1995

Betty Ann Romero v. Industrial Commission of Utah, Workers Compensation Fund, Little American; Cigna Insurance Company; and Quality Inn Airport/Claythor, Inc. : Reply Brief

Utah Court of Appeals

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UTAH COURT OF APPEALS

BETTY ANN ROMERO, Petitioner, vs. INDUSTRIAL COMMISSION OF UTAH, WORKERS COMPENSATION FUND, LITTLE AMERICAN; CIGNA INSURANCE COMPANY; and QUALITY INN AIRPORT/CLAYTHOR, Inc., Respondent.	Appeal No. 950197-CA Priority No. 7

REPLY BRIEF OF PETITIONER/APPELLANT BETTY ANN ROMERO FOR PETITION FOR REVIEW

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INTRODUCTION

In its statement of issues the Defendant, Quality Inn, sets forth two issues. Defendants first issue involves the Allen vs. Industrial Commission definition of accident, and the second issue is whether or not legal and medical causation is established pursuant to the Allen standard. However, the Commission's Order dated February 17, 1995, which the petitioner is appealing, specifically states that:

> Because the Commission has concluded that the alleged industrial accidents did not occur, it is not necessary to consider Ms. Romero's argument regarding the proper application of the Allen test of legal causation.

Consequently, the petitioner did not address the Allen test in her brief. Page 2 of the Commission's Findings of Fact Conclusions of Law and Order, specifically states: "In this case the ALJ concluded that Ms. Romero had failed to prove the existence of any work related injury and therefore, denied her claim for benefits." Thus, it appears that the Industrial Commission's Findings, Conclusion and Order are based upon the Administrative Law Judge's Findings which stated that the existence of any work related injuries was not proven. Before any Allen issue may be dealt with on appeal, the case needs to be remanded back to the Commission for findings and conclusions that the Allen test needs to be applied.

However, in the event that the Court of Appeals wishes to hear this issue, this Reply Brief will discuss the Respondent's arguments regarding the application of the Allen standard.

Defendant Quality Inn's Statement of Case

Defendant Quality Inn, in its statement of case on page 5 of its Brief, in the second paragraph states:

> On October 14, 1993, petitioner gave a statement to Workers Compensation Funds claims adjuster in which the petitioner asserted that she did not lift anything that day and that her back went out when she was bending over folding the sheets under. (Record at 50-52 in Addendum E page 1-3).

The record at pages 50-52 make no mention of the statement to the claims adjuster. Addendum E, pages 1-3, are Respondent's Request for Admissions that were submitted to the petitioner. In her response the petitioner confirmed that when asked if she was lifting anything while cleaning the room, she stated, "no, I was just bending over folding sheets under." However, petitioner had testified on pages of 30 of the Transcript that she had also been lifting numerous mattresses that day.

In the third paragraph of Respondent Quality Inn's Brief, Respondent compares the Application for Hearing filed against Quality Inn to those filed against Little America. Said Applications For Hearing were signed by Applicant's attorney and

not the applicant. Applicant's attorney drafted said applications with the intent to put the Industrial Commission and the Defendants on notice as to the Petitioner's claim for workers compensation. Counsel for petitioner did not include every detail of the accident when filling out the Application For Hearing. Consequently, any differences between counsels Application For Hearing and the Petitioner's testimony were not necessarily Petitioner's fault.

Paragraph number 8 of Respondent Little America's statement of facts refers to Petitioner's testimony that she was not lifting anything at the time of her November 10, 1992 accident. As stated in the Petitioner's Brief, the petitioner had transposed the November 10, 1992 accident and the February 28, 1993 accident. At the time she gave testimony that she was not lifting anything on the November 10, 1992, accident she was under the impression that she had hurt herself while bending over the toilet. Naturally, she would state that she was not lifting anything.

SUMMARY OF ARGUMENT

Respondent Little America, states that the petitioner failed to identify what portion of the test in Allen vs. Industrial Commission she objected to, and why it was error for the Commission to rely upon Allen. The reason that the petitioner did not mention which portion of the Allen vs. Industrial Commission test she objected to and did not state why it was error for the Commission

to rely upon Allen is because the Commission ruled in its Order that the Allen test and analysis was irrelevant to its findings and order.

DETAIL OF ARGUMENT

The Commission specifically stated that its decision was based upon the Administrative Law Judge's findings that there was not sufficient evidence that the industrial related accidents took place, and that the Allen test and analysis was not considered in its decision. However, in the event that the court wishes to consider such, the petitioner sets forth the following argument:

The Administrative Law Judge based application of the Allen test on a finding that two entries in the medical records, one in December, 1991, and another on October 27, 1992, indicated a "pre-existing injury". (See Addendum D of petitioner's brief). In finding number 4 on page two of said order, the Administrative Law Judge reasoned that the effort expended to clean behind the toilet does not meet the requirement of "unusual effort". He went on to analyze what could constitute an unusual effort in that context throughout paragraph 6,7,8 and 9.

The Administrative Law Judge erred in finding that the November 10, 1992 and February 28, 1993, accidents were subject to an Allen test analysis. In Nyrehn vs. Industrial Commission of Utah, 800 P.2d 330, 335 (Utah 1990), Kathleen Nyrehn worked at a

Fred Meyer's store where her duties consisted of lifting, carrying and stacking tubs between 15 and 40 pounds each. One day at work, she felt a gradual on-set of pain in her lower back while performing her duties, but she continued to work. Eventually, the pain became so severe that Ms. Nyrehn had to leave work. After she had received three back operations and was still unable to work, she sought permanent disability benefits. After a hearing, the Administrative Law Judge found that Nyrehn had an asymptomatic pre-existing condition, spondylolysis, and applied the Allen test. The Administrative Law Judge denied Nyrehn benefits finding that her duties, while working at Fred Meyers, did not rise to the level of "unusual and extraordinary exertion". The Court of Appeals reversed the findings of the Commission and found that the Allen test should not have been applied. The Court of Appeals stated:

> An Administrative Law Judge may not simply presume that the findings of a pre-existing condition warrants application of the Allen test. **An employer must prove medically that the claimant, "suffers from a pre-existing condition which contributes to the injury".** (emphasis added)

The Court of Appeals went on to note that the actual findings in the Nyrehn case were silent as to whether or not Nyrehn's pre-exiting condition **contributed** to the industrial injury.

> The ALJ had merely concluded as a matter of law that, "[s]ince Ms. Nyrehn brought a pre-existing low

> back condition to the work place," the Allen test applied. Implicit in such a legal conclusion is the critical factual finding that Nyrehn's pre-existing condition contributed to her injury. Such material findings, however, may not be implied. In order for us to meaningfully review the findings of the Commission, the findings must be, "sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue is reached".

Nyrehn at 335.

Thus, in order to apply the Allen case, the Administrative Law Judge must make a specific finding that, 1) the applicant suffered from a pre-existing condition, and 2) that condition contributed to the injury for which the applicant is seeking benefits. As in the Nyrehn case, the ALJ, in the case on review, did not make a finding that a pre-existing condition contributed to either of the Little America injuries or the Quality Inn injuries. Thus, per Nyrehn, the Romero findings are not adequate for an application of the Allen test. As also stated in the Nyrehn case, failure of an agency to make adequate findings of fact on material issues renders its findings arbitrary and capricious.

This same principle is reiterated by the Court of Appeals in, Stouffer Foods Corporation vs. Industrial Commission, 801 P.2d 179, (Utah 1990). In that case, the court once again, held that in order for the Allen decision to apply, the employer must prove

medically that the claimant suffered from a pre-existing condition which contributed to the injury. Stouffer at 182.

In Utah Transit Authority vs. Industrial Commission, 721 P.2d 1012, (Utah 1986), the Supreme Court addressed a similar issue. In that case, a bus driver suffered a swollen disc as a result of having to drive a bus without power steering when there was an extreme amount of snow in the streets and claimed workers compensation. The Transit authority denied liability. In that case, Booth, the applicant, had a prior history of back trouble. The Supreme Court held that the Transit authority claim of prior back trouble did not prove that the applicant had a pre-existing condition.

From the evidence available at hearing on the Romero case, it would have been impossible for the ALJ to find that there was a pre-existing condition, and consequently, that said condition contributed to the injuries in question. The medical record entry of December, 1991, only indicated that applicant had a sore lumbar bruise from a fall. There is no indication of what portion of the lumbar spine was injured, whether the injury resolved or remained symptomatic or if there was any permanent damage.

The notation in the medical records dated October 27, 1992, also lacks necessary information to indicate a pre-existing injury. It was diagnosed as a lumbar sprain. Once again, there is no

indication as to what portion of the lumbar spine was affected, whether the injury resolved or remained symptomatic or if there was any permanent damage. Without this information and these findings it is impossible for the Administrative Law Judge to find that the **"pre-existing"** condition **contributed** to the accident.

Thus, it is not surprising that there is no finding in the ALJ's order that those areas of the lumbar spine or those injuries to the lumbar spine contributed in any way to the injuries that the applicant incurred at Little America Hotel and Quality Inn. As stated in the Nyrehn case, such a finding simply cannot be implied.

In Stouffer Foods Corporation vs. Industrial Commission, 801 P.2d 179 (Utah 1990), 182, the ALJ made a finding that the applicant suffered from a pre-existing carpal tunnel syndrome condition because he engaged in sports such as weight lifting and football and because the medical panel report stated that medical literature indicated a relationship between carpal tunnel syndrome and work utilizing the upper extremities. The Court of Appeals stated that the Administrative Law Judge's findings in that case fell short of a clear finding of a pre-existing condition contributing to an industrial accident. In this case on review, the Administrative Law Judge's findings are even more deficient then those set-forth in the Stouffer case, and consequently, must be found to be arbitrary and capricious and not a basis by which

the Allen test for pre-existing injuries can be applied.

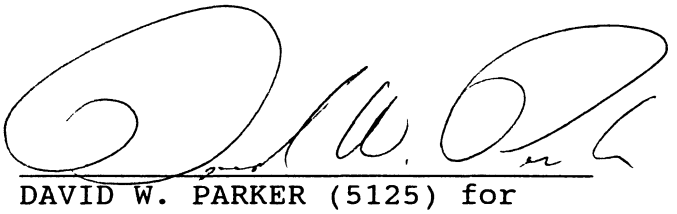
Respondent Quality Inn, sets forth an analysis of why the Allen test applies to the September 25, 1993, industrial injury. Once again, it should be pointed out that neither the Industrial Commission nor the Administrative Law Judge made any finding as to why the November 25, 1993, did not occur. Furthermore, the Industrial Commission refused to apply the Allen test to any of the accidents including the September 25, 1993, accident. In the event that this Court finds that the Commission's Findings, that the three alleged work-related accidents did not occur was not supported by substantial evidence, then it must be remanded for further findings.

Petitioner's response to whether or not the Allen analysis might apply to her September 25, 1993, industrial accident is the description of her duties the day of the accident. Beginning with the Transcript on page 29, the Petitioner states that she had made approximately 11 or 12 beds prior to making the one that had caused her pain. She goes through, in her testimony, detail by detail of how she made the beds. For each bed she stated that first of all she moved the bed out from the wall, (Record page 31) and then lifted the corners and tucked the sheets under. At the time that her back popped she was lifting the bottom of the mattress to tuck a sheet under. (Record page 33).

CONCLUSION

For the foregoing reasons the petitioner respectfully requests that the court reverse and or remand the Industrial Commission's Order.

DATED this 25 day of September, 1995.



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CERTIFICATE OF MAILING

I hereby certify that on 25 day of September, 1995, I caused to be mailed by First-Class Mail, postage pre-paid, a true and correct copy of the foregoing Reply Brief of Petitioner/Appellant Betty Ann Romero to the following:

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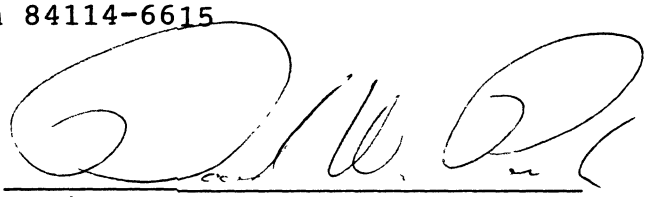

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