FILED
MAR 14 1977
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

CLYDE E. ROBY,

Appellee,

v.

JOHN DEERE WATERLOO TRACTOR WORKS,

Appellant.

Filed March 14, 1977

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2-58153

Appeal from Black Hawk District Court - Blair C. Wood, Judge.

Appeal from trial court affirmance of Industrial Commission's ruling in a workman's compensation review reopening proceeding that the § 86.34 statute of limitation defense had not been timely raised. Affirmed.

John E. Behnke, of Parkersburg, for appellee.

Hoxie and Gottschalk, of Waterloo, for appellant.

Heard by Allbee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

CARTER, J.

This is an appeal by defendant-employer from a decision and order of the trial court affirming the decision of the industrial commissioner granting increased compensation to the plaintiff - employee as a result of a review reopening proceedings instituted pursuant to section 86.34, The Code, 1973. The trial court's judicial review of said administrative order is also authorized by section 86.34, The Code, 1973.

Following the review reopening, the commissioner ruled that an industrial injury sustained by the employee on March 19, 1968, arising out of and in the course of his employment with the employer had produced a 15% disability to the employee's body as a whole. Accordingly, it was ordered on January 9, 1974, that the employer pay the employee substantial weekly workmen's compensation benefits and medical expenses in addition to those which had been specified in the original memorandum of agreement between the parties filed with the commissioner on April 3, 1968.

In the trial court the employer's appeal from the commission's order challenged the sufficiency of the evidence to support the commission's finding that the disability subsequently found to exist was caused by the employee's earlier industrial accident. The trial court's adverse ruling on this issue has not been challenged on this appeal.

The employer also challenged in the trial court the rejection by the commissioner of the statute of limitation defense tendered by the employer at the conclusion of the hearing. It is this issue with which we are now presented. More precisely the issue is whether or not it was within the commissioner's discretion to reject this proferred defense as untimely, and, if so, whether an abuse of discretion is shown to exist.

At the time with which we are involved, section 86.34, The Code, 1973, provided that requests for review reopening must be made within three years "from the date of the last payment of compensation made under . . . award or agreement." This statute has been construed to be a nonjurisdictional statute of limitation. Paveglio v. Firestone Tire & Rubber Co., 167 N.W.2d 636, 639 (Iowa 1969); Secrest v. Gallaway Co., 239 Iowa 168, 173-76, 30 N.W.2d 793, 796-97 (1948). As such it must be affirmatively asserted by the party relying on its provisions to defeat the claim of the adverse party. Section 86.14, The Code, 1973.

Application of this statute of limitation to the facts of the instant appeal requires some review of the various pleadings of the parties before the commissioner and amendments or proposed amendments thereto. The employee in his petition for review reopening filed on July 20, 1972, alleged that while working for the employer he sustained a permanent partial disability to the body as a whole from a March 19, 1968, industrial accident. He alleged that as a result thereof he had been paid temporary or healing period benefits but no permanent partial disability benefits. In its answer to this petition filed August 8, 1972, the employer admitted the injury occurred in the course of and arose out of the employment between the parties but denied that the employee sustained any permanent disability as a result thereof. The employer admitted that it had paid the employee temporary or healing period benefits. It affirmatively asserted, however, that there had been no award or memorandum of agreement as to the employee's right to workmen's compensation and that therefore there was no basis for a review reopening. As a result of the latter contention the employer affirmatively asserted that the employee's remedy, if any, must arise under a petition for arbitration.

By amendment to the petition on October 6, 1972, just five days prior to the hearing, the employee withdrew his allegation that he had received temporary disability or healing period benefits as a result of the injury in question and affirmatively alleged that he had not received any such payments. At the commencement of the hearing on October 11, 1972, the employer dictated into the record an answer to the employee's October 6 amendment. In substance this answer denied the employee's claim that he had not been paid temporary or healing period benefits.

The hearing then commenced with a deputy commissioner hearing the testimony of the employee and the employee's personal physician. Following the presentation of this evidence the employee rested subject to the right to submit the deposition of an orthopedic surgeon who had treated him with respect to the matter in issue. At this point the employer's counsel dictated into the record the following:

> "Comes now the employer-defendant and for further answer to claimant's petition for review reopening and for further answer to amendment to petition for review reopening filed herein on October 6, 1972, states:
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> "That pursuant to section 86.34 of the 1971 Code of Iowa a review reopening must take place within three years from the date of last payment of compensation made under such award or agreement.
>
> "That from the pleadings now on file and the record in this case, including the employer's first report of injury, the Iowa Memorandum of Agreement, the Form Five, dated April 23, 1968, it appears conclusively that more than three years have elapsed prior to the commencement of this review reopening, since the payment of any compensation. That the said statute bars the claimant's cause of action."

Counsel for the employee then responded by asserting on the record that his client's right to benefits was not barred by

§ 86.34. The employer presented no evidence at the hearing but subsequently submitted depositions of certain witnesses as part of the record.

In his written decision the deputy commissioner rejected the employer's tendered statute of limitations defense as untimely. The trial court agreed with this conclusion. So do we for the reasons which follow.

I. Initially we must reject the employer's claim that it was entitled, as a matter of right, to assert the bar of the statute at the conclusion of the hearing. The commissioner's rules of practice in effect at the time of the hearing, provide in rule 1-9 (86), Iowa Departmental Rules, 1973:

> "Amendments may be made to any pleading before hearing or to conform to proof."

Clearly the amendment in question was not proferred before the hearing. Based upon the circumstances which are discussed in the next division of this opinion we also conclude this was not an amendment to conform to proof. Thus the employer's amendment was not authorized as a matter of right under the commission's rules. Nor do we believe we would reach a different conclusion with respect to amendments offered during the hearing if we adopted the employer's contention on this appeal that the matter is governed by rule 88, Rules of Civil Procedure.

If there is a difference in the application of rule 88 and the commissioner's rules to the facts of this case, we believe the commissioner's own rules should govern. The Rules of Civil Procedure apply to courts (rule 1, Rules of Civil Procedure) and because of distinctions between courts and administrative agencies of the executive branch those rules were not adopted with contested workmen's compensation cases in mind. The commissioner

is empowered to adopt his own rules of procedure in contested cases. Section 86.8(1), The Code. On such matters as the time for amending pleadings there is no reason for these rules to be the same as the Rules of Civil Procedure. The commissioner's present rule 500-4.35 (86), not in force at time of instant hearing, expresses the principle, which we accept, that the commissioner's rules control over conflicting provisions in the Rules of Civil Procedure. Because we conclude that the commissioner has authority to prescribe rules limiting time for amendments in contested cases we believe it naturally follows that he is cloaked with discretion to refuse to permit amendments not made within the time provided in said rules.

II. We next consider whether the rejection of the amendment in question was an abuse of discretion. The employer's answer had from the beginning asserted that any payments made to the employee were not pursuant to award or memorandum of agreement. This allegation constituted the pleading of facts which if established would constitute a jurisdictional defense under section 85.26, The Code, 1973. Mousel v. Bituminous Material & Supply Co., 169 N.W.2d 763 (Iowa 1969). The employee on the other hand did not admit that there had been no memorandum of agreement but asserted that he had received no prior temporary disability or healing period payments pursuant to such agreement.

At the commencement of the hearing, the commissioner's file contained a memorandum of agreement filed April 3, 1968, for temporary disability and healing period payments to the employee for the March 19, 1968, injury. The file also contained a so-called "Form 5," which, pursuant to rule 1.1(4) of the commissioner's rules (Iowa Departmental Rules 1973) is to be signed by the employee and filed with the commissioner when compensation payments have terminated. This document, filed April 24, 1968, was not signed by the employee, however, and

indicated the employee was absent "on reserve duty at this time." Thus, while the form indicates when compensation should have been paid under the April 3, 1968, memorandum of agreement there is no acknowledgment by the employee as required by rule 1.1(4) that said payments had in fact been made. The employer at no time tendered any proof as to the date upon which prior payments of compensation, if any, were made for the March 19, 1968, injury.

On this state of the record, the employer, in seeking to urge the three year bar of section 86.34, was asserting a special defense which had not been raised prior to the conclusion of plaintiff's evidence and which was inconsistent with allegations previously made by the employer and not withdrawn. Moreover, this issue would necessarily involve an additional evidentiary showing on the part of the employer. Based upon these considerations, and the fact that the true situation in regard to the memorandum of agreement and dates of payment were matters which should have been revealed by the employer's own records with sufficient clarity to permit the defense to be timely urged, we believe the commissioner acted within his discretion in refusing to allow the statute of limitations defense.

Realizing the intended liberality of procedure in hearings before the commissioner, we believe that the untimely injection of a special defense required by statute to be specifically pleaded must be viewed more critically than the injection of new matter going to the merits of the claim.

III. The employer seeks to counter our holding on the scope of the commissioner's discretion by asserting that the deputy commissioner did in fact permit the amendment in question to be made and then later refused to apply it in reaching his decision. As pointed out by the trial court, there is nothing

in the record to show that permission to offer the untimely amendment to the employer's answer was either sought from or granted by the deputy commissioner. The employer's only support for its contention that permission to amend was granted is found in a recital contained in the deputy's written decision -- the same decision which ultimately rejected the defense as untimely. On this state of the record we cannot conclude that permission to amend was granted. Moreover, on the facts involved in the present controversy, we know of no rule which would preclude the commissioner from changing his mind on the timeliness of the proferred defense prior to rendering his final decision. See, *e.g.* Fowler v. Vermillion, 167 Iowa 362, 149 N.W. 444 (1914). He was and should have been free to reverse a previous interlocutory ruling in the absence of some change in position by one of the parties in reliance on the prior ruling. Here there is no indication that the employer, in reliance on its belief that the amendment would be allowed, failed in any way to defend the claim on the merits.

We have considered all issues presented and find no basis for reversal.

AFFIRMED.