2016

Richard M. La Jeunesse v. Utah

Utah Supreme Court

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**IN THE THIRD DISTRICT COURT,
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH**

In the Matter of the Discipline of: **Richard M. La Jeunesse, Utah State Bar Number 7408** Respondent	**RESPONDENT'S TRIAL BRIEF** Case No. 130905706 Judge Andrew H. Stone

Respondent Richard M. La Jeunesse, by and through counsel hereby submits his trial brief.

The administrative law judges of the Utah Labor Commission adjudicate *inter alia* disputes between occupationally injured employees and their employers and their insurance carriers. Utah Code Ann. § 34A-2-801 (2012).[1] Judge La Jeunesse and Judge Hann were, at all times relevant, an administrative law judge at the Utah Labor Commission.

In certain cases involving conflicting medical opinions generally between

[1]Some of the Labor Commission Act was amended in 2013, which is not pertinent to this case. Citations are therefore, to the 2011 statute unless otherwise indicated.

the treating physician and an Independent Medical Examiner (IME) retained by the insurance carrier, the Adjudicative Division of the Utah Labor Commission, responsible to conduct formal hearings for the Commission, is required to utilize a Medical Panel to advise and assist the administrative law judge in the medical aspects of the case. Utah Administrative Code R. 602-2-2.

Between January of 2012 and June of 2012 Judge Hann in five separate workers' compensation cases received Medical Panel Reports in workers' compensation cases assigned to her where she requested a written clarification to the Medical Panel Report under Utah Code Section 34A-2-601(2)(b)(ii). This clarification is allowed prior to sending the Report to the parties as required later in the statute pursuant to Utah Code Ann. § 34A-2-601(2)(d)(i).

On July 9, 2012, the Labor Commissioner notified Judge Hann that she intended to impose a written reprimand for violating the Labor Commission's Code of Conduct and Employee Ethics and Conflict of Interest Policy, both promulgated, in part, pursuant to Utah Code Title 67, Chapter 16, Utah Public Officers and Employees Ethics Act. As Judge Hann's direct supervisor the Labor Commission took action against Judge LaJeunesse pursuant to the same set of facts and considerations and terminated his employment as the Director of Adjudication although subsequently reemploying him as an administrative law

judge in another division.

OPC's *Complaint* alleges violation of Rule of Professional Conduct 8.4(d), Conduct prejudicial to the administration of justice. Rule 8.4(d) states: "[i]t is professional misconduct for a lawyer to: . . . (d) engage in conduct that is prejudicial to the administration of justice; . . ." The *Rules of Professional Conduct* means "the Utah Rules of Professional Conduct (including the accompanying comments) initially adopted by the Utah Supreme Court in 1988, as amended from time to time; . . ." *Rules Governing the Utah State Bar*, Rule 14-502(k).

The only Comment to Rule 8.4 mentioning subsection (d) states:

> [3] ***A lawyer who, in the course of representing a client***, knowingly manifests by words or conduct bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule. (emphasis added).

The alleged violation does not fall into the category of a "lawyer representing a client" in any respect. This court found in denying Judge La Jeunesse's 12(b)(6) motions he read the comment too broadly, the rule must mean something more than mistaken interpretation of the law by one charged with interpreting the law.

In the case of *Utah State Bar v. Jardine*, 2012 UT 67, 289 P.3d 516, the Utah Supreme Court examined OPC's recommendation, and the district court's finding that Mr. Jardine had violated rule 8.4(d) (in addition to other violations not discussed here). Mr. Jardine had missed a court appearance. The court indicated that the rule exists to curb much greater evils (than missing a court date):

> a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

Id. cmt. 2. *Jardine*, ¶ 77, 289 P.3d at 533. The court concluded the district court erred in determining that Mr. Jardine violated rule 8.4(d) because the rule contemplates much more severe conduct than missing a hearing. Id. ¶ 75. Judge Hann and Judge La Jeunesse made their best effort to meet their legal obligations as ALJs to interpret the law. OPC asserts these acts were out of the ordinary, and perhaps they were, but that does not make them "conduct prejudicial to the administration of justice." The acts were done in an effort to train the medical panels. When panels improperly answered questions, or pontificated about medical concerns unrelated to the questions at hand, litigants were harmed by needless appeals to clarify the question, which could be set straight from the outset

with a directive from the ALJ to do so. Litigants had been complaining to the Commission the panels needed additional training, the Adjudicative Division was responsible to train the panels, and seeking clarification is a reasonable method to train them. Proposed trial Ex. R_23, 27, 28, 29, 30, 32, 33.

Both Judges Hann and La Jeunesse were motivated to try to improve the system, and remained involved in medical panel training. There is no evidence other ALJs were so inclined, so it is not surprising other judges did not make these efforts.

I. The Complaint alleges statutory violation, but only under section 34A-2-601(2)(d) without addressing 34A-2-601(2)(b).

> A. On July 10, 2012, the Utah labor Commission issued its report finding that the conduct of Judge Hann and Judge La Jeunesse was inappropriate and violated explicit and statutory requirements in the Utah Worker's (sic) Compensation Act and the Utah Administrative Procedures Act.

Complaint, ¶ 29. The Complaint does not provide the specifics of the violation alleged, and neither OPC nor the Labor Commission ever discuss the directives of 34A-2-601(2)(b).

> B. Judge Hann's failure to circulate the <u>preliminary</u> medical panel report to all parties resulted in a probable deprivation of due process of the litigants in the cases at issue.

Complaint, ¶ 33 (emphasis added). By its own admission, the medical panel

report is preliminary, and it makes no sense to circulate draft reports to parties for objections. This would be inefficient, confusing, and terribly wasteful of resources. Litigants all had the opportunity to appeal, and none, as far as known to Judge La Jeunesse and Judge Hann, ever did.

II. There was no bright line policy prohibiting the acts.

A. On July 18, 2012, Commissioner Hayashi issued a letter titled imposition of Discipline Written Reprimand to Debbie Hann. Commissioner Hayashi stated that the requesting changes to medical panel reports without notice to parties rejecting reports and destroying reports when this has not been done in other cases was inconsistent with well established practices.

Complaint, ¶ 30.

B. Commissioner Hayashi also stated that the improper destruction of reports violated the Commission Code of Conduct's prohibition against wrongful destruction of records and that the conduct resulted in substantial mistrust and doubt in the integrity of the ability of the Commission to fulfill its mission and harmed the effectiveness of the Commission.

Complaint, ¶ 31.

Comm'r Hayashi informed Workers' Compensation Stakeholders on June 14, 2012 that Judge Hann's and Judge La Jeunesse's actions with respect to the cases at issue "are contrary to ***my*** expectations for transparency and openness in the Commission's adjudicative process." (Emphasis added), proposed Ex. R_ 0049. Hayashi's termination letter to Judge La Jeunesse indicated his "failure to

insist on open and transparent process undermined the parties' confidence that their cases were being handled fairly and correctly and deprived them of their ability to protect their rights." Hayashi did not cite any statute, policy or practice. OPC cites only to the provision WCF announced it thought was violated, 34A-2-601(2)(d), paying no attention to 34A-2-601(2)(b).

There must be a mens rea to violate rule 8.4(d) – it cannot be just an accident. There never was a rule requiring preliminary reports be maintained, and until the events in question, there had been open communication with the panels, who are adjunct to the judges. How can an entity be adjunct to the judges if they cannot communicate? Although Judge La Jeunesse can cite to no specific Utah case on point, the case of *Cooper v. Board of Professional Discipline of Idaho State Board of Medicine*, 134 Idaho 449, 4 P.3d 561 (Idaho, 2000) is instructive. The holder of a professional license has a valuable property right protected by the safeguards of due process, and the professional is not required to defend against or explain any matter not specified in the charges. *Cooper*, 4 P.3d at 566. There never has been any willful violation of a rule, or willful violation of a law or policy. All efforts were made in earnest effort to improve services at the Commission by asserting authority the judges believed they had.

III. At all times relevant, Judge Hann and Judge La Jeunesse acted in their

roles as ALJs, the actions were governed by Section 34A-2-601, and all decisions of the ALJs were appealable.

At all times relevant to this action, Ms. Hann and Mr. La Jeunesse acted in their roles as ALJs in the Adjudication Division of the Utah Labor Commission. "This fact is undisputed." OPC *Memorandum in Opposition to Motion for Summary Judgement*, ¶ 1. Rules made under Title 34A section 1 include procedures to dispose of cases informally, expedite claims adjudication and to dispose of cases by simplifying the methods of proof at a hearing. Utah Code Ann. § 34A-1-304 (3). The decisions of the administrative law judges of the Utah Labor Commission are subject to appeal. Utah Code Ann. Sections 34A-1-303, 34A-2-801. Historically, since before 2000, communication between the administrative law judges and the medical panel chairpersons was routine and not reported to the parties. (Affidavit of La Jeunesse in Support of Summary Judgement, ¶ 12), (Affidavit of Hann in Support of Summary Judgement, ¶ 10).

Medical Panels function in an adjunct capacity as advisors and assistants to the administrative law judge. "The role of the Medical Panel is . . .'advis[e] an administrative law judge with respect to the administrative law judge's fact-finding responsibility." *Blair v. Labor Commission*, 2011 Utah App. 248, ¶ 18, 262 P. 3d 456, 461, referencing Utah Code Ann. § 34A-2-601(1)(d)(ii) (Supp.

2010), *Intermountain Health Care, Inc. v. Board of Review of the Industrial Comm'n of Utah*, 839 P. 2d 841, 845 (Utah App. 1992) (role of panel is only to assist the ALJ in deciding whether medical cause has been proven), Proposed Ex. R_0018 ("service on medical panel was adjunct to the impartial fact-finding responsibilities of Judge Luke and the Commission").

At all times relevant to this action, the Adjudication Division of the Utah was responsible for training the medical panels. Administrative Law Judges sent a Memorandum Letter to the Medical Panel as a Referral, which included the language, "[t]hank you in advance for your assistance in resolving the medical disputes in this matter. **If I can be of any assistance, please do not hesitate to contact me at [phone number of judge]**." Proposed trial Ex. R_002 (emphasis added). This letter was always copied to the parties. The ALJs proposed certain questions to the medical panels which the medical panels were to answer. Id. Proposed trial Ex. R_008 (Medical Panel Process Summary). Communication with the medical panel was assumed, and not objected to.

The reports are written ***to the judge***. Utah Code Ann. § 34A-2-601(2)(b). The medical report written to the administrative law judge shall be in a "form prescribed by the Division of Adjudication." Utah Code Ann. § 34A-2-601(2)(b). The term "form prescribed by the Division of Adjudication" was not specifically

defined in the Utah Labor Code Workers' Compensation Act or any administrative rule or Commission policy. Its interpretation was left to the sound discretion of the administrative law judge presiding over the specific case. Utah Code Ann. § 34A-2-601(2)(b). After the ALJ receives the report in proper form, the ALJ distributes the report to the parties for their objections. Only if the report is properly supported by evidence, and after objections are ruled upon is it deemed evidence and admitted as such. Prior to its acceptance, the ALJ is allowed to direct the panel to make additional findings as the ALJ may require. Utah Code Ann. § 34A-2-601(2)(b).

At all times relevant to this action, reading the statute in the order it is written allowed the administrative law judge not distribute copies of the medical panel report until after seeking additional findings as necessary or unless it was "in proper form." Section 34A-2-601(2)(d). The administrative law judges of the Labor Commission have a duty to interpret the law, even if the interpretation is in error.

Applying the statute in the order it is written is a legitimate, lawful, and correct form of statutory interpretation. *Esquivel v. Labor Comm'n of Utah*, 2000 UT 66, ¶ 24, 7 P.3d 777, 782-83. The plain meaning of the statute allows the ALJ to ensure the report is in proper form before distributing it. *Florida Asset*

Financing Corp. v. Utah Labor Comm'n, 2006 UT 58, ¶ 9, 147 P.3d 1189.

OPC has denied it had any knowledge of policy at the Labor Commission requiring distribution of the report, even if flawed. *OPC Response to La Jeunesse Requests for Admissions* Question No.7 "Objection, the OPC does not have any direct knowledge of the policies of the Labor Commission and therefore cannot admit or deny." Judge La Jeunesse wrote the first policy directing even flawed reports to be distributed. See proposed trial Ex. R_ 0036, R_0037, confirming the new policy of June 6, 2012 is prospective only.

IV. Ethical concerns are governed by the State Officers and Employees Act.

The Utah Supreme Court held in *V-1 Oil Co. v. Dept. of Environmental Quality*, 939 P.2d 1192, 1195 (Utah 1997)[2] that "the Utah Administrative Code and the State Officers and Employees Ethics Act provide rules that are directly applicable to administrative adjudicative officers. . . ." The court stated, "[t]he proper starting point for any analysis of an asserted ethical conflict in an adjudicatory proceeding is by reference to the ethical rules governing that proceeding. . . . the Utah Administrative Code and the state Officers and Employees Ethics Act provide rules that are directly applicable to administrative

[2]V-1 Oil asserted the attorney's employment within a state agency created an unethical risk of bias in his role as an adjudicatory officer. *V-1 Oil*, 939 P.2d 1192, 1194.

adjudicative officers." *Id*. The court relied on the ***function*** of the attorney as a hearing officer, not his status as an attorney, finding he acted in a "adjudicative role." *Id*. at 1196. The court's rationale parallels the function test and reasoning of *Butz v. Economou*, 438 U.S. 478, 508, 511, 514, 98 S.Ct. 2894, 2911, 2913, 57 L.Ed.2d 895 (1978) even though *Butz* is not specifically mentioned (persons performing adjudicative functions within federal agencies are entitled to absolute immunity for their judicial acts because of the "special functions" involved).

Administrative Law Judge La Jeunesse has broad authority under § 34A-2-802, and agency law demands efficiency. Utah Code Title 34A, Chapters 1, 2. *See* § 34A-1-306 (2008) (orders are not to be "declared inoperative, illegal, or void" for any omission of a technical nature). The Labor Commission imposed its own disciplinary action on both Judge La Jeunesse and Judge Hann. Nowhere does OPC address the need for efficiency in agency law. Administrative actions taken against the judges negate the need for any further action by OPC or this court.

V. Mr. La Jeunesse is entitled to absolute immunity because he performed the conduct alleged in his role as an adjudicator.

In *Butz v. Economou*, 438 U.S. 478, 508, 511, 514, 98 S.Ct. 2894, 2911, 2913, 57 L.Ed.2d 895 (1978) the Court found that persons performing

adjudicatory functions within federal agencies are entitled to absolute immunity for their judicial acts because of the "special functions" involved. The Judicial Officer and Chief Hearing Examiner "are . . . employees of the Executive Branch. Judges have absolute immunity not because of their particular location . . . but because of the special nature of their responsibilities." *Id*. at 511. "[T]he correctability of error on appeal [is] just [one] of the many checks on [even] malicious actions by judges." *Id*. at 512.[3] The Court reasoned, "[w]e think that adjudication [functions] share[] enough of the characteristics of the judicial process that those who participate in such adjudication should also be immune from suits for damages." *Id*. at 512-13. The Court continued:

> [T]he role of the . . . administrative law judge within this framework is "functionally comparable" to that of a judge. His powers are often . . .comparable to those of a trial judge: He may issue subpoenas, rule on proffers of evidence, regulate the course of the hearing, and make or recommend decisions.

Id. at 513. *See also Johnston v. Labor Commission*, 2013 UT App 179, ¶ 12, 307 P.3d 615, 620 (administrative law judge has statutory discretion to decide whether to hold objection hearing). In *Johnston*, the court found the scenario where no ruling was specifically made on the objection an acceptable process to admit the

[3]Thus this court's concern, in its ruling on Respondent's 12(b)(6) motion, that there could be inferences in favor of OPC must be set aside under the immunity standards of *Butz*.

report into evidence under 34A-2-601 despite there being no such specific language in the statute. Id. at 624. The court noted "[t]he scenario before us is admittedly perplexing, and had the Legislature defined the scope and operation of this third scenario, then the focus of this appeal would. . . not have turned solely on our own interpretation of [34A-2-601]." Id., ¶ 27. If the law was misinterpreted, or there was a defect in procedure, the court in *In re Stoney*, 2012 UT 64, ¶ 10, 289 P.3d 497, 501 holds the remedy for defects in following law or procedure is appeal. Administrative tribunals are not held to a more stringent standard than trial courts. *Johnston v. Labor Comm'n*, 2013 UT App 179, ¶ 16, 307 P.3d 615, 620.

To allow a bar complaint to proceed against Judge La Jeunesse for his adjudicative acts would produce the tangled mess of never-ending litigation and "undue interference with [performance of his] duties and [the] potentially disabling threats of liability" that Utah's Supreme Court held *Butz* safeguards against. *Bailey v. Utah State Bar*, 846 P.2d 1278, 1280 (Utah 1993) (holding quasi-judicial immunity extended to those engaged in the performance of duties integral to the judicial process).

In *Ambus v. Utah State Bd. of Educ.*, 858 P.2d 1372, 1379 (Utah 1993), the court relied on the *Butz* test ((1) adjudication, (2) adjudicatory acts likely to

generate lawsuits from disappointed litigants, and (3) sufficient safeguards in statutes and rules governing disciplinary to shield the Board from disgruntled litigants.

In *Anderson v. Eyre*, 2015 UT App 148, 353 P.3d 170, the court reiterated, "'judges are immune from suit for actions taken in their judicial capacities, except when those actions have been taken in the absence of subject matter jurisdiction[,]' *Parker v. Dodgion*, 971 P.2d 496, 498 (Utah 1998) (citation and internal quotation marks omitted)." *Anderson v. Eyre*, ¶ 3, 353 P.3d at 171. The *Anderson* Court went so far as to extend quasi-judicial immunity to court personnel, stating, "[f]urthermore, quasi-judicial immunity is properly extended to court personnel when, as here, the acts were committed as an integral part of the judicial process within the cases. *Bailey v. Utah State Bar*, 846 P.2d 1278, 1280 (Utah 1993)." *Anderson*, ¶ 3, 353 P.3d at 171. There was no policy prohibiting the acts and all of the claims by OPC relate to decisions or actions taken by him in his role as a Labor Commission adjudicator, and are as immune as the acts considered by the court in *Anderson v. Eyre*. OPC makes no credible argument the acts were done in the absence of subject matter jurisdiction and has admitted the ALJs were in an adjudicative role.

VI. Public Policy dictates Judicial Codes Should Apply.

The Comment to Section I Applicability of Utah's Judicial Code of Conduct states that the rules in the code have been formulated to address the ethical obligations of any person who serves a judicial function. Utah law does not contemplate OPC alleging conduct prejudicial to the administration of justice for acts by administrative law judges interpreting the law.

The Alleged Violation is Unconstitutionally Void for Vagueness as Applied.

Rule 8.4 is a catch all provision lacking specificity. The Utah Supreme Court has ruled that rule 8.4(a) alone is no more than a "piling on" and repeated its directive to decline to impose any sanction based on a violation of rule 8.4(a) *In re Jardine*, 2012 UT 67, ¶ 73, 289 P.3d 516, 532. Under OPC's application of rule 8.4(d), any appealable or questionable decision by any judge in the course of the judge's duties could be deemed by OPC to be "prejudicial to the administration of justice." Constitutional validity is determined by examining whether the law fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct is prohibited or authorizes or encourages arbitrary and discriminatory enforcement. *State v. Gallegos*, 220 P.2d 136, 141 (Utah 2009).

VII. Judge Hann's Actions were consistent with her broad authority under Utah Code Section 34A-2-802.

Labor Commission law allows ALJs to investigate. Utah Code § 34A-2-

601(2)(b)(ii) allows the judge to obtain additional findings from the medical panel. The law states "The commission may make its investigation in such manner as in its judgement is best calculated to ascertain the substantial rights of the parties and to carry our justly the spirit of the chapter." Section 34A-2-802(1). In seeking clarifications from the medical panels and not retaining the preliminary reports, Judge Hann took acts as in her best judgment were best calculated to ascertain the substantial rights of the parties and to carry out justly the spirit of the chapter. As such, she should not be prosecuted for conduct prejudicial to the administration of justice.

VIII. OPC incorrectly argues the Medical Panel Reports are Evidence.

Nowhere in the Complaint is it alleged the reports are evidence, but OPC now asserts this, without proper notice. The medical panel reports only become evidence once they are distributed to the parties, objections are made, and ruled upon if necessary, and only "insofar 'as the report is sustained by the testimony admitted.'" *Johnston v. Labor Comm'n*, 2013 UT App 179, ¶ 29, 307 P.3d 615, 624. This is not a blood stain on the carpet. The reports are not evidence until such time as they become evidence. They do not start out as evidence, but are preliminary reports as alleged in the *Complaint* at ¶ 33 until such time as they are deemed admitted.

IX. No Parties were Harmed.

The complaining party got exactly what it wanted: to have none of its cases heard by Judge Hann, following an immediate granting of its blanket motion to recuse, with no opportunity for opposing litigants to respond. Defense counsel Dori Peterson wrote, "[i]f it were anyone but Judge Hann, I probably wouldn't think much about this, but it's Judge Hann." Petersen email June 5, 2012, Proposed trial Ex. R_35. OPC's complainant, Mr. Miller asserted the report he received after learning one was shredded was "actually better than the first." Proposed Ex. R_ 72. The Labor Commission was in the best position to remedy any harm, since Judge Hann and Judge La Jeunesse were ordered by the Commissioner to refrain from any contact with case files or parties on the five cases involved. All parties should have been notified of the concerns, but Judge Hann and Judge La Jeunesse are not privy to this information. Their best evidence is Hennebold's December 6, 2012 letter, proposed Ex. R_74 indicating there were no substantive changes to the four cases which were compared. We have no indication, one way or the other if the fifth set of litigants were notified and allowed opportunity to object or seek a new medical panel report – but that decision was made by the Commission, not Judge Hann or Judge La Jeunesse. WCF gained traction with the legislature and OPC, by this Complaint, has likely

succeeded in intimidating every ALJ in the state, who must now worry about bar sanctions for interpreting the law.

CONCLUSION

ALJs Hann and La Jeunesse at all times acted as adjudicators. At all times their interpretation of Section 34A-2-601 allowed them to seek clarifications from the medical panels who are adjuncts to the ALJs prior to releasing the reports to the parties. Prior to the events in question, there were no written policies prohibiting the acts, and no policies known to Judge La Jeunesse, the Director of Adjudication or to Judge Hann. Reports returned to the panel for clarification were preliminary, and so was the one report shredded rather than returned. There was no policy directing medical panelists to retain draft reports, or for anyone to retain preliminary reports. OPC in asserting there were policies and law violated failed to disclose any policy and relies on WCF's interpretation of only subsection (d) of 34A-2-601. In doing so, it ignores subsection (b) of 34A-2-601, which requires the report to be in proper form prior to release to the parties.

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All acts complained of were subject to appeal by the parties, and no action should stand against their licenses.

Dated this 12th day of February, 2016.

LAW OFFICE OF ELIZABETH BOWMAN, PLLC

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of February, 2016, a true and correct copy of **RESPONDENT'S TRIAL BRIEF** was served upon counsel electronically as follows:

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