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SUPREME COURT OF VIRGINIA
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IN THE

Supreme Court of Virginia

AT RICHMOND

Record No. 810727

STUART CIRCLE HOSPITAL
AND
AETNA CASUALTY & SURETY COMPANY,

Appellant,

v.

NANCY S. ALDERSON,

Appellee.

APPENDIX

Richard Cullen
McGUIRE, WOODS & BATTLE
1400 Ross Building
Richmond, Virginia 23219

Counsel for Appellant

Nancy S. Alderson
2506 Fleet Avenue
Richmond, Virginia 23228

Pro se

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Nancy S. Alderson
2506 Fleet Avenue
Richmond, Va. 23228
August 29, 1980
Ref: I.C. File #
679-410

Industrial Commission of Virginia
Department of Workmen's Compensation
p.o. Box 1794
Richmond, Virginia 23214

Dear Sir:

I, Nancy S. Alderson, wish to apply for a hearing with the Industrial Commission of Virginia, Department of Workmen's Compensation, due to the fact that permanent damage that I received as a result of my injury on March 28, 1977.

I feel this hearing is essential and necessary, since the Insurance Company feels that they have no further liability in this case.

Attached is a copy of the notice you forwarded to me.

RESPECTFULLY YOURS,

Nancy S. Alderson

NANCY S. ALDERSON

DOCKET FOR Richmond
DATE OF DOCUMENT 9/4/80
DATE RECEIVED 10/27/80
RETURNED TO DOCKET
BY

Appendix 1

September 15, 1980

File No. 679-410 Nancy S. Alderson vs Stuart Circle Hospital
Accident: 3-28-77

Ms. Nancy S. Alderson
2506 Fleet Avenue
Richmond, Virginia 23228

Dear Ms. Alderson:

We have your letter of August 29, 1980, wherein you are requesting a hearing in this case.

We have reviewed the file and find that the accident occurred on March 28, 1977, and under the provisions of the workmen's compensation law, an injured employee has two years from the date of injury in which to file a claim for weekly benefits and medical expenses resulting from an accident. The statutory period has expired and your letter, received September 4, 1980, is the first information we have had from you.

We regret that we are unable to assist you due to the running of the statute.

Very truly yours,

INDUSTRIAL COMMISSION OF VIRGINIA

Claims Assistant

V/lc

cc: Aetna Casualty & Surety Company
P. O. Box 25283
Richmond, Virginia 23260

Appendix 2

Nancy S. Alderson
2506 Fleet Ave.
Richmond, Va. 23228
September 25, 1980

Commonwealth of Virginia
Department of Workmen's Compensation
Industrial Commission of Virginia
P.O. Box 1794
Richmond, Virginia 23214
Att: Virginia Vaughan

Ref: File No. 679-410

Dear Ms. Vaughan:

I wish to appeal the decision of the Commission, in reference to the above case file number. On the basis of CODE 65.1-94, in chapter 7 of the Rules of the Commission of The Virginia Workmen's Compensation Act.

In reference to your letter of September 15, 1980, in which I was denied a hearing. I have a duplicate copy of the form which was filed by my employer, dated 5-3-77.

I appreciate your attention and cooperation in this matter.

SINCERELY,

Nancy S. Alderson

NANCY S. ALDERSON

Stuart Circle Hospital

June 5, 1980

G. F. Dollard, Supervisor
Casualty and Surety Division
Aetna Life and Casualty
P.O. Box 26283
Richmond, VA 23260

Dear Mr. Dollard:

In response to your June 3, 1980 letter to Ms. Elizabeth Lamb regarding the Workmen's Compensation claim of Nancy Alderson, I am returning the medical bills in question for reconsideration, since the statute you cite as a basis for denial (65.1-87) has been complied with in its entirety. The initial claim was filed with the Industrial Commission of Virginia at the time of the accident in 1977 (of which they have a copy) and has remained active ever since with the medical bills being paid periodically throughout the entire period.

My discussion with the Industrial Commission has confirmed my belief that this section applies to the initial filing of the claim and that there is no requirement that a petition to continue a claim as active beyond two years be filed with the Commission.

Accordinly, I hope you will take whatever steps are necessary to have these claims paid as soon as possible since Ms. Alderson has been most cooperative in undergoing whatever treatment has been prescribed with only a minimal amount of lost time. This claim could have been much greater than it has been had Ms. Alderson not been as diligent as she has been in trying to remain on her job.

Sincerely,

William H. Walters

William H. Walters
Director of Human Resources

WHW/erl

Appendix 4

415 Stuart Circle • Richmond, Virginia 23220 • (804) 358-7051

COMMONWEALTH OF VIRGINIA

(Refer to I.C. File No. in all correspondence about this injury.)

I.C. FILE NO. 679-410

CARRIER'S NO.

DEPARTMENT OF WORKMEN'S COMPENSATION
INDUSTRIAL COMMISSION OF VIRGINIA
P. O. BOX 1794 RICHMOND, VIRGINIA 23214

NOTICE OF HEARING

DATE OF ACCIDENT
March 28, 1977

RE: Nancy S. Alderson
v.
Stuart Circle Hospital

TO THE PARTIES ADDRESSED:

A hearing will be held at:

Industrial Commission Courtroom
Room 300 - Blanton Building
Governor & Bank Streets
RICHMOND, Virginia

on December 29, 1980 -at- 10:20 A.M.

SUBJECT OF HEARING

Claimant filed application
for hearing September 4, 1980
by letter.

This hearing is part of a schedule. Postponement will cause inconvenience and extra expense. Continuance is entirely within the discretion of the Commission except as otherwise provided by law.

All medical reports are to be submitted to this Commission so they can be placed in the file prior to the date of hearing. Medical reports are acceptable in lieu of physicians personal appearances.

The parties must arrange to have all witnesses present to testify at the time and place designated. Failure of any party to appear at the time and place herein prescribed will result in action by the Commission as provided by law.

INDUSTRIAL COMMISSION OF VIRGINIA
DEPUTY COMMISSIONER JERRY O. EALTON

Claimant

Ms. Nancy S. Alderson
2506 Fleet Avenue
Richmond, Virginia 23228

Employer

Stuart Circle Hospital

Fold

Insurance Carrier

Aetna Casualty & Surety Company
P. O. Box 26283
Richmond, Virginia 23260

Claimant's Counsel

Defendant's Counsel

John M. Oakey, Jr., Esquire
Ross Building
Richmond, Virginia [illegible]

Appendix 5

Date of this Notice
[illegible]

NANCY S. ALDERSON, Claimant

v. Claim No. 679-410

STUART CIRCLE HOSPITAL, Employer
AETNA CASUALTY & SURETY COMPANY, Insurer

Claimant appeared in person.

Mr. Richard Cullen,
Attorney at Law
Ross Building
Richmond, Virginia 23219
for the Defendants.

Hearing before Deputy Commissioner TALTON in Richmond, Virginia on December 29, 1980.

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

DEPUTY COMMISSIONER TALTON:

This is Claim 679-410, Nancy Alderson v. Stuart Circle Hosptial. Mr. Cullen has entered an appearance for the defendants. The claimant has appeared in person. The parties have stipulated the occurrence of an injury by accident arising out of and in the course of the employment on March 28, 1977. The claim is defended on the grounds that the present application is barred by the statute of limitations of Virginia Code §65.1-87 and it is further contended that any unpaid medical expenses are unrelated to the March 28, 1977 accident. Any other grounds of defense Mr. Cullen?

MR. CULLEN:

I would also, Your Honor state that we are relying on

all applicable statute of limitations other than the one so designated by statute number.

DEPUTY COMMISSIONER TALTON:

I'm unaware of any other but I would assume then that you also are raising the statute of limitation of §99 on grounds of a change in condtion were the Commission to find the payment of medical---to that an award of benefits?

MR. CULLEN:

Yes.

DEPUTY COMMISSIONER TALTON:

The Commission has just received a rather substantial number of medical reports, there were no other medical reports in the file at the time of today's hearing. They were filed by the claimant and the defendants with the Commission. There is no claim for loss of wages or period of lost time from work, is that correct?

MR. CULLEN:

That's correct sir.

DEPUTY COMMISSIONER TALTON:

The claim is only for medical expense?

MR. CULLEN:

Yes sir.

(Off the record)

NANCY S. ALDERSON, Claimant

BY DEPUTY COMMISSIONER TALTON:

Q Ms. Alderson, when was the first time that there were any

seetlement negotiations with you with regard to the accident of March 28, 1977?

(Off the record)

A When I received these papers from McGuire, Woods and Battle. There is no date on it.

Q When approximately was that?

A This was sometime the first part of--

MR. CULLEN:

August 21, 1980 Mr. Oakey wrote to Ms. Alderson enclosing proposed settlement papers August 21st.

Q You have incurred medical expenses related to the March 28, 1977 accident?

A Yes sir, on a continuous basis.

Q To your knowledge, what bills have been paid, have you personally received any bills for treatment?

A What bills I have received, yes sir, I have given them to our Personnel Manager which now handles all the employees workmen's comp and they have in turn forwarded them to Aetna.

Q To your knowledge, have any of the medical expenses related to the March 28, 1977 accident been paid?

A Yes sir, to Dr. Johnstone, to Dr. Raymond Adams, to Dr. Wright, to Dr. Clary I believe. All the medicine, various prescriptions I have been on since then have been paid by them and the physical therapy treatments they have me on.

Q Briefly if you would, tell us what took place on March 28, 1977.

A I was on the fourth floor of Stuart Circle Hospital and another nurse, Ms. Herbig and myself were working on a patient and I was at the foot of the bed and the nursing assistant came flying through the door and the type of handles we had on the doors at that time were the metal that curved out, caught me in the lower left flank of the spine and in my kidney area and set me across the room.

Q On what grounds do you contend that the statute of limitations has not run, what is your position with regard to the statute of limitations?

A Due to the physicians that I have seen and from their reports and all, they tell me that I have permanent intercostal nerve damage which is irreversible and it would be an on long process of time before they can alleviate the pain and the sensation that keeps coming from the block of the nerve ends.

Q Have you been hospitalized for this condition?

A No sir, except, let me back up sir, except in March of '80 when I was referred to another neurologist by Dr. Raymond Adams and they put me in for extensive tests to see if there was anything else that could possibly be done.

DEPUTY COMMISSIONER TALTON:

Mr. Cullen, have the defendants made payment for this period of hospitalization or is this one of the medical expenses in dispute?

MR. CULLEN:

It's my understanding that the dispute is for medical bills in 1980, is that your understanding?

A Yes sir. I should say from March of 1980, everything prior to this has been paid to the best of my knowledge.

Q The Commission notes that you could not file an application until a period of time more than two years subsequent to the occurrence of the industrial accident, why did you not file the application within two years from the accident?

A Because according to what Ms. Boyle told me that Ms. Miller told her from Aetna, we had filed everything that we had to, other than that, I knew nothing. How are you supposed to know if your representative doesn't tell you what to do. I mean, I'm just asking because I don't really know.

Q You're speaking with regard to the employer?

A Employer or your representative, which Aetna was our representative at the time.

Q Was there any other conduct which caused you to delay filing your application?

A No sir, if I would have known I was supposed to file something, I would have filed it.

DEPUTY COMMISSIONER TALTON:

Mr. Cullen.

BY MR. CULLEN:

Q Ms. Alderson, is the disputed bill the March 1980 M. C. V. Hospital Dr. Young's bill, is that what's in dispute?

A Dr. Harold Young's bill, Dr. Rafii's bill, all this is from M. C. V. which I am still under there care.

Q You went to see them in 1980?

A That's when I was sent to them, yes sir.

Q Did anybody tell you not to file the claim, did anybody advise you not to file anything with the Industrial Commission?

A Nobody didn't advise me not to but nobody advised me to.

Q If this is improper sir, strike it, is there additional insurance available to you through your employer?

A They carry hospitalization on us but it is my understanding that they will not cover the entire thing if they accept it at all.

Q I don't understand if they accept it at all, what do you mean?

A All I know is what I have been told, you know, I mean that's all I have to go by. They say they could petition the insurance company that have our hospitalization but they don't know if they will accept it since it was a workmen's compensation thing and they said if they did, I think they would pay 80 percent of it or something, if they accept it, that's all I know.

MR. CULLEN:

That's all I have.

DEPUTY COMMISSIONER TALTON:

Is there anything else you would like to tell us at this time?

A No sir, other than what the physicians have told me. That it's just a prolonged thing, they can't give me a definite time limit. They have hooked up to a TENS unit which I wear almost 24 hours a day, seven days a week except when I'm in the shower.

Q Nerve stimulator?

A Yes sir and I take acupuncture treatments every two to three weeks.

MR. CULLEN:

Could I ask a couple of more questions?

DEPUTY COMMISSIONER TALTON:

You may.

BY MR. CULLEN:

Q Ms. Alderson, when you went to see Dr. Young and Rafii somewhere around March of 1980, when was the last time you had been to a doctor prior to that?

A It was in 1980, Dr. Raymand Adams is the one that--

Q Dr. Adams was immediately prior to Dr. Young?

A Yes sir.

Q Do you remember when you saw Dr. Adams last before Young?

A Well, let's see, there's a letter---

(Off the record)

A Here's a letter where he first referred to going to the pain clinic in Charlottesville, that was in September of '79. To give you an exact as to when my last visit was, I really would not know.

Q Was there a gap of time between when Dr. Adams advised you to go to the pain clinic until you actually went, a substantial gap of time over a month?

A It might have been.

Q Can you find anything other than the letter of referral of September '79 that you just referred to?

(Off the record)

BY DEPUTY COMMISSIONER TALTON:

Q ---tell us, now is the time to do so.

A No sir, like I said, the only thing is I feel like that I shouldn't be responsible for the medical bills, I feel like they should be since it was incurred in working. It has been an on continuous thing. First one doctor sent me to the other one and this one has tried this and that and they've all come up basically with the same diagnosis.

Witnesses dismissed.

Case concluded.

VIRGINIA:
IN THE INDUSTRIAL COMMISSION

NANCY S. ALDERSON, Claimant

FEB 9 1981

v. Claim No. 679-410

Opinion by TALTON,
Deputy Commissioner

STUART CIRCLE HOSPITAL, Employer
AETNA CASUALTY & SURETY COMPANY, Insurer

Claimant appeared in Person.

Richard Cullen, Esq.
Ross Building
Richmond, Virginia 23219
for the Defendants.

Hearing before Deputy Commissioner TALTON at Richmond, Virginia, on December 29, 1980.

This case is before us on the application of the claimant, filed September 4, 1980, alleging injury by accident arising out of and in the course of employment on March 28, 1977.

The claim is defended on the grounds that it is barred by the jurisdictional time limitation of Virginia Code §65.1-87 and on the additional basis that the claimed medical expenses are unrelated to the injury at work.

The defendants stipulate that on March 28, 1977, the claimant sustained an injury by accident arising out of and in the course of her employment with the Stuart Circle Hospital when she sustained a contusion to the area left of an upper lumbar verterbrae.

There was no contention by Mrs. Alderson that she is entitled to temporary total incapacity benefits for a loss of wages. She claims only medical expenses related to the industrial accident.

The record reflects that the defendants have paid all of the employee's medical expenses incurred prior to March 28, 1979. Also of interest is a June 5, 1980 letter from the employer to the insurance carrier which reads as follows:

"In response to your June 3, 1980 letter to Ms. Elizabeth Lamb regarding the Workmen's Compensation claim of Nancy Alderson, I am returning the medical bills in question for reconsideration, since the statute you cite as a basis for denial (65.1-87) has been complied with in its entirety. The initial claim was filed with the Industrial Commission of Virginia at the time of the accident in 1977 (of which they have a copy) and has remained active ever since with the medical bills being paid periodically throughout the entire period.

My discussion with the Industrial Commission has confirmed my befief that this section applies to the initial filing of the claim and that there is no requirement that a petition to continue a claim as active beyond two years be filed with the Commission.

Accordinly, I hope you will take whatever steps are necessary to have these claims paid as soon as possible since Ms. Alderson has been most cooperative in undergoing whatever treatment has been prescribed with only a minimal amount of lost time. This claim could have been much greater than it has been had Ms. Alderson not been as diligent as she has been in trying to remain on her job."

By making payment of all medical expenses related to the March 28, 1977 industrial accident through March 28, 1979, the insurance carrier eliminated the necessity that the employee request a hearing until the limitation period of Virginia Code §65.1-87 had ostensibly expried. While there does not appear to have been any bad faith on the part of the insurer, its conduct lulled this employee into a false sense of security and created an expectation that all medical bills related to the industrial accident would be paid.

The Industrial Commission is clothed with the full powers of a court of equity. *Ashby v. Red Jacket Coal Corporation*, 185, Va. 202, 206-7, 38 S.E. 2d 436, 438 (1946) citing, *Harris v. Diamond Construction Company*, 184 Va. 711, 721, 36 S.E. 2d 573. In *Equity Jurisprudence* Justice Story discusses constructive frauds which:

> (a)lothough not originating in any actual evil design or contrivance to perpetrate a positive fraud or injury upon other persons, are yet, by their tendency to deceive or mislead other persons, or to violate private or public confidence, or to impair the public interests, deemed equally reprehensible with positive fraud ... they are chiefly prohibited, because they operate substantially as a fraud upon the private rights, interests, duties, or intentions of third persons, or unconscientiously compromit or injuriously affect,

the private interests, right, or duties of the parties themselves. Chapter VII, *Constructive Fraud*, §§258-9."

The term "constructive fraud" is in reality a misnomer because it is not necessary that there be any bad faith or intent to deceive.

In the case at bar the claimant was operating under a misapprehension; i.e. that all medical bills related to the accident would be paid. This belief was created by the two year course of conduct of the insurance carrier in paying all medical expenses incurred prior to March 28, 1979. Considerations of fundamental fairness and of public policy dictate that this employee should not be deprived of medical care related to an industrial accident where the defendants have acknowledged their responsibility for medical expenses over so long a period of time.

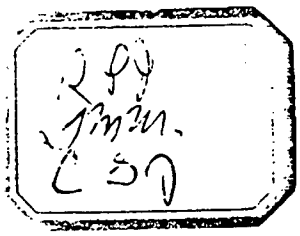
This is not to say that payment of a single medical bill precludes an employee from relying upon the time limitation of Virginia Code §65.1-87 (although the great majority of states have adopted this rule on the theory that the furnishing of any kind of benefit required by compensation law indicates an acceptance of liability. *See Larson, Workmen's Compensation*, §78.43(b) 15-121-7 and particularly n.98.) The conduct of the defendant in the present case constitutes a waiver of their right to rely upon the time limitation of Virginia Code §65.1-87 because it created the reasonable belief by the claimant that all medical expenses related to the accident would be paid. It should also be noted that there is nothing inconsistent with this holding and the decision of the Supreme Court of Virginia in *Meade v. Clinchfield Coal Company*, 215 Va. 18 (1974) inasmuch as the latter case involved the question of whether or not payment of medical expenses constituted payment of "compensation" as the term is defined in Virginia Code §75.1-99. In *Meade* the employee was already under an award for medical expenses, and it is clear that such payments have no effect on the limitation period for claiming weekly benefits for a loss of wages or permanency. The holding of the Commission in the instant case is grounded solely upon longstanding principles of

equity and of public policy. The Industrial Commission has the jurisdiction and responsibility to do full and complete justice in each case, and the equities are with this employee.

An award is hereby entered on behalf of Nancy S. Alderson against the defendants for all reasonable and necessary medical attention related to the March 28, 1977 industrial accident, including the cost of her hospitalization in March of 1980.

The case is ordered removed from the hearing docket.

VIRGINIA:
IN THE INDUSTRIAL COMMISSION



NANCY S. ALDERSON, Claimant

v. Claim No. 679-410

Opinion by JOYNER, Chairman

APR 7 1981

STUART CIRCLE HOSPITAL, Employer
AETNA CASUALTY & SURETY COMPANY, Insurer

Richard Cullen, Esquire
1400 Ross Building
Richmond, Virginia 23219
for the Defendants.

REVIEW before the Full Commission at Richmond, Virginia, on April 1, 1981.

This claim is before the Full Commission for review of the opinion of February 9, 1981, finding that the employer was estopped to rely upon the statute of limitation set forth Section 65.1-87, awarding medical benefits as the result of injury suffered by industrial accident on March 28, 1977.

Injury by industrial accident on March 28, 1977, is stipulated. All related medical expenses were paid from that date through March 28, 1980, [Tr.5]. [Aetna Casualty letter of 6/3/80]. Thereafter, the employer declined further payment of medical expenses upon the grounds that the claimant had not applied for hearing nor had there been an award entered by the Industrial Commission in this case before the statute of limitations expired on March 28, 1979, one year earlier. The Deputy Commissioner's holding that the employer was estopped to rely upon the two-year statute of limitation was based upon the claimant's testimony [Tr.5] that she had not filed within the two-year period

". . . because according to what Mrs. Boyle told me that Mrs. Miller told her from Aetna, we had filed everything we had to, other than that, I knew nothing. . ." The claimant's testimony in this regard is corroborated by the letter of William H. Walters, Director of Human Resources, Stuart Circle Hospital, of June 5, 1980. Upon being advised by the carrier by letter dated June 3, 1980, that the two-year statute of limitations had expired, Mr. Walters responded in part that:

> ". . .I am returning the medical bills in question for reconsideration, since the statute you cite as a basis for denial [65.1-87] has been complied with in its entirety. The initial claim was filed with the Industrial Commission of Virginia at the time of the accident in 1977. . ."

The claimant's testimony [Tr.5] that ". . .we had filed everything we had to . . ." is verified by the employer. It would appear from this testimony that the claimant had been led by the employer and, perhaps by the insurance carrier, to believe that everything required to protect her claim had been done by the employer. It would further appear from the record that the employer was under this impression, lending credance to the claimant's testimony. Moreover, there was no report by the carrier filed with the Industrial Commission indicating payment of medical expenses exceeding $500.00. The filing of this report would have caused the Commission to notify the claimant of the pertinent time limitations.

The Full Commission, upon review, is therefore of the opinion and finds that the employer is estopped to rely upon the statute of limitations set forth in 65.1-87 and that the employer should be responsible for the cost of all medical treatment rendered the claiman which is related to injuries suffered by industrial accident on March 28, 1977, as well as any disability or wage loss which may be related to these injuries. The opinion appealed from is AFFIRMED.

VIRGINIA:
IN THE INDUSTRIAL COMMISSION

NANCY S. ALDERSON, Claimant

v.

CLAIM NO. 679-410

STUART CIRCLE HOSPITAL, Employer
AETNA CASUALTY & SURETY COMPANY, Insured

NOTICE OF APPEAL

Notice is hereby given that the employer-insurance carrier, Stuart Circle Hospital-Aetna Casualty and Surety Company, by counsel, appeal from a final judgment rendered by this Commission on April 7, 1981 and received on April 8, 1981 and state their intention to file their Petition for appeal to the Supreme Court of Virginia and further states that the employer-carrier challenge the findings of the Commission as being contrary to the law and the evidence.

A transcript of the evidence is to be filed hereafter.

STUART CIRCLE HOSPITAL
AETNA CASUALTY & SURETY COMPANY

BY: _____
Of Counsel

Richard Cullen
McGUIRE, WOODS & BATTLE
1400 Ross Building
Richmond, Virginia 23219
(804) 644-4131

CERTIFICATE

I hereby certify that a true and exact copy of the foregoing Notice of Appeal was mailed, postage prepaid, to Nancy S. Alderson at 2506 Fleet Avenue, Richmond, Virginia, 23228, on this 22 day of April, 1981.

Richard Cullen

Richard Cullen

Filed 4-22-81 MWR

ASSIGNMENTS OF ERROR

1. Mrs. Alderson's claim was barred by § 65.1-87 of the Code of Virginia and the Commission's award of the payment of medical bills and compensation was in error.

2. The Commission erred in holding the employer-carrier are estopped from relying or or have waived the limitation in § 65.1-87.

3. The Commission ruling that Mrs. Alderson is entitled to "any disability or wage loss which may be related to these injuries" granted her relief she did not seek, and which was not in controversy. That ruling was in error.