

1992

James Turcsanski v. Salt Lake City Corporation, and Board of Review of the Utah State Industrial Commission : Reply Brief

Utah Court of Appeals

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DOCKET NO. 920716-CA

BEFORE THE UTAH COURT OF APPEALS

JAMES TURCSANSKI,
Petitioner/Applicant

vs.

SALT LAKE CITY CORPORATION,
and BOARD OF REVIEW OF THE
UTAH STATE INDUSTRIAL
COMMISSION

Respondent/Defendant.

Case No. 920716-CA

Priority No. 7

REPLY BRIEF OF PETITIONER

REPLY BRIEF OF INJURED WORKER
SEEKING REVIEW OF INDUSTRIAL
COMMISSION RULING DENYING WORKERS
COMPENSATION ON THE GROUND THAT THE
INJURY WAS NOT WORK RELATED

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None

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UTAH STATE INDUSTRIAL)	
COMMISSION)	
)	
Respondent/Defendant.)	Priority No. 7
)	

STATEMENT CLARIFYING MATERIAL FACTS

Petitioner possesses the good faith belief that he has not mis-represented the tactical decision made by Assistant City Attorney Nakamura in his September 8, 1992 submission herein to concede that it was equally probable that the back injury of Petitioner did flow from his industrial accident. True, this concession does appear in the Arguments section of that submission. However, it also does follow a marshaling of the medical evidence by Mr. Nakamura, and Petitioner is unaware of a mandatory, or even more commonly used procedure for acknowledging the strengths in the other sides case than to do so in argument. Also, if Respondent did not believe this case to present a situation of equal probability of medical causation, it certainly need not have used that phrase at all.

Petitioner is less convinced than Respondent that there is some legal distinction, significant to this case, between saying that medical causation is "at least" equally probable, or that it is "no more than" equally probable. One statement in the Brief of Respondent, though, certainly indicates that the thought process of

counsel for Respondent back in September of 1992 was exactly what his literal words seem to say. "The City was arguing that minimally, the medical evidence demonstrated that it was equally probable a non-industrial exertion caused petitioner's back and neck problems." (Brief, at P.25 emphasis added). The position of Petitioner is that the original concession of Respondent was that the evidence shows equal probability of medical causation in this case at the minimum, rather than at the maximum, and the Brief of Respondent does little, if anything, to dispel this conclusion.

On the subject of medical causation, the same doctor's reports that say that Petitioner could not have broken his back in his accident without experiencing serious, immediate pain also say that the condition of Petitioner need not have come from a fracture at all (See the reports of Doctors Anden and Stuart.) Further, they say that one of the possible causes of exactly the condition that this Petitioner does have is the work accident that he did suffer.

Dr. James Antinori is the physician who treated Petitioner at the Holy Cross Hospital Emergency Room, immediately after his accident. Later, in 1991, Dr. Antinori thought it probable enough that the accident that he treated the injuries of could also have damaged Petitioner's back that he sent him to a specialist for evaluation. Respondent agrees that all of this happened just this way. Respondent also agrees that this specialist was Dr. Cory Anden, and that she concluded in December of 1991 that the condition that Petitioner was then suffering from probably had a direct cause in his earlier industrial accident. Subsequently,

Dr. Anden issued a second report that repudiated her first one, at least with respect to its dispositive opinion. However, the second report does not say that Petitioner lied to her during the first interview, or that she was less than completely professional in obtaining from him the information required to support her first conclusion, so the second report cannot have completely invalidated the first report.

ARGUMENT

Point I.

RESPONDENT IS ARGUING IN FAVOR OF A
DIFFERENT DECISION THAN THE ONE
THAT THE INDUSTRIAL COMMISSION
ACTUALLY WROTE

Since Respondent claims to easily win this case on the "U.C.A. 35-1-99 issue", Petitioner will put that argument to rest first. Petitioner and Respondent will probably agree that the text of the "Denial of Motion for Review" is not a model of clarity. However, Petitioner does not believe that it is quite as confusing as Respondent appears to find it, either.

The Administrative Law Judge actually did make as much of the application of Section 35-1-99 to the facts of this case as Respondent claims. However, there is really no way to say that the Commission based its opinion on that part of the decision being reviewed by it. The Commission explicitly affirmed only the "order" of the Administrative Law Judge, and made no mention of the reasoning behind the first order in its own Order. Further, for the Commission to have decided the same way that the Administrative

Law Judge did (and that Respondent claims that the Commission did) it would have had to adopt that decision as its own, or, at the very least, to closely track the reasoning thereof in its own decision. This the Commission did not do. Rather, it only said "This reliance on that statute of limitations to bar applicant from recovery was an additional reason to the lack of medical causation". Obviously, merely trying to restate what happened below is far from the same thing as openly and clearly approving of it.

Though it would obviously be stretching to do so, Petitioner realized that it was not impossible that Respondent would claim to have won this matter below on the Section 35-1-99 argument. Of course, saying "we find that this claim is barred by application of the one year statute of limitations of Section 35-1-99", does not take 6 pages, and would be the most natural way to say exactly that. However, even though the Commission did not do that, Petitioner resolved not to leave anything to chance.

At P. 8-9 of the Brief of Petitioner is a discussion of the merits of the Section 35-1-99 issue. Fitting this into the Brief was not easy, because figuring out how Section 35-1-99 fits into the decision being appealed, if at all, was not easy. However, it is clear that Utah law does not prevent the claim of Petitioner from even being heard, and proving that this case could go forward at all is a reasonable part of arguing that it should have been allowed to proceed on to the medical panel stage. This, then is what Petitioner did. What is not reasonable is to claim that an

argument that covers nearly two pages just doesn't exist. To prevail here, then, Respondent will need this Court to agree that a decision that doesn't exist does, and that an argument that clearly does exist doesn't.

Point II.

THE ENTIRE ANALYSIS OF THE PROPRIETY OF THE
PREPONDERANCE OF THE EVIDENCE FINDING
CHANGED AFTER RESPONDENT MADE ITS
"EQUALLY PROBABLE" CONCESSION

Petitioner contends that the Industrial Commission did not know what to do after Respondent admitted that the respective positions of the two sides had approximately equal strength. Putting the matter perhaps a bit simply, the parties were tied at 0% to 0% when the case began, and the one to reach at least 51% of the evidence "preponderance" would be declared the winner. After Respondent conceded that the facts were equally strong for both cases, the parties were tied at 50% to 50%. The Industrial commission, though, seems to have only seen the fact that the parties were still tied, and to have decided that Petitioner still needed to meet his original burden. In reality, the law should be that Petitioner should have needed only enough additional evidence (on top of the evidence relied upon by Respondent in making the decision to offer its concession, i.e. the second report of Dr. Cory Anden and the report of Dr. Stuart) at that point in time to tip the scale in his favor. Going from 50% of the evidence to 51% is far easier than starting from scratch, and the decision of the Industrial Commission simply reflects no understanding of this very basic proposition.

Specifically, the Administrative Law Judge stated "In short, there is simply no credible medical or factual evidence that the back pain is related to the 1988 fall." (at P. 6, emphasis added) Later, and in stark contrast to this, Mr. Nakamura made his "equally probable" concession; i.e. agreed that this case was a far closer call than the Administrative Law Judge had found it to be. In spite of this, the Commission stated "We conclude that there is substantial evidence in the file to support the Administrative Law Judge's decision when the entire record is considered." (at P.4). The basic contention of Petitioner is that the Commission was not entitled to support the decision of the Administrative Law Judge any more fully than the attorney for the Respondent did. This is one of the those times when a party should be bound by the strategy of its lawyer. The Commission did not acknowledge this case to be a very close one, after the other side had already done that, and start its review from that perspective. Accordingly, as the Commission clearly did not use the correct standard of review in deciding this matter, this case needs to be remanded for further consideration.

CONCLUSION

The Industrial Commission did not dismiss this claim as having been filed in violation of the time limit of U.C.A. 35-1-99, and such a ruling would not have been in compliance with the law on

that subject, anyway. Rather, remand for further consideration is appropriate herein because the Commission did not realize that Respondent had relieved Petitioner of the major portion of his burden of proof.

Respectfully submitted this 14 day of ~~May~~^{June}, 1993.

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CERTIFICATE OF MAILING

I certify I mailed ~~2~~³ copies of the foregoing to:

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on this 14 day of May, 1993.

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