1973

Kennecott Copper Corporation v. The Industrial Commission of Utah And Eugene Bradley Anderson : Plaintiff's Brief

IN THE

SUPREME COURT
OF THE
STATE OF UTAH

KENNECOTT COPPER CORPORATION,

Plaintiff,

vs.

THE INDUSTRIAL COMMISSION OF UTAH and EUGENE BRADLEY ANDERSON,

Defendants.

PLAINTIFF'S BRIEF

Original Proceeding to Review an Order of the Industrial Commission

JAMES S.
ERIE V.

PARSONS

520
Salt Lake

VERNON ROMNEY
Utah Attorney General
State Capitol
Salt Lake City, Utah 84114
Attorney for Defendant
The Industrial Commission of Utah

ROBERT D. MOORE
Suite 400, Ten West Broadway
Salt Lake City, Utah 84101
Attorney for Defendant
Eugene Bradley Anderson

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TABLE OF CONTENTS

	Page
STATEMENT OF NATURE OF CASE	1
DISPOSITION BY THE INDUSTRIAL COMMISSION OF UTAH	2
RELIEF SOUGHT ON REVIEW	3
STATEMENT OF FACTS	3
STATEMENT OF POINTS	4
POINT I. SECTION 35-1-66, UTAH CODE ANNOTATED, AS AMENDED, BARS THE RECOVERY BY DEFENDANT, EUGENE BRADLEY ANDERSON, OF THE PERMANENT PARTIAL DISABILITY COMPENSATION BENEFITS AWARDED TO HIM BY THE INDUSTRIAL COMMISSION IN ITS SUPPLEMENTAL ORDER OF NOVEMBER 3, 1972	4
POINT II. THE AWARD OF HOSPITAL AND MEDICAL EXPENSES IN THE SUPPLEMENTAL ORDER OF NOVEMBER 3, 1972 IS BARRED BY SECTION 35-1-66, UTAH CODE ANNOTATED, 1953, AS AMENDED	4
POINT III. THE INDUSTRIAL COMMISSION ACTED WITHOUT OR IN EXCESS OF ITS AUTHORITY UNDER SECTION 35-1-81, UTAH CODE ANNOTATED, 1953, AS AMENDED, IN MAKING ITS AWARD OF ADDITIONAL MEDICAL BENEFITS IN THE SUPPLEMENTAL ORDER OF NOVEMBER 3, 1972	5
ARGUMENT	5
POINT I. SECTION 35-1-66, UTAH CODE ANNOTATED, AS AMENDED, BARS THE RE-	

TABLE OF CONTENTS—Continued

Page

COVERY BY DEFENDANT, EUGENE BRADLEY ANDERSON, OF THE PERMANENT PARTIAL DISABILITY COMPENSATION BENEFITS AWARDED TO HIM BY THE INDUSTRIAL COMMISSION IN ITS SUPPLEMENTAL ORDER OF NOVEMBER 3, 1972 5

POINT II. THE AWARD OF HOSPITAL AND MEDICAL EXPENSES IN THE SUPPLEMENTAL ORDER OF NOVEMBER 3, 1972 IS BARRED BY SECTION 35-1-66, UTAH CODE ANNOTATED, 1953, AS AMENDED .. 12

POINT III. THE INDUSTRIAL COMMISSION ACTED WITHOUT OR IN EXCESS OF ITS AUTHORITY UNDER SECTION 35-1-81, UTAH CODE ANNOTATED, 1953, AS AMENDED, IN MAKING ITS AWARD OF ADDITIONAL MEDICAL BENEFITS IN THE SUPPLEMENTAL ORDER OF NOVEMBER 3, 1972 15

CONCLUSION 17

CASES CITED

Buckingham Transportation Co. v. Industrial Commission, 93 Utah 342, 360, 72 P. 2d 1077 (1937).. 16

Fredrickson v. Industrial Commission, 19 Utah 2d 233, 429 P. 2d 981 (1967) 8

Johnson, James T. v. Interstate Motor Lines and Truck Ins. Exchange, Industrial Commission Decision No. 1173-502 (Dec., 1969) 6, 10

Jones v. Industrial Commission, 17 Utah 2d 28, 404 P. 2d 27 (1965) 8, 12

Page

Marsh, Parley H. v. Kennecott Copper Corporation, Industrial Commission Decision Claim No. 2U5-4225 (Feb., 1971) 6, 10

Roberts, Patrick G. v. Arch Dam Const. Co., Claim No. 2-70-505 (June, 1970) 6, 10

Smith, Betty W. v. Utah State Training School and State Ins. Fund, Claim No. 16U12-3087 (Mar., 1970) 13

Sullivan v. Industrial Commission, 83 Utah 187, 196, 27 P. 2d 443 (1933) 16

Thomas, Percy v. Yoho Automotive, Inc. and State Ins. Fund, Claim No. 1443-15 (June, 1969) 6, 10

United States Smelting, Refining and Mining Co. v. Nielsen, 19 Utah 2d 239, 430 P. 2d 162, affirmed on rehearing, 20 Utah 2d 271, 437 P. 2d 199 (1968) 6, 7, 8, 9, 10, 11, 14

United States Steel Corp. v. Industrial Commission and William Zele, Sr., 27 Utah 2d 145, 493 P. 2d 986 ..... 9, 11, 12, 13, 14

STATUTES CITED

Section 35-1-66, U. C. A. 1953, as amended 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 18

Section 35-1-78, U. C. A. 1953, as amended 7, 9

Section 35-1-81, U. C. A. 1953, as amended 15, 18

Section 35-1-82.55, U. C. A. 1953, as amended 2

Section 35-1-83 1

Section 35-1-99 ..... 8, 12, 13, 14

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

KENNECOTT COPPER CORPORATION,

Plaintiff,

vs.

THE INDUSTRIAL COMMISSION OF UTAH and EUGENE BRADLEY ANDERSON,

Defendants.

Case No. 13131

PLAINTIFF'S BRIEF

STATEMENT OF NATURE OF CASE

This is an original proceeding before the Supreme Court of Utah for the purpose of having the lawfulness of an award dated November 3, 1972 and finalized on November 15, 1972 by the Industrial Commission of Utah in proceedings entitled Eugene Bradley Anderson, Applicant vs. Kennecott Copper Corporation, Defendant, File No. 2U5-4040, inquired into and determined as provided by Section 35-1-83, Utah Code Annotated, 1953, as amended.

DISPOSITION BY THE INDUSTRIAL COMMISSION OF UTAH

On November 3, 1972, the Industrial Commission of Utah entered its Supplemental Order and award that Kennecott Copper Corporation pay Applicant Eugene Bradley Anderson permanent partial disability benefits as a result of an industrial injury incurred on May 5, 1959, the difference between a previous permanent partial disability award of 20% by Order of the Commission dated February 10, 1961 and the current Medical Panel disability rating, adopted by the Commission, of 75% permanent partial disability or a total of 55% at the rate in existence at the time of the accident. The order further directed Kennecott to "pay for hospital and medical expenses incurred as a result of the industrial accident . . . along with specified attorneys' fees, to be deducted from the award. Kennecott Copper Corporation, plaintiff herein, on November 9, 1972, filed with the Industrial Commission of Utah a Motion for Review of the November 3, 1972 Supplemental Order, as required by Section 35-1-82.55 Utah Code Annotated, 1953, as amended, as a prerequisite for the filing of this action in the Supreme Court of the State of Utah. The Motion for Review was denied by Denial of Motion for Review entered by the Industrial Commission of Utah on November 15, 1972. Plaintiff filed this action with the Supreme Court of Utah on November 30, 1972.

RELIEF SOUGHT ON REVIEW

Plaintiff, Kennecott Copper Corporation, upon this

review seeks to have the Supplemental Order issued by the Industrial Commission on November 3, 1972 set aside in its entirety.

STATEMENT OF FACTS

Applicant Eugene Bradley Anderson, was injured on May 5, 1959 when molten copper from a ladle accidentally spilled on him while he was working at plaintiff's smelter operation near Magna, Utah. Plaintiff paid medical expenses and temporary total compensation for time lost by Applicant as a result of the injury. The record shows that on February 2, 1960 Applicant filed an application to protect his rights. On January 28, 1961, the Disability Rating Board appointed by the Industrial Commission found Applicant to have suffered a 20% loss of body function as a result of his accidenut (R. 16), and on February 10, 1961 (R. 19), the Industrial Commission issued an Order awarding Applicant 20% permanent partial disability. Applicant filed for additional compensation and medical benefits on June 20, 1963 and by Order dated October 17, 1963 (R. 51), as amended November 21, 1963 (R. 56), the Industrial Commission awarded Applicant additional medical treatment and temporary total compensation benefits.

Applicant again applied for additional compensation, including medical benefits, on October 22, 1968. The matter was referred by the Commission to a Special Medical Panel which, on April 21, 1971, rendered its report (R. 110).

The Panel Report was adopted by the Commission in its Order dated September 8, 1971 (R. 122), later modified by the Supplemental Order issued by the Industrial Commission of Utah on November 3, 1972 (R. 142). Kennecott Copper Corporation, plaintiff herein, filed its Motion for Review on November 9, 1972 (R. 145), which was denied by the Industrial Commission on November 15, 1972 (R. 149). This Petition was filed by plaintiff on November 30, 1972 (R. 150).

STATEMENT OF POINTS

POINT I.

SECTION 35-1-66, UTAH CODE ANNOTATED, AS AMENDED, BARS THE RECOVERY BY DEFENDANT, EUGENE BRADLEY ANDERSON, OF THE PERMANENT PARTIAL DISABILITY COMPENSATION BENEFITS AWARDED TO HIM BY THE INDUSTRIAL COMMISSION IN ITS SUPPLEMENTAL ORDER OF NOVEMBER 3, 1972.

POINT II.

THE AWARD OF HOSPITAL AND MEDICAL EXPENSES IN THE SUPPLEMENTAL ORDER OF NOVEMBER 3, 1972 IS BARRED BY SECTION 35-1-66, UTAH CODE ANNOTATED, 1953, AS AMENDED.

POINT III.

THE INDUSTRIAL COMMISSION ACTED WITHOUT OR IN EXCESS OF ITS AUTHORITY UNDER SECTION 35-1-81, UTAH CODE ANNOTATED, 1953, AS AMENDED, IN MAKING ITS AWARD OF ADDITIONAL MEDICAL BENEFITS IN THE SUPPLEMENTAL ORDER OF NOVEMEBR 3, 1972.

ARGUMENT

POINT I.

SECTION 35-1-66, UTAH CODE ANNOTATED, AS AMENDED, BARS THE RECOVERY BY DEFENDANT, EUGENE BRADLEY ANDERSON, OF THE PERMANENT PARTIAL DISABILITY COMPENSATION BENEFITS AWARDED TO HIM BY THE INDUSTRIAL COMMISSION IN ITS SUPPLEMENTAL ORDER OF NOVEMBER 3, 1972.

The parties have stipulated that Applicant was injured while in his employment with plaintiff on May 5, 1959 (R. 71). The application for additional compensation at issue in this action was filed by Applicant on October 22, 1968, more than nine (9) years after the date of injury.

Section 35-1-66 reads in pertinent part as follows:

> "Partial disability — Scale of payments. — 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 . . ." (Italics supplied.)

It is the position of plaintiff, Kennecott Copper Corporation, that Applicant's recovery for permanent partial disability is barred by the clear language above quoted of Section 35-1-66, as interpreted by this Court in *United States Smelting, Refining & Mining Company* v. *Nielsen,*[1] and since followed by the Industrial Commission of Utah in many decisions.[2]

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[1]19 Utah 2d 239, 430 P. 2d 162, Affirmed on Rehearing, 20 Utah 2d 271, 437 P. 2d 199 (1968).

[2]*Patrick G. Roberts* v. *Arch Dam Const. Co.,* Claim No. 2-70-505 (June, 1970).

Parley H. Marsh v. *Kennecott Copper Corp.,* Ind. Comm. Decision, Claim 2U5-4225 (Feb., 1971).

James T. Johnson v. *Interstate Motor Lines & Truck Ins. Exchange,* Ind. Comm. Decision No. 1173-502 (Dec. 26, 1969).

Percy Thomas v. *Yoho Automotive, Inc. and State Ins. Fund,* Claim No. 1443-15 (June, 1969).

In the *Nielsen* case, as here, Applicant sustained an injury for which he was granted medical benefits and temporary compensation. He also received, as here, a permanent partial disability rating which was paid to him in a lump sum upon his request. In that case, as here, the applicant attempted to reopen his case for additional permanent partial disability compensation after the six (6) year period set forth in the statute (Section 35-1-66) had expired. This Court rejected the continuing jurisdiction argument in behalf of the applicant under Section 35-1-78, Utah Code Annotated and held that Section 35-1-66 applied to bar recovery for permanent partial disability benefits beyond six years after the date of the injury. The following language of this Court is pertinent to this case as well as to the *Nielsen* case:

> "We have no quarrel with the above statute, but construe it to mean the Commission has continuing jurisdiction only during the period of the limitations statutes mentioned above, and has nothing to do with the abrogation of or exception to such limitations statutes. Our conclusion about legislative intent seems to be borne out by Sec. 35-1-78, U. C. A. 1953, which allows for destruction of records after 10 years, at the discretion of the Commission." 19 Utah 2d 239, 242.

And further on page 242:

> ". . . the three and six year statutes are ones of repose, which we think the legislature intended should terminate not encourage protraction of claims . . ."

Thus, it was held in that case that both the three

year statute of limitations (Sec. 35-1-99) and the six year statute of limitation (Sec. 35-1-66) were applicable to cut off the applicant's claim for additional compensation. Upon rehearing, the decision was reaffirmed (20 Utah 2d 271, 437 P. 2d 199) although it was held that application of Section 35-1-99 was not involved in the supplemental claim for benefits. The limitations upon continuing jurisdiction were restated and reemphasized, however, with language such as the following:

> ". . . It is well to keep in mind that since time immemorial, and quite universally throughout other areas of the laws, the policy has been that there should be some definite period of time within which adverse claims must be asserted, so that possible controversies are sometimes put at rest.
>
> "It will be noted that Section 78 is speaking somewhat generally about the continuing jurisdiction of the Commission to deal with claims before it, but does not say any particular duration of time in which that can be done. There is nothing in that section inconsistent with the idea that it means the Commission 'from time to time make such changes with respect to former orders' *which are within limitations of time otherwise prescribed.*" (Italics supplied.)

This principle was reaffirmed in *Madge Fredrickson* v. *Industrial Commission*[3] and in *Jones* v. *Industrial Commission,*[4] both of which rejected the contention that the

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[3]19 Utah 2d 233, 429 P. 2d 981 (1967).

[4]17 Utah 2d 28, 404 P. 2d 27 (1965).

continuing jurisdiction language of Section 35-1-78 overrides express limitations provision found elsewhere in the law.

Further support for plaintiff's position is found in the recent decision of this Court in *United States Steel Corporation* v. *The Industrial Commission of Utah and William Zele, Sr.*, 27 Utah 2d 145, 493 P. 2d 986 (Feb. 1972, Rehearing Denied August, 1972) in which the main opinion states as follows:

> "Since Applicant in the instant case would be precluded from an award of *any supplemental compensation under the Nielsen case because of the limitation period,* it would be reasonable to conclude that the same limitation would apply to the additional item of compensation, namely, medical expenses."[5] (Italics supplied.)

It seems clear from the above that the *Nielsen* case properly applies to bar any supplemental compensation, including specifically permanent partial disability compensation, beyond six (6) years after the date of the injury and that Section 35-1-66 properly applies to bar the claim of defendant for benefits in this case.

Finally, it should be noted that since the *Nielsen* decision, its rationale consistently has been applied by the Industrial Commission of Utah, a defendant herein, to bar recovery for either temporary total compensation or permanent partial disability compensation beyond six (6) years after the date of the injury.

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[5]27 Utah 2d 145, 148.

In *Marsh* v. *Kennecott Copper Corporation, supra,* the Commission held that the claim of Applicant for increased permanent partial disability from 20% to 55% after the expiration of six (6) years from the date of the industrial accident was barred by the express limitation of Section 35-1-66, Utah Code Annotated, 1953, as amended. Similarly, the Commission in *Johnson* v. *Interstate Motor Lines, et al., supra,* referred to the *Nielsen* decision in holding that the defendants were not responsible for any additional compensation beyond six (6) years from the date of the accident. Likewise, in *Roberts* v. *Arch Dam Const. Co.,* award denied June 22, 1970, the Commission held that since more than six years had elapsed since the date of accident, applicant's claim for additional compensation for temporary total and/or permanent partial disability was barred by the statute of limitations.

And, in *Percy Thomas* v. *Yoho Automotive, Inc. and The State Insurance Fund,* counsel for the State Insuranc Fund (who is counsel herein for applicant, Eugene Bradley Anderson) argued and the Industrial Commission agreed, that increased disability was *not* compensable under the *Nielsen* case since more than six (6) years had elapsed since the date of the accident.

In view of the above, it now is beyond reasonable controversy that the award by the Industrial Commission to defendant, Eugene Bradley Anderson, of additional permanent partial disability benefits in the Supplemental

Order of November 3, 1972 was barred by the plain language of Section 35-1-66, Utah Code Annotated, 1953, as amended, as interpreted by this Court in *United States Smelting, Refining and Mining Co.* v. *Nielsen, supra,* and *United States Steel Corp.* v. *The Industrial Commission of Utah, supra,* and indeed as applied consistently by defendant Industrial Commission of Utah since the *Nielsen* decision was issued on January 23, 1968 until the Supplemental Order in this case.

As a final note, it should be pointed out that the Utah Legislature in 1971 amended Section 35-1-66 in response to apprehensions expressed following the *Nielsen* decision. The following paragraph was inserted in that Section to cover employees still under medical care and without a proper permanent partial disability award at the expiration of the six-year period after the date of injury:

> "The commission may make a permanent partial disability award at any time prior to six years and nine months after the date of injury to any employee whose physical condition resulting from such injury is not finally healed and fixed six years after the date of injury and who files an application for such purpose prior to the expiration of such six-year period."

Plaintiff submits that the Utah Legislature, by such action, has recognized the application of Section 35-1-66, Utah Code Annotated, as herein asserted by plaintiff and as interpreted by this Court in the *Nielsen* case. Clearly, the statute (35-1-66) bars the award in this case to defendant, Eugene Bradley Anderson, of additional perma-

nent partial disability benefits beyond the six year period after the date of his injury on May 5, 1959.

POINT II.

THE AWARD OF HOSPITAL AND MEDICAL EXPENSES IN THE SUPPLEMENTAL ORDER OF NOVEMBER 3, 1972 IS BARRED BY SECTION 35-1-66, UTAH CODE ANNOTATED, 1953, AS AMENDED.

It is the position of plaintiff that medical expenses constitute an additional item of compensation and as such are subject to the same limitation periods as other compensation items.

The decisions of this Court in *Jones* v. *Industrial Commission*[6] and *United States Steel* v. *Industrial Commission*[7] provide unmistakable support for this position. In the *Jones* case, the three-year limitation period of Section 35-1-99, Utah Code Annotated was involved. It reads in part as follows:

> ". . . If no claim for compensation is filed with the Industrial Commission within three years from the date of the accident *or the date of the last payment of compensation*, the right to compensation shall be wholly barred." (Italics supplied.)

This Court held that "compensation was exhausted at the time of the last medical service" and that the mere failure of the employee to pay the medical bill until after the three year period did not toll the statute.

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[6]17 Utah 2d 28, 404 P. 2d 27 (1965).

[7]27 Utah 2d 145, 493 P. 2d 986 (1972).

In *U. S. Steel* v. *Industrial Commission, supra,* medical expenses were considered as an additional item of compensation for the same application of the six-year limitation period of Section 35-1-66 which plaintiff urges in this action. The language of the Court:

> "By the express language of this statute, the legislature has designated medical expenses an additional item of compensation to be included in an award under the provisions of this title. Since applicant, in the instant case, would be precluded from an award of any supplemental compensation under the *Nielsen* case because of the limitation period, it would be reasonable to conclude that the same limitation would apply to the additional item of compensation, namely, medical expenses . . ."[8]

Further recognition of the inclusion of medical expenses as "compensation" for statute of limitation purposes is found in Industrial Commission Claim No. 16U12-3087, *Bette W. Smith* v. *Utah State Training School,* March, 1970, where the Industrial Commission held that "compensation" encompasses medical expenses for application of the three-year limitation period of Section 35-1-99 and that applicant's claim filed more than three years after the last payment of medical expenses was barred by the limitation statute.

In view of the above, plaintiff submits that medical expenses properly are considered as an additional item

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[8]27 Utah 2d 145, 148, 493 P. 2d 986, 988 (1972).

of "compensation" within the contemplation and application of the Utah Workmen's Compensation Act, including the limitation provisions set forth in Sections 35-1-99 and 35-1-66, Utah Code Annotated, 1953, as amended. Thus, it follows that the rationale of the *Nielsen* case applies to this action and that Section 35-1-66 operates to bar the recovery by defendant Eugene Bradley Anderson of medical expenses as well as permanent partial disability benefits after six years from the date of injury. This Court so held in *United States Steel Corp.* v. *Industrial Commission, supra,* with the following language:

> ". . . I can find no rational basis to hold that applicant is foreclosed by the passage of the limitation period from an award of any supplemental compensation and at the same time affirm the order awarding a legislatively designated additional item of compensation, medical expenses. The order of the Industrial Commission is reversed on the ground that the six year statute of limitations applicable to applicant's award for partial disability has run."[9]

In summary, medical expenses are a legislatively designated additional item of compensation and have been so considered by this Court as well as defendant Industrial Commission. As such, they are subject to application of Section 35-1-66 which bars the award of any supplementary compensation beyond six years from the date of injury. Thus, the award to defendant, Eugene Bradley

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[9]27 Utah 2d 145, 148, 493 P. 2d 986, 988.

Anderson of additional medical expenses in the Supplemental Order of November 3, 1972 was barred by the six-year statute of limitations applicable to his award of partial disability.

POINT III.

THE INDUSTRIAL COMMISSION ACTED WITHOUT OR IN EXCESS OF ITS AUTHORITY UNDER SECTION 35-1-81, UTAH CODE ANNOTATED, 1953, AS AMENDED, IN MAKING ITS AWARD OF ADDITIONAL MEDICAL BENEFITS IN THE SUPPLEMENTAL ORDER OF NOVEMEBR 3, 1972.

It is the further position of plaintiff that the medical expense statute, Section 35-1-81, Utah Code Annotated, 1953, as amended, does not contemplate or permit, nor does the record support the medical expense award made in the Supplemental Order of November 3, 1972.

Section 35-1-81 in effect at the time of defendant's application for supplemental benefits on October 22, 1968 reads in pertinent part as follows:

> "Awards — Medical, nursing, hospital and burial expenses — Artifical limb or eye — Artificial appliances. — In addition to the compensation provided for in this title the employer or insurance carrier, or the commission of finance out of the state insurance fund, shall in ordinary cases also be required to pay such a reasonable sum for medical, nurse and hospital services, and for medicines, and for such artificial means and appliances as may be necessary to treat the patient as in the

> judgment of the industrial commission may be just, not exceeding the sum of $1,283.38, provided that if upon application to and investigation by the industrial commission it shall find that in particular cases such an amount is insufficient, it shall determine and fix such a reasonable amount as under all the circumstances may be fair and just . . ."

It seems apparent from the language of the statute (1) that reasonable medical expenses initially must be determined by the Industrial Commission in all cases, and (2) that in particular cases (those exceeding the statutory limitation) there must be application to and investigation by the Commission, followed by a determination by the Commission of a reasonable amount "fair and just" under all the circumstances.

Such requirements have been recognized at least as early as 1933 when this Court, in *Sullivan* v. *Industrial Commission*,[10] held that the Commission in awarding medical expenses must consider all the circumstances of a "particular" case, then "determine and fix such a reasonable amount as under all the circumstances shall be fair and just".

The *Sullivan* holding was referred to and approved in *Buckingham Transportation Co.* v. *Industrial Commission*[11] where this Court set aside the Industrial Commission's order because there was no evidence in the rec-

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[10] *Sullivan* v. *Industrial Comm.*, 83 Utah 187, 196, 27 P. 2d 443 (1933).

[11] *Buckingham* v. *Ind. Comm.*, 93 Utah 342, 360, 72 P. 2d 1077 (1937).

ord to sustain a portion of the medical expense award made by the Commission.

In this action, it is at once obvious that the medical expense award properly should be set aside. In the first place, there has been no determination by the Industrial Commission of "a reasonable amount as under all the circumstances shall be fair and just" as required by the statute. Indeed, there has been no amount at all fixed or determined by the Commission in its award under the Supplemental Order of November 3, 1972. Secondly, there is no evidence in the record to support any determination of "fair and just" medical expenses to be assessed against plaintiff. Plaintiff in the Supplemental Order has been ordered to ". . . pay for hospital and medical expenses incurred as a result of the industrial accident. Said payments to be made in accordance with the Medical and Surgical Fee Schedule . . ." (R. 143). Nothing more appears either in the Supplemental Order of November 3, 1972 or the original Order of September 8, 1971 (R. 124); nothing appears in the record from which either the Industrial Commission or this Court can ascertain or fix a reasonable amount fair and just under all the circumstances. Thus, the medical expense award is fatally defective in two major respects and must be set aside as having been issued in excess of the authority of the Commission.

CONCLUSION

Plaintiff respectfully submits that the award to defendant Eugene Bradley Anderson by defendant Indus-

trial Commission of Utah in its Supplemental Order of November 3, 1972 of additional permanent partial disability compensation was barred by the six-year limitation of Section 35-1-66, Utah Code Annotated, 1953, as amended, that the award of additional medical expenses in said Supplemental Order is an award of additional compensation and likewise barred by Section 35-1-66, Utah Code Annotated and that in any event, said award of medical expenses is invalid because it is in excess of the Industrial Commission's authority under Section 35-1-81, Utah Code Annotated, 1953, as amended, and because it is not supported by the findings or by the record. Therefore, the Supplemental Order heretofore made on November 3, 1972 and finalized on November 15, 1972 properly should be set aside.

Respectfully submitted,

JAMES B. LEE and
ERIE V. BOORMAN, JR.
of and for
PARSONS, BEHLE & LATIMER
Attorneys for Plaintiff
520 Kearns Building
Salt Lake City, Utah 84101