Workmen's Compensation Act — Industrial Accident Board, Notice To—Discretion Exercised By.

Where a person receives an accident and fails to give notice to the Industrial Accident Board thereof, recovery of compensation is barred, though the board should exercise its discretion whether compensation should be allowed.

Helena, Montana, January 5, 1920.

Hon. A. E. Spriggs,
Chairman Industrial Accident Board.
Dear Sir:

You have submitted to me files and records in the case of Peter A. Stevens, for whose death his widow has presented a claim for compensation. The facts in this case are as follows:

Mr. Stevens, while in the employ of the Auerbach Mining Company at Philipsburg, suffered accidental injury in the course of his employment on May 20th, 1918, consisting of a fracture of the fourth and fifth ribs, from which injury he was supposed to have gradually recovered. He continued in the employ of this company until they were succeeded by the Butte & Plutus Mining Company, in whose employ he continued until April, 1919, when he entered the Murray Hospital at Butte, where he gave the history of his case to the attending physicians, who examined him and found a growth involving the lung and liver. About a month following this treatment Mr. Stevens went to Blackfoot, Idaho, where he was examined by a Dr. Mitchell, who diagnosed his case as "cancer of the liver and lung, caused by the injury to his chest and rib, in May, 1918." Later Mr. Stevens went to Salt Lake City, where he entered Mr. Marks Hospital, and was examind by Drs. Caselman and Jellison. These physicians were also of the opinion that the cancerous growth was due to the injury to the chest and ribs sustained by Mr. Stevens in May, 1918. Mr. Stevens died September 12th, 1919, and some time thereafter a claim was presented to the board by his widow for compensation, alleging that the proximate cause of his death was the injury above referred to.

No notice of the injury was given the Industrial Accident Board by Mr. Stevens, or by anyone on his behalf, at any time. It appears, however, that his employer was well aware of the occurrence of the accident at the time that it occurred, and that he excused his failure to notify the Industrial Accident Board, as required by Section 17 (h) of the Compensation Act, as he states for the reason that he was of the opinion that it was the duty of the attending physician or hospital doctor to give this notice.

The quesion presented is: was there sufficient notice of the accident, and has there been a claim for compensation made within the time required by the provisions of the Act?

Section 17 (g) provides:

> "No claim to recover compensation under this Act, for injuries not resulting in death, shall be maintained unless within sixty days after the occurrence of the accident which is claimed to have caused the injury, notice in writing, stating the name and address of the person injured, and the time and place where the accident occurred; signed by the person injured, or someone on his behalf, shall be served upon the employer or the insurer; providing, however, that actual knowledge of such accident and injury on the part of the employer shall be equivalent to such service."

In proceedings under the Massachusetts Act, it appears that no notice of injury was given in accordance with the provisions of the Act, but it was found by the Commissioner of Arbitration "that the report of the injury was made by the employer." The Court said: "The fact that the report of the injury was made by the employer is amply sufficient to warrant a finding that the subscriber had knowledge of the injury in accordance with Part 2, Section 18."

In re Mattewson, 227 Mass. 470.

In proceedings for compensation under the Maine Act it has been held that a foreman who had complete supervision of the employes is an agent of the employer whose knowledge of the injury to the employee obviates the necessity of giving written notice thereof.

In re Simons, Me. 103, Atl. 368.

An employee, while in the course of his employment, slipped and fell while dumping red lead from a keg. On January 14th, the deceased did not come to work. Deceased's brother told the foreman of the injury, and the deceased was then in the hospital. The foreman went to the hospital where the deceased related his injuries to him. The foreman asked the deceased why he did not report the injury to him at the time. and the deceased replied that he did not think the injury would amount to anything. Affirming a judgment of the District Court granting compensation, the Court held that the verbal report of the injury given to the foreman satisfied the provisions of the Act regarding notice.

Texas Employers Ins. Assn. vs. Mummey, 200 S. W. 251.

It would thus appear from the foregoing, and from the provisions of Section 17 (g), that actual knowledge by the employer, of the injury, disposed with the service of notice.

Section 10 (s) of the Workmen's Compensation Act provides: "In case of personal injury or death, all claims shall be forever barred unless presented within six months from the date of the happening of the accident." This section was amended March 4th, 1919, to require the claim to be presented in writing under oath to the employer or insurer or the Board, as the case may be, within six months from the date of the happening of the accident. It will be observed that Section 10 (a) as it was originally, does not designate to whom the claim should be presented. However, from the amendment as it now appears, and from the provisions of Section 17 (g), I am of the opinion that the claim might have been presented to the employer. It will be observed that there is a distinction between giving notice of injury and making claim for compensation.

In proceedings under the Nebraska Compensation Act, it appeared that the employer had knowledge of the injury to the employee, but that no claim for compensation had been made by the employee within six months as provided by the statute limiting the time within which claim might be made. The statute requires "that notice of the injury shall be given as soon as perceptible after the happening thereof." It was argued by the plaintiff that the statute made no distinction between "giving notice of injury" and "making claim for compensation," and that notice was unnecessary where the employer had knowledge of the injury, therefore in such case no claim need be made. The Court held that the giving of notice of the injury and the making of claim for compensation were distinct and separate prerequisites of bringing an action for compensation. This, the Court said, is a statute of limitations, telling the claimant having a valid claim within what time he must prosecute it, if at all.

Good vs. City of Omaha, 168 N. W. 639.

In proceedings under the Michigan Workmen's Compensation Act, evidence tended to show that a piece of steel entered claimant's eye November 19th, 1914, and that he filed a claim for compensation on February 3rd, 1917. From the time of the accident to the time of the hearing, claimant had been continuously employed by the defendant with the exception of a few days after the accident, and for a period of about a month when he was operated on, a short time before he made his claim. It appeared that he

had lost the use of his eye, and had had a serious operation, which together with the physician's services had been paid for by the defendant. The only question involved in the case related to compensation under Section 10, part 2, and whether the claim was made seasonably. The defendant insisted to the arbitrators and before the board that the claim which was made more than two years after the accident was barred by Section 15, part 2, requiring notice of claim within six months. Vacating award, the Court said: "The plaintiff's counsel insists that the employer had full knowledge of the accident and resultant injury; that he continued in this employ under its observation; and that he is required under the Act to do no more than he has done. It is undoubtedly true that this record discloses such knowledge of the accident and injury by employer, as to justify and, in fact, require the board to find that the employer had notice of the injury, but the section above referred to requires not only notice of injury but also claim for compensation, one to be given within three months, and the other to be given within six months after the occurrence of the injury. We have recently held that the claim for compensation must be an unequivocal one. Baase vs. Coal Co., 202 Mich. 57. Upon this record there is no evidence that such a claim for compensation was made until February 3rd, 1917."

In Hubert vs. Lake Shore Ry. Co., 200 Mich. 566, deceased had suffered hernia from severe strain. This condition was called to the attention of the claim agent who advised him to have an operation performed. This he did, but owing to his physical condition, lobar pneumonia developed, and he died January 25th, 1916. Subsequently a claim for compensation was lodged with the accident board, in which the date of the accident was given as November 8th, 1914. The claim was allowed on the theory that the company had knowledge of the injury, but was set aside on *certiorari* on the ground that there was no evidence that the employer had actual knowledge of the injury. It will be observed that the Michigan statute used the word "injury" while our statute uses the word "accident." Under the Michigan statute an injury might not be sufficient at the time it occurred to incapacitate the employee from his work, but subsequently might develop, as in the case of Mr. Stevens, into something of a serious nature which would ultimately result in his death, and in this case the injury would not be considered to have occurred until it had developed sufficiently that the employee would have knowledge of it. Under our Compensation Act this does not appear to be the case, but that the time of notice is made to date from the time of the happening of the accident.

This case presents a difficult situation. There is no question but that the employee was injured in the course of his employment; that the employer had notice thereof, and that under any ordinary circumstances he would have been entitled to compensation without question had his claim been presented within the required time. This he did not do for the reason that he was still able to continue his work notwithstanding the injury, and that he was not aware of the serious nature of the injury and the result which it ultimately occasioned. The Compensation Act has always received a liberal interpretation for the protection of injured

employes, and while under a strict construction of Section 10-A, I am of the opinion that the claim is barred, still the board might in its discretion, grant some compensation.

I am returning the letters and giles to you herewith.

Respectfully,
S. C. FORD,
Attorney General.