

2008

# William Revene v. Nationwide Insurance Co., Wausau Insurance : Brief of Petitioner

Utah Court of Appeals

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Brett Gardner; Counsel for Respondents.

William Revene; Petitioner.

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**BEFORE THE UTAH COURT OF APPEALS**

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WILLIAM REVENE	) PETITIONER'S BRIEF
	) FOR APPEAL WORKER'S
Petitioner	) COMPENSATION DECISION
	)
	) APPEALS COURT CASE NO.
	)
VS.	) 20080076
NATIONWIDE	)
INSURANCE CO.	)
And/or	)
WAUSAU INSURANCE	)
Respondent	

APPEAL FOR REVIEW OF THE WORKERS  
COMPENSATION DECISION TO THE UTAH COURT OF  
APPEALS

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RESPONDENTS	PETITIONER

FILED  
UTAH APPEL

APR 24

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I. THIS COURT IS THE PROPER VENUE AND  
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III.STATEMENT OF FACTS RELEVANT TO ISSUES  
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## **STATUTES AND RULES**

§ 334 Effect of Pre-existing Condition

§ 571 Hearsay; admissions & declarations

§ 578 Hearsay Evidence

Rule 35-1-81(f)

Rule 34A-2-601 page 7

Rule 34A-2-802 page 8

## **STATEMENT SHOWING JURISDICTION**

1. The Appellate Court of the State of Utah is the Proper Court to hear the Appeal of a Worker's Compensation Decision.

## **STATEMENT OF THE ISSUES**

The attorney for the Respondent lied in his brief to the Worker's Compensation hearing Judge (Traynor) by stating that the Petitioner had filed a subsequent Worker's Compensation claim with another employer for back and neck injuries. This alleged Worker's Compensation claim was supposed to have been filed several years after the injuries that are the basis for this claim. No such claim was ever filed by the Petitioner. The attorney had access to the records for Worker's Compensation claims and knew that no such

claim was on record. The attorney also attempted to show the hearing judge that the Petitioner had a "pre-existing" condition. The attorney also presented a statement from a Doctor making a pronouncement that the injury in question should have ended on a specific date.

The claims by the attorney for the Respondent fails in several ways.

1. As a sworn officer of the court, it is a violation of his oath to present statement that he knows, or should have known, to be false. i.e False statement about a 2<sup>nd</sup> Worker's Compensation claim.

2.Had there been a "pre-existing"" condition, it does not disqualify a claimants right to compensation. "A subsequent aggravation or "lighting up" of a previous injury sustained while in the employ of a previous employer is compensable if it is demonstrated that there was a causal relationship between the two.

*Makoff Co. v. Industrial Comm'n*, 13 Utah 2d 23, 386 P.2d 70 (1962)

*"A pre-existing disease or other disturbed condition or defect of the body, when aggravated or lighted up by an industrial accident, is compensable under the act.*

*Jones v. California Packing Corp., 121 Utah 612, 244 P.2d 649 (1952)*

3.The attorney for the Respondent did hire a Doctor to review all of the Petitioners records and make a prognosis of the Petitioners condition. This Doctor never examined the Petitioner. The Doctor was not available for cross-examination. The report submitted without unfairly prejudicing the Judge's opinion and by the Dr. was "hearsay evidence" and not admissible violating the civil and legal rights of the Petitioner.

4. When the Labor Commission appoints a medical examiner or panel to review a case, they require that the Dr. be subject to cross-examination or their report is not permitted.

Rule 34A-2-601 (f,g,i) Medical Evaluations-Objections to Report. *"(i) The written report of a medical panel,*



medical director, or one or more medical consultants may be received as an exhibit at the hearing described in Subsection (2) (f). (ii) Notwithstanding Subsection (2) (g) (i) a report received as an exhibit **may not be considered as evidence** in the case except as far as the report is sustained by the testimony admitted. It would stand to reason that if an unbiased, independent report that is ordered by the Labor Commission is required to have supporting testimony to be admitted, then a biased report submitted by the Respondent should be subject to the same standards. The Dr. was not available to give testimony.

34A-2-802 Rules of Evidence and procedure before commission.

**Constitutional Rights of Parties** The hearing judge did deny the Petitioner's objection to the submission of the biased Dr. report on the grounds of "hearsay evidence" and that the petitioner had the right to cross-examine the witness. The judge did state that this did not apply because it was too costly and time

consuming. "Commission, in exercising its rights to proceed without certain formalities under this section, must not deprive any party of every fair means of eliciting facts to be finally determined nor unnecessarily limit cross-examination of witnesses."

*Ocean Accident & Guarantee Corp. v. Industrial Comm'n.* 66 Utah 600, 245 P.343(1926) "Where the plaintiff filed written objections to the report of the medical panel and objected to the report at the hearing, the burden was on the commission or the employer to sustain it and this was not done, the report could not be considered as evidence." *Hackford v. Industrial Comm'n*, 11 Utah 2d 312, 358 P.2d 899 (1961) "Hearsay evidence is admissible in an administrative hearing before the commission, however, the commissions findings of fact cannot be based exclusively on hearsay evidence and there must be as residuum of evidence, legal and competent in a court of law, to support an award. *Industrial Power Contractors v. Industrial Comm'n* 832 P2d.477 (Utah Ct. App.1992)

*Rushton v. Gelco Express & Employers Mutual Liab.,*

*732 P.2d 109 (Utah 1986) The commission must look at all relevant evidence in reaching its findings without being restricted to giving evidence from specific witnesses more weight than that from other witnesses.*

Again, the report submitted by the Respondent should be subject to the same standards as an unbiased report ordered by the commission. The Petitioner did object to the admission of the Respondents report at the beginning of the hearing. The judge did rely on this report as her decision gave the exact same date for terminating treatment as requested in the report by the Respondents.

The Petitioner does submit that the admission of the Dr.'s report and the untruthful statement by the Respondents attorney did present enough weight as to compromise the rights of the petitioner.

Judge Traynor was the administrative Judge that heard the case. It is with belief that she unfairly decided the case knowing that the evidence presented by the Respondents was neither based in law or reason. At the beginning of the hearing the Petitioner did object

to the submission of the Dr.'s report by the Respondent in that it was "hearsay evidence" and that it was not supported by testimony. The Petitioner was denied the right to cross-examine the testimony of the witness.

The conclusion of the Judge was in exact agreement with the date of termination of treatment as requested by the medical report submitted by the Respondents.

It is unreasonable to assume that her opinion could have come spontaneously to the same conclusion as the report. The evidence and statements submitted were "hearsay" and not supported by case law. The judge knew or should have known that this was the case. The judge did find that the first part of treatment was covered, the middle part of treatment was denied, and the judge stated that if the Petitioner had surgery for the claimed injuries, a claim could be submitted for that at a later date.

*"Commission, in exercising its rights to proceed without certain formalities under this section, must not deprive any party of every fair means of eliciting facts to be*

finally determined nor unnecessarily limit cross-examination of witnesses." *Ocean Accident & Guarantee Corp. v. Industrial Comm'n.* 66 Utah 600, 245 P.343(1926) "Where the plaintiff filed written objections to the report of the medical panel and objected to the report at the hearing, the burden was on the commission or the employer to sustain it and this was not done, the report could not be considered as evidence. "Hackford v. Industrial Comm'n, 11 Utah 2d 312, 358 P.2d 899 (1961) "Hearsay evidence is admissible in an administrative hearing before the commission, however, the commission's findings of fact cannot be based exclusively on hearsay evidence and there must be as residuum of evidence, legal and competent in a court of law, to support an award. *Industrial Power Contractors v. Industrial Comm'n* 832 P2d.477 (Utah Ct. App.1992)

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The decision of the judge was based on hearsay evidence, an untrue statement by opposing counsel, a lack of evidence from the Respondent, and failed to acknowledge evidence as submitted by the Petitioner. Petitioners asserts that this was biased and prejudicial and swayed the decision of the judge.

#### **Nature of the case.**

This case is a simple Worker's Compensation case.

The Petitioner was injured twice, while on the premises of the employer and while working as a Claims Adjuster.

The Petitioner was pulling himself out from under a vehicle he was inspecting and experienced a severe and unexpected "tearing" to his neck, mid-back and low back. The injury was primarily to the right side of the neck and low back. This injury was acknowledged and accepted by the employer's insurer; Wausau Insurance Company. The employee, William Revene, did seek treatment from a chiropractor. The insurance company did tell the Dr. that they would not pay for any additional treatments, even though pain still existed. The employee sought pain relief through massage therapy. The employee then sought help through a Dr. that was recommended by an associate. Dr. Chung was a neurologist. He prescribed some muscle relaxers and OTC NSAIDS (over-the-counter-non-steroidal anti-inflammatory drugs) along with a course of physical therapy. A TENS unit (electro-muscular stimulations) was prescribed to help with pain relief. Minor relief was experienced, however, the NSAID's burned a hole in the colon of the employee. The Petitioner repeatedly asked for an MRI. The Dr. refused. It was then learned that

the primary occupation of this Dr. was as a consultant or IME (Independent medical examiner) for insurance companies. He was not working in the best interests of the Petitioner and was fired.

The Petitioner sought relief from back and neck pain from another chiropractor, who noticed a narrowing of the cervical vertebrae at the C-5-6-7 area. This treatment again provided temporary relief from pain. The Petitioner was then referred to another neurologist by a previously treating physician. This Dr. treated with a variety of muscle relaxers, and another course of physical therapy. This again provided minor relief. This Dr. ordered an MRI and found narrowing of the cervical vertebrae at the C-5-6-7 area of the neck. Lortab pain medication was also prescribed because the pain was becoming unbearable and incapacitating at times. Dr. Dall noted "if anyone would benefit from surgery, it would be Bill," but he did not recommend it. The petitioner was then referred to a neuro-surgeon for a second opinion. Dr. Robert Hood performed surgery within 2 weeks after the consultation.



The disc between C5-6 was removed and the vertebrae fused. Pain relief in the neck was instantaneous.

During this period, the Insurance Carrier, Wausau Insurance did not dispute the findings or the injury. They did however, refuse to pay for any treatment after the firing of Dr. Chung. They had accepted liability and told the Petitioner that they would continue to pay for treatment as long as it was related to the original injury. They did not pay anything, and left the petitioner with an unpaid bill from the TENS unit provider.

**a. Course of Proceedings.**

The Petitioner filed for a hearing with the Labor Commission. The Petitioner sent a complete copy of medical records to the Judge. One of the employees in the Labor Commission called and told the Petitioner that the judge did not want and would not look at the records and to pick them up.

During this procedure, the petitioner cited the case history, showing that the injury remained constant and progressive and treatment was all conservative in

nature and provided only minor pain relief. The statement also included the comments by Dr. Dall, that; "if anyone would benefit from surgery, it would be Bill, but I don't recommend it."

The Respondent presented their commissioned report from a Dr. that regularly does reports for insurance companies. An objection was raised by the Petitioner citing "hearsay evidence" and the lack of opportunity to cross-examine the witness. The judge stated that it was too costly and time consuming for such things.

The Respondent failed to show that the Petitioner had a pre-existing condition, even though that would not matter as shown by citations above. The Respondent made an untrue statement to the judge, in his brief, that the Petitioner had filed another Worker's Compensation Claim for neck and back injuries subsequent to the one at issue. The counselor knew this to be untrue and did not amend his brief.

**B. Statement of Proceedings, Disposition at Agency.**

The judge found for the Respondent by stating that

the first part of treatment was covered, the middle part was not covered, and that should surgery be needed, the Petitioner could submit for review of that part of the claim.

#### **RELEVANT FACTS WITH CITATION TO THE RECORD**

1. The petitioner was injured on the job.
2. The Worker's Comp Insurance carrier, Wausau Insurance company did accept liability for the injury.
3. The carrier did pay for the initial treatment of the injury.
4. The carrier did state that they would pay for treatment as long as it was related to the original injury. This was by way of phone conversations, mail and email.
5. The carrier then quit paying for treatment.
6. The employee did everything that the Doctors suggested and prescribed, with only temporary relief from pain. The employee finally had a Dr. that thought the injury was serious enough to perform surgery within 2 weeks of the initial consultation.

6. The insurance carrier and the counsel for them have demonstrated shoddy and unfair claims practices throughout this ordeal. By not upholding their obligation as prescribed by law and by their own statements, they have placed a physical, emotional and financial hardship on the Petitioner. Opposing Counsel, by making untrue statements as an officer of the court, has perpetuated that practice.

#### **SUMMARY OF THE ARGUMENT-DETAILS OF THE ARGUMENT**

The Petitioner has been victimized by the treatment of the Insurance carrier and by opposing counsel with their handling of this claim. They have intentionally caused harm to the employee.

During the period from the date of the injury and reporting of the claim, the Petitioner has sought conservative relief from the injury, has not requested drugs, has not been a malingerer and has tried to carry on a normal life, in spite of chronic pain caused by this injury. The medical advice during this period may not have always been the best, but the petitioner did follow instructions.

The Insurance Carrier did cease paying for treatment although the complaint during this 10 year period has been the same. Any and all medical records requested by the carrier or their counsel have been provided willingly. The Insurance carrier has failed to show that the injury claimed was not from the date of the accident. They have failed to show any intervening incidents to aggravate the injury. They have failed to show any pre-existing condition contributed to the injury although citations provided herein show that would be irrelevant anyway.

The insurance carrier has shown bad-faith in handling this claim since the Petitioner fired Dr. Chung for not looking out for the patient.

The Petitioner has provided records to show that this injury caused deterioration in the condition of the Petitioner.

The Petitioner needed surgery for one of the affected areas (cervical fusion) and has completed surgery and is still in recovery.

The judge in this case erred by accepting hearsay

evidence which unfairly biased the case against the petitioner. The judge accepted the word of the counsel for the carrier, in which he made an untrue statement. The judge interpreted the statement of Dr. Dall that "if anyone would benefit from surgery, it would be Bill, but I don't recommend it." The judge interpreted this statement to mean that surgery wasn't needed, although the Dr. clearly stated that it would be beneficial.

#### **CONCLUSION-PRAYER FOR RELIEF**

The Petitioner does pray that this court will overturn the decision of Judge Traynor and find for the Petitioner. The evidence submitted by the opposing counsel was unsubstantiated and violated due process.


The Petitioner prays that all expenses for medical treatment, medications and therapy that are un-reimbursed be paid to the Petitioner. The Petitioner has several thousands of dollars of out of pocket expenses incurred as a result of the injury sustained at work. The insurer accepted liability, they just don't want to pay.

The Petitioner prays that future treatments,

medications and procedures that are related to this injury are compensated by the insurance carrier.

A complete billing and treatment history will be presented upon finding for the Petitioner. The treatment history is already in the possession of the carrier/opposing counsel, with the exception of the surgical procedure and subsequent treatments, medications, and procedures.

Respectfully,

  
William Revene  
Attorney Pro Se

4/17/08  
Dated:

APR 24 2008

BEFORE THE UTAH COURT OF APPEALS

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	) NO ADDENDUM SUBMITTED
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## PROOF OF SERVICE

UTAH COURT OF APPEALS

CASE NO. 20080076

This is to certify under penalty of perjury, that on April 23, 2008, I did place in USPS mail, 2 copies of the Petitioner's Brief (William Revene), and notice of no addendum, by first class mail with correct postage to the Respondent;


Brett Gardner

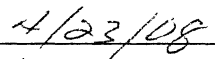
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