NATURAL RESOURCES JOURNAL

Volume 8
Issue 3 *Resources of the Sea*

Summer 1968

Civil Procedure—"Final Judgement Rule" in Workmen's Compensation Cases Johnson v. C & H Constr. Co., 78 N.M. 423, 432 P.2d 267 (N.M. Ct. App. 1967)

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Civil Procedure—"Final Judgment Rule" in Workmen's Compensation Cases*

In workmen's compensation proceedings, decisions subject to appeal are normally limited to those expressly called out by statutory provision.[1] The criterion most frequently followed is that only final judgments, orders, or decrees are appealable.[2] This is the rule in New Mexico.[3] A reason often given for the "final judgment rule" is that interlocutory appeals add to the delay of litigation.[4] In New Mexico, "the policy behind statutes, rules and decisions permitting appeals only from final judgments or orders substantially disposing of the merits of the action is that litigation shall not be piecemeal."[5]

The question of the finality of a district court judgment in a workmen's compensation proceeding was raised in the case of *Johnson v. C & H Construction Company*.[6]

In *Johnson* the district court found that plaintiff had been injured in the course of his employment and awarded him compensation for temporary total disability for a fixed period of time. In addition, if the plaintiff elected to accept surgery, the judgment directed defendants to pay surgical benefits as well as temporary total disability compensation for ninety days from the date of the surgery. If plaintiff failed to make arrangements for the surgery at the earliest feasible time, a final order was to be issued by appropriate motion. The judgment deferred the question of plaintiff's attorney's fees and any further determination of disability (if surgery were accepted)

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* Johnson v. C & H Constr. Co., 78 N.M. 423, 432 P.2d 267 (N.M. Ct. App. 1967).

1. *See, e.g.*, U.S. Fidelity & Guaranty Co. v. Motes, 101 Ga. App. 628, 114 S.E.2d 795 (1960); Carpenter v. Scanlon, 168 Ohio St. 139, 151 N.E.2d 561 (1958); White v. State Ind. Accident Comm'n, 227 Or. 306, 362 P.2d 302 (1961); American Motors Corp. v. Industrial Comm'n, 26 Wis. 2d 165, 132 N.W.2d 238 (1965).

2. *See, e.g.*, Industrial Comm'n of Colo. v. Globe Indem. Co., 145 Colo. 453, 358 P.2d 885 (1961); Pressman v. State Accident Fund, 228 A.2d 443 (Md. 1967); Barry v. Wallace J. Wilck, Inc., 65 N.J. Super. 130, 167 A.2d 181 (1961); Shoecraft v. Hart's Food Stores, Inc., 12 A.D.2d 553, 206 N.Y.S.2d 712 (1960); Dawson v. Ferguson, 398 P.2d 820 (Okla. 1965); Wiles v. Department of Labor and Industries, 34 Wash. 2d 714, 209 P.2d 462 (1949); Moore v. Industrial Comm'n, 4 Wis. 2d 208, 89 N.W.2d 788 (1958).

3. N.M. Stat. Ann. § 59-10-16.1(A) (Repl. 1960) states:

> Any final order or judgment rendered by the district court under the Workmen's Compensation Act . . . is reviewable by the state Supreme Court. . . .

4. *See, e.g.*, C. Wright, Federal Courts § 101 (1963).

5. Floyd v. Towndrow, 48 N.M. 444, 152 P.2d 391 (1944).

6. 78 N.M. 423, 432 P.2d 267 (N.M. Ct. App. 1967).

until the matter should come before the court on appropriate motion of either party.[7]

Defendants sought to appeal this judgment on the merits. On a motion before the New Mexico Court of Appeals[8] to determine jurisdiction, *held,* Not appealable; the issues of disability and attorney's fees were yet to be determined.[9]

This Comment will (1) briefly consider whether the policies behind the Workmen's Compensation Act are satisfied by this holding; (2) show that none of the geenral reasons why a district court might wish to retain jurisdiction in a workmen's compensation proceeding were applicable in this case; and (3) show that the district court judgment should have been considered a "final judgment" within the meaning of the Workmen's Compensation Act.

A determination of whether a judgment in a workmen's compensation case is "final" and thus appealable should not be based solely on a rule of procedural convenience. Rather, it should take into account the various provisions of the Workmen's Compensation Act,[10] viewed together as a whole, as well as the policies that underlie workmen's compensation. In this respect, it should be noted that the New Mexico Supreme Court has reiterated time and again its view that the various provisions of the Workmen's Compensation Act are to be liberally construed.[11]

Judgments in workmen's compensation cases must be drawn to carry out the purposes of the Workmen's Compensation Act.[12] Most

7. The judgment was in part worded as follows:

> 4. In the event that plaintiff elects to have the surgery . . . then plaintiff may, at the end of the 90-day period, further petition this court for an award of disability if he considers that any disability exists.
>
> 5. . . .
>
> 6. The question of plaintiff's attorney fee will be deferred until such time as further proceedings are had in this matter.
>
> IT IS THEREFORE ORDERED that defendant will pay plaintiff medical expense and compensation as set forth above, and further determination in this matter will be deferred until this matter shall again come before the court upon appropriate motion of either party.

8. In 1966, appellate jurisdiction over all actions under the Workmen's Compensation Act was transferred to the New Mexico Court of Appeals. N.M. Stat. Ann. § 16-7-8(B) (Supp. 1967).

9. Johnson v. C & H Constr. Co., *supra* note 6.

10. N.M. Stat. Ann. §§ 59-10-1 through 59-10-37 (Repl. 1960).

11. *See, e.g.,* Gammon v. Ebasco Corp., 74 N.M. 789, 399 P.2d 279 (1965); Employer's Mut. Liability Ins. Co. of Wis. v. Jarde, 73 N.M. 371, 388 P.2d 382 (1963); Armijo v. Middle Rio Grande Conservancy Dist., 59 N.M. 231, 282 P.2d 712 (1955).

12. N.M. Stat. Ann. § 59-10-16(A) (Repl. 1960).

American jurisdictions hold that a purpose of workmen's compensation legislation is to provide a prompt and speedy remedy or method of settling the claims of injured workmen or their dependents.[13] This view is taken in New Mexico, both through judicial interpretation[14] and statutory provisions.[15]

It is clear that both the district court judgment and the holding of the court of appeals in *Johnson* failed with respect to this purpose. The plaintiff suffered injury in the course of his employment on November 22, 1965, and received compensation through April 5, 1966. The judgment was entered September 9, 1966.[16] On September 19, 1966, notice of appeal was filed.[17] On August 11, 1967, the court of appeals issued its opinion,[18] and on October 2, 1967, the district court rendered a final judgment.[19]

From April 5, 1966, through October 2, 1967, the plaintiff received no compensation payments whatever, although he had undergone surgery and, by the terms of the judgment of September 9, 1966, was entitled to medical and surgical payments as well as more than seven months of temporary total disability compensation. The reason that no compensation was paid was that no final judgment had been entered by the district court.[20]

13. *See, e.g.*, Industrial Comm'n of Colo. v. Globe Indem. Co., 145 Colo. 453, 358 P.2d 885 (1961); Busey v. Washington, 225 F. Supp. 416 (D.D.C. 1964); Hibler v. Globe Am. Corp., 128 Ind. App. 156, 147 N.E.2d 19 (1958); Hobelman v. Mel Krebs Constr. Co., 188 Kan. 825, 366 P.2d 270 (1961); United States Lines Co. v. Jarka Corp. of New England, 265 F. Supp. 811 (D. Mass. 1967); State ex rel Morgan v. Industrial Accident Board, 130 Mont. 272, 300 P.2d 954 (1956); Barnhardt v. Yellow Cab Co., 266 N.C. 419, 146 S.E.2d 479 (1966); Naseef v. Cord, Inc., 48 N.J. 317, 225 A.2d 343 (1966).

14. *See, e.g.*, Sanchez v. Hill Lines, Inc., 123 F. Supp. 42 (D.N.M. 1954); Jones v. George F. Getty Oil Co., 92 F.2d 255 (10th Cir. 1938), *cert. denied*, Associated Indem. Corp. v. George F. Getty Oil Co., 303 U.S. 644 (1938); Gonzales v. Chino Copper Co., 29 N.M. 228, 222 P. 903 (1924); *see also* 7 Natural Resources J. 442, 449 (1967).

15. N.M. Stat. Ann. § 59-10-13.10(A):

> When a workmen's compensation claim is at issue, the judge of the district court shall advance the cause on the court's calendar and dispose of the case as promptly as possible. The trial shall be conducted in a summary manner as far as possible.

N.M. Stat. Ann. § 59-10-16.1(A):

> Any final order or judgment rendered by the district court under the Workmen's Compensation Act is reviewable by the state Supreme Court . . ., except that the appeal shall be advanced on the calendar and disposed of as promptly as possible.

16. Record at 20.

17. Record at 22.

18. Johnson v. C & H Constr. Co., 78 N.M. 423, 432 P.2d 267.

19. Johnson v. C & H Constr. Co. Record of final judgment filed October 2, 1967. (File A-19678, Second Judicial District, County of Bernalillo.)

20. Telephone conversation with Mr. J. E. Casados, attorney for defendants, on

This result is completely contrary to the intent of workmen's compensation legislation[21] and can only cause undue hardship to the plaintiff and his dependents.[22]

The question of final judgment in workmen's compensation proceedings is complicated by the doctrine of res judicata. Res judicata literally means the matter has been decided.[23] The usual definition of the doctrine is that an existing final judgment rendered on the merits by a court of competent jurisdiction is, in all subsequent actions, conclusive of rights of the parties thereto and of their privies on all material issues which were or might have been determined.[24]

The application of the doctrine of res judicata to workmen's compensation proceedings is limited, however. In almost all states, some provision is made for reopening or modifying workmen's compensation awards or judgments at the level of the commission or court which had original jurisdiction.[25] Reopening is allowed in recognition of the obvious fact that although a claimant's condition may be diagnosed with a great degree of certainty at the time of the original hearing, the same cannot be said for his future condition. The condition—and hence the degree of disability—may later get worse, improve, or even clear up altogether.[26]

In New Mexico reopening is allowed only on an express showing of a change of condition in the claimant. Section 59-10-25(A) of the Workmen's Compensation Act states:

> The district court in which any workman has been awarded compensation . . . may, upon the application of the employer, workman, or other person bound by the judgment, fix a time and place for hearing upon the issue of claimant's recovery and if it shall appear upon such hearing that diminution or termination of disability has

October 2, 1967. It should be noted, however, that while the appeal was pending before the court of appeals, an appeal bond was placed with the court to cover the amount of any judgment that should be declared due.

21. *See, e.g.*, Wilstead v. Industrial Comm'n, 17 Utah 2d 214, 215, 407 P.2d 692, 693 (1965).

22. Presuppose, however, that from the time the judgment was entered, the defendants had made regular compensation payments to the plaintiff as required by the judgment. Presuppose further that after final judgment was entered, they appealed and were successful in having the judgment reversed. How could there be any guarantee that the compensation payments made under the earlier judgment would be recovered?

23. Smith v. Smith, 299 S.W.2d 32, 35 (Mo. Ct. App. 1957).

24. Klinker v. Klinker, 132 Cal. App. 2d, 687, 283 P.2d 83, 87 (1955).

25. A. Larson, 2 The Law of Workmen's Compensation § 81 (1961).

26. *Id.*

> taken place, the court shall order diminution or termination of payments of compensation as the facts may warrant. And if . . . the disability . . . has become more aggravated or has increased without the fault of the workman, the court shall order an increase in the amount of compensation allowable as the facts may warrant. Hearings may not be held more frequently than at six-month intervals. . . .[27]

The district court in *Johnson* expressly retained jurisdiction over the judgment in the original proceeding. Just why is unclear because there was no necessity that the judgment be held open in order to avoid having it be res judicata on any future determination of disability arising from the same cause. The New Mexico Supreme Court has indicated that this problem is clearly covered by section 59-10-25(A).

In commenting on an earlier but similar statute, the supreme court in *La Rue v. Johnson*[28] said that "as the right later to contest questions of a continuance of the disability is statutory, it would exist even though a judgment is absolute in form."[29] Similarly, with regard to the provisions of section 59-10-25(A), in *Segura v. Jack Adams General Contractor*[30] the supreme court has declared:

> [T]he ordinary rules of res judicata cannot apply to a judgment rendered on the merits after trial. In fact, in such a case except for loss of a specific member of the body *there is no final judgment as it is generally understood short of 550 weeks* when either party may come into court and have a hearing on a decrease or increase of disability and have a new judgment rendered in accordance with new findings.[31]

The supreme court further emphasized this holding in *Churchill v. City of Albuquerque*.[32]

In jurisdictions having statutes similar to section 59-10-25(A), it is generally held that:

> a compensation award is an adjudication as to the condition of the injured workman at the time it is entered, and conclusive of all matters adjudicable at that time, but is not an adjudication as to the claimant's future condition. . . .[33]

27. N.M. Stat. Ann. § 59-10-25(A) (Supp. 1967).
28. 47 N.M. 260, 141 P.2d 321 (1943).
29. *Id.* at 268, 141 P.2d at 326.
30. 64 N.M. 413, 329 P.2d 432 (1958).
31. *Id.* at 416, 329 P.2d at 433. Emphasis added.
32. 66 N.M. 325, 347 P.2d 752 (1959).
33. Annot., 122 A.L.R. 556, 557 (1939).

One reason why the judgment may have been held open was that the district court may have felt that it would want to change the period for which compensation would be paid but was afraid it could not do so if it did not hold the judgment open. Section 59-10-25(A) allows the district court, on rehearing, to increase, diminish, or terminate compensation payments, but it makes no provision whatever for changing the period for which compensation is to be paid. However, the fact that a finding of further disability could change the term for which compensation was to be paid is not sufficient grounds for failing to issue a final judgment in *Johnson*.

In *Segura* the supreme court indicated that it was within the jurisdiction of the district court to hear an application for an extension of payment time.[34] In *Churchill* the court explained this holding by stating:

> There can be no logical distinction drawn between the jurisdiction of the court in amending the amount of disability and jurisdiction as to the length of the term for which disability is to be received.[35]

Under section 59-10-25(A), rehearings can be had only at six month or longer intervals.[36] Where the compensation period ceases on the date an extension of the period is applied for[37] or where the compensation period is sought to be extended long before the original period has ended,[38] the supreme court has ruled that the district court retains jurisdiction. But there was a possibility under the terms of the *Johnson* judgment that compensation would have ceased before six months had passed and a new hearing on disability could be held.[39] This should not, however, remove jurisdiction from the district court to determine future disability.[40]

34. *See* note 30 *supra*, 64 N.M. at 418, 329 P.2d at 435.
35. *See* note 32 *supra*, 66 N.M. at 327, 347 P.2d at 753.
36. See text accompanying note 27 *supra*.
37. Segura v. Jack Adams General Contractor, 64 N.M. 413, 329 P.2d 432 (1958).
38. Churchill v. City of Albuquerque, 66 N.M. 325, 347 P.2d 752 (1959).
39. The judgment was phrased as follows:
> [I]n the event that plaintiff elects to have this surgery performed at the earliest feasible time after trial, the defendant will pay the cost of such surgery and will continue to pay the plaintiff total temporary disability for a period of 90 days thereafter.

See also note 7 *supra*.
40. This would seem to follow from the cases which hold that latent injuries are compensable. *See, e.g.*, Linton v. Mauer-Neuer Meat Packers, 71 N.M. 305, 309, 378 P.2d 126, 129 (1963) where the supreme court states:
> [The Workmen's Compensation Act] recognizes latent injuries. It follows, therefore, that even though an accident causes a disability which results in payment of compensation for a time, the employer is not necessarily relieved of the further duty to pay compensation for a subsequent disability, which is the "natural and direct" result of the same accident.

Thus, there seems to be no apparent requirement or necessity that the district court expressly retain jurisdiction with regard to possible future disability, or that all issues of disability be determined in the original proceeding.

In *Johnson* the court of appeals held that a final order or judgment "means an order or judgment in the current proceeding that determines the issues of law and of fact necessary to be determined *in that proceeding.*"[41] The court then went on to find that the judgment did not dispose of the issue of disability and hence was not final in that respect. But, if there is no requirement that all issues of disability be resolved in the original proceeding, this holding appears to be *contra* the court's definition of final judgment.

The district court was required to determine if and to what extent disability had existed or did actually exist at the time of the proceeding in question. It did that. It was not required *in that proceeding* to adjudicate the claimant's future condition,[42] yet that is precisely what the court of appeals would have it do. If the district court had made no mention of possible future disability, the judgment would have been final with respect to the issue of disability. If the court had arbitrarily stated that at the end of the ninety-day period of temporary total disability, the plaintiff would have a ten per cent total disability, that would have been a final judgment. Yet neither judgment would have or even could have settled the ultimate issue of disability so long as section 59-10-25 (A) allows a new hearing on the subject every six months. The only way the issue of disability could be finally settled would be for a lump sum settlement to be accepted by the court or for the statutory period for which compensation could be paid to expire.

The other point relied on by the court of appeals to support its holding of no final judgment in *Johnson* was the fact that the district court failed to fix attorney's fees during the original proceeding. The Workmen's Compensation Act, however, contains no provision requiring that a district court set attorney's fees in order that its judgment be final.[43] Rather, in those cases such as *Johnson* where compensation has been refused and a claimant thereafter through court proceedings collects compensation in excess of any amount offered in settlement within thirty days of the trial:

41. Johnson v. C & H Constr. Co., 432 P.2d at 269. Emphasis added.

42. *See* notes 30, 32, and 33 *supra.*

43. The provisions of the Workmen's Compensation Act relating to attorney fees are contained in N.M. Stat. Ann. § 59-10-23 (Repl. 1960).

> compensation to be paid the attorney for the claimant shall be fixed by the court trying the same or the Supreme Court upon appeal in such amount as the court may deem reasonable and proper and when so fixed and allowed by the court shall be paid by the employer in addition to the compensation allowed the claimant under the provisions of the Workmen's Compensation Act.[44]

Attorney's fees are to be fixed by the district court of appeals or *the supreme court on appeal.*[45] There is no limitation that the district court alone has power to set such fees or that it is absolutely required to set them.

No case has arisen in New Mexico whereby a judgment in a workmen's compensation case was appealed solely on the grounds that no attorney's fees were fixed by the district court judgment. There is early authority to indicate that the power to allow attorney's fees rests "in the court trying (the case) alone."[46] But this holding was based on a construction of an earlier statute[47] which made no mention of the supreme court.[48]

The recent case of *Turrieta v. Creamland Quality Chekd Dairies, Inc.*[49] is more directly in point. Following the filing of a claim for workmen's compensation, the parties entered a stipulation whereby they agreed that the plaintiff would receive total permanent disability for a certain time. If at the end of that time, they could not agree on the percentage of total disability, the stipulation provided that the matter would be submitted to the court for determination. The stipulation further provided that the court should award such

44. N.M. Stat. Ann. § 59-10-23 at part D.

45. Presumably the appellate court here referred to is now the court of appeals. See note 8 *supra.* However, in giving the court of appeals appellate jurisdiction over all actions under the Workmen's Compensation Act, the Legislature for some reason failed to substitute "court of appeals" for "supreme court" within the provisions of the Workmen's Compensation Act itself.

46. New Mexico State Highway Dept. v. Bible, 38 N.M. 372, 376, 34 P.2d 295 (1934).

47. N.M. Laws 1929, ch. 113, § 22. The pertinent provision is:

> Provided, that where compensation, to which any person shall be entitled under the provisions of this act, shall be refused, and the claimant shall thereafter collect compensation through court proceedings in an amount in excess of the amount tendered by the employer prior to the court proceedings, then the compensation to be paid the attorney for the claimant may be increased at the discretion of the court trying the same, to such amount as the court may deem reasonable and proper, and such amount when so allowed by the court, shall be paid by the employer in addition to the compensation allowed the employee under the provisions of this act.

48. N.M. Laws 1937, ch. 92, § 11 added the words "or the Supreme Court on appeal."

49. 77 N.M. 192, 420 P.2d 776 (1966).

attorney's fees as it deemed reasonable. The court approved the stipulation and awarded 350 dollars in attorney's fees.

Approximately a year later, defendants moved for a reduction in compensation. The district court entered a judgment reducing the permanent disability to 15 per cent. As a part of this judgment, the court determined that no attorney's fees should be allowed "at the time."[50] Plaintiff appealed the reduction in disability and also the court's refusal to allow attorney's fees. The supreme court held that the case should be remanded to the trial court with direction that an award be made of a reasonable attorney's fee. In all other respects, the judgment was affirmed.[51]

On the basis of the *Turrieta* decision, it is difficult to see why a failure to fix attorney's fees should act to prevent a final, *i.e.*, appealable, judgment. The better view would be to allow an appeal on the merits concerning disability and remand, as the court did in *Turrieta,* to the district court with instructions to allow reasonable attorney's fees.

In determining whether there is a final judgment or order, the substance and not the form of the judgment or order is to be looked to.[52] Many years ago, the Iowa Supreme Court issued an opinion that could well have served in *Johnson*. The court said:

> It was, of course, not a final judgment in the sense that it was the last judgment rendered in the case; but it is manifest that there is another sense in which the words "final judgment" may be used, and that is to denote the final determination of a substantial right for which the action was brought.[53]

A substantial right was finally determined in the initial district court proceeding in *Johnson*. That right was the right to compensation for disability as it was found to exist at the time of the proceeding. The determination of that right should have been an appealable judgment. To hold otherwise was to contravene the court's own definition of "final judgment."

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50. *Id.* at 194, 420 P.2d at 778.
51. *Id.* at 196, 420 P.2d at 779.
52. Rio Arriba County Board of Education v. Martinez, 74 N.M. 674, 397 P.2d 471 (1964).
53. McMurray v. Day, 70 Iowa 671, 28 N.W. 476 (1886).