

1994

John G. Kane v. Board of Review of the Industrial Commission of Utah, Department of Employment Security, and Farmers Distributing Incorporated : Reply Brief

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

John G. Kane; Claimant- Petitioner, Pro Se.

K. Allan Zabel; Attorney for Respondent.

Recommended Citation

Reply Brief, *Kane v. Board of Review*, No. 940376 (Utah Court of Appeals, 1994).

https://digitalcommons.law.byu.edu/byu_ca1/6026

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at

http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH COURT OF APPEALS

JOHN G. KANE

Petitioner,

vs

Case No. 940376-CA

**BOARD OF REVIEW OF THE INDUSTRIAL
COMMISSION OF UTAH, DEPARTMENT
OF EMPLOYMENT SECURITY, and
FARMERS DISTRIBUTING INCORPORATED**

Priority No 7

Respondents,

REPLY TO BRIEF OF RESPONDENTS

**Petition for Review of a Decision of the
Board of Review of the Industrial Commission,
Department of Employment Security,
State of Utah**

JOHN G. KANE
P. O. Box 2792
Midland, TX 79702-2792

Telephone: (915) 570-9563

Claimant - Petitioner, Pro se

K. ALLAN ZABEL - 3598
140 East 300 South
P O Box 45244
Salt Lake City, Utah
84145-0244
Telephone: (801) 536-7680

Attorney for Respondent
Board of Review of the
Industrial Commission of
Utah, Department of
Employment Security

**T OF APPEALS
BRIEF**

UTAH
DEPARTMENT
KPU
50
A10
DOCKET NO.

940376

FILED

NOV 28 1994

COURT OF APPEALS

TABLE OF CONTENTS

REBUTTAL OF RESPONDENT'S BRIEF 1

APPENDIX A (REFENCES TO THE RECORD) 6

APPENDIX B (ORDERS BY THE STATE OF TEXAS). 8

REBUTTAL OF POINTS I - III

This claim would never have reached this point except for the actions of the Industrial Commission of Utah, Department of Employment Security. Their error was in their denial of the Petitioner his rights in the initial filing of his unemployment claim.

As stated in the initial Brief, we questioned the fact that the initial claim by the claimant requested a interview concerning his separation, which was never scheduled nor granted. At that time, with the information that would have been given to the Petitioner, and the information that would have been able to have been acquired , this claim would not have been extended to this position.

With regards to the extra hours that the employer alleges to have been forced to work, due to the period that the Mr. Kane was gone, would have been cleared-up through the information that would have been supplied by Mrs. Darlene Bierlie, as she would still have been available at that time. It was given as evidence that Mr. Graff was not forced to work the alleged 100 hours, and there were no temporary help acquired until the second week of January. In addition, Mr. Kane was called to the St. George Employment Office, to be sent on a job interview on the 18th of January, the company was, Farmers Distributing, Inc., needless to say, he refused that appointment. The fact is that Mrs. Bierlie left Farmers Distributing employ the 15th of February.

The supervisor who stated that there were "numerous" tasks unfinished, the only possible response to that is that the tasks must have increased following the 1st of January. The

only major task remaining was the printing of the W-2 forms, which are not due until the end of January, and which in fact could not be finished until the payroll of the 5th of January was completed, and as pointed out previously, Mrs. Bierlie was more than capable of doing the payroll, which is what she normally did under Mr. Kanes supervision and, that is what would have occurred up to Wednesday, January 2, leaving only the 3rd and 4th for any other tasks. This has been stated and restated and it seems that no one listens, that the only lose in time was Thursday and Friday. Upon the return of Mr. Kane on the 7th of January, there was more than enough time available for the printing of the W-2 forms. This can be verified contacting any bookkeeper or accountant.

As the council for the Respondent has pointed out clearly, there is the item of health that was brought up at a late date. {Page 14} We wish to address this item in depth at this time.

In addition to the testimony that Mrs. Bierlie would have been able to give, concerning the above matter of the extra hours, she would also have been able to testify as to the health of Mr. Kane. The Petitioner was not aware of all of the health aspects of his unemployment claim at the time of the initial filing, and additional information has come to his attention in a most distressful manner during the past three months.

We shall give some background information concerning the health of Mr. Kane, which is known by Mr. Graff and Farmers Distributing, Inc.

Mr. Kane has Crohn's disease, which he has had diagnosed since January, 1990. This has resulted in a colon resection in May of 1990, and treatment by Prednisone. The disease may not in itself be a factor, but the treatment definitely is. Prednisone, is a steroid, that

has several very bad side effects, these being changes in personality, bone & joint dissolving, though the lack of oxygen, diabetes, nervous disorders, and vision impairment, to name those that have affected Mr. Kane.

In November, 1992, Mr. Kane had his left hip operated on, but do to the pressures at work, was expected back to work on the day he was discharged from the hospital. This was 3 days following the surgery.

In June, 1993, Mr. Kane suffered a "black-out" at the office of Farmers Distributing, and had to go home for the remainder of the day. This was followed by another during July, when he broke his eye glasses and cut his face. Mr. Tom Graff, Mr. Greg Graff, Mr. Bill Lundin, and Mrs. Darlene Bierlie were all aware of these occurrences. This was followed by another at his home, following which he arranged an appointment with Dr. Kerry Stratford. The only out come was that Mr. Kane had a heart mummer. The causes of the occurrences were not determined.

On November 11, 1993, Mr. Kane had surgery on his right hip, this being the same as that which was required on his left, the year earlier. The procedure is called insertion of a metal nail. Both surgeries were preformed by Dr. Anderson of St. George, Utah.

Following the second surgery, Mr. Kane was again required to return to work immediately, even though Dr. Anderson suggested that he take at least two weeks for recuperation.

At this time, the Crohn's started to cause Mr. Kane additional pain and difficulty, this being the first weeks of December, and he was directed to Dr. Hixson of St. George, who placed him on 30 mg. of Prednisone and told to rest and avoid stress.

This was all connected on the 26th of May, 1994, when Mr. Kane suffered a Grand Moll seizure, resulting in his hospitalization for 10 days, and though a review of his medical records by Dr. John Foster, Jr. of Midland, Texas, it was considered that Mr. Kane has suffered from a variant of Epilepsy for a considerable period of time. He was prescribed 800 mg. of Dilantin. At this time, it was decided that the incidents of "black-outs", were in fact seizures

In addition, at this time, he was also suffering a relapse of the Crohns, and under the treatment of Dr. Sarva of Midland, was prescribed to go back to taking Prednisone, at 10 mg . daily. On the 23rd of July, following increases in his Prednisone prescription, and due to the stress of being unemployed, Mr. Kane attempted suicide, and was placed in the Glenwood Mental Health facility at Midland for treatment and observation for the following 12 days. During that time, his Prednisone was decreased to 10 mg. and has remained at that level. He has had no further difficulty, except that he has now been diagnosed with diabetes and is still being treated for his seizures. The State of Texas revoked his driving privileges, due to his health on the 13th of October, {Item A}, and he currently has a claim for disability filed with the Social Security Service, which is currently pending, under the assistance of Chris McCormack, attorney.

Under the treatment of Prednisone, and in conjuncture with the stress that was placed upon him, both by his employer and the fact of his family leaving, his actions were "reasonable".

We assert that all of the actions of the week prior to the 1st of January, in fact the actions of the Petitioner prior to this date, November 22, 1994, and those after, that have been or

will be under the influence of Prednisone, must be looked at in a very special manner.

As reasonable to him as was the action of planning the shooting of the neighbors car, because it made too much noise, prior to the taking of his own life. These are recorded in the investigation by the Midland Police Department.


The Petitioner would most assuredly have had most of this information available to the Department of Employment Security, if they would have followed their own guidelines and had granted him the interview that he requested.

We have given the names of all parties that have knowledge of the Petitioner, and who can give any information. The only person, and the most important, is Darlene Bierlie, who is believed to be somewhere in the San Antonio area, but her exact location is unknown.

CONCLUSION

We have proven that the Claimant's decisions were both reasonable and equitable to him as he was able to understand. Also, due to the failure of the Industrial Commission of Utah, Department of Employment Security to grant the Claimant his legal rights in the first place, and depriving him of the opportunity to the interview which he had requested, the decision of the Board of Review should be overturned.

Respectfully submitted this 25th day of **November, 1994.**



John G. Kane
Petitioner

CERTIFICATE OF MAILING

I hereby certify that I mailed a two (2) true and correct copies of the foregoing Brief by depositing the same with Federal Express, postage pre-paid to the following on this date.

K. Allan Zabel #3598

Attorney for Respondents

Board of Review of the Industrial

Commission of Utah, Department of

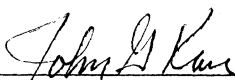
Employment Security

140 East 300 South

P. O. Box 11600

Salt Lake City, Utah 84147

Dated this 25th day of November, 1994



John G. Kane



Utah Department of Employment Security
CLAIMANT STATEMENT OF JOB DISCHARGE
SECOND PAGE

Name JOHN G. KANE SS # 482-52-1062

USE THE OTHER SIDE IF YOU NEED MORE SPACE FOR YOUR ANSWERS.

5. If you were discharged for violating a company policy, what was this policy? NA
Is this a verbal or written policy? _____
How did you violate this policy? _____
Did you know before about this policy? NA ☐ Yes ☐ No
Have other employees been fired before for the same reason? ☐ Yes ☒ No
6. If you were discharged for attendance problems, how often were you late or absent? _____
Briefly explain your reasons for missing work. _____
7. Were you discharged for any alleged illegal activity? ☐ Yes ☒ No
If "Yes," what activity? _____
Have you been charged with a crime related to your discharge? ☐ Yes ☒ No
If "Yes," what is the current status of this charge? _____
Have you admitted guilt or been convicted in court of the activity which was related to your discharge? ☐ Yes ☒ No
If "Yes," where and when? _____
8. What other information would you like to present to this Department to be considered in a decision on your eligibility? _____

Enter a telephone number where you can be reached if we need more information on this issue. 674-0376

I request an interview appointment on this issue ☒ I request that my eligibility be decided with no interview ☐

CERTIFY the information on these pages is true, correct and complete. I have made these statements to obtain unemployment benefits knowing that the law provides penalties for false statements or withholding material facts.

Date 1/11/94 Signature [Signature]

DO NOT WRITE BELOW THIS LINE

☐ Interview ☐ APO ☐ Rebuttal Offered ☐ Not Needed

☐ Allowed (DE, DA) ☒ Denied (DD, DC) ☐ Abeyance (LT) Sec. SACA Eff. 1-994

☐ Charged (BC, OC, SC, BR, OR, OS) ☒ Not Charged (BN, ON, SN, BR, OR, OS) 8/15/2010 ☐ Abeyance (LT)

JST CAUSE: Filed a quit as claimant to moving party in that he lost

knowledge: lessen off even after being denied it did as well

culpability: May should have known procedure & details

control: the resulting he was not shown nor F&G as

Reasoning Statement: failed to act reasonably 3B

Dept. Repr.

Date

good conscience. See Petitioner's Brief, page 9. He further alleges that he has Crohn's disease, justifying application of equity and good conscience and finally, that he did not know his job was in jeopardy. Petitioner's Brief, page 10.

Claimant does not explain in his Brief how his affliction with Crohn's disease would justify application of equity and good conscience. However, in his appeal to the Board of Review he stated with respect to the Crohn's disease:

If I would have remained in St. George, while my wife and two small children were on a 1100 mile trip, one way, that and the pressure of the employment would most certainly have caused me great difficulty.

R. 55 Had the Claimant offered medical evidence to support his argument, it might have made a difference in the outcome of the case. However, the Claimant did not raise the issue of his affliction with Crohn's disease with his employer or in his hearing with the ALJ. It seems logical that had the Claimant felt he needed the vacation for health reasons, that he would have expressed that need to his employer and to the ALJ. By bringing it up after the ALJ issued her decision, it appears that his medical condition was simply an afterthought that had no bearing on his decision to go on vacation without employer approval.

Indeed, the Claimant's testimony in the hearing centered only on the Claimant's desire to be with his family during the week of January 1-7, 1994. Referring to the employer's decision to disapprove the request for vacation the Claimant testified:

. . . And then on the 30th he came back with the written notice, on the afternoon of the 30th. My wife was leaving town the 31st or the 1st, I knew that. When you have an

TEXAS DEPARTMENT OF PUBLIC SAFETY

JAMES R. WILSON
DIRECTOR

5805 N. LAMAR BLVD.-BOX 4087-AUSTIN, TEXAS 78773

DRIVER IMPROVEMENT & CONTROL BUREAU

512/465-2170

FAX NO. 512/465-2501



DUDLEY M. THOMAS
ASST. DIRECTOR

11/17/94

KANE, JOHN GEORGE
P O BOX 2792
MIDLAND TX 79702

CASE NO. 02526519
DL NO. 02526519

ORDER OF REVOCATION

Your Texas Driver License and/or driving privilege is revoked effective 10-13-94 as provided in Article 6687b, V.T.C.S., Section 22, Subsection (b), Paragraph (5), upon a recent court finding that you are incapable of safely operating a motor vehicle at this time.

It Is Further Ordered that under the provisions of Section 23, Article 6687b, V.T.C.S., your driving privilege will continue to be revoked beyond the revocation period unless a \$50.00 (fifty dollar) reinstatement fee is paid to the Department of Public Safety, Central Cash Division, P.O.Box 15999, Austin, Texas 78761-5999, in addition to any other fees required by law.

DEMAND IS HEREBY MADE for the surrender to the Department of any and all classes and types of licenses issued to you, which have not been surrendered. Failure to surrender a revoked license or furnish an affidavit showing reason for failure to surrender revoked items will result in charges being filed as provided by law.

Items to surrender include:

- (1) Class C License issued 06-08-94 to expire 10-12-98.

Manager
Driver Improvement and Control