

1983

**Clarine Edward v. The Industrial Commission of Utah, Utah State Insurance Fund And Jack O. Tillery : Brief of Plaintiff - Appellant
Clarine Edwards**

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IN THE SUPREME COURT OF THE STATE OF UTAH

CLARINE EDWARDS,,)	
)	
Plaintiff and Appellant)	
)	
vs.)	CASE NO. 19047
)	
THE INDUSTRIAL COMMISSION)	
OF UTAH, UTAH STATE INSURANCE)	
FUND and Jack O. TILLERY,)	
)	
Defendants and Respondents.))	
)	

BRIEF OF PLAINTIFF - APPELLANT
CLARINE EDWARDS

REVIEW OF ORDER OF THE INDUSTRIAL COMMISSION
OF THE STATE OF UTAH

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§35-2-56, Utah Code Annotated, (1953)	p. 5, 6, 8

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FUND, and JACK O. TILLERY,)	
)	
Defendant)	
)	
)	

INTRODUCTION

This is a petition for review by the Supreme Court of the State of Utah of the final Order of the Industrial Commission in the above-captioned matter. Appeal is made from The Industrial Commission's denial of applicant's claim for workmen's compensation.

RELIEF SOUGHT ON APPEAL

Applicant seeks that the denial of her claim by The Industrial Commission be vacated. She desires that her claim be reconsidered by the Industrial Commission after appointment of, and evaluation by, a new medical panel consisting of physicians specially trained in the care and treatment of

applicant's condition, as required by §36-1-77, Public Health Code Annotated, (1953).

FACTS

Plaintiff-Appellant Clarine Edwards, (hereinafter referred to as plaintiff), was the manager and cook at Klara's restaurant. On the morning of March 25, 1981, as she was beginning her work day, she turned on the gas-fired grill in the kitchen. As she did so, the control knob to the thermostat fell off. She quickly got a pair of pliers and attempted to turn down the grill which was turned on high. She was unsuccessful in this. Accordingly, the grill began to smoke as it continued to get hotter. Eventually, the room became filled with black sooty smoke. Meanwhile, plaintiff was working underneath the grill in an attempt to turn it off before the kitchen caught fire. Eventually, a delivery man came by and found plaintiff, who was coughing and choking, and pulled her out of the room. (Record 9, 10, 11)

Although plaintiff continued to work until June 5, 1981, she became progressively weaker and developed more problems with a cough and a sore throat. She was unable to get an appointment with her doctor until July 9, 1981, but has had treatment since that time. (Record 15)

Plaintiff filed an application for a hearing before the Industrial Commission on August 21, 1981. (Record 1) A hearing was held on the matter on February 8, 1982. (Record 2) As a result of the hearing, the administrative law judge sent the matter to a medical panel for consideration of the plaintiff's

issues of the claim. Dr. Frank Dituri and Dr. Theodore Noehren were appointed as members of the panel. (Record 44, 116)

On April 28, 1982, copies of the Medical Panel report were distributed to the parties. (Record 128) On May 21, 1982, the Industrial Commission extended to June 1, 1982, the time in which objections to the Panel's report could be filed. (Record 130) On June 1, 1982, plaintiff's attorney filed timely objections to the report with the Industrial Commission. (Record 131)

On August 16, 1982, plaintiff's attorney filed a Motion to Vacate the Report of the Medical Panel and To Have a New Panel Appointed. (Record 141) The motion was based on the assertion that all members of the Medical Panel did not have the expertise required by state statute. (Record 142, 143) This motion was denied on August 19, 1982. (Record 144)

On October 7, 1982, a hearing on the objections to the Medical Panel report was held at the Industrial Commission. Dr. Frank Dituri, the Chairman of the Medical Panel was examined, among other things, regarding his qualifications for consideration of plaintiff's pulmonary problems. (Record 279-283, 305-306, 310)

On October 29, 1982, plaintiff's attorney filed with the Industrial Commission a Brief in Support of Objections to the Report of the Medical Panel. (Record 216) This brief set forth an argument as to why the Medical Panel did not meet the statutory requirements that the physicians be specialists in the area of the injury or disease involved in plaintiff's

claim. (Record 216-239) On this same day, October 19, 1982, the Findings of Fact, Conclusions of Law, and Order were issued by the Industrial Commission. (Record 240-243) There is no indication in the record that the administrative law judge read or considered plaintiff's brief before issuing his order, even though at the October 7, 1982 hearing, plaintiff's attorney was given permission to submit a legal memorandum supporting plaintiff's contentions on or before October 30, 1982.

On or about November 15, 1982, a Motion for Review of Order was filed with the Industrial Commission by plaintiff's attorney. In this motion, plaintiff sought, among other things, that the Industrial Commission review whether or not the medical panel in the case was qualified as required by §35-1-77, Utah Code Annotated, (1953). (Record 261-263)

On February 9, 1983, plaintiff's November 15, 1982 Motion for Review was denied by the Industrial Commission on other grounds. (Record 266-267)

This appeal is taken from this February 9, 1983 denial. (Record 270, 271)

ARGUMENT

POINT I

THE MEDICAL PANEL DID NOT MEET
THE REQUIREMENTS OF SECTION
35-1-77, UTAH CODE ANNOTATED,
(1953)

§35-1-77, Utah Code Ann., (1953), states that when medical issues are involved in an industrial claim:

The Commission shall refer the medical aspects of the case to a medical panel appointed by the Commission and

having the qualifications generally applicable to the medical panel set forth in §35-2-56.

§35-2-56, Utah Code Ann., (1953), defines the necessary qualifications for a medical panel as authorized by the above-quoted statute:

. . . measurement of partial permanent disability is a highly technical and difficult task and should be placed in the hands of physicians specialty trained for the care and treatment of the occupational disease involved . . .

The Commission shall appoint an impartial medical panel to consist of one or more physicians specializing in the treatment of the disease or condition involved in the claim (Emphasis added).

Dr. Frank Dituri, M.D., Chairman of the Medical Panel appointed in this case, did not meet these qualifications. The condition involved in plaintiff's claim involves complicated pulmonary problems. Although this doctor is Board Certified in internal medicine, he is not Board Certified in pulmonary disease which is a subspecialty of the broad field of internal medicine. (Record 310)

Since 1977, he has withdrawn from private practice as a treating physician and has devoted his time solely to evaluations of impairment disabilities for insurance companies and other private and public organizations. (Record 280)

Although the record shows that this doctor has experience in various areas, it cannot be said that he is "specialty trained" for the care and treatment of the condition involved as mandated by statute. He, accordingly, does not

qualify as a specialist in pulmonary medicine, nor does he meet the statutory requirements of a "specially trained" physician in the area of the condition in issue.

The statutes also establish that members of the medical panel are to be physicians who specialize in the "treatment of the disease or condition involved in the claim" §35-2-56 supra. Dr. Dituri testified at the hearing on the objections to the Medical Panel report that he has withdrawn from private practice and is a paid consultant for various organizations; he is no longer a treating physician and has not been one since 1977. (Record 280)

POINT TWO

BECAUSE THE MEDICAL PANEL DID
NOT MEET THE STATUTORY
REQUIREMENTS, THE PANEL REPORT
IS INVALID AND SHOULD BE
DISREGARDED

The October 7, 1982 hearing on objections to the Medical Panel's report brought out information regarding Dr. Dituri's training and qualifications. It appears from the record that although he may be a highly trained professional, he is not a specialist in the area of pulmonary medicine. His appointment to the Medical Panel was improper; and, therefore, invalidates the findings of the Medical Panel. This is strengthened by the fact that he was Chairman of this particular Panel and was responsible for accounting for the Panel's findings at the hearing on objections to the Panel's report.

Of further importance in this matter is the fact that the administrative law judges who try workmen's compensation claims give great deference to the findings of the panel unless there is sufficient evidence to tip the balance in the other direction. Redman Warehousing Corp. v. Industrial Comm., 22 Utah 2d. 398, 454 P.2d 283 (1969); Shipley v. C&W Contracting Co., 528 P.2d 153 (Utah 1974). However, it is often difficult to produce such evidence due to cost and time involved on the part of a claimant who may not have the resources to do so. The question of medical issues may be reduced down to the point in the end that it becomes the medical panel's opinion versus the opinion of the claimant's physician. In such a situation, the Commission may well find in favor of the medical panel's opinion. That makes it all the more important that those serving on the medical panel be specialists as highly qualified as possible in the evaluation of the condition involved in the claim.

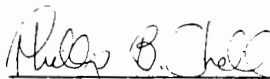
CONCLUSION

Because of the technical nature of determining the cause and nature of disabilities, the statutes of our state require that specialists be appointed to medical panels for the determination of medical issues in workmen's compensation cases. For this reason, only the best available physicians who are qualified specialists should be appointed to serve on medical panels. This is especially true due to the weight put

upon the reports of the medical panels by administrative judges. For these reasons, the report of the medical panel in this case should be disregarded because the Chairman of the panel was not a physician "specializing in the treatment of the disease or condition involved in the claim." §35-2-56, Utah Code Ann., (1953). Plaintiff's claim should be reconsidered by the Industrial Commission after re-evaluation by a qualified medical panel.

DATED this 24th day of June, 1983.

RESPECTFULLY SUBMITTED



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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the
referred Brief of Appellant was served upon the following by U.S.
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