1965

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

Utah Supreme Court

Charles Welch, Jr.; Attorney for Plaintiff;
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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

BRIEF OF DEFENDANT UNITED PARK CITY MINES COMPANY

NATURE OF THE CASE

This is a silicosis claim under the Utah Occupational Disease Disability Law (herein called the "O. D. Law") for permanent total disability benefits. Defendant United Park City Mines Company (herein called "defendant employer") and plaintiff are in dispute as to which of them has the obligation to pay whatever benefits defendant James F. Taylor, (herein called "defendant Taylor") is entitled to receive. Defendant employer joins plain-

tiff, however, in plaintiff's assertion that defendant Taylor failed to file his claim within the period provided by Section 35-2-48 U.C.A., 1953, the limitations of actions statute.

STATEMENT OF FACTS

Defendant Taylor was employed by defendant employer as an underground miner for about 15 years beginning in 1925. Thereafter (except for a two year hiatus between July, 1952 and October of 1954), he was employed as a watchman on the surface from 1945 until June 30, 1961. He returned to work, as a substitute for a sick watchman, for the period from February 3 through February 8, 1962. During that six days in February, he did exactly the same work he had done for twenty years before his 1961 separation from employment, and he was then exposed to the same dust conditions as had prevailed during his previous employment in surface activity (R-77, 79). Furthermore, he was as capable of the necessary physical exertion in February of 1962 as he had been the previous June. In February, he fired the boiler every day (R-80) and performed every other duty of a watchman. There was no appreciable change in his condition between July of 1961 and February of 1962 (R-103) or, indeed, between the end of 1959 and the date of termination of his employment (R-81, 83, 103).

ARGUMENT

POINT I.

DEFENDANT TAYLOR FAILED TO FILE HIS SILICOSIS CLAIM WITHIN ONE YEAR AFTER HIS CAUSE OF ACTION, IF ANY, AROSE.

Defendant employer fully concurs with plaintiff's argument under its Point I. Section 35-2-48 U.C.A., 1953, requires that a silicosis claim be filed within one year after the cause arises. If the Court adopts the most liberal view of when a cause of action arises, it must still, on the record in this case, perceive that defendant Taylor's cause of action was mature and complete by the end of 1959, and he then knew or should have known of the existence of every element of his cause of action:

1. Defendant Taylor knew that he had silicosis.

   He testified (R-82) that Dr. Barta told him he had silicosis in 1933; Dr. Openshaw told him he was silicotic in 1943 or 1944 (R-82), and Dr. Oniki similarly diagnosed his condition in 1952.

2. Defendant Taylor knew he was disabled by the end of 1959.

   He testified about his disabling symptoms as follows (R-81):

"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 Judge Daly Mine, or 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?"

and (R-83):

"Q. Why did you leave work on June 30th of 1961?

"A. I was laid off.

"Q. Your condition at that time was about the same as it had been for a year or so previously; is that correct?

"A. I'd say that, yes."

3. Defendant knew that the cause of his symptoms was silicosis.

He testified he had been told three times that he had silicosis, and his symptoms were the classic symptoms of silicosis — well known to all who live in hard rock mining communities.

There is absolutely no evidence of any appreciable change in defendant Taylor's condition after 1959. The Panel has found that he is now totally disabled, and the members would undoubtedly have reached the same conclusion in 1959 by which time all his present symptoms had fully developed and he had suffered from silicosis for twenty-five years of which he was aware. We know (R-23, 30) that the Panel found no change in the lung condition between September 29, 1962, and March 23,

1963. Since the symptomatology had been static for several years, we must assume the disease process had been as static during those years as it was for the six months before March 23, 1963.

We do not believe the mere fact defendant Taylor worked after 1959 demonstrates that he was not disabled or even totally disabled before that time. The Panel's conclusion of total disability is based upon the evidence of sufficient pathology (obviously present in this case by the end of 1959) to contraindicate employment. The panel members do *not* conclude that Mr. Taylor's performance of the duties of a watchman is now a physical impossibility, they merely conclude that any substantial physical exertion by him is medically unwise.

POINT II.

THE STATE INSURANCE FUND MUST RESPOND, IF COMPENSATION IS PAYABLE ON THIS CLAIM, AS THE COMPENSATION CARRIER FOR THE EMPLOYER AT THE TIME OF LAST EXPOSURE.

The Commission found, with reference to the exposure during February of 1962, as follows:

> "* * * Under the principles enunciated in Pacific Employers Insurance Company v. Industrial Commission, 157 P. 2d Page 600, there must be a causal relation between the applicant's disability due to silicosis and his employment during the policy period covered by The State Insurance Fund. Since we have found that the applicant was exposed to harmful quantities of silicon dioxide dust during the period between February 3, 1962,

and February 8, 1962, inclusive, the aforementioned case has been satisfied. Therefore, the applicant is entitled to an award for total and permanent disability due to silicosis against The State Insurance Fund.''

Plaintiff now contends it is an error of law for the Commission to impose liability upon a carrier in a silicosis case unless the carrier had been ''on the risk'' for a period of thirty days during which the employee was harmfully exposed to silicon dioxide dust. Plaintiff bases its contention on Section 35-2-14, U.C.A. 1953, and particularly the following language:

> ''* * * In the case of silicosis 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 (SiO2) dust during a period of 30 days or more after the effective date of this act.''

Obviously, that language does not say anything about which of the two carriers, where there is a successor carrier during the period of exposure, must respond when an employee develops silicosis. Plaintiff asks this Court to read into the section enough additional language so that the protection it gives to employers is also extended to insurance companies. The language this Court would have to read into the section would almost double its length. There is no precedent for such monumental judicial legislation.

The legislative purpose in making liable only the last employer during 30 days of harmful exposure is not evident from the words of the statute or its legislative history. It cannot be assumed, however, that the legislature believed a 30 day exposure would produce or significantly effect the course of the disease. If this Court can judicially notice any medical doctrine, it can take notice that the disease of silicosis develops only after years of exposure. The real purposes hoped to be accomplished by Section 35-2-14 were

1. to encourage mining companies to eliminate dust from their mines within the statutory period (originally 60 days), and

2. to eliminate the economic drain which would be entailed if a mining company had to wait until it had investigated the health of an applicant for employment before it could risk hiring him and putting him to work.

Neither of these reasons has the slightest application to insurance carriers. To apply Section 35-2-14 to insurance carriers would lead to a ridiculous result in any number of entirely probable situations. Suppose, for instance, that an employer, then insured by a private carrier, employs a silicotic for the first time on November 15. He works underground in dusty environment for thirty consecutive days. On December 1, however, the employer's policy expires, and he then insures with the State Insurance Fund. The silicotic becomes disabled on December 16. Who, under the plaintiff's theory, must

respond? Plaintiff apparently believes the employer should pay the benefits and the two insurance carriers should be entirely relieved of responsibility, even though the employer was always insured as the law requires and even if the employer were insolvent and unable to pay such benefits.

The plaintiff cites the Deza case (*Pacific Employers Ins. Co.* v. *Commission,* 108 Utah 123) as authority for the proposition we now criticize. We submit that the Deza case says plainly and without equivocation that the carrier who must respond (where there have been two or more carriers on the risk during the period of exposure) is the one who insures the employer "*on the date*" of last harmful exposure. On page 124, the Court makes this statement:

> "From the foregoing statement of facts, it is seen that the last exposure to silicon dioxide dust was June 7, 1943. The significant importance of this *date* will become apparent immediately." (Our emphasis.)

Again, on page 128, the Court says this:

> "As has been pointed out, however, *June 7, 1943, was the date of the last exposure* of the applicant to harmful quantities of silicon dioxide dust, and from that date until his employment ceased because of total disability on March 25, 1944, he continued in the employ of the Mines Company but in the capacity of a watchman above ground on the property of the Company. The insurance carrier at the time of *such last exposure* was the State Insurance Fund; *this is the date* which fixes the lia-

bility of the employer, and consequently also attaches the liability to the employer's insurance carrier *as of that date.*" (Our emphasis.)

Plaintiff cites the Deza case as being authority for the proposition that some causal relationship between exposure while a carrier is on the risk and the employer's disability must be shown if the carrier is to be held responsible. We submit that every day of an employee's exposure to harmful quantities of silicon dioxide dust is as significant in the total picture as every other day. The necessary causal relationship is shown by the mere fact that the exposure is to silicon dioxide dust and harmful. The reason the insurance carrier was exonerated in the Deza case was that the court clearly found that there was *no* harmful exposure while that carrier (Pacific Employers) was on the risk. In the instant case, the Commission has found that the exposure during seven days while plaintiff was on the risk was harmful. The carrier with the coverage for the employer who is liable on the date of the employee's last exposure in that employer's employment is, under the doctrine of the Deza case, the carrier who must respond. In this case, that carrier was plaintiff.

Respectfully submitted,

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