Decision STS 7474/2003
Supreme Court

In Madrid, November 25 2003

Considering the pending requests before this Chamber, and under an appeal for unification of the doctrine filed by Mrs. Patricia, represented herein by attorney Mr. Enrique Lillo Pérez, against decision dated July 25 2002 of the Social Chamber of the Superior Court of Justice of Madrid, after the appeal number 358/2001, for the reimbursement of medical expenses. The appealed part is the National Institute of Health, herein represented by the court agent Mr. Manuel Gómez Montes.

Factual Background

First.- The Social Chamber of the Superior Court of Justice of Madrid ruled the herein appealed decision. After a previous appeal against the decision ruled on June 28 2001 by the Social Court number 35 of Madrid, between the parties indicated above, regarding medical expenses.

The proven facts stated in the lower court decision were: "1.- The claimant, Mrs. Patricia, affiliated to Social Security under number NUM001, suffered a outside of working hours accident while walking in the subway. She fell and twisted her right ankle. Was attended in the Hospital Severo Ochoa in Leganés, where the diagnosis was a grade 1 sprain. After exploration and radiography she was informed that: 'image was compatible with a cortical astragal fracture without displacement". The treatment consisted of: "Posterior splint, rest with the leg up and ice in the fracture. Also, anti-inflammatory medicine, walking helped by crutches and control by the traumatologist in 10 days." After 10 days, the patient visited the traumatologist of the area, in the Hospital Severo Ochoa in Leganés (specialized attention, area 9 of Leganés). In the ambulatory, on June 12, the plaster was removed, and after cleaning the patient still showed some pain, so the leg was plastered again for 10 more days. On June 22, the plaster was removed in the outpatient center The patient showed stable and normal mobility, without bone lesions in the radiography dated June 28 2000. The diagnosis stated 'dystrophy simpatico reflexive', indicating as treatment a contrast of cold and hot baths, Nolotil every eight hours and forced to walk 2.- On July 3, the claimant went to the Hospital Ruber Internacional, since the pain continued and the claimant was still unable to walk. Initially, he was first diagnosed with "Calcaneus fracture inter-articulated comminution related to the calcaneocuboid joint. The treatment consisted of surgery to reduce and osteosynthesize the calcaneus fracture, including prescribed rest until the day scheduled for surgery, July 12. 3.- Surgery was undertaken on July 12, and the the foot was plastered. The treatment prescribed was to walk with crutches without leaning on the foot. On July 27 2000, the patient went to medical check the wound was healed, and the stitches were retired as well as the plaster. Elastic socks and

walking with crutches without leaning on the foot for 3 weeks as well as rehabilitation for jointure mobility and muscular strengthening of the lower right appendage were recommended. September 20, the patient showed recovery post-surgery, and pain in the sole was probably related to the supportive defense side of the foot. Today, he walks without support, does not show limping and is practically without pain. 4.- The expenses for the health services provided in the Hospital Ruber Internacional went over 776.050 pesetas. 5.- The claimant claimed reimbursement of expenses, incurred due to the private health services, from INSALUD. This request was dismissed by Resolution of the Territorial Direction of INSALUD of Madrid, on March 6 2001. 6.- Dissatisfied with the Resolution, the claimant presented writ of previous claim, expressly dismissed by Resolution proposal dated June 4 2001".

The decision of lower court ruled as follows: "Dismissing the exception for incompetence of jurisdiction claimed by the attorney of INSALUD, and upholding the claim made by Mrs. Patricia against the National Institute of Health, I must condemn and therefore I do, the defendant to pay the claimant as reimbursement for denial of medical services the amount of 776.050 pesetas".

Second.- The account of the facts proven by the lower court's decision is kept in its totality by decision ruled by the Social Chamber of the Superior Court of Justice of Madrid. Decision requested to be review today for unification of the doctrine. The holding of such decision was: "We decide: That upholding the claim made by Mrs. Nieves García Peña on behalf of INSALUD against decision of the Social Court number 35 of Madrid, number 358/01, dated June 28 2001, after claim of reimbursement of medical expenses made by Mrs. Patricia, we must and therefore proceed to revoke the decision, and instead, we dismiss the claim made by Mrs. Patricia against the aforementioned Institute, and acquit the Entity from such claim.

Third.- The appellant considers a contradiction between the decision herein reviewed and the decision of the Superior Court of Justice of Castilla-La Mancha, dated February 13 2002. This decision accounts the following proven facts: 1.- Mr. Miguel Angel, on August 25 1995, went into the Emergency Room of Hospital La Mancha Centro, at the Alcázar of San Juan, where he was attended to by Doctor María Milagros. The diagnosis was pingueculitis and eye drops were prescribed. 2.- The cause of the consult was that 'from days, reddishness showed in the inner part of the right eye'. 3.- The claimant, after noticing that there was no improvement in his ailment while using the treatment prescribed, decided to consult a private practitioner in the Barraquer Clinic of Barcelona. 4.- On September 13 1995, at the Ophthalmological Center of Barraquer, the diagnosis was of retinal detachment (right eye), proceeding on September 15 1995 to a 'broad cerclage plus circocoagulation". 5.- The claimant requests the reimbursement of the expenses for the 3 interventions undertaken in the Barraque Clinic, those of September 15 1995, July 18 1996 and September 23 1996 and their correspondent revisions, all for the

amount of 1.162.920 pesetas. 6. – The invoices are attached to the administravite file. 7. – The claim was dismissed." In the ruling of the decision the review request made by INSALUD was dismissed. The decision was therefore confirmed.

Fourth. – This appeal is dated November 20 2002. The allegation is that under article 221 of the Law of Labor Procedures, there is a contradiction between the aforementioned decision and the decision herein appealed. The claimant also alleges an infraction of article 5 of the Royal Decree 63/1995 of January 20. Finally, a claim is made for the unification of the court's jurisprudence.

The appellant provided a certified copy of the decision of the Superior Court of Justice that considers the decisions herein contradicted.

Fifth. – By Act of November 27 2002, the appeal for the unification of the jurisprudence was filed accordingly. The files were given to the Reporting Judge, and the process was admitted. Being the appellant present there, was notified of the transfer of the appeal. The counterclaim is dated June 27 2003.

Sixth. – The file and further interventions of the parties were transferred to the Public Prosecutor's Office for his affidavit. On November 18 2003, after proper notification, the voting and the ruling of this court came out with the present holding.

Legal Rationale

First. – The matter of substance raised by the appeal for the unification of the doctrine herein, is to determine whether the appellant has the right or not to the reimbursement of costs incurred due to her making use of private health services, in case of a wrong diagnosis by the services of National Health System. We found as well in this matter a subsidiary question of a procedural nature, which is, regarding the hierarchy of the court competent to hear this kind of litigations after the enactment of the Law 29/1998 of the Administrative Law Jurisdiction.

The circumstances of the case in the appealed decision that we should take into consideration for its resolution are: a) the error in which the services of the health assistance of the Social Security occurred, in relation to a non-labor accident suffered by the appellant, consisting in a diagnosis and treatment of an ankle sprain of first degree when it was in fact a calcaneus fracture; b) That error of diagnosis was prolonged for a month during which, besides the initial attention, other three examinations were undertaken, along with many other cures and inadequate therapeutic indications; and c) before persistent and continuous pain and functional impotence the appellant went to a private clinic that made the right diagnosis and treatment (chirurgical and post-operatory). The lower court, considered itself implicitly competent to hear the case, when it rejected the claim for reimbursement.

It is important to notice that all of the events herein mentioned, with the exception of those in relation to the jurisdictional process, took place in the summer of 2000.

The decisions being compared herein, also referred to a diagnosis error (pingueculitis in the right eye), which gave place to an inadequate treatment (use of eye drops). Since the insured was not satisfied with the treatment, he went to a private health center, where the diagnosis was different (retinal detachment), and which allowed, after three opportune chirurgical interventions, the healing of the ailment. The lower court considered itself competent to hear the case, being forced to reason it expressly, and, regarding the matter of substance, it ruled in favor of the reimbursement of the first of the surgeries done; this one took place on September 1995.

Second. – The Law that contains the regime of health expenses derived from the care of Social Security insured people and beneficiaries, when attended outside the National System of Health, is article 5 of the Royal Decree 63/1995. Section 3 of the rule, states as follows: "In cases when health care is urgent, immediate, and of vital character, and it is taken outside the National Health System, the expenses of such care must be reimbursed, once verified that those services could not be used opportunely so it does not constitute an abuse of this exception."

A meticulous analysis of this rule and of the current normative context, of which it is part of, with the purpose of deciding the question of unification of the doctrine requested in the appeal, leads us to appreciate two substantial differences between the litigation of the compared decisions. The first difference refers to ailments suffered in both cases. Even though both cases of access to health care at the margin of the National System of Health, seem at first sight justified for reasons of urgency, the truth is that the fulfillment of the requirement of the "vital character" of such assistance is not clear at all in respect of the ankle injury suffered in the case of the decision appealed herein, unless it is understood that every single process of an ailment healing is vital. But the result of this interpretation, about which our opinion is not essential, seems hard to achieve in principle, taking into account that the statement of the Law quoted before, demands the vital character requirement of the medical attention as different to the immediate urgency one. Therefore, the terms are not similar enough to compare the litigation with the decision being compared, where the dispute is regarding an ocular injury, of undoubtedly major repercussion on the physical integrity and management of one's life.

Third. – The second substantial difference between the appealed decision and the decision brought for comparison, relates to the procedural law in force at the time of the respective events. In the case of the decision brought for comparison, the diagnosis error that gave place to the claim before the court was in 1995. In the case of the appealed decision, the error happened in 2000, after the new Law of Administrative Law Jurisdiction came into force. Article 2.e. gives this jurisdictional

order the competence to hear litigations about the "strict liability of the public administration, whatever the nature of the activity or the kind of relation where the liability arises, without admitting any claim based on jurisdictional rulings on social or civil matters."

This rule has introduced an important novelty in delimiting the competences between the social (labor law) jurisdiction and the administrative law jurisdiction, in the matter of reimbursement of health expenses for medical assistance outside the National Health System. The litigation provoked by cases of medical urgency of vital character, whatever its cause, will still be assigned to the social (labor law) jurisdiction, by virtue of article 2.b of the Law of Labor Procedure. This is because they constitute an exceptional supposition of extension or expansion of the right to health assistance and protection of the insured, the scope over which the social (labor law) jurisdiction must decide. Corresponds, in the other hand, to the administrative law jurisdiction, by virtue of article 2.e of the Law of the Administrative law jurisdiction, to hear the litigations of reimbursement of health expenses derived from private assistance. This does not derives from the right to health care in cases of vital urgency in the strict sense of the expression, but as a compensation or indemnification for an abnormal functioning of the public health service.

The application of this jurisprudence to the present case leads without a doubt to consider, that the claim for the reimbursement of health expenses caused by a wrong diagnosis, requested in the reviewed decision, should have been set before the Administrative Law jurisdiction. The unified doctrine of the decision of this very chamber, dated November 8 1999, states that our competence for wrongdoing in diagnosis, as in the present case, and on which the decision being used herein to contrast, must be abandoned. But not because it contains a wrongful analysis, but because it was dictated under a normative situation in which there was no applicability of article 2.e of the LCJA, since the facts disputed therein that determine the health expenses as outside the National System of Health, occurred between February and April 1996.

WE DECIDE

We deny the appeal for the unification of the doctrine, requested by Mrs. Patricia, against decision of the Sup. Court, against the decision of the Supreme Court of Justice, dated 25 2002, after appeal before administrative court no. 35 of Madrid in a file followed also by the defendant, that is, the National Institute of Health for the Reimbursement of medical expenses.

The data has to be sent back to the Jurisdictional Organ (CNE), certified and with communication of the aforementioned resolution.

This decision shall be inserted in the Legislative Collection.

PUBLICATION.- In the same day that was read and published the herein decision, I Mr. Justice Antonio Martín, after public audience of the social chamber of the Supreme Court, and as of Secretary of the same, herein certify.