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In The Supreme Court of the State of Utah

UNITED STATES SMELTING, REFINING AND MINING COMPANY,
Plaintiff,

- vs -

PAUL D. NIELSEN and the INDUSTRIAL COMMISSION OF UTAH,
Defendants.

Case No. 10768

Petition for Rehearing And Brief in Support Thereof

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MOTION TO GRANT REHEARING

Come now Paul D. Nielson and the Industrial Commission of Utah, Defendants, and the Utah AFL-CIO, a labor federation, amicus curiae, and petition this court to grant a rehearing in the above entitled matter, upon the grounds that this court erred as a matter of law, in reversing the award of the Industrial Commission:

1. In failing to give proper interpretation and application to Repl. Vol. Utah Code Ann. § 35-1-65 (1966);

2. In failing to give proper interpretation and application to Repl. Vol. Utah Code Ann. § 35-1-65 (1966);

3. In failing to give proper interpretation and application to Repl. Vol. Utah Code Ann. § 35-1-67 (1966);

4. In failing to give proper interpretation and application to Repl. Vol. Utah Code Ann. § 35-1-79 (1966);

5. In holding that defendant Nielson established both date of injury and the date of disability as the same, and in basing this decision in part on a matter of such minor import.

WHEREFORE, these parties respectfully move this court to grant this motion for rehearing and permit further oral arguments and enter its order and

decision affirming the award of the Industrial Commission below.

RESPECTFULLY SUBMITTED,

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STATEMENT OF FACTS

The facts are as stated in the court's opinion with the following additions:

It does not appear in the court's decision that Nielson, following his injury of September 16, 1952, did in fact file a timely application with the Industrial Commission of Utah. This original claim, filed with the Commission on the 20th day of June, 1953, gave the commission full, plenary and continuing jurisdiction of his claim (R-5).

On July 13, 1966, (R-91) the Commission ordered the employer to pay Nielson two awards:

1. **Permanent partial compensation,** for a 10% functional loss to the right arm, and a 12% functional loss to the left arm, amounting to $30.25 per week for 24 weeks; a total of $724.00.

2. **Temporary total compensation** from April 12, 1965, to and including December 1, 1965, at $30.25 per week for a total of $1,011.21.

The panel held the arm disabilities were directly related to the surgical knee procedure (R-91), and the award was in addition to the 30% previously paid Nielson for the permanent partial loss to his lower left extremeties.

POINT I

THE COURT ERRED IN MISAPPLYING AND MIS-INTERPRETING UTAH CODE ANN. § 35-1-66 (1966).

A careful reading of the **partial disability** statute demonstrates that the legislature was actually creating two remedies for partially disabled workers.

The first, provides for compensation for injuries to earning power. The first three paragraphs of this section, Utah Code Ann. § 35-1-66 (1966), provides:

> "Where the injury causes partial disability for work, the employee shall receive, during such disability and for a period of not to exceed six years from the date of the injury, a weekly compensation equal to sixty per cent of the difference between his average weekly wages **before** the accident and the weekly wages he is able to earn **thereafter,** but not

more than $42 per week, and in addition thereto $3.60 for a dependent wife and $3.60 for each dependent minor child under the age of eighteen years, up to and including four, or a maximum of $60 per week in the case of a dependent wife and four or more such dependent minor children. (Emphasis added.)

In case the partial disability begins after a period of total disability, the period of total disability shall be deducted from the total period of compensation.

In no case shall the weekly payments continue after the disability ends, or the death of the injured person."

The compensation for this facet of the statute is limited to a period of "six years from the date of injury" (See discussion infra).

Following the first three paragraphs, the legislature next carefully provided a schedule of compensation awards for partially disabling functional body loss, not earning power:

One arm at or near shoulder	200 weeks
One arm at elbow	180 weeks
One arm between the writ and the elbow	160 weeks
One hand	150 weeks
One thumb and the metacarpal bone thereof	60 weeks
One thumb at the proximal joint	30 weeks
One thumb at the second distal joint	20 weeks
One first finger and the metacarpal bone thereof	30 weeks
One first finger at the proximal joint	20 weeks
One first finger at the second joint	15 weeks
One first finger at the distal joint	10 weeks
One second finger and the metacarpal bone thereof	30 weeks

One second finger at the proximal joint	15 weeks
One second finger at the second joint	10 weeks
One second finger at the distal joint	5 weeks
One third finger and the metacarpal bone thereof	20 weeks
One third finger at the proximal joint	12 weeks
One third finger at the second joint	8 weeks
One third finger at the distal joint	4 weeks
One fourth finger and metacarpal bone thereof	12 weeks
One fourth finger at the proximal joint	9 weeks
One fourth finger at the second joint ...	6 weeks
One fourth finger at the distal joint	3 weeks
One leg at or near the hip joint as to preclude the use of an artificial limb	180 weeks
One leg at or above the knee where stump remains sufficient to permit the use of an artificial limb	150 weeks
One leg between the knee and ankle	140 weeks
One foot at the ankle	125 weeks
One great toe with the metatarsal bone thereof	30 weeks
One great toe at the proximal joint	15 weeks
One great toe at the second joint	10 weeks
One toe other than the great toe with the metatarsal bone thereof	12 weeks
One toe other than the great toe at the proximal joint	6 weeks
One toe other than the great toe at the distal joint	3 weeks

In the above cases permanent and complete loss of use shall be deemed equivalent to loss of the member or part thereof.

One eye by enucleation	120 weeks
Total blindness of one eye	120 weeks

It is clear from these paragraphs of the section that compensation for these functional losses not to exceed in any case 200 weeks, was subject only to the limitation as to the maximum weekly amount

payable in the section, or in no event to exceed $12,-000.00.

This remedy is not conditioned upon any limitation of time, from the date of injury, so long as the applicant has filed a timely claim under the general statute of limitation; to-wit, three years.

Nielson was awarded $724.00 permanent partial disability compensation under this remedy, for functional loss to the body, not for any partial loss to his earning power.

POINT II

THE COURT ERRED AS A MATTER OF LAW IN MISAPPLYING AND MISINTERPRETING UTAH CODE ANN. § 35-1-65 (1966).

Nielson also received a temporary total disability award of $1,011.21 lost weekly compensation from April 12, 1965, to and including December 1, 1965 at $30.25 per week.

It will be argued that this position of the award is limited by the six year provision contained in Utah Code Ann. § 35-1-65 (1953). We respectfully submit that review of the history of workmen's compensation legislation will demonstrate that such argument is untenable.

Utah Code Ann. § 35-1-64 (1966) provides:

> "No compensation shall be allowed for the first three days after the injury is received . . . provided, however, if the period of total temporary disability lasts more than 21 days, compensation shall also

> be payable for the first three days after the injury is received."

This waiting period applies to all sections of the workmen's compensation act.

In 1917, Revised Statutes of Utah § 3136 read:

> "No compensation shall be allowed for the first 10 days after the injury is received . . ."

This was amended in Revised Stat. § 42-1-60 (1933):

> "No compensation shall be allowed for the first three days after the injury is received . . ."

This provision is a limitation on **all compensation** awards. Although Utah Code Ann. § 35-1-64 applies to all compensation, the temporary total **disability** statute (35-1-65) has never expressly incorporated this limitation. In order to interpret the temporary total disability statute, it will be necessary to interpret the partial disability (35-1-66) statute.

Section 3138 of the Revised Statutes of Utah (1917) provided:

> "In no case shall compensation continue for more than six years beginning on the 11th day of disability . . ."

The comparable 1933 section reads:

> "In no case shall compensation continue for more than six years beginning on the 4th day of disability . . ."

Finally, Laws of Utah 1939 Ch. 51 § 1 provided:

> " . . . six years from the date of injury . . ."

This language has been retained in present law, Utah Code Ann. § 35-1-66 (1966).

By reducing the waiting period from the **11th day of disability**, to the **4th day of disability**, to the **date of injury**, the legislature actually intended date of injury to mean the **1st day of disability.**

This interpretation is supported by long precedent in the court. In **Salt Lake City v. Industrial Commission**, 93 Utah 510, 74 P.2d 657 (1937), this court held:

> "Not until there is an accident and injury and a disability or loss from the injury does the duty to pay arise. A mere accident does not impose the duty to pay. Accident plus injury therefrom does not impose the duty. But accident plus injury which results in disability or loss gives rise to the duty to pay. When the employer refuses or ceases to pay compensation, the cause of action against him arises."

In **Wiliams v. Industrial Commission**, 95 Utah 376, 81 P.2d 649 (1937), the court held:

> "In our recent decision in the case of **Salt Lake City v. Industrial Commission**, 74 P.2d 657, we held, overruling the previous cases, that the limitation period does not begin to run until a disability has arisen resulting from accidental injury in the course of employment. We there held that the limitation statute in industrial accident cases (page 658),
>
> * * * begins to run, not from the time of the accident, but from the time of the employer's failure to pay compensation for disability when the dis-

ability can be ascertained and the duty to pay compensation arises. * * *"

In **State Industrial Fund v. Industrial Commission,** 116 Utah 279, 209 P.2d 558 (1949), the court held in an occupational disease case:

"This question is one of first impression in this court under this statute, but in **Salt Lake City v. Industrial Commission,** 93 Utah 510, 74 P.2d 657, we passed on a somewhat similar question. There we were dealing with the general statute of limitations as applied to the filing of a claim for workmen's compensation. In that case the applicant in the course of his employment by Salt Lake City was, on June 26, 1929, struck in his eye by a golf ball and thereby disabled for a short period of time for which he was paid compensation without filing a claim therefore. In January, 1936, this eye began to give him trouble again, and later his doctors advised him that he was going to lose the sight in his eye as the result of the injury thereto in 1929 and on May 13, 1936, he filed his claim for compensation for such loss. In holding that the claim was filed in time we said on pages 512-514 of 93 Utah Reports on page 658 of 74 P.2d;

* * * We think Section 104-2-26 R.S. Utah 1933, * * * was applicable as a statute of limitations, but that it begins to run, not from the time of the accident, but **from the time of the employer's failure to pay compensation for disability when the disability can be ascertained** and the duty to pay compensation arises. * * * The Compensation Act * * * imposes a duty on employers to pay compensation to employees who suffer disability from an injury by accident arising out of or in the course of the employment. Not **until** there is an accident and injury and disability or loss from the injury does the **duty to pay** arise. A mere accident does not impose the duty to pay. Accident plus injury therefrom does

not impose the duty. But accident **plus injury which results in disability or loss gives rise to the duty to pay. When the employer refuses or ceases to pay compensation, the cause of action against him arises."**

And Justice Wolf concurring in the result wrote:

"It appears to me that in this sort of case the reasoning in the case of **Salt Lake City v. Industrial Commission,** 93 Utah 510, 74 P.2d 657, is applicable. The employer's liability is imposed by statute; the carrier's liability by contract made pursuant to the statute for the benefit of any person disabled under the terms of the statute. It follows, therefore, that the conditions antecedent to the accrua of a cause of action are; (1) A compensable disability under the terms of the statute. (2) Reasonable diligence in the ascertainment of the extent and nature of the disability and the fact that it was employment caused. (3) Knowledge of such compensable disability brought home to the responsible employer which is notice to the carrier. (4) Refusal or failure of the responsible employer (viz. his insurance carrier) to meet the obligation to pay compensation within a reasonable time. The cause of action that is the cause for the action against the carrier is under the act, the failure or refusal of the responsible carrier to meet its contractual obligation which does not arise until all three of the previous conditions are or can be fulfilled."

It has also been held that injury means **compensable injury** or **disabling injury** and is synonomous with **compensable disability. Roschek v. Volcan Iron Co.,** 157 Pa. Super. 227, 32 A.2d 280 (1945).

See **Mollerup Van Lines v. Industrial Commission,** 16 Utah 2d 235, 298, P.2d 882 (1965); and **Spen-**

cer v. Industrial Commission, 4 Utah 2d 185, 290 P.2d 692 (1955).

We respectfully submit that the phrase **date of injury** means **first day of disability,** according to "casualty," not calendar years, as held in **Hardy v. Industrial Commission,** 89 Utah 561, 58 P.2d 15 (1936) and **Utah Apex Mining Co. v. Industrial Commission,** 116 Utah 305, 209 P.2d 571 (1949).

In **Hardy** this court held:

> "The limitation provided by the section (permanent partial disability relates to the disability period and not the calendar period dating from the injury."

Therefore, a claimant could receive a maximum of 312 weeks of disability payments within 6 casualty years.

When Hardy was decided, the partial disability section provided for compensation not to exceed six years from the 4th day of disability. If we equate "date of injury" with first day of disability," then **Hardy** remains pertinent.

After the 1939 amendment to the **partial disability** section, **Utah Apex Mining Co. v. Industrial Commission** came before the court. That case properly held the commission retained jurisdiction.

Where injuries were sustained in 1931 and aggravation resulted in 1948, the court observed in **Apex:**

> "Inasmuch as this is the only provision in either statute with which we are here concerned, the reas-

oning of this court in that case is applicable here. We there held that the provision that payment of compensation should not continue for more than six years from the date of the injury was only meant to fix the period during which payment is to extend, that is, the disability period, and that it was not in conflict with 42-1-72, supra, which provides that the jurisdiction of the Commission shall be continuing. We there said:

"We discover no conflict betwen section 42-1-62 and section 42-1-72, supra. The latter section is one relating to jurisdiction only. The former relates to the amount to be paid and the period during which the payment shall extend. 'Where the injury causes partial disability for work, the employee shall receive during such disability and for a period of not to exceed six years' the compensation provided for by the statute. Reading the whole section, it is apparent the part under consideration and last above quoted has the same effect and meaning as though it read: 'When the injury causes partial disability for work the employee shall receive, during such disability * * * not to exceed six years, the compensation specified'.

"The limitation provided by the section relates to the disability period and not the calendar period dating from the injury.

We conclude that the Commission properly permitted a hearing and was empowered to make an additional award of compensation should it be made to appear that such an award was proper."

The court observed in **Apex,** that section 42-1-61 and 62 R.S.U. 1933 (35-1-65 and 35-1-66):

". . . are, in substance, identical when we limit our consideration to the provision that payment of compensation shall not continue for more than six years from the date of injury."

Therefore, it is respectfully submitted that both **Hardy** and **Utah Apex Mining** are controlling, unless by this Nielson decision, the court overrules these pecedents.

POINT III

THE EMPLOYER'S LIABILITY UNDER THE WORKMEN'S COMPENSATION LAW IS DEFINITE AND CERTAIN UNDER UTAH CODE ANN. § 35-1-67 (1966).

The court's concern that:

> "The three and six year statutes are ones of repose, which we think the legislature intended should terminate, not encourage protraction of claims, otherwise, an employer could and would be an insurer for the natural lives of its employees, based on real or imaginary discoveries of erstwhile latent injuries . . . ."

is relieved by the last paragraph of Utah Code Ann. § 35-1-67 (1966), which clearly provides that:

> "In no case shall the employer be required to pay compensation for any combination of disabilities of any kind including loss of function, in excess of $18,720."

Once this figure is reached, any combination of disabilities such as **temporary total, temporary partial, permanent partial,** or **permanent total** are subject to this overall monetary limitation.

POINT IV

THE COURT ERRED AS A MATTER OF LAW IN MISAPPLYING AND MISINTERPRETING UTAH CODE ANN. § 35-1-78 (1966).

The statute of limitation applicable to all workmen's compensation law is provided in Utah Code Ann. § 35-1-99 (1966).

It has been held in **Spencer v. Industrial Commission,** supra p. 645:

> "In view of the express term of this statute of limitation, there can be no doubt that once the application has been filed, and the commission's jurisdiction invoked it has the authority to entertain further proceedings to deal with any substantial changes or unexpected developments that may arise as a result of the injury.
>
> There was no error committed, in fact, the commission was obliged to take jurisdiction and consider the new application."

Utah Code Ann. § 35-1-78 provides:

> "The power and jurisdiction of commission over each case shall be continuing, and it may from time to time make such modification or change with respect to former finding, or orders with respect thereto as in its opinion may be justified . . ."

If, as the court holds in **Nielson,** the jurisdiction is continuing only for six years subsequent to the date of injury, then there would be no reason for the provision:

> " . . . that records pertaining to cases, other than those of total permanent disability, or where a claim

> **has been filed as in 35-1-99, which has been closed and inactive for a period of 10 years, may be destroyed at the discretion of the commission. (Utah Code Ann. § 35-1-78)."**

The legislature obviously contemplated that aggravated disability should be compensated, even though it occurred more than six years after the injury, provided proper appliation was made, and findings supported the modification. See exhaustive review of Utah cases in 165 A.L.R. at 108 and 116, and see the excellent article in Vol. 33-34 University of Missouri, Kansas City Law Review, P.125 (1965).

A petition for modification is not a new proceeding. It is merely another step in the proceeding which was initiated by the original application for a claim. **Parker v. Industrial Commission,** 66 Utah 256, 241 Pac. 362 (1925); **Utah Apex Mining Co. v. Industrial Commission,** 77 Utah 542, 298 Pac. 381 (1931).

Furthermore, where statutes provide review at "any time," or from "time to time," review is not barred at a later time by the expiration of the time period for which compensation was originally awarded and paid. **Moray v. Industrial Commission,** 58 Utah 404, 199 Pac. 1023 (1921); **Utah Apex Mining Co.,** supra.

It is respectfully submitted that the court erroneously construed Utah Code Ann. § 35-1-78 (1966) as a limitation on the commission's continuing jurisdiction.

POINT V

THE COURT ERRED AS A MATTER OF LAW IN HOLDING THAT THE LUMP SUM SETTLEMENT EXHAUSTS A CLAIMANT'S PERIOD OF COMPENSATION UNDER UTAH CODE ANN. § 35-1-99 (1966).

Utah Code Ann. § 35-1-79 authorizes the commissio to commute periodical benefits into one lump sum payment. It was stated in **Barber Asphalt Corp. v. Industrial Commission,** 102 Utah 371, 135 P.2d 266 (1943):

> "That provision does not purport to authorize the commission to approve a lump sum settlement so as to bar a claim for additional compensation for a disability out of the injury which was not known, or existing at the time of the payment. It connotes a lump sum payment in lieu of installment payments then awarded or owing under the statute for a disability then known. (135 P.2d at 271)."

It was further held in **Utah Fuel Co. v. Industrial Commission,** 159 P.2d 877 (1945):

> "Under the Workmen's Compensation Act, the Industrial Commission has continuing jurisdiction to grant additional awards even though payment has been made to an injured employee under an agreement for final settlement, with the approval of the commission, if after the settlement there is a change in the condition of the employee."

Nielson did receive an order from the Industrial Commission authorizing his lump sum payment (R-22). Therefore, the court erred when it held that the lump sum settlement exhausted Nielson's compensation.

POINT VI

THE COURT ERRED WHEN IT HELD THAT NIELSON HAD SELECTED IN HIS APPLICATION THE DATE OF INJURY AND THE DATE OF DISABILITY AS THE SAME.

The date of the original injury, September 16, 1952, and the date of the greater disability, April 11, 1965, were both clearly alleged on Nielson's application for additional compensation (R-25). In basing its decision that Nielson, "in his own application set both the date of injury and disability at the same time, so that really there is no problem as to dates of accident, disability, or discovery," the court misread the record and worked an unconscienable injustice to the applicant and to the cause of the statute by its oversimplification of an insignificant point at issue.

CONCLUSION

For the reasons stated, we respectfully urge the court to grant this petition for rehearing and, after oral argument and due consideration, affirm the decision of the Industrial Commission.

Respectfully submitted,

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