

1994

Brown and Root Industrial Service and Highland Insurance v. Industrial Commission of Utah and David Wardrop: Response to Petition for Rehearing

Utah Court of Appeals

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Recommended Citation

Response to Petition for Rehearing, *Brown and Root Industrial Service v. Industrial Commission of Utah*, No. 940652 (Utah Court of Appeals, 1994).

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DOCKET NO. 940652CA

IN THE UTAH COURT OF APPEALS

BROWN & ROOT INDUSTRIAL
SERVICE and HIGHLAND
INSURANCE,

No.: 940652-CA

Petitioners,

Case No.: 93-0561

Priority No. 7

vs.

INDUSTRIAL COMMISSION OF UTAH
and DAVID WARDROP

Respondents.

RESPONSE TO PETITION FOR REHEARING

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FILED

JAN - 3 1996

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INTRODUCTION

This Court correctly determined that Mr. Wardrop is not entitled to workers' compensation benefits because Utah Code Ann. §35-1-99(2) (1988) retroactively applies to bar his untimely claim for medical expenses. Section 35-1-99(2) cannot be characterized as substantive merely because it precludes claims for medical expenses brought after a certain time period. Section 35-1-99(2) is a statute of limitations. It prescribes the legal procedure for obtaining redress -- no claimant may pursue the substantive remedy of medical expenses benefits unless he follows the procedure of filing a claim within three years after the date of the accident or the date of the last payment of compensation.

This Court also acted appropriately in reversing the Industrial Commission's award of temporary total disability benefits since §35-1-98(2) (1994) precludes Mr. Wardrop's untimely claim. The Industrial Commission is estopped from arguing that Brown & Root Industrial Service ("Brown & Root") waived its right to contest the award on appeal. The Industrial Commission could have filed an appellee's brief with this Court that raised this argument, but it chose not to do so. Now that this Court has issued an opinion in this case that the Commission deems

unfavorable, the Commission's after-the-fact protest of waiver falls on its own sword.

ARGUMENT

POINT I

THIS COURT CORRECTLY DETERMINED
THAT §35-1-99(1988) APPLIES RETROACTIVELY
TO BAR MR. WARDROP'S CLAIM FOR MEDICAL EXPENSES.

In determining that §35-1-99(1988) is a procedural statute with retroactive application, this Court's analysis was simple: this Court has previously held §35-1-99 to be a statute of limitations. Brown & Root Industrial Service v. Industrial Comm'n., 905 P.2d 305 (Utah App. 1995), citing Avis v. Board of Review, 837 P.2d 584, 587 (Utah App., 1992), cert. denied, 853 P.2d 897 (Utah 1993). Statutes of limitations are considered to affect only procedural rights and therefore have retroactive application. Id. at 307-08, citing Financial Bancorp, Inc. v. Pingree & Dahle, Inc., 880 P.2d 14, 16 (Utah App. 1994).

The Industrial Commission does not deny that §35-1-99(1988) is a statute of limitations in its Petition for Rehearing. Neither does it contest that statutes of limitations have been viewed as procedural under Utah law. Rather, it contends that this statute of limitations is substantive because the 1988 amendment decreased the time in which an injured worker could

bring a claim for medical benefits. (Petition for Rehearing at 8).

A statute of limitations does not become substantive merely because it shortens the time in which a substantive claim must be brought. By defining time limits, statutes of limitations set forth the procedure by which a substantive claim must be initiated. In Pan Alaska Trucking, Inc. v. Crouch, 773 P.2d 947 (Alaska 1989), the court rejected an injured worker's argument that a statutory amendment shortening the time in which claimants must request a hearing with the Workers' Compensation Board, enacted after the date of injury, was substantive. The court applied the amendment retroactively, explaining that:

[the claimant] argues here that because the change in [the statute] "results in the absence of any effective remedy to enforce a substantive right," the change should be treated as substantive. But in deciding whether a change is substantive in character, it will hardly suffice that a new rule has proved dispositive in a particular case: if ignored, nearly any procedural rule can play a role in the disposition of a case....The claim has faltered on the two-year limit not because it was a significant obstacle, but because [the claimant] failed to pay it any heed.

Pan Alaska Trucking, Inc. v. Crouch, 773 P.2d at 949.

Similarly, the court in Harrelson v. Industrial Com'n. of Arizona, 697 P.2d 1119 (Ariz. App. 1984), considered the retroactive application of a statutory amendment giving workers'

compensation claimants one year from the date of injury in which to file a claim. While the court observed that retroactive application would operate to destroy "what previously may have been a claim of continued vitality," this did not mean that it would operate to destroy a vested right. Harrelson, 697 P.2d at 1123. The court affirmed the Industrial Commission's dismissal of the late claim on the ground that the statute was a procedural law prescribing the method of enforcing substantive rights and therefore applied retroactively. Id. at 1122. See also Oestreich v. Dept. of Labor & Industries, 822 P.2d 1264, 1266 (Wash. App. 1992) (limitations period for making claims for adjustment of workers' compensation benefits does not eliminate ability to make claims and applies retroactively).

This Court correctly recognized the procedural, and therefore retroactive, nature of §35-1-99(1988). The statute simply sets forth a time procedure for filing medical expenses claims; it does not completely destroy a claimant's ability to seek medical expenses benefits. Mr. Wardrop's award was properly reversed for untimeliness.

POINT II
THE COMMISSION IS ESTOPPED FROM
CLAIMING THAT BROWN & ROOT WAIVED
ITS RIGHT TO APPEAL THE AWARD OF TEMPORARY
TOTAL DISABILITY BENEFITS.

This Court appropriately reversed the Commission's award of temporary total disability benefits to Mr. Wardrop on the basis that this claim was untimely under §35-1-98(2). In its Petition for Rehearing, the Industrial Commission claims that Brown & Root contested this award for the first time on appeal.

This Court was free to address the Commission's award of temporary total disability benefits on appeal, having received no objection during appellate briefing to this Court's consideration of the award. The Commission notes in its Petition for Rehearing that it received Brown & Root's appellate brief on March 26, 1995. While the Commission laments that the deadline for filing a responsive brief had expired by this time, nothing prevented the Commission from requesting an extension of time in which to submit an appellee's brief on the ground that it received the appellant's brief late. This Court issued its opinion nearly seven months later, but during that time, the Commission chose not to file an appellee's brief. The Commission had several

months in which to raise its claim that Brown & Root was contesting the award of temporary total disability benefits for the first time on appeal, but it elected to remain silent.

The Commission's present protest of waiver comes only after this Court has issued an opinion in this case that the Commission views as unfavorable. The Commission now seeks to reopen the case and oppose Brown & Root's appeal for the first time, in the hopes of achieving a more favorable result the second time around. The Commission had its chance to claim waiver, and the opportunity has passed. It is estopped from raising waiver for the first time on a Petition for Rehearing.

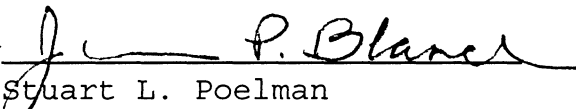
CONCLUSION AND RELIEF REQUESTED

This Court's opinion in Brown & Root Industrial Service v. Industrial Comm'n., is correct in all respects. In addition to the arguments presented above in support of this Court's opinion, Brown & Root incorporates the arguments presented in its principal brief on appeal. Brown & Root requests that this Court deny the Commission's Petition for Rehearing. Should this Court grant the Petition for Rehearing, Brown & Root asks that this Court also consider the second issue raised in Brown & Root's appeal, which this Court did not reach in light of the

disposition of the case: whether the Commission should have submitted to a medical panel the issue of the medical cause of Mr. Wardrop's present need for knee surgery.

DATED this 3^d day of January, 1996.

SNOW, CHRISTENSEN & MARTINEAU

By 
Stuart L. Poelman
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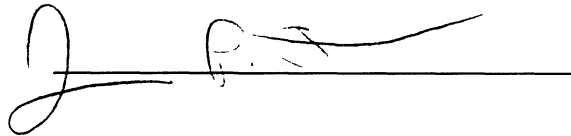
CERTIFICATE OF MAILING

I hereby certify that on the 3rd day of January, 1996, two
(2) true and correct copies of the foregoing was mailed, postage
prepaid, first-class, to the following counsel of record:

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DATED this 3rd day of January, 1996.

A handwritten signature in black ink, appearing to read "Alan L. Hennebold", is written over a horizontal line. The signature is stylized with a large initial "A" and a long, sweeping underline.