

2001

Kelly Gates, SR., v. Utah Labor Commission and George M. Anderson : Brief of Respondent

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

KELLY GATES, SR.,

Petitioner,

v.

UTAH LABOR COMMISSION
and GEORGE M. ANDERSON,

Respondents.

Case No. 20010934-CA

Priority No. 7

**BRIEF OF RESPONDENT
GEORGE M. ANDERSON**

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Case No. 20010934-CA

Priority No. 7

**BRIEF OF RESPONDENT
GEORGE M. ANDERSON**

JURISDICTION OF THE COURT

This appellate review proceeding arises from the Utah Labor Commissioner's determination that Petitioner George Anderson's work related injuries entitle him to medical, temporary total, and permanent partial disability benefits. The Utah Court of Appeals has jurisdiction over this proceeding pursuant to Utah Code Ann. §78-2a-3 (2) (a) (1953, as amended) and Utah Code Ann. §34A-2-801 (8) (1997).

STATEMENT OF ISSUES AND STANDARD OF REVIEW

Issue No. 1: Whether the brief of Kelly Gates, Sr. should be considered by this Court where the brief fails to marshal the evidence against Gates, fails to appropriately cite to the record or case law, provides little legal analysis, does not contain the required addendum, and misrepresents the record?

Standard of Appellate Review: “To effectively challenge the Board’s findings of fact, a party must marshal ‘all of the evidence supporting the findings and show that despite the supporting facts, and in light of the conflicting or contradictory evidence, the findings are not supported by substantial evidence.’” *Merriam v. Board of Review* 812 P.2d 447, 450 (Utah Ct. App. 1991). (quoting *Grace Drilling Co. v. Board of Review*, 776 P.2d 68); accord *Intermountain Health Care, Inc. v. Board of Review*, 839 P.2d 841, 843-4 (Utah Ct. App. 1992).

“‘[A] reviewing court is entitled to have the issues clearly defined with pertinent authority cited and is not simply a depository in which the appealing party may dump the burden of argument and research.’” *State v. Bishop*, 753 P.2d 439, 450 (Utah 1988). Furthermore, “[i]t is well established that an appellate court will decline to consider an argument that a party has failed to adequately brief.” *Valcarce v. Fitzgerald*, 961 P.2d 305, 313 (Utah 1998); *See also State v. Cabututan*, 861 P.2d 408, 414 (Utah 1993); *State v. Wareham*, 772 P.2d 960, 966 (Utah 1989); *State v. Amicone*, 689 P.2d 1341, 1344 (Utah 1984).

Preservation for Appeal: This issue arose on appeal to this Court and, as such, there was no need for preservation of the issue in the administrative proceeding.

Issue No. 2: Whether there is substantial evidence to support the Labor Commission's finding that Kelly Gates, Sr. was Anderson's employer where Anderson testified he was hired by Gates, used Gates' tools, was subject to the control of Gates, and all of Anderson's paychecks were drawn on Gates' business account?

Standard of Appellate Review: This Court's review of the Labor Commission's findings of fact is governed by §63-46b-1-16(4)(g) (1997) of the Utah Administrative Procedures Act (UAPA). Under UAPA, the Labor Commission's findings of fact will be affirmed if they are "supported by substantial evidence when viewed in light of the whole record before the court." *Merriam v. Board of Review* 812 P.2d 447, 450 (Utah Ct. App. 1991) (quoting *Grace Drilling Co. v. Board of Review*, 776 P.2d 63, 67-68 (Utah Ct. App. 1989)). "Substantial evidence is that which a reasonable person 'might accept as adequate to support a conclusion.'" *Id.* (quoting *Grace Drilling Co. v. Board of Review*, 776 P.2d at 68). "It is not [the court's] prerogative on review to reweigh the evidence. Instead, [the court] defer[s] to the Commission's findings because, when reasonably conflicting views arise, it is the Commission's province to draw inferences and resolve these conflicts." *Id.* (quoting *Grace Drilling v. Board of Review*, 776 P.2d 83, 68 (Utah Ct. App. 1993)).

Preservation for Appeal: This issue was arguably never preserved for appeal. Indeed, in setting forth the four issues in his brief, Gates does not indicate, in violation of

Rule 24, where he had preserved any of those alleged issues.

Issue No. 3: Whether Anderson is entitled to an award of attorney fees where Gates' brief, misrepresents the facts, refers to evidence which was "doctored", fails to follow a majority of the requirements of Rule 24, and appears to be brought for the sole purpose of delay?

Standard of Appellate Review: "An appeal that is frivolous is one that is 'not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law.' Utah R. App. P. 33(b); *See, Hunt v. Hurst*, 785 P.2d 414, 416 (Utah 1990).

Preservation for Appeal: This issue arose on appeal to this Court and, as such, there was no need for preservation of the issue in the administrative proceeding.

DETERMINATIVE STATUTES AND RULES

Utah R. App. P. 24 is the applicable rule regarding the sufficiency of briefs and is attached in full at Addendum "A". UTAH CODE ANN. §63-46b-16 is the applicable statute regarding appeals from administrative actions and is attached in full at Addendum "B". Utah R. App. P. 33 is the applicable rule regarding frivolous appeals and is attached in full at Addendum "C".

STATEMENT OF THE CASE

Nature of the Case: Kelly Gates, Sr. seeks review of the Labor Commission's final order awarding workers' compensation benefits to Respondent, George Michael

Anderson, for injuries he sustained while working for the employer, Kelly Gates, Sr. dba Kelly Gates Enterprises.

Course of the Proceedings: On August 27, 1997, Anderson filed an Application for Hearing with the Labor Commission of Utah alleging entitlement to benefits for medical expenses, temporary total compensation, and permanent partial disability compensation as a result of injuries sustained on January 17, 1996, while working as a framer for Kelly Gates, Sr. building a home in Diamond Valley, Utah. (R1 at 5).

The Labor Commission held a hearing in St. George, Utah, on July 1, 1999. (R3 at 1). The Administrative Law Judge issued Findings of Fact, Conclusions of Law and Order on January 19, 2001, finding that Kelly Gates, Sr. was not the employer of Anderson and dismissed Anderson's claim for workers' compensation benefits. (R2 at 356-61). A copy of said order is attached hereto as Addendum "D".

Anderson filed a Motion for Review with the Labor Commission on February 19, 2001. (R. 2 at 364-71). The Motion for Review was granted by the Labor Commission on June 28, 2001, remanding the case to the Administrative Law Judge for a determination as to the amounts owed Anderson for temporary total disability benefits, medical expenses and permanent partial disability. (R2 at 410-14). A copy of the Commission's order is attached hereto as Addendum "E". On July 30, 2001, the ALJ entered an Order on Remand awarding temporary total disability, permanent partial disability, and medical benefits to Anderson. (R2 at 420-2). A copy of the ALJ's order is attached hereto as Addendum "F".

On August 29, 2001, Gates filed a Motion for Review with the Labor Commission. (R2 at 423-47). On November 15, 2001, the Labor Commission issued an Order Denying Gates' Motion for Review. (R2 at 459-61). A copy of the Commission's order is attached hereto as Addendum "G". On November 28, 2001, Gates filed a Petition for Review with the Utah Court of Appeals. (R2 at 462-3).

STATEMENT OF FACTS

1. In its Order Granting Motion for Review, the Labor Commission found as follows:
 - a. On January 17, 1996, Mr. Anderson was working as a carpenter, framing a residence to be occupied by Kelly Gates, Jr. ("Junior" hereafter). As Anderson cut a metal band holding a stack of lumber, the metal band snapped and cut his wrist. Surgery was required to repair the injury. Anderson was unable to work for a period of time after the accident; he also has suffered permanent impairment. (R2 at 410; See also, Addendum "E" at 1).
 - b. Anderson contends he was employed by Junior's father, Kelly Gates, Sr. ("Senior" hereafter) at the time of his accident, and that Senior is liable for his workers' compensation benefits. In response, Senior argues that Anderson was employed by Junior at the time of Anderson's accident. Senior further argues that, because Anderson was employed by Junior in the construction of Junior's own residence, Anderson is excluded from coverage under the workers' compensation system by §34A-2-103(6)(b) of the act. (R2 at 410; See also Addendum "E" at 1).
 - c. It is undisputed that Anderson's injuries resulted from a work-related accident on January 17, 1996. It is also undisputed that Anderson was an employee, rather than an independent contractor, at the time of the accident. To determine whether Anderson was employed by Junior or Senior, it is necessary to review the circumstances and context of Anderson's work and his relationships with Senior and Junior. (R2 at 411; See also Addendum "E" at 2).

- d. Senior is a businessman in the St. George area. In the past, he owned and operated an auto dealership in St. George, by the time of the hearing in this matter, he had formed another automobile business, this time with Junior, his son. Under the business name of “Kelly Gates Enterprises,” Senior owns rental units, condominiums, and town homes. He was also a principal in the development of a residential subdivision known as Diamond Ranches, located about 15 miles from St. George. Senior gave Junior a residential building lot in the Diamond Ranch subdivision. It was at this lot, in the course of the construction of Junior’s residence, that Anderson was injured. (R2 at 411; See also Addendum “E” at 2).
- e. At the time of Anderson’s accident, Junior was 22 years old. He had little or no experience with building or construction. He was employed on a full-time basis as an assistant manager at a grocery store and also worked 30 hours a week as a salesman at a local car dealership, both in St. George. (R2 at 411; See also Addendum “E” at 2).
- f. In November, 1995, Senior hired Anderson to work on a cabin Senior was building for his personal use in the Kolob Canyon area north of St. George. Shortly thereafter, Senior also hired Anderson and several other workers to remodel two storage units located in St. George into business offices. At the time as the storage units were being remodeled, Anderson and the other workers began construction of Junior’s residence in Diamond Ranch, where Anderson suffered his injury on January 17, 1996. (R2 at 411; See also Addendum “E” at page 2).
- g. The parties do not substantially dispute the foregoing facts. However, the parties tell very different versions of the remaining facts. Before the Commission sets out its findings on these disputed issues, some general comments are in order regarding the relative credibility of the parties. (R2 at 411; See also Addendum “E” at 2).
- h. The ALJ discounted Anderson’s testimony, in part, because of his economic self-interest in obtaining workers’ compensation benefits. But Senior, who has no workers’ compensation insurance, has an equivalent economic interest in avoiding payment of such benefits. Consequently, economic interest does not provide a means of judging the relative credibility of Anderson and Senior. (R2 at 411; See also Addendum “E” at 2).

- i. The ALJ also discounted Anderson's testimony on the grounds it was contradicted by the testimony of all other witnesses. However, after careful review of Anderson's testimony, the Commission finds such testimony to be responsive, simple, and straight-forward. Furthermore, Anderson's testimony does not conflict with the testimony of Mr. Hoskins, the only disinterested individual to testify in this matter. (R2 at 412; See also Addendum "E" at 3).
- j. The Commission has also carefully review the testimony of Senior and Junior and finds it to be equivocal and inconsistent. Furthermore, Senior and Junior admit to conduct that undermines their general credibility. For example, Senior asked Mr. Hoskins, a construction contractor, to turn in Anderson's injury as a claim against Hoskins' workers' compensation insurance policy. Such a claim would have been fraudulent. To his credit, Mr. Hoskins refused Senior's request. As another example, even in their project to remodel storage units, where Senior admits to being Anderson's employer, Senior failed to comply with state and federal laws requiring withholding of income tax, payment of FICA tax, unemployment insurance contributions, and obtaining workers' compensation coverage. Finally, Junior admits that he submitted false information to his construction lender in order to obtain funds to pay Anderson's medical expenses. The foregoing conduct diminishes the persuasive force of Senior and Junior's testimony. (R2 at 412; See also Addendum "E" at 3).
- k. . . . Anderson contends that he was hired by Senior to work on remodeling the storage units in St. George and that the employment relationship continued on to include work done at Junior's residential building site. According to Anderson, all his significant dealings were with Senior. He did not see Junior at the building site until the project was well underway. In response, Junior claims to have personally hired Anderson before the residential project and to have negotiated the wage to be paid Anderson. However, Junior was unable to accurately state Anderson's wage rate. In contrast, Senior was fully aware of Anderson's wage rate. Furthermore, nearly all the crew that Senior employed to remodel his storage units also worked on Junior's residential project. This supports Anderson's testimony that Senior directed his employees, Anderson included, to work on Junior's residence. (R2 at 412; See also Addendum "E" at 3).

- l. As is customary in construction projects, Anderson provided his own hand tools such as a hammer and saw for both the remodel project and the residence project. However, Senior provided large equipment such as an air compressor and air-driven nail guns. Junior provided no equipment or tools. (R2 at 412; See also Addendum “E” at 3).
- m. There is no question that every payment of wages to Anderson was actually made by Senior from his “Kelly Gates Enterprises” checking account. At first, Senior testified that his payments to Anderson were solely an accommodation to Anderson’s frequent need for cash and that such payments did not include any payments for Anderson’s work on Senior’s remodeling project. However, when confronted by financial records to the contrary, Senior conceded that his payments to Anderson represented co-mingled wages for work on the remodeling project and the residential project. Junior never paid any wages directly to Anderson, although he did make payments to Senior. It is clear that Anderson always looked directly to Senior, not Junior, for payment of wages. (R2 at 412-3; See also Addendum “E” at 3-4).
- n. Senior was at the work site on a daily basis. Junior was rarely present. Because Anderson was an experienced carpenter, he did not require much direction in the actual performance of his work. However, Senior felt free to exercise control over Anderson. For example, Senior testified he ordered Anderson off the job because Anderson was under the influence of drugs or alcohol. Later in his testimony, Senior attempts to downplay his control by stating that he merely “suggested” that Anderson not work. But the Commission concludes that Senior’s initial testimony is the most accurate statement of Senior’s own perception of his authority over Anderson at the work site. The Commission also notes that Senior told the workers when to show up for work. Anderson would clear his absences from work with Senior. (R2 at 413; See also Addendum “E” at 4).
- o. After his accident, when it became clear that Anderson required medical care, Anderson sought payment from Senior. Senior told Anderson he didn’t have any money and directed Anderson to make his request to Junior. Then, despite Senior’s previous statement that he didn’t have any money, Senior transferred \$1,000 to Junior, who deposited the funds in his own account for use in paying some of Anderson’s medical expenses. It appears to the Commission that the

foregoing transfer of funds from Senior to Junior was intended to create some evidence that Junior was Anderson's employer. (R2 at 413; See also Addendum "E" at 4).

2. In addition to the findings of fact of the Labor Commission, the following documents were received into evidence:
 - a. A "Physician's Initial Report of Work Injury or Occupational Disease" dated January 18, 1996, one day after Anderson's accident, wherein the emergency room physician indicates that Anderson was injured at work and his employer was Gates Enterprises. (R1 at 1).
 - b. The Washington County Building Permit Application for the Diamond Valley home which was signed by Kelly Gates, Sr., as the builder, dated August 29, 1995. (R1 at 211) (Gates indicates that it is his signature on the building permit. See R3 at 61).
 - c. A series of eight checks made out from Gates, Sr.'s business account, Kelly L. Gates Enterprises, to Anderson during the time periods in question. (R1 at 188-92).
 - d. Answers to Request for Production of Documents consisting of loan documents. (R1 at 196-7). This documentation was admittedly "doctored" according to testimony of Kelly Gates, Jr. (R3 at 175).
3. In addition to the unfavorable documentation and findings issued against Gates, the following relevant testimony was elicited at hearing:
 - a. Gates' attorney asked Gates whether the money he paid Anderson for work on the Diamond Valley home included any hours he worked on Gates, Sr.'s office building. Gates, Sr. answered, "No. No. Absolutely not." (R3 at 138-9). Gates, Sr. further indicated that it would have been highly improper to include anything but work that was done on the house. (R3 at 139). However, on cross examination, when confronted with the "doctored" records from State Bank of Southern Utah (R1 at 196-7), Gates, Sr. admitted that the checks which were paid to Anderson must have been a "partial payment on the - - on the rentals out here or - - something he done on Kolob." (R3 at 146).

- b. Upon prompting from his counsel, Gates, Sr. indicated that Anderson preferred to be paid in cash. (R3 at 79). Over objection of Anderson's counsel, Gates, Sr. testified that the reason Anderson wanted to be paid in cash was for "tax purposes". (R3 at 80). However, on cross-examination, Gates, Sr. admitted that Anderson was paid entirely by check, not cash, for the work he did on the Diamond Valley project. (R3 at 90-1).
- c. Gates, Sr., in an attempt to show Gates, Jr. was Anderson's boss, testified that he was present during a conversation wherein Gates, Jr. hired Anderson. This apparently took place over the phone. Gates, Sr. testified, "I do not recall, but I'm going to say it was over the telephone." (R3 at 42), leaving one to speculate how it is that Gates, Sr., Gates, Jr., and Mr. Anderson could converse simultaneously over the phone.
- d. In order to explain why Anderson was paid on Gates, Sr.'s business account, Gates, Sr., testified that Anderson was requesting money at least every other day and it was not possible to get a draw from the construction loan more than once every two weeks. (R3 at 46). However, all the other framers working on the Diamond Valley home, Bret Rasmussen, Brad Cook, Mike Schurtz, and Travis Whitsnitzer were all paid out of Kelly L. Gates Enterprises account as well. (R3 at 52).
- e. When initially questioned regarding who signed for the building permit on the Diamond Valley home, Gates, Sr. indicated that he could not recall who had applied for the building permit, but that he assumed his son had done so. (R3 at 61). However, when actually presented with a copy of the building permit, Gates, Sr. indicated that it was his signature on the building permit. (R3 at 61). Having previously testified that he could not recall who had applied for the building permit, Gates, Sr. had miraculous recall and was able to testify that the reason his son did not apply for the building permit was because "he couldn't get off work to go in and get it." (R3 at 85).
- f. Gates, Sr. testified that after Anderson's injury, Gates, Sr. loaned his son, Gates, Jr. \$1,000 to loan Anderson to help Anderson out. That check was written on Gates, Sr.'s account then, Gates, Jr. wrote a check to Anderson from Gates, Jr.'s own account. (R3 at 63). Gates, Sr. initially testified that it was his son who had delivered the

check to Anderson, indicating that, “I’m assuming he gave it to Mike, the money.” (R3 at 71). However, on further examination, Gates, Sr. admitted that it was actually Gates, Sr who delivered the \$1,000 check to Anderson because the doctors “wouldn’t work on him until we could get him - - he could present some money to them.” (R3 at 72).

- g. After the hearing of July 1, 1999, it took the Administrative Law Judge more than 18 months to issue an order on January 19, 2001. (R3 at 356-63; See also Addendum “D”), in spite of Anderson’s request on six separate occasions requesting an order, (R3 at 350-5), leaving one to wonder if the ALJ actually remembered the evidence in this case.

SUMMARY OF THE ARGUMENT

In his brief, Gates fails to marshal any of the Labor Commission’s findings against him, any of the documentary evidence received at the hearing against him, or any of the testimony against him. Further, Gates’ brief fails to comply with Rule 24 as it provides no legal analysis relative to the issues set forth in the brief, contains no addendum containing the orders which have been issued by the Labor Commission, cites inappropriately to the record and the law, does not indicate where the issues were preserved in the Administrative agency and misrepresents the evidence. Hence, the appeal should be summarily dismissed.

Secondly, the evidence when marshaled is substantial and supports the findings of the Labor Commission in awarding workers’ compensation benefits to Anderson in this case.

Finally, Gates' brief is frivolous, misstates the facts and misstates the law. As such, an award of attorneys fees and costs should issue.

ARGUMENT

I

GATES' BRIEF SHOULD NOT BE CONSIDERED BY THIS COURT

On appeal, “[a] reviewing court is entitled to have the issues clearly defined with pertinent authority cited and is not simply a depository in which the appealing party may dump the burden of argument and research.” *State v. Bishop*, 753 P.2d 439, 450 (Utah 1988) (quoting *Williamson v. Opsahl*, 92 Ill. App. 3d 1087, 416 N.E.2d 783, 784 (Ill. App. Ct. 1981)) (other citations omitted). Here, Gates' brief is inadequate for numerous reasons.

A. GATES HAS FAILED TO MARSHAL ANY OF THE EVIDENCE AGAINST HIM

In setting forth his issues, it is apparent Gates is not satisfied with the findings of fact of the Labor Commission. However, he does not indicate which of those findings he disputes, let alone marshal any of the evidence which supports the Commission's findings. Proper marshaling of the evidence entails marshaling, or listing all of the evidence supporting any challenged finding. See, e.g. *State Ex Rel. T. J.*, 945 P.2d 158, 164 (Utah Ct. App. 1997); *En Re Estate of Hamilton*, 869 P.2d 971, 977 (Utah Ct. App. 1994). It is inappropriate for an appellant to marshal the evidence of carefully selected

facts and excerpts of testimony in support of his own position, conveniently leaving out facts which are negative to his case. See, e.g., *Valcarce v. Fitzgerald*, 961 P.2d 305, 312 (Utah 1998); *Johnson v. Higley*, 977 P.2d 1209, 1218 (Utah Ct. App. 1999).

Additionally, it is not proper to incorrectly state marshaled “facts” in an attempt to improve ones position on appeal. See, e.g. *State v. Pilling*, 875 P.2d 604, 608 (Utah Ct. App. 1994); *Johnson v. Board of Review of the Indus. Comm’n*, 842 P.2d 910, 912 (Utah Ct. App. 1992).

Once the evidence has been marshaled with appropriate citations to the record pursuant to Utah R. App. P. 24(e), the appellant must then show that the marshaled evidence is legally insufficient to support the findings of the trier of fact when viewing the evidence and inferences in a light most favorable to the decision. See, *Child v. Gonda*, 972 P.2d 425, 433 (Utah 1998). If an appellant fails to properly marshal the evidence, the appellate court must presume the findings to be correct. See, *Valcarce v. Fitzgerald*, 961 P.2d 305, 312 (Utah 1988).

In his brief, Gates sets forth four issues claiming that he has been substantially prejudiced by the findings of the Labor Commission. (See Brief of Gates at pages 1-2). Gates then goes on and sets forth a statement of relative [sic] facts wherein he makes absolutely no reference to the 16 paragraphs of findings made by the Labor Commissioner. (R2 at 410-3; See also Addendum “E” at pages 1-4). These findings of the Commission are significant. For example, the Commission found:

1. Anderson’s testimony was “responsive, simple, and straight-forward.” (R2 at 412; See also, Addendum “E” at 3).

2. The testimony of Gates, Sr. and Gates, Jr. is “equivocal and inconsistent.” (R2 at 412; See also, Addendum “E” at 3).
3. Gates, Sr. sought to commit fraud. (R2 at 412; See also, Addendum “E” at 3).
4. Gates, Jr. submitted false information to his construction lender. (R2 at 412; See also, Addendum “E” at 3).
5. Gates, Jr., the purported employer of Anderson, did not know Anderson’s wage rate. (R2 at 412; See also, Addendum “E” at 3).
6. Gates, Sr. did know Anderson’s wage rate. (R2 at 412; See also, Addendum “E” at 3).
7. Gates, Sr.’s crew that worked at the Diamond Valley project also worked to remodel his storage units. (R2 at 412; See also, Addendum “E” at 3).
8. Gates, Sr. provided large equipment to do the Diamond Valley work such as a compressor and air-driver nail guns. Gates, Jr. provided no equipment or tools. (R2 at 412; See also, Addendum “E” at 3).
9. All of Anderson’s wages were paid out of Gates, Sr.’s Kelly Gates Enterprises checking account. (R2 at 412; See also, Addendum “E” at 3).
10. Gates, Sr. co-mingled payments to Anderson for work on the Diamond Valley and remodeling projects. (R2 at 412; See also, Addendum “E” at 3).
11. Gates, Jr. never made any direct payment to Anderson, but he did make payment to Gates, Sr. (R2 at 412-13; See also, Addendum “E” at 3-4).
12. Anderson always looked to Gates, Sr., not junior, for wage payment. (R2 at 413; See also, Addendum “E” at 4).
13. Gates, Sr. was on the job site on a daily basis. Gates, Jr. was there rarely. (R2 at 413; See also, Addendum “E” at 4).
14. Gates, Sr. exercised control over Anderson. (R2 at 413; See also, Addendum “E” at 4).
15. After Anderson was hurt, Gates, Sr. transferred \$1,000 to his son, his son

then paid the \$1,000 to Anderson from the son's personal account. This was intended to create some evidence that Gates, Jr. was Anderson's employer. (R2 at 413; See also, Addendum "E" at 4).

In addition to failing to cite to the Commission's findings, Gates, Sr. fails to cite to any of the unfavorable documentary evidence against him, such as the checks which were written to Anderson on Gates, Sr.'s Kelly Gates Enterprises' account. He likewise fails to refer to the physician's first report of injury wherein Anderson tells his treating physician that he worked for Gates Enterprises. Further, Gates entirely fails to refer to all of the testimony which preponderates against him, such as:

- a. Gates' attorney asked Gates whether the money he paid Anderson for work on the Diamond Valley home included any hours he worked on Gates, Sr.'s office building. Gates, Sr. answered, "No. No. Absolutely not." (R3 at 138-9). Gates, Sr. further indicated that it would have been highly improper to include anything but work that was done on the house. (R3 at 139). However, on cross examination, when confronted with the "doctored" records from State Bank of Southern Utah (R1 at 196-7), Gates, Sr. admitted that the checks which were paid to Anderson must have been a "partial payment on the - - on the rentals out here or - - something he done on Kolob." (R3 at 146).
- b. Upon prompting from his counsel, Gates, Sr. indicated that Anderson preferred to be paid in cash. (R3 at 79). Over objection of Anderson's counsel, Gates, Sr. testified that the reason Anderson wanted to be paid in cash was for "tax purposes". (R3 at 80). However, on cross-examination, Gates, Sr. admitted that Anderson was paid entirely by check, not cash, for the work he did on the Diamond Valley project. (R3 at 90-1).
- c. Gates, Sr., in an attempt to show Gates, Jr. was Anderson's boss, testified that he was present during a conversation wherein Gates, Jr. hired Anderson. This apparently took place over the phone. Gates, Sr. testified, "I do not recall, but I'm going to say it was over the telephone." (R3 at 42), leaving one to speculate how it is that Gates, Sr., Gates, Jr., and Mr. Anderson could converse simultaneously

over the phone.

- d. In order to explain why Anderson was paid on Gates, Sr.'s business account, Gates, Sr., testified that Anderson was requesting money at least every other day and it was not possible to get a draw from the construction loan more than once every two weeks. (R3 at 46). However, all the other framers working on the Diamond Valley home, Bret Rasmussen, Brad Cook, Mike Schurtz, and Travis Whitsnitzer were all paid out of Kelly L. Gates Enterprises account, as well. (R3 at 52).
- e. When initially questioned regarding who signed for the building permit on the Diamond Valley home, Gates, Sr. indicated that he could not recall who had applied for the building permit, but that he assumed his son had done so. (R3 at 61). However, when actually presented with a copy of the building permit, Gates, Sr. indicated that it was his signature on the building permit. (R3 at 61). Having previously testified that he could not recall who had applied for the building permit, Gates, Sr. had miraculous recall and was able to testify that the reason his son did not apply for the building permit was because "he couldn't get off work to go in and get it." (R3 at 85).
- f. Gates, Sr. testified that after Anderson's injury, Gates, Sr. loaned his son, Gates, Jr. \$1,000 to loan Anderson to help Anderson out. That check was written on Gates, Sr.'s account then, Gates, Jr. wrote a check to Anderson from Gates, Jr.'s own account. (R3 at 63). Gates, Sr. initially testified that it was his son who had delivered the check to Anderson, indicating that, "I'm assuming he gave it to Mike, the money." (R3 at 71). However, on further examination, Gates, Sr. admitted that it was actually Gates, Sr. who delivered the \$1,000 check to Anderson because the doctors "wouldn't work on him until we could get him - - he could present some money to them." (R3 at 72).

These facts which were not marshaled, nor even attempted to be marshaled by Gates, show that the determination of the labor Commissioner that Gates, Sr. was Anderson's employer, was supported by the record. The failure to marshal these facts,

pursuant to the above referenced authority, is fatal and Gates, Sr.'s appeal should be summarily dismissed.

B. GATES, SR.'S BRIEF FAILS TO COMPLY WITH RULE 24

Briefs which are not in compliance with Rule 24 can be stricken or simply disregarded by the appellate court. U. R. App. P. 24(i); *SLW/UTAH, McKAY v. Hardy*, 973 P.2d 941, 948 (Utah 1998). Gates, Sr.'s brief, in addition to failing to marshal evidence fails for a number of reasons.

Rule 24(a)(5)(A) requires that a brief "cite to the record showing that the issue was preserved in the trial court"; or (B) "a statement of grounds for seeking review of an issue not preserved in the trial court." In this situation, Gates has done neither. He sets forth four issues but makes no attempt to indicate where those issues were preserved in the administrative agency, or whether they were required to be preserved. (See brief of Gates at 1-2). It is inappropriate for a party to simply "dump the burden of argument and research" on the other party. See, *State v. Larsen*, 828 P.2d 487, 491 (Utah Ct. App. 1992) (quoting *Williamson v. Opsahl*, 416 N.E. 2d 783, 784 (Ill. App. Ct. 1981)).

Additionally, the brief fails to contain an argument setting forth the contentions and reasons of Gates with respect to the issues presented as required pursuant to Rule 24(a)(9). In his brief, Gates identifies, or attempts to identify four separate issues. (See brief of Gates at pages 1-2). After setting forth those issues, they are never addressed anywhere in the entire body of the brief. Then, Gates appears to reargue the same case

that he argued in front of the Labor Commissioner providing little, if any, legal analysis. It is not proper to try to reargue the same case which was argued before the trial court. See, e.g. *Butler, Crockett and Walsh Dev. Corp. v. Pinecrest Pipeline Operating Co.*, 909 P.2d 225, 236 (Utah 1995); *Moon v. Moon*, 973 P.2d 431, 437 (Utah Ct. App. 1999).

Further, the authority cited by Gates is irrelevant. In a case appealed from an administrative agency, Gates cites two criminal cases that allegedly support his position; *State v. Pena*, 869 P.2d 932 (Utah 1994) and *State v. Visser*, 31 P.3d 584 (Utah Ct. App. 2001). Not only are *Pena* and *Visser* irrelevant to an administrative proceeding, the citation to those cases is inappropriate. At page nine of his brief, Gates portends to quote from *Pena*, but the only citations for the case are indicated as, “(citing case)” and “(citation of the case)”. In similar fashion, in quoting the *Visser* case at page ten of the brief, Gates indicates, “(citation of case)” . . . “(citation)”. One would think that if these two cases were so important Gates could at least find the cites located within the body of the cases and inform the Court and counsel as to where it is he is purportedly quoting.

It is well settled that “[t]he brief of appellant should contain the points relied upon. . . and these points should be supported by authorities. . . If the questions involved in a case are of sufficient importance to justify asking the Court to decide them, they are worthy of careful consideration of counsel presenting them. . . It is the duty of attorneys practicing in this Court to present to the Court the authorities supporting their views and to assist the Court in reaching a correct conclusion.” *State v. Thomas*, 974 P.2d 269, 272 (Utah 1999) (quoting *En Re Estate of Kunz*, 7 Ill. App. 3d 760, 288 N.E. 2d 520, 523 (Ill.

App. Ct. 1972).

Gates, Sr.'s failure to appropriately cite to legal authority is surpassed only by his inability to cite to the record. In his statement of facts, Gates does attempt to cite to the record, with the exception of paragraph 18 which is obviously a legal conclusion.¹

A sampling of the failure to cite to the record is indicated in the following selections from Gates' brief:

- a. "Gates, Sr. also built condos in Santa Clara using a contractor. Those facts are rather important evidence in determining whether Gates, Sr. would act as a contractor on the construction of his son's own home." (See brief of Gates at page 23).
- b. "The fact is, Gates provided only a compressor driven nail gun and the compressor, to operate it, after the construction was well underway, in order to accelerate the work Anderson was doing for the express purpose of saving his son money. That was the only 'large equipment' he provided." (See brief of Gates at page 23).
- c. "Perhaps, the last issue of significance is the Commissioner's finding that it was Gates, Sr. who 'hired' Anderson to do the work on Gates, II's house in Diamond Valley. He based that determination almost entirely on the testimony of Anderson who virtually denied ever meeting Gates II until several weeks after he started the project." (See brief of Gates at page 26-7).
- d. "Gates Sr. himself was not experienced as a contractor or builder. He had worked in the automobile business all of his professional life. He loaned money to his son to pay the demands of Anderson and other workers until Gates II could get a bi-weekly draw on his construction loan to keep workers on the job, and he helped out however he could, but he was not a contractor and received no compensation or payment for assisting his son, except for the satisfaction of helping a son. He did not serve as a contractor in building his son's home." (See brief of Gates at page 28).

¹Paragraph 18 of the Statement of Relative [sic] Facts found at page seven reads, "Gates II was not required to have insurance, since he was building his own home, not subject to the workman's compensation laws. See §34A-2-103(7)(b) Utah Code Annotated.

- e. “Gates, Sr. spent time watching the workers, but acted only on the instructions of his son in directing those workers.” (See brief of Gates at page 29).

These references contain no cite to the record. Likewise, they don’t refer back to anything that is cited in the Statement of Relative [sic] Facts. It is almost impossible to defend against allegations contained in a brief when there is no admissible evidence cited.

C. GATES, SR. HAS MISREPRESENTED THE EVIDENCE TO THE COURT

In his attempt to undermine the findings of the Labor Commissioner, Gates alleges, “[i]t is almost impossible in a relatively short brief to state all of the matters, in which the respondent [sic] believes the Labor Commissioner made errors in his order Granting [sic] the original motion for review in reading and interpreting the evidence, but a few will demonstrate, the appellant believes, that the Labor Commissioner erred in revising the order and the findings of fact of the ALJ, and that he acted arbitrarily and capriciously.” (See brief of Gates at page 11).

Indeed, if there are multiple factual errors on the part of the Labor Commissioner, one would presume that Gates, Sr. would identify the most egregious error of the Labor Commissioner and point it out to this Court. However, he is not able to do so and instead fabricates an “error”. Gates argues as follows:

“The Labor Commissioner in paragraph three of his Order states that Gates, Sr. in the past owned an auto dealership and that he had formed another with his son, Gates II under the business name of ‘Kelly Gates Enterprises.’ This is the first of numerous misstatements of the record by the Labor Commissioner. The facts are, that Kelly Gates, Sr. and his son, Kelly Gates II opened an automobile dealership, not under the name of ‘Kelly Gates Enterprises’ which was Gates, Sr.’s own

business, but under the name of 'Sun Land Sales and Leasing'." (See brief of Gates at page 11).

Gates' attempt to discredit the Labor Commissioner entirely misstates the evidence. The Labor Commissioner, in his order, did not find that Gates, Sr. and Gates, Jr. owned an auto dealership under the name "Kelly Gates Enterprises." The Labor Commissioner determined as follows:

"Senior is a businessman in the St. George area. In the past, he owned and operated an auto dealership in St. George, by the time of the hearing in this matter, he had formed another automobile business, this time with Junior, his son. Under the business name of 'Kelly Gates Enterprises,' Senior owns rental units, condominiums, and town homes."

(R2 at 411; See also, Addendum "E" at 2).

Indeed, the testimony from Gates, Sr. supports the finding of the Labor Commissioner. Gates, Sr. testified:

- Q. Okay. And are you employed presently?
- A. Yes and no. I'm semi-retired.
- Q. Okay.
- A. I'm in the automobile business.
- Q. And is that in the automobile business with your son, Kelly Gates, Jr.?
- A. Yes.

(R3 at 20).

Gates further testified:

- Q. Can you tell me what Kelly L. Gates Enterprises is?
- A. That is - - basically, it's the rental units that I have, condominiums, town homes, various business that I have.
- Q. The same business - - part of that same business is the offices out on Sunset?
- A. There's no offices there, they're not finished, but the storage units are there, and yes that's part of my - -
- Q. Kelly Gates Enterprises?
- A. Kelly Gates Enterprises.

(R3 at 46).

A plain reading of the findings of the Labor Commissioner is that Kelly Gates, Sr. and Junior own an automobile dealership together. The record clearly indicates that is true. Additionally, the Labor Commissioner determined that Kelly Gates, Sr. was the sole owner of Kelly Gates Enterprises. That is supported by the record. Gates' characterization of the Labor Commissioner's findings regarding Kelly Gates Enterprises is absurd. The determination of the Labor Commissioner is clear. It is apparent that Gates and his attorney are willing to misrepresent the facts to this Court in an attempt to argue their position. That is inappropriate.

As Gates has entirely failed to marshal the evidence, provide any type of meaningful legal analysis, has failed to follow Rule 24 and has misrepresented matters to this Court, his appeal should be summarily dismissed.

II.

THERE IS SUBSTANTIAL EVIDENCE TO SUPPORT THE FINDINGS OF THE LABOR COMMISSION

While Gates' brief portends to set forth four "issues", the sum of his argument appears to be that there is insufficient evidence to support the findings of the Labor Commission. However, Gates makes no attempt to identify the findings of the Commission to which he takes issue. This in and of itself is a fatal flaw to his appeal. Indeed, failure to appropriately challenge the findings of the Labor Commission must necessarily result in those findings being conclusive for the purposes of appeal. *Osman*

Home Improvement v. Indus. Comm'n, 958 P.2d 240, 241 (Utah Ct. App. 1998).

However, assuming that Gates' convoluted argument and issues are sufficient to raise an issue as to the sufficiency of the findings of the Labor Commissioner, the evidence, when marshaled, is overwhelming that Kelly Gates, Sr. was the employer of Anderson.

As indicated by the Labor Commission, "it is well established that when an employer has retained the right to control the worker of a workers' compensation claimant, the claimant is the employer's employee for workers' compensation purposes." (citing *Bennett v. Indus. Comm'n*, 726 P.2d 427, 429-30 (Utah 1986). (R2 at 413; See also, Addendum "E" at 4).

It is unrefuted that Gates, Sr. was an uninsured employer without workers' compensation insurance. The Labor Commission, quite succinctly, indicates that Gates made the frank admission that he had hired people to remodel storage units, including Anderson, which was not in compliance with state and federal laws requiring withholding of income tax, FICA tax, unemployment insurance contribution, as well as workers' compensation insurance. (R2 at 412; See also, Addendum "E" at 3).

Yet Gates, who is clearly violating several different laws, wishes to have the Labor Commission, as well as this Court, believe the "story" that it was not really he, but his son, who hired Anderson to work on the Diamond Valley home. The problem with this argument is that every piece of documentary evidence points to Kelly Gates, Sr. and his dba, Kelly Gates Enterprises, as being the employer of Anderson. Every paycheck that

was issued to Anderson was issued on Kelly Gates Enterprises' account. It was not drawn on Kelly Gates, Sr.'s personal account, but his business account which included additional projects on which he had Anderson working.

Further, when Anderson was taken in for medical treatment, he told the treating physician that his employer was Kelly Gates Enterprises. That fact is identified in the Physician's first report of injury and at that time, Anderson could not have possibly known that a defense would arise that Kelly Gates, Jr. was his employer. It was a statement that showed his then existing state of mind, before any legal proceedings began. As Anderson stated at the time of hearing, he believed his employer to be the man who paid him his wage, Kelly Gates, Sr. (R3 at 123).

Additionally, Gates, Sr.'s testimony was not believable. Gates, Sr. initially testified that Anderson wanted to be paid cash for "tax purposes". However, when confronted with his own checks drawn on the Kelly Gates Enterprises account, Gates, Sr. had to admit that Anderson was always paid by check, not by cash, for work on the Diamond Valley home.

Likewise, in an attempt to show that his son was Anderson's employer, Gates, Sr. testified that his son delivered a \$1,000 check to Anderson so Anderson could see the doctor. However, upon additional examination, Gates admitted that it was he, Gates, Sr., who delivered the check to Anderson.

Further evidence of the scheme is evidenced by the \$1,000 check which was written out as a "loan" to Anderson. Gates, Sr., while testifying outside of the presence of

his son, and having been examined vigorously with documentation including his own checks, was a little wary when testifying as to where the \$1,000 came from and make the frank admission that the \$1,000 offered to Anderson came from Gates, Sr. Contrary to the testimony of his father, Gates, Jr. testified that this was money that Gates, Jr. had obtained from his construction account. It was relatively obvious that Gates, Jr. and Gates, Sr. were not quite able to get their stories straight as to who paid the \$1,000 to Anderson.

The documents received into evidence as well as the testimony of the witnesses, which was incorporated into the Commission's findings, is relatively clear. Kelly Gates, Sr. was Anderson's employer and the defense asserted in this case is tainted with lies and misstatements. The evidence in this case is substantial and justifies the findings of the Labor Commissioner that Gates, Sr. was Anderson's employer.

III.

GATES' APPEAL IS FRIVOLOUS AS A MATTER OF LAW AND AN AWARD OF ATTORNEY FEES AND COSTS SHOULD ISSUE

In relevant part, Utah R. App. P. 33(a) provides that attorney fees and single or double costs can be awarded to a party when they have to defend an appeal which is frivolous or brought for the sole purpose of delay. A frivolous appeal has been defined as, "[o]ne in which no justiciable question has been presented and appeal is readily recognizable as devoid of merit and that there is little prospect that it can ever succeed."

Hunt v. Hurst, 785 P.2d 414, 416 (Utah 1990) (quoting Black's Law Dictionary 601 (5th ed. 1979)).

In this situation, Gates' appeal is frivolous. As indicated previously, the brief of Gates makes no attempt to marshal any of the evidence against him, which includes his own contradictory testimony, the documentation which speaks for itself, as well as the findings of the Labor Commissioner. Further, his legal analysis regarding the citation of two criminal cases is void of any benefit to this Court. His failure to properly cite to either the record or case law is inappropriate. Additionally, his failure to indicate where any issues had been preserved before the administrative agency is inappropriate. Also, his conduct is misstating the Commission's findings as to the relationship between Kelly Gates, Jr. and Kelly Gates, Sr. in forming an automobile partnership is improper.

The above mentioned conduct is sanctionable in and of itself. However, Gates has gone further than simply submitting a baseless brief. He has referenced admittedly "doctored" evidence and makes argument that is not based in fact or law.

At hearing, Gates' responses to Interrogatories, Request for Production of Documents and Things was admitted into evidence. (R1 at 173-210). The answers and corresponding documents were signed under oath by Kelly Gates, Sr. (R1 at 186-7). The bank documentation in the form of "loan advances" attached to the Request for Production of Documents appearing at page 196-7 of the record were admittedly "doctored" according to the testimony of Kelly Gates, Jr. (R3 at 175).

That "doctored" evidence came in the form of discovery responses from Kelly

Gates, Sr. It was his witness, Kelly Gates, Jr. who indicated those documents were “doctored”. Yet, instead of correcting the “doctored” documents which were received into evidence, Gates, Sr. instead relies on the bank records throughout the course of his brief:

Q. Okay. Wasn't Mr. Rasmussen paid for work on your son's home in Diamond Valley on checks drawn on the account of Kelly Gates Enterprises?

A. Yes. And so was Mr. Anderson.

Q. So they weren't paid by your son, they were paid by your company?

A. Mr. Anderson would come in at least every other day and want to get paid, and my son, I called him up one day and he explained that he took a draw every two weeks, he couldn't pay him except every two weeks, so we would write - he'd say dad, would you write him a check, I'll reimburse you, which we did and which I was reimbursed by the bank and that's the way it was submitted. (Emphasis in original) (See brief of Gates at page 24-5).

In his brief, Gates continues to rely on the testimony referring to bank records:

Q. But he didn't pay the helpers, you paid the helpers?

A. They weren't working for him, they were working for my son.

Q. I see. And they were paid by you?

A. My son would ask me to pay them and he'd make the draw and reimburse me. (Emphasis in original)

Q. (By Mr. Wright): Now, you also indicated that (Anderson) wanted to be paid more often than every two weeks or whenever the draws were available at the bank; is that right?

A. That is correct.

Q. And some of the documents you looked at indicated he was paid sometimes

every other day; is that right?

A. One time he was paid the next day. . .

Q. Okay. And so when that happened, did Mr. Kelly Gates, Jr. have the money to pay those requests on a daily basis like that?

A. No. He did not. In fact, he told Mr. Anderson that it would be paid by a draw and it would be two to three weeks on a draw.

(See brief of Gates at page 25).

Not only did Gates, Sr. rely on the falsified bank documents, but so did Kelly Gates, Jr. in his testimony. That is again identified in Gates' brief:

Q. Did you have funds of your own to cover his requests between draws?

A. No. No.

Q. Okay. So what happened then?

A. Dad would pay Mike, and then when I could turn in a draw every week or every two weeks, I'd reimburse dad. (Emphasis in original)

(See brief of Gates at page 26).

Gates, Sr. relies on testimony and documentation regarding the draws to such an extent that he emphasizes the testimony in his brief by underlining the references. One would hope that Gates and his attorney would take remedial steps to correct the “doctored” documents. However, they do the opposite and refer to the “doctored” draws to support the claim made in this appeal. That is inappropriate conduct and should not be condoned by this Court.

In addition to the above mentioned improprieties, Gates makes legal argument which has no merit. Gates raises, as his first issue, whether he “was substantially

prejudiced by the Labor Commissioner who did not participate in the hearing, did not hear the testimony, observe the witnesses and with only a cold transcript before him, reversed the Findings of Fact, and Conclusions of Law and Order the Administrative Judge who heard the case, observed the witnesses, and reviewed the evidence? (See brief of Gates at 1). The law on this point is relatively clear.

The Utah Labor Code specifically allows the Commission to reverse the findings of the Administrative Law Judge. In relevant part, UTAH CODE ANN. §34A-1-303(4)(a) provides, “on appeal, the Commissioner or the Appeals Board may:

- (i) affirm the decision of an Administrative Law Judge;
- (ii) modify the decision of an Administrative Law Judge;
- (iii) return the case to an Administrative Law Judge for further action as directed;

or

(iv) **reverse the findings, conclusions, and decisions of an Administrative Law Judge.**” (Emphasis added)

Obviously, the legislature has granted to the Labor Commissioner and the Appeals Board the authority to reverse the findings of the ALJ. Further, Utah case law supports the conclusion that the final arbiter of the findings of fact in a case before the Labor Commission is the Labor Commission, not the ALJ.

In *United States Steel v. Industrial Comm’n* 607 P.2d 807 (Utah 1980), the Supreme Court dealt with facts very similar to those addressed here. There, after an

evidentiary hearing on an injured workers claim for workers compensation benefits, the ALJ determined the injured worker lacked credibility, found no work accident to have occurred, and denied compensation. The injured worker sought review by the Industrial Commission. Based on the same record which was in front of the ALJ, the Commission found that the injured worker had indeed been involved in an accident at work.

U.S. Steel appealed and argued that it was improper for the Labor Commission to substitute its findings for those of the ALJ, particularly when the ALJ had based his findings on the credibility of a witness. The Supreme Court rejected U.S. Steel's argument summarily:

Our statutes do not mandate or indicate that the Commission is bound by the findings of the Administrative Law Judge when the evidence is conflicting. On the contrary, Section 35-1-82.54 provides that when a case is referred to the full Commission, it shall review the entire record, and may make its own findings of fact and enter its award thereon. In doing so it may, in its discretion, take further evidence. Though this Court cannot overturn the findings of fact made by the Commission if there is substantial evidence furnishing a reasonable basis for such findings, there is nothing in our statutes which limits the power of the Commission itself in reviewing and adopting or reversing the findings of its Administrative Law Judge. . . (citations omitted).

Utah Appellate Courts have always held that an ALJ's findings are not binding in later proceedings before an administrative agency. See, *Giles v. Industrial Comm'n* 967 P.2d 743, 745 (Utah 1984); *USX Corp. v. Industrial Comm'n*, 781 P.2d 883, 886 (Utah Ct. App. 1989); *Virgin v. Board of Review*, 803 P.2d 1284, 1287 (Utah Ct. App. 1990); *Chase v. Industrial Comm'n* 872 P.2d 475, 479 (Utah Ct. App. 1994); *Commercial Carriers v. Industrial Comm'n*, 888 P.2d 707, 710 (Utah Ct. App. 1994).

On this issue, Utah law is consistent with the majority rule in other states. As noted by Professor Larson in *Larson's Workers Compensation Law* §80.12(b), p. 15-565:

It also follows logically that the rule of conclusiveness of administrative findings of fact should apply to the final action of the Director or full Board, rather than the decision of the referee. . . . The fact that the Commission took no new evidence is immaterial. Moreover, in states adhering to the orthodox rule, no exception is made even when the issue is credibility of a witness, and when only the referee and not the Commission had the benefit of first hand observation of the witness.

Utah Law is clear that the Commission has the authority to supplant the ALJ's findings of fact with it's own based upon the same evidence presented to the ALJ. Indeed, that is the rule from the majority of jurisdictions.

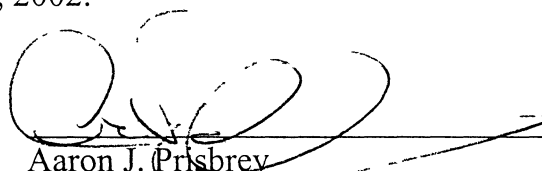
The above referenced argument was set forth in Anderson's Motion for Summary Disposition before this Court. Obviously, Gates must be aware that his argument the Commission cannot supplant the findings of the ALJ is without merit. In fact Gates for the first time "acknowledges that the Commissioner had the authority and the power to reverse the findings of the Administrative Law Judge, but due process demands there be a legally justifiable basis for such reversal." (See brief of Gates at page 9).

Nevertheless, Gates goes on to make the exact same argument that he made in front of the administrative agency, that the two criminal cases to which he cites are relevant to an administrative proceeding. (R2 at 427-47). In fact, the argument that he made in front of the Appeals Board is parroted back in his brief almost verbatim. That is not appropriate. There is no merit to the legal argument set forth in Gates' brief and it should be summarily dismissed and attorney fees and costs should be awarded.

CONCLUSION

The brief of Gates fails, in almost every respect, to comply with Rule 24 and should not be considered by this Court. The evidence in this case, when marshaled, is clear and supports the findings of the Labor Commissioner in all respects. Finally, the appeal brought by Gates is not brought or asserted in good faith, is frivolous in all aspects and, as such, an award of attorney fees and costs should enter.

DATED this 24 day of May, 2002.


Aaron J. Prishbrey
Attorney for Petitioner/Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 24 day of May, 2002, a copy of the foregoing BRIEF OF APPELLEE was mailed, postage prepaid, as follows:


Utah Court of Appeals	(1) original
450 South State Street	(7) copies
P.O. Box 140230	
Salt Lake City, Utah 84111-0230	

Mr. J. MacArthur Wright	(2) copies
Gallian Westfall Wilcox & Wright	
59 South 100 East	
St. George, UT 84770	

Mr. Alan Hennebold	(2) copies
Labor Commission of Utah	
160 East 300 South, 3 rd Floor	
P.O. Box 146615	
Salt Lake City, UT 84114-6615	

Mr. George Anderson
PO Box 62
Springdale, UT 84767

(1) copy



AARON J. PRISBREY
Attorney for Respondent

Addendum A

(a) Brief of the appellant. The brief of the appellant shall contain under appropriate headings and in the order indicated:

(1) A complete list of all parties to the proceeding in the court or agency whose judgment or order is sought to be reviewed, except where the caption of the case on appeal contains the names of all such parties. The list should be set out on a separate page which appears immediately inside the cover.

(2) A table of contents, including the contents of the addendum, with page references.

(3) A table of authorities with cases alphabetically arranged and with parallel citations, rules, statutes and other authorities cited, with references to the pages of the brief where they are cited.

(4) A brief statement showing the jurisdiction of the appellate court.

(5) A statement of the issues presented for review, including for each issue: the standard of appellate review with supporting authority; and

(A) citation to the record showing that the issue was preserved in the trial court; or

(B) a statement of grounds for seeking review of an issue not preserved in the trial court.

(6) Constitutional provisions, statutes, ordinances, rules, and regulations whose interpretation is determinative of the appeal of central importance to the appeal shall be set out verbatim with the appropriate citation. If the pertinent part of the provision is lengthy, the citation alone will suffice, and the provision shall be set forth in an addendum to the brief under paragraph (11) of this rule.

(7) A statement of the case. The statement shall first indicate briefly the nature of the case, the course of proceedings, and its disposition in the court below. A statement of the facts relevant to the issues presented for review shall follow. All statements of fact and references to the proceedings below shall be supported by citations to the record in accordance with paragraph (e) of this rule.

(8) Summary of arguments. The summary of arguments, suitably paraphrased, shall be a succinct condensation of the arguments actually made in the body of the brief. It shall not be a mere repetition of the heading under which the argument is arranged.

(9) An argument. The argument shall contain the contentions and reasons of the appellant with respect to the issues presented, including the grounds for reviewing any issue not preserved in the trial court, with citations to the authorities, statutes, and facts of the record relied on. A party challenging a fact finding must first marshal all record evidence that supports the challenged finding.

(10) A short conclusion stating the precise relief sought.

(11) An addendum to the brief or a statement that no addendum is necessary under this paragraph. The addendum shall be bound as part of the brief unless doing so makes the brief unreasonably bulky. If the addendum is bound separately, the addendum shall contain a table of contents. The addendum shall contain a copy

any constitutional provision, statute, rule, or regulation of central importance cited in the brief but not reproduced in full in the brief;

in cases being reviewed on certiorari, a copy of the Court's opinion; in all cases any court opinion of central importance to the appeal but not available to the court as part of a regularly published reporter service; and

those parts of the record on appeal that are of central importance to the determination of the appeal, such as the assigned instructions, findings of fact and conclusions of law, a summary decision, the transcript of the court's oral decision, a contract or document subject to construction.

Brief of the appellee. The brief of the appellee shall conform to the requirements of paragraph (a) of this rule, except that the appellee need not include:

a statement of the issues or of the case unless the appellee is dissatisfied with the statement of the appellant; or

an addendum, except to provide material not included in the addendum of the appellant. The appellee may refer to the addendum of the appellant.

Reply brief. The appellant may file a brief in reply to the brief of the appellee, and if the appellee has cross-appealed, the appellant may file a brief in reply to the response of the appellee to the issues presented by the cross-appeal. Reply briefs shall be limited to answering any new matter set forth in the opposing brief. The content of the reply brief shall conform to the requirements of paragraph (a)(2), (3), (9), and (10) of this rule. No further briefs may be filed except with leave of the appellate court.

References in briefs to parties. Counsel will be expected to refer to their briefs and oral arguments to keep to a minimum references to parties by such designations as "appellant" and "appellee." It promotes clarity to use the designations used in the lower court or in the agency proceedings, or the actual names of the parties, or descriptive terms such as "the employee," "the injured person," "the taxpayer," etc.

References in briefs to the record. References shall be made to the pages of the original record as paginated pursuant to Rule 11 (b) or to pages of any statement of the evidence or proceedings or agreed statement prepared pursuant to Rule 11 (f) or 11 (g). References to pages of published depositions or transcripts shall identify the sequential number of the cover of each volume as marked by the clerk on the bottom right corner and each separately numbered page(s) referred to within the deposition or transcript as marked by the transcriber. References to exhibits shall be made to the exhibit numbers. If reference is made to evidence the admissibility of which is in controversy, reference shall be made to the pages of the record in which the evidence was identified, offered, and received or excluded.

Length of briefs. Except by permission of the court, principal briefs shall not exceed 50 pages, and reply briefs shall not exceed 25 pages, exclusive of pages containing the table of contents, tables of citations and any addendum containing statutes, rules, regulations, or portions of the record as required by paragraph (a) of this rule. In cases involving cross-appeals, paragraph (g) of this rule sets forth

(g) Briefs in cases involving cross-appeals. If a cross-appeal filed, the party first filing a notice of appeal shall be deemed the appellant for the purposes of this rule and Rule 26, unless the parties otherwise agree or the court otherwise orders. The brief of the appellant shall not exceed 50 pages in length. The brief of the appellee/cross-appellant shall contain the issues and arguments involved in the cross-appeal as well as the answer to the brief of the appellant and shall not exceed 50 pages in length. The appellant shall then file a brief which contains an answer to the original issues raised by the appellee/cross-appellant and a reply to the appellee's response to the issues raised in the appellant's opening brief. The appellant's second brief shall not exceed 25 pages in length. The appellee/cross-appellant may then file a second brief, not to exceed 25 pages in length, which contains only a reply to the appellant's answers to the original issues raised by the appellee/cross-appellant's first brief. The lengths specified by this rule are exclusive of table of contents, table of authorities, and addenda and may be exceeded only by permission of the court. The court shall grant reasonable requests, for good cause shown.

(h) Briefs in cases involving multiple appellants or appellees. In cases involving more than one appellant or appellee, including cases consolidated for purposes of the appeal, any number of parties may join in a single brief, and any appellant or appellee may adopt by reference any part of the brief of another. Parties may similarly join in reply briefs.

(i) Citation of supplemental authorities. When pertinent and significant authorities come to the attention of a party after its brief has been filed, or after oral argument but before decision, a party may promptly advise the clerk of the appellate court, by letter setting forth the citations. An original letter and nine copies shall be filed in the Supreme Court. An original letter and seven copies shall be filed in the Court of Appeals. There shall be a reference either to the page in the brief or to a point argued orally to which the citations pertain, but the letter shall without argument state the reasons for the supplemental citations. Any response shall be made within 10 days of filing and shall be similarly limited.

j) Requirements and sanctions. All briefs under this rule must be concise, presented with accuracy, logically arranged with proper headings and free from burdensome, irrelevant, immaterial and scandalous matters. Briefs which are not in compliance may be rejected or stricken, on motion or sua sponte by the court, and the court may assess attorney fees against the offending lawyer.

k) Brief covers. The covers of all briefs shall be of heavy card stock and shall comply with Rule 27.

m 8. Checklist for Briefs - Rules 24, 26, and 27. Effective upon April 1, 2002.

Deadlines for Filing

- . Appellant: 40 days from notice by clerk.
- . Appellee: 30 days from appellant's brief.
- . Reply: 30 days from appellee's brief.

Proof of Service

In criminal appeals arising from a felony charge, upon the Attorney General.

In criminal appeals arising from a misdemeanor charge, upon the executing attorney.

In appeals from the juvenile court, upon the Attorney General. See Canon 78-3a-909.

Original signature required on proof of service.

Number of Copies

Supreme Court: Ten copies - one with original signature.

Court of Appeals: Eight copies - one with original signature.

Two copies served on counsel for each party separately represented.

Length

Appellant and Appellee: 50 pages, excluding addendum.

Reply: 25 pages, excluding addendum.

Petition for Rehearing: 15 pages, excluding addendum.

Size and Binding

Size: 8 1/2" x 11".

Binding: Compact or Vello binding required; coiled plastic or other binding not acceptable.

Printing Requirements

Margins at least one inch on top, bottom and sides of each page.

Proportionally spaced typeface must be 13-point or larger for both text and footnotes. A monospaced typeface may not contain more than ten characters per inch for both text and footnotes.

Print on both sides of the page.

Double spaced; 1 1/2 line spacing is not acceptable.

Other Requirements

Heavy weight paper.

Color:

Appellant or Petitioner	Blue
Appellee or Respondent	Red
Reply	Gray
Clerk, Intervenor, Guardian	Green
Petition for Rehearing	Tan
Response to Pet'n for Rehearing	White
Petition for Certiorari	White
Brief in Opposition to Cert	Orange
Reply to Brief in Opposition	Yellow

Caption of the Case:

Full title of the case as it appeared in the trial court or agency;

ency (e.g., "plaintiff/defendant");

c. designation of the parties as they appear in the appellate court (e.g., "appellant/appellee").

4. Name of the appellate court ("In the Utah Supreme Court") ("In the Utah Court of Appeals").

5. Appellate court docket number.

6. Title of the document (e.g., "Brief of the Appellant", "Brief of the Appellee").

7. Nature of the proceeding (e.g., "appeal", "petition for review").

8. Name of the trial court or agency and name of the judge (e.g., "Appeal from the Third District Court, Salt Lake County, Judge Smith").

9. Name of counsel and the parties they represent:

a. counsel filing brief on lower right;

b. opposing counsel on lower left.

Content Requirements - In the Order Stated

1. List of all parties unless the caption on the cover shows all parties.

2. Table of contents with page references.

3. Table of authorities with page references: (a) cases listed alphabetically with parallel citations; (b) rules; (c) statutes; (d) other authorities.

4. Statement showing jurisdiction of the appellate court.

5. Statement of the issues. For each issue state the standard of review and supporting authority. (Optional with appellee if there is no agreement with appellant's statement.)

6. Determinative constitutional provisions, statutes, ordinances, and rules set forth verbatim or by citation alone if they are set forth verbatim in the addendum.

7. Statement of the case (Optional with appellee if there is no agreement with appellant's statement):

a. nature of the case;

b. course of proceedings;

c. disposition at trial court or agency.

d. Relevant facts with citation to the record.

e. Summary of the argument.

f. Detail of the argument.

g. Conclusion containing a statement of the relief sought.

h. Original signature of counsel of record or party appearing without counsel on one copy of brief; reproduced signature on other copies.

i. Addendum

Attach at end of brief or file separately.

Not counted against total page number.

Contents:

Reproduction of opinion, memorandum decision, findings of fact, conclusions of law, orders, or jury instructions;

Reproduction of parts of the record of central importance such as exhibits or other documents;

Reproduction of determinative constitutional provisions, statutes, rules. Supplement to the Brief

By letter to the court. Original and nine copies to Supreme Court. Original and five copies to Court of Appeals.

File any time prior to decision, even after oral argument.

Citation of supplemental authority with statement of reason. No new argument.

Reference to page of brief or point in oral argument supplemented.

Response to be filed within seven days.

Request for Enlargement of Time

By stipulation: Rule 26

first extension only;

limit: 30 days;

file prior to expiration of original deadline.

By motion: Rules 22 & 23

File prior to deadline; show original deadline sought to be extended;

Show number and length of previous extensions;

Give date certain on which brief will be filed;

Set forth facts constituting good cause for the request.

Amended effective October 1, 1992; July 1, 1994; April 1, 1995; April 1, 1998; November 1, 1999; amended effective April 1, 2002.)

Addendum B

**-46b-16. Judicial review - Formal
judicative proceedings.**

(1) As provided by statute, the Supreme Court or the Court of Appeals has jurisdiction to review all final agency action resulting from formal judicative proceedings.

(2) (a) To seek judicial review of final agency action resulting from formal adjudicative proceedings, the petitioner shall file a petition for review of agency action with the appropriate appellate court in the form required by the appellate rules of the appropriate appellate court.

b) The appellate rules of the appropriate appellate court shall govern all additional filings and proceedings in the appellate court.

(3) The contents, transmittal, and filing of the agency's record for judicial review of formal adjudicative proceedings are governed by the Utah Rules of Appellate Procedure, except that:

a) all parties to the review proceedings may stipulate to shorten, summarize, or organize the record;

b) the appellate court may tax the cost of preparing transcripts and fees for the record:

1) against a party who unreasonably refuses to stipulate to shorten, summarize, or organize the record; or

11) according to any other provision of law.

4) The appellate court shall grant relief only if, on the basis of the agency's record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following:

a) the agency action, or the statute or rule on which the agency action is based, is unconstitutional on its face or as applied;

b) the agency has acted beyond the jurisdiction conferred by any statute;

c) the agency has not decided all of the issues requiring resolution;

d) the agency has erroneously interpreted or applied the law;

e) the agency has engaged in an unlawful procedure or decision-making process, or has failed to follow prescribed procedure;

f) the persons taking the agency action were illegally constituted as a decision-making body or were subject to disqualification;

g) the agency action is based upon a determination of fact, made or relied upon by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court;

1) the agency action is:

1.) an abuse of the discretion delegated to the agency by statute;

1) contrary to a rule of the agency;

11) contrary to the agency's prior practice, unless the agency justifies the inconsistency by giving facts and reasons that demonstrate a fair and rational basis for the inconsistency; or

v) otherwise arbitrary or capricious.

Addendum C

torney's fees.

(a) *Damages for delay or frivolous appeal.* Except in a first appeal of right in a criminal case, if the court determines that a motion made or appeal taken under these rules is either frivolous or for delay, it shall award just damages, which may include single or double costs, as defined in Rule 34, and/or reasonable attorney fees, to the prevailing party. The court may order that the damages be paid by the party or by the party's attorney.

(b) *Definitions.* For the purposes of these rules, a frivolous appeal, motion, brief, or other paper is one that is not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law. An appeal, motion, brief, or other paper interposed for the purpose of delay is one interposed for any improper purpose such as to harass, cause needless increase in the cost of litigation, or waste time that will benefit only the party filing the appeal, motion, brief, or other paper.

c) *Procedures.*

1) The court may award damages upon request of any party or on its own motion. A party may request damages under this rule as part of the appellee's motion for summary disposition under Rule 10, as part of the appellee's brief, or as part of a party's response to a motion or other paper.

2) If the award of damages is upon the motion of the court, the court shall issue to the party or the party's attorney or counsel an order to show cause why such damages should not be awarded. The order to show cause shall set forth the allegations which form the basis of the damages and permit at least ten days in which to respond unless otherwise ordered for good cause shown. The order to show cause may be part of the notice of oral argument.

3) If requested by a party against whom damages may be awarded, the court shall grant a hearing.

Addendum D

UTAH LABOR COMMISSION

Case No. 97694

RECEIVED
FEB 03 2001
J. MacArthur

GEORGE M. ANDERSON,

Petitioner,

v.

KELLY GATES SR.
aka KELLE GATES SR. (uninsured)
and the UNINSURED EMPLOYERS
FUND,

Respondents.

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FINDINGS OF FACT

CONCLUSIONS OF LAW

& ORDER

HEARING: July 1, 1999 at 3:00 P.M.
Fifth District Court
Courtroom J
220 North 200 East
St. George, Utah 84770

BEFORE: Donald L. George, Administrative Law Judge (ALJ).

APPEARANCES: George M. Anderson (Anderson, petitioner or applicant) is represented by attorney Aaron Prisbrey.

The respondent, Kelly Gates Sr. (Gates Sr. or respondent) is represented by attorney J. MacArthur Wright.

The Uninsured Employer's Fund is represented by attorney Sherrie Hayashi.

INTRODUCTION OF CASE

Anderson filed a pro se Application for Hearing with the Labor Commission on August 27, 1997 requesting medical expenses, temporary total and permanent partial disability compensation and travel expenses. Anderson alleges that he sustained an industrial accident arising out of and in the course of his employment by Kelly Gates Sr. on January 17, 1996. That Application was assigned case number 97694, a copy was

sent to the Respondents, an Answer thereto was timely filed and the matter was ultimately set for this hearing. Attorney Prisbrey entered the case on behalf of the petitioner on March 24, 1998.

Seven exhibits were admitted without objection, four by the petitioner and three by the respondents. Petitioner invoked the exclusionary rule and accordingly the witnesses were sworn, instructed, and all that were not parties left the room. After having taken that step, the petitioner then called respondent Kelly Gates Sr. as his first witness and examined him extensively for over two hours. Petitioner called as his second witness Seymour Hoskins, and at last petitioner presented his own testimony.

It should be noted that there are two Kelly Gates, father (who is the respondent) and his son, hereinafter respectively referred to as Gates Sr. and Gates II.

The respondents presented the testimony of Gates Sr. and Gates II.

The issue for resolution is whether Gates was an employer and Anderson an employee within the purview of the Workers Compensation Act, or whether the work Anderson was doing was exempted from the Workers Compensation Act pursuant to U.C.A. 34A-2-103 (6)(b) exempting those constructing their own home.

FINDINGS OF FACT

The occurrence of Anderson's injury on January 17, 1996, the ensuing treatment, time off work and impairment are not contested. It is stipulated that he was working 26 hours per week at \$12 per hour, was married and had one child.

Although Hoskins was listed as the contractor and did put in the footings for the house, he denied that he was the general contractor and no party has joined him in this action. Hoskins testified that he knew Gates II was building the house and that Gates Sr. was just helping his son.

As he had been for approximately 6 weeks on January 17, 1996 Anderson was involved in framing a personal residence for Gates II. When Anderson was breaking a metal band around some lumber, the band struck and lacerated his left wrist. Anderson was off work from the date of injury to June 1, 1996 when he was released to full duty.

Gates Sr's livelihood was in automobile dealerships from which he is now semi-retired, i.e., he still has an interest in a St. George dealership. Gates Sr. had hired a

contractor to build an apartment house for him previously in 1985. He also has some storage units, two of which he was remodeling into office space with Anderson and other assistants. At Anderson's request, Anderson was paid cash for his work on the conversion. Anderson also did some work for Gates Sr. at a personal cabin in Kolob canyon. Anderson made the same request for payment in cash for the work on the cabin. The storage-unit-to-office conversion was going on at the same time as the construction of Gates II's home, where the alleged industrial accident occurred. Gates Sr. had built his own home previously and the same plans were used in the construction of this home for Gates II.

Gates Sr. gave Gates II the lot where the accident occurred on the condition that he would live on it for at least 5 years. Gates Sr. advised his son to build his own home because of the savings that Gates II could make. On August 17, 1995, Gates II and his wife took out a construction loan in their sole names to build the house. Gates II was 21 years old at the time and intended for this house to be his family's own home. Gates II hired Anderson to work for him at \$12 per hour. Anderson came to work when he wanted.

At the time the home was being constructed, Gates II was working full time but varying shifts at Smith's. During the same period, he was also working approximately 30 hours flex time at a car lot as a commission salesman. Both jobs were approximately 10 to 12 minutes from the home site.

Petitioner Anderson was newly married and his wife was pregnant at the time Anderson was working on Gates II's home. Anderson often asked Gates II for payment after having worked just a day or two but Gates II could only submit reimbursement requests from the construction loan at two week intervals. Since Gates II could not personally advance the requested amounts to Anderson [it does seem unlikely that at 21 years old and married, he was working two jobs for any reason other than economic necessity], and he wanted to keep Anderson on the job, he asked his father to make the interim payments Anderson requested. Gates Sr. made those payments from his business checking account, Gates Enterprises. When Gates II would submit his reimbursement request to the bank and that was received, he would pay his father back. Gates Sr. did not receive any consideration for the sums advanced, doing so only at his son's request to help him out.

With his son working long hours on two jobs, semi-retired Gates Sr. would also help his son by going to the home to monitor Anderson and other workmen's hours, run errands for materials, and help as requested by Anderson. Gates Sr. also advanced at his son's request, payments to other individuals working on the house, who had the same frequent need for money as did Anderson. Gates Sr. was always reimbursed for

the exact amounts that he advanced on his son's behalf.

After Anderson was injured, and since he had no personal health insurance, he went to Gates II and asked for some help so he could get the medical attention that he needed. In anticipation that Anderson would soon return and be able to work off any advance, Gates II recalls that he loaned Anderson \$2,500; \$1,000 by his personal check dated January 31, 1996, another \$1,000.00 check and \$500.00 in cash. Gates II thinks he got some of the money from the bank under a construction loan advance, while Gates Sr. thinks he advanced \$1,000.00 of that for his son.

Anderson attempts to interject the tests to determine whether a person is an independent contractor or an employee in ascertaining whether this is a covered accident. That is not an appropriate test when the question is whether the exemption for a personal residence applies. In this case, Gates Sr. was just the interim financing until his son was able to get draws from the bank and then Gates Sr. was promptly reimbursed. There has been no showing that this residence was intended for anything other than Gates II's personal residence. Gates Sr. did not own the lot, he was not building this home, he did not take out the loan for the financing on it, and he received nothing but a return of the amounts he advanced on his son's behalf. In the financial respect as well as in having the time flexibility in his semi-retired situation to go to the home site and keep track of the hours worked by various individuals, Gates Sr. was a simply a father helping his son, or at worst, a beneficent agent for his son.

There is a question of credibility in this case, that is raised by the vastly different representations between Anderson's testimony and all of the other witnesses. However, where petitioner so ordered the testimony of Gates Sr. before his own, the opportunity for adaptive testimony was in Anderson's hands and he fully utilized it. His testimony is starkly contrary in nearly every respect with all of the other witnesses, Gates Sr., Gates II (who had been excluded under the petitioner's invocation of the exclusionary rule), and his own witness, Seymour Hoskins. Having had an opportunity to observe the testimony, candor and demeanor of the witnesses over the course of this five-hour hearing, and considering the powerful economic incentive to Anderson in gaining \$4200+ in temporary total disability compensation and \$6,800+ in permanent partial disability compensation as well as avoiding the substantial medical expenses incurred, the ALJ finds that Anderson lacks credibility.

CONCLUSIONS OF LAW

Although no claim was brought against him, a preponderance of the evidence establishes that Kelly Gates II was engaged in the construction of his personal

residence and was therefore not an employer pursuant to U.C.A. 34A-2-103 (6) (b).

Petitioner George Anderson has failed to show by a preponderance of the evidence that Kelly Gates Sr. was his employer on January 17, 1996 while Anderson was working on Gates II's home, therefore all of the petitioners claims against Kelly Gates Sr. and the Uninsured Employers Fund should be dismissed with prejudice.

ORDER

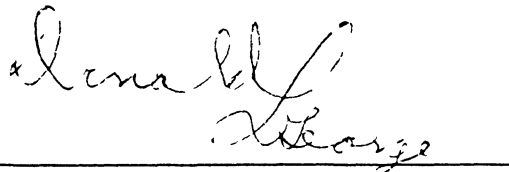
IT IS THEREFORE ORDERED that all of the petitioner George M. Anderson's claims under the Application for Hearing filed August 27, 1997 against Kelly Gates Sr. (aka Kelle Gates Sr.) are hereby denied and dismissed with prejudice.

NOTICE OF APPEAL RIGHTS

A party aggrieved by the decision may file a Motion for Review with the Adjudication Division of the Utah Labor Commission. The Motion for Review must set forth the specific basis for review and must be received by the Commission within 30 days from the date this decision is signed. Other parties may then submit their Responses to the Motion for Review within 20 days of the date of the Motion for Review.

Any party may request that the Appeals Board of the Utah Labor Commission conduct the foregoing review. Such request must be included in the party's Motion for Review or its Response. If none of the parties specifically requests review by the Appeals Board, the review will be conducted by the Utah Labor Commissioner.

DATED THIS 19th day of January, 2001

A handwritten signature in black ink, appearing to read "Donald L. George", is written over a horizontal line.

Donald L. George
Administrative Law Judge

CERTIFICATE OF MAILING

I certify that a copy of the foregoing Findings of Fact, Conclusions of Law & Order in the matter of George M. Anderson was mailed, first class, postage prepaid this 19th day of January, 2001, to the following:

GEORGE M. ANDERSON
195 W MAIN STREET
ROCKVILLE, UTAH 84763

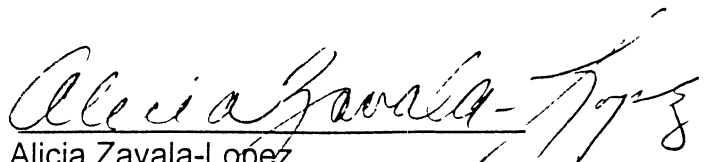
KELLE GATES
2306 VINEYARD DRIVE
SANTA CLARA, UTAH 84765

AARON PRISBREY, ATTY
~~135 N 900 E STE 4~~ 1071 E. 100 S. BLDG D STR 3 S
ST GEORGE, UTAH 84770

SHERRIE HAYASHI, ATTY
UNINSURED EMPLOYERS FUND
160 E 300 S, 3rd FLOOR
P O BOX 146612
SALT LAKE CITY, UTAH 84114-6612

K. SENT
2/2/01

UNINSURED EMPLOYERS FUND
160 E 300 S, 3rd FLOOR
P O BOX 146612
SALT LAKE CITY, UTAH 84114-6612



Alicia Zavala-Lopez
Support Specialist III
Utah Labor Commission

Addendum E

GEORGE M. ANDERSON,

Applicant,

v.

**KELLY GATES, SR. and
UNINSURED EMPLOYERS' FUND,**

Defendants.

ORDER GRANTING MOTION FOR REVIEW

ORDER OF REMAND

Case No. 97-0694

George M Anderson asks the Utah Labor Commission to review the Administrative Law Judge's denial of Mr Anderson's claim for benefits under the Utah Workers' Compensation Act ("the Act", Title 34A, Chapter 2, Utah Code Ann)

The Labor Commission exercises jurisdiction over this motion for review pursuant to Utah Code Ann §63-46b-12, Utah Code Ann §34A-2-801(3) and Utah Admin Code R602-2-1 M

BACKGROUND

On January 17, 1996, Mr. Anderson was working as a carpenter, framing a residence to be occupied by Kelly Gates Jr. ("Junior" hereafter). As Anderson cut a metal band holding a stack of lumber, the metal band snapped and cut his wrist. Surgery was required to repair the injury. Anderson was unable to work for a period of time after the accident; he may also have suffered some permanent impairment.

Anderson contends he was employed by Junior's father, Kelly Gates Sr ("Senior" hereafter) at the time of his accident and that Senior is liable for his workers' compensation benefits. In response, Senior argues that Anderson was employed by Junior at the time of his accident. Senior further argues that, because Anderson was employed by Junior in the construction of Junior's own residence, Anderson is excluded from coverage under the workers' compensation system by §34A-2-103(6)(b) of the Act.

ISSUE PRESENTED

Who was Mr Anderson's employer at the time of his work-related accident on January 17 1996?

**ORDER GRANTING MOTION FOR REVIEW
ORDER OF REMAND
GEORGE M. ANDERSON
PAGE 2**

FINDINGS OF FACT

After careful review of the testimony and other evidence presented in this matter, the Commission sets aside the ALJ's findings of fact and substitutes the following findings.

It is undisputed that Anderson's injuries resulted from a work-related accident on January 17, 1996. It is also undisputed that Anderson was an employee, rather than an independent contractor, at the time of the accident. To determine whether Anderson was employed by Junior or Senior, it is necessary to review the circumstances and context of Anderson's work and his relationships with Senior and Junior.

Senior is a businessman in the St. George area. In the past, he owned and operated an auto dealership in St. George, by the time of the hearing in this matter, he had formed another automobile business, this time with Junior, his son. Under the business name of "Kelly Gates Enterprises," Senior owns rental units, condominiums, and town homes. He was also a principal in the development of a residential subdivision known as Diamond Ranches, located about 15 miles from St. George. Senior gave Junior a residential building lot in the Diamond Ranch subdivision. It was at this lot, in the course of the construction of Junior's residence, that Anderson was injured.

At the time of Anderson's accident, Junior was 22 years old. He had little or no experience with building or construction. He was employed on a full-time basis as an assistant manager at a grocery store and also worked 30 hours a week as a salesman at a local car dealership, both in St. George.

In November, 1995, Senior hired Anderson to work on a cabin Senior was building for his personal use in the Kolob Canyon area north of St. George. Shortly thereafter, Senior also hired Anderson and several other workers to remodel two storage units located in St. George into business offices. At the same time as the storage units were being remodeled, Anderson and the other workers began construction of Junior's residence in Diamond Ranch, where Anderson suffered his injury on January 17, 1996.

The parties do not substantially dispute the foregoing facts. However, the parties tell very different versions of the remaining facts. Before the Commission sets out its findings on these disputed issues, some general comments are in order regarding the relative credibility of the parties.

The ALJ discounted Anderson's testimony, in part, because of his economic self-interest in obtaining workers' compensation benefits. But Senior, who has no workers' compensation insurance, has an equivalent economic interest in avoiding payment of such benefits. Consequently, economic interest does not provide a means of judging the relative credibility of Anderson and Senior.

ORDER GRANTING MOTION FOR REVIEW
ORDER OF REMAND
GEORGE M. ANDERSON
PAGE 3

The ALJ also discounted Anderson's testimony on the grounds it was contradicted by the testimony of all other witnesses. However, after careful review of Anderson's testimony, the Commission finds such testimony to be responsive, simple and straight-forward. Furthermore, Anderson's testimony does not conflict with the testimony of Mr. Hoskins, the only disinterested individual to testify in this matter.

The Commission has also carefully reviewed the testimony of Senior and Junior and finds it to be equivocal and inconsistent. Furthermore, Senior and Junior admit to conduct that undermines their general credibility. For example, Senior asked Mr. Hoskins, a construction contractor, to turn in Anderson's injury as a claim against Hoskins' workers' compensation insurance policy. Such a claim would have been fraudulent. To his credit, Mr. Hoskins refused Senior's request. As another example, even in the project to remodel storage units, where Senior admits to being Anderson's employer, Senior failed to comply with state and federal laws requiring withholding of income tax, payment of FICA tax, unemployment insurance contributions, and obtaining workers' compensation coverage. Finally, Junior admits that he submitted false information to his construction lender in order to obtain funds to pay Anderson's medical expenses. The foregoing conduct diminishes the persuasive force of Senior and Junior's testimony.

Returning to the facts of this case, Anderson contends he was hired by Senior to work on remodeling the storage units in St. George and that the employment relationship continued on to include work done at Junior's residential building site. According to Anderson, all his significant dealings were with Senior. He did not see Junior at the building site until the project was well underway. In response, Junior claims to have personally hired Anderson before the residential project and to have negotiated the wage to be paid Anderson. However, Junior was unable to accurately state Anderson's wage rate. In contrast, Senior was fully aware of Anderson's wage rate. Furthermore, nearly all the crew that Senior employed to remodel his storage units also worked on Junior's residential project. This supports Anderson's testimony that Senior directed his employees, Anderson included, to work on Junior's residence.

As is customary in construction projects, Anderson provided his own hand tools such as a hammer and saw for both the remodel project and the residence project. However, Senior provided larger equipment such as an air compressor and air-driven nail guns. Junior provided no equipment or tools.

There is no question that every payment of wages to Anderson was actually made by Senior from his "Kelly Gates Enterprises" checking account. At first, Senior testified that his payments to Anderson were solely an accommodation to Anderson's frequent need for cash and that such payments did not include any payments for Anderson's work on Senior's remodeling project. However, when confronted by financial records to the contrary, Senior conceded that his payments to Anderson represented co-mingled wages for work on the remodeling project and the residential project. Junior never paid any wages directly to Anderson, although he did make payments to

**ORDER GRANTING MOTION FOR REVIEW
ORDER OF REMAND
GEORGE M. ANDERSON
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Senior. It is clear that Anderson always looked directly to Senior, not Junior, for payment of wages.

Senior was at the work site on a daily basis. Junior was rarely present. Because Anderson was an experienced carpenter, he did not require much direction in the actual performance of his work. However, Senior felt free to exercise control over Anderson. For example, Senior testified he ordered Anderson off the job because Anderson was under the influence of drugs or alcohol. Later in his testimony, Senior attempts to downplay his control by stating that he merely “suggested” that Anderson not work. But the Commission concludes that Senior’s initial testimony is the most accurate statement of Senior’s own perception of his authority over Anderson at the work site. The Commission also notes that Senior told the workers when to show up for work. Anderson would clear his absences from work with Senior.

After his accident, when it became clear that Anderson required medical care, Anderson sought payment from Senior. Senior told Anderson he didn’t have any money and directed Anderson to make his request to Junior. Then, despite Senior’s previous statement that he didn’t have any money, Senior transferred \$1,000 to Junior, who deposited the funds in his own account for use in paying some of Anderson’s medical expenses. It appears to the Commission that the foregoing transfer of funds from Senior to Junior was intended to create some evidence that Junior was Anderson’s employer.

DISCUSSION AND CONCLUSION OF LAW

The sole issue before the Commission is whether Anderson was employed by Senior or by Junior. Section 34A-2-104 of the Utah Workers’ Compensation Act defines an employee as:

each person in the service of any employer . . . who employs one or more workers or operatives regularly in the same business, or in or about the same establishment, under any contract of hire, express or implied, oral or written, ... but not including any person whose employment is casual and not in the usual course of trade, business, or occupation of the employee’s employer.

It is well established that when an employer has retained the right to control the work of a workers’ compensation claimant, the claimant is the employer’s employee for workers’ compensation purposes. Bennett v. Industrial Commission, 726 P.2d 427, 429-30 (Utah 1986). Among the factors commonly used to determine whether an employer has retained the right of control are: 1) the right to direct the performance of the work; 2) the right to hire and fire; 3) responsibility for payment of wages; and 4) providing necessary equipment. But these factors are not inclusive and no one factor is completely controlling. Johnson Brothers Construction v. Labor Commission, 967 P.2d 1258, 1260 (Utah App. 1998). Ultimately, it is the right to control that is determinative. Pinter Construction Co. v. Frisby, 678 P.2d 305, 309 (Utah 1984).

**ORDER GRANTING MOTION FOR REVIEW
ORDER OF REMAND
GEORGE M. ANDERSON
PAGE 5**


In applying the foregoing standards to the facts of this case, the Commission notes that Anderson was an experienced framer who required little actual direction. However, such direction as was required came from Senior, not Junior. Senior hired Anderson and directed whether he would work on the storage unit project or the residential construction project. Senior paid Anderson. Senior provided such equipment as was necessary to perform the work. In contrast to the pervasive control that Senior exercised, Junior exercised little or no control.

In light of the foregoing, the Commission concludes that Anderson was employed by Senior at the time of his work-related accident and injury. As Anderson's employer, Senior is liable for workers' compensation benefits due Anderson on account of his injury. The Commission therefore remands this matter to the ALJ to determine the amount of such benefits and for such other action necessary to conclude this matter. In light of the length of time that elapsed between the original hearing in this matter and the issuance of the ALJ's prior decision, the ALJ is instructed to give high priority to the final resolution of this matter.

ORDER

The Commission remands this matter to the ALJ for further proceedings and order consistent with this decision. It is so ordered.

Dated this 28th day of June, 2001.


R. Lee Ellertson
Utah Labor Commissioner

**ORDER GRANTING MOTION FOR REVIEW
ORDER OF REMAND
GEORGE M. ANDERSON
PAGE 6**

CERTIFICATE OF MAILING

I certify that a copy of the foregoing Order Granting Motion For Review/Order of Remand in the matter of George M. Anderson, Case No. 97-0694, was mailed first class postage prepaid this 28th day of June, 2001, to the following:

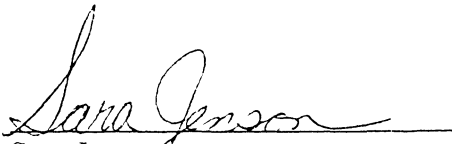
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AARON PRISBREY, ATTORNEY
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SHERRIE HAYASHI, ATTORNEY
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J MACARTHUR WRIGHT, ATTORNEY
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59 SOUTH 100 EAST
ST GEORGE UT 84770


Sara Jenson
Support Specialist
Utah Labor Commission

Addendum F

UTAH LABOR COMMISSION
Adjudication Division

AUG 02 2001

Case No. 97694

GEORGE M ANDERSON,
Petitioner,

v.

KELLY GATES SR. aka KELLE
GATES SR. (uninsured) and the
UNINSURED EMPLOYERS FUND,
Respondents.

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ORDER ON REMAND

BEFORE: Donald L. George, Administrative Law Judge (ALJ).

APPEARANCES: George M. Anderson (Anderson, petitioner or applicant) is represented by attorney Aaron Prsbrey.

The respondent, Kelly Gates Sr. (Gates Sr. or respondent) is represented by attorney J. MacArthur Wright.

The Uninsured Employers Fund is represented by attorney Sherrie Hayashi.

In accordance with the 6/28/2001 Order Granting Motion for Review which made new Findings of Fact and Conclusions of Law, and Petitioner's 7/02/01 letter summary of uncontested evidence (no party having taken issue within 20 days thereafter), the ALJ hereby issues the following:

ORDER ON REMAND

IT IS THEREFORE ORDERED that uninsured employer Kelly Gates, Sr. shall pay Petitioner George M. Anderson temporary total disability compensation at the weekly rate of \$218.10 for the period from January 17, 1996 through June 1, 1996, a period of 19.28 weeks for a total of \$4,206.28, plus interest at 8 percent per annum from the date when each payment would have otherwise been due and payable but less the attorney's fee hereinafter awarded.

Order on Remand
RE: George M. Anderson
Page 2

IT IS FURTHER ORDERED that uninsured employer Kelly Gates, Sr. shall pay Petitioner George M. Anderson permanent partial disability compensation at the weekly rate of \$218.10 for 31.2 weeks for a 10 percent whole person impairment of his left upper extremity for a total of \$6,804.72, plus interest at 8 percent annum from June 1, 1996 but less the attorney's fee hereinafter awarded.

IT IS FURTHER ORDERED that uninsured employer Kelly Gates, Sr. shall deduct attorney's fees from the foregoing temporary total and permanent partial disability awards and interest according to the Labor Commission sliding scale and remit those fees directly to Petitioner's attorney, Aaron Prsbrey, at his offices.

IT IS FURTHER ORDERED that uninsured employer Kelly Gates, Sr. shall pay all reasonably related and necessary medical expenses incurred as a result of the industrial accident of January 17, 1996 specifically including but not limited to bills from Dixie Regional Medical Center, Dr. Lawrence Chase and Dr. R. Mark Albright. The covered medical expenses are to be paid pursuant to the Relative Value Schedule of the Labor Commission, plus interest at 8 percent per annum from the date the services were rendered. To avoid the possibility of future litigation and personal liability, Mr. Anderson is urged to submit any proposed treatment plan(s) to uninsured employer Kelly Gates, Sr., for preauthorization.

IT IS FURTHER ORDERED that the Uninsured Employers Fund has no liability in this matter as there is no proof that uninsured employer Kelly Gates, Sr. is insolvent.

NOTICE OF APPEAL RIGHTS

A party aggrieved by the decision may file a Motion for Review with the Adjudication Division of the Utah Labor Commission. The Motion for Review must set forth the specific basis for review and must be received by the Commission within 30 days from the date this decision is signed. Other parties may then submit their Responses to the Motion for Review within 20 days of the Motion for Review.

Any party may request that the Appeals Board of the Utah Labor Commission conduct the foregoing review. Such request must be included in the party's Motion for Review or its Response. If none of the parties specifically requests review by the Appeals Board, the review will be conducted by the Utah Labor Commissioner.

DATED THIS 30th Day of July, 2001

UTAH LABOR COMMISSION



Donald L. George
Administrative Law Judge

CERTIFICATE OF MAILING

I hereby certify that on the 30th day of July, 2001, I mailed a copy of the foregoing **Order on Remand**, in the matter of *George M. Anderson*, postage prepaid to the following:

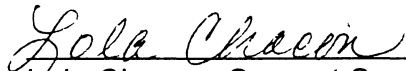
GEORGE M ANDERSON 195 W MAIN ST ROCKVILLE UT 84763

KELLE GATES 2306 VINEYARD DR SANTA CLARA UT 84765

AARON PRISBREY ATTY 135 N 900 E STE 4 ST GEORGE UT 84770

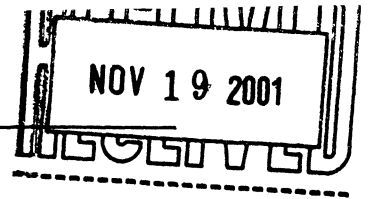
SHERRIE HAYASHI ATTY UNINSURED EMPLOYERS FUND 160 E 3RD FL PO BOX
146612 SALT LAKE CITY UT 84114-6612 (Interoffice Mail)

UTAH LABOR COMMISSION

A handwritten signature in cursive script, reading "Lola Chacon", is written over a horizontal line.

Lola Chacon, Support Specialist III
Adjudication Division
(801)530-6079 or 1-800-530-5090

Addendum G



APPEALS BOARD
UTAH LABOR COMMISSION

GEORGE M. ANDERSON,

Applicant,

v.

KELLY GATES, SR. and
UNINSURED EMPLOYERS' FUND,

Defendants.

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**ORDER DENYING
MOTION FOR REVIEW**

Case No. 97-0694

Kelly Gates, Sr. asks the Appeals Board of the Utah Labor Commission to review the Labor Commission's Order dated June 28, 2001, and the Administrative Law Judge's Order of July 30, 2001, awarding benefits to George Anderson under the Utah Workers' Compensation Act ("the Act"; Title 34A, Chapter 2, Utah Code Ann.).

The Appeals Board exercises jurisdiction over this motion for review pursuant to Utah Code Ann. §63-46b-12, Utah Code Ann. §34A-2-801(3) and Utah Admin. Code R602-2-1.M.

BACKGROUND

Mr. Anderson filed a claim for workers' compensation benefits against Mr. Gates for injuries sustained in an accident on January 17, 1996. In defense against the claim, Mr. Gates alleged he was not Mr. Anderson's employer at the time of the accident. The ALJ initially accepted Mr. Gates' argument and denied Mr. Anderson's claim. Mr. Anderson then sought agency review of the ALJ's decision. Because neither Mr. Anderson nor Mr. Gates opted to present the motion for review to the Appeals Board, the motion for review was considered by Utah Labor Commissioner.

On June 28, 2001, the Labor Commissioner set aside the ALJ's findings of fact, substituted his own findings, and concluded that Mr. Gates was Mr. Anderson's employer at the time of the accident. The Commissioner remanded Mr. Anderson's claim to the ALJ to determine the amount of benefits due Mr. Anderson. Pursuant to the Commissioner's instruction, the ALJ issued a decision on July 30, 2001, which merely fixed the amount of medical and disability benefits payable on Mr. Anderson's claim. Mr. Gates has now requested Appeals Board review of both the Commissioner's decision of June 28, 2001, and the ALJ's decision of July 30, 2001.

**ORDER DENYING MOTION FOR REVIEW
GEORGE M. ANDERSON
PAGE 2**

ISSUE PRESENTED

Mr. Gates asks the Appeals Board to set aside the Commissioner's decision in this matter and reinstate the ALJ's first decision, thereby denying Mr. Anderson's claim and releasing Mr. Gates from liability for that claim.

DISCUSSION AND CONCLUSION OF LAW

In essence, Mr. Gates asks the Appeals Board to reverse the decision of the Commissioner in this matter and reinstate an earlier decision of the ALJ. However, Mr. Gates has not identified any statutory authority for the Appeals Board to review decisions of the Commissioner. To the contrary, §34A-1-303(2)(b) of the Labor Commission Act provides as follows:

Unless a party in interest to the appeal requests in accordance with Subsection (3) that the appeal be heard by the Appeals Board, the commissioner shall hear the review in accordance with Title 63, Chapter 46b, Administrative Procedures Act. A decision of the commissioner is a final order of the commission unless set aside by the court of appeals.

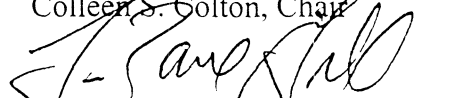
Thus, the only available review of the Commissioner's order is appellate judicial review. Unless the Commissioner's order is modified by an appellate court of appropriate jurisdiction, the Commissioner's decision is "the law of the case" and is binding with respect to further proceedings in this matter.

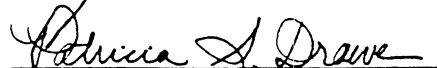
ORDER

Because the Appeals Board has no authority to review a decision of the Labor Commissioner and Mr. Gates has raised no other objections to the ALJ's order on remand, the Appeals Board affirms the decision of the ALJ dated July 30, 2001, and denies Mr. Gates' motion for review. It is so ordered.

Dated this 15th day of November, 2001.


Colleen S. Golton, Chair


L. Zane Gill


Patricia S. Drawe

IMPORTANT! NOTICE OF APPEAL RIGHTS FOLLOWS ON NEXT PAGE.

ORDER DENYING MOTION FOR REVIEW
GEORGE M. ANDERSON
PAGE 3

NOTICE OF APPEAL RIGHTS

Any party may ask the Appeals Board of the Utah Labor Commission to reconsider this Order. Any such request for reconsideration must be received by the Appeals Board within 20 days of the date of this order. Alternatively, any party may appeal this order to the Utah Court of Appeals by filing a petition for review with the court. Any such petition for review must be received by the court within 30 days of the date of this order.

CERTIFICATE OF MAILING

I certify that a copy of the foregoing Order Denying Motion For Review in the matter of George M. Anderson, Case No. 97-0694, was mailed first class postage prepaid this 15th day of November, 2001, to the following:

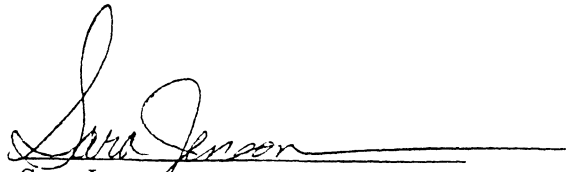
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Sara Jenson
Support Specialist
Utah Labor Commission