1984

Sarah Ann Anderson v. The Industrial Commission of Utah, Department Of Employment Security, Barco Of Utah, State Insurance Fund, And Second Injury Fund : Brief of Defendants/ Respondents Barco Of Utah & State Insurance Fund

IN THE SUPREME COURT OF THE STATE OF UTAH

SARAH ANN ANDERSON,	:	
	:	
Applicant/Appellant,	:	
	:	Case No. 19128
vs.	:	
	:	
THE INDUSTRIAL COMMISSION OF UTAH, DEPARTMENT OF EMPLOYMENT SECURITY, BARCO OF UTAH, STATE INSURANCE FUND, AND SECOND INJURY FUND,	:	
	:	
Defendants/Respondents.	:	

BRIEF OF DEFENDANTS/RESPONDENTS

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IN THE SUPREME COURT OF THE STATE OF UTAH

SARAH ANN ANDERSON, Applicant/Appellant, vs. THE INDUSTRIAL COMMISSION OF UTAH, DEPARTMENT OF EMPLOYMENT SECURITY, BARCO OF UTAH, STATE INSURANCE FUND, AND SECOND INJURY FUND, Defendants/Respondents.	:	Case No. 19128

NATURE OF THE CASE

This is a worker's compensation case involving an employee of Barco of Utah, who was injured while in the course of her employment. She claims she is entitled to compensation benefits for injuries allegedly resulting from the accident.

DISPOSITION BY THE INDUSTRIAL COMMISSION

The Administrative Law Judge entered Findings of Fact, Conclusions of Law and Order granting applicant's claim for compensation benefits, holding that Mrs. Anderson suffered a 20% loss of body function with 2.5% permanent physical impairment attributable to the industrial injury and 15% attributable to pre-existing conditions. A Motion for Review of the Order was denied by the Industrial Commission on March 15, 1983, and the Order of the Administrative Law Judge was affirmed.

RELIEF SOUGHT ON APPEAL

It is respectfully submitted that the Order, as affirmed by the Industrial Commission, should be upheld by the Supreme Court.

STATEMENT OF FACTS

On March 7, 1978, Sarah Ann Anderson was employed by Barco of Utah as a head presser of collars and uniforms manufactured at the plant. (R, 31, 117) On the day in question, she ran into the corner of a table while carrying a number of boxes, and experienced pain in her right knee as a result. (R, 33, 117) She continued to work, when an hour later she twisted her right knee as she reached down for a bundle of collars to press. (R, 34, 117) She suffered pain and notified her supervisor, who told her to continue working, so she finished the shift. (R, 34, 117, 118) After completing the shift, she saw Dr. Peter Sundwall in Kanab, who told her to stay off her leg for a few days and then allowed her to return to work. (R, 35, 36, 118) The applicant testified she was unable to return to work because of pain, so she consulted with Dr. Robert Allen, in Richfield, Utah, on March 18, 1978. Dr. Allen ordered x-rays of the knee which showed some problems. (R, 37,39,118) After showing no improvement, she was examined by Dr. Craig McQueen who eventually performed surgery on Mrs. Anderson on April 24, 1978. He removed damaged cartilage from the leg and shifted the kneecap back into position. (R, 42, 118) The applicant subsequently had two operations on her knee which were not related to her industrial injury by

rather to degenerative problems involving the patellofemoral mechanism. (R, 118)

Mrs. Anderson was referred to a medical panel, which found a 5% pre-existing permanent partial impairment for a long-standing seizure disorder, a 2.5% loss attributable to the industrial injury, and a 10% loss of body function resulting from the above-mentioned non-industrial surgery. (R, 102, 119) This results in a total of 20% loss of body function, rounded to the nearest 5%.

Dr. Boyd Holbrook also reviewed applicant's medical file at the request of the State Insurance Fund. He found that she had degenerative joint disease of the knee and indicated that the episode of March 7, 1978, was probably not a significant factor in Mrs. Anderson's problem: "It is difficult to see that the minimal amount of trauma which she reported would be a significant factor in the condition of her knee or that it would be a significant factor in precipitating the knee to the condition requiring surgery." (R, 88)

Mrs. Anderson's treating physician Dr. Craig McQueen, essentially agreed with the medical panel's evaluation with the exception that Dr. McQueen found a 25% permanent partial impairment and the medical panel gave a 20% rating. (R, 136)

ARGUMENT

POINT I

APPELLANT'S CLAIMS ARE NOT SUPPORTED BY THE RECORD AND THEREFORE CANNOT BE CONSIDERED IN THIS APPEAL.

In view of the fact that the medical panel hearing transcript was lost, it is appellant's responsibility to reconstruct the record and to provide the court with some evidence to support her position, which appellant has not done. In fact, nowhere in appellant's brief is there a reference to the record in support of any point, and respondent asserts that it is improper for the applicant to make such unsubstantiated claims. For example, Mrs. Gardner claims that it was error to adopt the findings of the medical panel as opposed to the findings of her physician, Dr. McQueen. She asserts that "Dr. McQueen had substantially greater percentage of the permanent partial disability attributable to the accident, and an additional 1 1/2 to 2 years of temporary total disability rating." (Applicant's brief at 2) She also claims that "there were a number of relevant material tests that the medical panel did not have when it rendered its decision." (Appellant's brief at 10) However, these allegations are unsubstantiated. There are means to complete the record none of which were done. The record merely recognizes that Dr. McQueen gave a 25% disability rating as opposed to the medical panel's 20% rating. (R, 136) There is nothing in the record to indicate what part of Dr. McQueen's rating was attributable to the accident or Dr. McQueen's assessment of how long Mrs. Anderson suffered

temporary total disability. It was applicant's responsibility to see that this became part of the record below. The Utah Supreme Court has made it clear that matters which are not a part of the record before the Supreme Court on appeal cannot be considered in connection with the appeal. Matter of Estate of Cliff, 587 P.2d 128 (Utah 1978). See also Corbet v. Corbet, 24 Utah 2d 378, 472 P.2d 430 (1970). Since appellant raises a number of issues that are not found in the record, and since she has made no effort to supplement the record in support of these issues, her claims must fail.

POINT II

THERE IS NO EVIDENCE THAT JUDGE FOLEY WAS BIASED AGAINST APPLICANT IN ANY WAY OR THAT THERE WAS SUBSTANTIAL OR PREJUDICIAL ERROR.

The applicant would have this court believe that it was improper for Judge Foley to hear the case below. However, as previously mentioned, she presents no evidence in support of her position. In any event, assuming the claimed facts have some foundation, appellant's contentions must fail. The law in Utah is well-established that "a judgment should not be reversed in the absence of error which is substantial and prejudicial in the sense that there would be a reasonable liklihood of a different result in the absence of such error." Arnovitz v. Tella, 27 Utah 2d 261, 495 P.2d 310, 312 (1972). See also Gilhespie v. DeJong, 520 P.2d 878 (Utah 1974). According to the Utah Rules of Civil Procedure:

No error in either the admission or the exclusion

> of evidence, and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties, is ground for granting a new trial or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not effect the substantial rights of the parties. U.R.C.P. 61.

Appellant has introduced no evidence indicating that the findings of the Administrative Law Judge or the Industrial Commission would have been any different absent the alleged prejudice of the presiding judges, therefore their decisions must stand.

The applicant asserts that Judge Foley failed to adopt her treating physician's report after he privately agreed to do so, and that because of this agreement her counsel did not request a hearing on the medical panel report. However, it would have been improper for the Judge to have privately contacted counsel for applicant out of the presence of the other attorneys involved, and the only evidence of the call is the confirmation letter written by Mr. Roberts. (R, 114) In any event, no harm resulted to Mrs. Anderson as a result of this misunderstanding, since she was still allowed a hearing on the medical panel report after Judge Foley adopted the panel's findings.

In connection with this incident, appellant claims that Judge Foley in essence called her counsel a liar. However, assuming the facts asserted to be true, all that is indicated is a misunderstanding between applicant's counsel and the Judge. Merely because the Judge did not recall such a conversation and

accompanying letter does not prove that he was inferring that Mr. Roberts was a liar, and there is no evidence to indicate that Judge Foley became biased because of this. In any event, the case law in this area indicates that the incident was harmless error. [1] For example, in Christensen v. Christensen, 18 Utah 2d 315, 422 P.2d 534 (1967), one of the parties filed an affidavit of prejudice to remove the Judge from the case, asserting, among other things that "a misunderstanding of plaintiff's counsel in a conversation had with the court" was one of the reasons for filing the affidavit. Id. at 535, 536. The Supreme Court held, with respect to this issue that "[I]t is obvious that the reason assigned has no substance, since concededly it was bottomed on misunderstanding." Id. at 536. Accordingly, a misunderstanding between Mr. Roberts and Judge Foley is not a substantial reason to remove the Judge from the case.

Another Utah case has held that, simply because the trial Judge stated that he did not believe the appellant's testimony at a previous trial does not show bias. Haslam v. Morrison, 113 Utah 14, 190 P.2d 520 (1948). So, even if Judge Foley was essentially calling Mr. Roberts a liar, the Haslam case suggests that it takes more than a Judge's disbelief of a party (or a

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[1] (In a recent Utah case, the court has recognized that "It has . . . become the prevailing view that most of the law concerning disqualification because of interest applies with equal flow to . . . administrative adjudicators." Vali Convalescent & Care Institution v. Industrial Commission, 649 P.2d 33, 37 (Utah 1982). Accordingly, the above Utah cases discussing disqualification of a Judge are applicable to the case at bar.)

party's counsel, in the instant case) to prove that the Judge is biased. Neither is it enough to claim that a Judge is "somewhat hostile," if the record supports the judgment as in the present case. In Lepasiotes v. Dinsdale, 121 Utah 359, 242 P.2d 297, (1952) the Court noted:

> From an examination of the voluminous record, it appears that there is evidence amply to sustain the findings and decree, even though the court evinced a somewhat hostile attitude towards defendants and their counsel. (Emphasis added)

Appellant is also concerned about Judge Foley's statement that it was his policy to affirm the medical panel's report. This statement by the Judge, if it was in fact said, was merely a comment on his past practice and was no indication of the Judge's ability to weigh the evidence concerning an objection to a medical panel report. The Utah court, in Haslam, supra, stated that a Judge is disqualified "only if he is actually biased and prejudiced." Haslam v. Morrison, supra, at 523. The court further noted that:

> Bias and prejudice mean a hostile feeling or spirit of ill will toward one of the litigants, or undue friendship or favoritism toward one. The fact that a judge may have an opinion as to the merits of the cause or that he has strong feelings about the type of litigation involved, does not make him biased or prejudiced. For example, a judge with strong feelings about the use of liquor or violation of the liquor laws, is not biased against a defendant charged with a violation of the liquor laws, unless he has some active personal hostility toward the defendant. Id.

In any event, applicant's claims in regard to Judge Foley must be denied because Mrs. Anderson failed to comply with

Rule 63(b) of the Utah Rules of Civil Procedure, or otherwise make a proper objection. This rule provides for a filing of an affidavit when a party believes the judge has a bias or prejudice. It states further that:

> Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be filed as soon as practicable after the case has been assigned or such bias or prejudice is known. (emphasis added)

Assuming appellant's allegations to be true, she should have filed an affidavit as soon as practicable after these biases became known at the medical panel hearing on April 16, 1982. As the record stands, no objection was made to Judge Foley's hearing the case until February 9, 1983, and this was only in the form of a Motion for Review before the Industrial Commission. (R, 139, 140) In fact, in a letter dated September 8, 1982, counsel for appellant wrote to Judge Foley requesting a decision in the case. (R, 134) Certainly appellant cannot claim that it was error for Judge Foley to have issued a ruling in this matter after she urged him to do so.

According to Utah case law, if an affidavit of prejudice is filed too late there is no violation of Rule 63(b). In Lepasiotes v. Dinsdale, 121 Utah 359, 242 P.2d 297 (1952), an affidavit of prejudice was filed and the trial court failed to disqualify himself. The Supreme Court affirmed this action, stating:

> It is to be noted that such affidavit was filed after the trial had comenced, and its contents had to do with matters alleged to have existed long before the trial and a statement by the court during the trial.

> Under these circumstances, the filing of such affidavit was untimely and hence Rule 63(b), U.R.C.P., was not violated. This is particularly true in view of the fact that the evidence supported the decree regardless of any statements made by the court. Id. at 297.

Extending this reasoning to the present case, it follows that since the applicant filed no affidavit of prejudice and didn't object to Judge Foley in any form until after the Administrative Law Judge had rendered a decision, such objection must be viewed as untimely, resulting in no violation of Rule 63(b).

POINT II

IT WAS NOT INAPPROPRIATE UNDER THE CIRCUMSTANCES FOR JUDGE ALLEN TO SIGN AN ORDER MEMORIALIZING THE ORDER ISSUED BY JUDGE FOLEY.

In reviewing the record, it appears that Judge Timothy C. Allen, who issued the Order dated January 25, 1983, was initially the attorney for defendant Second Injury Fund. There is a statutory prohibition that reads: "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 for counsel for either party in the action or proceeding." Utah Code Ann. Section 78-7-3 (1953). However, this provision is not absolute. The Utah Supreme Court has repeatedly stated that unless an error, if committed, would have such an adverse effect upon the trial that there is a reasonable liklihood that a different result would have been reached, the verdict must be sustained. See Rigtrup v. Stawbe. Water Users Ass'n., 563 P.2d 1247 (Utah 1977), and Paull v. Zion First National Bank, 18 Utah 2d 183, 417 P.2d 759 (1966). According

to the evidence, there is no reasonble liklihood that had Judge Allen not been assigned to this case, the result would have been different. Judge Allen merely put in written form what had already been decided by Judge Foley at the time of the medical panel hearing. The record indicates that at the time of the medical panel hearing, Judge Foley informed appellant that the findings of the medical panel would be admitted into evidence and that the applicant's objections would be dismissed. (R, 136) Judge Allen's order dated January 25, 1983, was in response to Mr. Robert's letter to Judge Foley requesting a decision in the case. (R, 134) As noted in Judge Allen's order:

> After hearing the testimony of the treating physician, the panel chairman did not change his opinion regarding the applicant's impairment. It appears the panel reviewed all of the medical evidence, the medical panel report should be admitted into evidence, and the objections filed by the applicant should be dismissed. It appears from the file that the applicant's counsel was advised of this fact at the termination of the hearing but so that the record may be clear an Order to that effect will be issued. (Emphasis added) (R, 136)

It is clear that it was harmless error for Judge Allen to have issued the foregoing order first of all, because he was merely making a record of Judge Foley's decision and did not exercise any discretionary function, and secondly, because there is substantial evidence to support this decision, considering the medical panel's findings and the coinciding report of Dr. Holbrook. (R, 87, 88, 97-103)

Appellant also claims that since the transcript of

the medical panel hearing was lost, she should be entitled to a new hearing. (appellant's brief at 16, 11) In support of this contention she cites Reliance National Life Insurance Company v. Caine, 20 Utah 2d 427, 439 P.2d 283 (1968). The Caine case granted a new trial because the incomplete record of the testimony did not support the trial court's findings and judgment. In the instant case, although the record is incomplete, there is sufficient evidence to support the Commission's finding in the form of medical reports and the Administrative Law Judge's Findings of Fact, Conclusions of Law and Order. Therefore, a new hearing is unnecessary.

POINT IV

THE APPLICABLE STANDARD OF REVIEW DICTATES THAT THE COMMISSION'S DECISION BE UPHELD.

According to the Utah Code Annotated, this Court may set aside the Commission's ruling only upon finding: "(1) That the Commission acted without or in excess of its powers; [or] (2) That the findings of fact do no support the award." Utah Code Ann. Section 35-1-84 (1953, as amended). In addition, this Court stated in Ogden Standard Examiner v. Industrial Commission, 663 P.2d 88 (Utah 1983):

> Our inquiry is whether the Commission's findings are "arbitrary and capricious," or "wholly without cause" or contrary to the "one inevitable conclusion from the evidence" to support them. Only then should the Commission's findings be displaced.

Martinson v. W.M. Insurance Agency, 606 P.2d 256, 258-259 (Utah 1980), also discussed the appropriate standard of review as follows:

> When the Commission remains unpersuaded on a question of fact, this Court does not disagree therewith and compel such a finding unless the evidence is such that all reasonable minds would so find, and the court would thus so rule as a matter of law. On the contrary, if there is a reasonable basis in the evidence (or lack of evidence) such that reasonable minds acting fairly thereon could remain unpersuaded, this Court does not upset the determination made.

See also: Kaiser Steel Corporation v. Monfredi, 631 P.2d 888 (Utah 1981); Clinger v. Industrial Commission, 571 P.2d 1328 (Utah 1977); Savage v. Industrial Commission, 565 P.2d 782 (Utah 1977).

The foregoing standard of review dictates that the Commission's decision be upheld. The Utah Code states that:

> The commission, upon referral of a case to it by an administrative law judge, or upon a motion being filed with it to review its own order, or an administrative law judge's supplemental order, shall review the entire record made in said case, and, in its discretion, may hold further hearings and receive further evidence, and make findings of fact and enter its award thereon. The award of the commission shall be final unless set aside by the Supreme Court as hereinafter provided.

Utah Code Ann. Section 35-1-82.54 (1953, as amended). This statute provides that the commission is to review the record and has the discretion to receive further evidence if it is offered. The applicant has already been provided with the safeguard of this three-man panel who evaluated the evidence, and their decision should stand. The final decision in any case before the Commission is made by the three Commissioners. If a Motion for Review is filed, the Findings of Fact, Conclusions of Law and Order become

advisory in nature. The Commission reached an independent decision as provided by statute and awarded significant benefits to the appellant. She is simply dissatisfied and wants more.

The facts must be interpreted by the appellate court with all inferences favorable to sustaining the trier of fact. The appellant asks this Court to reweigh the facts. The facts found by the Administrative Law Judge were based not just on what was said, but on his observations of the witnesses and should be accorded great weight. The Commission's decision was based on substantial facts and the appropriate law was applied. The holding was not arbitrary, capricious, wholly without cause, or in excess of the Commission's powers, and the evidence presented by the applicant is far from "substantial" and "uncontradicted."

It is within the discretion of the Administrative Law Judge to adopt the findings of an impartial, disinterested medical panel as opposed to the plaintiffs personal physician.

CONCLUSION

The Commission's decision should be upheld. There is nothing in the record to indicate that either Judge Foley or Judge Allen harbored any kind of bias or prejudice against the applicant or her attorney. That prejudice, if any, was cured by the Commission's review of the case. No claim is made that the Commissioners were biased against the appellant. More importantly, there is no evidence that indicates a different result would have been reached had another Administrative law Judge heard the case at bar.

DATED THIS 3 Day of August, 1984.

BLACK & MOORE

BY James R. Black
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Attorney for Respondent

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing BRIEF was sent this 3rd Day of August, 1984, to the following:

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