

1964

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

Utah Supreme Court

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

FILED  
DEC 16 1964

THE STATE INSURANCE FUND,  
*Plaintiff,*

Supreme Court, Utah

—vs.—

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

*Defendants.*

Case  
No.  
10219

BRIEF OF DEFENDANT JAMES F. TAYLOR

Appeal from Order of the Industrial Commission  
of Utah

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# IN THE SUPREME COURT of the STATE OF UTAH

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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

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BRIEF OF DEFENDANT JAMES F. TAYLOR

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## NATURE OF THE CASE

This is an appeal from the Industrial Commission of Utah.

## DISPOSITION BEFORE THE INDUSTRIAL COMMISSION

On June 15, 1964, defendant James F. Taylor was awarded compensation for total and permanent disability due to silicosis under the provisions of Chapter 2, Title 35, U.C.A. 1953. The award was made against United Park City Mines Company and the State Insurance Fund, its occupational disease insurance carrier.

## RELIEF SOUGHT IN PLAINTIFF'S PETITION

The plaintiff, The State Insurance Fund, seeks to have the Supreme Court reverse, vacate and annul the award which the Industrial Commission made to James F. Taylor, in so far as it relates to the liability of the

State Insurance Fund to pay the benefits set forth in the Order of The Industrial Commission.

## STATEMENT OF FACTS

Defendant, James F. Taylor, agrees with the statement of facts contained in plaintiff's brief, but notes certain additions thereto.

James F. Taylor filed his claim dated May 9, 1962 for disability due to the occupational disease of silicosis, with the Industrial Commission of Utah on June 4, 1962 (R. 1, 90).

## ARGUMENT

### POINT I

DEFENDANT TAYLOR WAS EXPOSED TO HARMFUL QUANTITIES OF SILICON DIOXIDE DUST FOR MORE THAN FIVE YEARS BETWEEN JUNE 4, 1947 AND JUNE 4, 1962.

Prior to April 20, 1938, defendant Taylor had in excess of thirteen years of harmful exposure to silicon dioxide dust while employed by Silver King Coalition Mines Company in underground mining as a mucker, motorman and a pipe and track man. (R. 56-57)

Commencing January 31, 1939, Mr. Taylor acted as a watchman and worked on the surface for Silver King Coalition Mines Company.

Between January 1, 1939 and 1950 Mr. Taylor in his employment as a watchman for the Silver King Coalition Mines Company was required to punch various time clock stations located in the sampler and the flotation

mill of the Company. To reach these various stations Mr. Taylor passed through the main haulage way from the main shaft to the mill and sampler, which is enclosed in a weather tight snow shed. The passage of the ore and waste trains created a dust condition similar to that in underground haulage (R. 65-69). In the sampler, the concentrated dry ores are dumped by a skip into large bins falling approximately 100 feet. From these bins they are drawn out into buckets of an aerial tramway for shipment to Park City (R. 69-70). Mr. Taylor, in the course of his employment, during the afternoon and graveyard shifts of each working day, was required to punch each station five times on the afternoon shift and eight times on the graveyard shift (R. 70). Other stations located in the flotation mill required passage through the crushing department of the mill and across the crude bins of the mill four times each shift (R. 71-72).

In September of 1950, Mr. Taylor became watchman at the Park City terminal of the aerial tramway, wherein the concentrated ores were dumped into bins in the terminal building preparatory to shipment in railroad cars. The concentrated ores were loaded into box cars by a mechanical belt device which threw the ores from the door of the box cars to the extreme ends. All of such activity produced exposure to silicon dioxide dust (R. 73-75).

On May 8, 1953, the Silver King Coalition Mines Company merged with the Park Utah Consolidated Mines Company and became the United Park City



Mines Company. Mr. Taylor was off work because of a strike and shutdown between August 15, 1952 and October 22, 1954 (R. 59-60), during which time the merger took place. Upon return to work, Mr. Taylor was transferred by United Park City Mines Company to the watchman job at the Judge unit. Mr. Taylor, in the course of his employment, would sweep a half car-bide can of mine ore and waste from the floor of the change room each shift (R. 75-76). He was required to sweep and clean the haulage way and the snow shed which became littered from mine ores being shipped by leasers. Further exposure to dust was created by dumping the ores from the floor of the snow shed to trucks below for shipment (R. 76-77). This course of employment continued until Mr. Taylor was laid off June 30, 1961.

The exposure of Mr. Taylor upon his recall to work between February 3, 1962 and February 8, 1962 was no different than his exposure between October 22, 1954 and June 30, 1961. It is significant that he worked shifts of twelve hours each and was required to and did shovel a ton and one-half of coal into a hopper approximately 5-1/2 feet high (R. 106). We submit this to be rather vigorous activity for a man whom plaintiffs would have this Court believe to be totally disabled prior to this time in order to bar his claim by application of the one year statute of limitations.

We submit that the Commission's finding the defendant Taylor was exposed to harmful quantities of



silicon dioxide dust for a total period of more than five years in this State during the fifteen years immediately preceding his disablement, is supported by substantial competent evidence having probative value.

## POINT II

DEFENDANT'S CLAIM WAS FILED WITHIN THE TIME LIMITATION OF 35-2-48, U.C.A. 1953.

We believe it to be fundamental law that a statute of limitations does not commence to run until a cause of action arises. A cause of action arises under the Occupational Disease Act when there is a disability or death due to an occupational disease.

What is the meaning of the term "disability"? The term is defined in the Act at 35-2-12 U.C.A. 1953, the pertinent parts of which 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 di-

rectly resulting from an occupational disease and *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.” (Emphasis ours)

Plaintiff argues that defendant Taylor was disabled when he first demonstrated symptoms of silicosis. This argument assumes that the first stages of silicosis are tantamount to disability in some form which starts the statute of limitation running. This argument ignores the facts shown in the record that defendant was gainfully employed from 1933 when the first symptoms of silicosis were noted to the 30th day of June, 1964 when defendant was laid off because of a reduction in forces. Defendant Taylor was physically capable of returning to work during the period from February 3rd to February 8th of 1962 inclusive and performing work for remuneration or profit while working a 12 hour shift on each of the days included in the period. (R. 111) The work record of the defendant Taylor is a part of the record of this case (R. 116) and is as follows:

“Silver King Coalition Mines Company

1925 to 4-20-38	Underground trackman
1-31-39 to 7-1-50	Surface Watchman
9-16-50 to 8-15-52	Surface watchman

United Park City Mines Company

10-22-54 to 6-30-61	Surface watchman
2-3-62 to 2-8-62	Surface watchman

Defendant’s work record demonstrates that during his entire working life he has been employed by the Sil-

ver King Coalition Mines Company or its successor in interest, the United Park City Mines Company. Breaks in the work record are accounted for by industrial disruptions, shut-downs and a disabling non-industrial accident suffered by defendant Taylor.

Defendant's record of earnings during the course of his employment by United Park City Mines is significant in that it indicates the defendant was regularly and gainfully employed between October 22, 1954 to June 30, 1961. Defendant's earnings during this period are a part of the record and are as follows :

"10-22 to 12-31-54	\$ 557.09 (R. 118)
1-1 to 12-31-55	4,154.39 (R. 134)
1-1 to 12-31-56	4,316.22 (R. 119)
1-1 to 12-31-57	4,521.39 (R. 120)
1-1 to 12-31-58	4,472.85 (R. 121)
1-1 to 12-31-59	4,483.15 (R. 122)
1-1 to 12-31-60	4,262.89 (R. 123)
1-1 to 6-30-61	2,183.97 (R. 124)

Defendant was recalled to and did work between February 3rd and February 8th, 1962 and earned the sum of \$98.63 (R. 125).

We think the earning record of the defendant clearly and fairly demonstrates that he was regularly engaged in work for remuneration or profit during the aforementioned period.

As a matter of law that defendant could not be either totally disabled or partially disabled during the period ending June 30, 1961.

Defendant was still physically able to return to work at the request of his employer and resume his normal occupation of watchman during the period between February 3rd and February 8th, 1964, working 12 hour shifts and shoveling a ton and a half of coal into a hopper approximately 5-1/2 feet high (R. 106).

Defendant Taylor filed his application dated May 9, 1962 with the Industrial Commission on June 4, 1962. This is less than four months from his February, 1962 employment and less than one year from his continuous course of employment commencing in October of 1954 and ending June 30, 1961.

The Commission found that his tentative permanent and total disability commenced as of June 4, 1962. We submit that the sole question here is, whether or not there has been a mis-application of law, or is there no substantial evidence furnishing a reasonable basis to support a material find of fact? *The State Insurance Fund vs. The Industrial Commission of Utah*, ..... Utah ....., 395 P.2d 541, Case No. 10095, September, 1964.

There seems to be no doubt by plaintiff that the defendant is disabled from the occupational disease of silicosis. The only question is as to when the total disability occurred and we submit that the Commission's finding of June 4, 1962 is amply supported by the law and the evidence.

As to the portion of the plaintiff's brief wherein it is argued, since defendant Taylor was partially disabled since 1952; and, since he failed to file an application

for partial disability within one year after the alleged disability, his claim for total disability is barred by application of the one year statute of limitations; fails, for several reasons.

First, upon the basis of the records and files in this case, we do not believe that a finding of partial disability prior to June 30, 1961 can be supported. There would also be grave doubt as to the supportability of any finding of partial disability prior to the period of employment between February 3rd and February 8, 1962.

Second, even if a finding were made of permanent partial disability subsequent to June 30, 1961, it would be within the time limit of the one year statute of limitations contained in 35-2-48, UCA 1953, which is not applicable to partial disability.

Third, the limitation of action set forth in 35-2-48, UCA 1953 does not apply to partial permanent disability, because the limitation of action provision of this Section is contained in 35-2-56(b), UCA 1953 which is as follows:

“(b) No compensation shall be paid unless such partial disability results within two years prior to the day upon which claim for compensation was filed with the Industrial Commission of Utah.”

Fourth, it is the position of defendant Taylor that the provisions for total disability contained in 35-2-13 and the provisions for partial permanent disability contained in 35-2-56, UCA 1953 create separate and distinct causes of action. A review of the legislative history of the two provisions will show that there was no liability



for partial disability, until the latter section was added by the Laws of Utah, 1949, Chapter 51, Section 2. See the case of *Masich vs. United States Smelting, Refining and Mining Co.*, 113 Ut. 101, 191 P.2d 612, wherein it was held that the Occupational Disease Act, Laws of Utah 1941, Chapter 41, had pre-empted the field of disability due to silicosis and that even though there were no provisions for partial permanent disability, there was no common law action for partial permanent disability due to silicosis.

Fifth, with the passage of the partial permanent disability section, Laws of Utah, 1949, Chapter 51, Section 2, the Legislature saw fit to deal with partial disability. The conditions precedent to a claim for total disability due to silicosis are set forth in 35-2-13, UCA 1953, and may be summarized as follows :

1. The last day of injurious exposure must be subsequent to July 1, 1941.
2. There must be exposure to harmful quantities of silicon dioxide dust for a period of five years during the fifteen years prior to disability; and
  - (a) Disability must result within two years for uncomplicated silicosis;
  - (b) Disability must result within five years for silico-tuberculosis from the *last day worked for the employer* against whom compensation is claimed.
3. The claim must be filed pursuant to 35-2-48, UCA 1953, within one year after the cause of action arises.

The conditions precedent to a claim for partial permanent disability are set forth in 35-2-56, UCA 1953 and may be summarized as follows :

1. The last day of injurious exposure must be subsequent to July 1, 1941.
2. Partial disability must result within two years prior to the day upon which the claim was filed.
3. Partial disability must result within two years of the date of *last exposure*.

We submit that the Legislature in providing for partial permanent disability for silcosis elected to treat partial disability in a substantially different manner than it treated total disability. The conditions precedent are different, as well as a different statute of limitations. As a practical matter, a simple way to emasculate the total disability provision of the Occupational Disease Act would be to adopt the theory urged by the plaintiff. Those applicants filing their claim with the Industrial Commission for total disability, who had not previously filed a claim for partial permanent disability, would be barred by the statute of limitations. We urge that it is the duty of this Court to interpret these provisions so that the intent of the Legislature in allowing compensation for partial permanent disability due to silicosis will not thwart an applicant whose disability has become total as measured by the provisions of the Act.

Assume the case of an employee who suffers from silicosis which would be classified as non-disabling, per se; assume that the employee continued in his employ-



ment and was gainfully employed, even though he might suffer occasional loss of time because of the progressive nature of his disease but of insufficient amount to entitle him to any measurable compensation, in essence, the beginning of a reduction of his earning capacity; assume that the employee is removed from exposure type employment and continues for more than two years in this employment; then assume that the employee contracts a case of tuberculosis super-imposed upon the silicosis; under plaintiff's theory the employee is barred from filing for his total disability because he failed to file for partial disability.

We submit that the adoption by this Court of plaintiff's theory will have harsh and unwarranted results. The solution is simply to treat the two causes of action separately as they were intended to be treated by the Legislature. The treatment is not without precedent in this jurisdiction where in this Court in *Pacific States Cast Iron Pipe Company vs. Industrial Commission*, 18 Ut. 46, 218 P.2d 970, held that there were two separate and distinct claims pending before the Commission in that the death claim of the dependent is a separate and distinct cause of action from the one running to the deceased because of his injuries.

Sixth, while defendant Taylor does not concede that there is any factual basis to support a finding of partial disability prior to February 8, 1962, Mr. Taylor submits that as a matter of law, the running of a statute of limitations upon a claim for permanent partial disability due

to silicosis, does not bar a claim for total disability due to silicosis.

Plaintiff cites and argues *State Insurance Fund vs. Industrial Commission*, 116 Ut. 279, 209 P.2d 558, referred to hereafter as the *Lunnen* case, which cites and discusses *Marsh vs. Industrial Accident Commission*, 217 Cal. 338, 18 P.2d 933, 86 A.L.R. 563. Defendant Taylor has no quarrel with the doctrine announced in these cases. Rather, it is felt that the plaintiff ignores the doctrine of the cases. There is a distinction between the symptoms of the progressive disease known as silicosis and the disability produced by the disease. Plaintiff refuses to recognize that disability is a word of art and must be construed in accordance with the definitions contained in 35-2-12, U.C.A. 1953. The cases talk about disability, not symptoms. We believe this can be illustrated by quoting the rule of the *Lunnen* case set forth in plaintiff's brief and found at Page 283, Volume 116, 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 vs. Industrial Accident Commission* \*\*\* (emphasis added)

Again, illustrating the defendant's contention by directing the Court's attention to the portion of *Marsh vs. Industrial Accident Commission* (cited above) quoted by plaintiff's brief, commencing at Page 938 of 18 P.2d:

“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 compensable injury was sustained in performance of the duties of the employment.” (emphasis added)

Again directing the Court’s attention to *State of California, Subsequent Injuries Fund, Petitioner, vs. Industrial Accident Commission of the State of California*, ..... Cal.. .., 304 P.2d 112 at Page 114, the doctrine, again emphasized by italics:

“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 said disability was caused by his present or prior employment.”

Nor do we believe that the case of *Universal Granite Quarries Company vs. Industrial Commission*, 224 Wisc. 680, 272 NW 863, assists the position of the plaintiff. In this case a stone cutter, age 69 years, after some 40 years’ exposure became sick and disabled in January of 1932. In February and March of 1932 his illness was diagnosed as tuberculosis. He was treated for tuber-

culosis and in the Fall of 1934 the X-ray films diagnosed silicosis. He filed within thirty days of the X-ray diagnosis of silicosis. The Commission found:

“The applicant knew that he had tuberculosis about February or March, 1932; that he did not, however, know that he had silicosis or that his tuberculosis was caused by silicosis or by his employment until ex-rays were taken in the latter part of the year 1934 \* \* \* that the applicant did not know until within thirty days prior to notice to the respondent, nor ought he to have known, the nature of his disability and its relation to his employment.”

The Supreme Court reversed the Commission indicating that the applicant was aware that stone dust was causing his sickness as early as 1930-31. He became sick in January and was completely disabled since that date. His claim was filed in the Fall of 1934, which is substantially in excess of the two year statute of limitations applicable in Wisconsin. Applying this case to the Utah Act, we would agree that the statute of limitations would run one year after the diagnosis of tuberculosis. Under 35-2-12, UCA 1953, silicosis complicated by active pulmonary tuberculosis shall be presumed to be total disablement.

However, under the same definition found in 35-2-12, UCA 1953, the defendant Taylor could not be found to be totally disabled prior to February 8, 1962. He filed June 30, 1962, well within the one year statute of limitations.

The only case which supports plaintiff's contention is that of *Hutchinson vs. Semler*, 227 Ore. 437, 361 P.2d 803, decided May 10, 1951; rehearing denied June 14, 1961, 362 P.2d 704. However, in reading the *Hutchinson* case, we were suprized to learn that the subject matter of that action was a common law action for damages. The Occupational Disease Act is the sole and exclusive remedy of an applicant in Utah. The common law defenses of the fellow servant rule, contributory negligence and assumption of risk have been eliminated by our Act. The Oregon Court in *Hutchinson* concurred in the doctrine laid down in *Urie vs. Thompson*, 337 U.S. 163; 69 S.Ct. 1018, 1025; 93 L.Ed. 1282; 11 A.L.R. 2d 252, and announcing the following rule:

“We concur in the rule enunciated in the *Urie* case and believe that their 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 under mined by the dust which he was breathing.”

We do not quarrel with the rule announced by either the *Hutchinson* or the *Urie* case. We believe it to be the proper rule to apply in the case of a *negligence action* for exposure to harmful or poisonous substances. However, it is not the proper rule to be applied to the Utah Occupational Disease Act which is a creature of statute and not the common law. The concept of disability is the concept created by the statute and there can be no claim until there is a disability.



We again submit that measured by the standards of 35-2-12, UCA 1953, there was no total disability prior to February 8, 1962 and no evidence to support a finding of partial disability prior to June 30, 1961. The Commission has found that defendant Taylor became totally disabled as of June 4, 1962 which, in either event, is less than four months from his last exposure or employment and less than one year from a continuous course of employment dating back to October 22, 1954. We submit that there has been not misapplication of law and that there is substantial evidence furnishing a reasonable basis to support the material findings of fact.

### POINT III

LIABILITY MAY BE IMPOSED UPON THE STATE INSURANCE FUND AS CARRIER, EVEN THOUGH APPLICANT WAS NOT EXPOSED UNDER THEIR COVERAGE DURING A PERIOD OF THIRTY DAYS, OR MORE.

It is the position of defendant Taylor that liability may be imposed upon the State Insurance Fund if, during the period in which the State Insurance Fund was on the risk, Mr. Taylor was exposed to harmful quantities of silicon dioxide dust. This is the doctrine laid down in the case of *Pacific Employers Insurance Company vs. Industrial Commission*, 108 Utah 123, 157 P.2d 800, referred to as the Deza case:

“The insurance carrier at the time of the 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."

The Court will recall that the Industrial Commission had awarded compensation against Pacific Employers Insurance Company, who was the compensation carrier on the risk at the *time Deza became disabled*. The Court, in reversing the Commission, held that the carrier who was on the risk at the time of the *last exposure* was liable, which was the State Insurance Fund. Deza had continued in the employ of the same employer, but during the coverage of the Pacific Employers Insurance Company was in non-exposure type employment.

Thus, we feel the rule to be clear, if defendant Taylor was exposed to harmful quantities of silicon dioxide dust in his employment between February 3 and February 8, 1962, then the State Insurance Fund is the insurer who should respond. We think the record clear that Mr. Taylor resumed his normal duties as watchman and in the course of these duties was exposed to quantities of silicon dioxide dust *which to him* were harmful. During the course of each 12 hour shift worked during this period defendant Taylor swept the change room floor (R. 75, 76, 79) and the snow shed (R. 80). During the February period Mr. Taylor's activities at work were essentially the same as they were during his prior employment at the Judge Unit (R. 79). While occupied in the sweeping of the change room defendant Taylor would be sweeping for at least thirty minutes each shift (R. 99, 110). The sweeping activity would produce a one-half carbide can



full of mine dust (R. 110), which defendant Taylor indicates as a can about half again as high as the waste basket in the hearing room (R. 113).

Defendant Taylor in the course of his watching activities was required to travel through the snow shed wherein the dust condition was aggravated by the passage of the trains hauling the ores and waste from the mine (R. 76, 112). Defendant Taylor also swept the snow shed during the February period (R. 79, 80).

It is readily apparent and the record so shows that Mr. Taylor's activity during the period between February 3 and February 8, 1962 was not substantially different than his activity between October 22, 1954 and June 30, 1961. It is possible that this activity alone in a normal unexposed employee would not produce harmful effects. However, in an employee such as defendant Taylor, who has had some thirteen years of extremely harmful underground exposure, the exposure in his watchman duties was an exposure to harmful quantities of silicon dioxide dust as to him. We submit that there is a casual relationship between this last exposure and Taylor's ultimate disability which occurred June 4, 1962.

Plaintiff directs the Court's attention to Section 35-2-14, UCA 1953, which is as follows :

“\*\*\*in the case of silicosis the only employer liable shall the employer in whose employment the employee was last exposed to harmful quantities of silicon dioxide ( $\text{SiO}_2$ ) dust during a period of thirty days or more after the effective date of this act.”

And, in effect, urges upon this Court the proposition that the defendant must be in the employ of the employer and in the coverage of the insurance carrier during a thirty day period since the effective date of this Act. The dangers of this theory were pointed out to the Court in the briefs filed in the *State Insurance Fund vs. The Industrial Commission of Utah*, 395 P.2d 541. The clear intent of this statute, in our opinion, is to differentiate between employers. It is not the last employer who is liable, but only the last employer who exposes the employee to harmful quantities of silicon dioxide dust during a period of thirty days. There is only one employer in this action. What we are determining is which of two insurance carriers should respond.

We do not agree with the contention of the plaintiff the *State Insurance Fund vs. Industrial Commission*, ..... Utah ....., 365 P.2d 541, controls this case in that the insurer must be on the risk for a period of thirty days or more. This case merely holds that, as to an employer, the employee need not work each day of the thirty day period nor need he be harmfully exposed each day during such period. It only requires harmful exposure and employment during a period of thirty days. We submit that 35-2-14, UCA 1953, is not available to the insurer. His liability is based upon whether or not there is a casual connection between the exposure and the resulting disability. We submit that there is ample evidence to sustain the Commission's findings that the applicant was exposed to harmful quantities of silicon dioxide dust during the period between February 3 and February 8, 1962.

Being on the risk and the employer having exposed defendant Taylor to the harmful quantities during this period, the insurance carrier upon the risk at this time should respond.

We submit, that in a disease such as silicosis where the exposure is cumulative, liability is imposed on the last employer exposing the employee to harmful quantities of silicon dioxide dust during a period of thirty days. The employer may not escape liability because as a practical matter the overwhelming majority of the employee's exposure was in the employ of another employer. *Kennecott Copper Corporation vs. Industrial Commission*, 115 Utah 451, 205 P.2d 829.

Hence, as to insurance carriers, the principle announced in *Pacific Employers Insurance Company vs. Industrial Commission*, 108 Utah 123, 157 P.2d 800, the Court should impose liability on the insurer who was on the risk at the,

“\*\*\*date of the last exposure of the applicant to harmful quantities of silicon dioxide dust,\*\*\*” without the limitation of a period of thirty days. Such a rule will be definite and put these matters to rest so that they may be handled on the administrative level rather than in the Supreme Court. Some hardship may result in that an insurer may be on a risk for a short time and suffer liability; however, the possibilities are just as good that the same insurance company will escape liability just as often by the application of such a rule. Otherwise, there will be continuing periods of non-

coverage for a period of thirty days with each change of insurers.

## CONCLUSION

For the foregoing reasons, we submit that there has been no misapplication of law and that the findings of the Commission are supported by substantial evidence furnishing a reasonable basis to support such findings of fact. The Order of the Commission awarding compensation to James F. Taylor should be affirmed.

Respectfully submitted,

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Received three copies of the foregoing brief this  
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