1984

Albert G. Perkes (Self Employed), State Insurance Fund, And Second Injury Fund v. Albert G. Perkes : Brief of Plaintiffs

IN THE SUPREME COURT

OF THE STATE OF UTAH

ALBERT G. PERKES (SELF EMPLOYED), STATE INSURANCE FUND, and SECOND INJURY FUND,	:	Case No. 19071
Plaintiffs,	:	
vs.	:	
ALBERT G. PERKES,	:	
Defendant.	:	

BRIEF OF PLAINTIFFS

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BRIEF OF DEFENDANT

NATURE OF THE CASE

Defendant on appeal, Albert G. Perkes (hereinafter defendant) alleges that he sustained a hernia in the course of his employment as a self-employed service station operator in November of 1980. The Utah State Insurance Fund's position is that Mr. Perkes first report of the injury dated May 7, of 1982 was barred under Section 35-1-97 Utah Code Annotated (1953 as amended 1967) requiring that an employee report injuries within a week after the occurance of an accident resulting in an injury; and by the provisions of Section 35-1-99 Utah Code Annotated (1953 as amended 1981), which provides that if no notice of the accident or injury is given to the employer within one year of the date of the accident, compensation shall be wholly barred.

DISPOSITION BY THE INDUSTRIAL COMMISSION

Following an evidentuary hearing an order was entered by the Administrative Law Judge awarding the defendant temporary total compensation and payment of medical benefits. A timely Mot. for Review was filed by the plaintiff herein and the Industrial Commission without note or comment upheld the Administrative Law Judge's findings. This case now comes before the Supreme Court by Writ of Review pursuant to 35-1-83 Utah Code Annotated 1953.

RELIEF SOUGHT ON APPEAL

Plaintiff's respectfully ask that the decision of the Industrial Commission of Utah upholding the Administrative Law Judge's findings granting benefits to the defendant be reversed and that the application for compensation and medical benefits be denied because the defendant failed to report and file this claim in a timely fashion.

STATEMENT OF FACTS

The facts in this matter are as follows, the applicant while at work on the 3rd of May, 1982, without excess exertion or strain suffered a strangulation of a hernia which had pre-existed that date. On May 3rd, 1982, the applicant was walking towards a gas pump to clear it for a customer when he had a sudden pain in his groin. (T 8-9) The applicant reported to the St. Mark's er room where he was diagnosed as having a strangulated hernia and at that time the applicant was admitted into the hospital and the surgical repair was performed. (T 12-13) The applicant has been business of running a self-service gas station for approximately years (T-9) and testified that sometime in the fall of 1980, prob

November, while repairing tires at a gas station and self-service market that he operated at the time, he experienced a pulling sensation and burning pain in his groin area. (T 10-11) The applicant also testified that a few days later he noticed a bulge in that area. (T-11) The applicant clearly did not seek medical treatment at that time and made no report of injury to his insurer, which was the Utah State Insurance Fund or the Utah State Industrial Commission. (T 12, 104) The applicant was unclear as to what day the injury occurred, whether it occurred before or after Thanksgiving in 1980. (T 15-16) The applicant also showed some confusion about the side on which the hernia occurred, the bulging of which he noticed in the fall of 1980. (T 19-20) The applicant did testify to two prior hernias indicating that they had ocurred on the opposite side of the one in question. (T 20) The Utah State Insurance Fund in its answer to defendant's application for hearing denied liability based on its denial that an accident occurred in the course of employment and it also raised Utah Code Annotated, Section 35-1-99 and 97 as part of its basis for denial of the claim. (T-3)

The applicant testified that he was working at a service station located on 11th East and 2700 South in Salt Lake City, on May 3, 1982, when the pre-existing hernia strangulated(T-8). He also testified that at the time he believed the hernia occurred, he was working at a different location, he indicates to be 5400 South 1415 West in Salt Lake City. (T-10) In his initial description of the incident in 1980 Mr. Perkes stated: "that was also a gas station I owned and thats when I was picking these tires up and

I was fixing tires. After I put these tires up, I noticed that . . .

Q. What did you notice after you put the tires up?

A. Well it kind of hurt down there so I never done nothing about it till about a year and a half later." (T-10)

The Administrative Law Judge then asked the defendant to describe the symptoms that he experienced at the time. The witness answered: "kind of burning strange pain right here in the side."

The Court: did you have any other symptoms or manifestations?

The witness: No.

The Court: No bulging?

The witness: Yes I had a bulge.

The Court: on which side?

The witness: on my right side.

The Court: so you noticed a bulge right after the tire?

The witness: about two or three days after it, yes." (T-11)

Later in cross-examination the applicant was asked "You indicated in your direct testimony that that occurred on your right side. Is that correct? Answer: that's correct.

Q. We have records in evidence here I believe, that indicate that you were admitted into St. Mark's Hospital is that correct?

A. Yes.

Q. You were admitted on the 3rd of May, 1982, is that correct?

A. Yes.

Q. If I indicate to you that the records of St. Marks Hospital indicate that you had a left hernia when were admitted, would that change your testimony?

A. Well it probably was the left side, I didn't know

[redacted] You don't recall which side the hernia was on during this occassion?

A. I had two hernias on the right side. That had to be on the left side." (T 18-19)

It was upon these facts that the Administrative Law Judge found there was a compensable accident in November of 1980 while the defendant was repairing tires in a service station and covered by Worker's Compensation through the Utah State Insurance Fund.

ARGUMENT

A SELF-EMPLOYED INDIVIDUAL SHOULD NOT HAVE UNLIMITED TIME TO REPORT AN ACCIDENT.

The issue of reporting requirements for the insured employee who is also the employer is one of first impression in Utah. From research completed by counsel for the State Insurance Fund, it also appears this issue has not been decided elsewhere. The Legislature in developing and amending the employer reporting requirements and the statute of limitations for workers, has apparently not considered the self-employed individual. The court in the case at bar is called on to fashion a standard that will be reasonable and balance all interests. It is the position of the State Insurance Fund that within the parameters of Utah Code Annotated §§ 35-1-97 & 99 a reasonable standard exists by implication.

The conclusions of law made by the Administrative Law Judge and affirmed by the Commission in this matter set no standard for a self-employed individual to report an industrial accident. The Commission's position has enormous implications for insurance carriers. It has been recognized by this court, that it is important for an employer and his insurance carrier to receive notice of an accident in order to allow for adaquate investigation to avoid

fraudulent claims; See e.g. United States Steel Corp. v. Industrial Commission, 27 U.2d 145, 493 P.2d 986 (1972); Salt Lake City v. Industrial Commission, 104 U 436, 140 P.2d 644 (19); Kennecott Corporation v. Industrial Commission, 597 P.2d 875 (Utah 1979). In Kennecott Copper, the Court stated:

> There are other valid reasons for the requirement that such claims should be asserted within some reasonble and specified time. If an investigation is necessary, it can be made promptly while the evidence and the witnesses are available. This is a safeguard not only against possible fictitious or fraudulent claims, for real or imagined old injuries, but calls attention to any necessity that may exist for remedial steps to protect other employees from injury. Furthermore, the longer the period of limitation, the longer the employer must maintain records, and set up and carry reserves (or insurance) to take care of such possible claims. While the burden of the things just mentioned may initially appear to fall upon the employer (industry), it must be realized that they must also be borne by other workers, and ultimately by the public.
> Id. at 877

When the employer is also the injured worker the risk of delayed reporting increases the risk of fraudulent claims. In the instant case, there are no medical records between the alleged incident and the hospitalization to help verify the applicant's st Even the work location has changed for this individual and the description of his duties and activities is not verifiable. From the record, it is known that Mr. Perkes did not have health insura to cover this particular surgery making it even more imperative th the insurance carrier have adequate notice to conduct an investig **of the claim.** (T 28-29)

The provisions of Utah Code Annotated §35-1-97 could b construed strictly against the self-employed individual by not re recognizing the criminal sanction but also barring compensation a

the accident is not reported within one week. Such an application might be a reasonable one for this court to make when the possibility of fraudlent claims is considered. However, a one week reporting requirement maybe harsh when the self-employed individual is viewed as the employee. However, it is important in implementing the policy of the Worker's Compensation Act to allow workers a reasonable length of time to discover and report an injury resulting from an industrial accident. Utah Code Annotated §35-1-99 sets the reporting time for the employee at one year. It is the position of the State Insurance Fund, that the maximum limit a self-employed individual should be given for reporting an industrial accident to the Commission is the one year he is allowed as an employee and the one week he is allowed as employer. No limit beyond one year plus one week is defensable under the statute as presently written. The Administrative Law Judge's position was that Mr. Perkes had obviously reported the accident to himself, therefore, he was not barred by §35-1-99, and § 35-1-97 didn't create a bar to the claim. This position is tantamount to giving the self-employed individual no reporting requirement, a result which is clearly contrary to the legislative policy of the above cited sections.

While the State Insurance Fund believes the one year plus one week standard could be applied from the statutory language, the Fund would take the position that the one year and one week should be the maximum limit. The Commission's determination of whether an accident was reported timely should be based on when the self-employed employee discovered the injury then allowing that person one week as employer to report the accident. This position seems to balance all interest by allowing a reasonable time for discovery of

the injury and prompt notification thereafter to allow adequate investigation and adjustment of the claim. Mr. Perkes testified he discovered a bulge about three days after the incident in November, 1980, but admits he didn't report it until May of 1982.

CONCLUSION

The self-employed individual injured on the job should have a reasonable, but not unlimited time in which to report the accident. The Worker's Compensation statute in Utah could be read to give as little as one week or as long as one year and one week for that reporting. The State Insurance Fund would implore this Court to require self employed individuals to report industrial accidents within one week after the worker discovered the injury provided that not longer than one year and one week elapse. In the instant case, Mr. Perkes detected a bulge indicating an inguenial hernia within three or four days of the alleged accident but failed to report it for a year and a half. Mr. Perkes, therefore, should be barred from receiving compensation.

DATED THIS 23 Day of June, 1983.

BLACK & MOORE

BY _____
FRED R. SILVESTER

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing BRIEF was sent this 30th day of June, 1983, to the following:

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