

1995

Ames Construction Inc v. Board of Review of the Industrial Commission : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

AMES CONSTRUCTION, INC.,

Petitioner,

v.

BOARD OF REVIEW OF THE
INDUSTRIAL COMMISSION OF UTAH,
DEPARTMENT OF EMPLOYMENT
SECURITY and KIM J. PETERSON,

Respondents.

95-0154-CA

Case No. ~~948154-CA~~

Priority No. 7

REPLY BRIEF OF PETITIONER

PETITION FOR REVIEW OF A FINAL DECISION OF THE
BOARD OF REVIEW OF THE INDUSTRIAL COMMISSION OF UTAH,
DEPARTMENT OF EMPLOYMENT SECURITY

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RESPONSE TO RESPONDENTS' "STATEMENT OF FACTS"

Petitioner Ames Construction, Inc. ("Ames"), submits the following comments and corrections to the Brief of Respondents Board of Review of the Industrial Commission of Utah, Department of Employment Security ("Board of Review") and Kim J. Peterson ("Peterson").

1. Respondents state at the bottom of page 5 of Respondents' Brief that Peterson "told Pack that in any event he could not flag on the next day because he had a doctor's appointment and a physical therapy appointment." In fact, there is no evidence that Peterson informed Pack he would not be to work the next day because of his doctor's appointment and physical therapy. Rather, Peterson simply informed Pack that he first had to see his doctor and physical therapist before going to work. The record does not reflect that Peterson led Pack to believe that Peterson would not come to work at all. Accordingly, Pack had every reason to expect Peterson to show up for work on Tuesday, January 18, even though he knew Peterson could not appear until later in the day. (See Petitioner's Statement of Relevant Facts ("Petitioner's Facts") ¶¶ 10-11 in Brief of Petitioner.)

2. Respondents state on the middle of page 6 that Peterson "had already reported to the employer the day before that he could not do the job he had scheduled for him." Again, the record does not reflect that Peterson ever told Pack or anyone else at Ames that he could not do the flagging job. He expressed misgivings about the job to Pack but Pack was never made aware (either Monday afternoon during the telephone conversation or the

next day) that Peterson would obtain a note from Dr. Rosen on Tuesday, January 18, excusing him from the flagging job. (See Petitioner's Facts ¶¶ 10-13.)

3. Respondents state at the bottom of page 6 that Peterson "assumed that the employer would be informed about appointments scheduled with its own doctors." Ames does not employ or retain its own doctors and there is nothing in the record that reflects otherwise. Mr. Howell's statement merely reflects that Ames was in communication with the Kennecott Clinic. Mr. Howell's statements do not reflect that all appointments at the Kennecott Clinic were automatically reported to Ames.

4. Respondents also refer at the bottom of page 6 to "Dr. Bates." Duane Bates ("Bates") is not a doctor. It is Ames's understanding that Bates is a physician's assistant who works at the Kennecott Clinic.

ARGUMENT IN RESPONSE TO RESPONDENTS' BRIEF

POINT I

THE BOARD OF REVIEW'S FACTUAL FINDINGS ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

- A. Respondents' Claim that Ames Did Not Completely Marshall the Evidence Which Supports the Board of Review's Factual Findings Is Incorrect.

According to respondents, additional evidence exists in the record--evidence not marshalled by Ames--which allegedly supports the Board of Review's findings. However, some of the additional "facts" enumerated by respondents are incorrect. Respondents state, for example, that "the doctor [Dr. Rosen,

Peterson's surgeon] then made several telephone calls on the claimant's behalf. (R. 67)" Although the record reflects that Dr. Rosen made telephone calls, no competent evidence exists regarding who Dr. Rosen called or, indeed, whether any or all of the telephone calls were made on behalf of Peterson rather than another patient. The only other evidence in the record which reflects contact by Dr. Rosen's office is the note written by Bates stating that Pat, someone who worked for Dr. Rosen, contacted Bates to inform him that Dr. Rosen was referring worksite conflicts back to Dr. Harris. Bates then set up the appointment with Dr. Harris. There is no evidence in the record, other than Peterson's own speculation, that Dr. Rosen told anyone at Ames that Peterson should not or could not do the flagging job the next day (Wednesday, January 19) after seeing Dr. Harris and the physical therapist. (R. 16.)

Respondents also make the unsupported statement that D. Bates is an associate of Dr. Rosen. This is incorrect. Dr. Rosen is an independent surgeon. Bates is a physician's assistant at the Kennecott Clinic. Thus, respondents' statement on the middle of page 11 that Peterson "was correct in assuming, without specifically being told, that Dr. Rosen and his staff were in contact with his supervisor" is unwarranted. The only facts in evidence are that Dr. Rosen's office spoke with personnel at the Kennecott Clinic and not with anyone at Ames. The fact that Ames knew Peterson had appointments with Dr. Rosen on Tuesday, January 18 and with Dr. Harris on Wednesday, January 19 does not support

Peterson's alleged assumption. The mere fact that Ames was aware of doctors' appointments does not signify that it believed Peterson would not show up for work at all on Tuesday and Wednesday. Rather, it merely supports an assumption that Ames realized Peterson's schedule at work would be curtailed and that he would be arriving late after meeting with his health care providers. By no stretch of the imagination can knowledge of these two doctor's appointments be used as the basis for an assumption that Ames did not expect Peterson at work at all these two days.

Respondents argue at the bottom of page 11 that Ames failed to cite testimony in support of the Board of Review's factual findings that Peterson "was outside the regular course of business." While it is true that prior to January 17, Peterson had no set assignments, this situation changed. In attempting to place Peterson in the flagging job, Peterson would have had a set schedule. As a result, it is reasonable to assume that Peterson's work schedule would have followed the regular course of business had he shown up for the flagging job. Peterson had been in the construction industry long enough to be aware of the fact that the schedule for a flagging position was generally tied to the same shift as other workers on the job.

In sum, Ames marshalled the facts in evidence which support the Board of Review's factual findings.

B. The Board of Review's Findings Are Not Supported By Substantial Evidence.

According to respondents, Ames does not challenge the factual findings that on Monday, January 17, Peterson first went to his job site, picked up his check, told a co-worker about medical appointments, went to the appointments and then went home feeling ill (Respondents' Brief pp. 12-13). Further, respondents claim that the evidence in the record tends to show that Ames knew Peterson had medical appointments "that would keep him from work for a major portion of the day." These are not, however, the facts. Peterson had a single medical appointment (with his physical therapist) on Monday morning and not multiple appointments as respondents assume (R. 22). Peterson testified he told Ron, a co-worker, to inform Stan Van Dam that Peterson was going to physical therapy and that he would talk to Van Dam later when he got back from physical therapy (R. 46). This, of course, did not occur. Instead, Peterson never showed up for work on Monday as he had said he would and as expected by Ames but, rather, went home. Ames was forced to call Peterson in order to find out where he had been and to ascertain his schedule for the next day. Thus, Peterson did not "report to work" on January 17 as promised.

Respondents argue that Ames again knew Peterson was going to miss work because of medical appointments on Tuesday, January 18, and, in addition, that Peterson correctly assumed Dr. Rosen contacted Stan Van Dam at Ames to let Ames know Peterson would not be at work Tuesday afternoon. Ames does not challenge the fact

that Peterson was going to miss work because of medical appointments Tuesday morning and that he reported this fact to Steve Pack. However, there is no evidence in the record to support the conclusion that because of this knowledge Ames did not expect to see Peterson in the afternoon. Ames also does not challenge the fact that Dr. Rosen apparently sent Peterson home after his appointment. However, there is no evidence that Ames was aware of this or that it knew Peterson would not be showing up for work at all on Tuesday, January 18. Thus, the evidence does not support the Board of Review's finding that on January 18, Peterson had adequate reason for not appearing at the worksite after his doctor's appointment, particularly since Peterson had not been in contact with anyone at Ames all day.

Finally, with respect to Wednesday, January 19, although Peterson had an appointment with Dr. Harris, the doctor at the Kennecott Clinic (and not the "company doctor" as Ames contends), the evidence in the record indicates that Ames nevertheless reasonably expected Peterson to show up at work sometime that day and/or to call in. Ames had no way of knowing that there would be several hours between doctors' appointments and that Peterson would not finish physical therapy until 2:00 or 2:30 p.m. There is thus no evidence whatsoever in the record from which it might be concluded that Peterson met the requirements for "calling in" or "reporting to work."

In sum, the Board of Review's factual findings are not supported by substantial evidence when viewed in light of the

entire record. The only times Peterson made any effort to contact Ames on January 17-19 was Monday morning, January 17, to pick up his pay check and Wednesday afternoon, near the end of his shift, when he called to inform Ames that it was too late to come to work that day. This evidence does not by any stretch of the imagination rise to the level required of an employee that he make a good faith effort to "call in" or "report to work." Consequently, this Court should hold that the Board of Review's factual findings are not supported by substantial evidence.

POINT II

THE BOARD OF REVIEW'S DETERMINATION THAT AMES DID NOT HAVE JUST CAUSE FOR DISCHARGING PETERSON IS NOT REASONABLE AND RATIONAL

Respondents claim, gratuitously, that Ames "failed to show that the claimant even committed the behavior for which he was discharged" and that Ames "presented no evidence of what it meant by 'reporting to work' or 'calling in,' . . ." (Respondents' Brief pp. 16-17). None of the parties to the hearing, i.e., Peterson, Jim Howell or the Administrative Law Judge, seemed to have any problem at all with the terms "reporting to work" and "calling in." Indeed, both terms are self explanatory. "Reporting to work" means showing up at the work place ready to work. "Calling in" means contacting the employer by telephone, or by any other reasonable means. Ames expected Peterson to show up at work on Monday after his physical therapy appointment or, if he could not make it to work, to call and let Ames know he would not be there. Peterson

was aware, or should have been aware, of Ames's reasonable expectations. It is undisputed that Ames reasonably believed Peterson would show up for work on Tuesday, albeit late, but that Peterson, instead, neither contacted anyone at Ames nor showed up to work on Tuesday. Finally, Ames also reasonably expected that Peterson would show up for work on Wednesday although, again, probably late because of a doctor's appointment. Instead, he may (or may not) have called in at the end of his shift to tell Ames he was not coming into work that day. The telephone call, if actually made, was long overdue.

Respondents assert that it was beyond Peterson's control to go back to work on any of the three days in question. The mere fact that an employee cannot go to work, however, does not relieve the employee of all obligations to the employer. All employers require reasonable notification prior to or at the beginning of a work shift (or as soon as possible if circumstances prevent) from the employee that he/she will not be at work. Peterson was certainly capable of picking up the telephone and calling Ames on each of these three days when he could not make it to work because of illness, rescheduled doctors' appointments and the like. Ames has, consequently, established that it had "just cause" for discharging Peterson: (1) Peterson was culpable because he made no attempt whatsoever to apprise his employer of his schedule and, indeed, appeared to be avoiding work; (2) Peterson had read Ames Employee Handbook and was aware of his obligations to call in

and/or show up for work; and (3) Peterson had control over his behavior on the three days in question.

CONCLUSION

This Court should overrule the decision of the Board of Review and hold that Peterson was discharged from his employment with Ames for reasons that were disqualifying. This Court should further hold that an overpayment has been established pursuant to Utah Code Ann. § 35-4-406(5)(a) and that Ames is relieved of liability for charges in connection with Peterson's claims as provided by Utah Code Ann. § 35-4-7.5.

DATED this 4th day of August, 1995.

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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of August, 1995, true and correct copies of the above and foregoing Reply Brief of Petitioner was mailed, postage prepaid thereon, to the following:

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