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IN THE COURT OF APPEALS OF IOWA SUPREME COURT

FIRESTONE TIRE & RUBBER COMPANY,)
Employer, and, LIBERTY MUTUAL)
INSURANCE COMPANY, Insurance)
Carrier,)

Filed September 20, 1979

Petitioners-Appellants,)

vs.)

FLOYD WILLIAMS, Claimant, and,)
ROBERT C. LANDESS, Iowa Industrial)
Commissioner,)

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2-62739

Respondents-Appellees.)

Appeal from Polk District Court - Theodore H. Miller, Judge.

Petitioners, employer and its insurance carrier, appeal from district court ruling affirming denial of their motion for summary judgment in a worker's compensation action, asserting that the action was barred by the applicable statute of limitations and that their motions for summary judgment should have been granted. **AFFIRMED.**

Jones, Hoffman & Davison, Des Moines, Iowa, for appellants.

Thomas J. Reilly, Des Moines, Iowa, for appellees.

Submitted to Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

JOHNSON, J.

Petitioners, Firestone Tire & Rubber Company and its insurance carrier, Liberty Mutual Insurance Company, appeal from a ruling of the Polk County District Court affirming the Iowa Industrial Commissioner's¹ denial of their motion for summary judgment in a worker's compensation action. On appeal petitioners assert that the action was barred by the applicable statute of limitations and their motion for summary judgment should have been granted. We affirm.

Respondent, Floyd Williams, was an employee of petitioner-Firestone on July 13, 1974, when he sustained an injury alleged to have arisen out of and in the course of his employment. On December 16, 1975, Liberty Mutual filed the "First Report of Injury" and a "Memorandum of Agreement" (Iowa Form No. 4) with the Office of the Commissioner. On October 28, 1976, Liberty Mutual filed an "Employer's Report of Benefits Paid" (Iowa Form No. 5) with that office. The latter report showed payment of medical expenses totalling \$279, but showed no payment of any weekly compensation benefits, although the memorandum of agreement allocated the sum of \$97 for "temporary, healing period, permanent total and death rate" and the sum of \$86 for "permanent partial rate."² On July 17, 1977, respondent Williams filed an original notice and petition seeking review-reopening of his claim for weekly benefits under the terms of section 86.34, The Code 1977, which provides, in part, that "[a]ny award for payment or agreement of settlement . . . where the amount has not been commuted, may be reviewed by the industrial commissioner or a deputy commissioner . . . at any time within three years from the date of the last payment of compensation made under the award or agreement"

In their Answer and Motion for Summary Judgment, petitioners contended there was nothing to review due to the fact that Williams' action was barred from consideration by section 85.26, The Code 1977, because it was an original proceeding brought after the two year statutory limitation period. They further argued that, even if it were considered a continuation of proceedings for purposes of section 85.26, it would be barred under section 86.34 because no weekly compensation benefits had ever been paid to Williams pursuant to the memorandum of agreement. The deputy

¹ Hereinafter referred to as "the Commissioner."

² Tr. Court Papers, Memorandum of Agreement, filed December 16, 1975.

commissioner found that the memorandum of agreement was a filing reviewable by the commissioner within the three year period allowed under section 86.34. The Commissioner and district court affirmed.

I. Our review in this matter is governed by sections 17A.19 and 17A.20, The Code 1977, and is limited to a determination as to whether the district court correctly applied the law. Jackson County Public Hospital v. PERB, 280 N.W.2d 426-429 (Iowa 1979); Second Injury Fund v. Mich Cole Co., 274 N.W.2d 300, 302 (Iowa 1979).

II. An injured employee seeking worker's compensation benefits must commence an original proceeding for compensation within two years from the date of the injury-causing disability for which benefits are claimed or the action is barred under section 85.26, The Code.³ The law provides two methods by which a worker can proceed to secure compensation benefits. One is by the employer (or employer's insurance carrier) filing a memorandum of agreement with the commissioner under section 86.13, The Code, Whitters & Sons, Inc. v. Karr, 180 N.W.2d 444, 446 (Iowa 1970); the second is by either party filing a petition for arbitration as provided by section 86.14, The Code 1977.⁴ Otis v. Parrott, 233 Iowa 1039, 1044, 81 N.W.2d 708, 712 (1943).

With the proper filing of a written memorandum of agreement for compensation, the two year limitation set by section 85.26 is tolled. Petitioners contend that because no weekly compensation benefits were paid under the memorandum of agreement, it was legally insufficient to qualify as an original proceeding. Thus, they assert respondent Williams' petition to reopen is in effect an original proceeding filed more than two years from the date of injury.

³ Section 85.26, The Code 1977, provides: "No original proceedings for compensation shall be maintained in any case unless such proceedings shall be commenced within two years from the date of the injury causing such death or disability for which benefits are claimed."

⁴ Section 86.14, as amended by 1977 Session, 67th G.A. ch. 51, § 9, now reads:

86.14 Contested Cases.

1. In an original proceeding, all matters relevant to a dispute are subject to inquiry.

2. Any proceeding to reopen an award for payments or agreement for settlement as provided by section 86.13, inquiries shall be into whether or not the condition of the employee warrants an end to, diminishment of, or increase of compensation so awarded or agreed upon.

Section 86.13 provides:

If the employer and the employee reach an agreement in regard to the compensation, a memorandum thereof shall be filed with the industrial commissioner by the employer or the insurance carrier, and unless the commissioner shall, within twenty days, notify the employer or the insurance carrier and the employee of his disapproval of the agreement . . . , the agreement shall stand approved and be enforceable for all purposes, except as otherwise provided in this and chapters 85 and 87.

Once a memorandum of agreement is entered, unless it is set aside on such grounds as mutual mistake or fraud, it settles two of the three principle elements which a worker must establish to receive benefits under our worker's compensation act. These are: 1) the employer-employee relationship at the time of the injury; and, 2) an injury arising out of and in the course of employment. Freeman v. Luppas Transport Co., 227 N.W.2d 143, 150 (Iowa 1975).⁵ However, where the compensation is not commuted by the terms of the agreement, it leaves the question of the extent of disability open for adjustment in accordance with the statutory provisions for review-reopening under section 86.34, which permits the commissioner to end, diminish or increase the compensation agreed upon. Whitters & Sons, Inc. v. Karr, 180 N.W.2d at 446, citing Tebbs v. Denmark L. & T. Corp., 230 Iowa 1173, 1176, 300 N.W. 328, 329 (1941).

Respondent argues that the payment of medical payments constitutes "compensation." We cannot agree. In Powell v. Bestwall Gypsum Co., 255 Iowa 937, 942, 124 N.W.2d 448, 451 (1963), the court held that our worker's compensation act creates three distinct types of benefits for an injured employee and his or her dependents: 1) medical and hospital care; 2) burial expenses; and 3) weekly death or disability compensation. The court, noting that section 85.27 requires the employer to furnish reasonable medical care once the employer has notice or knowledge of an employee's injury, concluded that "[f]urnishing of these [medical] services . . . is mandatory. It is not dependent on a memorandum of agreement. The Act is clear they are not paid as 'weekly compensation.'" Id. See also Rankin v. National Carbide Co., 254 Iowa 611, 619, 118 N.W.2d 570, 575 (1962). Thus, we conclude that no weekly compensation benefits have been paid pursuant to the memorandum of agreement.

We, however, do not agree with petitioners that the inquiry ends there. While the Iowa cases hold that there can be no review-reopening under section 86.34 if no

⁵ The worker also must establish that the claimed disability was proximately caused by the injury. Freeman v. Luppas Transp. Co., Inc., 227 N.W.2d at 148.

memorandum of agreement has been filed pursuant to 86.13, nowhere in Iowa law do we find that a memorandum of agreement is legally insufficient to toll the limitation provisions of section 85.26 unless it provides for weekly compensation, in fact. See Rankin v. National Carbide Co., 254 Iowa at 615, 118 N.W.2d at 572-73; Bever v. Collins, 242 Iowa 1192, 1196, 49 N.W.2d 877, 880 (1951); Otis v. Parrott, 233 Iowa at 1046, 8 N.W.2d at 713.

It is well established that the compensation act is for the benefit of the worker and is to be construed as liberally as possible to him or her. Hoenig v. Mason & Hanger, Inc., 162 N.W.2d 188, 190 (Iowa 1968); Bergen v. Waterloo Register Co., 260 Iowa 833, 838, 151 N.W.2d 469, 471 (1967); Price v. Fred Carlson Co., 254 Iowa 296, 299, 117 N.W.2d 439, 441 (1962). This principle would be defeated by a conclusion that review is barred in this case because the parties' memorandum of agreement, filed December 16, 1975, stated there was no known disability at that time for which weekly compensation benefits were to be paid. As the court stated in Rose v. John Deere Ottumwa Works, Co. v. State Industrial Accident Commission, 211 Cal. 154, 160, 294 P. 763, 765, 72 A.L.R. 1118, 1123 (1930):

Many times the seriousness of the injury is not at first apparent, and from its very nature cannot be determined until considerable time has lapsed after its infliction. The clear intent of the statute in such cases is that the injured employee shall be entitled to compensation for his permanent disability notwithstanding the fact that he may in the early stages of his injury have been granted an award only for temporary disability, or may have been paid compensation voluntarily by his employer;"

"When passage of time and subsequent events show the true extent of industrial disability there should be some vehicle for adjusting a prior award." Meyers v. Holiday Inn of Cedar Falls, 272 N.W.2d 24, 26 (Iowa Ct. App. 1978). We conclude the policy of the law is to allow for a review-reopening in cases where a memorandum of agreement has been properly filed as it has in this case.

Finally, section 86.34 provides that review must be initiated within three years from the date of the last payment of compensation under the memorandum of agreement. As of December 16, 1975, the parties agreed there was to be no compensation for disability. Under these facts it is logical to consider that date for purposes of calculating the three year period.

We, therefore, conclude the petitioner's motion for summary judgment was properly denied and the case should be remanded for consideration by the Commissioner on the merits. Costs of this appeal should be assessed to petitioners.

AFFIRMED.