

1964

# American Mud & Chemical Co. and American Surety Co. v. Industrial Comm. Of Utah and Byron Davies : Plaintiffs' Brief

Utah Supreme Court

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IN THE SUPREME COURT  
of the  
STATE OF UTAH .

CITY OF UTAH

OCT 14 1964

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AMERICAN MUD & CHEMICAL  
COMPANY, and AMERICAN  
SURETY COMPANY,

*Plaintiffs,*

vs.

Case No.  
10111

INDUSTRIAL COMMISSION OF  
UTAH, and BYRON DAVIES,

*Defendants.*

**FILED**  
JUN - 2 1964  
Clerk, Supreme Court, Utah

PLAINTIFFS' BRIEF

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APR 29 1965

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PLAINTIFFS' BRIEF

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NATURE OF THE CASE

This matter comes before the Supreme Court of Utah on Petition of the plaintiffs to review the proceedings and the Orders of the Industrial Commission of Utah awarding Byron Davies benefits

for total disability by reason of silicosis under the Utah Occupational Disease Disability Law and to determine whether Davies' claim for occupational disease was filed within the time required by law.

## DISPOSITION BEFORE THE INDUSTRIAL COMMISSION

Upon application of Byron Davies filed April 9, 1962, for a claim for Occupational Disease Benefits the Industrial Commission had the applicant examined by a medical panel and following a hearing October 22, 1962, which was continued and concluded December 28, 1962, the Commission on November 18, 1963, made an order finding that Davies was totally and permanently disabled as a result of silicosis and ordered the American Mud & Chemical Company and the American Surety Company, its insurer, to pay occupational disease compensation benefits totaling \$15,415.00 for disability plus medical and hospital expenses not to exceed \$1,925.01. A petition by the plaintiffs for rehearing and for a hearing de novo on the grounds of newly discovered evidence were denied by the Commission.

## RELIEF SOUGHT IN PETITION

The plaintiffs in this review proceeding seek to have the Supreme Court reverse the Order of the Commission granting Byron Davies an award for total permanent disability.

## STATEMENT OF FACTS

Byron Davies is 55 years old. He has had four years college training as a geologist. (R-33, 35, 51) He has spent most of his life since 1929 working in underground mining, and it is not disputed that out of the last fifteen years of his work history, at least five years have been spent in underground mining activities in Utah. (R-37 through 40) In February 1957 he started work as a foreman of an open pit Bentonite mine located at Cannonville, Utah. (R-41) The mine was operated by the Bentonite Corporation of America and was later taken over the American Mud and Chemical Company, which continued to operate it until it was closed down December 31, 1960. (R-68) The Bentonite ore contained free silica which tested around 7%. (R-49)

In June of 1960 Davies became concerned about his shortness of breath and a chronic cough. He consulted Dr. William Mason at the Panguitch L. D. S. Hospital. X-rays were taken and he was referred to the Rumel Chest Clinic in Salt Lake City for further studies and diagnosis. (R-57, 58)

On June 13, 1960, Davies was examined by Dr. J. D. Mortensen a chest surgeon associated with the Rumel Clinic. (R-119) He gave a history of difficulty in breathing and a chronic cough that had been progressive for four months. He suspected that he has silicosis and wanted an examination to determine whether he did or not. (R-119, 120, 121,

122). Upon completion of his examination including tests at the L. D. S. Hospital in Salt Lake City Dr. Mortensen concluded that Davies had advanced silicosis and diffuse bronchitis and so advised him suggesting that he should contact the Industrial Commission. (R-62, 128 Exhibit 4).

Davies returned to his work at the Betonite mine where he remained until the mine was closed down at his request because of the dust situation December 31, 1960. (R-67, 68). He engaged in no physical labor after that date, but claims to have inspected some mining property as a geology consultant and prepared a report in November and December of 1961, for which he was paid \$500.00. (R-69, 70, 71).

## ARGUMENT

### POINT I

BYRON DAVIES DID NOT FILE HIS CLAIM FOR TOTAL DISABILITY RESULTING FROM AN OCCUPATIONAL DISEASE WITHIN THE TIME REQUIRED BY SECTION 35-2-48(a) UCA 1953.

Section 35-2-13(a) Subsection (4) provides:

“No claim shall be maintained nor compensation paid unless the claim has been filed with the Commission in writing within the time fixed by the appropriate subdivision of Section 35-2-48.”

Section 35-2-48 provides:

“The right to compensate under this act for disability or death from an occupational di-

sease shall be forever barred unless written claim is filed with the Commission within the time as in this section hereinafter provided:

(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."

Byron Davies filed his claim in writing with the Commission on April 9, 1962. The Commission in its Order dated November 18, 1963, made no finding as to when Davies became disabled or when his cause of action arose and it is therefore necessary to look to the record and to applicable case law in order to determine whether his claim was filed in time.

Davies' claim is for total disability resulting from silicosis. the Statutes require that such a claim will be forever barred unless filed within a year from the time the cause of action arises. When did his cause of action arise? The court had before it this same question in the case of *State Insurance Fund vs. Industrial Commission*, 116 Utah 279, 209 P.2d 553. It was held there that:

"The better rule which is in accord with reason and justice, is that a cause of action does not arise until an ascertainable disability and compensable disability results.

The Court in reaching its decision adopted the rule laid down in California as set out in *Marsh vs. In-*

*dustrial Accident Commission*, 18 P.2d 933, where the court held that the limitations period did not commence to run until:

“The time when the accumulated effects culminate in a disability traceable to the latent disease as the primary cause and by the exercise of reasonable care and diligence it is discoverable and apparent that a compensable injury was sustained.”

Applying the rule and reasoning set out in the *State Ins. Fund* and the *Marsh* cases, *supra*, when did Davies first have an ascertainable compensable disability? He had formal training as a geologist. He had worked in underground mining for many years. He was acquainted with free silica and that it was a causative factor in a disease commonly found in miners, known as silicosis. (R-51, 60). He knew that there were appreciable quantities of silica in the Bentonite dust at the Cannonville mine where he had worked and had made frequent tests for silica for some three years. (R-41, 49). Because of a chronic cough and shortness of breath which had been progressive for four months; in June of 1960 he sought medical attention. He was concerned about lung cancer. (R-64, 65); but he also told Dr. Mortensen on examination that he suspected that he had silicosis and that he wanted to know whether he had it or not (R-121, 122). Following an extensive examination by Dr. Mortensen in his office and at the hospital Davies was advised that

he had a case of advanced silicosis and was told that he should contact the Industrial Commission. (R-65, 128).

It seems clear that as early as June of 1960 Davies knew that he had silicosis and was in fact told that he should contact the Industrial Commission.

Having ascertained in June of 1960 that he had silicosis, what is the evidence that Davies knew or in the exercise of reasonable diligence it should have been apparent to him, that he had sustained a compensable injury?

Following his hospitalization he returned to the job at Cannonville until December 31, 1960 when the operation was shut down. During this time the mill operated about one-half of the time. (R-66.) Part of his work was supervisory only. (R-74). He performed no physical labor after December 31, 1960. (R-69).

In a recorded interview with John Nelson, an investigator for the American Surety Company following the filing of his claim for compensation Davies, in answer to a question of whether or not he had lost any work because of the silicosis stated that he could not work and had not worked since the mill closed down. (R-63, 70, 71).

In filing his Occupational Disease Claim Form dated March 8, 1962, which was filed with the In-

dustrial Commission April 9, 1962, Davies stated that he had been unable to work because of silicosis during the years 1961 and 1962. (R-1).

At the time of the examination by the Chest Panel on June 16, 1962, Dr. Kilpatrick noted on page 1 of the patients history that Davies stated that he work<sup>d</sup> last December 31, 1960; that he had done a little geology work but no physical labor since that time. (R-15).

At the hearing Davies testified that in November and December, 1961, he was employed as a geologist to examine some mining property and to prepare a written report for which he was paid \$500.00; and while plaintiffs have sought by their motion for a hearing de novo and supporting affidavit of Billy Davis to refute this testimony, even assuming such employment, it is evident that Davies himself did not consider this to be physical employment. With reference to this he testified "No physical labor involved. As I already testified in November and December of 1961, I made a report but there was no physical activity involved." (R-69).

Section 35-2-12 in construing the term "Disablement" as used in the occupational disease act provides:

"(a) 'Disablement' means the event of becoming *physically* incapacitated by reason of an occupational disease as defined in this act from performing any work for remuneration or profit . . ." (emphasis added)

The statement of Davies and his conduct as it appears from the record clearly establishes that he considered himself to be disabled by reason of silicosis and totally unable to perform any physical work for remuneration or profit after December 31, 1960. Under these circumstances, the provisions of Sections 35-2-13(a) and 35-2-48(a) U.C.A. 1953 place the responsibility upon him to file his claim in writing with the Industrial Commission within a year from that date. He did not do this.

### CONCLUSION

For the foregoing reasons, the Order of the Industrial Commission dated November 18, 1963, awarding Davies compensation for total disability should be set aside.

Respectfully submitted,

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Received a copy of the foregoing this .....  
day of June, 1964.

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