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IN THE SUPREME COURT
of the
STATE OF UTAH

FILED
JUL 13 1964
Supreme Court, Utah

AMERICAN MUD & CHEMICAL COMPANY, and AMERICAN SURETY COMPANY,
Plaintiffs,

vs

INDUSTRIAL COMMISSION OF UTAH, and BYRON DAVIES,
Defendants.

Case No. 10111

DEFENDANTS' BRIEF

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IN THE SUPREME COURT
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DEFENDANTS' BRIEF

STATEMENT OF FACTS

Defendant Byron Davies, hereinafter referred to as Mr. Davies, agrees with the statement of facts contained in plaintiffs' brief but notes certain additions thereto.

Mr. Davies' claim for occupational disease, dated March 8, 1962, was filed with the Industrial Commission on April 9, 1962.

ARGUMENT

POINT 1.

BYRON DAVIES FILED HIS CLAIM FOR TOTAL DISABILITY RESULTING FROM AN OCCUPATIONAL DISEASE WITHIN THE TIME REQUIRED BY SECTION 35-2-48(a) UCA 1953.

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The difficulty defendants see with plaintiffs' position is an unwillingness to differentiate between symptoms of silicosis and disability due to silicosis. We think it only fair to state that those employed in the mining industry are well aware that continuous exposure to harmful quantities of silicon dioxide dust will cause silicosis.

The Legislature has seen fit, however. to award compensation only for *disability,* not the symptoms. Section 35-2-13 UCA 1953 is quoted in part:

> "35-2-13. EMPLOYER LIABILITY FOR COMPENSATION — CONDITIONS WHEN NO PAYMENT TO BE PAID. — (a) There is imposed upon every employer a liability for the payment of compensation to every employee who becomes *totally disabled* by reason of an occupational disease subject to the following conditions:
>
> "(1) No compensation shall be paid when the last day of injurious exposure of the employee to the hazards of said occupational disease shall have occurred prior to the effective date of this act.
>
> "(3) No compensation shall be paid in case of silicosis unless during the fifteen years immediately preceding the disablement, the injured employee shall have been exposed to harmful quantities of silicon dioxide (SiO_2) dust for a total period of not less than five years in this state and unless *total disability* results within: (a) two years in case of silicosis not complicated by active tuberculosis, . . from the last day upon which the employee actually worked for the employer against whom compensation is claimed." (Emphasis added)

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Since Mr. Davies last actually worked for American Mud & Chemical Company through December 31, 1960, in order to have cause of action his total disability must result within two years of that date, or December 30, 1962, unless complicated by tuberculosis, when total disability must result within five years.

It is true that an employee must file his claim within the time provided in 35-2-13 (4), UCA 1953, which section is as follows:

> "(4) 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 UCA 1953 provides:

> "The right to compensation under this act for disability or death from an occupational disease 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."

The question is, when did Mr. Davies' claim for total disability arise? It is readily apparent that under a fair interpretation of the foregoing provisions, it is possible that an employee such as Mr. Davies could: (1) terminate his employment as of December 31, 1960; (2) become totally disabled on December 30, 1962; (3) file his claim on December 29, 1963; and still have a valid

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claim against 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." 35-2-14 UCA 1953.

Was Mr. Davies totally disabled from silicosis when examined by Dr. J. D. Mortensen on June 13, 1960? Dr. Mortensen's conclusions (R-127, 128) are as follows:

> "Q. All right. Doctor, I may have interrupted your train of thought, but let me ask you what was your final diagnosis as a result of the hospitilization tests? Or did you make any further tests, or examinations?
>
> "A. No. I just concluded — put all this together and made conclusions — and wrote a letter to Dr. Masin summarizing my findings and conclusions, and talked with Mr. Davies and reported to him my findings and conclusions. I felt that this man — We had positive evidence that he had advanced silicosis, and that he also had diffuse bronchitis. *I felt that his pulmonary function test had indicated his silicosis was not at that time disabling, but that he was limited in activity because of bronchitis.* (Emphasis ours.) I prescribed inhalations of nebuperal (?) and neomycin, asked him to take antibiotics for his bronchitis, reassured him about the absence of tumor or tuberculosis or other infections, and asked him to keep in close touch with his doctor for management of his chronic bronchitis and weight problems."

Dr. Mortensen indicates, that because of bronchitis, overweight and silicosis, Mr. Davies would be limited

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in his physical activities at least 50% at that time, compared to a normal man of his age. (R-128, 129).

Mr. Davies returned to his regular occupation, continued his regular duties, at his regular salary until the operation was closed down because of the dust hazard, as of December 31, 1960. (R-68) In November and December of 1961, Mr. Davies did work as a consulting geologist, (R-47) and received the sum of $500.00 for his work. (R-48, 49, 69, 70 and 71).

Was Mr. Davies totally disabled as a matter of law in November and December of 1961? Section 35-2-12 UCA 1953, defining terms, is of assistance here and the portions covering "total disability" and "partial permanent disability" are set forth as follows:

> "35-2-12. CONSTRUCTION OF TERMS. — The following terms as used in this act shall be construed as follows:
>
> "(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. Silicosis, as defined in this act, when complicated by active pulmonary tuberculosis, shall be presumed to be total disablement. 'Disability,' 'disabled,' total disability,' or totally disabled' shall be synonymous with 'disablement,' but they shall have no reference to 'partial permanent disability.'
>
> "(e) 'Partial permanent disability,' as herein used, is defined as that pathological condition directly resulting from an occupational disease and

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> causing substantial physical impairment, evidenced by objective medical and clinical findings readily demonstrable, and which has reduced the earning capacity of the employee, excluding, however, total disability cases."

Applying the definitions to the facts of the instant case, we believe that Mr. Davies was probably "partially permanently disabled" during the period of November-December 1961, because there is "substantial physical impairment" which has reduced the earning capacity of the employee. However, as a matter of law, he was not "totally disabled" at this time because he was "performing work for remuneration or profit." Although he was not performing labor in the sense of manual labor requiring great physical exertion, it is "any work for remuneration or profit," which is the test of the statute. Had the commission determined Mr. Davies to be totally disabled at this time, this court might well reverse the commission as a matter of law.

Mr. Davies filed his application for disability on April 9, 1962; within four months of the time he last performed work for remuneraton or profit, to-wit, November-December of 1961.

When did Mr. Davies become totally disabled? It was the opinion of the three member chest panel, appointed by the Industrial Commission and consisting of specialists Drs. Kilpatrick, Moffat and Waldo, that Mr. Davies was totally disabled as of June 16, 1962. This date is within two years from the last day upon which

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the employee actually worked for the employer against whom compensation is claimed, to-wit, December 31, 1960.

Under the facts of this case, it is difficult to see how a finding of partial disability in Mr. Daves could be sustained prior to December 31, 1960 under the provisions of 35-2-12 (e). Symptomatically, he demonstrated silicosis yet there was no reduction in his earning capacity prior to this date.

This court is no doubt familiar with the cases wherein the employee and the employer are both aware of the silicotic condition developing in the employee. The employee is then taken out of underground or exposure type employment and is placed in other employment wherein the employee continues to work until disability finally occurs. See *Pacific Employers Insurance Co. v. Industrial Commission,* 108 Utah 123, 157 P 2d 800; *Pacific Employers Insurance Company v. Industrial Commission,* 115 Utah 451, 205 P 2d 829. To apply the reasoning of the plaintiffs to these situations, an employee would be barred by a one year statute of limitation commencing at the time he knew he had silicosis, regardless of the fact that he continues in gainful employment and suffers no reduction in his earning capacity. The unworkability of such an approach is readily apparent. The filing of a claim for disability due to silicosis results in a termination of employment.

Defendants have no quarrel with the doctrines laid down in the cases of *Marsh v. Industrial Accident Commission,* 217 Cal. 338, 18 P 2d 933; or *State Insurance*

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Fund v. Industrial Commission, 116 Utah 279, 209 P 2d 553. The quoted portion of the latter case in the plaintffs' brief is illustrative:

> "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." (Emphasis added.)

The disability must be ascertainable and compensable, and there can be no compensation for *total disability* when the employee is performing work for remuneration or profit. Total disability is a mixed question of fact and law. It cannot be subjectively determined by the employee. This determination is made by the Industrial Commission based upon the Report of the Medical Panel (R-19), as provided in 35-2-56 UCA 1953, and on other competent evidence contained in the record.

The Commission found that Mr. Davies performed work for remuneration or profit in the capacity of a consulting geologist and earned the sum of $500.00, between November 15 and December 31, 1961. The commission also adopted the Medical Panel's finding that employee was totally disabled as of June 15, 1962 (R-153).

We submit that the application filed April 9, 1962 within four months of Mr. Davies' last work for remuneration or profit, is within time.

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CONCLUSION

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

Respectfully submitted,

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Received a copy of the foregoing Brief this..... day of July, 1964.

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