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Record No. 7442

In the Supreme Court of Appeals of Virginia at Richmond

JESSE SLEDGE, ET AL.

v.

CHARLIE C. PRICE

FROM THE INDUSTRIAL COMMISSION OF VIRGINIA

RULE 5:12—BRIEFS

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of this Court and three copies shall be mailed or delivered by counsel to each other counsel as defined in Rule 1:13 on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

HOWARD G. TURNER, Clerk.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 7442

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Tuesday the 10th day of March, 1970.

JESSE SLEDGE AND NATIONWIDE MUTUAL INSURANCE COMPANY, Appellants,

against

CHARLIE C. PRICE, Appellee.

From the Industrial Commission of Virginia

Upon the petition of Jesse Sledge and Nationwide Mutual Insurance Company an appeal is awarded them from an award entered by the Industrial Commission of Virginia on the 9th day of December, 1969, in a certain proceeding then therein depending, wherein Charlie C. Price was claimant and the petitioners were defendants; upon the petitioners, or some one for them, entering into bond with sufficient security before the Secretary of the said Industrial Commission in the penalty of $3,000, with condition as the law directs.

RECORD

* * * * *

Commonwealth of Virginia

Department of Workmen's Compensation
Industrial Commission of Virginia
Richmond

MEMORANDUM OF AGREEMENT
AS TO
PAYMENT OF COMPENSATION

Charlie C. Price, Employee
Jesse Sledge, Employer
Nationwide Mutual Ins. Co., Insurance Carrier

We Charlie C. Price residing at 621 Vaughan Ave.; City or Town—Hampton; State—Va.; and Jesse Sledge; Office address—230 Canford Dr., Hampton, Va. have reached an agreement in regard to compensation for the injury sustained by said employee and submit the following statement of facts relative thereto:—

Date of injury—April 20, 1967; Date disability began—April 21, 1967

Nature of injury—Possible Head Injury, multiple contusions, questionable fracture right orbit & sinuses

Place of accident—Seaford. York County, Va.

Cause of accident—Fall from staging to ground

Probable length of disability—3 or 4 weeks

The terms of this agreement under the above facts are as follows:—

That the said Charlie Price shall receive compensation at the rate of $45.00 per week based upon an average weekly wage of $160.00 and that said compensation shall be payable from and including the 28 day of April, 1970 until terminated in accordance with the provisions of the Workmen's Compensation Law of the State of Virginia

Ernest F. Sommer, Witness
L. F. Whipple, Witness

Charlie C. Price, Employee or Dependent
Jesse Sledge, Employer

Nationwide Mutual Ins. Co., Carrier
By L. F. Whipple
Approved by GR
Title—Field Claimsman
Date of Approval
Date of Agreement—May 19, 1967

page 2 }

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF WORKMEN'S COMPENSATION
INDUSTRIAL COMMISSION OF VIRGINIA
RICHMOND

Division of Claims

AWARD

Corrected
Approval of Agreement—ec

Claim No. 915-104
Case of Charlie C. Price
Accident: 4/20/67

Date: June 13, 1967

To:
Jesse Sledge, (Employer)
230 Canford Drive
Hampton, Virginia,
and
Mr. Charles C. Price, (Employee)
621 Vaughan Avenue
Hampton, Virginia,
and
Nationwide Mutual Insurance Company, (Insurance Carrier)
Box 1180
Lynchburg, Virginia

Note: The compensation herein awarded is to be paid by the insurance company or by the employer, if self-insurer. In the event that payment is delayed, the employee is requested to write the insurance company or his employer, before taking it up with the Commission.

Take notice that the Industrial Commission of Virginia has approved the memorandum of agreement entered into May 19, 1967 for the payment of compensation under the Workmen's Compensation Act, and in accordance with the

provisions of said Act enter an award of compensation as follows: $45.00 per week, during incapacity, payable weekly, beginning April 28, 1967.

INDUSTRIAL COMMISSION OF VIRGINIA

In view of the nature of the injury sustained by this claimant, before closing the file, we will require a final medical report covering the question of permanent disability.

If incapacity (disability) as indicated in Section 65-59 exceeds six (6) weeks, compensation is Then to be paid for such calendar days of incapacity to work, in accordance with Section 65-51 and Section 65-52, in addition to such payments as may be awarded under Section 65-53 and the Commission so advised.

page 3 } Commonwealth of Virginia
Department of Workmen's Compensation
Industrial Commission of Virginia
Richmond

Approved—Award Terminated

Industrial Commission of Virginia
In the Industrial Commission of Virginia:
Charlie Price, Employee
and
Jesse Sledge, Employer Claim No. 915-104

AGREED STATEMENT OF FACT

It is mutually agreed between the undersigned as follows:

1. That on the 20 day of April, 1967, Charlie Price, employee, sustained compensable injuries while employed by Jesse Sledge, at an average weekly wage of $160.00;

2. That the said employee (returned to work) on the 15 day of May, 1967, at an average weekly wage of: $160.00;

3. That as the result of the injuries aforesaid the employee has sustained a (total loss of) or (a percent loss of use) (strike out one or both as inapplicable) of the for which compensation is properly allowable within the purview of Section 65-53, Code of 1950, as amended.

4. That said injuries resulting from the (loss of) or (partial loss of use of) the became permanent on the day of , 19 .

Agreed to this 19 day of May, 1967.

Ernest F. Sommer, Witness

L. F. Whipple, Witness
Jesse Sledge, Employer

Nationwide Mutual Insurance Company
by: L. F. Whipple, F.C.
Charlie C. Price, Employee
Total Compensation paid $109.29 at the rate of $45.00 per week from April 28, 1967 to May 15, 1967.
Medical Expenses: $

Note: Should further disability, total or partial, other than that heretofore compensated for result from the injury the case may be reopened upon application made to and received by the Industrial Commission within twelve months from the date of the last payment of compensation pursuant to an award under the Workmen's Compensation Act.

This form of agreed statement of fact should be completed in triplicate, the original to be filed with the Commission, a copy retained by the employer and employee.

2 3/7 wk et
6-15-67 ah

page 4 }

Randolph T. West
Attorney and Counsellor at Law
12352 Warwick Boulevard
Newport News, Virginia 23606
Telephone 595-7101
Area Code 703

January 30, 1969

My File: 69-8

The Industrial Commission of Virginia
P. O. Box 1794
Richmond, Virginia 23214

Re: Charlie C. Price, Claimant
vs. Jessie Sledge
Claim No. 915104

Gentlemen:

This is to advise that the claimant in the above matter has employed me to determine if he is entitle to total disability for the injury received in the above accident.

I have discussed this matter with the insurance carrier for the defendant and they advise that the Statute of Limitation has run insofar as any claim for compensation for permanent disability is concerned.

It is my position that the medical report from Dr. F. A. Carmines should show that there was permanent damage and

such permanent damage is open and obvious, and the adjustor finalizing this claim should have been aware of said permanent injury.

I would appreciate your sending me copies of all medical reports as well as copies of any forms signed by the claimant. I would further appreciate this matter being reinstated on the docket for a hearing to determine whether the claimant should be compensated for the permanent injury he
page 5 } received.

Thanking you for your cooperation in this matter, I am,

Very truly yours,

Randolph T. West

RTW/dp

Docket for York County
Date of last payment 5/14/67
Application filed 1/31/69
Referred to Docket 2/4/69
By GM

Acknowledged: 2/11/69
Attorney
Claimant:
Ins. Carrier
gt

page 6 } Charlie C. Price, Claimant v. Jesse Sledge, Employer Nationwide Mutual Insurance Company, Insurer

Claim No. 915-104

Randolph T. West,
Attorney-at-Law,
12352 Warwick
Boulevard, Newport News,
Virginia, 23606,
for Claimant.

Fred W. Bateman,
Attorney-at-Law,
311 Main Street,
Newport News, Virginia, 23601, for
Defendant.

Charlie C. Price

Hearing before Commissioner Miller at Williamsburg, Virginia, April 18, 1969.

All witnesses having been duly sworn, the following testimony was taken:

Com.: All medicals are made a part of the record. Also made a part of the record is the correspondence between the Commission and the carrier and the carrier's response.

Counsel are to further consult between themselves and with their principals and advise the Commission within approximately a week as to whether or not there might be a basis for resolving the matter.

The claimant last saw either of the treating specialists, I believe, back in '68—in December of '68. Is that
page 7 } correct?

Mr. West: That's correct, your Honor.

Charlie C. Price.

By Com.:

Q. And there was discussion regarding a possible fusion of the ribs. Is that right, Mr. Price?

A. Yes, sir, that's right.

Q. And what was the nature of that discussion between you and the doctors, regarding that fusion and what took place?

A. Well, the doctor—Doctor Butterworth, in Richmond, is the last doctor that I went to. Well, Doctor Butterworth told me, said, "Price," said, "Mr. Price," said, "I tell you the truth," said "your wrist is tore up so bad." He said, "Can you use it any at all? does it bother you too much to use it any at all?" I said, "Any, I told him, "Not too bad." He said I ought to use it. He said, "The best thing for you to do is use it as long as you can and if it gets any worser so you can't make it, you have to come back."

Q. They never scheduled any—

A. Because, see, I have to do—in order to do my work, I got to bend this (indicating) a little bit and if they go in there, they are going to straighten it, put it back and then they are going to leave it stiff and then I'll be out of a job.

Q. The fusion would make it stiff, you say?

A. Beg your pardon.

Q. The fusion would make it stiff?

page 8 } A. Yes, sir, that's right.

Q. And, now, you have some flexibility?

Charlie C. Price

A. Some, see, but nothing like I got in this one (indicating) see.

Q. And no appointment was made for any operation, was it?

A. No, sir.

Q. You work now doing what?

A. I work—I worked ever since off and on. Now, the only thing I might be in Richmond bricklaying.

Q. Well, what do you do?

A. I lay brick. I lay brick.

Q. Labor work?

A. No, sir, I'm a bricklayer.

Q. Bricklayer?

A. I'm a bricklayer.

Q. All right. And you—when you went back the 15th of—what was it—January, you kept working for Mr. Sledge, up until that Summer of '68 and then you went to work somewhere else. Is that right?

A. '68? I was off for just a few weeks—

Q. For what reason?

A. A few weeks between, see.

Q. Why?

A. I was trying to think why was I off that few weeks between. I don't know whether that—oh, I know,
page 9 } too, I do know, too, come to think about it. Well, this wrist, this same wrist—my wife, she was sick and she said, "The best thing for you to do is to go down there and try to get something easier." Now—

Q. So, you went looking for other work?

A. And I went down to Mr. Moore and he hired me down there and I *aorked* down there for a little while and then I went back to Mr. Miller, see.

Q. And he is another merchant, too?

A. Beg pardon.

Q. And he is another one, too?

A. He is another bricklayer.

Q. Right.

A. I mean bricklayer-carpenter.

Q. And you have been with him since about November—since the Summer of '68?

A. In other words, I'm ahead of my story. I found out—I found out I couldn't make it on this little light job. So, I just quit that light job and went on back laying bricks again, see.

Q. Right. And then you had another accident in November of '68. Is that right?

Charlie C. Price

A. In *Novembef,* '68? Yes, sir, that's right. That's right.

Com.: All right. Now, it's defended by the carrier on the ground of no filing within the statutory period under—let's see—Section—

Mr. Bateman: 65.1-99.

page 10 } Com.: All right. And do you have any questions to ask the claimant, Senator Bateman?

By Mr. Bateman:

Q. How old are you, sir?

A. I'm fifty five.

Q. And what education do you have?

A. Sixth grade.

Q. Did you get a letter from the Industrial *Commiasion,* advising you that you or telling you that you had a certain period of time of time in which to file, otherwise, you might lose your rights?

A. Yes, sir, I did.

Q. And you understood what that was?

A. Yes, sir.

Mr. Bateman: That's all I have.

Com.: Do you have any questions?

Mr. West: Yes, sir.

By Mr. West:

Q. Charlie, you have been under the doctor's care ever since you were injured on this job in 1967, have you not?

A. Yes, sir.

Q. You have been every time that they have requested you to come back and there have been intermittent—intermediate periods between the—or two or three months at a time—

A. Yes, sir, that's right.

page 11 } Q. That they would tell you to go home and try to work and come back? Would they tell you they didn't know what was wrong with your hand and they didn't want to mess with it at this time?

A. Yes, sir.

Q. All right. Now, after Doctor Carmines and Doctor Butterworth gave you his last report in December of 1968, did you then, thereafter, go to the insurance carrier?

A. Yes, sir.

Q. Who did you go to see?

A. Mr. Whipple.

Charlie C. Price

Q. And what was your conversation with Mr. Whipple?
A. Well, I went up there to tell Mr. Whipple that I was still under the doctor's care and I didn't want to lose my insurance and I say—I told him I was—I came up to see him because I wanted to keep'em confirmed under, you know, to let him know that I was still under the doctor's care and they kept me—they give me an appointment so long—so far apart and I—

Com.: Just find out what took place.

Q. And didn't you even before you went back in December of last year, the last time before that was in April of 1968. Is that correct?
A. Yes, sir.
Q. And, at that time, he told you that it would be some—to come back some six or twelve months later. Is that correct?
A. Twelve months later.
page 12 } Q. Twelve months later.

Com.: And whom are you speaking of, now?
Mr. West: Doctor Butterworth. I mean Doctor Carmines. I believe the date of the appointment, your Honor please, was April the 12th, 1968, which would have been approximately a month before the statute of limitations which the carrier is relying on—it would have been one month before that time, sir.

By Mr. West:
Q. This is the last time that you saw him before you went back in December. Is that right?
A. Yes, sir, that's right.

Mr. West: Okay. I believe that's all the questions I have at this time.

By Mr. Bateman:
Q. You say that you had talked with Mr. *Shipple?*
A. Yes, sir.
Q. That's the man at the insurance company?
A. Yes, sir.
Q. All right. Now, is the reason you say that—yes, sir, the reason you say you went and talked with Mr. Whipple is so that your insurance would not lapse or expire. Now, you are talking about this compensation? Is that what you

are talking about or some other insurance?

A. That was the compensation.

page 13 } Q. This workman's compensation?

A. That's right.

Q. All right. Now, do you know whether or not you saw Mr. Whipple after May 17th, 1968?

A. May the 17th? After 1968?

A. Last year?

A. Yes.

Q. May 17th?

A. Did I see Mr. Whipple?

Q. Again, yes. When did you see him?

A. Well, now, I'm not positive about that, because I think it was somewhere *iong* in there the last time that I did see him. Something long in there. I tell you I think it was a little bit before that, the last time I saw him, I think a little bit before that.

By Com.:

Q. And where was that?

A. It was cold weather.

Q. Here or in Richmond or where?

A. No, sir, that was in Newport News.

Q. Newport News?

A. Newport News.

By Mr. Bateman:

Q. And has the insurance company paid any of your bills or paid you any compensation since May 17th?

page 14 } A. No, sir.

Q. Have they told you that they would or give you any reason to believe that they would?

A. Nobody give me no comment. No, I didn't hear from nothing, from nothing, from nobody.

Mr. Bateman: No further questions.

By Mr. West:

Q. In response to Mr. Bateman's question as to why you went there in reference to the insurance, Charlie, have you received any compensation whatsoever since the one time that you received about two and a half weeks pay back in May of 1967?

A. I think I received ninety three dollars—ninety some dollars.

Charlie C. Price

Q. Well, have you received any since that time?

A. No, sir.

Q. Now, in answer to Mr. Bateman's question, you told him you were going up there for compensation. What kind of compensation were going up there talking to Mr. Whipple about?

A. Well, I was going up there to talk to Mr. Whipple about my working period—my working period. I was going up there to try to tell Mr. Whipple that I wanted to keep on working, because I wasn't able—the insurance wouldn't pay me enough for me to take care of my family, see. In other words, what little bit I got from the insurance company, I couldn't make it on that, so I just have to keep on working see. I just have to.

page 15 } Q. Charlie, you are understanding my question.

A. Well, maybe I'm not.

Q. When you went up to talk to Mr. Whipple—

A. Yes, sir.

Q. After you saw Doctor Butterworth—

A. Yes, sir.

Q. Why did you go to see him?

A. Well, see, I hadn't seen Mr. Whipple since I see Mr. Butterworth—Doctor Butterworth, I hadn't seen him.

Q. You hadn't seen him since then?

A. No, sir, I haven't been up there since then.

Q. All right. Did you see him after you saw Doctor Carmines?

A. No, sir, because that was the same day. That was all done in the same day.

Q. Okay. All right. It was all done the same day. Why did you go to see him?

A. Which one? Who was that?

Q. Mr. Whipple.

A. Well, I went to see Mr. Whipple just to tell him that—in other words, to keep him in mind that it look like to me the way the doctors and all was doing, I didn't know. I always went up there to keep him in—I don't know how to put it, but, any way, I went up there to keep him notified.

Q. All right. Well, you knew—

A. Notified that I was still under the doctor's

page 16 } care, and I didn't want to lose the insurance because I—

By Com.:

Q. The doctors were keeping you coming to them?

A. Beg your pardon.
Q. The doctors kept you coming back for appointments?
A. Yes, sir, that's right, and there were so long periods of time, being two and three months and some time four months and all like that.

By Mr. West:
Q. And the reason for this, Charlie, was that you knew about this year statute of limitation, didn't you?
A. Yes, sir.
Q. Who told you about that?
A. Yes, sir, I knew about it. You are talking about—you are talking about the—you are speaking about now—I can't get this too much now, but you are talking about—I guess you are speaking about why I went up there to see Mr. Whipple. Right?
Q. Yes. You knew that you had to make claim for any permanent injury that you might receive within one year from the time—
A. Oh, who told me about this?
Q. Yes.
A. Mr. Whipple told me about that.
Q. When did he tell you about that?
A. He told me—he told me about that when I was going up there to him, about it, but that was the reason
page 17 } why I usually go *go* back to him.
Q. Didn't he tell you that, when you orginally signed, that you had received two and a half weeks compensation, at that time? When he paid you that and you signed that agreement, that you received two and a half weeks, didn't he tell you at that time that there was one year?
A. Yes, sir.
Q. Then, thereafter, you kept going up there, because you didn't want to lose your insurance rights. Is that correct?
A. Yes, sir, that's right. You are right, but I ain't never know how to explain it. I know what I want to say, but I just cannot say it.

Witness stood aside.

Com.: That completes the matter and, after you all confer, let us hear from you.

CLOSED

RLS/5/6/69

page 18 } Charlie C. Price, Claimant

V. Claim No. 915-104

Opinion by Miller,
May 9 1969
Commissioner

Jesse Sledge, Employer
Nationwide Mutual Insurance Company, Insurer

Randolph T. West
Attorney at Law
12352 Warwick Boulevard
Newport New, Virginia 23606
for the Claimant

Fred W. Bateman
Attorney at Law
311 Main Street
Newport News, Virginia
for the Defendant

Hearing before Commissioner Miller at Williamsburg, Virginia, April 18, 1969.

The claimant, age 55, with a sixth grade education, who had worked as a brick mason for the defendant for six years, on April 20, 1967 sustained multiple injuries and arm fracture and possible head injury which were the subject of admitted compensation award by agreement and paid until return to work on May 15, 1967.

It is uncontroverted that the claimant has 25% permanent partial loss of use of the arm as a result of the April 20, 1967 industrial accident.

The carrier defends on the technical grounds that the claimant did not file a rating application pursuant to §65.1-99 of the Code within one year from the last date on which compensation was paid on May 14, 1967.

page 19 } A letter was received from claimant's counsel on January 31, 1969 requesting reinstatement of the matter on the docket for a hearing to determine the permanency.

It is necessary that the entire record be considered including the communications between the claimant and the carrier, and the Commission and the carrier, together with the pertinent decisions and awards herein.

After return to work the claimant (and at the carrier's request) was under the continuing attention of specialists: Dr. Coppola, neurosurgeon, and Doctors Carmines and Butterworth, orthopedists.

On December 4, 1967 the Commission upon appraisal of medical reports informing of the application of an arm cast in November 1967 wrote to the carrier regarding supplemental memorandum of agreement and possible reinstatement of compensation. The carrier replied on December 27, 1967 in part, "***it may be necessary for additional medical treatment to be performed** and if it is necessary for Mr. Price to miss any further time from work we will proceed accordingly." Thus it is indicated that any additional compensability would be routinely processed by customary memoranda of agreement.

Thereafter on Januray 4, 1968 the Commission again wrote the carrier requesting current medical reports. A report was received on January 15, 1968 (dated December 7, 1967), a copy of which had been sent by the doctor to the carrier.

Thereafter on February 13, 1968 the following report was forwarded by the doctor to the carrier and carrier's self-explanatory notation was made thereon:

"I am enclosing copies of my reports previously written regarding Mr. Price which will acquaint you with
page 20 } the details of his initial findings, diagnosis, treatment, etc. in this office.

"Mr. Price was last seen on January 3, 1968 at which time subluxation of the distal carpal bones could still be palpated. I felt that we should continue to observe this man for a longer period of time before deciding what course of treatment to follow, and I asked him to return in two weeks; however, he has not returned and I do not know what his progress is to date."

(Carrier's notation at bottom of Dr. Carmines report)

"Will attempt to have clmt. return to for further examination."

It is noted that the carrier was having the claimant continue with medical treatment. Moreover, as further disclosed by the carrier's letter to the claimant of February 21, 1968 reference was made to the claimant's return to Dr. Carmines "for a final examination or receive the necessary treatment required." Again on April 2, 1968 the carrier wrote Dr. Carmines, "We are still handling this matter under Workmen's Compensation." The carrier throughout had been directing the claimant to continue with the medical attention with which he fully cooperated.

On April 12, 1968 the Commission wrote to the carrier

with copy to the claimant advising of the approaching date of May 15, 1968 and concluding, "However, if there is any permanent disability, we assume that you will let us have the supplemental agreement along with the final report of Dr. Carmines." There was no response from the carrier. Significantly, the carrier did not advise the Commission or the claimant that it would not routinely process the matter by supplemental agreement.

On May 13, 1968 Dr. Carmines advised the carrier that he was continuing to attend the claimant and page 21 } that additional time would be needed with the possibility that a fusion might be later indicated.

Uncontradicted testimony of the claimant was that in December 1968 he again conferred with the carrier's representative advising that he was continuing with the medical treatment that they were requiring and, of course, continued to assert his claim for any benefits to which he might be entitled.

Moreover, there is no evidence even at that December 1968 conference that the carrier advised the claimant it was denying his claim or was changing from a position of mutual cooperation with the claimant to one of arms length legalistic dealing. In February of 1969, for the first time, the carrier advised the Commission that it was seeking to avoid responsibility for permanency benefits and asserting the statute of limitations.

The following medical reports contain the medical evaluations and sequence of medical events:

"May 13, 1968"

"Nationwide Insurance Co.
Post Office Box 1023
Newport News, Virginia

Re: Charles C. Price v. Sledge Contr.

"Dear Sirs:

Mr. Charles C. Price was last seen in my office on April 8, 1968. He still has complaints referrable to his right wrist and it is still approximately one-third larger than the other wrist.

"He was fitted with a molded leather cuff brace. Both my associates, Dr. Stanton and Dr. Powell have been consulted, and it was our feeling that if we could determine how well he could get along with his work with some stability of his wrist, we could get some idea as to whether or not a fusion might be indicated to stablize the right wrist at a later date.

He is working at the present time, and if we can
page 22 } keep him reasonably comfortable with a support,
we feel this should be done.

"There is no question in my mind that he had an injury to his right wrist as a result of a fall on April 21, 1967, and the changes that have taken place in the wrist are related to this. We feel he should be allowed to work and that within the next six to twelve months, we should be able to gain some definite impression as to what definitive treatment is indicated.

"Trusting that this will be helpful in the further management of this problem, I am,

Sincerely yours,

S/ F. A. Carmines"

"17 December 1968

"Dr. F. A. Carmines
311 Main Street
Newport News, Va. 23601

Re: Charlie C. Price
Emp: Jesse Sledge-Contractor
Hampton, Va.

"Dear Doctor:

"I saw Charlie C. Price to-day, the 16th of December, '68. His history is well known to you. The fact is that he was injured on the 20th of April '67, I believe, when he fell off a scaffold injuring his right wrist. It was quite painful, but he has since then returned to work and he is working now, but he says his arm is getting a little worse.

"Examination of this patient's right wrist shows this is swollen, all motions are restricted about 75% of the normal, except supination and pronation appear to be normal to me.

"I examined the original x-rays on this patient and some taken recently and I took some myself to-day and this man now has a degenerated type of arthritis of the entire wrist with calcium formation in lots of places and all of this, in my opinion, is due to trauma.

"I advised him that he would either have to continue as
he is for some time yet to come or have a fusion
page 23 } of his wrist. I don't believe any other surgery
would be beneficial. He elects at this time to continue as he is, hoping that he can get by without fusion, but it would be my opinion that this man has as a result of his

accident, a 25% loss of use of his arm, which may and in all probability progressively get a little worse.

"Trusting this is the information you desire,

Sincerely yours,

s/ R. D. Butterworth, M.D.

RDB/eb
copy to: Nationwide Insurance Co.
Box 1023, Newport News, Va."

"January 2, 1969

"Nationwide Insurance Co.
Post Office Box 1023
Newport News, Virginia

"Dear Sirs:

"Mr. Charles C. Price was in my office on December 13, 1968, still complaining of pain in his right wrist and it was still swollen.

"The question arose as to whether or not we should continue along on the present course, consider a fusion, or rate him for permanent disability. Therefore, he was referred to Dr. R. D. Butterworth and a copy of his report is enclosed.

"I agree completely with Dr. Butterworth's report. If Mr. Price does not desire the surgery, it will probably be wise to rate him for permanent loss of use of the arm, which would be approximately twenty five per cent. He may well get worse and require a fusion at a later date.

"Trusting that this will be helpful in the further management of this problem, I am,

"Sincerely yours

S/ F. A. Carmines, M.D."

Also significantly noted are the rating letters of both Doctors Butterworth and Carmines that went to the carrier by doctors' letters dated December 17, 1968 and January 2, 1969, which were not timely filed by the carrier with page 24 } the Industrial Commission, nor was a copy provided the claimant. These rating reports were not filed with the Commission until the actual time of the hearing. This estops the defendant carrier from avoiding its responsibility by asserting the statute of limitations. See

American Mutual, etc. v. *Hamilton,* 145 Va. 391; *Clinchfield Carb'l Corp.* v. *Kaiser,* 139 Va. 451.

Moreover, the carrier is in violation of the mandate in the Commission's original award requiring timely filing of the evaluation reports; and it is so found.

Accordingly, the following three bases, any one of which should suffice, support an award in favor of the claimant:

(1) The defendant carrier is estopped to plead the statute of limitation and will not be heard to so plead under the circumstances of the case at bar.

(2) The administrative procedure uniformly adhered to by responsible carriers is to routinely process by supplemental memoranda of agreement proven permanency ratings that clearly flow from admitted industrial injury regardless of the time of the doctor's rendition of rating and formal filing by employee. This is manifestly in accord with the purpose and spirit of the Virginia Workmen's Compensation Act. In this connection it is noted that frequently doctors for medical, time and various other reasons are unable to make the final rating evaluation until more than one year after the employee is back at work (and after last payment of compensation for temporary total incapacity).

(3) Moreover, the Commission retained jurisdiction over the rating aspect by the following provision contained in the original award (dated June 13, 1967):

"In view of the nature of the injury sustained by this claimant, before closing the file, we will require a
page 25 } final medical report covering the question of permanent disability."

Accordingly, we find that through the aforesaid provision in the original award the Commission retained jurisdiction over the rating aspect. Thus it is determined that no further application was essential to preserving the claimant's right to a proper rating award.

It is again reiterated that herein the proven permanency plainly resulted from and flowed directly from the admitted April 10, 1967 industrial injury.

AWARD

Accordingly, an award is entered in behalf of the claimant against the defendant providing for payment of compensation of $45.00 per week for fifty weeks beginning December 16, 1968 on account of 25% permanent partial loss of use of the right arm.

From the award the sum of $150.00 shall be deducted and paid to Randolph T. West, attorney, for legal services rendered the claimant.

The defendant's responsibility for the costs of related medical care is extended to the fully extended statutory limits.

page 26 } Charlie C. Price, Claimant

v. Claim No. 915-104 Opinion by Harwood, Commissioner

Dec 9 1969

Jesse Sledge, Employer
Nationwide Mutual Insurance Company, Insurer

Randolph T. West, Attorney at Law,
12352 Warwick Boulevard, Newport News,
Virginia 23606, for the Claimant.

Fred W. Bateman, Attorney at Law,
311 Main Street, Newport News, Virginia 23601,
for the Defendants.

Review before the full Commission at Richmond, Virginia, on October 15, 1969.

From a decision and award of May 9, 1969, the employer and its insurer have appealed, and this case is before the full Commission upon review.

A majority of the Commission is of the opinion that the employer and its insurer are estopped to plead the limitation provisions of §65.1-99, Code of Virginia, and, for that reason, the claimant is entitled to an award for fifty weeks on account of permanent loss of use of the right arm of 25%.

A majority of the Commission adopts the findings of fact and conclusions of law contained in the decision and award of May 9, 1969. The award appealed from is modified to provide that from compensation there shall be deducted and paid to Randolph T. West, Esq., $300.00 for legal assistance rendered the claimant.

As modified, the award appealed from is
Affirmed.

RPld, Jr.
T.M.M.
M.E. (dissent opinion)

page 27 } Charlie C. Price, Claimant

v.

Jesse Sledge, Employer
Nationwide Mutual Insurance Company, Insurer

Claim No. 915-104

Dec 9 1969

Randolph T. West, Attorney at Law,
12352 Warwick Boulevard, Newport
News, Virginia 23606, for the
Claimant.

Fred W. Bateman, Attorney at Law,
311 Main Street, Newport News,
Virginia 23601, for the Defendants.

Review before the full Commission at Richmond, Virginia, on October 15, 1969.

Dissenting Opinion by Evans, Commissioner.

This case is before the full Commission on review at the request of the employer who is aggrieved by the decision and award of the hearing Commissioner whereby claimant was awarded specific disability benefits for 25% loss of use of his right arm. The employer contends that the Industrial Commission was without jurisdiction in the matter by virtue of the provisions of §65.1-99, Code of Virginia.

A review of the record discloses that claimant sustained compensable injury on April 20, 1967, while employed by the defendant. He was paid temporary total disability benefits for work disability suffered between the date of injury and May 15, 1967. At that time he returned to work at his usual wage and executed an agreed statement of fact. The award of the Commission was terminated as of May 14, 1967.

After returning to work claimant continued to suffer complaints in his right wrist and continued under the care of physicians furnished him by the employer until early 1969 at which time the attending physicians concluded that the employee had suffered a 25% loss of use of his right
page 28 } arm by virtue of his industrial injury.

Section 65.1-99, Code of Virginia, provides as follows:

"Upon its own motion or upon the application of any party in interest, on the ground of a change in condition, the In-

dustrial Commission may review any award and on such review may make an award ending, diminishing or increasing the compensation previously awarded, subject to the maximum or minimum provided in this act, and shall immediately send to the parties a copy of the award. No such review shall affect such award as regards any moneys paid but no such review shall be made after twelve months from the last day for which compensation was paid, pursuant to an award under this act."

Following the execution of the agreed statement of fact, the Industrial Commission received no communication from the employee until January 31, 1969. At that time claimant, by counsel, first filed a claim for specific disability benefits provided under the Virginia Workmen's Compensation Law for residual disability in his right arm which flowed from his industrial injury of April 20, 1967.

May 14, 1967, was the last day for which compensation was paid under the award of the Industrial Commission. The application to reopen the claim was received by the Industrial Commission on January 31, 1969, a period of more than one year from the day for which compensation was last paid. The Industrial Commission is without jurisdiction to hear the matter unless it can be shown that claimant's failure to make a timely filing of his application was due to the fraud or misrepresentation of the employer or its insurance carrier.

Under date of April 12, 1968, the Industrial Commission directed a letter to the insurance carrier for the employer, sending a copy to the claimant, in which the following statement is made:

"A review of the file indicates that this claimant signed an agreed statement of fact form indicating that he returned to work on May 15, 1967. Under the provisions of §65-95 (now 65.1-99) of the Act, an injured employee has one year from the date for which compensation was last paid in which to file claim with the Industrial Commission. For this reason, we are sending the employee a copy of this letter page 29 } along with application for hearing which he may complete and file with the Commission prior to May 15, 1968, should satisfactory adjustment of the case not be made. However, if there is any permanent disability, we assume that you will let us have the supplemental agreement along with the final report of Dr. Carmines."

Claimant testified that he received a copy of this letter and

understood it. He further testified that he had been advised by a representative of his employer's workmen's compensation carrier that he could file a claim with the Industrial Commission within one year from the day for which he was last paid compensation. Claimant states that he contacted the workmen's compensation insurance carrier's representative on numerous occasions after undergoing medical examinations and that he did so for the purpose of keeping the insurance carrier apprised of his physical condition.

This record is devoid of any evidence tending to establish that the employee's failure to make a timely filing with the Industrial Commission to reopen his case was due to the fraud or misrepresentation of the employer or a representative of its workmen's compensation carrier.

In *Robinson* v. *Teer Company,* 45 O.I.C. 209 it was held that limitation of time is jurisdictional and jurisdiction of the Industrial Commission cannot be enlarged by "judicial inclination."

Proceedings under §65.1-99 must be begun within twelve months of the date for which compensation was last paid pursuant to an award of the Commission. See *Allen* v. *Mottley Construction Co.* 160 Va. 875, 170 S.E. 412, *Collins* v. *Stonega Coke and Coal Co.,* 37 O.I.C. 103, *Brinkley* v. *Department of Agriculture,* 49 O.I.C. 38.

The hearing Commissioner was of the opinion that the employer is estopped from setting up the statute of limitations as a defense to the claim by virtue of the insurance carrier's failure to file with the Commission doctors' letters dated December 17, 1968, and January 2, 1969. Both of these letters were drafted after the expiration of the one year page 30 } period from the date for which compensation was last paid and have no bearing on the issue as to whether or not the Industrial Commission has jurisdiction over the claim now presented.

The evidence in this case conclusively establishes that the claimant has suffered residual specific disability in his right arm by virtue of the industrial injury of April 20, 1967. However, the evidence is equally conclusive that the employee did not comply with the express provisions of §65.1-99, Code of Virginia 1950, as amended, and that his failure to comply was not due to fraud or misrepresentation on the part of the employer or his representatives.

Jurisdiction of the Industrial Commission in industrial claims is specifically set forth in §65.1-87 and §65.1-99, Code of Virginia 1950, as amended. The limitations imposed by these sections cannot be altered or enlarged by an administrative act of the Commission such as stamping an award to

require the filing of the final medical reports covering the question of permanent disability before closing the file.

I am of the opinion that the provisions of §65.1-99, Code of Virginia 1950, as amended, are applicable in the instant case. Accordingly, the decision and award of May 9, 1969, should be reversed and set aside and the claim dismissed from the docket on the grounds that the Industrial Commission is without jurisdiction.

M.E.
Dissent.

* * * * *

page 31 }

In the Supreme Court of Appeals of Virginia
Charlie C. Price, Claimant
vs.
Jesse Sledge,
Nationwide Mutual Insurance Company,
Employer Insurer

PETITION FOR APPEAL

To the Honorable Justices of the Supreme Court of Appeals of Virginia

Jesse Sledge, Employer and Nationwide Mutual Insurance Company, Insurer, Petitioners, represent that they are aggrieved by an award, of December 9, 1969, made by a majority of the members of the full Industrial Commission in the above styled claim for benefits under the Workmen's Compensation Act wherein your Petitioners appear as Employer and Insurer.

Your Petitioners assign the following errors:

1. The Industrial Commission erred in accepting jurisdiction of the claim over the Employer and Insurer's plea to the Statute of Limitation.

2. The Commission's finding as to estoppel is not supported by the evidence.

3. The Commission erred in finding that the Employer and the Insurer, by reason of alleged failure to timely file certain medical reports, was estopped to plead the Statute of Limitation in bar of the claim.

Therefore, your Petitioners pray that they be awarded an appeal from a decision of the majority of the full Industrial Commission and that the said decision of the majority of the

full Industrial Commission may be, by this Honorable Court, reviewed and reversed.

Jesse Sledge
Nationwide Mutual Insurance Company

By Fred W. Bateman
Their Counsel

Fred W. Bateman
311 Main Street
Newport News, Va. 23601

page 32 } I, Fred W. Bateman, Attorney at Law, and counsel for Jesse Sledge, Employer, and Nationwide Mutual Insurance Company, Insurer, with offices at 311 Main Street, Newport News, Virginia, 23601, do certify that I am duly qualified to practice in the Supreme Court of Appeals of Virginia, and that in my opinion the award complained of should be reversed.

Fred W. Bateman

INFORMATION PURSUANT TO RULES OF COURT

(a) The names of all appellants: Jesse Sledge, Nationwide Mutual Insurance Company

(b) Name and address of counsel for appellant: Fred W. Bateman, 311 Main Street, Newport News, Va. 23601

(c) Name of Appellee: Charlie C. Price

(d) Name and address of attorney representing appellee: Randolph T. West, 12352 Warwick Blvd., Newport News, Va. 23606

(e) This Petition is not adopted in lieu of an opening brief.

(f) Counsel for the appellant does not desire to state orally the reasons for granting the Petition.

(g) *Supersedeas* is not requested.

(h) Order is requested directing Clerk of Industrial Commission to include both the majority and dissenting opinion as a part of the record in this case.

Fred W. Bateman

I certify that I mailed/delivered a true copy of the foregoing pleading to each counsel of record on the 18 day of Dec., 1969.

Fred W. Bateman
Of Counsel for Jesse Sledge & Nationwide

page 33 } I, Helen G. Cooper, Secretary, Industrial Commission of Virginia, do hereby certify that the foregoing, according to the records of this office, is a true and correct copy of the Findings of Fact, Conclusions of Law and other matters pertinent to the questions at issue in Claim No. 915-104, *Charlie C. Price,* Claimant v. *Jesse Sledge,* Employer, Nationwide Mutual Insurance Company, Insurer.

Given under my hand and seal of the Industrial Commission of Virginia this 24 day of December, 1969.

Helen G. Cooper
Secretary, Industrial Commission
of Virginia

* * * * *

A Copy—Teste:

Howard G. Turner, Clerk.

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