2011 IL App (3d) 100288WC-U

No. 3-10-0288WC

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

RICHARD NORTON,	)	Appeal from the
	)	Circuit Court of
Appellant,	)	LaSalle County.
	)	
v.	)	
	)	No. 09-MR-104
THE ILLINOIS WORKERS'	)	
COMPENSATION COMMISSION *et al.*	)	
(Tri-City Employment, Sungro Company and	)	
Zurich North America,	)	Honorable
	)	James A. Lanuti,
Appellees).	)	Judge, presiding.

JUSTICE STEWART delivered the judgment of the court.
Presiding Justice McCullough, and Justices Hoffman and Hudson concurred in the judgment. Justice Holdridge dissented.

ORDER

¶ *1* *Held:* The Commission did not err in finding that the claimant's amended application did not relate back to his original application pursuant to section 2-616(d) of the Code of Civil Procedure.

¶ 2 The claimant, Richard Norton, appeals from a decision of the circuit court of LaSalle County which confirmed a decision of the Illinois Workers' Compensation Commission (Commission). The Commission affirmed and adopted the arbitrator's dismissal of the claimant's amended application for adjustment of claim as barred by the statute of limitations, section 6(d) of the Illinois Workers' Compensation Act (Act) (820 ILCS 305/6(d) (West 2008)). We affirm.

¶ 3 BACKGROUND

¶ 4 The facts pertinent to this appeal are essentially undisputed. On December 19, 2000, the claimant filed an application for adjustment of claim against Tri-City Employment (Tri-City) alleging that he injured his back on July 7, 2000. No compensation has been paid to the claimant. While the case was pending, Tri-City's insurer, Legion Indemnity Company (Legion), entered insolvency proceedings causing the claim against Tri-City to be stayed. An order of liquidation, lifting the stay, was entered on April 9, 2003, and the Illinois Insurance Guaranty Fund (Guaranty Fund) accepted Legion's responsibilities as the insurer of Tri-City under the Illinois Insurance Guaranty Fund Act (Guaranty Fund Act). 215 ILCS 5/532 *et. seq.* (West 1987). On October 12, 2005, the claimant filed an amended application for adjustment of claim, alleging the same date of accident and the same injury, but adding "Sungro Horticulture" as an additional employer. On November 15, 2005, the claimant filed a second amended application for adjustment of claim for the same injury naming "Zurich American" as a respondent in addition to Tri-City and "Sungro Company."

¶ 5 Two of the respondents, Sungro Company (Sungro) and Zurich North America (Zurich), filed a motion to dismiss the second amended application, alleging that, on the date of the accident, the originally-named respondent, Tri-City, was the claimant's loaning

employer; that Sungro was the borrowing employer; and that Zurich was the workers' compensation insurance carrier for Sungro. Sungro and Zurich alleged that the second amended application should be dismissed because the claimant had failed to file his claim against them before the expiration of the three-year statute of limitations on July 7, 2003, as required by section 6(d) of the Act. 820 ILCS 305/6(d) (West 2008).

¶ 6 The claimant filed a response to the motion to dismiss, alleging that, on July 7, 2000, he was an employee of Tri-City and was performing work for Sungro. He argued that, pursuant to section 1(a)4 of the Act, "the liability of loaning and borrowing employers is joint and several," such that "if one party does not provide benefits to the employee under the Act the other party is liable to pay benefits." He further alleged that, "sometime in or around the year 2002, a bankruptcy order stayed all court action on this matter." He asserted that he did not receive notice that the stay had been lifted "until late 2004, and thus could not and had no reason to amend the Application until this time."

¶ 7 On April 26, 2006, the arbitrator conducted a hearing on Sungro's and Zurich's motion to dismiss. They argued that the arbitrator should dismiss the amended application because the claimant did not file it until after the statute of limitations had expired. They acknowledged that Sungro, as a borrowing employer, was jointly and severally liable with Tri-City for the claimant's work injury. However, they argued that the status of having joint and several liability merely gave the claimant the right to file his application against both employers but did not absolve him from the requirement of filing an application against Sungro within the statute of limitations. Sungro and Zurich argued that the bankruptcy stay against Legion did not prevent the claimant from filing a separate claim against them. They noted that, even if the bankruptcy stay had precluded the claimant from filing an application against them, that stay was lifted almost three months

before the expiration of the statute of limitations, allowing the claimant adequate time within the statute of limitations to file the application.

¶ 8 Tri-City acknowledged that the Guaranty Fund had accepted the rights and responsibilities of Legion and that the Guaranty Fund would meet its responsibilities under the Guaranty Fund Act. Counsel asserted, however, that the Guaranty Fund Act requires that a claimant exhaust all coverage provided by any other insurance policy for the same injury before payment is made from the Guaranty Fund. In the claim against Tri-City, the Guaranty Fund intends to assert the failure of the claimant to file his claim against Sungro within the statute of limitations as a failure to exhaust insurance coverage under the Guaranty Fund Act.

¶ 9 The claimant argued that there was nothing in the Act that required him to file anything against Sungro in addition to his application against Tri-City. He contended that his application against Sungro related back to his original, timely-filed application against Tri-City because the two employers were jointly and severally liable for his injuries under section 1(a)4 of the Act. He added that, since the second amended application would relate back to the original application, the statute of limitations in section 6(d) of the Act "does not even apply."

¶ 10 The arbitrator entered his decision on December 12, 2007. He found that "the doctrine of relation back does not apply under the facts herein as a matter of law" and dismissed Zurich and Sungro from the claimant's on-going case against Tri-City. The Commission affirmed and adopted the arbitrator's decision, and the circuit court confirmed the Commission's decision. This appeal followed.

¶ 11 ANALYSIS

¶ 12 The Commission's decision affirming the arbitrator's grant of the motion to dismiss

filed by Sungro and Zurich presents a question of law that we review *de novo*. *Hagemann v. Illinois Workers' Compensation Comm'n*, 399 Ill. App. 3d 197, 207, 941 N.E.2d 878, 886 (2010). Resolution of whether the Commission properly affirmed the dismissal involves interpretation of the statutes upon which the parties base their arguments. That review is also *de novo*. *City of Chicago v. Industrial Comm'n*, 331 Ill. App. 3d 402, 403, 770 N.E.2d 1208, 1209 (2002). Our interpretation of the statutes and the administrative regulation at issue is "guided by certain well-established principles of statutory construction." *Lulay v. Lulay*, 193 Ill. 2d 455, 466, 739 N.E.2d 521, 527 (2000).

> "The cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature. [Citations.] The best evidence of legislative intent is the language used in the statute itself, which must be given its plain and ordinary meaning. [Citations.] The statute should be evaluated as a whole, with each provision construed in connection with every other section. [Citations.] Further, in construing a statute, a court is not at liberty to depart from the plain language of the statute by reading into it exceptions, limitations, or conditions that the legislature did not express. [Citations.] Where the statutory language is clear and unambiguous, it will be given effect without resort to other aids of construction." *Id.*

¶ 13 Applying the above principles, we first consider section 6(d) of the Act, which provides, in relevant part, as follows: "unless the application for compensation is filed with the Commission within 3 years after the date of the accident, where no compensation has been paid, *** the right to file such application shall be barred." 820 IlCS 305/6(d) (West 2008). If we were to consider no other provision, our task would end here because the record is clear that neither Sungro nor Zurich were made parties to this claim until more than five years after the claimant's injury, long after the expiration of the Act's statute of limitations.

Accordingly, under section 6(d) of the Act, the claimant's application against Sungro and Zurich is barred. However, we will also address the claimant's other arguments.

¶ 14 The claimant argues that, because he filed his original application against Tri-City within the statute of limitations, his subsequently filed amended application against Sungro and Zurich relates back to the original date of filing so that the statute of limitations does not bar the claim against Sungro and Zurich. He claims that the Commission's rules allow an amendment which names additional parties respondent after the statute of limitations has run so long as the amended application is filed under the original case number before a hearing on the merits. See 50 Ill. Admin. Code §7020.20(e) (1991) (applications for adjustment of claims can be amended prior to a hearing on the merits by filing an amended application under the letter and number assigned to the original claim). The claimant does not argue that he filed the amended application against Sungro or Zurich within the statute of limitations, and he does not address the right of Sungro and Zurich to affirmatively defend the action against them by claiming the statute of limitations as a bar. See *Eschbaugh v. Industrial Comm'n*, 286 Ill. App. 3d 963, 964-65, 677 N.E.2d 438, 440 (1996) (section 6(d) of the Act is a statute of limitations that is raised by a defendant as an affirmative defense).

¶ 15 The administrative rules governing the filing of workers' compensation claims allow amendments to be filed, but those rules do not preclude respondent employers from claiming the statute of limitations as an affirmative defense. Where an administrative rule conflicts with the Act, the Act prevails. See *Greaney v. Industrial Comm'n*, 358 Ill. App. 3d 1002, 1026, 832 N.E.2d 331, 352-53 (2005). Under the claimant's argument, the Act's statute of limitations would have no application or effect any time a claimant filed an amended application against an entirely new respondent so long as the amendment was filed under the same case number and before a hearing on the merits. That argument does not account for

the effect of section 6(d) of the Act, and is, accordingly, meritless.

¶ 16 The claimant's main argument for avoiding the bar of the statute of limitations depends on the application of section 2-616(d) of the Code of Civil Procedure. 735 ILCS 5/2-616(d) (West 2002). We note initially that provisions of the Code of Civil Procedure and the Supreme Court Rules do not generally apply to workers' compensation proceedings to the extent that a provision of the Act regulates the proceeding. See *Illinois Institute of Technology Research Institute v. Industrial Comm'n*, 314 Ill. App. 3d 149,154, 731 N.E.2d 795, 800 (2000) (*Illinois Institute*), quoting *Elles v. Industrial Comm'n*, 375 Ill. 107, 113, 30 N.E.2d 615, 618 (1940). However, in *Illinois Institute*, the court determined that section 2-616(d) could be applied to the facts of that workers' compensation appeal because neither the Act nor the administrative rules fully covered the issues involved in that case. *Illinois Institute*, 314 Ill. App. 3d at 155, 731 N.E.2d at 801. Although we find section 2-616(d) unhelpful to the claimant, we find nothing in the Act to prevent its application under proper circumstances.

¶ 17 Section 2-616(d) of the Code of Civil Procedure provides as follows:

> "(d) A cause of action against a person not originally named a defendant is not barred by lapse of time under any statute or contract prescribing or limiting the time within which an action may be brought or right asserted, if *all* the following terms and conditions are met: (1) the time prescribed or limited had not expired when the original action was commenced; (2) the person, within the time that the action might have been brought or the right asserted against him or her plus the time for service permitted under Supreme Court Rule 103(b), received such notice of the commencement of the action that the person will not be prejudiced in maintaining a defense on the merits and knew or should have known that, *but for a mistake*

concerning the identity of the proper party, the action would have been brought against him or her; and (3) it appears from the original and amended pleadings that the cause of action asserted in the amended pleading grew out of the same transaction or occurrence set up in the original pleading, *** even though the person was not named originally as a defendant. For the purpose of preserving the cause of action under those conditions, an amendment adding the person as a defendant relates back to the date of the filing of the original pleading so amended." (Emphasis added.) 735 ILCS 5/2-616(d) (West 2002).

¶ 18 For the claimant to succeed in his argument that section 2-616(d) allows his untimely application to relate back to his timely application depends on whether the record shows that the claimant met *all* of the requirements of that section. See *Plooy v. Paryani*, 275 Ill. App. 3d 1074, 1083, 657 N.E.2d 12, 20 (1995) ("All of the requirements of section 2-616(d) must be satisfied for a plaintiff to add a defendant after the statute of limitations has expired, and even if only one of the requisite elements of section 2-616(d) is not met, the amended complaint cannot relate back"). In the case at bar, there is no evidence that the second criteria of section 2-616(d) has been met. The second criteria requires that, within the period of the statute of limitations plus time for service of process, Sungro and Zurich "knew or should have known that, *but for a mistake concerning the identity of the proper party,* the action would have been brought against" them. However, the claimant does not argue that he was mistaken about who to file his application against. In fact, in the hearing before the arbitrator, he argued that he knew that he was injured when employed by Sungro but stated that he was not required to file anything against Sungro or its insurer, Zurich, because the statute of limitations did not apply. The claimant has confused the doctrine of joint and several liability as between loaning and borrowing employers with his responsibilities under

the Act.

¶ 19 The Act provides for joint and several liability of loaning and borrowing employers pursuant to section 1(a)4, which provides in relevant part as follows:

> "4. Where an employer operating under and subject to the provisions of this Act loans an employee to another such employer and such loaned employee sustains a compensable accidental injury in the employment of such borrowing employer and where such borrowing employer does not provide or pay the benefits or payments due such injured employee, such loaning employer is liable to provide or pay all benefits or payments due such employee under the Act and as to such employee the liability of such loaning and borrowing employers is joint and several, provided such loaning employer is in the absence of agreement to the contrary entitled to receive from such borrowing employer full reimbursement for all sums paid or incurred pursuant to this paragraph together with reasonable attorneys' fees and expenses in any hearings before the *** Commission." 820 ILCS 305/1(a)4 (West 2005).

Additionally, section 1(a)4 provides that when an employee files an application with the Commission alleging that his claim is covered by the previous paragraph, he may join "both the alleged loaning and borrowing employers." 820 ILCS 305/1(a)4 (West 2005).

¶ 20 Thus, the Act clearly contemplates that employees may file applications against both the loaning and borrowing employers. See *A.J. Johnson Paving Co. v. Industrial Comm'n*, 82 Ill. 2d 341, 343, 412 N.E.2d 477, 478 (1980) (where the claimant originally filed his workers' compensation claim against the loaning employer and later filed an amended application to include the borrowing employer) and *Chicago's Finest Workers Co. v. Industrial Comm'n*, 61 Ill. 2d 340, 341, 335 N.E.2d 434, 435 (1975) (where the claimant filed his application against both the loaning and the borrowing employers). Section 1(a)4 of the

Act does not absolve employees from the requirement of filing claims against loaning or borrowing employers within the statute of limitations. Rather, the section merely addresses the respective liabilities of loaning and borrowing employers.

> "Generally, when a lending employer and a borrowing employer situation exists, the statute provides that both employers are jointly and severally liable to the employee, but as to the liability between the two employers, the borrowing employer is primarily liable and the lending employer is secondarily liable. [Citations.] If the borrowing employer fails to pay the benefits awarded to the claimant, then the loaning employer must pay and the loaning employer has the right to seek reimbursement from the borrowing employer." *Silica Sand Transport, Inc. v. Industrial Comm'n* 197 Ill. App. 3d 640, 649-50, 554 N.E.2d 734, 741 (1990).

¶ 21 The parties agree that Tri-City is a loaning employer, that Sungro is a borrowing employer, and that both of them are subject to the provisions of the Act. Additionally, it is undisputed that the date of claimant's injury is July 7, 2000, and that, unless the doctrine of relation-back applies, the second amended application was filed in derogation of the three-year statute of limitations. The doctrine of relation-back set forth in section 2-616(d) does not apply under the facts of this case, and the claims against Sungro and Zurich are barred by the statute of limitations.

¶ 22 The respondents also point out that the legislature provided for a form of relation-back in a section of the Act which renders contractors liable to pay compensation to employees of its subcontractors. That section provides, in relevant part: "With respect to any time limitation on the filing of claims provided by this Act, the timely filing of a claim against a contractor or subcontractor, as the case may be, shall be deemed a timely filing with respect to all persons upon whom liability is imposed by this paragraph." 820 ILCS305/1(a)3 (West

2005). The respondents assert that, in section 1(a)3, the legislature expressly indicated its intent to allow an untimely application against a contractor or subcontractor to relate back to a timely-filed application against a contractor or subcontractor. They argue that the fact that the legislature did not use similar language in section 1(a)4 pertaining to loaning and borrowing employers indicates legislative intent not to deem the timely filing of an application against a loaning employer as a timely filing against a borrowing employer. They argue that, if we were to accept the claimant's argument, we would essentially be adding that language to the Act, contrary to the intent of the legislature. We agree with the respondents.

¶ 23 In interpreting the Act, we must consider all of the Act's provisions and not construe an individual provision in such a way that it conflicts with or abrogates another. "In examining a statute, a court must give effect to the entire statutory scheme. Thus, words and phrases should not be construed in isolation; rather, they must be interpreted in light of other relevant portions of the statute." *Krautsack v. Anderson*, 223 Ill. 2d 541, 553, 861 N.E.2d 633, 643 (2006). Considering the Act as a whole and the proceedings below, we find that the Commission properly dismissed the amended application against Sungro and Zurich.

¶ 24 CONCLUSION

¶ 25 The decision of the circuit court confirming the decision of the Commission is affirmed.

¶ 26 Affirmed.

¶ 27 JUSTICE HOLDRIDGE, dissenting:

¶ 28 I respectfully dissent. I would find that the application of section 2-616(d) of the Code of Civil Procedure (735 ILCS 5/2-616(d) (West 2002)) would allow the claimant's amended application to relate back to the original application. I would hold, therefore, that the Commission erred as a matter of law in dismissing the claimant's amended application.

Section 2-616(d) of the Code was substantially rewritten by the legislature in Public Act 92-116 and became effective on January 1, 2002. The language upon which the majority relies upon ("but for a mistake concerning the identity of the proper party") does not appear to be a substantive requirement, but merely modifies the phrase "knew or should have known" which further modifies the substantive provision concerning whether the new defendant received such notice of the commencement of the action that he or she would not be prejudiced by being added as a defendant after the expiration of the original statute of limitations. Thus, the substance of the provision cited by the majority addresses notice and prejudice as it relates to the potential defendant, not the actions of the plaintiff. If the legislature had intended to require the plaintiff to prove he made a mistake as to the identity of the defendant in filing his original complaint, it would have given such a substantive requirement its own numerical designation and not buried it in a prepositional phrase modifying the second of three enumerated requirements.

¶ 29 I would further note that the purpose of section 2-616 of the Code is to ensure fairness to the litigants rather than to unduly enhance technical rules of pleading. *Halberstadt v. Harris Trust & Savings Bank,* 55 Ill. 2d 121, 124-25 (1973). Moreover, the policy considerations under the Workers' Compensation Act, which include providing for summary and informal proceedings for the expeditious resolution of worker injury claims, favor liberal pleading requirements. Given the policy considerations behind section 2-616(d) of the Code and the policies of the Act favoring compensation for work-related injuries, I would find that the claimant should be allowed to amend the application for adjustment of claim if Sungro received notice of the commencement of the claim and knew or should have known that the claim would be brought against them. Given the state of the record, it appears that Sungro knew of the claimant's injury while he was in its employ and should have known of the

likelihood of being named in an application for adjustment of claim.

¶ 30 Additionally, I do not agree with the majority's holding that the express provision in section 1(a)(3) of the Act allowing contractors to be added at any time to an application for claim against a subcontractor and the lack of such an express provision in section 1(a)(4) pertaining to loaning and borrowing employees evidences a clear legislative intent to deny a claimant the opportunity to amend a claim against a loaning employee to add a claim against the borrowing employee. A contractor and a subcontractor stand in a different relationship between each other and the employee than do a loaning and borrowing employer. The majority infers that the legislature clearly intended to treat loaning and borrowing employers differently from contractors and subcontractors. I do not find a clear and unambiguous legislative intent to prevent the adding of a borrowing employer to an application for adjustment of claim against the lending employer merely from the difference in the statutory language found in sections 1(a)(3) and (4). I would find the statutory language ambiguous at best. Given this ambiguity, I would rely upon the general policy of the Act in favor of compensation to find that the Commission erred in dismissing the claim. *Beelman Trucking v. Illinois Workers' Compensation Comm'n*, 233 Ill. 2d 364, 371 (2009) ("[T]he * * * Act is a remedial statute intended to provide financial protection for injured workers and it is to be liberally construed to accomplish that objective.").