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Kennecott Copper Corporation v. The Industrial Commission of Utah and Bill Bilanzich : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

KENNECOTT COPPER CORPORATION,)
Utah Copper Division,)

Plaintiff-Appellant,)

vs.)

Case No. 15939

THE INDUSTRIAL COMMISSION OF)
UTAH and BILL BILANZICH,)

Defendants-Respondents.)

RESPONDENT'S BRIEF

ORIGINAL PROCEEDINGS TO REVIEW AN AWARD
OF THE INDUSTRIAL COMMISSION OF UTAH

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TABLE OF CONTENTS

	Page
STATEMENT OF THE KIND OF CASE.....	1
DISPOSITION IN LOWER COURT.....	1
RELIEF SOUGHT ON APPEAL.....	2
STATEMENT OF FACTS.....	2
POINT I.....	3
THE INDUSTRIAL COMMISSION DID NOT ERR IN DETERMINING THAT THE APPLICANT WAS ENTITLED TO COMPENSATION BECAUSE THE LAST COMPENSATION WAS PAID WITHIN THREE YEARS FROM THE DATE OF THE APPLICATION.	
POINT II.....	7
THE INDUSTRIAL COMMISSION DID NOT ABUSE ITS DISCRETION IN DETERMINING THAT THE APPLICANT WAS ENTITLED TO COMPENSATION, FOR THE PLAINTIFF WAS ESTOPPED FROM ASSERTING THE LIMITATION PERIOD.	

CONCLUSION.....	8
-----------------	---

STATUTES CITED

35-1-99 Utah Code Ann.....	3
35-1-44 (6), Utah Code Ann. (1953 as Amended).....	4
35-1-45 Utah Code Ann. (1953 as Amended).....	4
35-1-66 Utah Code Ann. (1953 as Amended).....	6
35-1-78 Utah Code Ann. (1943 as Amended).....	6
35-1-99 Utah Code Ann. (as Amended).....	6

CASES CITED

Gardner v. Industrial Commission 30 Ut.2d 377, 517 P.2d 1329 (1973).....	5
Kennecott Copper Corporation v. Anderson 30 Ut.2d 102, 514 P.2d 217 (1973).....	6

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vs.)	Case No. 15939
THE INDUSTRIAL COMMISSION OF)	
UTAH and BILL BILANZICH,)	
Defendants-Respondents,)	

BRIEF OF RESPONDENT

STATEMENT OF THE KIND OF CASE

Defendant-Respondent, Bilanzich, filed an application with the Industrial Commission requesting compensation. Plaintiff, Appellant, Kennecott, denied the claim and a hearing was held before the Industrial Commission.

DISPOSITION BY INDUSTRIAL COMMISSION

The Industrial Commission, by its Administrative Law Judge made a certain award to the Defendant, Bilanzich, and against Kennecott Copper Corporation, Utah Copper Division for the total sum of \$5,963.67 plus medical costs incurred as a result of the accident. On request of appellant this award was reviewed by the entire commission and affirmed.

RELIEF SOUGHT ON APPEAL

Defendant-Respondent seeks an Order from this Court affirming the actions of the Industrial Commission.

STATEMENT OF FACTS

Bill Bilanzich is a 45 year old laborer who was employed by Kennecott Copper approximately 10 years prior to the injury involved. (R.5,6). He was employed as a hard rock miner in 1974 when he placed a great deal of tension on a crow bar and fell in such a manner that all of his weight went against his left wrist causing an injury. (R.7).

The witness produced by the Plaintiff-Appellant, Kennecott, testified that Mr. Bilanzich was a very good worker and not the type to complain about anything (R.46). Mr. Bilanzich testified that he felt pain in the wrist but thought it was a sprain which would cure itself. (R.9).

The Defendant cared for the injury because he felt he could not afford to take time off. (R.60). However, the pain grew worse and the left hand began to stiffen so Mr. Bilanzich went to the company doctor who was employed by Kennecott Copper Corporation. (R.10).

The company doctor informed Mr. Bilanzich that he had waited too long for treatment and that all he could do was wrap his wrist. (R.11). The pain in the wrist continued and the company doctor treated the wrist until about March of 1977 and then sent Mr. Bilanzich to a Dr. Berk. (R.12, Report of Dr. Gubler).

Mr. Bilanzich then was examined and treated by Dr. Lamb and advised that his health would not allow him to continue his work at Kennecott. (See Report of Dr. Lamb).

The applicant was then evaluated by orthopedic surgeon, A. Owen Smoot, at the request of the Industrial Commission and Dr. Smoot concluded that the Industrial accident was the significant cause of Mr. Bilanzich's wrist problem and that Defendant-Respondent was entitled to three month temporary total disability for recovery from the surgery to the wrist and for medical expenses and an award of permanent partial disability. (See Report of Dr. Smoot).

ARGUMENT

POINT I

THE INDUSTRIAL COMMISSION DID NOT ERR IN DETERMINING THAT THE APPLICANT WAS ENTITLED TO COMPENSATION BECAUSE THE LAST COMPENSATION WAS PAID WITHIN THREE YEARS FROM THE DATE OF THE APPLICATION.

The application was filed on May 18, 1977, and the applicant was treated for the injury by the company doctor from September of 1974 until March of 1977. The treatment consisted of medical examination, x-rays and the dispensing of drugs. The Plaintiff claims that this is not compensation under Utah Code Ann. Section 35-1-99 which provides the following:

"When an employee claiming to have suffered an injury in the service of his employer fails to give notice to his employer of the time and place where the accident and injury occurred, and of the nature of the same, within forty-eight hours, when possible, or fails to report for medical treatment within said time, the compensation provided for herein shall be reduced fifteen percent provided that knowledge of

such injury obtained from any source on the part of such employer, person in authority, or knowledge of any assertion by the injured sufficient to afford an opportunity to the employer to make an investigation into the facts and to provide medical treatment shall be equivalent to such notice; and no defect or inaccuracy therein shall subject the claimant to such reduction, if there was no intention to mislead or prejudice the employer in making his defense, and the employer was not, in fact, so misled or prejudiced thereby. If no notice of the accident and injury is given to the employer within one year from the date of the accident, the right to compensation shall be wholly barred. 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. (Emphasis Supplied).

Compensation is defined in Section 35-1-44 (6),

Utah Code Ann. (1953 as Amended), as follows:

"Compensation shall mean the payments and benefits provided in this title."

The payments and benefits provided in this title are set forth in Section 35-1-45, Utah Code Ann. (1953 as Amended), as follows:

"Compensation for Industrial Accidents to be paid.--Every employee mentioned in Section 35-1-43 who is injured, and the dependants of every such employee who is killed, by accident arising out of or in the course of his employment, wheresoever such injury occurred, provided the same was not purposely self-inflicted, shall be entitled to receive and shall be paid, such compensation for loss sustained on account of such injury or death, and such amount for medical, nurse, and hospital services and medicines, and, in case of death, such amount of funeral expenses, as is herein provided. (Emphasis added).

Kennecott paid the company doctor and also paid for the x-rays and the drugs that were dispensed. They knew of the accident and knew that this medical treatment was delivered in connection with the accident. Surely this is compensation as defined in the statutes set forth above. The practice of

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the State Insurance Fund and other carriers is not to pay the applicant directly for medical expenses and x-rays, but to deliver a check to the proper doctor, hospital or clinic on receipt of documents demonstrating the treatment was provided.

In this case the payments were made directly to the persons treating the applicant and such unilateral action should not benefit a self-insurer such as Kennecott.

The Plaintiff claims that the case of Gardner v. Industrial Commission, 30 Ut.2d 377, 517 P.2d 1329 (1973), is dispositive of this case because of the language contained therein. The Defendant disagrees with the Plaintiffs assessment of that case and claims those facts are not the same as the facts now before this Court. In that case the State Insurance Fund made payment for the loss suffered by the accident, x-rays, etc.; the last payment being made on October 25, 1968. The applicant then saw the doctor again on July 18, 1971, who sent him to another doctor. A second doctor also examined the applicant, but the Industrial Commission or the State Insurance Fund was not given notice of these events and this Court held that the three year statute of limitations applied because there had to be a payment and not simply treatment. (Emphasis added).

In that case, the Supreme Court indicated that the last payment made on October 25, 1968, included payment for x-rays and stated that this was the last payment.

In the instant case, the applicant contends that the date of last payment is the last time that the applicant was

examined by the company doctor because the doctor was paid and the company knew of the payment. The first examination by the company doctor is a late enough date to allow the applicants to come within the three year statute of limitations, and the last examination was in 1977.

The Plaintiff contends that payment of the company doctor and payments for x-rays and drugs do not constitute compensation and the statute of limitations is applicable. The applicant contends that under the Gardner case, supra, that the payment of the doctor, x-rays, and drugs by the Plaintiff initiates a date of last compensation. The Plaintiff relies on Kennecott Copper Corporation vs. Anderson, 30 Ut.2d 102, 514 P.2d 217 (1973), for the proposition that compensation payments do not include medical and hospital expenses. This Court in that case was construing Sections 35-1-66 and 35-1-78, Utah Code Ann. (1953 as Amended), to determine whether an applicant was entitled to additional disability after the six year period expired and whether the applicant was entitled to additional medical payments. This Court quoted Larson on Workmans Compensation, Section 66 PP. 88. 225 et seq., for the general rule that medical benefits are not subject to the same limitations as the compensation for wages lost or disability rating. The Court did not say in that case that payment of medical expenses was not compensation under Section 35-1-99, Utah Code Ann. (as Amended).

The Court did say in that case that:

"Also having a bearing on our conclusion is the administrative interpretation which the

Commission has given the statute. Although not controlling, in the event of doubt, such interpretation is entitled to some consideration and may be regarded as persuasive."

In the instant case the Commission has determined that compensation has been consistantly construed to include the payment of medical expenses. Although this finding of the Commission is not controlling, the Defendant, Bilanzich, requests this Court to consider such interpretation and regard same as persuasive.

ARGUMENT

POINT II

THE INDUSTRIAL COMMISSION DID NOT ABUSE ITS DESCRETION IN DETERMINING THAT THE APPLICANT WAS ENTITLED TO COMPENSATION, FOR THE PLAINTIFF WAS ESTOPPED FROM ASSERTING THE LIMITATION PERIOD.

The concurring opinion of Mr. Justice Wolfe in the case of McKee v. Industrial Commission, 115 U. 550, 206 P.2d 715 (1949), sets forth the policy behind the three year limitation period which is concerned in this case.

"Furthermore, there are comparatively few cases where disability arises more than three years after the accident or occurs three years after the last payment. And as to those cases the statute was meant to provide for a period after which the insurance carrier could safely cease to carry reserves against a definatate accident. The matter of whether an overall period of three years is too short is for the legislature. There will undoubtedly be cases of hardship when a man will suffer a residual disability from an old injury."

In this case the disability was caused by the

the injury during the three year period of limitation. Kennecott is a self insurer and its agent, Dr. Gubler, either did not know or chose not to disclose the nature of the injury to the Defendant. The company doctor treated the Defendant for the injury from September 23, 1974 until March 21, 1977, when the applicant was referred to an orthopedic surgeon.

It is the contention of the Defendant that the Plaintiff is estopped from claiming the benefit of the statute of limitations for the reason that the employers doctor did not advise this applicant of the extent of his injury and did not refer him to an orthopedic surgeon until almost three years after the date of the accident.

The general rules concerning estoppel are set forth in the case of McKee v. Industrial Commission, supra, and although, in that case the Industrial Commission did not find the estoppel, the facts in the instant case, led the Industrial Commission to a different conclusion. If this Court does not sustain the commission on the basis of Point I, then applicant requests the Court to affirm the decision of the commission on the basis of estoppel.

CONCLUSION

Medical expenses, including x-rays, drugs and examinations by a company doctor were paid by the Plaintiff and constitute compensation under the statute. The company

should not gain the benefit of its doctor providing minimal care until the limitation period expires. The award of the Industrial Commission should be affirmed.

RESPECTFULLY SUBMITTED,

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