1967

Madge Fredrickson v. The Industrial Commission of Utah Seagull Motel and The State Insurance Fund : Defendant's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

MADGE FREDRICKSON,
Plaintiff,

vs.

THE INDUSTRIAL COMMISSION OF UTAH, SEAGULL MOTEL and THE STATE INSURANCE FUND,
Defendants.

DEFENDANTS'

Petition for Review of Decision and
of The Industrial Commission of
State of Utah

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MADGE FREDRICKSON,
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THE INDUSTRIAL COMMISSION OF UTAH, SEAGULL MOTEL and THE STATE INSURANCE FUND,
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Case No. 10785

DEFENDANTS' BRIEF

STATEMENT OF FACTS

The defendants agree with the plaintiff's Statement of Facts; however, feel that the following amplification should be made:

Plaintiff suffered an injury during the course of her employment on July 9, 1959, which was compensable under the Workmen's Compensation Act. The last payment of compensation made by the defendant was on January 26, 1960. The only application filed by the plaintiff before The Industrial Commission was that filed on November 12, 1965 (R. 7).

ARGUMENT

POINT I

THE COMMISSION DID NOT ERR IN HOLDING THAT THE PLAINTIFF'S CLAIM WAS BARRED.

Plaintiff states in her brief that the only issue presented to The Industrial Commission in the hearing on which this appeal is taken was whether or not the cause of action against the employer-defendant commenced from the time of the accident or the time the extent of the industrial injury became apparent. The defendants agree that this was the issue presented to The Industrial Commission.

The Hearing Examiner based his decision denying plaintiff benefits on Sec. 35-1-99 U.C.A. 1953, as amended. This statute is entitled "Notice of Injury and Claim for Compensation — Limitation of Action." This section basically defines the employee's obligation in making proper notice of his injury. The statute reads in part as follows:

> "35-1-99 . . . 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."

The Hearing Examiner relied upon the last sentence set forth above in ruling that the plaintiff's claim was barred.

The plaintiff in her brief relies solely on the Utah case of *Salt Lake City* vs. *Industrial Commission,* 93 Ut. 510, 74 P.2d 657. This case involved a situation where the applicant received compensation; however, he believed that his injury had healed and claimed no compensation within six years. The issue presented to the Court, therefore, was when the cause of action commenced. The Court held, as stated by the plaintiff, that the cause of action commences when the industrial injury becomes apparent and a claim is made and the employer or insurance carrier refuses to pay compensation. The Court, in determining the issue, construed statutes which were part of the Compensation Code of 1937. The Court examined Sec. 104-2-26 R. S. Utah 1933, which was a general statute of limitation section appearing in the Code of Civil Procedure. This statute reads in part:

> "Within one year:
>
> 1. . .
> 2. . .
> 3. . .
> 4. . .
> 5. . .
> 6. An action against a municipal corporation for damages or injury to property caused by a mob or riot."

Subsequent to this case, the Legislature amended 42-1-92 R. S. Utah 1933 and said amendment is found in 42-1-92 U.C.A. 1943. The amendment to the statute was by the addition of the following sentence:

> "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."

The Legislature, therefore, specifically set forth a limitation of action provision which provided for Workmen's Compensation cases and which would be controlling rather than the general statute of limitation section of the Code of Civil Procedure relied upon by the Court in *Salt Lake City* vs. *Industrial Commission,* supra. The language of this amendment is clear, that is, that the applicant is barred unless there is a filing with The Industrial Commission within three years from the *date of accident* or from the *date of the last payment of compensation.* As mentioned above, it is clear and it is not disputed by plaintiff in this case that the first filing with The Industrial Commission was on November 12, 1965, more than five years and nine months later than the last compensation payment received on January 26, 1960, based upon an accident that occurred on July 9, 1959.

Our Supreme Court has considered the statute in question, that is, 35-1-99 U.C.A. 1953, as amended, in

McKee vs. *Industrial Commission,* 115 Ut. 550, 206 P.2d 715. The Court stated that the sole question to be determined is whether or not this particular section (then known as Sec. 42-1-92 U.C.A. 1943, as amended,) was an effective right to bar plaintiff's recovery for compensation. In this case, the employee had experienced back difficulties during the period of time that the statute of limitations was running. The plaintiff argued, however, that he did not have knowledge of the extent of the injury until after the statute had run. It was conceded that more than three years had expired from the time of the accident until the application for compensation was filed with The Industrial Commission. The applicant claimed that the rule set down in *Salt Lake City* vs. *Industrial Commission,* supra, was controlling and that the cause of action did not arise until the extent of the injury became known and the denial of the payment was made by the employer or the insurance carrier. The applicant was claiming under almost identical fact situations the same position contended by the plaintiff in this cause. The Court, however, at page 658 of the Pacific Reporter held as follows:

> " . . . He contends, however, that the statute did not begin to run against him until 1947 when he learned for the first time that his suffering was not the result of rheumatism or lumbago. In so arguing, he relies upon the rule announced in Salt Lake City v. Industrial Commission, 93 Utah

510, 74 P.2d 657, and Williams v. Industrial Commission, 95 Utah 376, 81 P.2d 649. These cases overruled a line of cases from this court which had held that Sec. 104-2-26, Rev. St. 1933, a one year general statute of limitations, commenced to run on industrial accidents from the time of the accident. In the cited cases we held that to follow the rule announced in the earlier cases might permit the statute to run before a cause of action accrued inasmuch as an employer's duty to pay under the Workmen's Compensation Act did not arise until there was an accident and injury and a disability or loss from the injury. We therefore held that the time prescribed in Sec. 104-2-26 U.C.A. 1943, would start to run from the time an employee's cause of action arose and not from the time of the accident.

"(1) Subsequent to these cases and in 1939, the legislature of this state enacted a statute of limitations which dealt specifically with actions arising under the Workmen's Compensation Act. This statute is 42-1-92, U.C.A. 1943, which is hereinbefore set forth and which 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 Court held that the legislative enactment which is found in 42-1-92 U.C.A. 1943, as amended, negates the

holding in *Salt Lake City* vs. *Industrial Commission,* supra.

It is conceded that the employer or the insurance carrier can waive by its actions the right to the defense of this limitation. See *McKee* vs. *Industrial Commission,* supra, and *Utah Apex Mining Co.* vs. *Industrial Commission,* 116 Ut. 305, 209 P.2d 571. There is no evidence in this record, nor is it contended by plaintiff, that any such facts exist in this case.

In a recent Utah case, *Jones* vs. *Industrial Commission,* 17 Ut. 238, 404 P.2d 27, this Court affirmed an Order of The Industrial Commission denying benefits based upon 35-1-99 U.C.A. 1953, as amended, on the grounds that the petitioner had not filed within the applicable three-year limitation and the Court stated that the provisions of this statute showed a clear and obvious legislative intent.

It should be noted that 35-1-100 U.C.A. 1953, as amended, protects the applicant from the situation where the extent of the injuries are not known or not apparent. The applicant is required to make a filing and with this filing he confers jurisdiction upon The Industrial Commission and if the injury lights up in the future, the applicant is protected.

CONCLUSION

The Commission did not err in holding that 35-1-99 U.C.A. 1953, as amended, requires that an applicant is barred from receiving compensation if no claim is filed with it within either three years from the date of the accident or the date of the last payment of compensation.

Respectfully submitted,

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