1964

State Insurance Fund v. Industrial Commission of Utah et al : Plaintiff's Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE INSURANCE FUND,
Plaintiff,

vs.

THE INDUSTRIAL COMMISSION OF UTAH, and JAMES F. TAYLOR, and UNITED PARK CITY MINES COMPANY,
Defendants.

Case No. 10219

PLAINTIFF'S BRIEF

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NATURE OF THE CASE

This case calls for the Supreme Court of Utah to review the Industrial Commission's proceedings and decision awarding benefits to James F. Taylor under the Utah Occupational Disease Disability Law, for the purpose of determining whether the Commission exceeded its powers in making such award, and whether the Commission's findings of

fact are supported by substantial, competent evidence having probative value.

DISPOSITION BEFORE THE INDUSTRIAL COMMISSION

James F. Taylor filed an Occupational Disease Claim of Employee with the Industrial Commission dated May 9, 1962. On August 6, 1963, pursuant to Order and Notice the Industrial Commission held a hearing on the application. Thereafter, pursuant to a Motion for Supplemental Hearing (R48, 49), the Commission issued its Order granting the said Motion (R50), and by said Order gave notice to the State Insurance Fund that it might desire to present evidence upon the issue of its liability as carrier. Thereafter, an order setting the time and place for the further hearing (R-51) was made and entered setting the time for the second hearing on the 30th day of December, 1963 at 11:00 a.m. The hearing was held on that date. On June 15, 1964 the Commission rendered its decision and order in which it was found that James F. Taylor was 100% disabled because of silicosis based upon the disabling effects of silicosis and that he was entitled to have the United Park City Mines Company and the State Insurance Fund pay him $15,415.00 compensation benefits at the rate of $41.75 per week beginning February 9, 1963 and continuing until a total of $15,415.00 has been paid, together with medical and hospital benefits. The order also required the State

Insurance Fund to pay the said benefits as the insurance carrier for the United Park City Mines Company.

RELIEF SOUGHT IN PETITION

The Plaintiff, The State Insurance Fund, in this review of proceedings seeks to have the Supreme Court reverse, vacate and annull the award which the Industrial Commission made to James F. Taylor insofar as it relates to the liability of the State Insurance Fund to pay the benefits as set forth in the Order above described.

STATEMENT OF FACTS

James F. Taylor commenced working as a miner in 1925 (R-56). He left actual underground work for the Silver King Mine "around in the '40s or '39, I think." (R-57). He was employed as a surface watchman between January 31, 1939 to July 1, 1950, and again between July 16, 1950 and August 15, 1952, and from October 22, 1954 to June 30, 1961. The last time he worked as a watchman it was for seven days only from February 3, 1962 to February 8, 1962. All of this period of time his employment was that of a surface watchman (R-116). The record is clear that at least since 1941, he had not been employed in underground mining. (R-61)

The last seven days of employment was that of a night watchman when he filled in for Moon

Q. So you noted that you had a definite shortness of breath at that time?

A. Yes.

Q. And you were unable in fact to carry on work as an underground miner at that time?

A. That's right.

Q. Did you have any trouble with arthritis at that time?

A. Well, I had it, but I would always go to work.

Q. And did that condition — shortness of breath, and tendency to fatigue — become worse, or was it a fairly static condition?

A. It became worse at times.

Q. As time went on, it became worse?

A. Yes.

Q. Would you say that by the time you went to work for the Daly Judge Mine, it had gotten about as bad as it got?

A. Well, it got a little worse after the last years there.

Q. The last year or two?

A. (Nodding head in the affirmative.)

Q. But it was very difficult for you to carry on the work during the last, oh, from 1959 on; is that correct?

A. That's right.

Q. Did you go to a doctor about this condition at all?

A. Yes.

Q. Who did you consult about it?

A. Well, here a while back — last winter — I went to Dr. Barta first. He told me I had silicosis.

Q. When did you first consult him?

A. That was around '33, I think it was. Something like that.

Q. Dr. Barta, back in 1933, told you that you had silicosis?

A. (Nodding head in the affirmative.)

Q. And what other doctors did you consult, in order of the time that you consulted them, about your condition?

A. I went to Dr. Onike when I went to work for United Park. He told me I had silicosis.

Q. And when was that?

A. 1952. I went to Dr. Openshaw here, and he told me I had silicosis, too.

Q. And when was that?

A. I think that was about '43 or '44. Somewhere around there, I think.

Q. Did these gentlemen suggest to you that you ought not to continue to work in the mines?

A. That's right. Dr. Openshaw sure did.

It may be claimed that Applicant's cause of action did not arise until he became disabled and unable to work as alleged, however, Section 35-2-56 provides for permanent partial disability from occupational disease. Certainly it cannot be said that Mr. Taylor was not partially disabled by reason of the disease as it was impossible for him to work underground, and he was advised that he ought not to continue working in the mine. Dr. Openshaw and Dr. Onike told him he had silicosis and that he should not continue to work in the mine (R-82, 83). It was very difficult for him to carry on work from 1959 on. This question was asked of Mr. Taylor and he advised that that was right. (R-82)

The provisions of Section 35-2-56 which provide for the payment of permanent partial disability compensation for occupational diseases was incorporated in the law in 1949. It cannot be said that the Applicant after that date did not have ample opportunity to properly present his claim for permanent partial disability due to silicosis. It also appears abundantly clear that under the provisions of the limitation statute above set forth that his claim should have been presented at least within one year following 1952 when he was told by Dr. Onike that he had silicosis, and that he ought not to continue to work in the mines.

Although we do not have a Utah silicosis case which involves the above-mentioned limitations statute, we do have a Utah case involving an occupational disease which does interpret the section.

In the case of *State Insurance Fund v. Industrial Commission*, et al., 116 U. 279, 209 P. 2d. 558, this Court carefully considered the provisions of Section 35-2-48, U.C.A., 1953, which at that time was known as Section 42-1a-49, U.C.A., 1943.

In that case Elbert I. Lunnen laid off from his work as a welder in a foundry after twenty-two years of employment. He was almost continuously exposed to harmful fumes. During the last five or six years of his employment he suffered from shortness of breath. During the time he was employed he repeatedly called his condition to the attention of his employer and on occasions he was off work from three to eight days at a time.

He was laid off from his employment on February 8th at which time he considered his disability to be only temporary, but he believed that it was due to his exposure to harmful fumes during his employment. He was aware of the fact that his disability might be compensable under the Act because he visited the Industrial Commission. His first doctor apparently did not realize the seriousness of his condition, but his second doctor advised him that his disability was total and permanent and that it was compensable under our Act.

This case was not a silicosis case, but it was based upon a disease other than silicosis, which required the written claim to be filed within sixty days after the cause of action arose. This Court said in construing the above-mentioned statute the following, at Page 283, Utah Reports:

> 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. This is the rule adopted in California. See *Marsh* v. *Industrial Accident Commission*, ***.

And again at Page 284, Utah reports:

> The cause of action arises in this kind of a case when the employee suffers compensable disability under the act and could by reasonable diligence ascertain that his disability was employment caused and by its nature compensable. That ignorance of the requirements of the law does not postpone the accrual of a cause of action.

And again on Page 285, Utah reports:

> But if, on account of his own failure to press his case, or have a complete examination made under circumstances which would reasonably put him on notice that he was probably entitled to compensation, he failed to discover that his disability was compensable, then the fault is his own and he cannot recover.

On Page 286, Utah Reports, Justice Wolf in writing a concurring opinion, had this to say:

> Such holding does not permit the employee, by failing to demand payment, to postpone the accrual of the cause of action indefinitely, nor does it in the case where one of several successive employers may be liable, permit the cause of action to arise before it can be ascertained which employer is liable.

There are numerous cases from other jurisdictions which are helpful and have discussed the question as to when the statute of limitations commences to run.

The California doctrine is that for the purposes of the limitation statute, the "injury" set forth in the compensation statute occurred when the accumulated effects culminate in a disability traceable to the latent disease as a primary cause and in those cases whereby the exercise of reasonable care and diligence by the Applicant it is discoverable and apparent that a compensable injury has occurred or has been sustained.

See *Marsh vs. Industrial Accident Commission*, 217 Cal. 338, 18 P. 2d. 933, 86 ALR 563.

In this case three separate matters were consolidated for consideration. In the Court's opinion at Page 938, 18 P. 2d. is the following:

> From our study of the subject we are brought to the conclusion that in the case of a latent and progressive disease, such as pneumoconiosis, it cannot reasonably be said that the injury dates necessarily from the last day of exposure to a dust-laden atmosphere and that the prescriptive period begins to run from that date. *Rather, according to our view, should the date of the injury be deemed the time when the accumulated effects culminate in a disability traceable to the latent disease as a primary cause, and by the exercise of reasonable care and diligence it is discoverable and apparent that a com-*

> *pensable injury was sustained in performance of the duties of the employment.* (Emphasis ours)

In the *Marsh* case the Court, in reaching its conclusion, fixed the beginning of the running of the limitation statue as of the date the deceased was first disabled from work. The Court held that there should be further proceedings to ascertain when the statute of limitations had begun to run in conformance with the rule above set forth.

This California rule was again stated in *State of California, Subsequent Injuries Fund, Petitioner v. Industrial Accident Commission of the State of California*, 304 P. 2d. 112 at Page 114, where the Court said:

> The date of injury in cases of occupational disease is that date upon which the employee first suffered disability therefrom, and either knew, or in the exercise of reasonable diligence should have known, that that disability was caused by his present or prior employment.

In *Hutchinson v. Semler*, 361 P. 2d. 803, 227 Ore. 437 decided May 10, 1961, rehearing denied June 14, 1961, 362 P. 2d. 704, the Court said at Page 807, 361 P. 2d.:

> In it he mentioned developments in the operation of the defendant's laboratory which he said caused the dust condition of the room in which he worked to become acute. He related the efforts which he then made to per-

suade the defendant to provide better ventilation. That occurred in the first part of '56, so he swore. He also described the illness which came upon him and the manner in which his health deteriorated. He dwelled upon the fact that his lungs became effected and declared that 'My breathing was very bad.' Shortly he found himself engaged in coughing. According to him he felt 'run-down, weak condition.' '***I thought maybe that I was tired and run-down and worn-out.' He added that, "If I walked two or three blocks at a normal rate I would be winded.' He attributed his ill health to the dust which he said was in the air of the room where he worked. He swore that the air in the room at times became so laden with dust that he could not see the walls and was compelled to withdraw to a nearby hallway until the dust had settled.

When the plaintiff was asked to specify the time when he noticed his symptoms of ill health, he replied with expressions that lend themselves to more than one signification of time. According to him, he noticed his ill health, 'I'd say three, three and a half years' from the time that he entered the defendant's employ which he stated occurred in 'the spring of 1953'.

In deciding that the judgment of the Circuit Court was affirmed which held that the statute of limitations began to run when the plaintiff became aware of accumulated effects of the harmful dust, the Court stated the following:

> We concur in the rule enunciated in the Urie case and believe that our prior decisions are in accord with it. Thus, the statute of limitations began to run in the case at bar when the Plaintiff became apprised, or as a reasonable man should have known, that his health was being undermined by the dust he was breathing.

It is interesting to note that Mr. Taylor in the case now before the Court, testified to similar conditions and that he had similar ailments as those claimed by the Applicant in *Hutchinson vs. Semler* (supra).

The Wisconsin case of *Universal Granite Quarries Companies vs. Industrial Commission*, 224 Wis. 680, 272 N.W. 863, held that the failure of the Applicant to make a claim for compensation "within two years from the time when he became aware of his condition, and the cause of it" barred his claim.

Mr. Taylor cannot be heard to say that he was not aware of his condition nor that he was somewhat disabled when he testified that commencing in 1941 he no longer worked underground and that he worked on the surface because he was having difficulty. (R-80) He also testified that he knew that he had silicosis because he had been told on more than one occasion, by his examining and attending doctors, that he had this disease. (R-82 83) Certainly the statute of limitations should be held to have run. He had the right to file a claim for

silicosis under the partial disability act at any time after that act went into effect. Certainly it cannot be said that Mr. Taylor was not partially disabled because he was unable to perform his regular duties and had to take jobs which entailed something other than underground mining.

We submit that Defendant Taylor, knew, years ago that he had silicosis and that as a result thereof he had disability, and that therefore his claim should be held to be barred.

Point 2

JAMES F. TAYLOR WAS NOT EXPOSED TO HARMFUL EMPLOYMENT DURING A PERIOD OF THIRTY DAYS AFTER THE POLICY OF INSURANCE ISSUED BY THE STATE INSURANCE FUND BECAME EFFECTIVE.

We do not in presenting this point, agree that James F. Taylor was, at any time during the period that he worked for the United Park City Mines Company after the policy of insurance issued to the United Park City Mines Company by the State Insurance Fund went into effect, exposed to a harmful quantity of silicon dioxide dust.

As hereinbefore set forth the United Park City Mines Company was self-insured until December 1, 1961. Following this date the State Insurance

> to the date incapacity began. See *Inre Johnson*, 217 Mass. 388, 104 N. E. 735, *Case of Bergeron*, 243 Mass. 366, 137 N. E. 739; *Case of Johnson*, 279 Mass. 481, 181 N. E. 761. *Where, in the case of a cumulative cause of injury there has been a change of insurer, it has been deemed essential that the employee, in order to establish the liability of the later insurer to pay compensation, prove the existence of a causal relation between the employment during the period covered by its policy and the employee's injury. Case of Fabrizio*, 274 Mass. 352, 174 N. E. 720; *Case of Langford*, 278 Mass. 461, 463, 180. N. E. 228; *Case of De Filippo*, 284 Mass. 531, 534, (188 N. E. 245). *The implication is that where no such causal relation exists the employee's injury which results in his incapacity is to be regarded as having occurred prior to that period and not at the date incapacity began.*

In the very recent case of *The State Insurance Fund v. The Industrial Commission* et al case No. 10095 this Court in discussing the above-quoted section pointed out that the statute requires employment throughout a 30-day period and harmful exposure during that period of 30-day employment. This Court said:

> This provision does not require that the employee actually work each day of the 30-day period, nor that he be harmfully exposed each day of such period, it only requires harmful exposure and employment "during a period of 30 days." It would be very un-

> usual to have 30 working days or 30 days of harmful exposure during such a period. The obvious meaning of this statute is that it requires employment throughout this period and also harmful exposure during the period but does not require actual working or actual exposure each day of such period.

We submit that the decision in the above-cited case is controlling in this case in that Taylor was not employed during 30-days after the policy of The State Insurance Fund became effective. He was in fact employed for only a seven-day period, all of the days being in succession.

CONCLUSION

For the foregoing reasons, the decision and order of the Industrial Commission insofar as it relates to The State Insurance Fund, should be annulled.

Respectfully submitted,

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