

2001

Kelly Gates, Sr v. Utah Labor Commission and George M. Anderson : Reply Brief

Utah Court of Appeals

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J. MacArthur Wright; Gallain, Westfall, Wilcox & Welker; counsel for petitioner.

Alan Hennebold; Aaron J. Prisbrey; counsel for respondent.

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IN THE UTAH COURT OF APPEALS

KELLY GATES, SR.,

Plaintiff/Appellant,

v.

UTAH LABOR COMMISSION and
GEORGE M. ANDERSON,

Defendants/Appellee.

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: No. 20010934-CA
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**REPLY BRIEF OF APPELLANT
KELLY GATES, SR.**

Appeal from the decision of
the Utah Labor Commission dated June 28, 2001,
reversing the Decision of the Administrative Judge

Aaron J. Prisbrey #6968
1071 East 100 South
Building D, Suite 3
St. George, UT 84770
Phone (435) 673-1661

Attorneys for Respondent/Appellee
George M. Anderson

Alan Hennebold
Labor Commission of Utah
160 East 300 South, 3rd Floor
Salt Lake City, UT 84114-6600
Phone (801) 530-6937

Attorneys for Respondent
Labor Commission of Utah

J. MacArthur Wright #3564
GALLIAN, WESTFALL, WILCOX
& WELKER
59 South 100 East
St. George, UT 84770
Phone (435) 628-1682

Attorneys for Petitioner/Appellant
Kelly Gates Sr.

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Clerk of the Court

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Building D, Suite 3
St. George, UT 84770
Phone (435) 673-1661

Attorneys for Respondent/Appellee
George M. Anderson

Alan Hennebold
Labor Commission of Utah
160 East 300 South, 3rd Floor
Salt Lake City, UT 84114-6600
Phone (801) 530-6937

Attorneys for Respondent
Labor Commission of Utah

J. MacArthur Wright #3564
GALLIAN, WESTFALL, WILCOX
& WELKER
59 South 100 East
St. George, UT 84770
Phone (435) 628-1682

Attorneys for Petitioner/Appellant
Kelly Gates Sr.

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REPLY BRIEF

Initially, Appellant acknowledges that the Respondent, in his Brief, makes two valid points. One is that Appellant failed to include the page numbers in two of his cites, for which Appellant apologizes.

They are State of Utah v. Jose Carlos Pena, 865 P.2d 932, and State of Utah v. Visser, 31 P.3d 584 (Utah App. 2001). However, those two cases merely illustrate an issue that is virtually hornbook law, i.e. that the trial judge is in the best position to assess the credibility of witnesses and that issues of credibility of the witnesses are best left to the trial court. In this case, that is the Administrative Law Judge (“ALJ”) who is the only one who saw and heard the testimony of the witnesses.

Nevertheless, Appellant apologizes for that omission.

Respondent also argues that because the two cases cited by Appellant are criminal cases, they are “—irrelevant to an administrative proceeding.” Regardless of whether they are criminal cases, or not, the principal enunciated would appear to be valid.

It is interesting to note that Respondent also quotes criminal cases when it suits him. See for example, State v. Bishop, 753 P.2d 439 (Utah 1988); State v. Larsen, 828 P.2d 487, 491 (Utah Ct. App. 1992) to name only a couple of several.

Secondly, Appellant, as Respondent pointed out, misquoted the Labor Commissioner when Appellant stated that the Commission had mis-identified the name of the automobile dealership operated by Appellant and his son, as Kelly Gates Enterprises, when in fact it was Sunland Sales and Leasing.

On closer examination of the Labor Commissioner's statement, Appellant admits he misread the statement and Appellant apologizes for that error.

To show however, that errors are easy to make, Respondent miscited at least two of the cases in his Table of Authorities. Giles v. Industrial Comm'n was cited as "967 P.2d 745, when it should have been, 692 P.2d 743. And, Grace Drilling Co. v. Board of Review should have been page 63, not 68.

Regardless, these are incidental issues, and not germane to the important issues of the case.

Appellant will attempt to respond to those issues of the case as they were raised by the Respondent in his Brief.

FAILURE TO MARSHAL THE EVIDENCE

Respondent raises as his principal issue, it appears, that the Appellant failed to "marshal the evidence," in his brief. The problem, as the Appellant sees it with that argument is that the Order of the Labor Commissioner was made up almost entirely of unreferenced conclusions, even in his Statement of Facts, making it extremely difficult for a third party to know what the alleged evidence was which he based any particular finding upon.

Examples of such statements are as follows:

"—[T]he Commission finds such testimony (presumably all of the testimony of the Respondent) to be responsive, simple and straight-forward."

Since almost the entire case supporting the Labor Commissioner's Order is dependant upon his determination that Respondent, not the other witnesses who testified, was credible, this becomes very significant.

How does one “marshal the evidence” for such a broad all-inclusive statement as that? It is especially difficult when one of the principal issues in this case, revolves around the relative “credibility of the witnesses” and the ALJ superficially found the Respondent to not be credible.

The Labor Commissioner follows up the above statement in the same paragraph with the statement that, “Furthermore, Anderson’s testimony does not conflict with the testimony of Mr. Hoskins, the only disinterested individual to testify in this matter.”

It is impossible to “marshal the evidence” in support of that conclusion, because as Appellant demonstrated in his opening brief, that statement was simply not true, and in fact, Anderson’s testimony did conflict with Mr. Hoskins’ testimony!

The Commissioner made a further finding that the testimony of Kelly Gates, Sr. and Kelly Gates, II was equivocal and inconsistent, but does not state the facts he depends upon in making that broad finding. How does one “marshal the evidence” in support of that conclusion, when the Appellant does not believe the record reflects that Kelly Gates, Sr. and Kelly Gates, II’s testimony is equivocal and inconsistent. In fact, just the opposite is more likely true.

Perhaps the Commissioner was attempting to support that conclusion with the statement that “—Senior asked Mr. Hoskins, a construction contractor, to turn in Anderson’s injury as a claim against Hoskins’ workers’ compensation insurance policy.” And that “[s]uch a claim would have been fraudulent.” Of course, that might have been a fact that could have been “marshaled”, if it were true.

However, one cannot marshal evidence in support of that conclusion because that is clearly not what happened. It would have been abundantly clear to the Commissioner that that is not what the testimony was if he had been listening to the actual testimony.

As pointed out in Appellant's opening brief, Appellant merely asked Hoskins if he had insurance that would cover the injury, and he was told "no" and that was the end of it. (See Hoskin's testimony, Tr. p. 103, lines 7-13.)

Appellant did not ask him to submit an insurance claim, when he did not have insurance that would cover the injury. (See also, page 20 of Appellant's Opening Brief.)

It is of some importance to point out as background that Hoskins had done some work on the house. (See Tr. p. 103, lines 7-12.) This might have suggested that he may have had insurance that would cover the injury, explaining why the question was even asked in the first place. When Gates was told that he, Hoskins, did not have, as Hoskins testified, "that was the end of it."

In an effort to "marshal the evidence," one cannot concoct evidence when it does not appear in the record. The fact is that the Appellant, in his Opening Brief, attempted to deal with each important issue that was raised by the Labor Commissioner, and thereby, in the only form possible, "marshal the evidence" of the Commissioner's Order in the best way he could, and showing how, whatever he based his conclusion upon, was in error or clearly misinterpreted or in many cases totally in contrast with what the testimony or evidence, that was actually presented, was.

It is true that the Respondent had cited some items that he believes supports his, the Respondent's position in this case, but there is no way to determine whether any of those allegations were what the Commissioner might possibly have relied upon in making some of the broad conclusions that he made. Appellant will deal with those issues later in this brief.

**RESPONDENT ARGUES THAT APPELLANT FAILED TO
COMPLY WITH RULE 24(a)(5)(A)**

First, Respondent states that the Appellant was obligated to and did not “preserve the issues in the trial court.”

This appears to be nothing but a red herring.

It is obvious that Appellant’s claims on appeal are not legal errors made by the ALJ who conducted the only hearing or trial that was held. The issues are that the Labor Commissioner acted arbitrarily and capriciously, abused his discretion and went against the weight of the evidence in reversing the Findings and Conclusions of the ALJ. There are no legal issue to be preserved in the trial, or hearing that was held in the matter. The legal issue arose when the Labor Commission reversed the ALJ. The Appellant had no idea that that would be the subject of this appeal until after the Labor Commissioner reversed the Findings and the Conclusions of the ALJ, and after the hearing was held and concluded.

The Labor Commissioner made his Order reversing the Findings of the ALJ without any hearing whatsoever or notice to the parties whatsoever. How can the Appellant “preserve that issue in the trial court?”

Second, the Respondent argues, apparently, though it is a little vague, that Appellant listed his four issues, but then never dealt with them in the brief thereafter.

The issues stated in the Appellant’s brief, in capsule form were, did the Labor Commissioner, in reversing the Findings of the ALJ a) prejudice the Appellant, b) go against the clear weight of the evidence, c) abuse his discretion, and d) was his Order arbitrary and capricious?

It hardly takes reciting Appellant's entire opening brief over again to show that his brief was entirely devoted to answering those four questions, or issues, in the affirmative.

Third, Respondent asserts that the two cases cited by the Appellant in support of the issue that the trial court's determination of credibility of the witnesses, State v. Pena, supra, and State v. Visser, supra, are criminal cases and hence should not be considered. That matter has been dealt with already and need not be rehashed.

Fourth, Respondent states that Appellant's brief, "should contain the points relied upon . . . and these points should be supported by authorities." This may well be the case when the issues are primarily legal issues. But, here, the issues are basically factual. Does the record show that the Labor Commissioner abused his discretion and acted arbitrarily and capriciously?

Appellant does not believe he has violated Rule 24 by arguing the facts and showing, hopefully that the facts do not support the Labor Commissioner's Order. Citing legal authorities hardly assists the court in determining the facts as they appear in this record. Appellant fails to understand how he may have violated any of the requirements of Rule 24.

RESPONDENT CLAIMS APPELLANT HAS MISREPRESENTED EVIDENCE TO THE COURT

Appellant has apologized above. But, to further explain that it was an unintentional error, Appellant read the phrase in the Commissioner's Order, "—he (the Appellant) had formed another automobile business, this time with Junior, his son. Under the business name of 'Kelly Gates Enterprises,' Senior owns rental units" etc.

Unfortunately, but unintentially, Appellant read the phrase "under the name of 'Kelly Gates Enterprises . . .'" to be part of the previous sentence, not the subsequent one. The error is inexcusable, but certainly not an intentional effort to mislead the court.

Again, it is important to refer to the point made in State of Utah v. Visser 31 P.3d 584, 587 (Ut. App. 2001) that “to the extent that findings of fact are based on a determination of credibility, we defer to the trial court.”

**FAILURE TO SUPPORT STATEMENTS MADE IN
APPELLANT’S BRIEF WITH CITES TO THE RECORD**

In his paragraph (a) on page 20 of his brief, Respondent complains that Appellant failed to cite to the record, when, in the argument portion of his brief, he stated that Appellant had built condos using a contractor. Perhaps that particular fact was not cited, but it could have been, and Appellant apologizes for not having done so, but it can be substantiated by a citation of the record. Page 21 of the record, lines 12-13 states when asked if he (Appellant) built apartments, the Appellant stated: “I hired a contractor to do it.”

In paragraph (b) Respondent argues on page 20 of his brief that Appellant did not cite to the record concerning the nail gun and compressor. However, see page 23 of Appellant’s brief in which Appellant cited the court to three pages of the transcript, pages 29-31 which discussed the entire issue of the nail gun and the compressor to operate it.

In paragraph (c), on page 20 of his brief, Respondent represents that the Appellant made no citation to the record to support that statement that the Commissioner must have relied solely upon testimony of Anderson in determining that Kelly Gates II, the owner of the house was never on the job, Respondent cited page 26-27 of Appellant’s brief, which has nothing to do with the issue stated by Respondent.

That fact is, Appellant did cite numerous pages in the transcript and even copied portions of the record, on pages 13 and 14 of his brief, pointing out that the Commissioner stated that “Anderson did not see Junior at the building site until the project was well under way.”

Thereafter, Appellant spent a considerable amount of time showing citations to the Record that Anderson did see, or should have seen Gates II there because he was there.

In his paragraph (d) on page 20 of Respondent's brief, Respondent again complains that no citations were provided to support the issues in that paragraph.

However, it is obvious that, contrary to Respondent's representation, that paragraph, in the argument portion of the brief, was simply a summary of issues, that had each been dealt with earlier in the brief.

For example, with reference to the Appellant's professional background see paragraph 5 and paragraph 16 of Appellant's Statement of Facts as to the issue of Appellant's payment of wages to Respondent see paragraphs 13, 14 and 15 of his Statement of Facts.

Finally, in paragraph (e) on page 21 of Respondent's brief, he again raises the specter of some terrible sin that Appellant, in the argument portion of his brief did not provide a cite for the statement that Appellant was merely watching the workers but acted only on the instructions of his son. However, see paragraph 8 of Appellant's Statement of Facts, and two cites to the record found on page 16 and 17 of Appellant's brief.

As to the allegation that Appellant did not cite to the record, that is simply not true as demonstrated above.

DOES THE EVIDENCE SUPPORT THE LABOR COMMISSIONER'S ORDERS?

In part II of Respondent's Reply Brief, after spending approximately 24 pages of his brief dealing with issues not germane to the real issue involved in this case, Respondent finally gets to the heart of the matter. That is, "does the Labor Commissioner's Order substantially prejudice

the Appellant; was it without substantial evidence to support it; was it an abuse of discretion; and, was it arbitrary and capricious?”

First, Respondent argues that “it is well established that when an employer has retained the right to control the worker of a worker’s compensation claimant, the claimant is the employer’s employee for worker’s compensation purposes.” The Appellant does not contest that statement as a general principle of law. What Appellant does contest, and believes the record shows, is that the Appellant, as a matter of fact did not retain the right to control the claimant.

The Appellant has attempted to show that the Labor Commissioner ignored substantial evidence to the contrary and misplaced his trust solely in the testimony of the Respondent. Appellant will not attempt to repeat the testimony and evidence that contradicts that testimony here, but it is outlined in his opening brief on page 16 and 17.

Osman Home Improvement v. Industrial Commission, 958 P.2d 240, 244, has a very good discussion of one of the most important issues of this case. Respondent, in citing the lines that he recited above, did not quote the following sentence, on page 244, which states as follows: “Furthermore, ‘it is the right of control that is the critical element underlying an employment relationship,’ not the actual exercise of control.” (Citing cases.)(Emphasis added.)

The Osman court, likewise, on page 244, discussing Special Division/No Insurance Section v. Industrial Commission, 172 Ariz. 319, 836 P.2d 1029 (Ariz. Ct. App. 1992) stated on page 244, “the court found no evidence ‘that London has ever employed anyone, nor was there evidence that he and Reeder had entered into a ‘contract of hire.’” Id. at 1033. The court rejected the ALJ’s determination that London “exercised sufficient right to control” Reeder so as to be his employer, “stating that ‘it is the right to control, not the exercise of that right, that is

determinative.” Id. Furthermore, the “exercise of ‘routine supervision’ over an employee is not in itself sufficient to establish an employment relationship.” (Emphasis added.)

While there is, of course, the testimony of the Respondent that he was working for the Appellant, not Appellant’s son, whose house was being built, the overall picture of what was happening and the testimony of those who really knew, makes it very obvious that the facts were that a father was simply attempting to help his young son save some money in the construction of his personal residence. The Appellant was not acting as a contractor on the job.

The Appellant probably was on the site more often than his son was, but anything he did was pursuant to his son’s instructions and only on behalf of his son. Appellant’s opening brief documents that fact. The Osman case, supra, confirms that his presence and even “routine supervision” does not make him an employer.

Second, Respondent argues that because Appellant hired the Respondent to do some framing work in the process of converting some storage units into offices, he must have been a contractor on the construction of Gates II’s personal residence.

The record of the testimony is (Tr. page 23, lines 13-20) as follows:

Q. Okay. And on this (the storage units) project you say he (Respondent) had worked for you a couple of days? (Emphasis added.)

A. Yes.

Q. What kind of things did you have him do—or did he do?

A. Just framing.

Q. Okay. Just wood framing, wood studs, that type of thing?

A. Yes.

It is easy to conclude that Respondent was not, even on that project, acting as a contractor but as the owner of a building, converting a storage unit into an office.

It is a great stretch to assume that that is the basis for finding that he was a contractor on the construction of his son's home.

Perhaps Appellant should have been more careful, and maybe even, for sake of argument, he should have behaved as an employer and paid certain taxes etc. for those two days of work. or on the other hand, maybe he should have made sure he was hiring a "contractor," not a carpenter.

As Appellant testified, "he did some work for a couple of days out there." (Tr. page 22, lines 24 & 25.) That hardly makes a contractor out of him in the building of Kelly Gates II's personal residence.

Third, Respondent argues that because he, himself, told the doctor he was working for Appellant, that that is proof that Appellant was a contractor. Of course, under the circumstances, that was a self-serving statement, bearing little or no credibility whatsoever, other than that he was already thinking about the deeper pocket he might be able to tap into. It conflicts with most of the other evidence in the trial.

Fourth, Respondent bears down heavily on the issue that Appellant advanced funds to Respondent when he demanded money, on almost a daily basis. Appellant devoted considerable space and time in his opening brief citing to the record, explaining that that was no more nefarious than an effort to assist his son. That issue has been dealt with in Appellant's opening brief. Whose version one believes, depends upon who was best able to assess the credibility of the witnesses, as well as the whole record. Appellant will further refer to that issue again infra.

Fifth, on page 25 of Respondent's brief, he states, (interestingly, without citation to the record) that "Gates Sr. initially testified that Anderson wanted to be paid in 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 cash.”

Presumably that reference was intended somehow by the Respondent to show that the Appellant was not credible because he had “lied” about how Respondent was paid. However, even a cursory review of the actual testimony shows that that statement was untrue and misrepresents the testimony that was given. In fact, the testimony, as it appears in the record, paints an entirely different picture.

By referring to the total series of questions and answers, one can see that Appellant had been asked why he thought Respondent had “asked” to be paid in cash. (Tr. page 79, lines 13-25, and page 80, lines 2-11.)

The salient point in that exchange of questions and answers is as follows:

Mr. Wright: Yeah. I’ll withdraw the previous one (question) and ask him if he (Respondent) ever told why he wanted to be paid in cash?

The Court: Proceed.

The Witness: He never explicitly said, no.

Q. (By Mr. Wright) Okay.

A. I assumed it was for tax purposes. (Emphasis added.)

(Mr. Prisbrey: Objection. Move to strike.)

The Court: So stricken.

Now Respondent is attempting to use that exchange to discredit the Appellant. The fact is, even if not stricken by the ALJ, the Appellant was merely speculating as to why Respondent may have “wanted” to be paid in cash. It was not a statement that the Appellant did pay in cash. In fact, Respondent’s own reference to the evidence showed that Respondent was paid by check, not in cash. There was no reflection on Appellant’s credibility in that statement!

That misrepresentation of the record not only fails to support Respondent's argument concerning that issue, it further illustrates the difficulty one would have in attempting to "marshal the evidence" in support of the Labor Commissioner's Order.

Sixth, Respondent attempts to create an issue out of the fact that when Respondent was injured and could not get medical treatment because he had no money, out of sympathy for him, and in an attempt to assist another human being, Appellant and his son obtained \$1,000.00 to be paid to the doctor for his treatment. There was some conflict in who actually delivered the check to the doctor, the son, or to the Respondent, himself.

The fact that the incident had happened three to four years before the hearing was held, and the parties could not remember for certain which of the two of them had actually delivered the check, hardly seems to rise to the level Respondent attributes it to, that is, that it shows Appellant and his son to be liars.

The fact that the Respondent has to depend upon that kind of "evidence" to discredit the Appellant and his son, should tell a lot about the strength of his overall case.

Seventh. Another offensive tactic by the Respondent is to repeatedly refer to Gates II as having "doctored" the evidence. What Respondent is referring to, and the only thing he can be referring to, is the fact that Kelly Gates II, in order to raise the \$1,000.00 to assist the Respondent, when he needed cash in order to even be able to get in to see a doctor, submitted a request for a draw on his construction loan, showing labor costs to be higher than the amount actually paid to workers for actual labor during that period but still under the budgeted sum. (Tr. page 175, lines 6-10.)

The facts are that that extra money could well be legitimately attributed to the cost of labor, the account from which it was drawn. But more importantly, the money that was drawn was Kelly Gates II's own money, money that he would have to and did repay the bank as a payment on his loan.

This hardly seems so egregious as the Respondent tries to make it out to be. Certainly, it does not seriously reflect upon the credibility of the Gates' testimony. Rather it reflects upon his generosity in attempting to assist a man whom had had hired, and who then turned on him.

In all candor, Gates II, after being badgered by Respondent's counsel did, when asked a couple of times if he was not "doctoring" the paperwork he gave to the bank, when applying for a draw, said "Yes, you could say that." (Tr. page 175, line 8.) If the Labor Commissioner had been there to hear the testimony, he would have understood that the statement did not in any way reflect that Gates II thought he was doing anything wrong or illegal.

Very importantly, however, this incident further discredits the Respondent's argument on the bigger issue. Respondent argues that Appellant was the contractor on the job and should be held liable, because it was he who made payments to Respondent out of his own business account. Yet, here, Respondent argues that Appellant's son is not credible because he obtained the \$1,000.00 to repay his father for the loan the father made to pay the doctor for Respondent's treatment.

The Respondent can't have it both ways. Either it was the father making the payment or it was the son. Obviously, it was the son.

Eighth, Respondent argues that because Appellant paid the Respondent out of his own business account for wages he earned, Appellant must have been a contractor. Appellant does

not deny that he paid the employees when they were demanding payments on an almost daily basis, or, at most, approximately every other day, or they would walk off the job, because his son could not obtain draws from the bank that often.

See Transcript page 169, lines 20-25, and page 170, line 1, which reads as follows:

Q. And Mike would contact you every day or two wanting money, and that's why you have told your dad to go ahead and pay him?

A. Dad paid him because I couldn't every day or two, and I needed to keep him on the job working. I needed—and Mike was hitting me up every couple of days for a paycheck.

And, that testimony was reiterated several times.

However, as documented in Appellant's opening brief, Appellant was repaid when Gates II was able to obtain a draw, and Appellant received no compensation, even interest on his money.

The Appellant received no compensation for the services he rendered to his son, services that only a father would provide, to assist his son in building the son's own residence. (Tr. page 158, lines 12-14, page 52, lines 16-19.)

Finally, Respondent argues, essentially, that because the Labor Commissioner has reversed the Findings of Fact and Conclusions of Law of the Administrative Law Judge, that that is the end of the case. He cites cases in support of the contention that the Labor Commissioner has the authority to reverse the Administrative Law Judge.

The real issue, however is, the effect of Section 63-46b016(4)(g) and (h)(iv) which provides that an appellant may have relief on appeal if he has been substantially prejudiced by the Labor Commissioner in any of the following regards:

. . . .

(g) The agency action is based upon determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record, before the court (Emphasis added.)

(h) the agency action is:

....
(iv) otherwise arbitrary or capricious.

The above statute would have no meaning whatsoever if it did not provide a reviewing court the opportunity to review all the evidence and make a determination whether the above-circumstances do exist, i.e. that the Labor Commissioner acted contrary to the weight of the evidence and acted arbitrarily and capriciously.

A determination of credibility of witnesses is only a partial aspect in deciding whether the evidence supports the Labor Commissioner's order reversing the ALJ. But it has to be an important element in light of the pronouncements in many cases, including, State v. Pena, supra, and State v. Visser, supra, that the judge who hears and sees the evidence should be relied upon very heavily for a determination of the credibility of the witnesses. This should be especially true when so much of the case is decided by reliance upon the credibility of the witnesses, as in this case. And here the ALJ specifically found the Respondent was not credible and took advantage of the system in the hearing. (See ALJ's Findings, page 4, Addendum A.)

RESPONDENT'S FAILURE TO EVEN REFER TO OR DISCUSS APPELLANT'S POINTS SUPPORTING HIS APPEAL

It is interesting that the Respondent, in his Reply Brief, fails to deal directly with the references to the testimony raised by the Appellant which contradicted the findings of the Commissioner but, rather quotes snippets of supposed testimony and made his own conclusions as to the meaning of those references, most of which, as have been pointed out supra are mis-

statements, misinterpretations of the testimony or are references that did not even exist in the record, as Respondent stated them.

Appellant will deal with each of them here.

On page 20 of Respondent's Brief, he begins 7 paragraphs that he claims support the Labor Commissioner's Findings.

In paragraph (a), Appellant is quoted as having said that the payments Appellant made to Respondent did not including anything due Respondent on either Appellant's Kolob cabin he had worked or for the conversion of the storage unit to an office.

As reported, Appellant was adamant that it did not. However, when showed that during a certain period he was paid less from the draw on his son's construction account than what he actually paid to Respondent, he agreed that he might have made a mistake and paid Respondent partly for work on the storage units and partly for the work on his son's residence.

Respondent makes that out to be evidence of his lack of credibility. What it actually shows, however, just the opposite.

As Appellant testified, "I know that everything that I paid him (Respondent) (on his son's residence) I was reimbursed for. (Tr. p. 146, lines 10 & 11) And again, on Tr. pg. 147, line 23 & 24. "Well, anything that he (Respondent) did on Kelly's house, I was reimbursed for."

If one were there to hear all of the testimony, it was clear, unlike the Respondent's interpretation of the testimony, it only supports the fact that he did not receive reimbursement for money he paid on behalf on his son that was not for his son's home.

Paragraph (b) Respondent revisits that “tax purposes” issue, but it has already been pointed out that Respondent misrepresented the testimony concerning that issue, supra, and it needs no further treatment now.

Paragraph (c) Respondent takes issue with the fact that Appellant assumed that a conversation between Kelly Gates II and Respondent, when he hired him could have been at his or his son’s home, but was probably over the telephone. Respondent’s counsel opines that all three of them could not communicate over the phone. However, it is not difficult at all, during a discussion of that type to hear one side of the telephonic conversation and understanding precisely what is going on. The important point, though, is that it was the son on the phone when he hired the Respondent, not the Appellant. That is hardly a very persuasive issue.

Paragraph (d) raises the issue of why Appellant advanced payments to the workers when Gates II could not get draws on his construction loan as often as the workers wanted to be paid. That issue has been dealt with in Appellant’s opening brief and elsewhere in this one and does not need to be reiterated here.

Paragraph (e) Respondent points out that when first questioned about who had signed for the building permit on the son’s home, could not remember for sure, but assumed it had been his son. Remember, this was three to four years later, during which time no one had anticipated having to remember every little detail! When showed his signature on the permit, it did refresh his memory as one of the tasks he had performed for his son who did not have the free time that he had. Again, it seems like, as the saying goes, Respondent is attempting to make a mountain out of a molehill.

Paragraph (f) Respondent raises the issue of who actually delivered the \$1,000.00 check to respondent when he needed money to have his injury treated by the doctor. Again, that has already been discussed.

The real point is, however, if that is a valid point, it is only fair to point out that the Labor Commissioner did not even have benefit of having sat through five hours of hearings formed impressions, and made contemporary notes.

It seems obvious that for the Respondent to depend upon those seven points to justify the action of the Labor Commissioner, only demonstrates that there was very little to go on, not to mention how difficult it would have been for the Appellant to “marshal the evidence” in support of the Labor Commissioner’s Order.

On the other hand, the Appellant attempted to show, with reference to the important issues the abundance of testimony that directly contradicted the Labor Commissioner’s overall conclusions supporting his reversal of the Findings of the ALJ.

Appellant can only refer to his opening brief for a review of the evidence and testimony which makes the Labor Commissioner’s reversal of the Findings of the ALJ, a substantial prejudice to the Appellant, without substantial evidence to support it, and both arbitrary and capricious.

EVIDENCE OF ARBITRARINESS AND CAPRICIOUSNESS OF THE LABOR COMMISSIONER

It is of further significance as to the issue of whether the action of the Labor Commissioner was arbitrary or capricious or not, it seems to the Appellant, is that the Labor Commission has communicated to the Court, through its General Counsel, that it “does not

intend to submit a separate brief in the matter, but generally subscribes to the arguments set forth in the brief of George Anderson, already on file.” See Addendum B attached hereto.

It should be noted, in light of the position, now being taken by the Commission, regarding the issue of arbitrariness and capriciousness, that the Counsel for the Uninsured Employers Fund, an agency of the Labor Commission, at the time of the hearing before the ALJ, when given an opportunity to file a written closing argument, along with other counsel, and who, at that time, had the option, to go either way, in support of the Respondent, or in support of the Appellant, and who having heard all of the testimony, and seen the evidence, argued strongly and persuasively in support of the Appellant, not the Respondent. See attached hereto as Addendum C to this brief.

Note specifically the final paragraph of that argument which outlines the position of the Labor Commission (through its agent) at that time:

“In summary, the evidence is that Gates, Jr. hired Anderson. Gates Jr. had the ultimate right to oversee the work on the home, including making decisions regarding the appearance and workmanship of the home. Gates Jr. approved payment of the checks and had the ultimate decision making authority to object or resolve any disputes regarding authority to object or resolve any dispute regarding wages or hours. Gates Sr. testified he did not believe he had any authority to take Petitioner off the job, but a responsibility to tell his son that there were problems. Gates Sr. stated that he would not have the ability to fire Anderson without his son’s permission. Gates Jr. was the individual with ultimate authority and control over the employment of Petitioner . . .

Gates Jr. was the property owner, and the holder of the construction loan. As such, Gates Sr. would have absolutely no legal authority to bind any decision regarding the property or the building of the home, except that delegated to him by his son. The fact that Gates Jr. is exempt under the Worker’s Compensation Act pursuant to §34A-2-103 has not been disputed. Therefore, the claim should accordingly be dismissed.

That conclusion is well supported in the body of the counsel for the Labor Commission’s argument. And again, in its Reply to Motion for Review, counsel for the UEF expanded the

argument in support of the Appellant, pointing out numerous references to the record that supported that position. (See Addendum D hereto.)

To the Appellant, that alone, even with nothing more, seems to make the Labor Commissioner's 180 degree reversal of position look very arbitrary and capricious.

Of course, Respondent may, and probably will argue that that was not the Labor Commissioner himself who authored those statements, and that he should and does have the authority to reverse those "arguments."

The fact remains, however, that everyone who listened to the testimony and saw the evidence, who had the option to draw an objective conclusion, even the Labor Commissioner's own attorney viewed the testimony and evidence favorable to the Appellant. How can it not be arbitrary and capricious for the Labor Commissioner who did not hear the testimony or observe the witnesses go against the objective observers, i.e. the ALJ and the attorney for the UEF, one of which works for the Utah Labor Commission?

RESPONDENT'S ARGUMENT THAT APPELLANT'S APPEAL IS FRIVOLOUS AS A MATTER OF LAW

The Respondent argues that because the Appellant has chosen to exercise his right to appeal as provided in §63-46-16(1) of the Utah Code Annotated, he should be assessed penalties for a frivolous delay of the conclusion of this dispute.

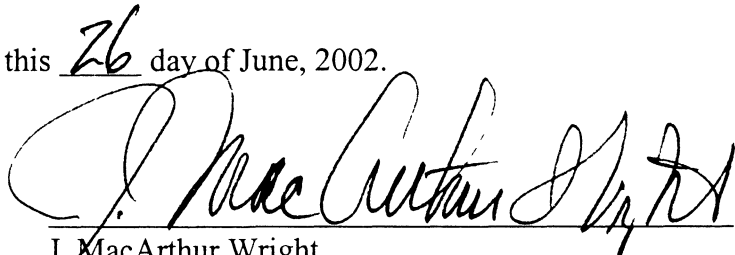
A review of the record in this matter will show that as to the issue of delay, Respondent's counsel both filed a motion to remove the ALJ from the case, (See Addendum E hereto.) a complaint against the ALJ with the Utah State Bar seeking to have him disbarred, resulting in a substantial delay of over several months. (See Addendum E attached hereto.)

Appellant does not criticize the Respondent for taking whatever steps, within the law, that he thinks necessary, but Appellant does not believe Respondent should properly allege that the Appellant, by exercising his right to appeal, should be penalized for exercising that right, as delaying the matter when Respondent created considerable delay himself, just on the other end of the case.

CONCLUSION

The Order of the Labor Commissioner reversing the Findings and Conclusions of Law and Order of the Administrative Law Judge should itself be reversed and the Administrative Law Judge's Order reinstated.

RESPECTFULLY SUBMITTED this 26 day of June, 2002.

A handwritten signature in black ink, appearing to read "J. MacArthur Wright", is written over a horizontal line.

J. MacArthur Wright

of and for

GALLIAN, WESTFALL, WILCOX & WELKER

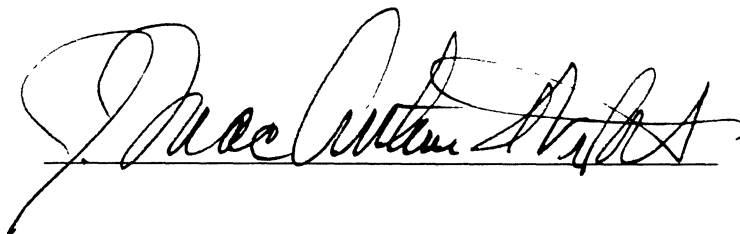
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Reply Brief of Appellant Kelly Gates Sr., was served this 26 day of June, 2002, to Appellee's counsel via U.S. Postage Services, first class mail, postage prepaid, to the following:

Aaron J. Prisbrey, Esq.
1071 East 100 South
Building D, Suite 3
St. George, UT 84770

Alan Hennebold, Esq.
Utah Labor Commission
160 East 300 South, Suite 300
P.O. Box 146600
Salt Lake City, UT 84114-6600

A handwritten signature in black ink, appearing to read "Alan Hennebold", is written over a horizontal line.

ADDENDUM A

UTAH LABOR COMMISSION

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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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 Prsbrey.

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

George M. Anderson
Findings of Fact, Conclusions of Law & Order
Page 2

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 (7)(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

George M. Anderson
Findings of Fact, Conclusions of Law & Order
Page 3

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

George M. Anderson
Findings of Fact, Conclusions of Law & Order
Page 4

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

George M. Anderson
Findings of Fact, Conclusions of Law & Order
Page 5

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

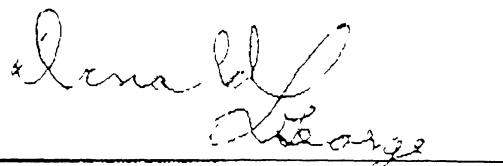
IT IS THEREFORE ORDERED that all of the petitioner George M. Anderson's claims under the Application for Hearing filed August 27, 1997 against Kelly Gates Sr. (aka Kelle Gates Sr.) are hereby denied and dismissed with prejudice.

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



Donald L. George
Administrative Law Judge

George M. Anderson
Findings of Fact, Conclusions of Law & Order
Page 6

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
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

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



Alicia Zavaia-Lopez
Support Specialist III
Utah Labor Commission

ADDENDUM B



State of Utah
LABOR COMMISSION

JUN 05 2002

Michael O. Leavitt
Governor

R. Lee Ellertson
Commissioner

160 East 300 South, 3rd Floor
PO Box 146600
Salt Lake City, Utah 84114-6600
(801) 530-6880
(800) 530-5090
(801) 530-6390 (FAX)
(801) 530-7685 (TDD)

June 3, 2002

CLERK OF THE COURT
UTAH COURT OF APPEALS
P O BOX 140230
SALT LAKE CITY UT 84114-0230

RE: Kelly Gates, Sr. v. Utah Labor Commission and George M. Anderson
Case No. 20010934-CA

Dear Clerk of the Court:

The Utah Labor Commission does not intend to submit a separate brief in this matter, but generally subscribes to the arguments set forth in the brief of George Anderson, already on file. The Labor Commission does intend to participate in the oral argument on this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Alan Hennebold".

Alan Hennebold
General Counsel
Utah Labor Commission

cc: J. MacArthur Wright
Aaron J. Prisbrey

ADDENDUM C

SHERYL M. HAYASHI (6397)
UNINSURED EMPLOYERS' FUND
UTAH LABOR COMMISSION
160 EAST 300 SOUTH, THIRD FLOOR
PO BOX 146600
SALT LAKE CITY UT 84114-6600
TELEPHONE: (801) 530-6818

UTAH LABOR COMMISSION

GEORGE M. ANDERSON,
Petitioner

vs.

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

*
* CLOSING ARGUMENTS
* OF RESPONDENT, THE
* UNINSURED EMPLOYERS
* FUND
*
*
*
* Case No. 97694
*
* Judge: Donald L. George
*

COMES NOW the Uninsured Employers' Fund and submits closing arguments in the above-captioned matter.

The petitioner is correct in asserting that all issues in this case are either stipulated or uncontested except whether Kelly Gates Sr., or Kelly Gates Jr. was the employer of the Applicant. Contrary to Petitioner's argument, the preponderance of the evidence clearly establishes that Kelly Gates Jr. was the employer of Anderson. Further, that Kelly Gates Jr., is clearly exempt from the Workers Compensation Act pursuant to U.C.A. §34A-2-103(6)(b).

**I. THE PETITIONER'S CLAIMS ARE NOT COMPENSABLE UNDER THE
WORKER'S COMPENSATION ACT.**

The Uninsured Employers' Fund does not contest that:

1. Anderson was involved in an accident on January 17, 1996, wherein he severed the tendons to his thumb while cutting the band of plywood. The incident occurred at 7850 North Amethyst Drive in Diamond Valley, Utah.
2. At the time of injury, Anderson was working 26 hours per week at \$12.00 per hour for a total of \$312 per week. He also had one dependent child and a spouse.

However, Petitioner's claims are not compensable under the Workers Compensation Act.

The evidence clearly establishes that Kelly Gates Sr. is not the employer in this circumstance, but rather that Mr. Anderson was employed by Kelly Gates Jr. Kelly Gates Jr. was engaged in constructing a personal residence that he himself owned and therefore Kelly Gates Jr. is exempt under §34A-2-103(6)(b). Therefore, the Uninsured Employers Fund disputes any liability for compensation under the Workers Compensation Act for the injury to Petitioner. The Uninsured Employers Fund affirmatively disputes that the Petitioner is entitled to any amounts related to the accident under the Workers Compensation Act, related to average weekly wage, temporary total disability, permanent partial disability, and medical expenses.

**II. KELLY GATES JR. IS THE INDIVIDUAL WITH THE ULTIMATE LEGAL
RIGHT AND AUTHORITY OF DIRECTION AND CONTROL OVER EMPLOYMENT
OF THE PETITIONER, NOT KELLY GATES SR.**

This is a case of a 21 year old son asking for his father's experience and assistance in the building of the son's first own personal home. The evidence clearly establishes that Kelly Gates Jr. was the individual who retained the ultimate legal right and authority of direction and control over the Petitioner.

In this particular case, it is clear that the only authority Kelly Gates Sr. had was that authority delegated by his son, Kelly Gates Jr. In this case, the home was being built by and for Kelly Gates Jr. as his personal residence. Kelly Gates Jr. and his wife were the legal owners of the property. The construction loan was taken out under the names of Kelly Gates Jr. and his wife. The father, Kelly Gates Sr. had absolutely no legal right to bind anything on the property or related to the construction loan. That is, except for that authority delegated to him by his son.

Petitioner argues that Gates Sr is the employer simply because Gates Sr. exercised some authority and control in this matter. This argument clearly and simply ignores the testimony that in each and every instance, that Gates Sr. and Gates Jr. testified that each decision was made with the approval or ratification of Gates Jr. To analogize Petitioner's argument, if that were the case, every manager, supervisor, or even payroll clerk of an employer would be held responsible for workers compensation claims. The person who retains **ultimate** control is the employer whether that control is exercised or not. In this case, that person is Kelly Gates Jr.

Petitioner cites several examples of where Gates Sr. asserted some type of authority. The issue however, isn't whether he actually exerted the authority, but that such authority was delegated to him by his son, who maintained ultimate control.

Gates Jr. testified that at the time the home was being built, he was working three jobs and could not be at the job site to supervise the work, nor had he any experience in construction

work. The son simply asked for his father's assistance. However, Gates Jr. retained the ultimate authority and control over the work that was done on the property, whether he exercised it or not.

Gates Jr. testified he had concerns regarding the hiring of Anderson. He and his father spoke about these concerns and Gates Jr. testified that he ultimately decided that he, Gates Jr., would go ahead and hire Anderson. Gates Jr. further testified that had his father wanted to hire Anderson, and that had he been opposed to that, Anderson would not have been hired. It is Gates Jr. that had the ultimate right of control, to hire, in this particular case.

In another situation, Petitioner contends that Gates Sr. exercised control by sending Anderson home when he believed that Anderson had shown up for the job under the influence. Petitioner fails to address the uncontroverted testimony which clearly established that Gates Sr. had called his son to tell him that Anderson was not in a position to work. Had Gates Sr. had ultimate authority, he would not have called his son. Gates Sr. further testified that although he did not feel that Petitioner was in an appropriate condition to work, that he had no right to make that ultimate decision. Both Gates Sr. and Gates Jr. testified that Gates Jr. was the one who told Gates Sr. to send Petitioner home.

Petitioner relies on the fact that his checks were made out by Gates Sr., that some of the equipment used was owned by Gates Sr., and the fact that Gates Enterprises was listed on the first report of injury somehow constitute an employer-employee relationship. Simply because a person believes an entity to be the employer does not make it so. The testimony at the hearing clearly establishes that all checks were paid with the approval of the Gates Jr. Gates Jr. further testified that had there been a dispute regarding wages, that he would have been the ultimate decision-maker. Petitioner further claims that there was commingling of the money paid for

work done at the business building and for the residential home being built. Whether or not the funds were commingled, the testimony of both Gates Sr and Jr. reflect clearly that Gates Jr maintained control over the sums paid to Petitioner and the work performed on Gates Jr's home.

Regarding the providing of the tools, lending tools within the family so that his son could build his home should not be construed as constituting an employer-employee relationship.

Whether or not Petitioner believed Gates Sr. to be the employer is irrelevant. In this case, the home was being built by Kelly Gates Jr. He owned the land, he took out a mortgage for the building of the home. Whether or not Anderson or other people such as Mr. Seymour Hoskins believed the home was being built by Kelly Gates Sr. is irrelevant. The land is and was clearly in Gates Jr.'s name. The construction loan was taken out in Gates Jr.'s name.

Although there was some discrepancy in the testimony regarding any amounts paid to Anderson regarding his injury, and whether those amounts were reimbursed or paid for by Gates Sr. or Gates Jr, the testimony was clear that in either event, that Gates Jr was the individual authorizing the payment of \$1000.00 to Anderson.

This is not a case where Gates Sr. was working as a contractor and should be held as the employer in this matter. He has been set out to be a professional contractor which is not true. He is not a contractor and certainly not in the "business" of being a contractor although he has done work in the past but primarily for his own personal use and one business building that he purchased. Gates Sr. testified that he received absolutely no compensation for his work on Gates Jr.'s personal residence, and that he did this work to help out his son, and that he was simply helping him because he was his son. Gates Sr. and Jr. both testified that since Gates Sr. is retired, he had the time to oversee the building of the home. The factors identified by Petitioner

must be considered as a whole, within the context of the other factors which clearly indicate that Gates Jr. retained ultimate authority over the employment relationship. Petitioner cannot create a facade to get around the fact that Kelly Gates Jr. is the employer, by simply calling his father, Gates Sr., the employer.

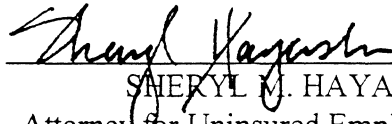
In summary, the evidence is that Gates Jr. hired Anderson. Gates Jr. had the ultimate right to oversee the work on the home, including making decisions regarding the appearance and workmanship of the home. Gates Jr. approved payment on the checks and had the ultimate decision-making authority to object or resolve any disputes regarding wages or hours. Gates Sr. testified he did not believe he had any authority to take Petitioner off the job, but a responsibility to tell his son that there were problems. Gates Sr. stated that he would not have the ability to fire Anderson without his son's permission. Gates Jr. was the individual with ultimate authority and control over the employment of Petitioner and Gates Jr.

Gates Jr. was the property owner, and the holder of the construction loan. As such, Gates Sr. would have absolutely no legal authority to bind any decision regarding the property or the building of the home, except that delegated to him by his son. Gates Jr. is exempt under the Worker's Compensation Act pursuant to Section 34A-2-103. Therefore, this claim should accordingly be dismissed.

**III. THERE HAS BEEN NO SHOWING OF INSOLVENCY ON BEHALF OF THE
ALLEGED UNINSURED EMPLOYER, KELLY GATES SR.**

In the event that Kelly Gates Sr is found to be liable for worker's compensation in this matter, there has been no showing of insolvency on behalf of Kelly Gates Sr. Accordingly, the Uninsured Employers Fund should be dismissed.

Respectfully submitted this 16 day of August, 1999.

A handwritten signature in black ink, appearing to read "Sheryl Hayashi", is written over a horizontal line.

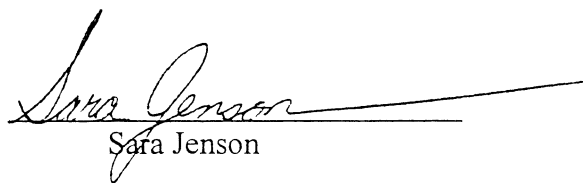
SHERYL M. HAYASHI
Attorney for Uninsured Employers' Fund

CERTIFICATE OF MAILING

I certify that on the 16th day of August, 1999, I served a true and correct copy of the foregoing Closing Arguments by depositing the same in the United States mail, postage prepaid addressed to:

J. MACARTHUR WRIGHT
59 SOUTH 100 EAST
ST. GEORGE, UT 84770

AARON PRISBREY
1071 EAST 100 SOUTH, BLDG D. SUITE 3
ST. GEORGE, UT 84770


Sara Jenson

ADDENDUM D

SHERYL M. HAYASHI (6397)
 ATTORNEY FOR THE UNINSURED EMPLOYERS' FUND
 160 EAST 300 SOUTH, THIRD FLOOR
 PO BOX 146600
 SALT LAKE CITY UT 84114-6600
 PHONE (801) 530-6818

THE LABOR COMMISSION OF UTAH

GEORGE M. ANDERSON ,	:	
	:	
APPLICANT,	:	
	:	UEF REPLY TO
V.	:	MOTION FOR REVIEW
	:	
KELLY GATES SR	:	
(UNINSURED), and/or UNINSURED	:	
EMPLOYERS FUND,	:	Case No. 97694
	:	
RESPONDENTS	:	
	:	

The Uninsured Employer's Fund ("UEF"), by and through its counsel of record, Sheryl M. Hayashi, hereby submits this Reply to Petitioner's Motion for Review. The UEF asserts that the decision of the ALJ was correct, and the Motion for Review should be denied.

FACTS

1. A hearing was held on this matter on July 1, 1999 in St. George, Hon. Donald L. George, presiding.
2. UEF asserted that Gates Sr. was not the employer, but rather Gates Jr. was the "employer", and exempt under §34A-2-103(6)(b).
3. Petitioner in his Motion for Review cites several examples in which the ALJ failed to reference facts proved at the time of trial. However, Petitioner fails to note that the ALJ,

specifically stated:

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 \$5800+ in permanent partial disability compensation as well as avoiding the substantial medical expenses, incurred, the ALJ finds that Anderson lacks credibility.

Contrary to Petitioner's assertion, the ALJ took into consideration the Petitioner's testimony, however in light of all of the evidence, did not find the Petitioner's testimony credible. Rather when looking at the evidence, the testimony of Gates Sr. and Gates Jr., largely supported each other, even though Gates Jr. had been excluded from the proceedings under the Petitioner's invocation of the exclusionary rule. When all the evidence and testimony is seen as a whole, the evidence establishes that Gates Sr was merely assisting his son in the building of the son's home and that Gates Sr. is not the employer, specifically:

A. At the time of the building of the home, Gates Jr. was approximately 21 years old, married with a pregnant wife and maintaining two full time jobs. [p. 73, 149, 155]

B. Gates Jr. testified he was building his own home and that his father, Gates Sr. assisted him in the building because of the family relationship. [p. 151]

C. Gates Sr. testified his only involvement in the construction of Gates Jr.'s home was to merely help out his 21 year old son. [p. 74-75] Gates Sr. testified that he was on the job to help his son since he was semi-retired. [p. 76]

D. Gates Sr. testified that he never received any funds to do any of the work on the

house. [p. 77] Similarly, Gates Jr. also testified that he never paid his father anything for the work on the house. [p. 158]

E. Gates Sr. testified that he is not a contractor. [p. 78]

F. Gates Sr. testified that Gates Jr. hired the Petitioner to work on the personal residence of Gates Jr. located in Diamond Valley [p. 38, 42-45]. Similarly, Gates Jr. testified he was the individual who hired the Petitioner to work on the building of his own personal residence. [p. 153-155].

G. Gates Jr. testified he was the individual with authority to hire and fire Petitioner. [p. 179] Further, Gates Jr. testified that his father had no authority to fire the Petitioner or any of the other individuals working on the project. [p. 180] Similarly, Gates Sr. testified he could not have hired these individuals over the objection of Gates Jr. [p. 92-93]

H. Gates Sr. testified that Petitioner negotiated with Gates Jr. regarding Petitioner's rate of pay. [p. 141] Similarly, Gates Jr. testified that he negotiated the rate of pay with the Petitioner . [p. 153-154]

I. Petitioner asserts Gates Jr. could not recall the amount that was being paid to the Petitioner and that the parties had in fact stipulated that the hourly rate was \$12.00 per hour. However, Gates Jr. clearly admitted during the hearing that due to the period of time that had lapsed, he could not recall the exact figure that he was paying Petitioner. [p. 154] Gates Jr. merely testified as to what he thought Petitioner was receiving, but specifically stated that he could not recall the exact figure. Further, as Gates Jr. was excluded from the courtroom due to Petitioner's invoking of the exclusionary rule, Petitioner's argument that the fact that the parties had stipulated to the rate of pay as \$12.00 per hour is clearly not relevant.

J. Further, even the Petitioner could not recall the amount that he was to be paid per

hour, believing it either to be \$12 00 or \$12 50 an hour [p 113]

K Gates Sr testified that all amounts paid to Petitioner from the checks drawn on the Gates Enterprises account were fully reimbursed by Gates Jr [p 83]

L Gates Sr further testified that the only reason that the amounts were paid on the Gates Enterprises account was due to the fact that Gates Jr was unable to get a draw from the construction loan at the intervals requested by the Petitioner [p 46-47, 56, 61] Similarly, Gates Jr testified that the applicant wanted to be paid more frequently than the draws, specifically that it seemed like "every two or three days " [157] Of interest, Gates Jr further testified that the Petitioner contacted him directly regarding payment [p 157] This testimony seems to presume that the Petitioner knew Gates Jr was the party responsible for payment Gates Jr further testified that he didn't have the funds to cover the requests between draw and so he requested that his father pay the amounts, and that he fully reimbursed Gates Sr for those amounts paid to the Petitioner [p 158]

M Gates Sr testified that all amounts paid to Petitioner were preauthorized by Gates Jr [p 97] Similarly, Gates Jr , also testified that he approved all of the payments [p 163]

N Gates Jr was the individual with authority to resolve disputes regarding hours or payment of wages [p 95]

O Gates Sr testified that the first time Gates Jr and Petitioner met was while Petitioner was doing work at the Kolob cabin [p 139] Gates Jr similarly testified that the first time that he met Petitioner was at the Kolob cabin [p 151] Gates Jr testified that when he initially met Petitioner, it was a couple of months before the building of the home [p 152] This testimony is starkly in contrast with the testimony given by Petitioner Petitioner testified that he had never meet Gates Jr until after he had started working on Gates Jr 's home [p 117, 128, 136]

P. Even though Gates Jr. was working two jobs, he testified he was intimately involved in the building of his home. It was his personal residence and he testified that he had some flexibility from his jobs which would allow him to oversee some of the work that was being done. [p. 165-167]

Q. Gates Jr. testified he had never built a home before, but stated in his testimony that he wanted to oversee the building of the home, as he believed anybody would. He stated he would give direction. "if he wanted windows here, or if he wanted a cathedral ceiling, or walk-in closets." [p.169] The testimony was clear that he was not giving direction as to how the work was to be accomplished, but rather direction on what he wanted done as he was building his personal residence. Simply because he does not have knowledge of the trade does not mean that he could not give direction as to his wishes on the building of the home. Although the Petitioner finds this incredulous, it is hardly that.

R. Gates Sr. testified he was retired and testified he would have run errands for his son, and further believed that he would have likely have also obtained the building permit for his son. [p.76, 85] Similarly, Gates Jr. stated he was working two full time jobs and he testified that his father assisted him in running errands such as obtaining the building permit.

S. Petitioner contends that there was a scheme devised as to the issuance of the \$1000.00 check in order to support the theory that Gates Jr. was the employer and exempt under the homeowners provision. Although there was a conflict in the testimony as to who the check was issued from and the delivery of the check or checks, in reading Gates Jr.'s testimony, the testimony was clear that Gates Jr. gave the approval for issuance of the check. [p. 173] Gates Sr. testified that Gates Jr. made the decision to pay Petitioner the \$1000.00. [p. 96] Gates Jr. stated, on his own, that he wrote the check. But notably, on his own, he made mention, "I don't think that dad

loaned me the money.” [p. 178] There is no evidence to support Petitioner’s theory, and is merely conjecture.

T. Gates Sr. testified that on one occasion when Petitioner appeared high, in order to take Petitioner off the job, he called his son before actually taking him off the job. [p. 65-66, 68-69, 93] Gates Jr. corroborated the incident. Gates Jr. had been excluded from testimony yet he related this same specific incident. [p. 182] There is nothing to suggest in the record that there could be any collusion between the two on this testimony. Rather this was a specific incident that each were asked about, which came up spontaneously. In contrast, Petitioner could not recall this incident. [p.126]

U. Even if Gates Jr. was not able to be on the site where his residence was being built, he was still the individual with the ultimate control and authority to make decisions regarding the property and the building of the home. Gates Sr. testified that he “called his son on every decision that was made up there stating, “It’s his home, if he wanted it fine, if he didn’t want it that was fine too.” [p. 94]

V. Gates Sr. only had that authority delegated to him by his son. [p. 98]

W. Petitioner incorrectly asserts that Seymour Hoskins testified that he thought Petitioner was working for Gates Jr. Mr. Hoskins testified, under oath, that, “I thought Kelly, Jr. was building his own house and his dad was just helping him. That was my understanding. I have never had any conversation about the particulars on it or anything.” [p. 104]. On cross examination, Mr. Hoskins reiterated that he knew “it was Kelly Jr.’s residence that was being built.” [p.106] Further, on cross examination, Mr. Hoskins testified that it was his understanding that it was nothing more than just a father helping his son. [p.106]

ARGUMENT

This is a case of a 21 year old son simply asking for his father's experience and assistance in the building of the son's own first personal home for his family. Although Gates Sr. oversaw many of the details on the building of the home, his mere exercise of supervisory direction is not sufficient to reach the conclusion that he is the employer. The evidence clearly establishes that the son, Kelly Gates Jr. was the individual who retained the ultimate legal right and authority of direction and control over the Petitioner. In this particular case, clearly, the only authority Kelly Gates Sr. had was that authority delegated by his son, Kelly Gates Jr. It is not disputed that Gates Jr. is exempt pursuant to U.C.A. §34A-2-103(6)(b)

Petitioner argues that Gates Sr. is the employer simply because Gates Sr. exercised some authority and control in this matter. Essentially, Petitioner is making the argument that Gates Sr is an independent contractor and that Petitioner is the employee of Gates Sr. However, to analogize Petitioner's argument, every manager, supervisor, or even payroll clerk of an employer would be held responsible for workers compensation claims.

It is helpful to look at some of the cases that enunciate the distinction between an employee and an independent contractor. In Osman Home Improvement v. Industrial Commission, 958 P.2d 240 (1998), the Court of Appeals approvingly stated: "An independent contractor can employ others to do the work and accomplish the contemplated result without the consent of the contractee, while an employee cannot substitute another in his place without the consent of the employer." In this case, Gates Sr could not have hired, fired, or otherwise substituted employees without the consent of his son, Gates Jr. The court in Osman went on to state, "exercise of routine supervision over an employee is not in itself sufficient to establish an employment relationship." *Id.*(citing, Special Fund Division/No Insurance Section v. Industrial Commission, 172 Ariz. 319,

836 P.2d 1029 (Ariz Ct. App 1992)). Although Gates Sr. was not an employee of Gates Jr., his position is most analogous to that of a supervising employee or agent, of Gates Jr. Gates Sr. is certainly not an independent contractor, and has no separate employer-employee relationship with the Petitioner.

The person who retains **ultimate** control is the employer whether that control is exercised or not. In this case, that person is Kelly Gates Jr. Kelly Gates Jr. and his wife were the legal owners of the property. The construction loan was taken out under the names of Kelly Gates Jr. and his wife, Hayley. The father, Kelly Gates Sr. had absolutely no legal right to bind anything on the property or related to the construction loan. That is, except for that authority delegated to him by his son.

The testimony of both Gates Sr. and Gates Jr. was that Gates Jr. was the individual who hired Petitioner, set his salary, and had the ultimate authority to hire and fire the Petitioner. Gates Sr. could not have separately hired or fired individuals without the approval of Gates Jr. Gates Jr. testified he had concerns regarding the hiring of Anderson. He and his father spoke about these concerns and Gates Jr. testified that he ultimately decided that he, Gates Jr., would go ahead and hire Anderson. Gates Jr. further testified that had his father wanted to hire Anderson, and that had he been opposed, Anderson would not have been hired. It is Gates Jr. that had the ultimate right of control, to hire, in this particular case.

In another situation, Petitioner contends that Gates Sr. exercised control by sending Anderson home when he believed that Anderson had shown up for the job under the influence. Petitioner fails to address the uncontroverted testimony which clearly established that Gates Sr. had called his son to tell him that Anderson was not in a position to work. Had Gates Sr. had ultimate authority, he would not have called his son. Gates Sr. further testified that although he did

not feel that Petitioner was in an appropriate condition to work, that he had no right to make that ultimate decision. Both Gates Sr. and Gates Jr. testified that Gates Jr. was the one who told Gates Sr. to send Petitioner home. Gates Sr. had no independent right to fire the Petitioner, or even to send him home for the day.

Petitioner relies on the fact that his checks were made out by Gates Sr., that some of the equipment used was owned by Gates Sr., and the fact that Gates Enterprises was listed on the first report of injury as somehow constituting an employer-employee relationship. Whether or not Petitioner believed Gates Sr. to be the employer is not relevant. In this case, the home was being built by Kelly Gates Jr. Further, Petitioner's argument clearly and simply ignores the testimony that in each and every instance, that both Gates Sr. and Gates Jr. testified that each decision was made with the approval or ratification of Gates Jr.

Gates Jr. testified that at the time the home was being built, he was working two full time jobs and could not be at the job site to supervise the work, nor had he any experience in construction work. The son simply asked for his father's assistance in maintaining regular supervision over the project when he was unable to be there.

Contrary to Petitioner's assertion, Seymour Hoskins testified that he thought the home was being built as Gates Jr.'s personal residence, and that Gates Sr.'s involvement was only that of a father assisting his son. Hoskins did **not** testify under oath that he believed that this was Gates Sr.'s project, as stated by the Petitioner.

Petitioner alleges that there is a scheme devised by the employer regarding delivery of the check of \$1000.00. Petitioner contends that the parties needed to establish that Gates Jr. was the issuer of the check to support the theory that Gates Jr. was the homebuilder and exempt from having workers compensation insurance. However, both Gates Sr. and Jr. testified that Gates Jr.

authorized the payment of all monies paid to Petitioner, including the \$1000.00 check drawn on Gates Jr.'s account.

Petitioner further claims that there was commingling of the money paid for work done at the business building and for the residential home being built. Whether or not the funds were commingled, the testimony of both Gates Sr. and Jr. reflect clearly that Gates Jr. maintained control over the sums paid to Petitioner and the work performed on Gates Jr.'s home regardless from the actual mechanism by which Petitioner was paid. Although there is the one discrepancy pointed out by the Petitioner regarding the total sums paid to the Petitioner, it is also clear that for the most part, the sums paid by Gates Sr. were supported by the draws from the bank. All sums were clearly authorized by Gates Jr. and paid back to Gates Sr. Gates Jr. further testified that had there been a dispute regarding wages, that he would have been the ultimate decision-maker.

This is not a case where Gates Sr. was working as a contractor and should be held as the employer in this matter. Gates Sr. testified that he received absolutely no compensation for his work on Gates Jr.'s personal residence, that he did this work to help out his son, and that he was simply helping him because he was his son. Gates Sr. has been set out to be a professional contractor which is not true. Gates Sr. testified that he is not a contractor and certainly not in the "business" of being a contractor although he has done work in the past but primarily for his own personal use and the one business building that he purchased. Gates Sr. and Jr. both testified that since Gates Sr. is retired, he had the time to oversee the building of the home.

The factors identified by Petitioner must be considered as a whole, within the context of the other factors which clearly indicate that Gates Jr. retained ultimate authority over the employment relationship. See, Osman, Graham v. R. Thorne Found (No one factor is completely controlling; instead, they should all be considered.") The evidence does not support that Gates Sr. is the

employer. Petitioner cannot create a facade to get around the fact that Kelly Gates Jr. is the employer, by simply calling his father, Gates Sr., the employer.

SUMMARY

In summary, although some of the evidence was contradictory, the evidence when taken as a whole, clearly shows that Gates Jr. hired Anderson. Gates Jr. had the ultimate right to oversee the work on the home, including making decisions regarding the appearance and workmanship of the home. Gates Jr. approved payment on the checks and had the ultimate decision-making authority to object or resolve any disputes regarding wages or hours. Gates Sr. testified he did not believe he had any authority to take Petitioner off the job, but a responsibility to tell his son that there were problems. Gates Sr. stated that he would not have the ability to fire Anderson without his son's permission. Gates Jr. was the individual with ultimate authority and control over the employment of Petitioner and Gates Jr.

Gates Jr. was the property owner, and the holder of the construction loan. As such, Gates Sr. would have absolutely no legal authority to bind any decision regarding the property or the building of the home, except that delegated to him by his son. The fact that Gates Jr. is exempt under the Worker's Compensation Act pursuant to Section 34A-2-103 has not been disputed. Therefore, this claim should accordingly be dismissed.

Dated this 2nd of March, 2001

THE UNINSURED EMPLOYERS' FUND

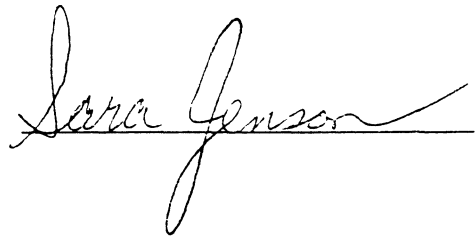
By 
SHERRIE HAYASHI

CERTIFICATE OF MAILING

I certify that on the 21st of March, 2001, I served a true and correct copy of the foregoing UEF REPLY TO MOTION FOR REVIEW by depositing the same in the United States mail, postage prepaid addressed to:

Aaron Prisbrey
1071 East 100 South, Bldg D Suite 3
St. George, UT 84770

J. MacArthur Wright
Gallian, Westfall, Wilcox & Wright
59 South 100 East
St. George, UT 84770

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

ADDENDUM E

Aaron J. Prisbrey #6968
Attorney for Petitioner
135 North 900 East Suite #4
St. George, Utah 84770
Telephone 435/673-1661

THE LABOR COMMISSION OF UTAH

GEORGE M. ANDERSON

Petitioner,

vs.

KELLY GATES, SR. aka KELLE GATES,
SR., and UNINSURED EMPLOYERS'
FUND

Respondents.

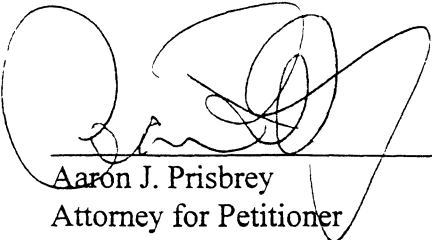
MOTION TO CONTINUE

Case No. 97694

Judge Donald L. George

COMES NOW Petitioner, by and through counsel, Aaron J. Prisbrey, and hereby requests this matter currently set for March 31, 1998, at 8:30 a.m. be continued. This request is made for the reason counsel for Petitioner, Aaron J. Prisbrey, is party to Complaint filed with the Utah State Bar alleging Donald L. George is incompetent to function as an attorney or an Administrative Law Judge. (A Copy of said complaint is attached as Exhibit "A" of the Application to Recuse Judge filed herewith). Furthermore, Counsel for the Uninsured Employer's Fund, upon receiving information that the above referenced complaint had been filed, stipulated to a continuance of this matter. (See Exhibit "A" attached hereto and incorporated herein by this reference).

Dated this 30th day of March, 1998.



Aaron J. Prisbrey
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a full, true and correct copy of the above and foregoing Motion to Continue was delivered as follows:

Hon. Donald L. George
LABOR COMMISSION OF UTAH
PO Box 146615
Salt Lake City UT 84114-6615

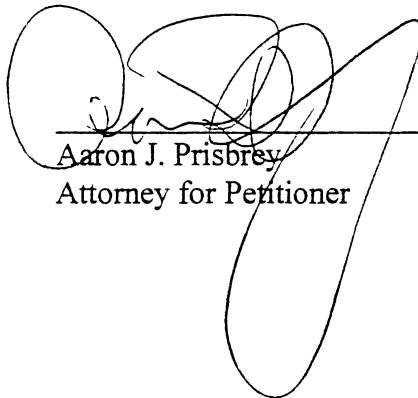
Hand Delivered (one original and one copy)
March 31, 1998

Sharon J. Eblen
Uninsured Employers' Fund
PO Box 146612
Salt Lake City UT 84114-6612

Via facsimile @ 801-530-6804 (one copy)
March 30, 1998

J. MacArthur Wright
59 South 100 East
St. George UT 84770

Hand Delivered (one copy)
March 31, 1998



Aaron J. Prisbrey
Attorney for Petitioner

Aaron J. Prisbrey #6968
Attorney for Petitioner
135 North 900 East, Suite 4
St. George, Utah 84770
Telephone 801/673-1661

THE LABOR COMMISSION OF UTAH
CASE NO 97694

GEORGE M. ANDERSON

Petitioner,

vs.


KELLY GATES, SR. aka KELLE GATES,
SR., and UNINSURED EMPLOYERS'
FUND

Respondents.

APPLICATION TO RECUSE JUDGE

Petitioner, by and through counsel, Aaron J. Prisbrey, hereby moves the Court for its order recusing itself from the above referenced case and requests that he call in another judge to hear this matter, as Aaron J. Prisbrey is party to Complaint filed with the Utah State Bar alleging Donald L. George is incompetent to function as an attorney or an Administrative Law Judge. (A copy of said Complaint with supporting affidavits is attached hereto as Exhibit "A" and incorporated herein by this reference.

DATED this 30th day of March, 1998.



AARON J. PRISBREY
ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that a full, true and correct copy of the above and foregoing Application
to Recuse Judge was delivered as follows:

Hon. Donald L. George
LABOR COMMISSION OF UTAH
PO Box 146615
Salt Lake City UT 84114-6615

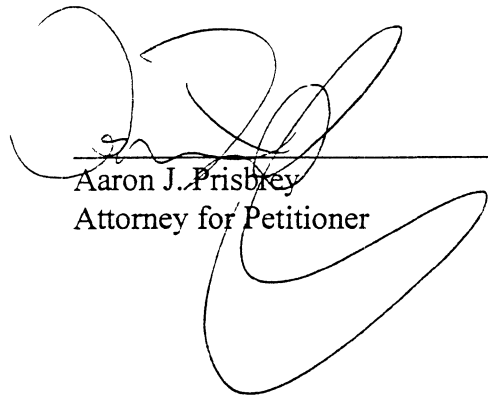
Hand Delivered (one original and one copy)
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Sharon J. Eblen
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PO Box 146612
Salt Lake City UT 84114-6612

Via facsimile @ 801-530-6804 (one copy)
March 30, 1998

J. MacArthur Wright
59 South 100 East
St. George UT 84770

Hand Delivered (one copy)
March 31, 1998



Aaron J. Frisbrey
Attorney for Petitioner

Wendell K. Smith, #3019
Attorney for Complainants
275 East 850 South
Richmond, UT 84333
Telephone: (435) 258-0011
Faxsimile: (435) 258-2182

BEFORE THE OFFICE OF PROFESSIONAL RESPONSIBILITY
OF THE UTAH STATE BAR

Virginius Dabney, Aaron J.
Prisbrey, and Bruce J. Wilson,

Complainants,

vs.

Donald L. George,

Respondent.

)
)
) COMPLAINT FOR VIOLATIONS OF
) THE RULES OF PROFESSIONAL
) RESPONSIBILITY OF THE
) UTAH STATE BAR
)

) and
)

) PETITION FOR INTERIM
) SUSPENSION FROM THE
) PRACTICE OF LAW
)

) and
)

) PETITION FOR TRANSFER TO
) DISABILITY STATUS
)

COMPLAINANTS, by and through their attorney, Wendell K. Smith, file the following complaint of professional misconduct against Respondent Donald L. George, and petition the Office of Professional Responsibility to file a Petition for the Interim Suspension of Respondent

EXHIBIT "A"

for Threat of Harm in accordance with Rule 18 of the Rules of Lawyer Discipline and Disability, and further petitions the Office of Professional Responsibility to file a Petition to transfer Respondent to disability status in accordance with Rule 23(c) of the Rules of Lawyer Discipline and Disability.

STATEMENT OF THE COMPLAINT

1. Respondent is currently an Administrative Law Judge with the Utah Labor Commission.
2. Respondent is suffering from a mental condition which adversely affects his ability to practice law and which renders him incompetent to function as an attorney or an Administrative Law Judge.
3. Respondent's lack of mental capacity to practice law, coupled with his position as an Administrative Law Judge, poses a substantial threat of irreparable harm to the public.

MATTERS IN SUPPORT OF COMPLAINT

4. Complainants have been informed and believe, and thereupon allege, that Respondent suffered a head injury in a auto accident a number of years ago while serving as an Assistant City Prosecutor in Salt Lake City, UT.
5. The date of this accident and the exact extent and nature of Respondent's injuries are unknown to Complainants inasmuch as this confidential information is not available to Complainants but can be obtained by the Utah State Bar.
6. Complainants have been informed and believe, and thereupon allege, that Respondent's head injuries rendered him incompetent to practice law and that the Salt Lake City

Prosecutor's office attempted to remove Respondent from his position due to his inability to perform his job competently.

7. Complainants have been informed and believe, and thereupon allege, that the Salt Lake City Prosecutor's Office did not pursue the termination of Respondent's employment as a City Prosecutor because he asserted he was entitled to the protections afforded him in the Americans with Disabilities Act (ADA) in that his inability to effectively function as a City Prosecutor was due to short term memory loss, and other head injuries, he suffered in the auto accident.

8. Attached hereto as Exhibit 1, and incorporated herein by reference, is the Affidavit of Virginius Dabney. In his Affidavit Mr. Dabney sets forth the factual basis upon which it can be concluded that Mr. George is mentally incompetent to function as an attorney. Mr. Dabney gives chilling examples of Respondent's incompetence in the adjudication of Worker's Compensation claims. Mr. Dabney practices almost exclusively before the Utah Labor Commission, yet he is willing to make this Affidavit knowing the adverse affect it could have upon his relationship with Respondent, the Utah Labor Commission, the insurance industry and the Defense Bar before whom and with whom he must continue to practice. This lends great credibility to the Affidavit of Mr. Dabney.

9. Attached hereto as Exhibit 2, and incorporated herein by reference, is the Affidavit of Bruce J. Wilson. In his Affidavit Mr. Wilson also cites examples of Respondent's mental incompetence. The Affidavit of Mr. Wilson corroborates the Affidavit of Mr. Dabney. Mr. Wilson, like Mr. Dabney, is willing to put his worker's compensation practice at risk for the good and protection of the public.

10. Attached hereto as Exhibit 3, and incorporated herein by reference, is the Affidavit of Aaron J. Prisbrey. This attorney, like Mr. Dabney and Mr. Wilson, is willing to put his Worker's Compensation practice at risk for the good and protection of the public.

WITNESSES

1. Commissioner R. Lee Ellertson, 160 East 300 South, 3rd Floor, Salt Lake City, UT 84114. (Current Commissioner of the Utah Labor Commission)
2. Mr. Thomas R. Carlson, 160 East 300 South, 3rd Floor, Salt Lake City, UT 84114. (Former Commissioner of the Utah Industrial Commission)
3. Mrs. Colleen S. Colton, 160 East 300 South, 3rd Floor, Salt Lake City, UT 84114. (Former Commissioner of the Utah Industrial Commission)
4. Hon. Benjamin A. Sims, 160 East 300 South, 3rd Floor, Salt Lake City, UT 84114. (Current Administrative Law Judge and former Chief Administrative Law Judge of at the Utah Labor Commission)
5. Timothy C. Allen, 350 South 400 East, #113, Salt Lake City, UT 84111. (Former Chief Administrative Law Judge of the Utah Labor Commission.)
6. Robert J. Shaughnessy, 1685 South 35 East, Bountiful, UT 84010. (Former Administrative Law Judge of the Utah Labor Commission)
7. David W. Parker, 50 West 300 South, #900, Salt Lake City, UT 84101. (Workers Compensation attorney who represents disabled workers)
8. Hans M. Scheffler, 311 South State, #380, Salt Lake City, UT 84111. (Workers Compensation Attorney who represents disabled workers)
9. Patrick J. O'Connor, 9164 Scirlein Dr. Sandy, UT 84094. (Injured Worker's Association of Utah)

APPLICABLE RULES

Rule 1 of the Rules of Lawyer Discipline and Disability

The attached Affidavits establish that Respondent due to his demanded mental capacity, cannot meet the standards of professional competency required by attorneys by this Rule.

Rule 18 of the Rules of Lawyer Discipline and Disability

Rule 18(b) provides for the immediate interim suspension from the practice of law of an attorney. An interim suspension under this Rule is appropriate where an attorney poses a substantial threat of irreparable harm to the public. It is not necessary that an attorney have committed any violations of the Rules of Professional Conduct in order to be suspended from the practice of law pursuant to this Rule. An attorney is subject to interim suspension if the attorney is under a disability as defined in the Rules of Lawyer Discipline and Disability. Such disability is defined in Rule 23(c) of the Rules of Lawyer Discipline and Disability as a physical or mental condition which adversely affects the lawyer's ability to practice law. Complainants request that the Office of Professional Responsibility promptly refer this matter to the District Court for a determination of Respondent's mental capacity to continue to practice law. This action needs to be taken promptly because Respondent is in a position to continue to do irreparable harm to a substantial segment of the public.

Rule 23 of the Rules of Lawyer Discipline and Disability

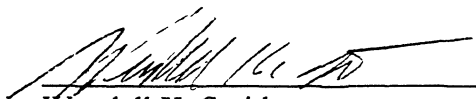
Rule 23(c) provides that the Bar shall conduct an investigation upon receiving information relating to a lawyer's physical or mental condition which adversely affects the lawyer's ability to practice law and, where warranted, initiate formal proceedings to determine whether the lawyer shall be transferred to disability status. Complainants request that a Petition

to place Respondent on disability status be promptly filed regardless of whether he is placed on interim suspension. This prompt action is necessary to protect the public from irreparable harm.

CONCLUSION

Respondent poses a clear and present danger of irreparable harm to the public. Steps should be immediately taken to place him on interim suspension and to place him on disability status until such time as it is determined that he can, if ever, return to the practice of law.

DATED this 27th day of March, 1998.

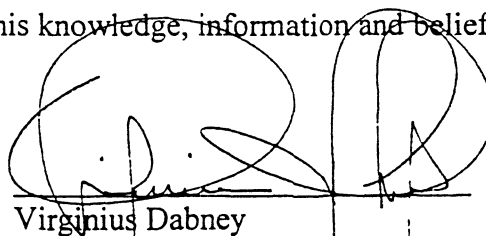


Wendell K. Smith
Counsel for Complainants

VERIFICATION

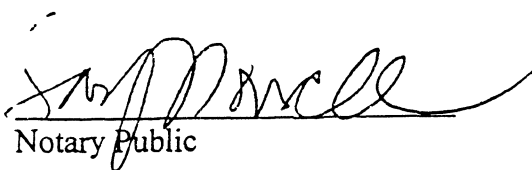
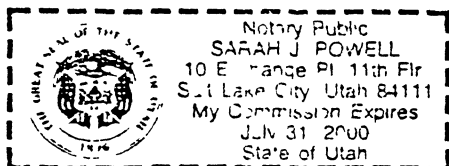
STATE OF UTAH)
 : ss
COUNTY OF SALT LAKE)

Virginus Dabney, being first duly sworn upon oath deposes and states that he is one of the Complainants in the foregoing Complaint; that he has read the contents thereof; and that the statements contained therein are true to the best of his knowledge, information and belief.



Virginus Dabney

SUBSCRIBED AND SWORN to before me this 27th day of March, 1998.



Notary Public

1 VIRGINIUS DABNEY #795
2 BARBARA DABNEY #794
3 DABNEY & DABNEY
4 South Main Plaza, Suite 2
1060 South Main Street
St. George, Utah 84770

Telephone: (435) 652-8500
Facsimile: (435) 652-8599
E-Mail: DabneyLAW@sginet.com

UTAH STATE BAR

Petition in re:
DONALD L. GEORGE,
Respondent.

AFFIDAVIT
of
VIRGINIUS DABNEY

COMES NOW Virginius Dabney, a member of the Utah State Bar for almost 25 years, and files this Affidavit regarding the qualifications of Donald L. George to continue to be an active licensed member of the Bar, and in support thereof alleges and represents as follows:

1. That Donald L. George [hereafter "Respondent"] has been an employee of the Labor Commission of Utah for almost ten years and has continuously since that time served as an Administrative Law Judge thereof.

2. That Affiant believes that Respondent is unqualified to continue to be an active, licensed member of the Bar for at least three reasons:

- a. Respondent is under the influence of a mental disability.
- b. Respondent is incompetent.
- c. Respondent harbors a bias against disabled injured workers.

3. That as a result of the above deficiencies, Respondent is incapable of performing his duties as a lawyer and as an Administrative Law Judge, and should be considered medically disabled from continuing to be an active, licensed member of the Bar.

4. That Respondent was previously employed by Salt Lake City, and while in their employ was questioned concerning his competence and inability to perform his duties as an Assistant City Prosecutor; and in fact left his employment with Salt Lake City under

1 unfavorable circumstances.

2 5. That Respondent has both defended his working difficulties arguing that he
3 needs training and assistance to do his job because of his mental disabilities; and subsequently
4 denied in a specific case that he suffers from short term memory loss at all. Patten v. Wal-
5 mart Distribution Center, Case Number 9714.

6 6. That Respondent suffers from short term memory loss, and as a result, relies
7 heavily if not exclusively on depositions taken prior to hearing, tapes of hearings and proffered
8 drafted orders following hearings in ruling on industrial claims.

9 7. That Respondent has repeatedly, particularly over the last five years,
10 demonstrated his incompetence in the industrial arena as evidenced by his inability and
11 unwillingness to draft his own orders as all other Administrative Law Judges commonly do,
12 and has routinely assigned his order drafting duties to defense counsel which results in an
13 inordinately high percentage of benefit denials.

14 8. That Respondent is unable because of his mental deficiencies to draft Findings
15 of Fact, Conclusions of Law and Orders in industrial cases, and has continuously and
16 repeatedly failed and refused to do so even though the drafting of these pleadings is an
17 inherent requirement of his position as an Administrative Law Judge.

18 9. That Respondent has further demonstrated his incompetence through errors in
19 judgement, interpretation of law and ability to rationally weigh questions of law, fact and
20 mixed questions of law and fact.

21 10. That Respondent during the course of his employment with the Labor
22 Commission has over the last several years repeatedly and consistently exhibited an anti-
23 injured worker attitude to the point where he now has a reputation for denying what many
24 believe to be valid industrial claims; has exhibited his antipathy for injured worker's in
25 conducting both formal and informal conferences and hearings; and has further conducted
26 himself in an incompetent manner to the point where he has been and continues to be a
27 continuing embarrassment to the Labor Commission.

1 11. That Affiant is informed and believes and therefore alleges that the Labor
2 Commission has placed Respondent on disciplinary probation and has attempted on at least two
3 separate occasions in the last three years to terminate Respondent's employment with the
4 Labor Commission on mental, competency and other grounds.

5 12. That the Labor Commission's two efforts and investigation into the
6 Respondent's medical condition and problems has confirmed that Respondent suffers from
7 short term memory loss, inter alia.

8 13. That Respondent in one case in 1991-1992 involving a client of Affiant required
9 seven and a half months to prepare a 29-page, single spaced Order to conclude a claim; the
10 Labor Commission subsequently and summarily reversed him and critically noted that in the
11 29-page Order, Respondent had failed to make a single Finding of Fact. He then required
12 eight additional months to reword and condense his Order with appropriate headings, Findings
13 and Conclusions language. Drake vs. Utah Department of Transportation, Case Number
14 90001048.

15 14. That in another case in 1993 Respondent was criticized for waiting sixteen
16 months following the formal hearing before forwarding the matter to a medical panel to
17 resolve medical issues which caused the injured worker's attorney to argue in his Motion to
18 Recuse Respondent from the case, the following:

19 *It is very apparent that after almost three years of employment, numerous*
20 *reversals on his inability to understand what facts are, attendance at the Compensation*
21 *College leads one to the conclusion that the Administrative Law Judge does not*
22 *understand his role as a judge.*

23 *The Administrative Law Judge has a facility to make a historical summary of*
24 *the case but can't distinguish between facts and history.*

25 *Time and experience have not changed this short coming. What is difficult for*
26 *Applicant's counsel to understand is why the commission stands for these conditions*
27 *to continue.*

28 Respondent was eventually recused from the case due to unconscionable delay and
incompetence. Keith vs. E. Scherer Co. Case Number 90000885.

1 15. That as a result of these and other cases Affiant has made a concerted effort to
2 avoid any more hearings with Respondent, which such action he deems essential in order to
3 avoid having his clients subject their claim to a mentally disabled, incompetent and prejudiced
4 Administrative Law Judge.

5 16. That a former Chief Administrative Law Judge of the Labor Commission, who
6 was instrumental at the request of the Labor Commission in attempting to have Respondent's
7 employment terminated, has been removed from Respondent's cases while all other injured
8 worker's counsel are not so fortunate.

9 17. That at least three well known Defense counsel, when they learned of
10 Respondent's having submitted his resignation following the Labor Commission's first attempt
11 to terminate his employment, urged him to withdraw his resignation, which eventually he did,
12 the result of which was that he was able to preserve his position because of the State merit
13 system; and, as a result of defense counsel's personal involvement in Respondent's threatened
14 unemployment concerns, Respondent now feels a personal obligation to them because of his
15 perception that they in essence saved his job.

16 18. That because of Respondent's medical disability, incompetence and prejudice
17 against the disabled and injured workers in the state of Utah are precluded from obtaining a
18 fair and impartial hearing before Respondent, and that has been the case for at least five years
19 and perhaps throughout Respondent's tenure as an Administrative Law Judge of the Labor
20 Commission.

21 19. That the Labor Commission, notwithstanding substantial evidence and numerous
22 complaints by members of the public, as well as employees within the Labor Commission, has
23 failed to satisfactorily address, evaluate, consider and remedy what has been known and
24 commonly referred to in the Labor Commission as "the Judge George problem."

25 20. That while other states, such as New Jersey, have adopted statutory and/or
26 regulatory guidelines governing the conduct and discipline of workers compensation
27 Administrative Law Judges, Utah through its Labor Commission unfortunately has not, and,
28

1 in essence, has failed to enact guidelines which could be used to evaluate Respondent and other
2 Administrative Law Judge's performance.

3 21. That Affiant is informed and believes that Respondent's conduct and demeanor
4 would - if such guidelines existed in Utah - have clearly and repeatedly authorized appropriate
5 sanctions including, among other things, termination of employment for reasons of medical
6 disability, incompetence, prejudice and conduct prejudicial to the administration of justice that
7 brings the office of Administrative Law Judge into disrepute.

8 22. That the Labor Commission has, because of its failure to address the problems
9 created by and associated with Respondent, improperly thrust the resolution of it into the
10 public arena - and particularly upon attorneys such as Affiant - for scrutiny and debate which
11 will unfortunately and undoubtedly occur.

12 FURTHER AFFIANT SAYETH NAUGHT.

13 DATED this 26th day of March, 1998.

14
15 VIRGINIUS DABNEY

16
17 VERIFICATION

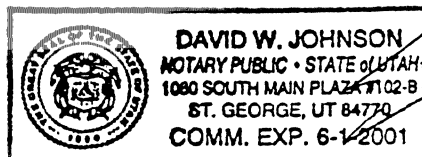
18 I, Virginius Dabney, Affiant herein, hereby acknowledge that the foregoing
19 representations are true and correct to the best of my knowledge, information and belief.

20 VIRGINIUS DABNEY

21
22 NOTARY

23 SUBSCRIBED AND SWORN to before me this 26th day of March, 1998.

24 My Commission Expires:



27 NOTARY PUBLIC

28 C:\FILES\GEORGE\AFFDVT1.WPD

AFFIDAVIT

I am Bruce Wilson. I am an attorney and have made my living in a Utah workers' compensation practice since 1983, when I started as house counsel for the workers' compensation fund. Though I quit that job and attended school full time between 1986 and 1990 when I graduated, I continued to support my family as an attorney, primarily doing plaintiff cases in workers' compensation. Since January 1991 I have represented workers' compensation claimants almost exclusively.

Since 1991 I recall only one case decided by Donald George in which I prevailed. That was a case where after I had gotten benefits for a client, the client challenged my right to attorney fees. I was granted the fee by Judge George.

It is with great hesitancy that I write this. I like Don George as a person. I know he supports a family. But I have seen other families devastated by his failure as a judge. It is not my opinion that Judge George is intentionally biased, though that is a possibility. I believe he accommodates his inability to comprehend and evaluate complex factual and legal problems by adopting some fairly simple mental procedures or rubrics that he knows by experience give him the least trouble personally. Among those rubrics are:

1. base findings on credibility.
2. deny applicant claims
3. let the defense prepare the order,
4. attorney conferences don't leave a record.

When I, along with two other attorneys went to Commissioner Hadley privately to discuss problems with Judge George, some effort was made at that time to evaluate and alleviate the problems, but that was not successful. Some days, or a week or so following this meeting, Commissioner Hadley stopped me at the commission and told me privately that Judge George had had an accident with brain injury for which he had been in therapy. He attributed some of the problems to that injury and tried to assure me that the situation had gotten better. This was the first time I heard of any accident, injury or therapy. I have never tried to confirm that, nor have I heard it from any other source.

Two or three years later, I contacted Judge Sims after a particularly bad decision and asked if he would look into whether Judge George had heard I had gone to Commissioner Hadley to complain about him and that might be the reason I was consistently losing cases heard by Judge George. I recall Judge Sims went through every case he could find through his computer, which I believe was 17 and showed me one case where my client had been awarded benefits. I pointed out that was actually a stipulated agreement that was put in the form of an order by Judge George. Though Judge Sims could find no cases where my client had won a favorable decision before Judge George, he did not think there was a problem and declined to take him off my cases as I had requested.

Losing cases has not been the only problem. I recognize losses and wins with all the judges. The problem with Judge George is the kind of cases and the reasons for the losses. My perception is he never addresses the issues presented in any coherent manner. Instead, he states a simplistic premise, marginally relevant, usually making a finding against the applicant based on lack of credibility.

Defendants have caught on to this and credibility is always brought up as an issue before Judge George. Whether it is reasonable or not, he usually picks up the credibility issue, then makes his finding based on that. One case I had challenged the validity of a settlement. My client had not been represented at the time, and I had argued that the adjuster had denied benefits without substantial justification, misrepresented some significant facts and told my client the paper he was signing was necessary before he could get benefits. When I had asked my client to read the agreement to me and explain its meaning, it was clear he had no idea what he had signed. My client had left work middle of the day and was taken to the hospital where there was clear evidence of a herniated disc. This gave the adjuster good reason to believe the injury was serious and would lead to an expensive claim. I argued that the adjuster, knowing these facts, tried to minimize losses by settling this claim for something like \$1500.00, knowing the claimant had a serious and legitimate claim for much more than that. Following this settlement, the worker went three years being unable to work and unable to get medical care, and he needed a surgery.

I thought the defense argued an excellent argument and presented herself well on the issues. Judge George took a recess, went and obtained some 10-year-old injury reports and started questioning my client about these claims. On one of them he had an injury and spent a night in the hospital for observation and was released and had no residual problems. My client said he didn't think that was a significant injury. The judge asked what he thought was significant, and he said ongoing symptoms that require surgery.

Judge George then found my client was not credible because he concluded that any injury that resulted in a night in the hospital was significant. He then went on to find that we had no case because in fact no accident ever occurred. My client had never lifted heavy chunks of concrete and thus no accident ever occurred. I was dumbfounded because, though the credibility of my client had been raised, his leaving in the middle of the day and going to the hospital in such pain that he couldn't even drive himself and finding in the hospital clear evidence of a herniated disc showed substantial support for the fact that something had occurred on the job.

This was a case I could have lost on the validity of the settlement, but the credibility issue was very weak and only very marginal at best. Following this decision, Judge George asked the defense to prepare the order. The order presented numerous reasons for the decision. I don't recall the order even mentioning credibility. Judge George adopted the defendant's order and signed it as his own. The result was a decision made on a very poorly supported basis of credibility that was rendered unappealable by a carefully written order by the defense based on arguments that Judge George never

considered at the hearing and showed no evidence of being able to comprehend.

A similar case involved a documented incident on the job, with records made concurrently describing the accident. What my client had thought was a neck strain turned out later to be a herniated disc requiring surgery. Witnesses described facts that easily could have caused the neck injury the applicant claimed. Judge George sat through the testimony apparently listening, then totally surprised me by saying he had observed the demeanor of my client through the hearing, that he was squirming in his seat (which was clearly reasonable considering the spine injury) and that his squirming and moving around in his seat during testimony indicated that the applicant was lying, therefore the claim was denied for lack of credibility. This totally surprised me because the witnesses appeared to me to be totally straight forward, sincere and believable.

Decisions like this are not the only problem. The very fact that Judge George is assigned creates a basis for compromise. I had one case in which my client had been declared totally disabled by Social Security. His treating doctor indicated the patient was disabled because of his industrial injuries. The insurance doctors agreed with the treating doctor. Yet, the defense attorney demanded compromise by reducing the lifetime monthly benefit, otherwise he wouldn't agree to settle. I said I could not compromise a case when they had presented absolutely no evidence to justify any compromise. His response was "I have Don George."

This action by this attorney was totally obnoxious to me. Yet, that was his position and he insisted on a reduction in benefits or he would go to hearing. As I discussed this with my client, I felt I had to advise him of my experience with Judge George's proven ability to find against applicants even with no evidence against them. I had to advise him to accept the reduction.

Unfortunately, I have had to compromise other cases that were scheduled with Judge George much more than I would consider reasonable based on the facts of the case alone.

The following is one more example. It shows another practice Judge George has used, that of scheduling an attorney conference where he announces his intention to find against you in order to force you to settlement. This example was written just after it occurred when the facts were fresh in my mind. Since then I have only edited briefly, adding comments in brackets to make it more comprehensible and taking out the names of the client and attorney.

Mr. A - AN EXAMPLE of DON GEORGE AS ALJ

I represented Mr. A in a case where he was denied a medical panel hearing even though he had two treating doctors giving ratings respectively of 10% and 15% and the defense offered no medical evidence to the contrary. The judge [not Judge George] found a

rating of 5% was reasonable, without supporting evidence. On appeal, the commission found the ALJ's findings supported by "substantial evidence" and refused to overturn.

The Appeals Court reversed and remanded for consideration and findings based on a "preponderance" standard, but failed to reverse the failure to send the matter to a medical panel. This was appealed to the Supreme Court. I discovered six months after, by calling the court clerk that cert. had been denied, but no notice of this had been sent to me. In the meantime, cert. had been accepted on the Willardson case, which had almost exactly the same fact situation and the issue was failure to send to a medical panel when the applicant's doctor had raised an issue of dispute with a document that [gave a rating that] "lacked adequate explanation" and was therefore rejected as not raising an issue for the panel. [This was the same as my case.] Consequently, I did not pursue the cert. for Mr. A.

Mr. A had AIDS and was dying. Even though his case was remanded, he did not pursue it feeling the benefit would be marginal without the medical panel issue.

Later Mr. A's chiropractor contacted me about his bill. After consulting with Mr. A and with his permission, I represented the chiropractor in making a claim for his bill of about \$1400. Mr. A told me at the time that all he wanted was to have this bill paid, because he could not do it. [I don't believe the issue of the chiropractor's treatment or bill had been considered in the prior case.]

I made a claim to the insurance company for the bill. The adjuster was very rude and just said no. Consequently, I filed for a hearing.

In the meantime, the Supreme Court ruling in Willardson came down favorable to Mr. A's case. I reported this to Mr. A, and at that point he felt some hope that on remand he would have a fair chance because the Willardson case would require that they send his case to a medical panel.

Because of this and because the adjuster had been so rude, Mr. A requested we file his claims as well. I filed a claim for permanent total disability benefits for Mr. A, because we had evidence from his doctor, that the AIDS did not prevent him from working, the spine injury did, and the issue of PTD had never been raised in the prior matter. We also wanted on remand for the other issues to be reconsidered first based on the proper standard of proof and second based on the rule in Willardson, which we felt required referral to a medical panel on the remand.

After Judge Sims declined to deal with this case, it was assigned to Judge George. A hearing was scheduled for the permanent total disability claim in St. George. The claim of the chiropractor and the remand were separate matters and no hearing had been set as yet. I wrote a motion that all of the three cases be joined.

At this point, I received a phone call from Don George. Mr. D, the defense counsel

was on the line when he called. Don George informed me that he wanted to discuss the motion to join the three matters. Within the first few seconds of this call, Judge George informed me that he had read the file and agreed with the findings of the commission. [These are the findings the appeals court had remanded.] I began to discuss the standard of proof, the fact that the IME doctor [whose file review was admitted over my objection and became the basis for the commission findings] had never examined the patient, never heard his side of the story, and that he didn't have all of the medical file when he gave his opinion. Specifically, I said he did not have the records of the chiropractor, whose bill was in question. Nor had the IME doctor commented on important issues in question such as need for chiropractic and he had not given a rating, which was also in issue. We also discussed the finding in Willardson, which we felt was a rule binding on the commission in this case, requiring that the matter be submitted to a medical panel, which had not been done.

It is obvious there are some complex issues in this case. During all of this discussion, Judge George never responded in any way that would indicate he understood the issues or was analyzing them. After every comment or argument he would turn to Mr. D and ask him to respond. That could be interpreted as simply requesting counter argument, but he never commented on the arguments or said anything that would indicate he understood the nature of the issues. He simply informed me that he agreed with the original ALJ and the commission and that was going to be his findings. In other words, he never acknowledged any argument, but simply informed me I was wrong on every point and my client had already lost.

I also argued that the chiropractor had a right to pursue his case separately based on a letter I had from the commission on that issue. Mr. D disagreed and Judge George agreed with him. [The commission had given a written opinion indicating the chiropractor could file a separate claim under UCA 35-1-45, which says the medical provider's claim is against the employer and not the employee. Based on that we filed a claim in the name of the chiropractor. Judge George was adopting the defense position saying we couldn't do that. He did, however, ask for a copy of the commission letter. After filing the chiropractor's claim, Mr. A filed a request for reconsideration of prior issues in accordance with the remand from the appeals court and a separate and new claim for total disability, which had never been considered. I had made a motion that these three cases be consolidated.]

After I had exhausted every argument on the issues (which are described in my motions in that file) and when I saw there was no hope of convincing him to either reconsider the evidence based on a preponderance, [as required by the remand order] or send it to a medical panel [as required by the Willardson decision], I finally asked whether we would join the three claims at the hearing in St. George.

Judge George then informed me he saw no evidence justifying a finding of PTD [permanent total disability]. I pointed out that the hearing on that issue had not been held and no evidence had been offered, of course there was no evidence yet, but we would

present it at the appropriate time. [Judge George still persisted, several times insisting that he didn't see evidence for total disability, though I think at the end he started showing signs that he realized the hearing hadn't been held yet so he shouldn't be pushing his decision.]

I think Mr. D realized he was going to be reversed on appeal even though he was prevailing on every issue in this discussion with Don George. He suggested before we hung up that we could consider settling.

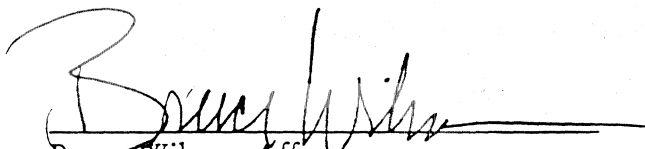
Mr. D offered \$3000 to settle. Mr. A accepted, since the Judge already told him he was going to lose and all he had originally wanted was the \$1400 chiropractor bill.

This is not the only time Judge George has done this kind of "attorney conference" decision, without evidence and without a record.


That is the end of my memo on the case of Mr. A.

It is extremely frustrating to try to argue a case before Judge George. You never get any feedback that shows any comprehension of what is going on. You get to hear the defense argue and Judge George telling you he agrees with them, but he doesn't respond in any way that shows comprehension of the issues. I am convinced a coin toss gives you a better chance to win than an assignment to Judge George. But losing is not the issue so much; someone loses every case. The problem is the basis for the loss being less than arbitrary, not connected to law, facts, or rational decision making, except to the extent there is a rationale behind the rubrics he appears to use, as shown in the above examples.

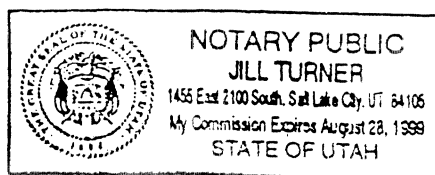
This statement represents the truth as best I remember and comprehend it. I so affirm this 27th day of March, 1998.


Bruce Wilson, Affiant

Affirmed and signed before me this 27th day of March, 1998


Public Notary

My commission expires: 8.28.99



COPY

AARON J. PRISBREY & ASSOCIATES P.C.
Aaron J. Prisbrey #6968
Eric S. Lind #7920
135 North 900 East, Suite 4
St. George, Utah 84770
Telephone 435/673-1661
Facsimile 435/673-3561

UTAH STATE BAR

PETITION IN RE: DONALD L. GEORGE	AFFIDAVIT OF AARON J. PRISBREY
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AARON J. PRISBREY, being first duly sworn upon oath, deposes and says as follows:

1. That affiant is an attorney licensed to practice law in the State of Utah, and is competent to testify regarding the ability of Donald L. George (hereafter "Respondent") to continue as an active member of the Utah State Bar.

2. That Respondent is employed by the Labor Commission of Utah as an Administrative Law Judge. Affiant has tried at least five cases with Respondent and had dealings with Respondent on multiple others.

3. That based upon his experiences with Respondent, affiant believes Respondent is unqualified to continue as an active member of the Utah State Bar because Respondent is not mentally capable of performing his job duties and has a bias against injured workers. Affiant has observed the following which makes it apparent Respondent is laboring under a disability and has a bias toward injured workers:

- a. It is Respondent's practice to request discovery depositions and read them in advance of trial. As these are discovery depositions, not evidentiary depositions, Affiant has objected to this practice, and has informed Respondent of the same. Nevertheless, Respondent continues with the practice. In a recent telephone conversation between Respondent, affiant and defense counsel, affiant informed Respondent he had objected to a discovery deposition being delivered to Respondent absent an appropriate motion to publish the deposition, Respondent then ordered defense counsel to file a motion to publish so the deposition would be delivered to Respondent prior to hearing.
- b. Respondent is the only Administrative Law Judge affiant has ever seen delegate his decision making duties to attorneys. Respondent usually has defense counsel draft his orders, with little or no guidance. Affiant has seen Respondent simply indicate that he is adopting the closing arguments of defense counsel and then order defense counsel to draft a final order consistent with defense counsel's closing arguments.
- c. Affiant has knowledge of only one order actually drafted by Respondent. The order was so lacking in substance that it is not sufficient to create a record on appeal. Respondent refused to address seven witnesses that testified on behalf of the injured worker. He simply indicated that "[b]ased on the representations of the applicant alone, I find her not to be a credible witness. . . . and the testimony of other witnesses as to the circumstances of the accident will be disregarded."
- d. As he has difficulty recalling events at hearing, Respondent engages in prior investigation of cases. Affiant has knowledge of one case where, without prior knowledge or consent of counsel, Respondent compiled evidence of an injured worker's past workers compensation claims.
- e. Affiant represented an injured worker who had made 19 prior work related accidents, most of which were minor. Only one of the claims had been adjudicated and was found to be compensable. Nevertheless, Respondent denied benefits, in part, because the injured worker had filed previous valid claims.
- f. Affiant has requested Respondent exclude witnesses at hearing as provided under the Rules of Evidence. This claim has been denied by Respondent.
- g. In denying benefits to an injured worker, affiant observed Respondent order defense counsel to draft the order consistent with the closing arguments of defense counsel. However, the final order was dissimilar to closing arguments. Nevertheless, Respondent signed the order before affiant was given a chance to object.
- h. Affiant has observed Respondent take an inordinate amount of time in examining witnesses and formulating questions at hearing. This causes affiant to believe Respondent has severe mental disabilities. Because of this problem most of the

hearings affiant has had with Respondent have gone way over the time allotted.

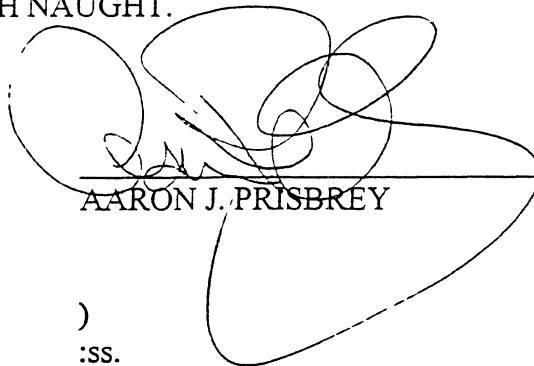
i. On one occasion, an employer was more than thirty days overdue in responding to an application for hearing. Affiant asked the clerk to enter the employer's default. Some ninety days later affiant again made this request of the judge handling the case. Without addressing the merits of the request for default, and not being the assigned judge, Respondent granted a continuance which gave the employer over a five month extension to answer.

4. That affiant believes the conduct of Respondent would violate the judicial canons regarding competency of a judge. However, affiant has been informed by Kay Carlson at the Judicial Conduct Commission that the Judicial Conduct Commission does not have jurisdiction over Administrative Law Judges.

5. That the Labor Commission of Utah does not have any procedures in place to deal with the incompetency of an Administrative Law Judge

6. That if Respondent is permitted to hear workers compensation cases that immediate and irreparable injury will occur to injured workers because of Respondents disabilities and biases.

FURTHER YOUR AFFIANT SAITH NAUGHT.

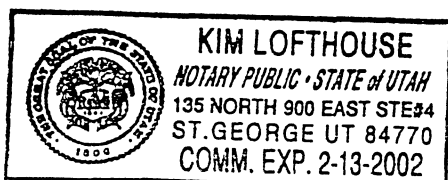

AARON J. PRISBREY

STATE OF UTAH

COUNTY OF WASHINGTON

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:ss.
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On the 26 day of March, 1998, personally appeared before me Aaron J. Prisbrey, the signer of the foregoing Affidavit of Aaron J. Prisbrey, who duly acknowledged to me that he executed the same.




NOTARY PUBLIC