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 Reply Brief

IN THE SUPREME COURT FOR 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

APPELLANT'S REPLY BRIEF

APPEAL from an Order of the Industrial Commission of Utah.

THOM D. ROBERTS of
ROBERTS & ROBERTS
10 West 300 South, Ste. 400
Salt Lake City, UT 84101

ATTORNEY FOR APPLICANT - APPELLANT

FRANK NELSON
236 State Capitol Building
Salt Lake City, UT 84114

ATTORNEY FOR RESPONDENT INDUSTRIAL COMMISSION OF UTAH

JAMES R. BLACK
261 East 300 South, Ste. 300
Salt Lake City, UT 84111

ATTORNEY FOR RESPONDENT STATE INSURANCE FUND
AND BARCO OF UTAH

GILBERT MARTINEZ
350 East 500 South
Salt Lake City, UT 84111

ATTORNEY FOR RESPONDENT SECOND INJURY FUND

IN THE SUPREME COURT FOR 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

APPELLANT'S REPLY BRIEF

APPEAL from an Order of the Industrial Commission of Utah.

THOM D. ROBERTS of
ROBERTS & ROBERTS
10 West 300 South, Ste. 400
Salt Lake City, UT 84101

ATTORNEY FOR APPLICANT - APPELLANT

FRANK NELSON
236 State Capitol Building
Salt Lake City, UT 84114

ATTORNEY FOR RESPONDENT INDUSTRIAL COMMISSION OF UTAH

JAMES R. BLACK
261 East 300 South, Ste. 300
Salt Lake City, UT 84111

ATTORNEY FOR RESPONDENT STATE INSURANCE FUND
AND BARCO OF UTAH

GILBERT MARTINEZ
350 East 500 South
Salt Lake City, UT 84111

ATTORNEY FOR RESPONDENT SECOND INJURY FUND

TABLE OF CONTENTS

AUTHORITIES CITED

CASES

TABLE OF CONTENTS
(continued)

ANNOTATIONS

IN THE SUPREME COURT FOR THE

STATE OF UTAH

SARAH ANN ANDERSON,	)	
	)	
Applicant- Appellant,	)	
	)	
vs.	)	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 REPLY BRIEF

The Applicant-Appellant, Sarah Ann Anderson, hereby submits the following Brief in reply to the Brief of Defendants-Respondents, Barco of Utah and State Insurance Fund.

ARGUMENT

POINT I: THAT THE PROBLEMS WITH THE RECORD REQUIRE THAT THIS CASE BE REMANDED FOR A NEW HEARING ON THE APPLICANT - APPELLANT'S OBJECTION TO THE MEDICAL PANEL REPORT.

There are a number of problems with regard to the record in this case, which the Applicant-Appellant asserts should cause this case to be remanded for new proceedings. As mentioned in the Appellant's Brief, one of the main problems is

> "Defendant has done everything that can reasonably be expected in order to perfect his appeal. Under the present state of things, his contentions are unreviewable. To deny defendant a new trial would be to deny him his right of appeal guaranteed by the New Mexico Constitution."

In arriving at its conclusion, the Court stated, at page 1125:

> "In determining whether a new trial is to be granted for inability to produce a transcript, the courts have weighed three factors--whether the appellant has complied with all the pro-edural requirements in order to perfect his appeal, whether the inability to obtain the transcript is without fault on the part of the appellant and whether a substitute or alternative form of record may be had."

Although these three requirements may in some cases be overly burdensome to the rights of appellants, in the present case the Applicant-Appellant would clearly comply with these three factors. The Writ of Review was timely and properly filed, and the procedural steps necessary to be taken by the Applicant-Appellant were taken. With regard to fault, the Applicant-Appellant did not learn of the lack of any transcript until after the case was appealed, and that one of the parties had indicated that such was the case. No fault can be attributed to any actions of the Applicant-Appellant.

With regard to the last factor, a complete reconstruction of the record of the proceeding would be next to impossible

that would in essence require a complete new trial. This is complicated by the fact that the Order in this case was signed and issued by Mr. Timothy Allen, who was the attorney for one of the parties previously. The original judge, Judge Foley, has since retired and no longer has any authority. Thus, there is no reviewing agency who can determine the appropriateness of a substituted record as the case now sits. Additionally, there would have been the cross-examination of the Medical Panel, and the confrontation of them of medical evidence and tests which they had previously not had in their possession. Thus, there is no substitute or alternative form of the record below which can be put together and subscribed to at this time.

Many courts and jurisdictions have granted a new trial as a matter of right due to the inability of the providing of a record to allow a meaningful review of the proceedings below. This is especially so when there is no fault or attributing cause to the Appellant. However, even if this Court should not adopt such a rule, at least the Court should grant a new trial in the circumstances set forth in the State vs. Moore. Therefore, this case falling within the confines of the analysis of State vs. Moore, a new trial should be granted.

There are other problems with regard to the current state of the record. One of the claims of the Defendants in their

Brief is that there is no evidence in the record which does so than support the ruling by the Commission. However, for some unknown reason, the reports of Dr. McQueen, the treating physician, which were supplied to the Commission are not in the file. See specifically Letter of Counsel, indicating enclosed reports, which is in the record, but the reports are not. See Record at page 116.

There are two further references in the record to matters which should appear in the record, but do not. In the Order signed by Judge Allen, Record at page 136, Judge Allen stated: "It appears from the file that the Applicant's counsel was advised of this fact at the termination of the hearing but so the record may be cleared an Order to that effect will issue." However, although the Writ of Review directed the Industrial Commission to forward on to this Court transcripts of all proceedings, and the entire record of all other matters in the file in this case, this record contains nothing which would support that statement by Judge Allen.

Another curiosity in the record in this case is pointed out by the Order Denying the Motion for Review done by the entire Industrial Commission, located at page 142 of the Record. In the next-to-last paragraph, the Commission indicates that "has reviewed the file and transcript in the above-entitled

case." However, there never was a transcript made of the hearing on the Objections to the Medical Panel Report. Further, if the record in this case constitutes the entire file as reviewed by the Commission, the safeguards of the prior review, as well as the independant decision of the Commission, as stated by the Defendants in their Brief, did not obtain.

In this case the Applicant-Appellant is seeking compensation benefits of both permanent and partial nature, as well as temporary total disability benefits. Additionally, there are substantial medical bills involved. The dispute between the doctors concerns itself with the injury to the knee of the Applicant-Appellant. Dr. Hess, who constituted the Medical Panel, was of the opinion that most of the problem with the Applicant-Appellant's knee since the accident was "chondromalacia patella with degenerative medial and lateral menisci secondary to subluxating patellae," not industrial, and not aggravated by the industrial injury. He therefore felt that the two subsequent surgeries on the knee were not related to an industrial injury. He also set temporary total as approximately three months after the initial surgery, being based upon the average that an ordinary person would encounter from the injury. Dr. McQueen, to the contrary, was of the opinion that the industrial injury was a substantial aggravating circumstance to the knee problems,

and therefore all of the problems after the accident were related to the industrial injury. As such, there would be an additional two years of temporary total disability, additional payments for the 10% disability attributable to the chondromalacia, and coverage for the medical expenses for the operations incurred by the Applicant-Appellant.

Therefore, in order for there to be a full resolution of the issues, as well as a meaningful review of the Industrial Commission's resolutions of factual issues and medical opinions involved, this Court should remand the matter back to the Industrial Commission for a new hearing on Applicant-Appellant's Objection to the Medical Panel Report.

POINT II: THAT THERE ARE SUFFICIENT CONCERNS WITH REGARD TO JUDGE FOLEY THAT A NEW TRIAL SHOULD BE GRANTED

It is admitted by all of the parties that certain actions taken by Judge Foley were improper. It is the Applicant-Appellant's claims that a new trial and hearing should be granted based upon his conduct. These arguments are set forth in Applicant-Appellant's Brief and concern actual bias and the avoiding of the appearance of bias.

As stated in Defendants' Brief, at page 6, it was improper for Judge Foley to have contacted the attorney for Applicant-Appellant concerning the case, and his intentions

regard to ruling. Further, Judge Foley did not rule as he indicated he was going to do, which indication was forwarded by counsel to the other parties. Then, at the time of the hearing, he denied that he had ever made the call, and told counsel that he was incorrect for so stating. Further, he indicated that he had a practice of never going against the Medical Panel Report. Finally, he refused to make any ruling, despite repeated requests by counsel for the Applicant-Appellant.

The cases cited by the Defendant in its Brief do not compel the conclusion that a new trial should not be granted. In Christiansen vs. Christiansen, 422 P. 2d 534, 18 Utah 2d 315 (1967) the issue was the sufficiency of the Affidavit of Bias which had been filed. Further, of the two grounds cited, one the Court held that the lower Court statement concerning rejecting the Stipulation of Divorce Action was proper, and second, concerning a misunderstanding with Plaintiff's counsel, such was not a fact or reason specifically stated to show any bias or prejudice. In the case of bar, there were explicit statements which showed more than a mere misunderstanding between counsel and the Judge. There was a specific denial of a conversation to which only the Judge and counsel were privy. This goes directly to the creditability of counsel for the Applicant-Appellant, and thereby would shade into any argument or position taken by the

Applicant-Appellant.

The other case cited by the Defendants, Lepasiotes vs. Dinsdale et al, 242 P. 2d 297, 121 Utah 359 (1952), also does not dictate the affirmance of the actions of Judge Foley and the Industrial Commission. In Lepasiotes, supra, this Court affirms a judgment where there was ample evidence to sustain the Findings and Decree, even though "the court evinced a somewhat hostile attitute towards the Defendants and their counsel." The case was mainly decided upon the timeliness of the filing of an Affidavit of Prejudice. The matters raised in the Affidavit, which was filed after the trial had begun, had to do with matters existing and known for a long time prior to the commencement of the trial.

The Defendants in their Brief, at pages 9 and 10, quote from Lepasiotes, supra. However, the quoted portion of the case does not fully explain the point of the case, nor its ruling. The Court continued, after that quoted by the Defendants, at page 297, 121 Utah, page 361:

> "This does not imply that had the affidavit been timely made a decree adverse to the party who claimed prejudice would nevertheless be sustained if there was evidence to support it. There may be cases where under the evidence no conclusion could be reached other than against the party who claims prejudice. In such cases, we could hold that prejudice, if any, could not have been in any part responsible for the judgment. But in other

> cases where two or more views or interpretations of the evidence or the credibility or lack of credibility accorded to witnesses might turn the case one way or the other, there is present the possibility that the prejudice of the judge, if any, could have influenced his judgment. In such cases we might, if the affidavit were timely filed or even if it were not, desire to reverse the case in order to avoid any possibility that prejudice influenced the decision."

The case at bar squarely fits into the caveat stated by the Court to its narrow ruling in Lepasiotes. The administrative law Judge Foley had to choose between one of two opinions, both by competent doctors. The Judge could have found in accordance with either one, based upon their demeanor, the pursuasiveness of their credentials, or their possession and familiarity with all of the relevent information and evidence. Here there is a possibility of prejudice, and the administrative law judge found in accordance with his expressed bias--in favor of Medical Panels and against the position advocated by the attorney for the Applicant-Appellant.

The Defendants also assert in essence three grounds for denying a new hearing based upon the bias and prejudice of the administrative law judge. These are procedural or affirmative type defenses. The first concerns itself with the timeliness of the claim of bias, citing Lepasiotes. However, here there was no knowledge or notice prior to the hearing of any

bias or prejudice on behalf of Judge Foley. Such was not discovered until the start of the hearing. Apparently, the Defendents would have the Applicant-Appellant make the claim after the hearing had commenced, which would still, in theory, put Appli- cant-Appellant in the bar stated in Lepasiotes. But at the point of discovery, which was part way through the hearing, it would appear that such a claim should best be raise in a forum other than the particular hearing in progress.

The next affirmative defense to the request for a new trial is in the nature of estoppel--that since counsel for the Applicant requested a ruling, Applicant-Appellant cannot now claim error. See Brief of Defendant, page 9. However, until such time as there was a ruling, there was no issue to be reviewed. Any claim at that point would be interlocutory, and the procedural requirements require an Order to be made and entered before a review can be had. Further, as it is noted i the record, Judge Foley never did issue a ruling or a decision in this case.

The final contention made is that any error was harmless. This was stated in the Brief of the Defendants at page 6, that since there was a hearing, there was no error. However, this claim goes to the heart of the issue of fairne and efficacy of the hearing that was had. As noted in Vali

Convalescent and Care Institute vs. Industrial Commission of Utah, 649 P. 2d 33 (Utah 1982) and Marshall vs. Jerrico, Inc., 446 U.S. 238, 100 S. Ct. 1610 (1980), cited and quoted in Appellant's Brief at pages 6 and 7, due process requires the actuality of an unbiased and impartial tribunal, as well as the appearance of one.

Therefore, as stated here and in Appellant's Brief, there is sufficient concern and evidence of bias and prejudice on the part of Judge Foley, or at least the appearance of such, that this Court should remand this case back down to the Industrial Commission for a full and fair hearing before a new administrative law judge.

POINT III: THAT THE IMPROPRIETY OF JUDGE ALLEN RULING IN THIS CASE REQUIRES A REMAND OF THESE PROCEEDINGS.

It appears to be the Defendants' claim that the action of Judge Allen entering the Order in this case is either merely a ministerial act or is harmless, and remand should not be had. However, the claim for a ministerial act is nowhere supported in the record. As stated by Judge Allen in his Order, record page 136, and quoted in the Brief of the Defendant on page 11:

> "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."

However, the Writ of Review in this case required the Industrial Commission to forward to this Court the entire file. Nowhere in that record can any indication be found that Judge Foley advised Applicant's counsel of his ruling, let alone attempted in any manner to issue a ruling. Further, of course, Judge Allen entered certain in essence findings in his Order, concerning what happened and transpired at the hearing. These findings and statements are not ministrial, and in fact have fixed and declared the rights of this Applicant-Appellant as well as constitute the Order to be reviewed.

If this were a case where the full and complete record of the proceedings was available, and where the judge had prepared specific findings and conclusions and an Order, but through some disability had not signed them, the signing of said Order might be a ministrial act. But it is not a ministrial act to state what happened, to set and determine rights where there is no clear indication of the judge's intent and ruling.

The claim that any error would be harmless raises again the issue as to the lack of record and the bias and prejudice of Judge Foley. It leaves unanswered the reason why Judge Foley refused for over six months, not withstanding a written request, to issue a ruling or an Order in this case. Further, it is clearly wrong and a specific statutory requirement

that no attorney for any party in a proceeding shall sit or act as a judge in the case. See Section 78-7-1, Utah Code Annotated, 1953, as amended.

In the case of Amos Treat and Company vs. Securities and Exchange Commission, 306 F. 2d 260 (D. C. Cir. Ct., 1962) a Mr. Cullen had been director of the Securities and Exchange Commission's Division of Corporate Finance and was responsible for the initiation, conduct and supervision of proceedings. Mr. Cullen held that position while an informal investigation was in progress against the Plaintiff in the case. Subsequently, Mr. Cullen became a member of the Commission and ultimately sat on a panel which voted to initiate action against the Plaintiffs. The Court there upheld the jurisdiction of the Court to resolve the issue, and directed that there be no proceedings or matters initiated wherein Mr. Cullen could participate as a Commission member. In arriving at that conclusion, the Court quoted from Trans World Airlines vs. Civil Aeronautics Board, 254 F. 2d 90 (D. C. Cir. Ct., 1958) at page 91:.

> "The fundamental requirements of fairness in the performance of such functions require at least that one who participates in a case on behalf of any party, whether actively or merely formally by being on pleadings or briefs, take no part in the decision of that case by any tribunal on which he may thereafter sit."

Here again is that dual concern with regard to actual fairness and propriety, as well as the appearance of fairness and propriety. On this point, both grounds dictate that Judge Allen's Order be set aside and ruled improper, which requires that this case be remanded back for a new hearing on the Applicant-Appellant's Objection to the Medical Panel Report.

POINT IV: THAT THE "INDEPENDANT DECISION" AND EVALUATION BY THE INDUSTRIAL COMMISSION AS A BODY IS NOT SUFFICIENT IN THIS CASE.

On pages 13 and 14 of the Defendants' Brief, great issue is taken with regard to this Applicant having been provided with the safeguard of a three-man panel of the Industrial Commission who evaluated the evidence and made an independant decision thereon. Further, the Defendants indicated that the Findings, Conclusion and Order are advisory on said Commission when a Motion for Review is filed. That safeguard having occurred, the award should be firm.

We at this point cannot determine what, if anything, the Industrial Commission reviewed with regard to this case. The court reporter was unable to find any of his notes or recordings with regard to the hearing in question, and therefore could not produce a transcript. Presumably, no independant transcript was made for the Commission, and thus they have not seen a transcript of the proceedings, let alone viewed the wit-

nesses and the evidence presented. The basis of their decision must somehow be gleaned from the record on appeal, as the Industrial Commission, by writ, was directed to provide the entire file in this case. A review of this record, no matter how thoroughly done, cannot qualify as an independant review such as to alleviate, make groundless, or right any of the objections to the proceedings and prior findings.

This claim by the Defendants leaves untouched and unanswered the prior problems of the conduct of Judge Foley and Judge Allen, let alone the appearance of fairness in this case. Additionally, this Applicant-Appellant has the right to have the actions that occurred in the Industrial Commission reviewed for their lawfulness. See Section 35-1-83, U.C.A., 1953, as amended. There is still no complete record, let alone transcript, in order for there to be a meaningful review as contemplated in the statutes, as well that dictated in the federal and state Constitutions.

CONCLUSION

It is therefore respectfully submitted that based upon the lack of a full and complete record herein, and based upon that which does appear of recored in this case, that this Court should vacate the Order of Judge Allen, Judge Foley and the

Industrial Commission, and remand this matter back down to the Industrial Commission for a hearing by a neutral and detached administrative law judge on the issue of the Objection to the Medical Panel Report.

DATED this _____ day of September, 1984.

THOM D. ROBERTS of
ROBERTS & ROBERTS
Attorney for Applicant-Appellant

CERTIFICATE OF MAILING

I hereby certify that two true and correct copies of the foregoing Appellant's Reply Brief were mailed, postage prepai to the following:

Frank Nelson
Attorney at Law
236 State Capitol Building
Salt Lake City, UT 84114

James R. Black
Attorney at Law
261 East 300 Suth, Ste. 300
Salt Lake City, UT 84111

Gilbert Martinez
Attorney at Law
350 East 500 South
Salt Lake City, UT 84111

on this _____ day of September, 1984.