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# Kennecott Copper Corporation v. The Industrial Commission of Utah and Bill Bilanzich : Plaintiff's Reply Brief

Utah Supreme Court

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

\* \* \* \* \*

KENNECOTT COPPER CORPORATION, )  
Utah Copper Division, )

Plaintiff, )

v. )

THE INDUSTRIAL COMMISSION OF )  
UTAH and BILL BILANZICH, )

Defendants. )

CASE NO. 15939

---

PLAINTIFF'S REPLY BRIEF

---

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

---

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

\* \* \* \* \*

KENNECOTT COPPER CORPORATION,	)	
Utah Copper Division,	)	
	)	PLAINTIFF'S REPLY BRIEF
Plaintiff,	)	
	)	Case No. 15939
v.	)	
	)	
THE INDUSTRIAL COMMISSION OF	)	
UTAH and BILL BILANZICH,	)	
	)	
Defendants.	)	

\* \* \* \* \*

I. STATEMENT OF NATURE OF CASE

This is Plaintiff's Reply Brief to the Brief filed by respondents, Bill Bilanzich and the Industrial Commission of Utah in the above-entitled Case No. 15939 between Kennecott Copper Corporation, Utah Copper Division, plaintiff v. the Industrial Commission of Utah and Bill Bilanzich, defendants, an original proceeding filed by plaintiff with the Supreme Court of Utah for the purpose of having the lawfulness of an Order dated May 5, 1978, and finalized on June 19, 1978, by the Industrial Commission of Utah inquired into and set aside in its entirety.

II. STATEMENT OF FACTS

The essential facts pertinent to this controversy were not in dispute and were summarized in Plaintiff's Brief heretofore filed in this controversy. However, there are certain

facts referred to in Respondent's Brief pertaining to the medical care of respondent, Bill Bilanzich, which require clarification. The record shows clearly that the alleged incident of Mr. Bilanzich occurred prior to March 8, 1974 and that he first received treatment for his wrist condition on September 23, 1974, from Dr. John A. Gubler, a physician retained by plaintiff to handle and treat both non-industrial and industrial injuries and illnesses of Kennecott employees working at its Bingham Mine operations. Respondent's Brief indicates that the company doctor continued to treat the wrist of Mr. Bilanzich until March of 1977. However, the record shows clearly that after the initial visit to Dr. Gubler in September of 1974, Bilanzich did not return for any treatment to Dr. Gubler until the middle of 1976 (R42). Indeed, the record shows also (R42) that in January of 1975, Mr. Bilanzich on his own went for treatment of his wrist to orthopedic specialist, Dr. Robert H. Lamb, who examined, took X-rays and treated the wrist of Mr. Bilanzich. The record is clear, of course, and the Administrative Law Judge so found, that no compensation benefits of any kind by way of temporary total disability benefits, temporary partial disability benefits or permanent partial disability benefits were paid at any time by plaintiff to Mr. Bilanzich. The Administrative Law Judge in his Findings of Fact (R98 and 99) acknowledged that no such compensation was paid within the three-year period specified by §35-1-99 U.C.A. but then found as a matter of law that the rendition of medical treatment by the company retained physician constitutes the payment of compensation under the Workmen's Compensation Act and thus serves to extend the time within in which a claim can be filed for workmen's compensation benefits of

all kinds. No authority was cited by the Administrative Law Judge for this conclusion of law which was made by the Administrative Law Judge on his own and which, in the opinion of the plaintiff, flies squarely in the face of the unanimous Utah Supreme Court decision in Gardner v. Industrial Commission, 30 Ut.2d 377, 517 P.2d 1329 (Dec. 1973) which clearly excludes the rendering of medical treatment as "payment of compensation" within the language or the intent of section 35-1-99. Accordingly the plaintiff filed this action with the Supreme Court and set forth its legal arguments in Plaintiff's Brief submitted in connection therewith. Respondent's Brief filed on behalf of the Industrial Commission of Utah and Bill Bilanzich has attempted to distinguish this case from the Gardner decision and in addition has raised for the first time the further defense of estoppel as against plaintiff. Plaintiff's Reply Brief is submitted herein as plaintiff's response to those contentions found in the Respondent's Brief as above set forth.

### III. STATEMENT OF POINTS

1. The unanimous Supreme Court decision in the Gardner case is not susceptible to the interpretation or explanation accorded to it in Respondent's Brief and means exactly what it says, i.e. that the plain clear language of the statute excludes medical treatment from consideration as payment of compensation.

2. Respondent's contention that plaintiff somehow is estopped from asserting the statute of limitations in this controversy is wholly untenable.

### IV. ARGUMENT

#### POINT I

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THE UNANIMOUS SUPREME COURT DECISION IN THE GARDNER CASE IS NOT SUSCEPTIBLE TO THE INTERPRETATION OR EXPLANATION ACCORDED TO IT IN RESPONDENT'S BRIEF AND MEANS EXACTLY WHAT IT SAYS, I.E. THAT THE PLAIN CLEAR LANGUAGE OF THE STATUTE EXCLUDES MEDICAL TREATMENT FROM CONSIDERATION AS PAYMENT OF COMPENSATION

The Industrial Commission here, as in the Gardner case, has attempted to bootstrap the rendition of medical treatment into the payment of compensation under the provisions of section 35-1-99 by the bold statement that "compensation has been consistently construed to include the payment of medical expenses." (R98) No authority is cited for such a construction and there is none. On the contrary this identical issue was the sole matter for resolution by the Supreme Court in the Gardner case where the Industrial Commission and the applicant contended, as here, that the three year statute mentioned above starts to run from the date of the last treatment because the rendition of medical treatment constitutes "payment of compensation within the language of the statute." This Court, in a unanimous decision, held otherwise, stating that

"under no construction of its wording can one arrive at such conclusion."

The court in closing referred to the

"plain clear language of the statute, leaving the matter of changing the language to the legislature if it chooses to liberalize, clarify or otherwise rewrite it."

The legislature has not thus far made any changes or amendments to the statute and we submit that it is not within the jurisdiction or the authority of the Industrial Commission to liberalize or rewrite the statute by administrative fiat.



The argument in Respondent's Brief that the payment of the medical services not the rendition of the medical services is the critical item is equally untenable. That argument was foreclosed as early as the Jones case 17 Ut.2d 28 404 P.2d 27 (1965) in which this Court in another unanimous decision held that the payment for medical services was of no significance in the operation of the limitation provisions of section 35-1-99 U.C.A. As stated by the court in its decision in the Jones case, to hinge the running of the statute of limitations upon the date of payment for medical services would "emasculate the obvious legislative intent of the statute." The Gardner decision, of course, holds that the same is true with respect to the date of rendition of the medical services.

Section 35-1-99 is not the only provision of the Utah Workmen's Compensation Act which recognizes the separate treatment of compensation vis-a-vis medical expenses. Other important provisions of the Act also recognizing this difference are as follows:

(A) Section 35-1-81. This section provides for the payment of medical, hospital and burial expenses, etc. The key language is in the beginning of the paragraph as follows:

"In addition to the compensation provided for in this title, the employer. . . shall in ordinary cases also be required to pay such 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 . . . ."

Such language, of course, recognizes that medical and hospital expenses, etc. are clearly separate from and 'in addition to' compensation payments.

In Kennecott Copper Corporation v. Anderson, 30 U.2d 102, 514 P.2d 217 this Court construed the medical expense language of this section (35-1-81) and held that the limitation provisions applicable to compensation payments could not be expanded to include medical expenses. The following language of the court is significantly applicable to this controversy:

"It is often said that it should be assumed that all of the words used in a statute were used advisedly and were intended to be given meaning and effect. For the same reasons, the omissions should likewise be taken note of and given effect." (30 Utah 2d at 105, citing Estate of Barnett 97 Cal. app. 138, 275 P.453) (emphasis supplied)

In the same case Justice Crockett referred to different jurisdictions in addition to Utah in which payments for medical care are not considered the same as "compensation" for lost wages or disability rating within the meaning of the statute and therefore, not subject to the limitations prescribed for compensation payments. (30 Utah 2d 102 at 105)

(B) Section 35-1-45.

"Every employee mentioned in §35-1-43 who is injured, and the dependents of every such employee who is killed, by accident arising out of or in the course of his employment . . . 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 the case of death such amount of funeral expenses as is herein provided." (emphasis supplied)

Here again is an indication that the employee is to receive compensation for loss and, in addition, amounts for medical and hospital expenses, etc.

(C) Section 35-1-69. This section provides as follows:  
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(1) "If any employee who has previously incurred a permanent incapacity by accidental injury, disease, or congenital causes, sustains an industrial injury for which compensation and medical care is provided by this title that results in permanent incapacity which is substantially greater than he would have incurred if he had not had the pre-existing incapacity, compensation and medical care, which medical care and other related items are outlined in §35-1-81, shall be awarded on the basis of the combined injuries but the liability of the employer for such compensation and medical care shall be for the industrial injury only . . ."

And in the following paragraph in the same section, the statute refers to the special medical panel and its allocation of permanent physical impairment with the following language:

"The Industrial Commission shall then assess the liability for compensation and medical care to the employer on the basis of the percentage of permanent physical impairment attributable to the industrial injury only . . ."

It is clear from the above that medical expenses, etc. are considered separate and distinct from compensation payments in many areas of the Utah Workmen's Compensation Act. This Court, we submit, properly has recognized that distinction in both the Gardner and the Anderson decisions, pointing out clearly that omissions should be taken note of and given effect in interpreting statutes and leaving "the question of any desired clarification to the attention of the legislature". We submit further that had the legislature, either originally or following the decision of this Court in the Gardner case, intended for either the date of rendition of medical services or the date of payment for the same to be the date for triggering the running of the statute of limitations in §35-1-99, it could very easily have done so with specific language to that effect. To date such language has not been forthcoming and we submit, therefore, that

both the language and the intent of the limitation of action requirements of that section remain as construed by this court in Gardner v. Industrial Commission and that the claim for compensation benefits of the applicant Bill Bilanzich in this controversy is barred by section 35-1-99 because it was not filed within three years from the date of the accident or from the date of the last payment of compensation as required by the statute.

## POINT II

RESPONDENT'S CONTENTION THAT PLAINTIFF  
SOMEHOW IS ESTOPPED FROM ASSERTING  
THE STATUTE OF LIMITATIONS IN  
THIS CONTROVERSY IS WHOLLY UNTENABLE.

It is contended in Respondent's Brief that plaintiff is estopped from asserting the statute of limitations because its doctor treated the defendant for almost three years without advising him of the extent of his injury or referring him to an orthopedic surgeon until almost three years after the date of the accident. Such contention is invalid and untenable. In the first place the record shows - and the defendant has acknowledged - that he did not see the company doctor (Dr. John A. Gubler) about his wrist condition until September 24, 1974 more than six months after his alleged injury, that he saw Dr. Gubler again the following week but did not go in again to see Dr. Gubler about his wrist until the middle of 1976 nearly two years later (R42). In the meantime defendant on his own went to an orthopedic specialist Dr. Robert A. Lamb in January 1975 (R36) where x-rays were taken and treatment given to defendant in the form of shots. Thus it can hardly be contended that the company doctor treated Mr. Bilanzich from 1974 until 1977 without revealing to him

the nature of his wrist problem. Indeed, it is apparent that Mr. Bilanzich sought out and consulted with an orthopedic specialist on his own with respect to this wrist problem and that he did not return again to the company doctor until almost a year and a half later. The record shows also that when defendant complained of further difficulties to Dr. Gubler in November of 1976 he was at that time referred for additional studies which followed and ultimately resulted in the wrist surgery in July of 1977. We submit that two brief visits by defendant to the company doctor more than six months after the alleged injury, followed by a waiting period of almost two years, then a single visit in the middle of 1976 and again in November of 1976 could hardly be construed as giving rise to a legitimate claim of continuous treatment for three years without disclosure of the extent of injury and without reference to specialist examination or assistance as contended in Respondent's Brief in this case. Indeed, it is clear that defendant relied not at all on Dr. Gubler, and it is clear also from defendant's own testimony that he, more than anyone, was aware of his wrist difficulties but endured his problems by himself for almost two years before returning to Dr. Gubler for assistance. (R42) Finally, when defendant near the end of November of 1976 complained of increased wrist difficulty, Dr. Gubler responded with electromyographic studies to be taken at Holy Cross Hospital and subsequent orthopedic examination and treatment. Under such circumstances, we submit that defendant has failed to establish any of the requisite elements of estoppel in this case and that plaintiff Kennecott Copper Corporation clearly is not estopped to raise the statute of limitations issue particularly where there was

never an acknowledgement by the plaintiff by way of workmen's compensation payments or otherwise that it considered defendant's wrist condition to be industrial in nature. There was no misrepresentation by word or conduct on the part of plaintiff which possibly could have misled or lulled defendant into a course of inaction by way of filing his claim for benefits; nor was there any reliance by the defendant upon any such word or conduct of the plaintiff as required for an estoppel claim of this nature. Indeed it is clear that the defendant did not rely at all upon any words or conduct of the plaintiff, but instead he sought and obtained, on his own, examination, treatment and advice from an orthopedic specialist for the very condition for which he now seeks compensation. To hold that by such minimal continuing and treatment over a period of almost three years under such circumstances as indicated above, plaintiff is now estopped from asserting its legal rights under the Utah Workman's Compensation Act would in effect tend to emasculate the very purposes for which the Act was designed, i.e. to obtain immediate and necessary medical treatment together with the payment of compensation for periods of disability and at the same time protect against dilatory or unjustified claims. Certainly an employer should not have to render medical treatment to its employees at its peril merely because there is some uncertainty as to whether the cause for treatment be industrial or non-industrial in nature. As Chief Justice Wolfe concurring specially in Crow v. Industrial Commission et. al. 104 Utah 333 at 338 stated:

"The insurance carrier is not 'estopped' by its payment of compensation. It does not pay at the peril of admitting the extent or duration of the

disability. It is not estopped because the applicant has not acted to his detriment in reliance on its action. Its action in paying compensation as if the disability were total for an indefinite period without requiring applicant to have it found by the commission as total is all for the applicant's benefit. To hold otherwise would discourage a practice highly beneficial to all parties."

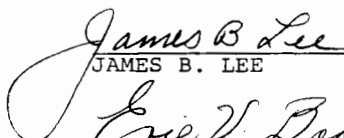
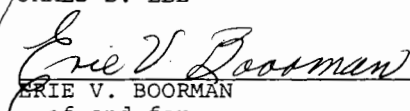
In view of the above we submit that in the light of the evidence and the record in this case, the estoppel position asserted in Respondent's Brief is invalid and wholly untenable as applied to plaintiff's conduct or as applied to defendant's reliance upon such conduct to his detriment.

#### CONCLUSION

It is the position of the plaintiff that the arguments set forth in Respondent's Brief are invalid and untenable; the clear language of the statute (35-1-99), as interpreted in the unanimous decision of this court in the Gardner case, excludes medical treatment from consideration as payment of compensation within the application of the limitation provisions of this statute. Plaintiff submits also that the Industrial Commission's conclusion of law that the rendition of medical treatment constitutes "payment of compensation" within the language of the statute was erroneous and improper - erroneous because it flies squarely in the face of the unanimous decision of the Court in the Gardner case and improper because it represents an effort on the part of the Industrial Commission to rewrite or distort the statute by administrative fiat instead of observing the Court's advice in Gardner (20 Utah 2d at 378) by " . . . leaving the matter of changing the language to the legislature if it chooses to liberalize, clarify or otherwise rewrite it."

Accordingly, we respectfully request this Court to reject Industrial Commission's attempt to rewrite the statute and to affirm and confirm the Court's prior interpretation of the limitation provisions of §35-1-99 as set forth in the Gardner decision by setting aside as contrary to law the Industrial Commission's Order heretofore entered in this case.

Respectfully submitted this 9<sup>th</sup> day of MAY, 1979.

  
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CERTIFICATE OF MAILING

I hereby declare that I caused to be mailed a true and correct copy of the foregoing Plaintiff's Reply Brief in Case No. 15938, postage prepaid, this 9<sup>th</sup> day of MAY, 1979, to:

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