

2001

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

Utah Court of Appeals

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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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**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

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STATEMENT OF JURISDICTION OF APPELLATE COURT

The Court of Appeals has jurisdiction in this matter pursuant to §63-46b-14 of the Utah Code Annotated 1953, as amended, which provides that “(1) a party aggrieved may obtain judicial review of final agency action, except in actions where judicial review is expressly prohibited by statute.”

Section 63-46b-16(1) provides “as provided by statute, the Supreme Court or the Court of Appeals has jurisdiction to review all agency action resulting from formal adjudicative proceedings.” (Emphasis added.)

This action is before this Court on appeal from the Utah Labor Commission as a result of the Labor Commissioner having reversed the Findings and Order of the Administrative Law Judge who, after hearing the evidence, viewing witnesses, and hearing the testimony of witnesses issued his ruling in favor of the Appellant.

STATEMENT OF THE ISSUES

A. Was Appellant substantially prejudiced by the Labor Commissioner who did not participate in the hearing, did not hear the testimony, did not observe the witnesses and with only a cold transcript before him, reversed the Findings of Fact, and Conclusions of Law and Order the Administrative Judge who had heard the case, observed the witnesses, and reviewed the evidence?

B. Did the Labor Commissioner go against the clear weight of the evidence supporting the Administrative Judge’s Findings of Fact and Conclusions of Law and make his ruling, reversing the Findings of Fact of the Administrative Judge, without the support of substantial

evidence to do so as required by §63-46b-16(4)(g) and (h)(iv) of the Utah Code Annotated 1953, as amended, and contrary to the weight of the evidence?

C. Was the Findings and Order of the Labor Commissioner an abuse of discretion delegated to the agency by statute?

D. Was the actions of the Labor Commissioner, in reversing the Administrative Judge, arbitrary or capricious?

The standard of review is defined by Utah Code Annotated, 1953 as amended in §63-46b-16(4) which states that “the appellate court shall grant relief only if, on the basis of the agency’s record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following (emphasis added):

.

(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;

(h) the agency action is:

.

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

CONSTITUTIONAL ISSUES, STATUTES, ORDINANCES, OR RULES

Section 34A-2-103(7)(b):

(b) Any person who is engaged in constructing, improving, repairing, or remodeling a resident that the person owns or is in the process of acquiring as the person’s personal residence may not be considered an employee or employer solely by operation of Subsection (7)(a).

STATEMENT OF THE CASE

1. Nature of the Case.

A. George M. Anderson was employed by Kelly Gates II to do some framing work on the said Kelly Gates II's residence under construction in Diamond Valley, Washington County, State of Utah.

B. While working, George M. Anderson, in the process of breaking a metal band around a bundle of plywood panels, was injured.

C. Kelly Gates II, the owner of the home, who was a young married man was building or contracting the construction of his own home, and was employed himself, so could only be at the construction site on a limited, part time basis. As a result he enlisted his father Kelly Gates Sr., Petitioner herein, without consideration, who was retired from his primary occupation as an automobile dealer, to assist him by watching over the construction of his home whenever possible.

D. Kelly L. Gates, II was exempt from the requirement of maintaining workman compensation insurance.

2. Course of Proceedings.

A. George M. Anderson filed a claim with the Labor Commission against Kelly Gates Sr.

B. Kelly Gates Sr. filed an answer to the claims with the Labor Commission.

C. A hearing was held before the Administrative Judge on July 1, 1999.

D. On January 19, 2001, the Administrative Judge issued his Findings of Fact, Conclusions of Law and Order in favor of Appellant.

E. On or about February 19, 2001, Respondent mailed his Motion for Review to the Labor Commission of Utah.

F. On June 28, 2001, Utah Labor Commission issued his Order reversing the Order of the Administrative Judge and remanding the case to the Administrative Judge for further proceedings consistent with his Order.

G. In Order to exhaust all administrative remedies, Appellant filed his Motion for Review with the Adjudicative Division of the Labor Commission of Utah on August 8, 2001.

H. The Appeals Board, on the grounds that it had no authority to review a decision of the Labor Commissioner, denied the Petition for Review on November 15, 2001.

I. Appellant's Petition for Review with this court was filed November 20, 2001.

J. On or about December 19, 2001, Appellee filed his Motion for Summary Disposition.

K. March 21, 2002, this Court denied the Motion for Summary Disposition.

STATEMENT OF RELATIVE FACTS

1. Kelly Gates II (hereinafter "Gates II") and his wife obtained a bank loan for the construction of a home in the Diamond Valley Subdivision in Washington County, State of Utah. (Tr. page 150, lines 10-24.)

2. At the time, Gates II and his wife decided that they could save money by doing the contracting themselves, rather than hire a contractor to build it for them. (Tr. page 150, line 25; page 151, lines 1-5.)

3. Kelly Gates, Sr. (hereinafter "Gates Sr.") the respondent herein, was and is the father of Gates II. (Tr. page 151, lines 14-17.)

4. Gates Sr. gave the lot upon which the residence was to be built to his son on the condition that the son build his home on the lot and live in it at least five years—the same offer and condition he offered his other children. (Tr. page 74, lines 12-16.)

5. Gates Sr. had been in the automobile business all of his professional life, but upon becoming semi-retired, had engaged in certain limited other business interests, such as becoming a partner in Diamond Valley Estates, building a condo complex in Santa Clara, and purchasing some storage units as well as building a spec home for sale in Diamond Valley. (Tr. page 20, lines 18-25; page 21, lines 1-17.)

6. Gates II worked a full time job from approximately 3:00 a.m. to 11:00 a.m. or 4:00 a.m. to 12:00 p.m. at a grocery store and supplemented his income by working afternoons as a salesman for an automobile dealership, so he could not be on site on a full time basis. However, Gates II's hours at the dealership were flexible and irregular enabling him to visit the site daily. (Tr. page 155, lines 22-25; page 156, lines 1-7.)

7. Gates II asked his father to assist him in the construction of his “home at Diamond Valley.” (Tr. page 151, lines 14-17)

8. Gates Sr. agreed, providing advice and some on site inspection assistance when Gates II was not able to be at the building site himself. (Tr. page 157, lines 2-12.)

9. George Anderson, the Petitioner, was hired to do some of the framing by Gates II upon the recommendation of his father who had used Anderson in constructing his own mountain cabin on Kolob Mountain earlier. (Tr. page 152, lines 5-15; page 153, lines 2-22.)

10. Gates Sr. had also used Anderson a small amount in remodeling some storage units, into offices, which he owned. (Tr. page 22, lines 4-10.)

11. Anderson, while working for Gates II on his house was injured, arguably, as a result of his own negligence. (Tr. page 37, lines 12-19.)

12. Anderson subsequently filed a claim against Gates Sr. claiming that Gates Sr. was the "contractor" on the job and that he was working for Gates Sr. not Gates II.

13. During his work on the Gates II home, Anderson constantly asked to be paid daily, or every two to three days, with the implied threat that if he did not get paid when he needed money he would quit. (Tr. page 157, lines 16-25; page 158, lines 1-7.)

14. Because Gates II could only get construction draws from the bank on his construction loan, every two weeks, and Gates II did not have the cash himself to pay Anderson so often, Gates II requested help from his father to make the payments, demanded by Anderson. (Tr. page 158, lines 8-14.)

15. In order to assist his son, Gates Sr. paid Anderson, and some of the other workers, out of his own pocket when such demands were made, but he was always reimbursed by his son when he, the son, was able to obtain draws on his construction loan from the bank. (Tr. page 158, lines 12-14; page 52, lines 16-19.)

16. Gates Sr. received no compensation, not even interest on the money he loaned his son for that purpose, or anything else which he did to assist his son. (Tr. page 158, lines 15-17; page 158 24-25.)

17. The Labor Commissioner concluded that Gates Sr. was a contractor on the job and hence subject to the requirement that he have Workman's Compensation Insurance, which, of course, he did not have.

18. Gates II was not required to have insurance, since he was building his own home, not subject to the Workman's Compensation laws. See § 34A-2-103(7)(b) Utah Code Annotated.

SUMMARY OF THE ARGUMENT

Kelly Gates II, and his young wife, obtained a construction loan to build his home on a lot in Diamond Valley in Washington County, Utah.

He and his wife decided they could build the home themselves, without the services of a general contractor, and save money.

Of course, Kelly Gates II was employed full time and he and his wife were not contractors by trade and they did not intend to physically build the house.

Kelly Gates II, looked to his father who was a semi-retired automobile dealer to advise and assist him because he had time to go to the construction site on a regular basis.

Kelly Gates II. was exempted from the requirements of the Utah Labor Code by §34A-2-103(7)(b) of Utah Code Annotated as amended, since he was constructing his and his wife's own, personal residence.

Respondent Anderson was injured while working on the home, and filed a claim against Kelly Gates Sr. the Appellant, alleging he was a contractor on the job and therefore, since it was not his house, he was not protected by §34A-2-103(7)(b) Utah Code Annotated, as amended.

The Appellant argues that he was simply the father of the owner of the home, assisting his son in whatever way he could, including advancing some funds on a short term basis, for which he received no compensation, and by observing the work as it progressed and reporting the results to his son, and doing other such things as any father would do for a son. All of those activities he did for no compensation whatever.

The Labor Commission, who did not see witnesses, observe them as they testified as the Administrative Judge was able to, reversed the Findings and Order of the Administrative Judge who had found in favor of the Appellant.

Because much of the evidence supporting the Respondent's position was his own testimony, hence his creditability has to be crucial to evaluating the case. But, even more significant was the testimony that the Commissioner apparently ignored, and still, even more important than that was, charitably, misunderstanding, misstating and misinterpreting evidence as it appeared in the written record.

Consequently, Appellant submits that he has been substantially prejudiced and that the Labor Commission's decision is not supported by the evidence, is arbitrary and capricious.

ARGUMENT

The Labor Commissioner, in revising the Findings of Fact and Conclusions of Law of the ALJ did so, upon a careful reading of his Order, based upon the premises that almost everything, if not everything Anderson said, “—was correct, truthful, and accurate—“ while, apparently, every bit of testimony from other witnesses that contradicted Anderson was not truthful.

Appellant acknowledges that the Commissioner had the authority and the power to reverse the Findings of the Administrative Judge, but due process demands there be a legally justifiable basis for such reversal.

While this proceeding was not in a normal court of law, the Labor Commissioner did list certain court cases in his Conclusions of Law which demonstrates that he must have felt there is some value in referring to the legal cases that have been issued by both the Supreme Court of Utah and the Utah Court of Appeals.

Consequently, it would be only logical that he also take guidance from certain other Supreme Court or Appeals Court decisions as well. The Appellant specifically refers to two cases, one by the Supreme Court of Utah, State of Utah v. Jose Carlos Pena, 865 P.2d 932, a 1994 case, and a very recent case out of the Utah Court of Appeals, State of Utah v. Visser, 31 P.3rd 584, 586 (Ut. App. 2001), both of which outline principles in some specificity, which are also enumerated in innumerable other cases, and that are almost so common place in Utah law as to hardly need repeating.

They are, State v. Jose Carlos Pena, supra, which states as follows:

Trial courts (the ALJ in this case) are given primary responsibility for making determinations of fact. Findings of Fact are revised by an Appellate Court (the Labor Commissioner in this case) under the clearly erroneous standard. For a review court to find clear error, it must decide that the factual findings made by the trial court are not adequately supported by the record, resolving all disputes in the evidence in the light most favorable to the trial court's determination (Citing case.) This standard is highly differential to the trial court because it is before that court that the witnesses and parties appear and the evidence is addressed. The judge of that court is therefore considered to be in the best position to assess the credibility of witnesses and to derive a sense of the proceeding as a whole, something an appellate court cannot hope to garner from a cold record. (Citation of the case.) (Emphasis added.)

State of Utah v. Visser, supra states as follows:

To the extent that findings of fact are based on a determination of credibility, we defer to the trial court. (Citation of case.) The trial court has the responsibility to determine the credibility of testimony. “A trial court’s factual findings [regarding defendant’s competency] will not be overturned unless they are clearly erroneous.” (Citation) We give deference to the trial court’s factual findings because of its superior position to assess credibility. (Emphasis added.)

While these are obviously criminal cases, the principal ennumerated when evaluating the credibility of witnesses applies here as in criminal cases. For example, in the instant case, most of the issues decided were decided almost exclusively on the basis of the credibility of the witnesses. The Respondent points out that in this case, the Labor Commissioner totally disregarded the observation by the ALJ that “Anderson lacks credibility.” See the final paragraph of the Findings of Fact made by the ALJ on page 5 thereof, and the ALJ noted that Anderson, was able to hear to the testimony of all other witnesses. The ALJ observed in this Findings that the opportunity for adaptive testimony was in Anderson’s hands and he fully utilized it. These are two very strong statements concerning the testimony of the Respondent Anderson.

The Labor Commissioner, on the otherhand, disregarded those findings when he states in the first paragraph of page 3 of his Order Granting Motion for Review, that “the commissioner finds such testimony (of Anderson) to be responsive, simple and straight-forward.”

It defies logic to determine how the commissioner can make that kind of determination, in the face of the ALJ’s determinations, when he never saw nor heard the Petitioner’s testimony, a conclusion which the Supreme Court of Utah states, an “appellate court cannot hope to garner from a cold record.” State v. Pena, supra.

It is even more difficult to understand, when the conclusions of the Commissioner, are refuted by considerable evidence in the record.

It is almost impossible in a relatively short brief to state all of the matters, in which the Respondent believes the Labor Commissioner made errors in his Order Granting the original Motion for Review in reading and interpreting the evidence, but a few will demonstrate, the Appellant believes, that the Labor Commissioner erred in revising the Order and the Findings of Fact of the ALJ, and that he acted arbitrarily and capriciously.

The Labor Commissioner in paragraph three of his Order states that Gates Sr. in the past owned an auto dealership and that he had formed another with his son Gates II under the business name of “Kelly Gates Enterprises.” This is the first of numerous misstatements of the record by the Labor Commissioner.

The facts are, that Kelly Gates Sr. and his son, Kelly Gates II opened an automobile dealership, not under the name of “Kelly Gates Enterprises,” which was Gate Sr. ’s own business, but under the name of “Sunland Sales and Leasing.” See Transcript, page 20, lines 20-25 and page 21, line 1.

While that is, of itself, not an important error made by the Labor Commissioner in attempting to usurp the role of fact finder, it portends the many other mistakes and errors he made in attempting to read a cold record and conjure up facts to support his decision.

It is significant to note, at this point, Anderson invoked the exclusion of witnesses rule which, of course, means that witnesses may not be in the court room and hear the testimony of other witnesses as they testify.

Anderson called, as his first witnesses, Gates Sr. which meant that Gates II and Seymour Hoskins, who were also subsequently called, were not in the courtroom and not able to hear the testimony of Gates Sr. However, the exclusion did not apply to Mr. Anderson, himself, as he was a party to the proceeding and hence able to be present during the testimony of all other witnesses.

It is also significant as mentioned above, that the ALJ found it important enough to mention again, after observing all witnesses over a five hour hearing, in the last full paragraphs of his Findings of Fact, page 4 of his written Findings of Fact and Conclusions of Law the following:

“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, when Petitioner (Anderson) 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. (Emphasis added.)

The Pena case, supra, pointed out, “the judge of that [the trial court] is therefore considered to be in the best position to assess the credibility of witnesses and to derive a sense of the proceeding as a whole, something the appellate court cannot hope to garner from a cold record.”

The Labor Commissioner made a point in the 3rd paragraph of his Findings of Fact of the fact that Gates II was only 22 years old and had little or no experience with building or construction, as if that should disqualify him from taking advantage of 34A-2-103(7)(b) Utah Code Annotated which allows one to build his own residence without being required to have Workman’s Compensation Insurance. That section does not require one to be an “experienced

builder” to take advantage of 34A-2-103(7)(b) and it does not preclude him from utilizing the assistance of his father and others to assist him. Gates II, obviously, would have to, and did rely upon numerous craftsmen and other experienced workers in the construction of his home.

The Labor Commissioner may have been attempting to set the stage for his later Findings in the 3rd paragraph on page 3, of the Order Granting the Motion for Review that “He (Anderson) did not see Junior at the building site until the project was well under way.”

And on page 4, first full paragraph, the Commissioner says “Junior was rarely present.” However, Gates Sr. testified, on page 45, line 2 after being asked by Anderson’s counsel if his son (Gates II) had met with Mike (Anderson) on the job site, “—oh many, many times.”

Gates II, who was not present to hear other witnesses testify, testified as follows when asked:

Q. Did you go up to the house as often as you could?

A. Every night.

Q. And that was every night that you’d go up to the house, is that right?

A. Uh huh.

Q. And whom did you talk with when you went up to the house?

A. Anyone who had been involved in the house, any of the workers and dad and anyone else.

Q. Would—Had—Would you talk with Mr. Anderson?

A. Every night.

Q. Every night that you went up there?

A. Uh huh.

Q. Was he there every day?

A. No. It wasn’t every day, there were a lot of days he just didn’t show up, but for the most part—for that time—in that time frame, I think it was pretty consecutive.

Q. Okay. Did you—When you talked to him, did you tell him what you wanted done or what you didn’t want done or give him any kind of instructions as to the progress of the building?

A. Uh huh, yeah, yes.

Even more significantly, however, is that Anderson himself testified, in addition to his statement cited above, that he did not see Gates II until the project was well underway. He also testified on page 11, lines 10-11 after being asked if he had conversations with Gates II answered, “No. I never met him until the exterior walls were built.”

Yet, three pages later, page 120, he was asked “Was Kelly Gates Jr.—was he there for the framing of the house?” Anderson answered “on and off . . . ,” which is a direct conflict with his own testimony 3 pages earlier in the transcript.

If Gates was there “on and off,” during the framing, he was certainly there by Anderson’s own admission, at times throughout the construction process, and certainly prior to and during the building of the exterior walls.

Again, the Labor Commissioner erred in his Findings of Fact, primarily because he was not there to see and hear the testimony of the witnesses.

Gates II, during questioning by Anderson’s counsel on cross, further explained how he was able to visit the job site on a daily basis on pages 165 and 166, lines 20-25 and 1-18 respectively:

Q. What time would you normally get off work when you were working a seventy hour week?

A. I worked at Smith’s from 3:00 to 11:00 or 4:00 to 12:00, and I ran up there in between going over to Desert Coach. I wasn’t on a time schedule there, it was commission at the car lot, and I knew the owner very well, so I could leave if I needed to to run up or run back or so on and so forth.

Q. So you worked 3:00 a.m. to 11:00 a.m.?

A. Yes. Yes.

Q. And then you’d run up to Diamond Valley?

A. Most of the time. I’d run up then or—

Q. Well, just explain for me—Well, didn’t you testify just moments ago that you would always run up in the evenings?

A. I'd run up then, I'd run up in the evening when I got done. A lot of times I would go to the car lot, check in there, run up around 2:00 or 3:00. Most of the time we were usually off by 4:00 or 5:00, and not necessarily in the evenings, but early afternoon.

Q. At Desert Coach?

A. At Desert Coach I could come and go, I was there pretty much full-time, but I had the leniency to be able to leave and go check on things and be able to take care of things that I needed to do to get my house built.

For some inexplicable reason, the Labor Commissioner chose to disregard or failed to consider the overwhelming evidence that was in direct contradiction to his conclusion that "Junior was rarely present."

Another example of the Labor Commissioner's faulty interpretation of the evidence is his conclusion that Gates Sr. was in control of the project, not Gates II.

A fallacy in the reasoning of the Labor Commissioner, is his assumption that Gates II, if he is contracting the construction of his own home, cannot rely upon the assistance of anyone, and in this case, the assistance of his own father without that person becoming the contractor on the job. That, of course, makes no sense.

Again, if that were the rule, Gates II could not hire Anderson to do some framing on the job, he could not hire a plumber or an electrician, or a roofer, or a cement man, or an excavation person, and especially, he could not allow a friend who, to help him out, might volunteer to do some work for him for free. That, of course, makes no sense.

The Labor Commissioner, points to a few other specific instances to justify his conclusion that Gates Sr. was a contractor and hence subject to the requirement to have Workman's Compensation Insurance.

On page 4, in the first full paragraph of his Order, the Commissioner asserts that Gates Sr. “—ordered Anderson off the job because he was under the influence of drugs or alcohol.” The Labor Commissioner justified that conclusion, because he says Gates “changed his testimony” to later say he “suggested” that Anderson not work. He doesn’t cite testimony or evidence that supports that assumption.

However, on page 66, lines 11-14, in the midst of an explanation of Anderson’s erratic behavior, and how careless Anderson often was in his behavior, and after commenting that Anderson appeared high on something one day when he showed up. Gates Sr. said “and I don’t know what it was and I’m not going to accuse him of any thing, but I wouldn’t let him work, he sat out in the truck for half a day.” From that the Commissioner apparently concluded Gates Sr. was controlling the workers and therefore was a contractor.

However, by reading only a few lines further in the transcript, Gates Sr. explains, when he testified on page 67, lines 8-10:

“I called my son on my cell phone and said Mike’s here and this is the condition, what do you want me to do, and he said dad, don’t even let him on the job.”

So when Gates Sr. said he wouldn’t let Anderson work on one certain day, he was only acting pursuant to instructions previously obtained from his son, “to not let Anderson work that day!”

Gates II, without the benefit of having heard anyone else’s testimony prior to his own, testified on page 181, lines 22-25, and page 182, lines 1-9 in response to questions by Petitioner’s counsel as follows concerning the same incident:

Q. Did your father ever call you at work and tell you there were problems with Mike at work?

A. Had he?

Q. Yeah.

A. Yeah.

Q. Do you recall how many times he called you to say there's problems with Mike (Anderson)?

A. There's one particular instance that comes to mind.

Q. Which was when?

A. When he called and said I think Mike's on something, he's acting all kind of goofy, and do you want him to stay, and I said no, send him home.

It was clear that Gates II was, contrary to the Labor Commissioner's assumption, in control and had primary responsibility for the construction of his own home.

The Labor Commissioner, also, in direct conflict with the Findings of the ALJ, concluded that Anderson was hired by Gates Sr. not Gates II, but what evidence he bases that on is a mystery, other than Anderson's testimony who desperately wanted to show someone other than Gates II to be the "contractor" on the job.

The Labor Commissioner states, as justification for this conclusion on page 3, in the 3rd paragraph thereunder, "Junior (Gates II) claims to have personally hired Anderson before the residential project and to have negotiated the wage to pay Anderson." Then the Labor Commissioner goes on to say, "However, Junior was unable to accurately state Anderson's wage rate" as if, three to four years, later Gates II should have precisely remembered that detail.

Well, if Gates II should have remembered what the exact figure was, almost four years later, when he had not had occasions to think about it for that long, then it only stands to reason that Anderson, too, should have remembered.

On page 113 of the transcript, lines 17-20, Anderson was asked, by his own counsel:

Q. Was there an amount agreed to? (Referring to what was to be his hourly rate as agreed upon.)

A. Yes. The \$12.00 or \$12.50.

Q. Okay.

A. I don't recall if it was \$12.00 or \$12.50.

It hardly seems justifiable to hold Gates II to a recollection some three to four years later but not require the same standard of Anderson.

On page 3, in the first paragraph, the Labor Commissioner, after concluding that Anderson's testimony, as opposed to the testimony of both of the Gates', was "responsive, simple, and straight-forward," and then goes on to say "furthermore, Anderson's testimony does not conflict with the testimony of Mr. Hoskins, the only disinterested individual to testify in the matter." The Commissioner doesn't explain how the testimony does not conflict, just makes that general conclusion.

However, a careful review of the testimony as found in the transcript of the hearing shows just the opposite to be the case.

It has to be assumed that Hoskins' testimony, according to the Commissioner's reading of the evidence must not have conflicted with Anderson's testimony concerning the main issue of "who was building the home of Gates II, as that is almost the only thing of any relevance that Hoskins testified to, in order to support the "finding" of the Labor Commissioner, that Hoskins' testimony did not contradict Anderson's testimony.

However, Anderson's counsel asked Mr. Hoskins starting on page 104, lines 4-12.

Q. Did you have an understanding as to who was constructing Kelly Gates Jr.'s home in Diamond Valley?

Mr. Wright: We'll object, your honor, his understanding is irrelevant.

The Court: Overruled, you may answer.

The Witness: Well, I thought Kelly Jr. was building his own house and his dad was helping him. That was my understanding. I have never had any conversations about the particulars on it or anything. (Emphasis added.)

That is in direct conflict with Anderson's position in this whole matter. So how can the Labor Commissioner conclude there was no conflict between Hoskin's and Anderson's testimony?

Anderson's counsel attempted to impeach his own witness's testimony, by referring to an alleged conversation he himself had had with Mr. Hoskins, by suggesting that he, Hoskins, knew it was Gates Sr. who was building the home for his son, but Mr. Hoskins' testimony, in response to that suggestion was, when he understood counsel's question, under oath on page 105, lines 2-5, "Well, yeah, I—I think Kelly was building the home for his son or with his son." (Emphasis added.)

Then again on page 105, lines 12-25, and page 106, lines 1 through 21, still under oath of course:

By Mr. Wright

Q. Mr. Hoskins, did you have a conversation with Kelly, Jr. (Gates II) in which he asked if you would act as the contractor on the loan application so he could get a loan to build a house?

A. I had the conversation—Well, yes I did.

Q. And that was with Kelly, Jr. wasn't it?

A. Yeah. That was.

Q. Kelly the II. So you knew it was Kelly, Jr.'s house that was being built?

A. Yes.

Q. And you knew that it was for his own residence too; didn't you?

A. Yes.

Q. And you testified that you knew that his father was going to help him build it; isn't that correct?

A. Yes.

Q. And did you think of that as anything other than just a father helping a son?

A. That was my understanding.

Q. Okay. Now, since that time you've had some disputes with Mr. Kelly, Sr.; have you not?

A. Yes.

Q. That ended up in Court? So you had—

A. Well, it didn't end up in Court.

Q. Well, you—you worked out a dispute that was between you?

A. Yes.

Q. So you have no reason to in any way to tailor your—your testimony in favor of Kelly Gates, Sr.; do you?

A. In favor of—Oh heavens, no.

Q. You're simply telling the truth as you recall it; is that right?

A. Exactly.

(Emphasis added.)

Certainly it defies reason to determine how Mr. Hoskins' testimony does not conflict with the testimony of Anderson!

Another gross misreading of the evidence by the Labor Commissioner is found in his second paragraph on page 3 of his Order, wherein he states, "For example, Senior asked Mr. Hoskins, a construction contractor to turn in Anderson's injury as a claim against Hoskins' Worker's Compensation policy. Such a claim would have been fraudulent."

The facts, however, were that Seymour Hoskins was listed on the loan application as the contractor in order for Gates II to be able to obtain a construction loan.

When Anderson was injured and was asking for money because the doctors would not treat him unless he paid up front, Mr. Hoskins was approached by Gates, Sr., merely to determine if his insurance policy would cover Anderson. Mr. Hoskin's testimony on page 103, lines 7-15, referring to this issue, was:

Q. No. Did anybody ever contact you after he was hurt regarding whether you had Workman's Compensation Insurance?

A. Kelly Sr. asked me if he could be covered on my policy and I told him no, he had to be working for me and be listed on it and that was the extent of that.

Q. That was the extent of the conversation.

A. Yes.

It was clear from a careful reading of that testimony, and which would have been abundantly clear had the Commissioner been present and actually heard the testimony and observed the witnesses, that Gates Sr. was only asking a question, “would Anderson be covered on his policy.” When told no, nothing more was said about it. It was not a request to fraudulently include him on his policy if he was not legitimately covered.

Making an inquiry is far different than how the Commissioner characterized it, i.e., that Gates Sr. asked Hoskins to turn in a fraudulent claim! Asking a questions is not asking Hoskins to make a claim, and the Commissioner’s interpretation is not only unfair, but grossly unsustainable in the record.

Going to another issue, the Commissioner makes a point in support of his Findings that Anderson was credible while Gates Sr. and Gates II were not by denigrating the ALJ’s observation that Anderson stood to benefit by a claim against Gates II for a fairly substantial amount of money. The Commissioner stated that Gates had a similar incentive to avoid such payments, so that did not demonstrate that Anderson’s testimony was not credible.

So, the question arises, how does that make Anderson’s testimony more credible than Gates? It doesn’t. On that issue there is at best a wash, unless you are present, observe and listen to the witnesses and the testimony and make an informed conclusion as to who is credible and who is not. The Commissioner was not there to do that. The ALJ was!

In another matter, the Commissioner points to the fact that Gates II in a request for a draw, requested enough money from the bank out of his construction loan to pay Anderson some

money so he could be treated by doctors as being evidence that Gates II was doing something terribly illegal and disreputable, and therefore is not credible.

The fact is, Gates II was simply withdrawing funds from his account which he would ultimately have to repay to the bank when he repaid his loan. Had he withdrawn the money from his account to pay Anderson a bonus for superior work on the house, even the Commissioner could not have been critical. In fact, there is no difference, and it certainly does not raise an issue of the credibility of Gates II in this matter. The Commissioner attempts to twist a humanitarian gesture into something despicable.

The Commissioner also cites an allegation that Gates Sr. on an unrelated project, that has no connection to and is irrelevant to the issues in this case, hired Anderson to work on remodeling storage units into offices for which Gates Sr. allegedly had no Workman's Compensation Insurance, either.

However, that was an entirely unrelated issue to the issues relevant to this case. Had there been a trial or hearing relating to that unrelated project, it is important to note that, during such a hearing, a determination of what the facts actually were in that case, including what defenses may have been introduced, would have been made there. In this case, it was simply speculation and innuendo.

It is unfair and totally irrelevant for the Commissioner to assume conclusions concerning that case and apply it to the facts of the instant case. Those allegations should not have even been admitted in the present case. But even if they were admitted, they do not prove Gates Sr.

was a contractor in the construction of Gates II's home, and, likewise, that he was not a credible witness.

Another failure in the analysis of the Commissioner, was to completely ignore other rather significant evidence when considering whether Gates Sr. was the contractor or not. That evidence was that Gates Sr., who owned several lots in the Diamond Valley Subdivision, one of which he gave to his son, and is key to this dispute, did build a spec home on one of those lots. He did not contract that himself, but, in fact, had it built by a licensed contractor. Page 33, lines 23-25 and page 34, line 1.

Gates Sr. also built condos in Santa Clara, using a contractor. Those facts are rather important evidence in determining whether Gates Sr. would act as a contractor on the construction of his son's home. Certainly if Gates were acting as a contractor in building his son's home, he would most likely have done the same on the spec home and the condo projects he built for himself.

The Commissioner also indicated in his Order, page 3, in the 4th paragraph that because Gates Sr. provided Anderson with "large equipment" to assist Anderson, he must be the contractor. The fact is, Gates provided only a compressor driven nail gun and the compressor, to operate it, after the construction was well underway, in order to accelerate the work Anderson was doing for the express purpose of saving his son money. That was the only "large equipment" he provided.

The testimony on pages 29-31 of the transcript was that Gates Sr. had borrowed the nail gun and the compressor from Seymour Hoskins to work on his own cabin on Kolob Mountain

earlier and eventually bought it used from Hoskins when he felt it would help his son on his son's home. That was the only large equipment he owned and provided for Anderson's use. Every other piece of equipment used by Anderson and the other workers belonged to Anderson and the other workers. Acquiring a nail gun for this one project hardly makes Mr. Gates a contractor.

Another item the Commissioner relied upon was that Gates Sr. made payments out of his own account to pay wages to Anderson. The Commissioner on the first line of page 4 states it "is clear that Anderson always looked directly to Senior, not Junior, for payment of wages." (Emphasis added.)

However, the Commissioner, to come to that conclusion, had to overlook substantial testimony to the contrary. He doesn't cite specifically the evidence he relied upon to reach that conclusion of fact, but there is ample evidence to the contrary.

It is, of course, true that Gates Sr. who was retired, and had time to be at the job site when his son was not during any given day, was the one Anderson often talked to. However, who he may have talked to, does not always indicate who is making the decisions, or that minor decisions that may have been made by Gates Sr. have any significance in determining whether or not Gates Sr. was a contractor on the job.

In an answer to a question by Anderson's counsel, Gates Sr. testified on page 46, lines 14-25 and page 47, lines 1-2 as follows:

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

A. Yes. And so was Mr. Anderson.

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

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

Again, after being asked if Anderson had anyone helping him, Gates Sr. was asked on page 61, and he testified:

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

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

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

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

On page 80, lines 14-25, and page 81, lines 1-16 Gates Sr. testified:

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

A. That is correct.

Q. And some of the documents that you've looked at indicated he was paid sometimes every other day; is that right?

A. One time he was paid the next day.

Q. Okay. And do you know—did he ever tell you why he wanted to be paid every other day or—

A. Well, the reason he gave me is his wife needed the money.

Q. And did he make those requests often or repeatedly or did he make himself a pest?

A. As often as he needed money.

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

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

Q. And Mr. Anderson didn't indicate that he was satisfied with that; is that right?

A. Well, he indicated he needed the money.

Q. Okay. So why then did you pay him out of your account?

A. Because I knew my son would reimburse me.

The Commissioner speculated that Anderson always looked to Gates Sr. for payment, but there is not evidence in the record to that effect, and it is in direct conflict with the testimony of Gates II who explained in detail on page 157, lines 13-25, and page 158, lines 1-14:

Q. Okay. Now, when checks were paid to Mr. Anderson or money was paid to Mr. Anderson, can you explain how that came about or what the process was?

A. Mike would hit me up for a paycheck every other day it seemed like, or every two to three days, and—

Q. And let me stop you and ask you there. When you say Mike would hit you up, would he ask you personally?

A. Yes.

Q. Okay. And when was that, when you came in the evenings?

A. Yes.

Q. Okay. And so what happened then?

A. He would hit me up for a check every day or so, and his wife was pregnant at the time and he needed money for this and he needed money for that, but I could only get a draw check every week or two weeks, it was—I couldn't turn in a draw check every other day to get Mike a check, and—

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

A. No. No.

Q. Okay. So what happened then?

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

And again Gates II testified on page 163, lines 5-17:

Q. Okay. Now, when money was paid to Mr. Anderson, did you approve those payments or did Mr.—your father pay them himself, or did he make the determination or did you approve any of the payments for him?

A. I did.

Q. And were you aware of every payment that was made to him for labor that he performed?

A. Yes.

Q. And you'd consulted and talked with your father and told him to go ahead and pay it; is that correct?

A. Uh huh.

Perhaps, the last issue of significance is the Commissioner's finding that it was Gates Sr. who "hired" Anderson to do the work on Gates II's house in Diamond Valley.

He based that determination almost entirely on the testimony of Anderson who virtually denied ever meeting Gates II until several weeks after he'd started on the project.

That, of course, is again in direct conflict with the detailed testimony of Gates Sr. and Gates II.

For example, Gates Sr. testified on page 139, lines 13-25 and page 140, line 22 that Gates II came up to Kolob Mountain where Anderson was working on Gates Sr.'s mountain cabin, and Gates II and Anderson talked about the house Gates II was intending to build in Diamond Valley. He also testified that Anderson and Gates II met again later to discuss the matter further, hourly wage, etc.

Gates II on page 151, lines 18-25, and page 152, lines 1-15 testified that he met Anderson at Kolob Mountain and described that he knew of Anderson because he and his family had both grown up in Santa Clara and Gates II knew Anderson's brother well.

He further testified that while they discussed his house to be built in Diamond Valley, he didn't discuss Anderson working on it until, he believed, at a later meeting.

On page 153, lines 2-22, Gates II testified how he—not his father—made the arrangements to hire Anderson to do some framing on the house:

Q. And as a result of your conversations with your dad, did you have conversations with Mr. Anderson?

A. Yes.

Q. And where were they, if you recall?

A. I—it seems like when I hired him to work on my house it was at my house.

Q. At your house. And how did he happen to come to your house; do you know?

A. He—Because—Because of him working for dad, and he worked there he'd come up to ask him to come up to the house, he and Bret and another gentlemen that was framing at the same time came up and I hired the two of them to do the framing on my house.

Q. Okay. Did you do the hiring or did your father do the hiring?

A. I did.

Q. You made arrangements to hire Mr. Anderson; is that right?

A. That's correct.

Q. You told him that; is that right?

A. Yes.

It is important to recall that Gates II was not present in the court room and did not hear the testimony of either his father nor of Anderson, yet his testimony compares favorably with that of Gates Sr. Gates II testified several times that it was he who had final authority to hire, fire, and give instructions to the workers how he wanted things done not his father. Though he frankly admitted he was not a builder and had to rely on Anderson and the other workers to actually carry out his desires concerning the house, which included such things as where doors and closets were to be located, etc. and whether a certain ceiling was to be flat or vaulted, etc., and the details of Anderson's employment and work on the home.

It was very clear from the testimony of both Gates II and Gates Sr. that Gates Sr. was merely being a helpful father, that being retired and having time that Gates II did not have, did what he could to assist his son in building his home, but that is all it was.

Gates Sr. himself was not experienced as a contractor or builder. He had worked in the automobile business all of his professional life, he loaned money to his son to pay the demands of Anderson and other workers until Gates II could get a bi-weekly draw on his construction loan to keep workers on the job, and he helped out however he could, but he was not a contractor and received no compensation or payment for assisting his son, except the satisfaction of helping a son. He did not serve as a contractor in building his son's home.

Gates Sr. spent time watching the workers, but acted only on the instructions of his son in directing those workers. It is incredulous to suggest that if the statute allows a home owner to build his own residence, and there is no dispute that the home being constructed was to be the home of Gates II and his wife, that that owner would have to do all of the work himself. Obviously he had to rely upon carpenters, plumbers, electricians, roofers, cement mixers, and any other skilled workers that he may use. If that be the case, he certainly should be able to rely upon his father to keep a watchful eye on what was being done, when he could not be there himself. That is exactly what happened, a father merely helped his son.

Admittedly, there was a considerable conflict in the testimony between Anderson and Gates Sr. and Gates II. In spite of the conclusion of the Commissioner that there was not a conflict between the sole disinterested witness, Seymour Hoskins and Anderson, it has been shown that there was!

And, of course, the most significant point is that the ALJ who sat through a five hour hearing and observed the appearance and demeanor of the witnesses and listened to the testimony found indisputably that Anderson's testimony was not credible. The lack of credibility was so evident that the ALJ didn't just take that into account in this decision, he made a "finding" to that effect twice! If the testimony of Anderson was not credible, the Respondent has no case whatever.

Both the Supreme Court of Utah in State v. Pena, supra, and the Utah Court of Appeals, State v. Visser, supra, have enunciated the law in this area and have explained why those courts

will rarely dispute the Findings of Fact as found by the trial judge who actually hears the testimony.

While the Commissioner cites three court cases attempting to justify his findings, they are Bennett v. Industrial Commission, 726 P.2d 427, 429-30 (Utah 1986); Johnson Construction v. Lake Commission, 967 P.2d 1258, 1260 (Ut. App. 1998); and Pinter Construction Co. v. Frisher, 688 P.2d 305, 309 (Ut. 1984)—he misconstrues the issue.

Even if it is correct that Gates Sr. exercised some of the control those cases deal with, Gates Sr. was at most acting as an agent of Gates II in exercising that control. He was not exercising it on behalf of himself, but on behalf of his son, Gates II. He did not receive any compensation himself, except the satisfaction of assisting his son.

The real issue is that Gates II who was the employer was exempt from the requirement of having Workman's Compensation, and Gates Sr. was simply assisting him, as his agent, at most, in all that he did, and was not a contractor on the job.

CONCLUSION

As observed by the ALJ, "there is a question of credibility in this case." In fact, the question of the credibility of the witnesses is one of the key elements in this case.

The evidence is heavily weighted in favor of the Appellant. The only way the Findings of Fact, Conclusions of Law and Order of the Administrative Law Judge can be overturned is by totally discrediting the ALJ's Findings concerning the credibility of the witnesses, and discrediting in its entirety, all of the evidence supporting the ALJ's Findings.

It is clear that the action of the Labor Commissioner was certainly arbitrarily lacking in a factual basis, and therefore capricious as well. Since the Administrative Law Judge was the only person able to properly evaluate the credibility of the witnesses, and there is considerable evidence to support his Findings of Fact, and Conclusions of Law and Order, the Administrative Judge's original order dated January 19, 2001, should be reinstated and made final.

RESPECTFULLY SUBMITTED this 24th day of April, 2002.



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 Brief of Appellant Kelly Gates Sr., was served this ____ day of April, 2002, to Appellee's counsel via U.S. Postage Services, first class mail, postage prepaid, to the following:

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ADDENDUM

Section 63-46b-14. Judicial review—Exhaustion of administrative remedies.

(1) A party aggrieved may obtain judicial review of final agency action, except in actions where judicial review is expressly prohibited by statute.

(2) A party may seek judicial review only after exhausting all administrative remedies available, except that:

(a) a party seeking judicial review need not exhaust administrative remedies if this chapter or any other statute states that exhaustion is not required;

(b) the court may relieve a party seeking judicial review of the requirement to exhaust any or all administrative remedies if:

(i) the administrative remedies are inadequate; or

(ii) exhaustion of remedies would result in irreparable harm disproportionate to the public benefit derived from requiring exhaustion.

(3) (a) A party shall file a petition for judicial review of final agency action within 30 days after the date that the order constituting the final agency action is issued or is considered to have been issued under Subsection 63-46b-13(3)(b)

(b) The petition shall name the agency and all other appropriate parties as respondents and shall meet the form requirements specified in this chapter.

Section 63-46b-16 Judicial review—Formal adjudicative proceedings.

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

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

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

- (a) all parties to the review proceedings may stipulate to shorten, summarize, or organize the record;
- (b) the appellate court may tax the cost of preparing transcripts and copies of the record;

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

- (ii) according to any other provisions of law.

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

- (a) the agency action, or the statute or rule on which the agency action is based, is unconstitutional on its fact or as applied;
- (b) the agency has acted beyond the jurisdiction conferred by any statute;
- (c) the agency has not decided all of the issues requiring resolution;
- (d) the agency has erroneously interpreted or applied the law;
- (e) the agency has engaged in an unlawful procedure or decision-making process, or has failed to follow prescribed procedure;
- (f) the person taking the agency action were illegally constituted as a decision-making body or were subject to disqualification;
- (g) the agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court;

(h) the agency action is:

- (i) an abuse of the discretion delegated to the agency by statute;
 - (ii) contrary to a rule of the agency;
 - (iii) contrary to the agency's prior practice, unless the agency justifies the inconsistency by giving facts and reasons that demonstrate a fair and rational basis for the inconsistency; or

(iv) otherwise arbitrary or capricious.