2015

Buffalo Wild Wings and Trumbull Insurance Company, Petitioners/ Appellant vs. Michael G. Torum and Utah Labor Commission, Respondents/Appellees

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

BUFFALO WILD WINGS and TRUMBULL INSURANCE COMPANY, Petitioners/Appellant vs. MICHAEL G. TORUM and UTAH LABOR COMMISSION, Respondents/Appellees	Appeal No. 20150413 Agency Decision No. 14-1034

APPELLANT'S REPLY BRIEF

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I. SERRATO v. UTAH TRANSIT AUTHORITY

Appellee in his brief extensively cites Serrato v. Utah Transit Authority, 13 P.3d 616 (Utah App. 2000). In this case, the Utah Court of Appeals differentiates excusable neglect and good cause. Specifically, excusable neglect is neglect that may be excused by special circumstances; whereas good cause pertains to special circumstances that are essentially beyond a party's control. Id. at 618. (See also Bennett v. Bigelow, 307 P.3d 641, 645 (Utah App. 2013)("excusable neglect is an admittedly neglectful delay that is nevertheless excused by special circumstances whereas good cause pertains to special circumstances that are essentially beyond the parties control.")

The Serrato Court lists several factors relevant to the determination of whether there is excusable neglect including: "[i] the danger of prejudice to the nonmoving party, [ii] the length of the delay and its potential impact on judicial proceedings, [iii] the reason for the delay, including whether it was within the reasonable control of the movant, and [iv] whether the movant acted in good faith." Id., at 619, citing West v. Coates, 940 P.2d 337 (Utah, 1997). The court must balance these factors, and any other relevant facts, to determine whether the neglect should be excused. Bennett, supra, at 645. The findings of fact should be sufficiently detailed to provide meaningful appellate review. Id. at 646.

In this case, the ALJ found there was no good cause for Appellant's failure to answer the application for hearing because Appellant had failed to notify the Industrial Accidents Commission of the change in designated agents. However, the ALJ failed to

take the next step in the analysis required by Rule 60(b) to determine whether the neglect was nevertheless excusable by special circumstances or whether the default should be set aside for any other reason justifying relief. The Labor Commission (Labor Commission) also did not address the issues of excusable neglect. In fact, in their order denying the motion to set aside default, the Labor Commission stated appellant "has not demonstrated any reason for justifying relief from default." This single conclusory sentence did not provide any analysis or evaluation of the facts which give rise to special circumstances which justify setting aside the default.

As discussed in Appellants' opening brief, there is evidence of special circumstances. This includes the fact that the Labor Commission has previously provided courtesy copies of applications for hearing to third-party adjusters, the fact that the Commission was aware the service of the application for hearing had been rejected, the fact that both the Commission and Petitioner were aware of the third-party adjuster's contact information through prior pleadings, the fact that the third-party adjuster's correct address was listed on the application for hearing, the fact that Appellant acted in good faith in notifying the Division of Insurance of the change of registered agents, and the fact that the Answer was filed less than thirty days after the deadline. While these circumstances may not constitute good cause, they support a finding of excusable neglect.

The Utah Workers' Compensation Act grants the Commission a wide degree of discretion to avoid the making of excessive awards and power to correct the same. Frito Lay v. Utah Labor Commission, 222 P.3d 55, 62 (Utah, 2009). It should be noted that Appellant originally admitted liability for this claim and actually paid both medical and

indemnity benefits. Benefits were discontinued when a witness provided information that Appellee had injured himself outside of work and had failed to disclose a previous medical provider. Appellant should be allowed the opportunity to conduct discovery and litigate the merits of these allegations. Otherwise, it may allow Appellee to perpetuate fraud and/or receive benefits to which he is not entitled.

It should also be noted that there is no prejudice to the Appellee to setting aside the default. He underwent surgery prior to the termination of benefits and completed his rehabilitation with the exception of a gym membership for an independent exercise program. He returned to light duty work on December 1, 2014 and full duty on January 15, 2015. There is no prejudice to Appellee as a result of the brief delay in filing the Answer other than having to prove the merits of his case at a hearing.

II. DRIPPS AND LOPEZ

The remainder of Appellee's brief addresses two Labor Commission cases—Dripps v. Lifetime Products, Case No. 09-0179 (Labor Commission, July 27. 2009) and Lopez v. Insulation Systems, Inc. Case No. 11-0363 (Labor Commission, April 15, 2014). In Dripps, the Commission refused to set aside a default order where the notice and order for answer had been served three weeks prior to the change in the insurance company's registered agent. According to the Labor Commission opinion, the correct registered agent was served, and there was no evidence the insurance company did not actually receive the notice and order for answer. The instant case is factually distinguishable in that there is evidence in the record that Appellant never received actual notice.

In Lopez, the Labor Commission again declined to set aside a default order. However, the underlying facts of the case were unclear from the Labor Commission's order, so it cannot be determined whether it is comparable to the instant case. In any event, the showing of excusable neglect is highly fact dependent. Routson v. State of Utah, 268 P.3d 200 (Utah App. 2011). That the Labor Commission refused to set aside default orders in the Dripps and Lopez cases is neither persuasive nor dispositive.

CONCLUSION AND PRAYER FOR RELIEF

WHEREFORE, respondents respectfully request that this Court reverse the order of the Labor Commission and set aside the default judgment and allow the parties to proceed to hearing on the merits of the claim.

DATED this 23rd day of September, 2015.

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DATED this 23rd day of September, 2015.

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I certify that a copy of the attached **APPELLANTS' BRIEF** was served upon the party(ies) listed below by mailing it by first class mail, personal delivery, or fax to the following address(es) on September 23rd, 2015:

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