further, in effect, concedes that if we consider the period between September 1, 1956 and May 1, 1957 at the Ontario loading station as harmful exposure, Mr. Lund has shown an additional eight months or a total period of four years and five months of exposure.

We submit that such concession should be made, since the only evidence before the Commission covering these periods is completely uncontradicted and is to the effect that Mr. Lund was exposed to harmful quantities of silicon dioxide dust during this time (R.25-34) and (R.34-36).

The only testimony as to lack of exposure to harmful quantities of silicon dioxide dust is confined to the period from May 1, 1957 to and including December 30, 1961, wherein Mr. Lund worked as a tool sharpener and repairman at Keetley, Utah (R.42-49).

Mr. Lund's testimony (R.36-41) is to the effect that there was exposure and is substantial, competent evidence having probative value.

While we take with a grain of salt his characterization as the "only disinterested witness", there is no substantial conflict between Mr. Hyde's and Mr. Lund's

testimony as to his working place. Both agree that Mr. Lund worked in the carpenter shop and the steel sharpening shop (R.37 and R.43). Both agree that the carpenter shop is located between the ore haulage way and the waste haulage way. (R.37 and R.43-44). Mr. Hyde indicates that one haulage way is 20 feet from the sawmill and the other 10 feet. The carpenter shop is 25 feet closer to the apex formed by the junction of the two haulage ways. Logically the carpenter shop must be the same distance *or less* from the haulage ways.

Mr. Lund says the passage of ore and waste trains on the haulage way raised dust: (R. 37)

“Q. With the passage of trains, what if anything occurred relative to creation of dust?

A. Well, any time a train went by on the inside track, it raised dust throughout the whole place.

Q. What type of dust was raised?

A. Well, mine dust. Silica and dust.”

Mr. Hyde agrees with the testimony wherein at (R.47-48) he states:

“Q. Mr. Hyde, are you familiar with the air conditions, with respect to the presence or absence of any dust?

A. Well, only as far as when you can see it. There might be dust in the air, and you don't know it. But when you can see dust, why you know it's there. But there is a lot of times that — well, all the ore, practically all the ore that we have ever shipped, is damp. And

what dust is raised is from the wheels on the track, or something of that sort.

Q. You are not talking about the dust inside the tunnels through which the trains go?

A. That is the only dust we have, unless the wind blows, or something of that sort. And that's only when the train passes. The ore is damp."

Both Mr. Lund and Mr. Hyde agree as to his duties filing saws, sharpening axes, doing repair work on various mine tools. Both agree the tools that come out of the mine are encrusted with mine dirt containing silica and require brushing prior to sharpening. Mr. Lund's testimony is as follows: (R. 37-38)

"Q. Now relative to your job of tool sharpening, will you describe the condition of an ordinary mine saw as it comes out of the mine?

A. Well, they came out of the mine laden with mine dirt. Silicon dust.

Q. What did you do, relative to cleaning them up?

A. Some was cleaned by hand, and some was cleaned by machine brush.

Q. Well, tell us what you did.

A. Well, you had to brush all the saws off. Clean them up before you start to work on them. Set them and file them.

Q. How many saws, on an average day, would you brush off and sharpen?

A. Well, that wasn't uniform. Some days you had lots, and some days not too many.

Q. The steel brush and the machine steel brush, state what they did relative to the creation of dust conditions.

A. Well, any time you turn a steel brush loose on a saw, you're going to raise a lot of dust."

Mr. Hyde agrees completely with this testimony (R.54).

"Q. Now as to the mine tools that came out, the timbermen's saws and axes, they would be covered with the dirt from the mine?

A. That's right.

Q. And they'd have to be steel-brushed?

A. That's right.

Q. And then you have a power steel brush, do you?

A. Yes.

Q. Does this operation create some dust?

A. It does. And the respirators are worn at this time.

Q. And the respirator is designed to protect against this dust condition?

A. That's right.

Q. So then it would be your testimony would it not, Mr. Hyde, that you wear these respirators because of dust conditions that do exist in that shop?

A. To eliminate every possible chance of a man breathing dust, yes."

Mr. Hyde also details the fact that all of the ore produced at United Park City is dumped from the mine

cars to railroad cars approximately 300 feet from the carpenter shop. That the ore is dropped approximately 14 feet and any dust created from this operation would be from dropping the ore this distance.

Both Mr. Lund and Mr. Hyde agree that whenever Mr. Lund was cleaning mine tools with power or hand brush or sharpening axes on the emery wheel that he used a respirator. Both agree that these operations produced sufficient dust that filters must be changed as often as every two days. Mr. Lund's testimony is as follows (R. 40).

“Q. You stated you wore a respirator?

A. I did.

Q. Does this respirator have a filter?

A. Yes.

Q. State what you did, relative to changing the filter.

A. Well, you couldn't use a respirator only just so long and the filter was full of dust and it had to be changed. Put it in a fresh filter.

Q. How often would you change the filter?

A. Well, that wasn't uniform. Sometimes every two days, and sometimes once a week.”

Mr. Hyde (R. 53) corroborates this testimony.

“Q. How often do the employees change the filters on those respirators?

A. That was left pretty much to their judgment. I keep new filters there, and they change those

at their own discrepancy. They inspect their filters, like Fred says, every day or every two days. It all depends on the amount of work they do, where a filter is required."

The significance of the use of a respirator is self evident. Both Mr. Lund and Mr. Hyde agree that a serious dust problem was created by the cleaning and sharpening operations. The inference we detect in the plaintiff's argument is that they would have the court believe that the use of a respirator while grinding or cleaning tools eliminates all exposure. It is conceded it will eliminate some dust and particular sizes of dust large enough to be arrested by the filter. There is no evidence it will filter out the microscopic particles of silicon dioxide dust which causes silicosis. This places the burden of making a fact determination in this area upon the Industrial Commission. In this area the Industrial Commission must apply its expert knowledge in these matters and make a fact determination.

Secondly, after the dust condition has been created and the dust is airborne and present in the general area, what effect will it have upon Mr. Lund when he is no longer grinding and cleaning and not using a respirator? The serious dust condition was demonstrated by evidence of both Mr. Lund and Mr. Hyde. What became of it? It existed in varying degrees throughout the entire area that Mr. Lund worked. It existed without regard to wind, weather, or time of year. It existed during the entire period, May 1, 1957 to and including December 30, 1961, a period of four years and seven months. Added

to our previous four years three months this would result in a period of eight years and ten months exposure out of the fifteen years prior to disablement.

Whether or not the general dust condition in the shop would produce silicosis in an applicant who had suffered no previous exposure, as did Mr. Lund, is not the question. The question is, was Mr. Lund exposed to harmful quantities of silicon dioxide dust in his employment?

We know that Mr. Lund, to use the words of Elmer M. Kilpatrick M.D., Chairman of the Medical Panel, has silico tuberculosis, "A classic case of combined disease which in any situation would prevent employment and we consider him permanently and totally disabled." (R. 16.) We know that he became disabled on May 8, 1962, four months and eight days after his lay-off on December 30, 1961.

The Industrial Commission has found as a fact, that Mr. Lund was exposed to harmful quantities of silicon dioxide dust for more than five years in this State during the fifteen years preceding his disablement. That he was last exposed to harmful quantities of silicon dioxide dust during a period of thirty days or more, from December 1st to December 30th 1961 in the employ of United Park City Mines Company.

We know he has the disease, this is not questioned. We know that the brushing and grinding produced dust, this is not disputed. We know there was sufficient dust created to require a change of filters daily or every two days. We know the dust was there and Mr. Lund has

the disease. Is not the Commission's Finding as to exposure supported by substantial, competent evidence having probative value? We submit the Commission's Finding and its Order should be sustained.

POINT 2.

ALFRED LUND WAS EXPOSED TO HARMFUL QUANTITIES OF SILICON DIOXIDE DUST IN HIS EMPLOYMENT FOR UNITED PARK CITY MINES COMPANY IN THE MONTH OF DECEMBER 1961.

The argument presented under Point 2 is a repetition of the argument under Point 1 confined to the limited period of December 1 to December 30, inclusive, of the year 1961.

It is submitted that if the argument fails for the reason stated in this Brief as to the period prior to December 1, 1951, it fails for the period covered by the month of December 1961. There may be merit to the contention that there is less likelihood of exposure during the month of December from the haulage way or the dumping operation since Mr. Lund is working in an enclosed space. But there is greater likelihood of exposure to harmful quantities from the silicon dioxide dust that is produced in this enclosed space when there is no ventilation. The cleaning operation with a power driven wire brush cutting the encrusted mine muck from the tools would be exactly the same process winter or summer. However, a room in which this operation is conducted, closed off from the rigors of a Keetley winter, would be an area that would be saturated with the microscopic size particles of

free silica cut from the tools by the use of a wire brush. Again, the use of a respirator at the time the cleaning operation is performed would filter out some but not all of these particles. The breathing of the same air without the filter in the course of Mr. Lund's other duties would result in exposure quantities of silicon dust.

It is commonly recognized that the exposure process that produce silicosis is a continuing one until finally disability occurs.

It is submitted that after the history of exposure demonstrated by Mr. Lund in this case, it would take less and less exposure to produce the final compensable event, to-wit: *disability*.

Applicant submits that this case is within the doctrine laid down in *Kennecott Copper Corporation vs. Industrial Commission*, 115 U. 451, 205 P. 2d 829, referred to as the Kucher case. While Kucher worked underground from 1917 to 1932, the only exposure suffered by Kucher from September 30, 1935 to July 15, 1946, in the employ of Kennecott Copper Corporation was that of working on the tracks in the open pit, repairing cars in the mine area, repairing cars on the hill, or repairing cars in the shop. There was testimony that considerable wind blew in the area but in no event was there any underground exposure since the effective date of the Occupational Disease Act, to-wit: July 1, 1941. The Commission found that the outside exposure was harmful and the Supreme Court agreed, summarizing as follows:

“The liability of an employer in whose employ an applicant becomes totally disabled from silicosis, is predicated not on having contracted such ailment in his employ, but for exposing such employee to harmful quantities of the dust. There being a period of nearly 11 years of some exposure to such dust, in view of the circumstances, the commission had a valid basis for its findings the the quantities were harmful in view of total disability.”

We submit that the Commission's finding (R.86) “that he was last exposed to harmful quantities of silicon dioxide dust during the period of thirty days, or more from December 1 to December 30, 1961, inclusive, in the employ of the United Park City Mines Company;” is supported by substantial, competent evidence having probative value. The Commission's findings should be sustained.

POINT 3.

LIABILITY MAY BE IMPOSED UPON THE STATE INSURANCE FUND AS CARRIER EVEN THOUGH ALFRED LUND WAS NOT EXPOSED FOR THIRTY WORKING DAYS IN THE MONTH OF DECEMBER 1961.

It is Mr. Lund's position that this is the real issue in this appeal. We address ourselves to this proposition, which is truly between the State Insurance Fund and the United Park City Mines Company in the hope that future applicants will not be burdened by the torturous interpretations placed upon 35-2-14 by the State Insurance Fund.

In the first instance, this Section determines which of two employers is liable. We set forth the entire Section as follows:

“35-2-14 *Last employer liable*—Exception.—Where compensation is payable for an occupational disease the only employer liable shall be the employer in whose employment the employee was last injuriously exposed to the hazards of such disease, provided that in the case of silicosis the only employer liable shall be the employer in whose employment the employee was last exposed to harmful quantities of silicon dioxide (SiO_2) dust during a period of thirty days or more after the effective date of this act.”

Prior to July 1, 1949 the only liability in law for an occupational disease was the common law right of action, necessitating the establishment of actual negligence on the part of the employer. The new Act covered only total disability, but was held by this court to have completely preempted the common law action including the action for partial disability, even though partial disability was not covered in the Act. See *Masich v. United States Smelting, Refining & Mining Co.*, 113 U. 101, 191 P. 2d 612.

The new Act was passed by the legislature on February 14, 1941 and went into effect on July 1, 1941. To provide continuity between the common law action and the action under the Occupational Disease Act the legislature saw fit to require an applicant under the Occupational Disease Act to be exposed to harmful quantities of silicon

dioxide (SiO_2) dust *during a period of sixty days or more* after the effective date of the Act. This, in effect, is a condition precedent which the applicant must satisfy in order to qualify under the new cause of action. Note, however, that the applicant must show exposure during the ten years prior to disablement for a *total period of not less than five years*, which exposure could all be prior to the effective date of the Act.

Since its enactment in 1941 the legislature has seen fit to reduce the period of 35-2-14 from sixty days to thirty days.

It now appears that the State Insurance Fund urges this court to interpret this statute so that the latter portion hereof will now, in effect, read:

“Provided that in the case of silicosis the only employer and *insurance carrier* liable shall be the employer and *insurance carrier* in whose employment and under whose coverage the employee was last exposed for thirty days or more to harmful quantities of silicon dioxide (SiO_2) dust since the effective date of this Act.”

It is defendant Lund's position that this interpretation should fail for many reasons.

In the first instance, by its title and language 35-2-14 U.C.A. 1953, establishes the proposition that the last employer who exposes an employee to harmful quantities of silicon dioxide dust, is liable. The exposure during the period of four years, eleven months, prior to the exposure during the period of thirty days can all be in the employ of other employers and yet the last em-

ployer is liable if he has exposed the employee to "harmful quantities" during the period. This view is supported by and fully discussed in *Kennecott Copper Corp. v. Industrial Commission*, 115 U. 451, 205 P. 2d 829 referred to as the Kucher case. Secondly, the legislature chose to use the word "last exposed to harmful quantities of silicon dioxide (SiO_2) dust during a period of thirty days, etc.". The legislature did not lay down a standard of what is a "harmful quantity", or to quote Justice McDonough in the Kucher case above, quoting the opinion of Justice Wade in *Uta-Carbon Coal Co. v. Industrial Commission*, 104 U. 567, 140 P. 2d 649, 651.

"Our legislature has not seen fit to define what amounts of silicon dioxide dust are to be considered harmful. On page 57 of Public Health Bulletin, No. 270, appear the following statements of the report of the International Conference on Silicosis held in Geneva in 1938, with reference to the problem of pneumoconiosis of workers in coal mines:

'(a) Silicosis occurs among workers in coal mines when the dust to which they are exposed contains free silica. The minimum proportion of silica necessary to produce the disease is not, in the present state of knowledge determinable.

'(b) Coal dust alone does not, either in animals or in man produce lesions similar to those of silicosis.'

As we have stated our legislature has not defined what are harmful quantities of silicon dioxide dust. The medical profession has not been able to determine what minimum proportion of silica may be breathed by man without harm to

himself. That breathing certain amounts of silica over an extended period of time is harmful is self-evident from the effects which produce the disease known as silicosis. In the absence of legislative or medical standards, in order to give effect to the Act, the commission must determine what are harmful amounts of silicon dioxide dust from the facts of each individual case.”

Had the legislature intended that the exposure be each and every day of five years or of thirty days they could have said so, but they did not. The legislature says exposure to harmful quantities for a “total period of five years” or “during a period of thirty days, or more, after the effective date of the Act”. What is the difference? The difference lies in the use of the word “period”. *Webster's Third New International Dictionary, Unabridged*, (1961), lists eleven definitions with sub-classifications of the noun “period”. The word has various meanings in science, music, grammar, and other areas. The definition contained in sub-head 7a referring to time seems most pertinent.

“a portion of time determined by some recurring phenomenon: a division of time in which something is completed and ready to commence and go in the same order (period of the earth's orbit) (period of a flashing beacon) b: the interval of time required for a cyclic motion or phenomenon to complete a cycle and begin to repeat itself (the period of a pendulum) (period of an alternating current) being equal to one divided by the frequency. c: a single cyclic occurrence of menstruation, called also menstrual period”.

We submit that what the legislature intended by the insertion of the word "period" is a portion of time determined by some recurring phenomenon, i.e. the passage of five years or thirty days.

What is harmful exposure within this cycle? The legislature did not spell it out. Does it mean exposure during each minute of each twenty-four hour day? Does it mean exposure during each minute of (5 times 365) 1825 days; or of 30 days? We think not. The facts of life are these: employees customarily work an eight hour day and a forty hour week with time off for vacations, sickness and holidays. Apply common sense to the proposition it can readily be seen that the legislature must have intended a workable expedient rule, otherwise the proof problem is insurmountable and the results ridiculous.

We submit that if an employee was regularly and gainfully employed in underground mining or other employment where he was exposed to silicon dust at some time during his shifts from January 1, 1956 to and including December 31, 1961, he has satisfied the exposure provision of 35-2-13(3).

We submit that the same rule would apply to the period of thirty days between December 1st and December 30th inclusive of 1961, satisfying the provision of Section 35-2-14.

This reasoning is well supported by authority. "In the absence of legislation or medical standards, in order

to give effect to the Act, the Commission must determine what are harmful amounts of silicon dioxide dust from the facts of each individual case”.

Kennecott Copper Corp. v. Industrial Commission, 115 U. 451, 205 P. 2d 829;

Uta-Carbon Coal Co. v. Industrial Commission, 104 U. 567, 140 P. 2d 649, 651.

It is probable, and we so submit, that the exposure to harmful quantities of silicon dioxide (SiO_2) dust is quantitative in its final effect. The same ^{quantitative} exposure for a exposure could result from extensive exposure for a period of five days with no exposure for a period of twenty days and then another period of extensive exposure for five days; as opposed to an evenly distributed daily exposure over a period of thirty days, they would both be equally harmful. The Industrial Commission must determine what is harmful from the facts of each individual case.

The second broad question in this area is whether or not 35-2-14 should be extended in total to the employers insurance carrier. We urge this court to answer this proposition in the negative. It is conceded that under the views expressed by this court in the case of *Pacific Employers Insurance Co. v. Industrial Commission*, 108 U. 123, 157 P. 2d 800, referred to as the Deza case, this court held that as between two insurance carriers, “The insurance carrier at the time of such last exposure was the State Insurance Fund; this is the date which fixes the liability of the employer, and consequently also

attaches the liability to the employer's insurance carrier as of that date; and upon the whole record and from the clear wording of the statute, the decision of the Commission should have held the State Insurance Fund liable for the payment of compensation awarded".

Every policy of workmen's compensation or occupational disease insurance sets out a period under which the policy is effective. One day's exposure under the new policy is sufficient, it is no different than an accident occurring at 12:01 a.m. under a policy that became effective at 12:00 m.

To extend the doctrine of the Deza case any further than one day's exposure will produce some very unhappy and catastrophic results. If each time an employer changes insurance carriers we invoke the provision of 35-2-14 requiring exposure during a period of thirty days under the coverage of the carrier, there will be a new thirty day period with each change. A change of carriers every thirty days would result in no insurance coverage. This may appear ridiculous but it is not uncommon for employers to change insurance carriers. To counsel's personal knowledge the insurance carrier of Silver King Coalition Mines Company prior to merger into the United Park City Mines Company was Continental Casualty Company. *See Silver King Coalition Mines Co. v. Industrial Commission*, 2 U. 2d 1; 268 P. 2d 689. From the record in our case its successor was for a period a self insurer. Then on December 1, 1961 changed coverage to the State Insurance Fund. Under plaintiff's theory then

there would be three periods of non-liability for the carrier since the effective date of the Act, plus additional periods of non-liability with each future change *ad infinitum*. With the little "poor boy" mining operation that operates from time to time, and renews and cancels its compensation coverage as it operates and shuts down, we can conceive of innumerable thirty days moratoriums on carrier liability.

The case of *Commission of Finance v. Industrial Commission*, 121 U. 83, 239 P. 2d 185, clearly permits the defendant to satisfy the thirty day period by accumulating time. We quote from page 187 of that opinion:

"Taking such view the defendant would have satisfied the statutory requirements of time of exposure since, if taking of time be necessary, such exposure need not be on successive days, but only cumulative after July 1, 1941. Citing *Kennecott Copper Corp. v. Industrial Commission*, 115 U. 451 205 P. 2d 829."

The difficulty of applying the plaintiff's theory to the situation is readily apparent. In tacking two periods it is possible and probable that you would be tacking two different insurance carriers. This serves to illustrate the unworkability of the plaintiff's proposition.

The answer is simple, clear and unassailable, to establish liability there need be only a casual relation between the employment and exposure and liability. *Pacific Employers Ins. Co. v. Industrial Commission*, 108 U. 123, 157 P. 2d 800, 803. We submit that one day's exposure is sufficient as to the insurance carrier.

CONCLUSION

For the foregoing reasons, the decision and order of the Industrial Commission dated December 4, 1963, should be affirmed.

Respectfully submitted,
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