1984

Sarah Ann Anderson v. The Industrial Commission of Utah, Department Of Employment Security, Barco Of Utah, State Insurance Fund, And Second Injury Fund : Appellant's Brief

IN THE SUPREME COURT FOR THE

STATE OF UTAH

SARAH ANN ANDERSON, :

Applicant-Appellant, :

v. : Case No. 19128

THE INDUSTRIAL COMMISSION OF UTAH, DEPARTMENT OF EMPLOYMENT SECURITY, BARCO OF UTAH, STATE INSURANCE FUND, and SECOND INJURY FUND, :

Defendants-Respondents :

APPELLANT'S BRIEF

Appeal from an Order of the Industrial Commission of Utah, Timothy C. Allen, Administrative Law Judge.

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NATURE OF CASE

The Applicant-Appellant, Sarah Ann Anderson, seeks workmen's compensation benefits against the Defendants for injuries she received on a job while working for the Defendant, Barco of Utah.

DISPOSITION IN LOWER COURT

The Industrial Commission granted to the Applicant-Appellant limited recover, for permanent partial disability, as well as granting an early date of stabilization.

RELIEF SOUGHT ON APPEAL

The Applicant-Appellant requests this Court to reverse the order of the Industrial Commission and grant the Applicant-Appellant a new hearing with regard to her injuries and compensation.

STATEMENT OF FACTS

The Applicant-Appellant was originally injured at place of employment on March 7, 1978. She requested compensation, which was originally denied, but prior to any hearing, liability was admitted and payments were made.

The Applicant-Appellant developed further complications and problems with her injuries. The Applicant-Appellant therefore sought additional benefits. Subsequent to a hearing, the matter was referred to a Medical Panel, consisting of Dr. M.E. Hess. Dr. Hess completed his examination, and issued his Medical Panel Report. On April 21, 1981, the Applicant-Appellant filed a timely objection to the finding of the Medical Panel Report.

Shortly after the filing of the objection to the Medical Panel Report, Judge Foley of the Industrial Commission contacted the attorney for the Applicant-Appellant. At that time Judge Foley indicated that he would be basing his ruling upon the treating physician Dr. McQueen, rather than a Medical Panel Report, and therefore questioned the necessity for a hearing. The treating physician Dr. McQueen had substantially greater percentage of the permanent partial disability attributable to the accident, and an additional 1½ to 2 years of temporary total disability rating. As a result of the statements by Judge Foley the Applicant-Appellant did not request a hearing on her objections to the Medical Panel Report. By letter dated May 6, counsel for the Applicant-Appellant memorialized the phone conversation with Judge Foley and withdrew the request for a

the objections. Further, copies were sent to the Applicant-Appellant as well as the attorney for the Defendants, Barco of Utah and State Insurance Fund.

On August 18, 1981 Judge Foley issued his Findings of Facts, Conclusions of Law and Order. At that time, he adopted the Medical Panel Report and entered an Order in accordance therewith. The Applicant-Appellant than timely filed an Objection to the Findings of the Medical Panel, Petition for Review and Request for Hearing on the Objections to the Medical Panel Report.

The subsequent hearing was held on April 16, 1982. At that time, present were Judge Joseph C. Foley, the Applicant-Appellant, her attorney, Mr. James R. Black, attorney for State Insurance Fund and Barco of Utah, and Timothy Allen, Administrator and Attorney for the Second Injury Fund. Called to testify about the hearing were Dr. W.E. Hess, who constituted the Medical Panel, and Dr. Craig H. McQueen, the treating physician of the Applicant-Appellant.

At the beginning of the hearing, the issue was raised as to the propriety of the hearing by Mr. Timothy Allen. Counsel for the Applicant-Appellant indicated to Judge Foley the phone call that Judge Foley had made to him, and the necessity for the hearing. At that time, Judge Foley told the attorney for the Applicant Appellant that could not possibly have happened, but finally acknowledged existence of the letter dated May 6, 1981. Further, the Administrative Law Judge indicated that in his entire

twenty years, he had only once not followed a Medical Panel Report. Judge Foley did not at that time rule on the [illegible] of the hearing, but let the hearing proceed, and testimony taken. Dr. Hess, the Medical Panel, received at the time of hearing certain tests which he had not previously had and he made his opinion. Said tests demonstrated the significant injury and damage as testified to by the treating physician.

Judge Foley after the hearing continued to refuse to issue any Order in the case. He then retired approximately 4 or 5 months later. Mr. Timothy Allen, attorney for the Second Injury Fund, was duly appointed as an Administrative Law Judge for the Industrial Commission. On January 25, 1982, Mr. Timothy Allen, formally attorney for the Second Injury Fund, issued an Order in the above entitled case adopting the Medical Panel Report. A Petition for Review was timely filed, and the Industrial Commission affirmed the Order previously entered. Applicant-Appellant than sought this timely review in the Supreme Court.

ARGUMENT

POINT I: THAT IT WAS IMPROPER FOR JUDGE FOLEY TO HAVE SAT AS ADMINISTRATIVE LAW JUDGE IN THE ABOVE CASE.

This point has two related but separate grounds. The first is that Judge Foley was disqualified, and therefore should not have heard the case. The second is that his acting as Administrative Law Judge in this case constitutes a denial of due process of the Applicant-Appellant.

These claims are made based upon the statements of Judge Foley at and during the hearing in this case. In his

Judge Foley in essence called the counsel for the Applicant-Applicant a liar- that Judge Foley would never have contacted counsel. Judge Foley went on to deny the existence of the letter which counsel had sent memorializing the phone call. He finally acknowledged the existence of the letter, but indicated he had not made the statements to counsel. Thus, for an Applicant to start off with a Judge who does not, or will not believe counsel puts the Applicant at a great disadvantage. Additionaly, the demonstration of counsel's accuracy would leave a bias and prejudice in the Judge's mind against counsel for the Applicant, and thereby to the Applicant.

The second concern over bias and prejudice statements by the Administrative Law Judge concerns his ability to waive the medical evidence in the case. Judge Foley indicated that it was his policy to affirm the Medical Panel, and in his twenty years had only once found the medical evidence as presented by treating physicians, as opposed to the Medical Panel. As such, this constitutes a bias and prejudice and leaning in favor of Medical Panel Reports, and challenges his ability to consider hearings and evidence on an Objection to a Medical Panel Report.

Various Utah statutes and constitutional provisions apply with regard to disqualification for bias and prejudice. Rule 63(b) of the Utah Rules of Civil Procedure explicitly makes bias and prejudice against a party or his attorney as a ground for disqualification. Additionally, the Utah Constitution in Article 8, Section 13 deals with the disqualification of the Judges. Although not explicitly stated, the Utah Supreme Court has held

that constitution provision requires disqualification of a judge who is bias or prejudice against a party or his counsel. See Haslam v. Morrison, 190 P.2d. 720, 114 Utah 14 (1948). Here the Judge's statements, as well as his refusal to issue an OSC demonstrate bias and prejudice. As such, this Court should reverse and remand the matter back down for a new hearing with an unbias and unprejudice Administrative Law Judge.

Both this Court and the United States Supreme Court have found and held that the due process clause of the Federal and State Constitution requires an impartial and unbiased Judge. In Vali Convalescent and Care Inst. v. Industrial Commission of Utah, 649 P.2d. 33 (Utah, 1982) a claim was made that it was denied due process because the hearing concerning increase in wages to the Industrial Commission was heard by employees of the Industrial Commission. This Court did not there hold that such was denial of due process. However, the Court stated, at page 36-7:

> "A fair trial in a fair tribunal is a basic requirement of due process." In re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955). "It has also become the prevailing view that '[m]ost of the law concerning disqualification because of interest applies with equal flow ... administrative adjudicators.'" Gibson v. Berryhill, 411 U.S. 564, 579, 93 S.Ct. 1689, 1698, 36 L.Ed.2d 488 (1973) (quoting in part K. Davis, Administrative Law Text Section 12.04 (1972). A biased decision maker is not only comstitutionally prohibited, "[b]ut our system of law has always endeavored to prevent even the probability of unfairness." In re Murchison, 349 U.S. at 136, 75 S.Ct. at 625.

In Marshall v. Jerrico, Inc., 446 U.S. 238, 100 S.Ct. 1610 (1980) the Supreme Court was concerning itself with the

Fair Labor Standards Act and the administrative hearings conducted therein. Claim was made that based upon financial interests by the agency, who was now due processed to have the hearing done by the agency and that particular employee. The Court there held that the financial interest was too remote to concern itself with the due process clause. However, the Court did discuss the due process rights to an impartial tribunal. The Court stated, at page 1613:

> The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decision-making process. See Carey v. Piphus, 435 U.S. 247, 259-262, 266-267, 98 S.Ct. 1042, 1043, 1050-1052, 1053, 1054, 55 L.Ed.2d 252, (1978). The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts of the law. See Mathews v. Eldridge, 424 U.S. 319, 344, 96 S.Ct. 893, 907, 47 L.Ed.2d 18 (1976). At the same time, it preserves both the appearance and reality of fairness, "generating the feeling, so important to a popular government, that justice has been done," Joint Anti-Fascist Committee v. McGrath, 341 U.S. 123, 172, 71 S.Ct. 624, 649, 95 L.Ed. 817 (1951) (Frankfurter, J. concurring), by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.
> The requirement of neutrality has been jealously guarded by this Court.

As indicated above, the due process concerns go to the actuality of an unbiased and impartial tribunal, as well as the

appearance thereof. In the case at bar, it is submitted that there is sufficient problems with this hearing officer that the actual due process rights of the Applicant were denied. However, based upon the statements and actions of the Administrative Law Judge Foley, it is clear that there is a strong appearance of impropriety. Such also calls for the protection of the due process clause and a reversal of this case. Thus, it is submitted that this case should be remanded for new proceedings and hearings in the Industrial Commission with a new hearing examiner.

POINT II: IT WAS IMPROPER FOR JUDGE ALLEN TO HAVE SAT AS ADMINISTRATIVE LAW JUDGE IN THE ABOVE CASE.

This issue, concerning the Judge who ultimately signed the Order in the above case, concerns itself with two grounds. The first, again, is that Judge Allen was disqualified from acting as the Administrative Law Judge. The second ground is that for him to so act constitutes a denial of due process rights of the Applicant-Appellant.

In this case, Judge Timothy Allen initially appeared as the Administrator and Attorney for the Defendant, Second Injury Fund. As such, he entered appearances, appeared and argued as the lawyer for an adverse party against this Applicant-Appellant in the hearings below. Although it was proper for him to be appointed as an Administrative Law Judge upon Judge Foley's retirement, it was improper and the denial of due process for him to act in any way as an Administrative Law Judge in this

The arguments as stated in the previous point would similiarly apply to Judge Allen. His prior representation

party, as well as his acting against this Applicant-Appellant, demonstrate bias and prejudice which should disqualify him. Additionally, there is a specific and explicit statute concerning this case. Section 78-7-1, Utah Code Annotated, 1953, as amended, states, in pertinent part:

> Except by consent of all parties, no ... judge ... shall sit or act as such in any action or proceeding:
> ... (3)When he has been attorney or counsel for either party in the action or proceeding.

As noted in Vali Convalescent, supra, and Gibson v. Berryhill, supra such concerns apply as well as to Judges as to Administrative Law Judges. Thus, it should be clear beyond per adventure that it was improper for Judge Allen to have taken any action with regard to this case. Therefore, there being no valid and proper Order, this matter should be remanded to the Industrial Commission for another hearing with a new Administrative Law Judge.

The argument in point I with regard to the due process claims apply with equal if not greater force in this instance. The idea of opposing counsel in a case, being elevated to the bench to hear the case prior to the conclusion, in then rendering the decision, shocks any sense of fair play. Further, no matter how fair or impartial the individual feels himself to be, the appearance of impropriety is just to great to allow. As stated in Marshal v. Jerrico, Inc., supra, the concern is both for the appearance and the reality of fairness. Therefore, this lack of fairness is a clear sense of injustice requires that the above matter be remanded to the Industrial Commission for a new hearing with a new Administrative Law Judge.

POINT III: THAT IT WAS AN ABUSE OF DISCRETION, ARBITRARY AND CAPRICIOUS FOR THE INDUSTIRAL COMMISSION TO HAVE ADOPTED THE MEDICAL PANEL REPORT AS OPPOSED TO THE TREATING PHYSICIAN.

The Applicant-Appellant in this case is well aware of the long line of cases which indicate that it is the sole discretion of the Industrial Commission to find the facts with respect to any disability rating, as well as the period of temporary total disability. This Applicant-Appellant, in the absence of a record with which to challenge the findings can not do so. However, there is one fact which does appear of record in this case. That were a number of relevant material tests that the Medical Panel did not have when it rendered its decision. These were, however in the possession of the treating physician Dr. McQueen who testified. Thus, both the Medical Panel and the Industrial Commission ignored pertinent information on the Applicant in determining their rating as well as the date of stabilization. As such, it constitutes and arbitrary and capricious action to not take this into account.

Claim is also made here that the lack of any record should entitle this Applicant-Appellant to a new hearing so that if there is a decision adverse to her, she can bring it for review to this Court. As indicated by way of Affidavit, as well the filing of a statement of the proceedings based upon Rule of the Utah Rules of Civil Procedure, the reporter for the hearing, Mr. Dean Ceily, was unable to find any of his notes and recordings of the hearing which caused there to be no transcript. Thus, there was no fault of the Applicant-Appellant or her

torney in the lack of record with regard to the above case. Further, there was a statement of the proceedings filed by Applicant-Appellant's counsel with regard to various matters upon which a reversal is requested. However, the factual matters concerning the medical evidence can not be ascertained. This Court should therefore reverse and remand this matter for a new hearing before a new Administrative Law Judge. Such an action, based upon the lack of a record, was done in the case of Reliance National Life Insurance Company v. Caine. 439 P.2d 283, 20 Utah.2d 427 (Utah).

CONCLUSION

It is therefore respectfully submitted that the above entitled matter should be remanded to the Industrial Commission for new hearings and proceedings with regard to the Applicant-Appellant's claim, and that said should be done before another and neutral and detached Administrative Law Judge. It is submitted that each of the six grounds asserted above, the disqualification of both Judge Foley and Judge Allen, the denial of due process to the Applicant-Appellant by Judge Foley and Judge Allen acting in the case, as well as the arbitrary and capricious findings of the Industrial Commission, and finally the lack of any transcript with regard to the medical issues, requires such an action.

DATED this ___ day of July, 1984.

ROBERTS & ROBERTS

By _____
THOM D. ROBERTS
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CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and correct copy of the foregoing Appellant's Brief was mailed to the following persons, postage pre-paid, on the 2nd day of July, 1984:

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