1965

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

IN THE SUPREME COURT OF THE STATE OF UTAH

LEN H. JONES,
Petitioner,

vs.

HE INDUSTRIAL COMMISSION
F UTAH and
AH POWER & LIGHT COMPANY,
orporation,
Respondents.

Case No. 10302

BRIEF OF RESPONDENTS

This is an appeal from a ruling of the Industrial mission of the State of Utah.

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STATEMENT OF THE CASE

This proceeding seeks a review of a decision of the Industrial Commission of Utah denying the claim of the petitioner and applying the three year statute of limitations as contained in Section 35-1-99, Utah Code Annotated, 1953.

RELIEF SOUGHT

The respondents seek an affirmance of the decision of the Industrial Commission of Utah.

STATEMENT OF FACTS

While the respondents generally agree with the statement of facts submitted by the petitioner, we are of the opinion that the statement is too abbreviated to fully apprise this Court of the material facts involved herein.

The accident here involved occurred on August 29, 1958. The petitioner was referred to Dr. O. W. Phelps who treated him until September 29, 1958, when he was discharged as cured. (Tr. 8)

The record next shows a request by the petitioner to change doctors which request was granted by the Industrial Commission of Utah on June 13, 1960. (Tr. 10)

During the next several months, the petitioner received treatments from Dr. Boyd G. Holbrook, including a mylogram performed at St. Marks Hospital on July 29, 1960. (Tr. 15) Dr. Holbrook's final report is dated August 31, 1961, and shows a final treatment on September 10, 1960. The bill submitted with this letter from Dr. Holbrook was paid on September 15, 1961. (Tr. 30)

The next entry in the Industrial Commission record is the petitioner's Application for a hearing which was received by the Commission on February 10, 1964. (Tr. 16)

A hearing was held on this Application on June 1, 1964, and the reporter's transcript of that hearing (Tr.

29) to 29) reaffirms the factual matters set out above; and on September 3, 1964, the petitioner's claim was denied by reason of the three year statute of limitations. (Tr. 63) The statements in the petitioner's brief as to the rehearing and the dates of the orders with respect thereto are correct.

ARGUMENT

POINT I

POINT I. THE PETITION FOR WRIT OF CERTIORARI WAS NOT FILED WITHIN THE TIME LIMITED BY SECTION 35-1-83, UTAH CODE ANNOTATED, 1953.

As is indicated by petitioner's brief, the sole question for determination here is the interpretation to be placed upon the words "after notice" and particularly whether time commences to run from the date of mailing such notice or from its receipt and what is required to determine the fact. And, in connection with this problem, it must be noted that the final sentence of Rule 5(b)(1), Utah Rules of Civil Procedure, reads that: "Service by mail is completion on mailing."

The words "after notice" were added by amendment to the statute in 1941. Prior to that date the decisions of this Court uniformly held that notice was not necessary and the thirty-day period commenced to run with the day the application for rehearing was denied. Since the amendment, this Court has not been called upon to interpret the meaning of the added words.

The petitioner contends for an interpretation of the present language that would require actual receipt of such notice by the party involved. We believe that such a contention leaves a good deal to be desired in the conduct of the affairs of the Industrial Commission and would effectively require of them an affirmative determination in each instance that notice of all decisions was actually placed in the hands of the parties involved.

The text writers do not agree upon the meaning to be ascribed to these words and particularly is there a conflict when decisions under Rule 5(b)(1) are considered.

We would call attention to the recent case of *Mosby Irrigation Co. v. Criddle,* reported as 354 P.2d 848, 11 Utah 2d 41, and decided on August 16, 1960. In that case Section 73-3-16, Utah Code Annotated, 1953, was under consideration and this section requires that a notice be sent to an applicant by registered mail. Failure to heed this notice can and did result in the loss of a valuable water right; and it was contended that the statute contemplated actual notice to the applicant and that a showing that such notice was not received should operate to relieve the applicant of his default. This Court, however, held that the mailing of such notice by the State Engineer constituted compliance with the statute and that the time for action commenced to run from such time. The Court said:

> "The legislature has the right to make reasonable regulations as to public or legal notices,

and the statutory requirements must be completely met in order to effect a valid notice. In requiring the State Engineer to notify the applicant by registered mail, it provided for a notice reasonably calculated, under all circumstances, to apprise the applicant of the date proof was to be due."

We respectfully submit that the statute requires that the application for the writ of certiorari must be filed within thirty days from and after the decision of the Industrial Commission when the record reasonably shows that notice of such decision was given by mail on such date.

POINT II

POINT II. THE CLAIM FOR COMPENSATION IS BARRED BY THE THREE YEAR PERIOD OF LIMITATION AS SET OUT IN SECTION 35-1-99, UTAH CODE ANNOTATED, 1953.

In construing this section following its enactment in 1939, this Court in *McKee v. Industrial Commission*, 206 P.2d 715, 115 Utah 550, said:

> "This statute . . . provides that unless an application 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 is barred. The language of the statute is clear and leaves no room for doubt. Regardless of the decisions rendered by this court prior to 1939, the law now is that the limitation statute begins to run from the date of the accident or from the date of the last payment of compensation."

The Industrial Commision denied the claim of the petitioner here on the grounds that a three-year period had intervened between the last payment of compensation and the claim filed with the commission on February 10, 1964. Petitioner seeks to avoid the effects of this statute by relying upon a payment to the doctor on September 16, 1961 even though the last service rendered by the doctor to the petitioner occurred on September 10, 1960, a year earlier.

The commission very concisely pointed out the abuses that could occur should the payment of the doctor bill be the controlling factor. Without admitting that the service rendered by the doctor in this case constitutes compensation within the meaning of the statute, we are firmly of the opinion that payment of the doctor bill was not.

In support of this contention, we call attention to Section 35-1-81, Utah Code Annotated, 1953, which reads as follows:

> "In addition to the compensation provided for in this title the employer . . . 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. . . ."

And the case of *Henrie v. Rocky Mountain Packing Corp.*, 196 P.2d 487, 113 Utah 415, holds that compensation as used in the act means:

"any payment required by the act to be made to a workman or to his dependents, or for their benefit, or into the state treasury for the special purposes of the compensation act. This includes disability payments, death benefits, medical and hospitalization expenses, burial expenses, and payments into the state treasury as provided by the act."

We submit that the order of the Industrial Commission under date of June 13, 1960, authorizing the petitioner to obtain the services of Dr. Holbrook obligated the respondent to pay for such services. Certainly if any compensation was then paid the petitioner, it was by reason of the rendering of such service by Dr. Holbrook. The payment for such service, whenever made by the respondent, was no benefit whatever to the petitioner and no compensation under the act.

A substantial number of jurisdictions have held that the furnishing of medical expenses and of hospital bills by an employer is not the payment of compensation that will toll the statute of limitations; and this is particularly true where, as in Utah, payment for such service is mandatory under the statute. The reason is, of course, obvious and is well stated in Volume 12 of Schneider's text on Workmen's Compensation at page 27, which reads as follows:

"Where the statute does not specifically provide that the statute is tolled by the last medical service, the providing of medical services to an injured employee with, or without consideration of the question of whether the injury is compensable is considered 'an act of mercy which no

> court should hold in any respect is an implied admission or circumstance tending to admit liability * * * It cannot be said that when an employer does what the Act requires or permits him to do, he thereby perforce admits liability and waives the protective provisions of the statute enacted in his behalf.' The limitation provision is not waived nor is the employer estopped to claim the limitation by providing such medical service."

The cases there cited from North Carolina, Florida, Georgia, Illinois, Vermont, Pennsylvania and Colorado support this rule; and an Iowa case, *Powell v. Bestwall Gypsum Co.*, reported at 124 N.W. 2d 448, also holds that the payment of medical expenses and hospital bills for injured employees, being mandatory under the statute, did not toll the statute of limitations.

There is, however, another line of cases from other jurisdictions holding that the furnishing of hospital or medical services is the payment of compensation and that the statute of limitations does not begin to run until after the last date on which such service was rendered. An annotation at 144 ALR 606 discusses generally the fact situations that will keep a claim alive and specifically at pages 617 and 620 discusses, respectively, cases holding that the furnishing of medical or hospital services do and do not toll the limitation statute.

We submit that the basis for holding that the furnishing of medical service should toll the statute is best stated in a California case, *Pacific Employers Insurance Company v. Industrial Accident Commission*, 152 P. 2d 501, where the Court said:

> "Payment of 'compensation' within this section includes payment or furnishing of medical care, hospitalization, or other benefits recoverable under the Code. The objective policy of this portion of the Code is the protection of the injured employee from being lulled into a sense of security by voluntary payment of benefits until the time to commence formal proceedings with the commission has expired. So far as the policy of the statute is concerned it makes no difference whether these benefits are paid under a confession of legal liability or not. The deciding factor is that the employee has been paid and is therefore not moved to commence legal proceedings to enforce his claim."

Clearly, this reasoning supports only the rendering of the service and not the payment of the bill for such service the date of which payment in the ordinary course of events would be wholly unknown to the injured workman.

None of the cases that we have examined has held that the statute is tolled by the payment for the medical expense rather than the furnishing of such service and we submit that this is proper and supported by sound reasoning and sound public policy.

And, finally, we submit that the payment of a doctor bill for which the petitioner had no liability confers no benefit upon him and cannot under any legal theory constitute the payment of compensation which would toll the statute.

CONCLUSION

It is respectfully submitted that the application for the writ of certiorari was filed too late to give this Court jurisdiction of this appeal and it is also submitted that the statute of limitations for the filing of claims for compensation is applicable to this case and that the decision of the Industrial Commission of Utah should be affirmed.

Respectfully submitted,

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