1965

Glen H. Jones v.the Industrial Commission of Utah and Utah Power Light Company : Brief of Appellant

IN THE SUPREME COURT
of the
STATE OF UTAH

LEN H. JONES,

Petitioner,

vs.

E INDUSTRIAL COMMISSION
UTAH and
AH POWER LIGHT COMPANY,
rporation,

Respondents.

Case No.
10302

BRIEF OF APPELLANT

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STATUTES

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THE INDUSTRIAL COMMISSION OF UTAH and UTAH POWER LIGHT COMPANY, a corporation,

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Case No. 10302

BRIEF OF APPELLANT

This is an appeal from a ruling made against the Petitioner by the Industrial Commission of the State of Utah.

This is a petition for review of a ruling of the Industrial Commission.

STATEMENT OF KIND OF CASE

Appellant was injured while working for Appellee. Industrial Commission denied workman compensation recovery.

RELIEF SOUGHT

Reversal of Industrial Commission's ruling.

STATEMENT OF FACTS

The petitioner was injured in an accident which occurred while he was working for the respondent. The petitioner applied for a hearing before the industrial commission, and filed a claim for compensation on February 18, 1964. The commission submitted the case to a panel of medical experts who ruled in favor of the injured, but the commission ruled that the claim was to be denied because it had not been filed within three years from the date of the injury or the last payment of benefits.

On September 11, 1964, petitioner made a motion for a rehearing. His motion was supported by an affidavit of Dr. Boyd G. Holbrook which stated that Dr. Holbrook received the last payment for the medical examination of the petitioner from the respondent on September 15, 1961. Three years had not transpired from the date of the payment and the filing of the claim with the commission. The commission granted a rehearing September 24, 1964, but it denied the claim on the ground that the last payment of compensation was made on the date of the examination by the doctor rather than on the date of the payment to the doctor.

The rehearing was held November 9, 1964. The decision was rendered on December 9, 1964, and the petitioner received notice of the decision on December 11, 1964. Petitioner applied to this court for a writ of certiori on January 11, 1965.

ARGUMENT

POINT I.

THE PETITION FOR THE WRIT OF CERTIORI WAS FILED WITHIN THE TIME PRESCRIBED BY SECTION 35-1-83, UTAH CODE ANNOTATED (1953).

Section 35-1-83 reads:

> "Within thirty days *after notice* that the application for rehearing is denied . . . any party . . . affected thereby may apply to the Supreme Court for a writ of certiori. . . ."

It is petitioner's contention that application for the writ was made within thirty days from the date that notice was received of the denial by the commission of claimants' application for a rehearing.

A series of decisions prior to 1933 held that the application for a writ of certiori must be made within thirty days from the date of the denial of the rehearing, regardless of the fact that no notice is given to the applicant.

See, e.g., *Heledakis v. Industrial Commission of Utah*, 66 Utah 608, 245 P. 334 (1936). And this was held to be the case where the stenographer of the commission gave misinformation as to whether or not a decision had been rendered by the commission. *Utah Fuel Co. v. Industrial Commission of Utah*, 73 Utah 199 273 P. 306 (1928).

In response to these decisions, and to avoid possible injustices resulting from such an interpretation of the provisions, the Code Commissioners responsible for the 1933 revision of the laws of Utah inserted the words "after notice" into the section of the Code comparable to what is now Section 35-1-83. Utah Rev. Stat., 1933, 42-1-77.

In the instant case, the denial of the application for rehearing was made December 9, 1964. Notice of the denial was received by the attorney for the claimant on on December 11, 1964. The petition for the writ of certiori was filed January 11, 1965.

It is conceded that if notice is not required there was not a timely application for the writ. But to so hold would be to disregard the plain meaning of the statute. The only reasonable interpretation of Section 35-1-83 is that the thirty day period begins to run from the date of notice of the denial of the rehearing by the commission.

Since notice is a prerequisite to the running of the thirty day period, and since notice was received by the attorney for petitioner on December 11, 1964, the thirty day period expired on January 10, 1965. However, January 10th was a Sunday and is not to be included in computing the period. Rather the next day, January 11, the date the petitioner filed for a writ of certiori, is to be considered the last day of the thirty day period. U.R.C.P. Rule 6 (a). Since there was a timely petition for a writ of certiorari to review the order of the commission denying the claim of petitioner, the writ should be granted.

POINT II.

THE CLAIM FOR COMPENSATION WAS FILED WITH THE INDUSTRIAL COMMISSION WITHIN THE THREE YEAR PERIOD PRESCRIBED BY SECTION 35-1-99, UTAH CODE ANNOTATED.

A claim will be barred under the Workmen's Compensation Act unless it is filed with the industrial commission within the prescribed period. Section 35-1-99, Utah Code Annotated, provides that:

> "If no claim 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."

It is to be noted that the three year period will begin to run from the date of the last payment of compensation if such a payment has been made. Petitioner alleges that there was a payment of compensation; that the payment consisted of the check sent by the respondent to the doctor who examined the petitioner; and that the petitioner filed a claim with the commission within three years from the date of the payment made by respondent.

The furnishing of medical attention by the employer is a payment of compensation. See e.g. *Richardson v. National Ref. Co.,* 136 Kan. 724 ....., 18 P.2d 131 (1933); *Oklahoma Furniture Mfg. Co. v. Nolen,* 164 Okla. 213, 23 P.2d 381 (1933). Similarly, where an employee has procured medical attention and he has been reimbursed by the employer, the reimbursement has been held to constitute a payment of compensation. *Colonial Ins. Co. v. Industrial Accident Commission,* 60 Cal. App. 93, 140 P.2d 442 (1943).

The commission did not seem to dispute the fact that the furnishing of medical attention is a payment of compensation. Rather, the commission concerned itself with whether the examination or the payment to the doctor by the respondent constituted the payment of compensation.

Where the medical examination has been furnished at the insistence of the employer, the examination alone

has been held to be a payment of compensation and the statute of limitations will begin to run from that date. But the procurement of services by the employee does not amount to payment of compensation and the time period will not be extended. See *Solorio v. Wilson Co.*, 161 Kan. 518, 169 P.2d 822 (1946).

Petitioner believes, however, that when there is a subsequent payment by the employer, after the employee has obtained an examination on his own, there has been a payment of compensation within the meaning of the statute. c.f. *Colonial Ins. Co. v. Industrial Accident Commission,* supra, where the subsequent payment was in the form of reimbursement to the employee.

The commissioners reasoned that a holding that the payment by the respondent to the doctor, (rather than the examination by the doctor), constituted a payment of compensation, would subject the employer to a claim that would never be closed, for the petitioner could keep the claim open indefinitely by merely submitting to an examination.

> "If the law is construed to mean actual payment of a medical examination fee, no claim would ever be closed because the claimant could keep the claim open indefinitely by submitting to an examination by any doctor at any time, without the knowledge of the employer." *See Appendix.*
>
> (Order of the Commission)

Of course, the mere fact that a claim may exist for an extended period is not sufficient reason in itself for denying the claim of the injured. See *Utah Apex Mining Co. v. Industrial Commission,* 209 P.2d 571 (1949). But conceding that a timely prosecution of claims is desirable, the reasoning of the commission is faulty. In fact, to hold as the commission did would allow a claimant to perpetually keep his claim open. If the examination itself was payment, as the commission held, then indeed one could keep his claim open by a unilateral submission to an examination. If the commission was desirous of preventing an undue extension of the time within which claims may be filed, it should have held that the payment of the doctor's fee was the payment of compensation.

Finally, the commission argues that the payment of medical benefits is not always an admission of liability. The petitioner readily concedes this point. Certainly after a voluntary payment of medical expenses by the employer, he should be able to urge the defense that the employee did not meet with an accident or that there was no casual connection between the injury and the disability. cf. *Harding v. In. Com. of Utah,* 83 Utah 376, 28 P.2d 18 (1934). But here we are not dealing with a case where the payment of medical expenses is said to be an admission of liability precluding the employer from asserting a defense. We are concerned merely with whether the payment was a "payment of compensation" within the meaning of Section 35-1-9 so as to extend the statute of

limitations. The payment is not urged as an admission of liability by the employer. In those cases where the furnishing of medical attention was said to be a payment of compensation tolling the statute of limitations, the payment was made before there was any administrative or judicial determination of liability. Whether or not the payment was an admission of liability was not important when the court was called upon only to decide whether there had been an extension of the time period. E.g. *Ketchall v. Wilson & Co.*, 138 Kan. 97, 23 P.2d 488 (1933).

This court has consistently held that Workmen's Compensation Acts should be construed liberally in favor of coverage of the employee. *Askren v. Industrial Commission*, 15 Utah 2d 275, 391 P.2d 302 (1964). And where the court is dealing with a valid claim, as in this case, but the statute of limitations is asserted as a bar to the claim, there is even more reason for construing the statute liberally and effectuating coverage of the employee.

CONCLUSION

The payment of medical expenses constitutes a payment of compensation within the meaning of Section 35-1-99. The date of respondent's payment to the doctor was the date of the last payment of compensation. Therefore, the three year statute of limitations contained within Section 35-1-99 did not bar petitioner from asserting his claim.

Respectively submitted,

GALEN ROSS

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Salt Lake City, Utah

Attorney for Petitioner

APPENDIX "D"

THE INDUSTRIAL COMMISSION OF UTAH

Claim No. 6216

GLEN H. JONES

Applicant,

vs.

UTAH POWER LIGHT COMPANY,

Defendant.

The above entitled cause came on regularly for hearing at Salt Lake City, Utah, June 1, 1964, at 10:00 o'clock A.M., before the Industrial Commission of Utah, pursuant to Order and Notice of the Commission. Applicant was present and represented by Galen Ross, attorney; defendant was represented by Robert B. Porter, attorney.

On February 10, 1964 applicant filed a claim for an injury alleged to have been incurred on August 29, 1958. On September 3, 1964, the Commission issued an Order denying the claim because the claim filed February 10, 1964 was not filed within three years from the date of the injury or the last payment of benefits. A Motion for Rehearing was filed by applicant on September 14, 1964, *with an affidavit attached, signed by Dr. Boyd G. Holbrook, alleging that Dr. Holbrook received the last payment for a medical examination on September* 22, 1964 *from the defendant.*

No evidence other than the affidavit was presented. The parties stipulated that the only issue was an *interpretation of the statute of limitations*, Section 35-1-99,

which reads as follows: "* * * *If no claim for compensation is filed with the Industrial Commission within three years from the date of the accident or the last payment of compensation*, the right to compensation shall be wholly barred."

If we assume *that the examination by the doctor constitutes payment of* compensation to the claimant, the three year statute expired on September 10, 1963, and the application was not filed until September 10, 1964.

If the law is construed to mean actual payment of a medical examination fee, no claim would ever be closed because the claimant could keep the claim open indefinitely *by submitting to an examination by any doctor at any time,* without the knowledge of the employer. In fact, the Utah Supreme Court held that payment of medical benefits is *not always* an admission of liability. (Section 35-1-10) No compensation other than the Holbrook medical bill was paid at any time and that bill was paid almost a year after the medical examination.

We find that the claim of applicant is barred by the three year statute of limitations.

IT IS THEREFOR ORDERED that the claim of applicant is denieid.
(SEAL)

Passed by the Industrial Commission of Utah, Salt Lake City, Utah, December 9, 1964.

ATTEST: Gloria B. Hanni, Commission Secretary.
Motion No.....Resolution No.....

(s) Wiesley, Chairman

(s) I Dissent CFG, Commissioner

(s) Nelson, Commission