1978

Joan Harrison v. Industrial Commission of Utah et al : Reply Brief of Appellant

Utah Supreme Court

Robert D. Moore and Gregory C. Diamond; Attorneys for Respondents;
W. Brent Wilcox; William J. Armstrong; Attorneys for Plaintiff-Appellant;

IN THE SUPREME COURT OF THE STATE OF UTAH

---000o000---

JOAN HARRISON, WIDOW OF WILLIAM G. HARRISON, DECEASED Plaintiff-Appellant, vs. THE INDUSTRIAL COMMISSION OF UTAH, BILL G. HARRISON MINING COMPANY, and STATE INSURANCE FUND, Defendants-Respondents.	)	District Court No. 9-75-6507 Supreme Court No. 15401

---000o000---

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DECISION OF THE INDUSTRIAL COMMISSION
FOR THE STATE OF UTAH
HONORABLE KEITH SOHM, ADMINISTRATIVE LAW JUDGE

W. Brent Wilcox
William J. Armstrong, of
MOYLE & DRAPER
600 Deseret Plaza
Salt Lake City, Utah 84111

Attorneys for Plaintiff-Appellant

Mr. Robert D. Moore
Mr. Gregory C. Diamond
Counsel for State Insurance Fund
Suite 400, Ten West Broadway
Salt Lake City, Utah 84101

The Industrial Commission of Utah
350 East 500 South
Salt Lake City, Utah 84111

IN THE SUPREME COURT OF THE STATE OF UTAH

---000o000---

JOAN HARRISON, WIDOW OF WILLIAM G. HARRISON, DECEASED Plaintiff-Appellant, vs. THE INDUSTRIAL COMMISSION OF UTAH, BILL G. HARRISON MINING COMPANY, and STATE INSURANCE FUND, Defendants-Respondents.	)	District Court No. 9-75-6507 Supreme Court No. 15401

---000o000---

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DECISION OF THE INDUSTRIAL COMMISSION
FOR THE STATE OF UTAH
HONORABLE KEITH SOHM, ADMINISTRATIVE LAW JUDGE

W. Brent Wilcox
William J. Armstrong, of
MOYLE & DRAPER
600 Deseret Plaza
Salt Lake City, Utah 84111

Attorneys for Plaintiff-Appellant

Mr. Robert D. Moore
Mr. Gregory C. Diamond
Counsel for State Insurance Fund
Suite 400, Ten West Broadway
Salt Lake City, Utah 84101

The Industrial Commission of Utah
350 East 500 South
Salt Lake City, Utah 84111

TABLE OF CONTENTS

CASES CITED

STATUTES CITED

IN THE SUPREME COURT OF THE STATE OF UTAH

---000o000---

JOAN HARRISON, WIDOW OF WILLIAM G. HARRISON, DECEASED Plaintiff-Appellant, vs. THE INDUSTRIAL COMMISSION OF UTAH, BILL G. HARRISON MINING COMPANY, and STATE INSURANCE FUND, Defendants-Respondents.	)	District Court No. 9-75-6507 Supreme Court No. 15401

---000o000---

REPLY BRIEF OF APPELLANT

This brief is submitted on behalf of the Appellant, Joan Harrison, in reply to the brief filed by the Respondents, The Industrial Commission of Utah and the State Insurance Fund. To facilitate reference between this reply brief and the Respondents' brief, the format of the latter has been adopted herein.

ARGUMENT

In preface to specific points of argument, we feel it necessary to point out to the Court that the Respondents' brief does not respond to the main issue raised on appeal by the Appellant. They argue throughout their brief that there is sufficient evidence to support the findings of the Commission and, therefore, this Court has no power to overturn the

Order. However, our appeal is based primarily on a failure to comply with the statutory requirement, that is, that the medical exidence shall be reviewed by three impartial physicians. Further, we argue that because the evidence was not so reviewed, the medical report submitted to the Commission was legally incompetent and should not have been considered in any way by the Commission in reaching its decision. The Respondents argue materiality and sufficiency, while we appealed raising the issue of competency of the medical report.

The Respondents categorize our argument at page 4 of their brief as, " ... nothing more than a conflict between the views of the two doctors who testified at the hearing." We object to this miscategorization and state emphatically that our main issue on appeal is that the Appellant was deprived of her statutory right to a medical panel composed of three impartial physicians, as provided by §35-2-56(2), Utah Code Annotated (1953), as amended.

We will now address the specific points in Respondent brief.

POINT I

THE ORDER OF THE INDUSTRIAL COMMISSION WAS BASED ON INCOMPETE EVIDENCE AND SHOULD, THEREFORE, BE REVERSED.

We are in full agreement with the general law as set forth by the Respondents under Point I. They cite

Amalgamated Sugar Co. v. Industrial Commission, 56 U. 80, 189 P. 69 (1920) and Board of Education of Salt Lake City v. Industrial Commission, 83 U. 256, 27 P. 2d 805 (1933) for the proposition that if there is substantial evidence in the record to support the findings of the Industrial Commission, a reviewing court should not reverse the judgment of the Commission. We agree with this and further assert that the cases cited and the position stated by the Respondents fully supports our appeal. A quotation from Board of Education of Salt Lake City v. Industrial Commission, supra, demonstrates this:

> It has been the uniform holding of this court that, on a conflict of material and competent evidence justifying a finding either way, a finding made by the commission will not be disturbed; ... [emphasis added] 27 P. 2d, at 810.

The decision in Board of Education specifically requires that the evidence be competent and in the case at bar, the medical report was incompetent because of the failure to comply with the statutory requirements of §35-2-56(2), Utah Code Annotated (1953), as amended.

The Respondents seem to have confused the legal concepts competency and materiality. The Supreme Court of New Mexico clearly distinguished the two concepts in Chiordi v. Jernigan, 46 N. M. 396, 129 P. 2d 640 (1942):

> The terms 'relevancy,' 'competency,' and 'materiality' are frequently used conjunctively in such a way as

> to suggest that they are synonymous. However, it is obvious that a matter may be relevant to the issues of the case and yet incompetent and inadmiss as evidence by reason of established rules of evidence, such as the rule which excludes heresay, a rule which requires the production of the best evidence within the power of the party to produce, and other positive rules of evidence. 129 P. 2d, at 643.

As argued in greater detail on pages 5 through 9 of Appellant's brief, we submit that the medical panels' report was incompetent evidence because that report was heavily influenced by the bias of the chairman of that panel. Section 35-2-56(2) equivocally and clearly requires an impartial medical panel of not less than three physicians. Appellant's claim has not had the benefit of this statutory requirement and, therefore, respectfully requests that her application be examined by a new medical panel, and the Industrial Commission render its decision on that panel's medical report.

POINT II

IT IS NOT NECESSARY FOR THE OPINION OF MEDICAL EXPERTS TO BE BIASED OR PREJUDICED IN THE LEGAL SENSE IN ORDER FOR THERE TO BE PARTIALITY CONTRARY TO THE STATUTORY REQUIREMENT.

At the outset of Respondents' Point II, our argument is again miscategorized as one of placing the medical examiners in the position of judges, and, therefore, held to a judicial standard. We merely assert that if a statute requires that the medical evidence be examined by

not less than three unbiased physicians, then that is the Appellant's right and we assert that the statute has not been complied with in the instant matter.

In Barney A. Stalcup v. Atlas Minerals and the State Insurance Fund, File No. 1A1286-00-7, Case No. 1-73-2215, Dr. Elmer Kilpatrick testified under examination by W. Brent Wilcox that in all cases where the miner had a history of smoking, he would disregard all other facts or circumstances and recommend that the claim be denied. We assert that this represents an extreme case of partiality on behalf of the physician and is in contravention to the language and spirit of §35-2-56(2) of the Utah Code Annotated (1953), as amended. Appellant has endeavored to obtain a transcript of that hearing, however, the court reporter's tapes have been destroyed.

Appellant wishes to underscore for the Court that we pointed out Dr. Kilpatrick's testimony and the fact of his replacement on subsequent medical panels in our brief and Respondentss did not deny or contravert those two facts in their brief.

POINT III

OBJECTION TO COMPOSITION OF MEDICAL PANEL WAS FILED BY THE APPELLANT AS SOON AS SHE WAS AWARE OF THE GROUNDS FOR OBJECTION.

On May 27, 1976, Appellant received a letter from the Industrial Commission of Utah with the medical panel's

report as an enclosure. (R. 87). That letter from the Industrial Commission advised her that if she was not satisfied with the medical panel's findings, she must file a written objection within fifteen days. (R. 87). At this juncture, Appellant realized that her claim was being seriously questioned and she employed the services of the Law Firm of Moyle & Draper, and particularly W. Brent Wilcox. On the same day that she received the letter and medical report, May 27, 1976, Appellant wrote W. Brent Wilcox requesting that he represent her regarding this matter and enclosed copies of the medical report and letter from the Industrial Commission. A copy of Appellant's letter of May 27, 1976, to W. Brent Wilcox appears in the Appendix, infra.

On June 7, 1976, the Utah Industrial Commission received Appellant's objection to the medical panel and the medical panel's report. (R. 88).

Relying on the three cases cited by the Respondents at page 13 of their brief, Appellant asserts that she has timely filed objection to the composition of the medical panel. She was unaware of the grounds for objection to the medical panel until she retained counsel on May 27, 1976, at which time an objection was promptly filed with the Commissio

POINT IV

WHILE THE MEDICAL REPORT IS ONLY CONSIDERED AS EVIDENCE, IT IS REQUIRED BY §35-2-56(2) TO BE THE FINDINGS OF A MEDICAL

PANEL OF NOT LESS THAN THREE IMPARTIAL PHYSICIANS.

The Occupational Disease and Disability Act of Utah provides a statutory scheme whereby a medical panel's report will be submitted to the Industrial Commission to aid in the reaching of its decision. The simple fact remains that that statutory scheme has not been complied with and Appellant respectfully requests that her statutory rights be upheld.

Appellant stated in her brief that she recognized that the Commission was not bound by the findings of the medical panel and Respondents have carefully quoted that section in their brief. We have never disputed that point and submit that Respondents' raising of that issue does not address the issue raised in Appellant's brief, that is, failure of compliance with the statute requiring three impartial physicians on the medical panel.

CONCLUSION

Appellant again respectfully submits that her right to a three-member impartial medical panel, pursuant to §35-2-56, was violated here.

Appellant respectfully requests a reversal of the decision of the Industrial Commission, and finding in favor of Appellant; or, in the alternative, a full review of the medical evidence by a different medical panel and the

submission of its findings to the Industrial Commission.

RESPECTFULLY SUBMITTED this 12th day of February, 1

W. Brent Wilcox

William J. Armstrong, of
MOYLE & DRAPER
600 Deseret Plaza
Salt Lake City, Utah 84111

Attorneys for Plaintiff-Appellant

Joan Harrison
P. O. Box 399
Moab, Utah 84532
259-7528

May 27, 1976

W. Brent Wilcox
600 Deseret Plaza
No. 15 East First South
Salt Lake City, Utah 84111

Dear Mr. Wilcox,

I would like you to handle my case with the Industrial Commission in reference to my late husband Bill G. Harrison.

Enclosed is the reply I received from the Industrial Commission of Utah.

Please refer to Charles J. Traylor's letter to you dated May 13, 1976, and let us know what we need to do to substantiate our claim with the Industrial Commission.

Sincerely,

Joan Harrison

Joan Harrison

JH/mw
Encl: (3)
bps to Charles J. Traylor

CERTIFICATE OF SERVICE

This is to certify that I mailed two true and correct copies of the Reply Brief of Appellant to the following this _____ day of February, 1978, postage prepaid:

Mr. Robert D. Moore
Counsel for State Insurance Fund
Suite 400, Ten West Broadway
Salt Lake City, Utah 84101

The Industrial Commission of Utah
350 East 500 South
Salt Lake City, Utah 84111