

2001

Leopoldina Osequera v. Farmers Insurance Exchange : Brief of Appellee

Utah Court of Appeals

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Recommended Citation

Brief of Appellee, *Osequera v. Farmers Insurance*, No. 20010099 (Utah Court of Appeals, 2001).
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Paulette Stagg

LEOPOLDINA OSEQUERA,

VS.

Defendant and Appellee.

Priority No. 15

AN APPEAL FROM THE TRIAL COURT'S DENIAL OF OSEQUERA'S 60(b) MOTION; THE DENIAL OF OSEQUERA'S MOTION TO PARTIALLY VACATE THE ARBITRATION AWARD; AND CONFIRMATION OF ARBITRATION AWARD, THIRD DISTRICT COURT, SALT LAKE COUNTY, THE HONORABLE DENISE LINDBERG PRESIDING

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STATEMENT OF JURISDICTION

This Court has jurisdiction under UCA §78-31a-19, Arbitration Act, appeals.

STATEMENT OF THE ISSUES

The following issues are presented to the Court for review, together with the respective standards of review:

FIRST ISSUE ON APPEAL

Issue: Under UCA §78-31a-14(b), did the trial court properly confirm the arbitration award and deny Osequera's Motion to Partially Vacate the Arbitration Award on the basis that there were no findings, by clear and direct evidence, that the arbitrator was partial or guilty of any misconduct that prejudiced the substantial rights of Osequera?

Standard of Review: In reviewing the Order of the trial court denying Osequera's Motion to Partially Vacate the Arbitration Award and confirming the arbitration award, the trial court's conclusions of law are reviewed for correctness and findings of fact are reviewed under the clearly erroneous standard. *Soft Solutions v. Brigham Young Univ.*, 1 P.3d 1095, (Utah 2000).

SECOND ISSUE ON APPEAL

Issue: Under CJA, Rule 4-501(3)(B)(C) and (F), was it proper for the trial court to not hold an oral argument hearing on Osequera's Motion to Partially Vacate the Arbitration Award and on Farmers' 56(f) Motion when neither party requested a hearing in their principal memoranda and where Osequera's Motion issues were authoritatively

decided?

Standard of Review: In reviewing the action of the trial court not allowing a hearing prior to its Notice of Decision and Memorandum and Order, the Court's actions are reviewed for correctness. *Soft Solutions v. Brigham Young Univ.*, 1 P.3d 1095, (Utah 2000).

DETERMINATIVE RULES OF APPEAL

UCA §78-31a-14(b), Vacation of award by the court:

- (1) Upon motion to the court by any party to the arbitration proceeding for vacation of the award, the court shall vacate the award if it appears: (b) an arbitrator appointed as a neutral, showed partiality, or an arbitrator was guilty of misconduct that prejudiced the rights of any party.

CJA, Rule 4-501:

(3) Hearings -

- (B) In cases where the granting of a motion would dispose of the action any claim in the action on the merits with prejudice, either party at the time of filing the principal memorandum in support of or in opposition to a motion may file a written request for a hearing.
- (C) Such request shall be granted unless the court finds that (a) the motion or opposition to the motion is frivolous or (b) that the dispositive issue or set of issues governing the granting or denial of the motion has been authoritatively decided.
- (F) If no written request for a hearing is made at the time the parties file their principal memoranda, a hearing on the motion shall be deemed waived.

STATEMENT OF THE CASE:

On April 29, 1998, Osequera was involved in a motor vehicle accident for which

she received \$65,600 for sustained injuries from the responsible party's insurance company and Personal Injury Protection (PIP) benefits. After receiving \$65,600 in settlement, Osequera made an Underinsured Motorist Coverage (UIM) claim with Farmers Insurance. Osequera's counsel and Farmers could not agree as to the amount of UIM benefits owed to Osequera; therefore, they both agreed to UIM arbitration under the policy. Osequera and Farmers agreed to use an attorney, Paul Felt, as the arbitrator.

The arbitration was held on October 18, 1999, with both parties having submitted stipulated medical records and medical expert reports. There was no live medical testimony. On October 19, 1999, Arbitrator Felt returned his Findings of Fact and Arbitration Award. On November 4, 1999, Osequera filed a Complaint to Partially Vacate the Arbitration Award. After Farmers filed an Answer on January 7, 2000, Osequera filed a Motion for Summary Judgment on January 10, 2000, without requesting a hearing. On January 20, 2000, Farmers filed a Rule 56(f) Motion for Continuance, without requesting a hearing.

On February 29, 2000, the trial court rendered a Memorandum Decision and Order (1) denying Farmers Rule 56(f) Motion as unnecessary; (2) denying Osequera's Motion to Partially Vacate the Arbitration Award; and (3) affirming the arbitration award. On November 30, 2000, Osequera filed a Rule 60(b)(6) Motion for relief from the judgment of the trial court dismissing Plaintiff's Motion to Partially Vacate the Arbitration Award. The trial court denied the 60(b)(6) Motion and the decision was appealed to the Utah Supreme Court.

FACTS

1. On April 29, 1998, Appellant Osequera was involved in a motor vehicle accident for which she received \$65,600 for sustained injuries from the responsible party's insurance company and Personal Injury Protection (PIP) benefits. (R. 36 ¶1)

2. After receiving \$65,600 in settlement, Osequera made an Underinsured Motorist Coverage (UIM) claim with Farmers Insurance. (R. 125 ¶1)

3. Osequera's counsel and Farmers could not agree as to the amount of UIM benefits owed to Osequera; therefore, they both agreed to UIM arbitration under the policy. (R. 125 ¶2)

4. Under the UIM arbitration provision, the only issue to be decided was the amount of damages, if any, owed under the UIM coverage. (R. 140)

5. Osequera's counsel and Farmers both agreed to use Arbitrator/Attorney Paul Felt as the arbitrator and both called his office in a conference call to arrange the scheduling of the arbitration. (R. 126 ¶3)

6. Both parties submitted arbitration pre-hearing statements with medical records and medical expert reports for the arbitrator to review prior to the arbitration. (R. 126 ¶4)

7. The UIM arbitration was held on October 18, 1999, and consisted of both parties arguing their positions before the arbitrator based on the submitted and stipulated medical records; stipulated medical expert reports; and testimony of Osequera. There was no live medical expert testimony. (R. 126 ¶4 and R. 167, depo. pg. 11, lines 4-18)

8. On October 19, 1999, Arbitrator Felt returned his Findings of Fact and Arbitration Award of \$15,000 UIM benefits owed by Farmers to Osequera. (R. 122)

9. In pertinent part, Arbitrator Felt explained the following in his Findings of Fact (R. 36 ¶3):

3. Plaintiff also claims that this accident caused an injury to her back. The first real complaint of back pain was not made by Plaintiff until November 2, 1998, which is six months after the accident. An MRI on 11-9-98 revealed an L2/3 disc herniation with extruding disc fragment displacing the L-3 nerve root. The MRI also showed other degenerative changes at L-5/S-1. Back surgery was performed on 1-26-99. I find that it is extremely unlikely that Plaintiff's back problem was caused by the accident. My experience is that if an accident caused a disc herniation, this herniation becomes painful and symptomatic much earlier than six months post accident. The 5-13-98 reference to thigh sensation on the leg which had the cast is not sufficient to qualify as a back complaint. Plaintiff is fluent enough in English to have made it clear to Dr. Horne if her back was painful.

10. Aside from the specific evidence addressed by Arbitrator Felt in his Findings of Fact, other evidence presented by Farmers in the arbitration was the following (R. 141-148):

(a) After reviewing the imaging studies performed on Ms. Osequera, Radiologist Dr. Paul E. Berger found that Plaintiff had a very common pre-existing lumbar degenerative disc disease and that based upon the medical records reviewed and imaging findings detailed in his report, it was concluded that the disc abnormality at L2-3 was not causally related to the motor vehicle accident of April 29, 1998.

(b) At least one month prior to the accident, Plaintiff had been seen for complaints of pain up the leg to the hip and to the lumbar area of the back.

(c) At the accident scene, Ms. Osequera reported she had no back pain and did not mention any low back pain to any of her health care providers until six months post accident.

(d) On September 29, 1998, (five months post accident) Plaintiff reported to her

doctor that she had fallen down some stairs carrying laundry. Her initial post accident back pain complaints began a month and a half after this report of her falling down the stairs (i.e., 6 months post accident).

11. After receiving notice of the arbitration award, Farmers mailed Osequera's counsel the \$15,000 arbitration award check and a UIM Release to be signed and returned before negotiating the draft. The award check was cashed by Osequera and her counsel, but the Release was never signed and returned. (R. 126-127)

12. On November 4, 1999, Osequera filed a Complaint to Partially Vacate the Arbitration Award and, upon being served, Farmers filed an Answer on December 9, 1999. (R. 1-6 and R. 42-46)

13. On January 7, 2000, Osequera filed a Motion for Summary Judgment without requesting a hearing. (R. 47-54)

14. On January 20, 2000, Farmers filed a Rule 56(f) Motion for Continuance, without requesting a hearing, to depose Arbitrator Paul Felt in order to respond to Osequera's Motion for Summary Judgment. (R. 91)

15. On January 28, 2000, Osequera filed a Response to Farmer's Rule 56(f) Motion, claiming the arbitrator's deposition was not necessary; would not shed light on any issue; and that the request for deposition should be denied. (R. 93-104)

16. After a Notice to Submit for Decision was filed on February 14, 2000 (R. 112), the Court, on February 29, 2000, filed a Memorandum Decision and Order (1) denying Farmers' Rule 56(f) Motion as unnecessary; (2) denying Osequera's Motion to Partially Vacate the Arbitration Award; and (3) affirmed the arbitration award, stating in

part (R. 119-121):

Starting from the proposition that the public policy underlying arbitration aims for "a speedy and inexpensive method of adjudicating disputes," *DeVore v. IHC Hospitals, Inc.*, 884 P.2d 1246, 1251 (Utah, 1994), the Utah supreme court has made clear that "[t]he standard of review for a trial court reviewing an arbitration award is an extremely narrow one: 'The court should give considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances.'" *Buzas Baseball*, 925 P.2d at 948 (quoting *First Options of Chicago v. Kaplan*, 514 U.S. 938 (1995)). "The trial court must 'give considerable discretion to the arbitrator,' even when the trial court disagrees with the award or believes the arbitrator made a factual or legal error." *Pacific Development, L.C., v. Orton*, 982 P.2d 94,97 (Utah 1999); *Intermountain Power Agency v. Union Pacific RR Co.*, 961 P.2d 320, 323 (Utah 1998). "It is a settled rule in the construction of awards that no intendment shall be indulged[] to overturn an award, but every reasonable intendment shall be allowed to uphold it." *Jensen v. The Deep Creek Farm and Live Stock Co.*, 74 P. 427, 430 (Utah 1903).

While taking the arbitrator's deposition might clarify the basis of his judgment, the Court concludes that neither a continuance nor additional discovery is necessary because, as a matter of law, Plaintiff has not articulated an adequate basis for vacating or modifying the arbitrator's award.

Even if the Court were to assume, *arguendo*, that the arbitrator based his Award on an improper factual or legal ground, Plaintiff's argument still cannot be sustained. As explained before, it is beyond this Court's power to vacate an arbitration award on the basis of factual or legal error. *Pacific Dev., supra*, at 97. More importantly, Plaintiff has failed to cite any binding or persuasive authority analyzing what constitutes "misconduct" in the context of state or federal arbitration law. See *Buzas Baseball*, 925 P.2d at 948, n.5 (noting that Utah courts may look to the Federal Arbitration Act [which like the Utah act, is based on the Uniform Arbitration Act] and to the law of other states for guidance). Utah law on the subject of "misconduct" is limited but what there is suggests that Plaintiff's claims in this case, even if taken as true, are insufficient to establish misconduct affecting the substantial rights of a party.

17. On June 27, 2000, Osequera filed an Appeal to this Court under Case No. 20000632-SC seeking a review of the trial court's judgment and order denying Osequera's Motion to Partially Vacate the Arbitration Award. (R. 198)

18. On October 11, 2000, this Court signed an Order and Notice of Decision dismissing Osequera's appeal. (R. 205-206)

19. On November 30, 2000, Osequera, for the first time, filed a Rule 60(b)(6) Motion for relief from the judgment of the trial court dismissing Plaintiff's Motion to Partially Vacate the Arbitration Award. (R. 208-214)

20. On December 12, 2000, one day before Farmers was required to file its Memorandum in Opposition, the trial court denied Plaintiff's 60(b)(6) Motion ruling that, in addition to other things, the Court had reviewed all of the submissions since the entry of judgment of February 29, 2000, and that nothing in those documents called into question the Court's original decision to deny Plaintiff's Motion. (R. 216)

SUMMARY OF ARGUMENTS

The trial court was correct in finding that Osequera had not met her burden of proof, by certain and direct evidence, that Arbitrator Felt was partial or guilty of misconduct that prejudiced the substantial rights of Osequera. The record clearly shows that (1) both parties agreed to arbitrate the UIM coverage under the policy; (2) both parties agreed to use Arbitrator Felt as the arbitrator; (3) Arbitrator Felt was impartial and was qualified in both personal injury and insurance issues to arbitrate the issues involved; (4) both parties presented all of their evidence through stipulated medical expert reports, medical records and through the testimony of Osequera; and (5) Arbitrator Felt considered all of the evidence presented in making his decision and award.

While Arbitrator Felt does use the phrase "in my experience . . ." in one part of his Findings of Fact, the record is clear that he considered all of the evidence in making his arbitration decision and award as evidenced by (1) his deposition testimony that he considered all the evidence in making his decision; (2) the invoice for the arbitration illustrates that Arbitrator Felt reviewed the evidence before and again after the arbitration; (3) paragraph 3 of the arbitrator's decision reveals that his decision was based on the evidence; and (4) the other evidence submitted by Farmers supports the arbitrator's decision. Also, the record is clear that Arbitrator Felt did not take "judicial notice" of one medical expert's evidence over another; but instead, took recognition of the various medical specialties of all of the medical experts who provided reports in regard to the arbitration. The expert reports were stipulated into evidence for the arbitrator's consideration and neither party presented live medical expert testimony.

Under CJA, Rule 4-501(3)(B)(C) and (F), the trial court was correct in not allowing oral argument with regard to Osequera's Motion to Partially Vacate the Arbitration Award (i.e. Motion for Summary Judgment) or Farmers' Rule 56(f) Motion for Continuance because neither party requested oral argument before the decision of the trial court was made and Osequera's issues argued in her motion were authoritatively decided by the trial court.

ARGUMENTS

I. UNDER CURRENT UTAH LAW, THE TRIAL COURT WAS CORRECT IN CONFIRMING THE ARBITRATION AWARD AND DENYING OSEQUERA’S MOTION TO PARTIALLY VACATE THE ARBITRATION AWARD BECAUSE THERE IS NO CLEAR AND DIRECT EVIDENCE FOR FINDING THE ARBITRATOR WAS PARTIAL OR GUILTY OF ANY MISCONDUCT THAT PREJUDICED THE SUBSTANTIAL RIGHTS OF OSEQUERA AS REQUIRED UNDER UCA §78-31a-14(b).

Under current Utah law, in reviewing the Order of the trial court confirming the arbitration award and denying Osequera’s Motion to Partially Vacate the Arbitration Award (filed by Osequera as a Motion for Summary Judgment), the trial court’s conclusions of law are reviewed for correctness and findings of fact are reviewed under the clearly erroneous standard. *Soft Solutions v. Brigham Young Univ.*, 1 P.3d 1095 (Utah 2000). Under *Soft Solutions*, the scope of review by this court is limited to the legal issue of whether the trial court correctly exercised its authority in confirming the arbitration award and the trial court’s authority is subject to the following guidelines:

- (1) The standard for reviewing an arbitration award is highly deferential to the arbitrator;
- (2) The trial court may not substitute its judgment for that of the arbitrator, nor may it modify or vacate an award because it disagrees with the arbitrator’s assessment;
- (3) Standard of review for a trial court is an extremely narrow one giving considerable leeway to the arbitrator and setting aside the arbitrator’s decision only in certain narrow circumstances; and

- (4) Given the public policy in law and support of arbitration, judicial review of arbitration awards confirmed pursuant to the act is limited to those grounds and procedures provided for under the act.

The statutory grounds for vacating an arbitration award are found in UCA §78-31a-14(b), wherein it states that the Court shall only vacate the award if there is partiality of the arbitrator or the arbitrator is guilty of misconduct that prejudices the rights of any party. The burden of proof evidencing partiality falls upon the movant, Osequera, and the evidence must be certain and direct, not remote, uncertain or speculative. *DeVore v. IHC Hospitals*, 884 P.2d 1246 (Utah 1994). Unless there is direct and certain evidence of dishonesty or unfairness resulting in partiality affecting the substantial rights of a party, an arbitration award should not be disturbed, reviewed or substituted, even if the Court does not agree with the award. See *Bivans v. Utah Lake, Land, Water & Power Co.*, 174 P. 1126 (Utah 1918); *Giannopoulos v. Pappas*, 15 P.2d 353 (Utah 1932); and *DeVore v. IHC Hospitals*, 884 P.2d 1247 (Utah 1994).

Based on a thorough review of the record, it should be determined that there is no basis for finding that Arbitrator Felt was partial or guilty of any misconduct that prejudiced the substantial rights of Osequera. Instead, the record is clear that Arbitrator Felt acted properly within his authority in regard to all aspects of the arbitration process, findings and award. This conclusion is based on the following:

1. Both parties agreed to arbitrate the UIM coverage under the policy

and both agreed to have Attorney Paul Felt serve as the arbitrator. (R. 126 ¶3)

2. Arbitrator Paul Felt has over 28 years of experience as an attorney (representing both plaintiffs and defendants); as a participant in mediations and arbitrations; and as an arbitrator and mediator himself. He has tried more than 100 jury trials; and has arbitrated/mediated over 200 cases. (R. 165, depo. pgs. 4-5)

3. In his deposition, Arbitrator Felt made it clear that he has no close relationship of any kind with Claim Representative Robert Payne of Farmers Insurance. (R. 168, depo. pg. 15)

4. Arbitrator Felt was also very clear in his deposition that he considered all of the evidence presented by both Osequera and Farmers in making his arbitration award, and that there was no evidence presented which he did not consider (R. 167, depo. pg. 12). (Under Utah law, the testimony of the arbitrator on what he considered in making his decision is admissible. *Giannopoulos*, at 355). The arbitration billing statement (R. 137) also documents that he reviewed the medical records and medical expert reports before and again after the arbitration, before rendering decision.

5. Even in paragraph 3 of the Arbitrator's Findings of Fact and Award, (R. 122 ¶3), Arbitrator Felt mentioned some of the evidence supporting his finding that Osequera's back problem did not result from the accident when he stated:

3. Plaintiff also claims that this accident caused an injury to her back. The first real complaint of back pain was not made by Plaintiff until November 2,

1998, which is six months after the accident. An MRI on 11-9-98 revealed an L2/3 disc herniation with extruding disc fragment displacing the L-3 nerve root. The MRI also showed other degenerative changes at L-5/S-1. Back surgery was performed on 1-26-99. I find that it is extremely unlikely that Plaintiff's back problem was caused by the accident. My experience is that if an accident caused a disc herniation, this herniation becomes painful and symptomatic much earlier than six months post accident. The 5-13-98 reference to thigh sensation on the leg which had the cast is not sufficient to qualify as a back complaint. Plaintiff is fluent enough in English to have made it clear to Dr. Horne if her back was painful.

The record is clear that Arbitrator Felt made his decision and award based on consideration of all the evidence. While Osequera has argued as to the evidence she feels the arbitrator should have accepted, the record demonstrates there was more credible, convincing evidence presented by Farmers, as illustrated by the following (R. 141-148):

- (a) After reviewing the imaging studies performed on Ms. Osequera, Radiologist Dr. Paul E. Berger found that Plaintiff had a very common pre-existing lumbar degenerative disc disease and that based upon the medical records reviewed and imaging findings detailed in his report, it was concluded that the disc abnormality at L2-3 was not causally related to the motor vehicle accident of April 29, 1998.
- (b) At least one month prior to the accident, Plaintiff had been seen for complaints of pain up the leg to the hip and to the L-7 area of the back.
- (c) At the accident scene, Ms. Osequera reported she had no back pain and did not mention any low back pain to any of her health providers until six months post accident.
- (d) On September 29, 1998, (five months post accident) Plaintiff reported to her doctor that she had fallen down some stairs carrying laundry. Her initial post accident back pain complaints began a month and a half after this report of her falling down the stairs (i.e., 6 months post accident).

Osequera incorrectly claims that Arbitrator Felt used his own personal experience

in place of any of the offered medical evidence in making his award. The mere fact that Arbitrator Felt, in his written award, used the words, "in my experience . . .", does not mean that he did not consider the evidence presented. Paragraph 3 of the award, Arbitrator Felt's deposition testimony, the billing statement and other evidence make it clear that he did. An arbitrator should not be required or expected to totally disregard his personal and/or professional experience when considering the weight of expert testimony. An arbitrator is the exclusive person to determine the facts in the case and to consider and weigh the expert evidence for that purpose.

Osequera also incorrectly argues that Arbitrator Felt improperly took formal "judicial notice" of scientific principals and evidence in the medical opinions rendered by the neurologists and radiologists in their medical reports submitted as evidence in the arbitration; however, it is clear from Arbitrator Felt's deposition that if he took judicial notice of anything, it was simply that he recognized the difference in specialties between what a radiologist does and what an orthopedic specialist does, not as to the opinions and findings of those specialists (R. 171, depo. pg. 29, lines 2-25 and pg. 30, lines 1-2). It is important to point out that Arbitrator Felt took recognition of the types and specialties of all six involved medical providers by accepting the medical records and medical expert reports submitted by both parties into evidence without requiring all the providers to testify as part of the arbitration. Both parties stipulated to the medical records and expert reports without laying a foundation for the reports (R. 167, depo pg. 11, lines 4-11).

Neither party presented evidence by live medical expert testimony, only through the reports. Arbitrator Felt should have every right to use his experience and knowledge to recognize the various medical specialists involved and consider all the medical evidence of both parties on that basis.

The two Utah cases on which Osequera relies concerning personal experience and expert testimony are simply not applicable in this arbitration award and decision review. Both cases, *Brady v. Gibb*, 886 P.2d 104 (Utah Ct. App. 1994) and *Dearden v. San Pedro, L.A. & S.L.R. Co.*, 93 P.271 (Utah 1907), deal with issues concerning improper jury instructions, not an arbitrator's weighing of expert opinions in medical reports which were submitted as evidence by stipulation. The other cases concerning judicial notice are also inapplicable as there was no judicial notice taken of any medical opinion evidence.

Based on the record, it should be determined that the trial court correctly exercised its authority when it determined the following (R. 119-121):

Starting from the proposition that the public policy underlying arbitration aims for "a speedy and inexpensive method of adjudicating disputes," *DeVore v. IHC Hospitals, Inc.*, 884 P.2d 1246, 1251 (Utah 1994), the Utah supreme court has made clear that "[t]he standard of review for a trial court reviewing an arbitration award is an extremely narrow one: 'The court should give considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances.'" *Buzas Baseball*, 925 P.2d at 948 (quoting *First Options of Chicago v. Kaplan*, 514 U.S. 938 (1995)). "The trial court must 'give considerable discretion to the arbitrator,' even when the trial court disagrees with the award or believes the arbitrator made a factual or legal error." *Pacific Development, L.C., v. Orton*, 982 P.2d 94, 97 (Utah 1999); *Intermountain Power Agency v. Union Pacific RR Co.*, 961 P.2d 320, 323 (Utah 1998). "It is a settled rule in the

construction of awards that no intendment shall be indulged[] to overturn an award, but every reasonable intendment shall be allowed to uphold it." *Jensen v. The Deep Creek Farm and Live Stock Co.*, 74 P. 427, 430 (Utah 1903).

While taking the arbitrator's deposition might clarify the basis of his judgment, the Court concludes that neither a continuance nor additional discovery is necessary because, as a matter of law, Plaintiff has not articulated an adequate basis for vacating or modifying the arbitrator's award.

Even if the Court were to assume, *arguendo*, that the arbitrator based his award on an improper factual or legal ground, Plaintiff's argument still cannot be sustained. As explained before, it is beyond this Court's power to vacate an arbitration award on the basis of factual or legal error. *Pacific Dev.*, *supra*, at 97. More importantly, Plaintiff has failed to cite any binding or persuasive authority analyzing what constitutes "misconduct" in the context of state or federal arbitration law. *See Buzas Baseball*, 925 P.2d at 948, n.5 (noting that Utah courts may look to the Federal Arbitration Act [which like the Utah Act, is based on the Uniform Arbitration Act] and to the law of other states for guidance). Utah law on the subject of "misconduct" is limited but what there is suggests that Plaintiff's claims in this case, even if taken as true, are insufficient to establish misconduct affecting the substantial rights of a party.

II. UNDER CJA, RULE 4-501(3)(B)(C) AND (F), THE TRIAL COURT RULED PROPERLY WHEN IT DID NOT HOLD AN ORAL ARGUMENT HEARING ON OSEQUERA'S MOTION FOR SUMMARY JUDGMENT (I.E. MOTION TO PARTIALLY VACATE ARBITRATION AWARD) AND ON FARMERS' 56(f) MOTION BECAUSE, NOT ONLY DID NEITHER PARTY REQUEST A HEARING IN THEIR MOTIONS, OSEQUERA'S MOTION ISSUES WERE AUTHORITATIVELY DECIDED.

Under CJA, Rule 4-501(F), if a request for a hearing is not made in the principal memoranda, the request is considered waived. The record is clear that, in her Motion to Vacate Arbitration Award, Osequera did not request a hearing (R. 47-54). In response to Osequera's Motion to Partially Vacate the Arbitration Award, Farmers filed a Rule 56(f)

Motion for Continuance to permit the taking of the arbitrator's deposition in order to respond to the Motion for Summary Judgment. This Motion was also made without requesting a hearing (R. 91). There were no requests for hearing made before the trial court's Memorandum Decision and Order of February 29, 2000.

Even if, for argument sake, it was determined that Farmers' Request for Hearing, which was filed well after the trial court's Order, should have been recognized, under CJA, Rule 4-501(3)(C), the District Court was not required to allow oral arguments as asserted by Plaintiff because the Court clearly found that the dispositive issues governing the denial of Osequera's Motion to Partially Vacate the Arbitration Award were authoritatively decided. In its Memorandum Decision and Order of February 29, 2000 (R. 119-121), the trial court stated the following (emphasis added):

While taking the arbitrator's deposition may clarify the basis of his judgment, the Court concludes that neither a continuance nor additional discovery is necessary because, as a matter of law, Plaintiff has not articulated an adequate basis for vacating or modifying the arbitrator's award. Even if the Court were to assume, arguendo, that the arbitrator based his award on an improper factual or legal ground, Plaintiff's argument still cannot be sustained. As explained below, it is beyond this court's power to vacate an arbitration award on the basis of factual or legal error.

Even in Osequera's own response to Farmers' Rule 56(f) Motion, Osequera claimed, "the deposition of the arbitrator is unnecessary as all facts are undisputed and the additional facts to be gained by the arbitrator's deposition are immaterial to Plaintiff's claim." Osequera requested that Farmers' Rule 56(f) Motion, which was to take the

arbitrator's deposition and make it part of the evidence, be denied. The Court in its ruling, denied Farmers' Rule 56(f) Motion, refusing to accept the deposition testimony as being unnecessary because Osequera had not asserted adequate grounds for vacating or modifying the arbitrator's award.

CONCLUSION

The trial court properly confirmed the arbitration award and properly denied Osequera's Motion to Partially Vacate the Arbitration Award because Osequera did not present evidence to meet the required burden of proof, by clear and direct evidence, that Arbitrator Felt was partial or guilty of misconduct which prejudiced the substantial rights of Osequera. The record clearly demonstrates that (1) both parties agreed to arbitrate the UIM coverage under the policy with Felt as the arbitrator; (2) Arbitrator Felt was impartial and well qualified to serve as the arbitrator; (3) all of the evidence presented by both parties was considered in making the arbitration award; and (4) Arbitrator Felt based his decision on the greater weight of the evidence.

The mere fact that Arbitrator Felt, in his written award, used the phrase, "in my experience. . .," does not mean that he did not consider the evidence presented. It is clear from the record that he did, as evidenced by (1) his deposition testimony stating he considered all the evidence; (2) the invoice for the arbitration showing time spent reviewing records before and again after the arbitration; (3) the arbitrator's reasoning in paragraph 3 of the decision; and (4) other supporting evidence identified in the record.

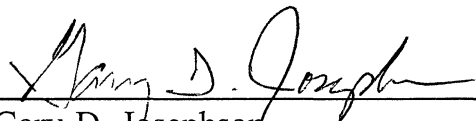
The record also demonstrates that Arbitrator Felt did not take "judicial notice" of the medical opinions asserted in the medical expert reports; but instead, the record clearly documents that he simply recognized the different medical specialties of the various doctors generating the medical expert reports and opinions because neither party presented live medical testimony and all medical expert reports and records were admitted as evidence through stipulation by the parties.

Finally, the trial court, under CJA, Rule 4-501(C) and (F), was correct when it did not hold an oral argument hearing before issuing its Memorandum Decision and Order confirming the arbitration award and denying Osequera's Motion to Partially Vacate the Arbitration Award because neither party requested a hearing in their principal memoranda as required under Rule 4-501(C) and, therefore, under Rule 4-501(F), the right for a hearing was considered waived. Osequera's attempt to rely on Farmers' request for hearing, made well after the trial court's Memorandum Decision and Order, is inappropriate. Even if, for purpose of argument, the request for a hearing was properly made, the fact that the issues brought up in Osequera's Motion were authoritatively decided by the trial court made the hearing unnecessary under Rule 4-501(C). The trial court authoritatively decided the issues in Osequera's Motion when it properly determined that under current Utah law, even if there had been a factual or legal error made in the arbitration, it would have been beyond the trial court's authority to vacate an arbitration award on the basis of factual or legal error.

Based on the foregoing, Farmers requests (1) that the arbitration award be confirmed; (2) Osequera's Motion to Partially Vacate the Arbitration Award be denied; (3) that Osequera's request to have this matter re-arbitrated be denied; and (4) Osequera's Rule 60(b) Motion hearing be denied.

DATED this 7th day of August, 2001.

PETERSEN & HANSEN




Gary D. Josephson
Attorney for Defendant/Appellee

CERTIFICATE OF MAILING

I, the undersigned, hereby certify that a true and correct copy of the foregoing Brief of Appellee was this 7th day of August, 2001, mailed first class, postage prepaid to the following:

Loren M. Lambert
Arrow Legal Solutions
266 East 7200 South
Midvale, Utah 84047



ADDENDUM

- (A) Memorandum Decision and Order
- (B) UCA §78-31a-14(b)
- (C) CJA, Rule 4-501(3)(B)(C) and (F)
- (D) Ruling on Motion for Relief from Judgment

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH
Sandy Department

LEOPOLDINA OSEQUERA

Plaintiff,

vs.

FARMERS INSURANCE EXCHANGE,

Defendant.

MEMORANDUM DECISION AND
ORDER

Civil No. 990410525

This matter comes before the Court following Defendant's filing of a Notice to Submit for Decision on its Rule 56(f) Motion for Continuance. The requested continuance is to allow time to depose the arbitrator who entered Findings of Fact and Award in a matter which the parties arbitrated in accordance with a pre-existing contractual agreement.

At the outset the Court notes that the procedural posture of this case is somewhat confused due to the manner in which the case was initiated by Plaintiff and pursued by the parties. Under Utah law, the proper procedure to challenge an arbitration award is not by way of a Complaint, but rather by “[filing] a single motion to vacate or amend, requiring a single response[.]” this approach being consistent with “the expedited procedure contemplated by the statutes and required by the policies underlying arbitration.” *See Buzas Baseball, Inc., et al., v. Salt Lake Tappers, Inc.*, 925 P.2d 941, 947 n.4 (Utah 1996); Utah Code Ann. §§ 78-31a-14, -15. However characterized, Plaintiff seeks to vacate a portion of the award on two grounds: First, under Utah Code Ann. § 78-31a-14(1)(b), she claims the arbitrator engaged in misconduct that prejudiced her rights by looking to his “experience” rather than to the expert testimony received as the basis for rejecting Plaintiff’s back-injury claim. Second, she claims that, under the terms of the contract providing for arbitration, it was error not to require Defendant to pay the interpreter fees incurred in the arbitration.

Following Defendant's Answer, Plaintiff filed a "Motion for Summary Judgment."¹ Plaintiff's motion in turn triggered the issue presently before the Court – Defendant's Rule 56(f) motion.

Starting from the proposition that the public policy underlying arbitration aims for “a speedy and inexpensive method of adjudicating disputes,” *DeVore v. IHC Hospitals, Inc.*, 884 P.2d 1246, 1251 (Utah 1994), the Utah supreme court has made clear that “[t]he standard of review for a trial court reviewing an arbitration award is an extremely narrow one: ‘The court should give considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances.’” *Buzas Baseball*, 925 P.2d at 948 (quoting *First Options of Chicago v. Kaplan*, 514 U.S. 938 (1995)). “The trial court must ‘give

¹That Motion was, strictly speaking, unnecessary once review was sought under U.C.A. § 78-31a-14. The court will treat it as seeking disposition under the statutory provisions to vacate the award.

considerable discretion to the arbitrator,' even when the trial court disagrees with the award or believes the arbitrator made a factual or legal error." *Pacific Development, L.C., v. Orton*, 982 P.2d 94, 97 (Utah 1999); *Intermountain Power Agency v. Union Pacific RR Co.*, 961 P.2d 320, 323 (Utah 1998). "It is a settled rule in the construction of awards that no intendment shall be indulged[] to overturn an award, but every reasonable intendment shall be allowed to uphold it." *Jensen v. The Deep Creek Farm and Live Stock Co.*, 74 P. 427, 430 (Utah 1903).

In this case Plaintiff claims arbitrator misconduct, one of the "narrow set of statutory grounds" upon which the Court may vacate an award. *Pacific Dev.*, 982 P.2d at 96, ¶ 8. The claimed misconduct involves the arbitrator improperly substituting his judgment for that of expert witnesses and, as evidence, Plaintiff cites to ¶ 3 in the Findings of Fact and Award. In ¶ 3 the arbitrator, after citing medical evidence regarding the Plaintiff's back injury states: "I find that it is extremely unlikely that plaintiff's back problem was caused by the accident. *My experience is* that if an accident caused a disc herniation, this herniation becomes painful and symptomatic much earlier than six months post accident. The 5/23/98 reference to thigh sensation on the leg which had the cast is not sufficient to qualify as a back complaint. Plaintiff is fluent enough in English to have made it clear to Dr. Horne if her back was painful." (emphasis added).

The entire weight of Plaintiff's argument rests on the words "[m]y experience is . . ." Plaintiff argues that the arbitrator's use of that language must be taken to mean that the decision was a personal judgment made in total disregard for the proffered expert testimony. Working from that premise Plaintiff then argues that a decision thus reached is *per se* "misconduct."

Although the arbitrator's language choice may have been inartful, a close examination of the arbitrator's findings – summary though they are – reveals that he in fact looked to the medical evidence including, among other things, the magnetic resonance imaging ("MRI") test performed on 11/9/98 and the proffered letter by David E. Curtis, M.D. which noted "thigh complaints of 05-13-98 which probably represented a complaint of pain, numbness and tingling in the L3 nerve distribution. . . ." Paragraph 3 of the Findings of Fact and Award also closely mirrors the conclusions of another expert, Paul Berger, M.D., whose report stated that "[t]he medical records do not describe any evidence of low back pain until approximately 6 months following the motor vehicle accident. Had the motor vehicle accident been directly, causally related to this finding, one would have assumed at least some complaints of back problems prior to that time." (quoted in the "Personal Injury Report & Board Certified Impairment Rating," dated 9/21/99, prepared by Jeffrey A. States, D.C., at page 4). Notwithstanding the personalized language of this Finding, it appears to this Court that the arbitrator's Findings and Award reflected, *sub silentio*, an acceptance of one expert's conclusions and rejection of contrary evidence.

While taking the arbitrator's deposition might clarify the basis of his judgment, the Court concludes that neither a continuance nor additional discovery is necessary because, as a matter of law, Plaintiff has not articulated an adequate basis for vacating or modifying the arbitrator's award.

Even if the Court were to assume, *arguendo*, that the arbitrator based his Award on an improper factual or legal ground, Plaintiff's argument still cannot be sustained. As explained before, it is beyond this Court's power to vacate an arbitration award on the basis of factual or legal error. *Pacific Dev.*, *supra*, at 97. More importantly, Plaintiff has failed to cite any binding or persuasive authority analyzing what constitutes "misconduct" in the context of state or federal arbitration law. See *Buzas Baseball*, 925 P.2d at 948, n.5 (noting that Utah courts may look to the Federal Arbitration Act [which like the Utah act, is based on the Uniform Arbitration Act] and to the law of other states for guidance). Utah law on the subject of "misconduct" is limited but what there is suggests that Plaintiff's claims in this case, even if taken as true, are insufficient to establish misconduct affecting the substantial rights of a party. See, e.g.,

Giannopoulos v. Pappas, 15 P.2d 353 (Utah 1932) and cases cited therein. In *Giannopoulos* the court found misconduct where an arbitrator assured a party that it would be given time to present certain testimony, failed to keep that promise, and further compounded the error by not notifying the other panel members of the party's request. Under those circumstances the court concluded that the arbitrator's conduct had misled the party, lulling him into a sense of security so that he did not press his request to the panel at large. By contrast, in this case Plaintiff was in no way foreclosed from presenting her evidence fully. Plaintiff's complaint, at most, reflects her disagreement with the arbitrator's rationale for the Award.


The two Utah cases on which Plaintiff relies are inapposite. In one, conflicting jury instructions were given, thereby creating jury confusion. *Brady v. Gibb*, 886 P.2d 104 (Utah Ct. App. 1994)² The other case, *Dearden v. San Pedro, L.A. & S.L.R. Co.*, 93 P. 271 (Utah 1907), also involved a challenge to a jury instruction, and the court rejected the claimed error.

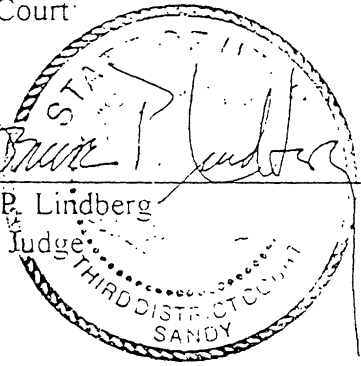
The second claim of error is also unavailing. The arbitrator's alleged refusal to tax Defendant with interpreter fees falls outside any of the statutory grounds for vacating the award.

For the foregoing reasons Defendant's Rule 56(f) motion is denied as unnecessary, and Plaintiff's Motion to Partially Vacate the Arbitration Award (captioned as a Summary Judgment motion) is also denied. The Arbitration Award is confirmed. So ordered.

Dated this 29th day of February, 2000.

By the Court:


Denise B. Lindberg
District Judge



²One of the instructions directed that the jury may only look to expert testimony in determining the applicable standard of care, whereas another instruction directed that the standard of care could be established by the common knowledge, experience and understanding of a layman.

certified mail upon all other parties to the proceeding. The notice of motion for modification shall contain a statement that objections to the motion be served upon the moving party within ten days after receipt of the notice. Any award modified by the arbitrators is subject to the provisions of Sections 78-31a-11, 78-31a-12, and 78-31a-14.

History: C. 1953, 78-31a-13, enacted by L. 1985, ch. 225, § 1.

Cross-References. — Motions and orders generally, U R C P 6(b), 6(d), 6(e), 7(b), 43(b)

NOTES TO DECISIONS

ANALYSIS

Failure to timely file.
Time for filing motion
— After judgment confirming award.

Failure to timely file.

The procedural safeguards set out in Subsection (1) of this section and 78-31a-14(2) are designed to protect against arbitrary, unfair, or prejudicial treatment in the arbitration process, however, failure to timely file a motion to

either modify or vacate an award forecloses a comprehensive review on the merits of the arbitration process *Allred v Educators Mut Ins Ass'n*, 909 P2d 1263 (Utah 1996)

Time for filing motion.

— After judgment confirming award.

The filing of motions to vacate or modify an award is barred once the court has entered a judgment confirming the award *Robinson & Wells v Warren*, 669 P2d 844 (Utah 1983).

COLLATERAL REFERENCES

Am. Jur. 2d. — 5 Am Jur. 2d Arbitration and Award § 143.

A.L.R. — Power of arbitrator to correct, or power of court to correct or resubmit, nonlabor award because of incompleteness or failure to pass on all matters submitted, 36 A L R 3d 939

Power of court to resubmit matter to arbitrators for correction or clarification, because of ambiguity or error in, or omission from, arbitration award, 37 A L R 3d 200

Key Numbers. — Arbitration ⇐ 63 2, 70

78-31a-14. Vacation of the award by court.

(1) Upon motion to the court by any party to the arbitration proceeding for vacation of the award, the court shall vacate the award if it appears:

- (a) the award was procured by corruption, fraud, or other undue means;
- (b) an arbitrator, appointed as a neutral, showed partiality, or an arbitrator was guilty of misconduct that prejudiced the rights of any party;
- (c) the arbitrators exceeded their powers;
- (d) the arbitrators refused to postpone the hearing upon sufficient cause shown, refused to hear evidence material to the controversy, or otherwise conducted the hearing to the substantial prejudice of the rights of a party;

or

- (e) there was no arbitration agreement between the parties to the arbitration proceeding.

(2) A motion to vacate an award shall be made to the court within 20 days after a copy of the award is served upon the moving party, or if predicated upon corruption, fraud, or other undue means, within 20 days after the grounds are known or should have been known.

(3) If an award is vacated on grounds other than in Subsection (1)(e), the court may order a rehearing before new arbitrators chosen as provided in the arbitration agreement or by the court. Arbitrators chosen by the court shall be found qualified to arbitrate the issues involved. The time for making an award, if specified in the arbitration agreement, is applicable to a rearbitration

Rule 4-408. Locations of trial courts of record.**Intent:**

To designate locations of trial courts of record.

Applicability:

This rule shall apply to all trial courts of record.

Statement of the Rule:

(1) Each county seat and the following municipalities are hereby designated as locations of trial courts of record: American Fork; Bountiful; Cedar City; Layton; Murray; Orem; Park City; Roosevelt; Roy; Salem; Sandy; Spanish Fork; West Valley City.

(2) Subject to limitations imposed by law, any trial court of record may hold court in any location designated by this rule.

(Added effective January 1, 1992; amended effective November 15, 1995.)

Rule 4-408.01. Responsibility for administration of trial courts.**Intent:**

To designate the court locations administered directly through the administrative office of the courts and those administered through contract with local government pursuant to § 78-3-21.

Applicability:

This rule shall apply to the trial courts of record and to the administrative office of the courts.

Statement of the Rule:

(1) All locations of the juvenile court shall be administered directly through the administrative office of the courts.

(2) All locations of the district court shall be administered directly through the administrative office of the courts, except the following, which shall be administered through contract with county or municipal government pursuant to § 78-3-21: Coalville, Fillmore, Junction, Kanab, Loa, Manila, Manti, Morgan, Panguitch, Park City, Randolph, and Salem.

(Added effective November 15, 1995; amended effective January 27, 1997; November 1, 1998.)

Amendment Notes. — The 1997 amendment, in Subdivision (2), substituted "district court" for "district and circuit courts" and deleted "Castle Dale" from the listed exceptions. The 1998 amendment deleted "Beaver" before "Coalville" in Subdivision (2).

ARTICLE 5. CIVIL PRACTICE**Rule 4-501. Motions.****Intent:**

To establish a uniform procedure for filing motions, supporting memoranda and documents with the court.

To establish a uniform procedure for requesting and scheduling hearings on dispositive motions.

To establish a procedure for expedited dispositions.

Applicability:

This rule shall apply to motion practice in all trial courts of record except proceedings before the court commissioners and small claims cases. This rule does not apply to petitions for habeas corpus or other forms of extraordinary relief.

Statement of the Rule:

(1) *Filing and service of motions and memoranda.*

(A) *Motion and supporting memoranda.* All motions, except uncontested or ex-parte matters, shall be accompanied by a memorandum of points and

(C)

authorities appropriate affidavits, and copies of or citations by page number to relevant portions of depositions, exhibits or other documents relied upon in support of the motion. Memoranda supporting or opposing a motion shall not exceed ten pages in length exclusive of the “statement of material facts” as provided in paragraph (2), except as waived by order of the court on ex-parte application. If an ex-parte application is made to file an over-length memorandum, the application shall state the length of the principal memorandum, and if the memorandum is in excess of ten pages, the application shall include a summary of the memorandum, not to exceed five pages.

(B) *Memorandum in opposition to motion.* The responding party shall file and serve upon all parties within ten days after service of a motion, a memorandum in opposition to the motion, and all supporting documentation. If the responding party fails to file a memorandum in opposition to the motion within ten days after service of the motion, the moving party may notify the clerk to submit the matter to the court for decision as provided in paragraph (1)(D) of this rule.

(C) *Reply memorandum.* The moving party may serve and file a reply memorandum within five days after service of the responding party’s memorandum.

(D) *Notice to submit for decision.* Upon the expiration of the five-day period to file a reply memorandum, either party may notify the clerk to submit the matter to the court for decision. The notification shall be in the form of a separate written pleading and captioned “Notice to Submit for Decision.” The Notice to Submit for Decision shall state the date on which the motion was served, the date the memorandum in opposition, if any, was served, the date the reply memorandum, if any, was served, and whether a hearing has been requested. The notification shall contain a certificate of mailing to all parties. If neither party files a notice, the motion will not be submitted for decision.

(2) *Motions for summary judgment.*

(A) *Memorandum in support of a motion.* The points and authorities in support of a motion for summary judgment shall begin with a section that contains a concise statement of material facts as to which movant contends no genuine issue exists. The facts shall be stated in separate numbered sentences and shall specifically refer to those portions of the record upon which the movant relies.

(B) *Memorandum in opposition to a motion.* The points and authorities in opposition to a motion for summary judgment shall begin with a section that contains a concise statement of material facts as to which the party contends a genuine issue exists. Each disputed fact shall be stated in separate numbered sentences and shall specifically refer to those portions of the record upon which the opposing party relies, and, if applicable, shall state the numbered sentence or sentences of the movant’s facts that are disputed. All material facts set forth in the movant’s statement and properly supported by an accurate reference to the record shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the opposing party’s statement.

(3) *Hearings.*

(A) A decision on a motion shall be rendered without a hearing unless ordered by the court, or requested by the parties as provided in paragraphs (3)(B) or (4) below.

(B) In cases where the granting of a motion would dispose of the action or any claim in the action on the merits with prejudice, either party at the time of filing the principal memorandum in support of or in opposition to a motion may file a written request for a hearing.

(C) Such request shall be granted unless the court finds that (a) the motion or opposition to the motion is frivolous or (b) that the dispositive issue or set of issues governing the granting or denial of the motion has been authoritatively decided.

(D) When a request for hearing is denied, the court shall notify the requesting party. When a request for hearing is granted, the court shall set the matter for hearing or notify the requesting party that the matter shall be heard and the requesting party shall schedule the matter for hearing and notify all parties of the date and time.

(E) In those cases where a hearing is granted, a courtesy copy of the motion, memorandum of points and authorities and all documents supporting or opposing the motion shall be delivered to the judge hearing the matter at least two working days before the date set for hearing. Copies shall be clearly marked as courtesy copies and indicate the date and time of the hearing. Courtesy copies shall not be filed with the clerk of the court.

(F) If no written request for a hearing is made at the time the parties file their principal memoranda, a hearing on the motion shall be deemed waived.

(G) All dispositive motions shall be heard at least thirty (30) days before the scheduled trial date. No dispositive motions shall be heard after that date without leave of the court.

(H) If a hearing has been requested and the non-moving party fails to file a memorandum in opposition, the moving party may withdraw the request or the court on its own motion may strike the request and decide the motion without oral argument.

(4) *Expedited dispositions.* Upon motion and notice and for good cause shown, the court may grant a request for an expedited disposition in any case where time is of the essence and compliance with the provisions of this rule would be impracticable or where the motion does not raise significant legal issues and could be resolved summarily.

(5) *Telephone conference.* The court on its own motion or at a party's request may direct arguments of any motion by telephone conference without court appearance. A verbatim record shall be made of all telephone arguments and the rulings thereon if requested by counsel.

(Amended effective January 15, 1990; April 15, 1991; November 1, 1996; November 1, 1998; April 1, 1999; April 1, 2001.)

Amendment Notes. — The 1998 amendment substituted “trial courts of record” for “district courts” in the applicability paragraph, added Subdivision (3)(h), and made a stylistic change.

The 1999 amendment substituted “claim” for “issues” in Subdivision (3)(B).

The 2001 amendment added the second sentence to Subdivision (1)(D) and made stylistic changes in the subdivision designations.

NOTES TO DECISIONS

Decisions sua sponte
Purpose
Request for hearing
Supplemental memoranda
When rule applies
Cited

Decisions sua sponte.

While a court may refrain from addressing a matter that is not submitted for decision under this rule, nothing in this rule or any other rule bars a court from deciding such a matter sua sponte. *Scott v Majors*, 1999 UT App 139, 980 P2d 214, cert denied, 994 P2d 1271 (Utah 1999).

No notice to submit for decision under this rule is required, and a trial therefore correctly determined that it could rule on pending motions sua sponte. *Scott v Majors*, 1999 UT App 139, 980 P2d 214, cert denied, 994 P2d 1271 (Utah 1999).

Purpose.

The purpose of the code of judicial adminis-

tration is not to create or modify substantive rights of litigants, but to bring order to the manner in which the courts operate. *Scott v Majors*, 1999 UT App 139, 980 P2d 214, cert denied, 994 P2d 1271 (Utah 1999).

Request for hearing.

Once a request for hearing by one of the parties has been granted and the matter set for hearing, the other party has a right to rely upon such setting regardless of whether it made its own request. *Price v Armour*, 949 P2d 1251 (Utah 1997).

Supplemental memoranda.

The plural “memoranda” in Subdivision (1)(a) refers to all memoranda received by the court — from all parties that either oppose or support any motion — and does not mean that each party may submit more than one memorandum, thus, the trial court was well within its discretion in refusing to accept a supplemental memorandum that was submitted without prior invitation and outside the bounds of pro-

THIRD DISTRICT COURT - SANDY COURT
SALT LAKE COUNTY, STATE OF UTAH

LEOPOLDINA OSEQUERA,
Plaintiff,

:
: RULING ON MOTION FOR RELIEF FROM
JUDGMENT

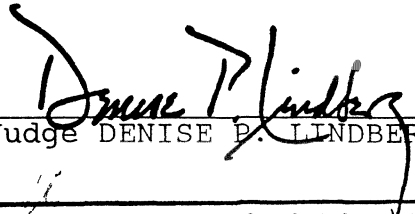
vs.

FARMERS INSURANCE EXCHANGE,
Defendant.

: Judge: DENISE P. LINDBERG
: Date: 12/12/2000

Clerk: loriw

Plaintiff's Rule 60(b)(6) Motion is denied. The Court acknowledges that the parties may not have been timely notified of its Memorandum Decision dated 2-29-00 affirming the Arbitrator's Award and denying Plaintiff's Motion for Summary Judgment. The Court apologizes to the parties for any inconvenience that resulted, but notes that it repeatedly denied requests to set additional pretrial conferences on the basis that judgment had already entered in the case. Accordingly, the parties cannot now claim that they were not aware of the Court's judgment, at least by May 2d. The Court has reviewed all the submissions since the entry of its February 29th decision and nothing in those documents calls into question the Court's original decision. Request for Oral Argument on the Rule 60(b)(6) is denied. The case is over.


Judge DENISE P. LINDBERG

By _____
STAMP USED AT DIRECTION OF JUDGE

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