

2008

Lindsay Germer v. Famous Dave's, Wausau Insurance Company : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

<p>LINDSAY GERMER,</p>	
------------------------	--

Appellant/Petitioner,

v.

FAMOUS DAVE'S and/or WAUSAU
INSURANCE COMPANY,

Appellee/Respondents.

Case No. 20080442 CA

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REPLY BRIEF OF APPELLANT

ARGUMENT

Contrary to Labor Commission Rule as well as Germer’s specific discovery requests, Famous Dave’s withheld notice of the specific affirmative defense it actually intended to litigate, along with its supporting witness and photographs until well after every deadline in the case had lapsed. Notwithstanding Famous Dave’s multiple violations of the

commission's own rules, the ALJ allowed the testimony, photographs and previously undisclosed affirmative defense over Germer's objection and without providing Germer the opportunity to rebut. The ALJ, and later the Labor Commissioner, then denied Germer worker's compensation benefits based primarily on the surprise evidence. In so doing, the Labor Commission violated Germer's basic constitutional right to due process.

At the same time, the Labor Commission erroneously applied the *Allen* test to the remaining Findings of Fact and undisputed evidence. Instead of considering the totality of the circumstances as required by law in determining legal causation, the commission embraced a "freeze frame" analysis of Germer's accident until it had isolated each and every aspect of the industrial accident in order to deny legal causation. Finally, Ms. Germer was not only denied her due process rights to address the actual issues presented at hearing, but she was also denied proper legal analysis of her accident and had to wait two years for the Labor Commission to affirm its ALJ's erroneous actions.

I. THE LABOR COMMISSION VIOLATED GERMER'S DUE PROCESS RIGHTS WHEN IT ADMITTED EVIDENCE THAT HAD BEEN IMPROPERLY WITHHELD PRIOR TO THE HEARING.

The Labor Commission acted outside its statutory authority and denied Germer her due process rights to notice when it allowed Famous Dave's to offer testimony and photographs which had not been properly disclosed pursuant to Labor Commission Rule. While Famous Dave's correctly argues that the Labor Commission is not bound by formal rules or procedure, the plain terms of the statute are not without limitation. Utah

Code Ann. §34A-2-802(“the commission. . . is not bound by. . . technical or formal rules or procedure, **other than as provided in this section or as adopted by the commission.** . . .”(emphasis added); Labor Commission Rule 602-2-1, entitled “Pleadings and Discovery.”

A. Famous Dave’s Did Not Comply with Labor Commission Rule Governing Pleadings and Discovery and the Labor Commission Permitted It.

From beginning to end, Famous Dave’s flaunted Labor Commission Rule to Germer’s detriment and the Labor Commission permitted it. In its Answer, Famous Dave’s offered a boilerplate statement challenging legal causation. It did not identify any specific affirmative defense, such as an argument that the cooler door did not stick. Yet Rule 602-2-1(C)(2) requires all affirmative defenses be stated with “sufficient accuracy and detail that the petitioner and the Division may be fully informed of the nature and substance of the defenses asserted.” As such, Germer was prepared to address a general legal causation defense at hearing. She was not prepared to rebut Famous Dave’s specific challenge as to whether the walk-in cooler door was sticking at the time of her accident as that had not been identified by Famous Dave’s as a legitimate issue.

In response to Germer’s specific interrogatories requesting identification of witnesses, the substance of their knowledge, and impeachment witnesses, Famous Dave’s responded that it had no information and that it would supplement its answers “at least 45 days prior to the evidentiary hearing.” Likewise, Famous Dave’s asserted that no photographs involving Germer’s claim existed in response to Germer’s specific request for production of documents. Famous Dave’s filed its Pretrial Disclosures after the 45-day deadline

established by Rule 602-2-1(I)(3) with no change or supplementation of its discovery responses. At that time, Famous Dave's did not identify Mr. Morton, or any other manager at Famous Dave's, as a witness. Famous Dave's did not identify photographs to be introduced at trial. Neither did Famous Dave's elaborate on its general legal causation defense.

No further discovery or disclosures are permitted by Labor Commission Rule 602-2-1 without first obtaining permission from the ALJ. *See* Rule 602-2-1(F)(6) ("If a hearing has been scheduled, discovery motions shall be filed no later than 45 days prior to the hearing unless leave of the administrative law judge is obtained."); Rule 602-2-1(I)(3) (requiring pretrial disclosures be submitted no later than 45 days prior to hearing). Notwithstanding the Rule, and without leave of court, Famous Dave's then filed "Supplemental Pretrial Disclosures" identifying for the first time Mr. Morton as a witness and photographs of the walk-in cooler it intended to offer into evidence.

At no point prior to hearing did Famous Dave's comply with Rule 602-2-1(I)(3) requiring identification of "the specific defenses that the respondent actually intends to litigate" with respect to the purpose of Morton's testimony and photographs. Instead of putting Germer on notice as to the basis of its new affirmative defense, Famous Dave's indicated in amended Answers to Interrogatories filed the same day as the Supplemental Pretrial Disclosures that Mr. Morton would testify as a lay witness "regarding the nature of restaurant's walk-in cooler, cooler door operation, and he will provide a lay-out of the walk-in cooler."

Based upon the testimony Famous Dave's elicited from Morton at hearing, there can be no question that Famous Dave's intended to launch a specific affirmative defense that the cooler door did not stick rather than rely on its stated general challenge to the legal causation of Germer's injuries. With respect to the newly-identified photographs, Famous Dave's never did supplement its answers to Germer's previous formal request for production of photographs.¹

This is not fair disclosure of the actual specific affirmative defense Famous Dave's intended to put on. Famous Dave's acted with utter disregard of multiple provisions of Labor Commission Rule. The ALJ was aware of this and admitted the surprise evidence anyway. He went on to rely on that evidence for the purpose of denying Germer's workers' compensation claim and the Labor Commissioner affirmed. The Commission's failure to enforce its own rules under these circumstances stretches beyond its statutory authority to relax the rules of evidence and procedure and swallows the limits of due process.

B. The Admission of the Surprise Evidence Was Contrary to Law, Labor Commission Rule, and Prejudicial to Germer and Violated Her Due Process Rights.

Famous Dave's defends the commission's admission of the evidence based on two internally contradictory premises. On one hand, Famous Dave's argues that it "was not obligated. . . to inform Ms. Germer of each and every bit and piece of testimony to be solicited from a witness at the evidentiary hearing." Appellee's brief at 31 – 32. This is

¹ Contrary to Famous Dave's assertion that the photographs were available for Germer to review, the photographs did not exist until Mr. Morton took them "just over a week" prior to the hearing. Tr., 104.

not so. Labor Commission Rule makes explicit the **continuing obligation** of the parties to promptly disclose information that has been properly requested. Rule 602-2-1(F)(1). In this case photographs, identification of witnesses and the substance of their testimony, as well as impeachment evidence were directly requested in formal interrogatories and requests to Famous Dave's. Similarly, Famous Dave's was under a direct obligation in both the Answer and Pretrial Disclosure phases to identify the specific issues it actually intended to litigate.

On the other hand, Famous Dave's argues that Germer "should have known [] that Famous Dave's would call Mr. Morton, or other manager, to testify regarding the operation of the cooler door." Appellee's brief at 32. In support of its argument that there was no unfair surprise, Famous Dave's carefully asserts that it disclosed "the subject matter" or "the substance of" Mr. Morton's testimony via telephone conversation between counsel for the parties. Appellee's brief at 6 ("The subject matter of Mr. Morton's testimony was discussed. . ."); Appellee's brief at 13 ("The subject matter of Mr. Morton's testimony was discussed. . ."); Appellee's brief at 33 ("The substance of Mr. Morton's testimony" was fairly disclosed prior to hearing.) There are a myriad of problems with this assertion.

First, there is no reason Germer should have expected Famous Dave's to call Morton or any other manager as a witness when it made no such indication until three weeks prior to trial that it intended to do so. Second, the telephone conversation Famous Dave's relies on to argue that it fairly conveyed the substance of Morton's testimony has no basis in evidence. Indeed, Famous Dave's sets forth this telephone conversation, and a

spectacularly vague statement of its purported contents, in Paragraph 24 of its Statement of Facts without citation to the record. This is because there is no evidentiary record establishing the facts of this conversation.²

The essence of Famous Dave's arguments is that Germer should not have relied on the explicit procedure established by Labor Commission Rule. And Famous Dave's offer a corollary proposition that Germer had an affirmative duty to chase every veiled nuance subsumed by Famous Dave's partial disclosures made after every deadline had lapsed. Contrary to Famous Dave's assertion, the commission's admission and consideration of the surprise evidence was significantly prejudicial to Germer. The Labor Commission based the bulk of its *Allen* analysis on its finding that the cooler door was not stuck. In this case, the labor commission denied Ms. Germer her due process rights to notice and a fair hearing and then denied her worker's compensation benefits on this surprise evidence. This is contrary to Labor Commission Rule, statutory authority, and the due process clause of the Utah Constitution. Germer respectfully requests that the Commission's decision be reversed, that the evidence as it relates to the testimony of Mr. Morton be excluded, and that the matter be remanded for consideration in accordance with Germer's due process rights. In the alternative, Germer requests that she be provided the opportunity to present evidence to challenge Mr. Morton's testimony and have full answers to her previously propounded discovery.

² Famous Dave's use of this unsupported assertion in the Statement of Facts is contrary to Utah Rule of Appellate Procedure 24(a)(7) which requires that "all statements of fact and references to the proceedings below shall be supported by citations to the record. . . ." and is therefore not properly before this Court.

II. THE LABOR COMMISSION ERRED WHEN IT FAILED TO APPLY ALLEN TO THE TOTALITY OF THE CIRCUMSTANCES

Aside from the due process issues surrounding the commission's admission of surprise evidence, the balance of Germer's appeal is that the labor commission erred in the manner which it applied the *Allen* test.³ Rather than consider the totality of the circumstances with regard to Germer's industrial accident, the commission deconstructed Germer's accident in a "freeze frame" fashion, isolating the mechanism of the accident as the simple act of kicking a door and then determining that Germer did not satisfy the *Allen* test. However, the clear legal authority requires the labor commission to consider legal causation under *Allen* in the actual context of the industrial accident. *See Stouffer Foods Corp. v. Industrial Comm'n*, 801 P.2d 179, 183 (Utah Ct. App. 1990); and *American Roofing Co. v. Industrial Comm'n*, 752 P.2d 912, 915 (Utah Ct. App. 1988).

In *Martinez v. Media-Paymaster Plus/Church of Jesus Christ of Latter-Day Saints*, 164 P.3d 384 (Utah 2007) the court distinguished between legal questions and mixed questions of law and fact. The court said that "mixed questions of law and fact generally arise when the applicability of the legal rule turns on the combination of present facts" and asks "whether a given set of facts comes within the reach of a given rule of law." *Id.* at 392 (internal quotations omitted). Legal determinations, on the other hand, are "rules

³ Famous Dave's devotes a significant portion of its brief to defending the commission's factual findings. However, Germer has not challenged the commission's factual findings except to the extent the commission relied on the surprise evidence discussed in Section I. Therefore, Famous Dave's arguments with respect to marshalling the evidence and the substantial evidence supporting the ALJ's factual findings are misplaced. Moreover, because Germer's appeal does not challenge the underlying undisputed facts, but rather the commission's legal conclusions drawn from the facts, she is not required to marshal the evidence. *Utah Auto Auction v. Labor Comm'n*, 191 P.3d 1252, 1255 (Ut. Ct. App. 2008).

or principles uniformly applied to persons of similar qualities and status in similar circumstances.” *Id.* (internal quotations omitted). Certainly the majority of appeals surrounding application of the *Allen* test have to do with whether the facts presented fall within the legal causation rule enunciated by *Allen*. However, Germer’s argument in this case is that the Labor Commission erred when it failed to consider the totality of the circumstances in applying the *Allen* test, which is an established principle to be uniformly applied to analyzing whether a particular industrial accident involves an unusual and extraordinary exertion.

As such, Germer respectfully submits that as a matter of law, the Labor Commission may not apply the *Allen* test without considering the totality of the circumstances and the appropriate standard of review in this instance is for correction of error. In *Acosta v. Labor Comm’n*, 44 P.3d 819, 822 (Utah Ct. App. 2002), this court said, “The *Allen* test is a judicially crafted rule that the Commission is in no better position to interpret than this court,” and reviewed the Commission’s interpretation of *Allen* with regard to asymptomatic preexisting conditions for correctness. Likewise, the Commission is in no better position to interpret the *Allen* test outside the actual context of an industrial accident and is not at liberty to do so.

Famous Dave’s cites no legal authority for deconstructing an industrial accident before applying the *Allen* test. Contrary to Famous Dave’s assertion, and the Commissioner’s conclusions, Germer was not just “kicking a door.” However, Famous Dave’s argues that the mechanism of the accident was just that and that consideration of anything else in the context in which Germer kicked the door is mere distraction. But

that is what the law requires and neither Famous Dave's nor the Labor Commission addressed how its deconstruction of the mechanism of the accident could comply with established law for properly determining legal causation. The Commission's application of *Allen* in this respect was erroneous.

For the same reasons, however, the Commission's failure to consider the totality of the circumstances in applying the *Allen* test does not pass muster under a reasonable and rational standard of review either. The relevant issue here is whether the Labor Commission's failure to follow longstanding law in its application of *Allen* in this case is reasonable or rational. With the exception of the ALJ's finding that the cooler door did not stick, Germer does not challenge the findings of fact and instead argues that a correct application of the law to the uncontroverted evidence satisfies legal causation in this case.

Famous Dave's argues that Germer waived arguments with respect to the fact that the floor was wet at the time of Germer's accident as well as the fact that Germer's fall tore hardware from her knee. However, these facts were unequivocally set forth in Germer's Motion for Review most notably in paragraph 11 of her statement of facts where she refers to both the wet floor and the force of her injury at the time of the accident. R. at 56-57. In addition to challenging the ALJ's admission of surprise evidence, Germer argued that a correct application of the *Allen* test to the remaining findings of fact and undisputed evidence would satisfy *Allen* whether the cooler door stuck or not. Germer could not anticipate that the Labor Commission would fail to properly apply the *Allen* test, but Germer certainly presented those facts, which Famous Dave's did not dispute, in its Motion for Review.

Finally, Germer notes some discrepancies in Famous Dave's citation to the record in its brief. While Famous Dave's generally cites to the record in its Statement of Facts, there is a shift in Famous Dave's repeated characterizations of Germer's fall in the body of the argument that has no support in the evidentiary record. For instance, Famous Dave's asserts that "Ms. Germer's right knee made no direct contact with the door or with the floor." Appellee's Brief at 9. Famous Dave's cites to the hearing transcript for this proposition. However, this citation does not support this statement. In its response to Motion for Review, Famous Dave's cites to the following exchange in the hearing transcript to support the same assertion:

Q: Then your knee comes in contact with the door?
A: That or the ground, It happened so fast that I honestly don't know. I know that when I kicked the door, I was going forward because I wouldn't have just kicked it, I would have kicked with my body weight going forward."

Tr., 67-68, see also R at 86.

However, the ALJ made a finding of fact that Germer "went down on both knees" at the time of the accident. This is a finding of fact that neither party disturbed and Famous Dave's has waived any argument contrary to the factual findings in this case.

Similarly, Famous Dave's re-characterizes Germer's accident as if she "slumped" to the floor. Again, nowhere is there evidence that Germer slumped to the floor. This is a term that Famous Dave's coined in its Response to Motion for Review without citation to anything whatsoever. Neither has it cited to anything for that term in Appellee's Brief. Germer respectfully submits that the facts are what they are and Famous Dave's is not at liberty to re-cast them contrary to the commission's findings or the actual testimony.

Had the Labor Commission considered the totality of the circumstances with regard to the undisputed facts in this case, the “unusual and extraordinary exertion” test would have been satisfied. Because the Labor Commission failed to correctly apply the law in this respect, Germer has been prejudiced in the denial of workers’ compensation benefits for her industrial injury. As such, Germer respectfully requests that this matter be reversed and remanded to the Commission for a decision that is in accordance with law.

III. THE TWO YEAR DELAY VIOLATED GERMER’S RIGHTS UNDER OPEN COURTS PROVISION OF THE UTAH CONSTITUTION


Germer agrees with Famous Dave’s that the delay in resolving cases before the Labor Commission is “unfortunate.” Under the Open Courts clause of the Utah Constitution, Germer has the right to judicial resolution without denial or unnecessary delay. In this case, Germer’s appeal sat at the Labor Commission for two years only to receive cursory review and no analysis of the evidentiary issues or the correct application of the *Allen* test at issue in her case. This is more than unfortunate and Germer respectfully requests that this Court hold the Labor Commission accountable for administering the Workers’ Compensation Act in the manner it was intended.

CONCLUSION

For the above-stated reasons, Germer respectfully submits that the Labor Commission’s decision be reversed and remanded for consideration in compliance with

established law and that the Labor Commission do so in a timely manner with a date certain.

DATED this 29 day of April, 2009.



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CERTIFICATE OF SERVICE

I hereby certify that on the 29 day of April, 2009, a copy of the foregoing REPLY BRIEF OF APPELLANT was mailed, postage prepaid, as follows:

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