

1977

Utah Chiropractic Association, Inc., v. Equitable Life Assurance Society of The United States And Deseret Mutual Benefit Association : Brief of Respondent Deseret Mutual Benefit Association

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

UTAH CHIROPRACTIC ASSOCIATION, INC.,)

Plaintiff-Appellant,)

vs.)

No. 15345

EQUITABLE LIFE ASSURANCE)
SOCIETY OF THE UNITED STATES)
and DESERET MUTUAL BENEFIT)
ASSOCIATION,)

Defendants-Respondents.)

BRIEF OF RESPONDENT

DESERET MUTUAL BENEFIT ASSOCIATION

APPEAL FROM A JUDGMENT OF THE THIRD

JUDICIAL DISTRICT COURT OF

SALT LAKE COUNTY

HONORABLE DEAN E. CONDER, JUDGE

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United States

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Utah Supreme Court, Utah

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vs.)

EQUITABLE LIFE ASSURANCE)
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and DESERET MUTUAL BENEFIT)
ASSOCIATION,)

Defendants-Respondents.)

No. 15345

BRIEF OF RESPONDENT

DESERET MUTUAL BENEFIT ASSOCIATION

NATURE OF CASE

The action in the district court was an appeal of certain findings and orders of the Commissioner of Insurance pursuant to section 31-4-10 of the Utah Code. The respondent does not believe that the issues confronting this Court present questions of first impression.

DISPOSITION OF CASE IN LOWER COURT

The Third Judicial District Court of Salt Lake County by the Honorable Dean E. Conder, dismissed the action as against Deseret Mutual Benefit Association on the basis that the appeal was not taken within the one-month period provided for such an appeal in the Utah Rules of Civil Procedure. (R. 124-125).

RELIEF SOUGHT ON APPEAL

The judgment of the district court should be affirmed.

STATEMENT OF FACTS

The respondent must take exception to many of the statements made in the appellant's lengthy, and at points immaterial, statement of facts. The following exceptions are noted:

1. Discrimination against chiropractors by DMBA was not established at the December 21, 1976, hearing and there was no lack of due process. The Commissioner of Insurance held that the schedule of benefits under the employee benefit program of the respondent was not discriminatory against chiropractors. (R. 32-39).

The schedule of benefits in question was organized to pay claims at three different levels. Type 1 benefits were paid at the rate of 100 percent of the usual, reasonable and customary charges. Type 2 benefits were paid at 80 percent of the usual, reasonable and customary charges. Finally, type 3 benefits, which include maternity expenses, consultation for emotional illness, and vertebral column rehabilitation, were paid at 50 percent of the usual, reasonable and customary charges. (R. 96-97).

The charge made was that the respondent discriminated against the chiropractors by paying only 50 percent for vertebral

column rehabilitation (R. 32).

In the hearing before the Commissioner of Insurance on December 22, 1976, the appellant was represented by both Daniel L. Berman and Gordon Strachan of Berman and Giaque. Witnesses were called and sworn and testimony was given before the Commissioner who was represented by Mr. William G. Gibbs, special assistant attorney general. Further additional material was submitted to the Commissioner. Based thereupon, the Commissioner made his "Findings and Order" dated April 25, 1977. (R. 32-33). A transcript of the proceedings was prepared by Barbara G. Anderson, CSR (R. 52).

After a careful consideration of Utah's Insurance Equality Law, section 31-27-4 of the Utah Code, the Commissioner concluded that the legislature intended to assure equal treatment of practitioners who provide similar services (paragraph 5, R. 34-35); that vertebral column rehabilitation may be performed by a physician, a therapist or a chiropractor and that neither the DMBA insurance policy or practice discriminates against chiropractors in the payment for providing these services (paragraph 5, R. 34-35); that a policy holder's freedom of choice in the selection of a practitioner as contemplated by the Insurance Equality Law is not violated by a policy that limits the number of treatments or dollar amounts covered of some treatments and not others (paragraph 8, R. 37-38); and that there is value in allowing an insurance company to write insurance with limited coverage for both

illness and treatment because by expanding coverage beyond intention of the writer of the policy, the premium must go accordingly (paragraph 8, R. 37-38).

2. Appellant distorts a statement concerning the accuracy of cost justifications (Appellant's Brief, P. 3). The statement in full is that "[t]he above cost estimates are quite accurate in some cases and little more than guesses in other areas where data is unavailable ." (R. 75).

3. The appellant states that the notice of the Commissioner's decision was mailed to the counsel for the appellant, citing the record at page 111 (Appellant's Brief P. 4). Page 111 is a portion of the appellant's memorandum submitted to the district court on the same subject which makes the same statement but without any authority. There is nothing in the record to support such a contention. However, it is clear from the Findings and Order of the Commissioner of Insurance that the office of Berman & Giauque received a copy of the Findings and Order, dated April 25, 1977, on April 26, 1977, because an office stamp on the first page contains the following:

RECEIVED
BERMAN & GIAUQUE
4-26-77

(R. 32).

4. The respondent denies that there is "overwhelming evidence in the hearing record of discriminatory practices".

that the respondent failed to justify its practices at the hearing.

5. The respondent has no knowledge concerning the dealings the appellant had with the Commissioner of Insurance as alleged on page 2 of its brief wherein it alleges inaction on the part of the Commissioner of Insurance concerning certain unspecified requests and meetings.

6. The respondent denies that the appellant filed a statement of particulars in the court below, as required by law.

7. The appellant distorts the import of the notice of jurisdictional deficiency filed with the district court by Mr. William G. Gibbs, special assistant attorney general and counsel for the State Insurance Department (R. 54-55). This notice is in the nature of advice from a friend of the court concerning possible problems with the timing of the appeal of the Commissioner's decision. It notifies the court that "there is a question whether it has jurisdiction over the appeal." It does not, as alleged, urge dismissal. There is nothing in the record that supports the contention that the Commissioner was "[c]oncerned by the prospect of having his findings and orders reviewed by the District Court." (Appellant's Brief, P. 5). The question raised by the Commissioner is by no means a "novel argument" as alleged (Appellant's Brief, P. 5), but is based upon the Utah Rules of Civil Procedure and case law. Further, it is untrue that DMBA and Equitable joined in

the Commissioner's "motion" because the Commissioner never made a motion before the court and DMBA and Equitable were acting independently.

ARGUMENT

The question for review presented to this Court is neither novel nor unusual. It is whether the appeals provisions of the Insurance Code are in conflict with or inconsistent with the rules concerning the time for taking an appeal as found in the Utah Rules of Civil Procedure.

The respondent presents the following points to support the district court's determination:

- I. The Appeals Procedure Found in the Utah Rules of Civil Procedure Apply to the Practice and Procedure in Appealing from any Order, Ruling or other Action of any Administrative Body to the Extent that the Statutory Procedure in Connection with Such an Appeal or Review Is Not in Conflict and Is Not Inconsistent with the Utah Rules of Civil Procedure

Rule 81(d) of the Utah Rules of Civil Procedure under a heading entitled "General Provisions" states:

On Appeal from or Review of a Ruling or an Order of an Administrative Board or Agency. These rules shall apply to the practice and procedure in appealing from or obtaining a review of any order, ruling or other action of an administrative board or agency, except insofar as the specific statutory procedure in connection with any such appeal or review is in conflict or inconsistent with these rules.

Therefore, based upon Rule 81(d), part IX of the

Rules entitled "Appeals", encompassing Rules 72-76, ought to apply unless there are provisions to the contrary on inconsistent with these rules.

A case in support of this proposition is National Advertising Co. v. Utah State Road Comm'n, 26 Utah 2d 132, 486 P.2d 383 (1971). In that case, the claim was made that the appellant filed his appeal from a decision of the Utah State Road Commission in an untimely manner. The appellant argued that the Road Commission's own rules could not determine the length of time within which an appeal must be taken to the district court. This Court agreed with this proposition, but stated that it was not important because the same time period was provided in the Utah Rules of Civil Procedure which were applicable to the review of the decision of the Utah State Road Commission. See footnote 2 on page 384 wherein the Court recognized that Rule 81 applies to the appeal time on the review of decisions of administrative agencies.

Hence, there is nothing new in Utah law concerning the applicability of the Utah Rules of Civil Procedure to the time for taking an appeal of the decisions of administrative agencies.

II. The Insurance Code, Containing No Provision Concerning the Time for Taking an Appeal to the District Court, Is Not in Conflict with and Is Not Inconsistent with the Utah Rules of Civil Procedure which Prescribe a One-Month Appeals Period

There is no question, as the appellant asserts, that

the Insurance Code has certain provisions dealing with appeals from a decision of the Commissioner of Insurance. However, the crucial fact is this: There is no provision in the Insurance Code that prescribes the time period within which an appeal must be taken to the Third Judicial District Court of Salt Lake County .

The appellant misses the point when it attempts to point out the differences between the appeals procedures for in the Utah Rules of Civil Procedure and those found in the Insurance Code. It is true that not all of the appeals procedures are identical. However, concerning the only procedural issue facing the Court now--the timing of the appeal--there is no conflict or inconsistency, because the Insurance Code simply has no provision whatsoever concerning the time for taking an appeal.

It is immaterial that the appeals procedures provided in the Utah Code for other administrative bodies may be "more amenable" to the appeals provisions of the Utah Rules of Civil Procedure. The point is that the time for taking an appeal from any decision of any administrative agency is governed by the appeals procedures of the Utah Rules of Civil Procedure unless there is a conflicting appeals period found elsewhere in the Utah Code.

There is no question that the proceeding in the Third District Court of Salt Lake County is an appeal. Section 31-4-9 of the Utah Code provides that an aggrieved party

may "appeal from the commissioner's order An appeal may be taken only to the district court of Salt Lake County" (Emphasis added). Section 31-4-10 of the Utah Code is entitled "Manner of taking appeal." (Emphasis Added). Further references throughout the next preceding sections clearly indicate that the nature of the proceeding is an "appeal".

Moreover, it is stated that:

The court shall hear the appeal upon the transcript of the record of the commission's hearing and on such additional proper evidence as may be offered by any party. After considering the evidence the court may affirm, modify, or set aside the order appealed from.

Utah Code Ann. § 31-4-12 (1974).

The appeal is taken by filing with the clerk a petition for a review (similar to a notice of appeal) and a statement of particulars in which is claimed that the order is in error (similar to a statement of points which must be served, if required, within 10 days after the filing of the notice of appeal pursuant to Rule 73(d)) and a statement of relief prayed for.

In summary, the Utah Chiropractic Association, Inc. attempted to take an appeal from the Findings and Order of the Commissioner of Insurance. The appeals procedure contained in the Insurance Code does not specify a time period within which the appeal must be taken. Therefore, there is nothing inconsistent with the procedures regarding the time for taking an appeal as found in the Utah Rules of Civil Procedure which,

according to Rule 81, must be applied.

III. The Appellant Did Not Take a Timely Appeal from the Findings and Order of the Commissioner of Insurance whether the Provisions of Rule 73(a)-(g) Are Applied or whether the Provisions of Rule 73(h)-(m) Are Applied

The appellant attempts to argue that the appeal from the decision of the Commissioner of Insurance is more analogous to an appeal from a judgment rendered in a city or justice court than to an appeal from the judgment of a district court. Under the facts of this case, the respondent contends that it is immaterial which of the two appeals procedures found in Rule 73 is applied. However, if a choice had to be made between the two, it would appear that the provisions contained in Rule 73(a)-(g) should apply to this case for the following reasons:

1. The Commissioner of Insurance conducted an extensive hearing into a matter that is peculiarly within his field of expertise and responsibility.
2. The appeal at the district court level would be primarily a review of the record made by the Commissioner of Insurance during the December 22, 1976 hearing. Although the legislature used the term "de novo" in describing the appeal in Utah Code Ann. § 31-4-9 (1974), specific language in a subsequent section provides (a) that the court shall hear the appeal upon the transcript of the record of the Commissioner's hearing and on such additional proper evidence as may be offered.

by the parties and (b) that the reviewing court has authority to affirm, modify, or set aside the order appealed from. Utah Code Ann. § 31-4-12 (1974). Such a procedure is similar to the procedure followed by the Utah Supreme Court in a review of a judgment of the district court with the exception that additional testimony is not taken.

3. In this case, it is not likely that there will be much, if any, additional testimony presented to the district court beyond what is contained in the 129-page transcript from the Commissioner of Insurance. The appellant's "Memorandum in Support of Petition for Review of Orders of Commissioner of Insurance" (R. 2-24), submitted to the district court concurrently with its petition for review, (a) bears a striking resemblance to an appellant's brief and (b) is based upon the record established at the hearing before the Commissioner of Insurance.

4. The procedure relating to an appeal from a city or justice court provides that:

All causes appealed to the district court shall be heard anew. Pleadings may be amended in all respects in the same manner and upon the same terms as pleadings in cases originally commenced therein

Rule 73(m), Utah Rules of Civil Procedure. The appeal is not a matter of review, but a matter of starting afresh with new pleadings, discovery and trial. Such is not contemplated by the appeals procedure found in the Insurance Code. The function of the district court in this case would

have been very similar to the function of the Utah Supreme Court in handling an appeal and quite dissimilar to the function of the district court in a de novo trial originated in a city or justice court.

The Court can avoid the issue of which appeals provisions to apply because under either set of rules, the appellant failed to file his appeal in a timely fashion.

Rule 73(a)-(g). Under the primary procedure, the time within which an appeal is to be taken is specified as one month from the date of the entry of the judgment or order appealed from. Rule 73(a), Utah Rules of Civil Procedure. The Findings and Order were signed by the Commissioner on April 25, 1977, which act is synonymous with the entry of a judgment in the district court. Therefore, the last day that an appeal could have been filed was May 25, 1977. See In re Lynch's Estate, 123 Utah 57, 254 P.2d 454 (1953) for the formula used to calculate the concluding day of the one-month period. Because the petition was not filed until May 27, 1977, it was not filed in a timely manner.

Rule 73(h)-(m). If the other appeals provisions are applied, the same results follow. The appellant claimed that a notice of the decision was mailed to the appellant. (Appellant's Brief, P. 17). For support for this statement reference is made by the appellant to page 111 of the record. Page 111 of the record is simply page 2 of a memorandum filed by the appellant in the district court to support the same

position. It is there stated that "[c]opies [sic] were mailed to counsel for petitioner." Nothing further is cited for the proposition in the memorandum to the district court. Moreover, there is nothing in the record before this Court to indicate that a notice of the Findings and Order was mailed to the appellant's attorneys. It is clear, however, that the office of Berman & Giaugue actually received a copy of the Findings and Order on April 26, 1977, thereby giving notice of the adverse decision (R. 32). Rule 73(h) of the Utah Rules of Civil Procedure provides that an appeal may be taken to the district court from the final judgment of a city or justice court within one month after notice of the entry of such judgment. Because notice was received by the appellant on April 26, 1977, the one-month period expired on May 26, 1977. Hence, under either set of procedures, the petition, which was not filed until May 27, 1977, was not timely filed.

The case of Glad v. Glad, 567 P.2d 160 (Utah 1977), is not applicable because it deals with the computation of time when the last day of the one-month appeal period falls on a Sunday. In this case, both May 25 and 26, 1977 are weekdays that are not legal holidays. Hence, no extra days beyond the one-month appeal period would be allowed under Rule 6(a) of the Utah Rules of Civil Procedures.

IV. A Court of Review Has No Jurisdiction to Entertain an Appeal When the Request for an Appeal Is Not Timely

In many instances, the failure of a party to follow

strictly the requirements of the appeals rules does not affect the validity of the appeal. However, the rules and cases are explicit that the failure to timely file a notice of appeal is jurisdictional in the sense that the reviewing court may not consider the matter any further and that such an appeal can be and should be dismissed, even if no motion to that effect has been made by a party.

This is alluded to in Rule 73(a) (first paragraph) of the Utah Rules of Civil Procedure wherein the one-month requirement for notice of appeal is stated. In the third paragraph it is stated:

Failure of the appellant to take any of the further steps to secure the review of the judgment appealed from does not affect the validity of the appeal, but is ground only for such remedies as are specified in this rule or, when no remedy is specified, for such action as the Supreme Court deems appropriate, which may include dismissal of the appeal.

(Emphasis added). The clear implication from this statement is that the failure of the appellant to take any of the preceding steps to secure review of the judgment (such as timely filing in the first paragraph) does affect the validity of the appeal.

The cases are clear on this point. For example, in Anderson v. Anderson, 3 Utah 2d 277, 282 P.2d 845 (1955) the Court stated:

The purpose of this Rule to make jurisdictional a failure to file the notice of appeal on time is clearly evident by the

special provision therein that:

"Failure of the appellant to take
any of the further steps to secure the
review of the judgment appealed from
does not affect the validity of the
appeal, but is ground only for such
remedies as are specified"
(Italics supplied [by Anderson court].)

282 P.2d at 847.

In that case, the Court dismissed the appeal where the notice had been filed on March 24, 1954, which was more than a month after the trial court, on February 23, 1954, had denied the petition to vacate its order.

To the same affect is In re Estate of Ratliff, 19 Utah 2d 346, 431 P.2d 571 (1967), wherein this Court stated:

Since the notice was filed more than one month after the entry of judgment or the order appealed from (Rule 73(a), U.R.C.P.), this court lacks jurisdiction to entertain the appeal, and is therefore compelled to order a dismissal thereof.

431 P.2d at 573-74.

It is not possible to "smooth the edges" of this rule. For example, in In re Lynch's Estate, 123 Utah 57, 254 P.2d 454 (1953), the trial court denied the motion to amend or to grant a new trial on November 22, 1952. The notice of appeal was filed on December 23, 1952, the day after an appeal would have been timely filed. Despite the closeness of the filing, this Court held that the appeal could not be entertained.

The law that the filing of the notice of appeal is jurisdictional continues the law and practice existing before

the enactment of the present rules. For example, in Allen v. Garner, 45 Utah 39, 143 P. 228 (1914), this Court stated that the filing of a notice of appeal was jurisdictional in the sense that it "affects the power of this court to hear and determine the appeal" 143 P. at 229. To the same effect is Sorenson v. Korsgaard, 83 Utah 177, 27 P.2d 439 (1939).

The prevailing party has never been required to show prejudice to support the dismissal of an untimely appeal. This rule is absolute in nature when an untimely appeal is attempted from a final order or judgment.

The case of Wood v. Turner, 18 Utah 2d 229, 419 P.2d 634 (1966), is not to the contrary. In Wood, this Court held that the premature filing of a notice of appeal from the denial of a petition for writ of habeas corpus, made within one month after the district court had stated that the petition was denied but before the signing and filing of a formal judgment was not a defect which would necessarily deprive the appellate court of jurisdiction but was an irregularity which could be the grounds for dismissal of an appeal within the discretion of the court. Two sentences from that opinion, however, indicate that the case has no application here:

It is true that this court has previously held that the filing of a notice of appeal after the expiration of the one month allowed by the rule is a jurisdictional defect. Our conclusion in this case represents no departure from that holding.

419 P.2d at 635.

The case of National Advertising Co. v. Utah State Road Commission, 26 Utah 2d 132, 486 P.2d 383 (1971), does not alter the rule that the late filing of an appeal is a jurisdictional defect. National Advertising dealt with an appeal from the State Road Commission, which appeal was not taken until several months after the plaintiff received a notice of the Commission's decision. The district court accepted review of the Commission's action and the Utah Supreme Court held that the trial court was within its prerogative in doing so.

However, it appears that the decision appealed from was not final until several months after the written decision was handed down:

But it is also true that the plaintiff sought modification and change in the order and that there continued to be negotiations and correspondence between the parties concerning the carrying out of the requirement imposed by the Road Commission until what appears to be a definite and final refusal of the Commission to change its order on July 11, 1969. The court proceeding was initiated within the 30 days thereafter on July 22.

486 P.2d at 384. Footnote 3 on page 384 of the same decision further amplifies the interlocutory nature of the written decision:

The detail of the events would unduly and unnecessarily extend the opinion, but they include the fact that under plaintiff's claims it promptly (within four days after receiving notice) requested by letter of April 3, 1969, an extension of time to appeal; and that by a letter of April 8 the Commission

granted such extension, also referring to what should be done about the sign; and that there continued to be negotiations from which the plaintiff could reasonably believe the matter was not closed until the final action of the committee on July 11.

In the case at bar, it is clear that the Findings and Order of the Commissioner of Insurance were final. The appellant does not contend that any further negotiations or discussions were conducted between the Commissioner of Insurance and the appellant. Hence, the Findings and Order being final, the starting of the appeal time would not have been extended as in National Advertising.

V. There Is No Reason to Apply Established Jurisdictional Requirements Prospectively Only.

The appellant would have this Court apply the jurisdictional requirements of the timely filing of an appeal of a decision of an administrative body prospectively only, despite the provisions of Rule 81(d) and the case of National Advertising Co. v. Utah State Road Commission, 26 Utah 2d 132, 486 P.2d 383 (1971), which announced six years ago that Rule 81 makes the appeals provisions of the Utah Rules of Civil Procedure applicable to appeals from administrative bodies, unless contrary to statute. This Court is not being asked to declare any statute or long-established principle invalid; instead, it is being asked to affirm a judgment based upon established procedural law. Justice does not require that

these established jurisdictional requirements be applied prospectively only.

CONCLUSION

The Commissioner of Insurance absolved the respondent from the charges of the appellant that it was discriminating against chiropractors. The Commissioner held a lengthy hearing during which able counsel for the appellant presented their case against the respondent. The Commissioner ruled, in essence, that the respondent did not discriminate against chiropractors by the terms of its policy and procedures. The appellant did receive a fair and impartial hearing of its complaint.

Although the appellant desired to appeal the Commissioner's ruling, it did not do so in a timely fashion. Such a failure is jurisdictional and absolute. The appellant is not saved by resort to the appeals procedures applied to appeals from a city or justice court because the record clearly indicates that the appellant had notice of the decision of the Commissioner more than one month before it attempted to take its appeal. There is nothing contained in the appeals provisions of the Insurance Code that is inconsistent or conflicting with the provisions concerning the time for taking an appeal from a decision of an administrative body as found in the Utah Rules of Civil Procedure.

The appellant did not take his appeal (May 27, 1977)

within one month from the entry of the order appealed from (April 25, 1977) or within one month from notice of the adverse decision (April 26, 1977). Therefore, the district court had no authority to entertain further proceedings on the appeal, and the appeal was property dismissed.

DATED this 3rd day of November, 1977.

Respectfully submitted,

KIRTON, McCONKIE, BOYER & BOYLE

By David A. Westerby
David A. Westerby

CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing
Brief of Respondent by placing a true and correct copy
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the 3rd day of November, 1977.

Jane Blauvelt