

2006

Maria D. Duran v. Labor Commission of Utah, Shoney's Restaurant, and Wasau Insurance Company : Reply Brief

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca2



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.

Mr. Alan L. Hennebold; Utah Labor Commission; Mr. Michael E. Dyer; Blackburn and Stoll; counsel for Respondents.

Virginius Dabney; Dabney and Dabney; Counsel for Petitioner.

Recommended Citation

Reply Brief, *Duran v. Wasau Insurance Company*, No. 20061122 (Utah Court of Appeals, 2006).
https://digitalcommons.law.byu.edu/byu_ca2/7016

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

MARIA D. DURAN.

Petitioner/Appellant,

v.

LABOR COMMISSION OF UTAH,
SHONEY'S RESTAURANT, and
WASAU INSURANCE COMPANY,

Respondents/Appellees.

Case No.20061122-CA

Labor Commission No.20040077

Priority No. 7

REPLY BRIEF OF PETITIONER MARIA D. DURAN

PETITION FOR REVIEW FROM ORDER OF THE
UTAH LABOR COMMISSION

Mr. Alan L. Hennebold
UTAH LABOR COMMISSION
Post Office Box 146600
Salt Lake City, UT 84114-6600
Telephone: (801) 530-6937
Counsel for Utah Labor Commission

Mr. Michael E. Dyer
BLACKBURN & STOLL, L.C.
257 East 200 So. Suite 800
Salt Lake City, Utah 84111
Counsel for Respondents/Appellees

Virginius Dabney
DABNEY & DABNEY, p.c.
South Main Plaza, Suite 2
1060 South Main Street
St. George, Utah 84770
Counsel for Petitioner
Maria D. Duran

**PETITIONER RESPECTFULLY REQUEST ORAL ARGUMENT
AND THAT THIS CASE BE REPORTED**

FILED
UTAH APPELLATE COURT

OCT 24 2006

IN THE UTAH COURT OF APPEALS

MARIA D. DURAN.

Petitioner/Appellant,
v.

LABOR COMMISSION OF UTAH,
SHONEY'S RESTAURANT, and
WASAU INSURANCE COMPANY,

Respondents/Appellees.

Case No.20061122-CA

Labor Commission No 20040077

Priority No. 7

REPLY BRIEF () PETITIONER MARIA D. DURAN

PETITION FOR REVIEW FROM ORDER OF THE
UTAH LABOR COMMISSION

Mr. Alan L. Hennebold
UTAH LABOR COMMISSION
Post Office Box 146600
Salt Lake City, UT 84114-6600
Telephone: (801) 530-6937
Counsel for Utah Labor Commission

Mr. Michael E. Dyer
BLACKBURN & STOLL, L.C.
257 East 200 So. Suite 800
Salt Lake City, Utah 84111
Counsel for Respondents/Appellees

Virginius Dabney
DABNEY & DABNEY, p.c.
South Main Plaza, Suite 2
1060 South Main Street
St. George, Utah 84770
Counsel for Petitioner
Maria D. Duran

**PETITIONER RESPECTFULLY REQUEST ORAL ARGUMENT
AND THAT THIS CASE BE REPORTED**

TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	ii
Jurisdiction of the Court	1
Statement of the Issues and Standard of Review	1
Determinative Statutes and Rules	2
Course of Proceedings/Statement of the Case	3
Summary of Reply	3
Argument:	
I. THE PETITIONER HAD A RIGHT TO WITHDRAW HER APPLICATION FOR HEARING AT ANY TIME PRIOR TO HEARING ...	4
II. THE LABOR COMMISSION ABUSED ITS DISCRETION IN DISMISSING THIS MATTER WITH PREJUDICE.	11
Conclusion/Statement of Relief Sought	14

TABLE OF AUTHORITIES

CASES:

	<u>Page</u>
<u>Bacon v. Industrial Commission</u> , 854 P.2d 548 (Ut. Ct. App. 1991)	13
<u>Bogacki v. Board of Supervisors</u> , 5 Cal.3d 771, 489 P.2d 537, 543-44, 97 Cal. Rptr. 657, 663-64 (1971), <u>cert. denied</u> , 405 U.S. 1030, 92 S.Ct. 1301, 31 L.Ed.2d 488 (1972))	9
<u>Bourgeois v. Department of Commerce</u> , 981 P.2d 414 (Ut. Ct. App. 1991) . . .	13
<u>Doubletree v. Industrial Commission</u> , 797 P.2d 464 (Utah App. 1990)	13
<u>Drake v. Industrial Commission</u> , 939 P.2d 177 (Utah 1997)	1
<u>Interiors Contracting v. Smith, Halander</u> , 881 P.2D 929 (Utah App. 1994)	9
<u>James v. Preston</u> , 746 P.2d 799, 801-02 (Utah App. 1987)	9
<u>Kaiserman Associates, Inc. Francis Towns</u> , 977 P.2d 462 (1998)	14
<u>LaSal Oil Co. V. Department of Environmental Quality</u> , 843 P.2d 1045 (Utah Ct. App. 1992)	1
<u>McPhie v. Industrial Commission</u> , 567 P.2d 153 (Utah 1977)	2
<u>Salt Lake County v. Carlston</u> , 776 P.2d 653, 655 (Utah App. 1989)	9
<u>Sierra Club v. Utah Solid Hazardous Waste Control Board</u> , 964 P.2d 335 (Utah Ct. App. 1998)	2
<u>State v. Lucero</u> , 2002 UT App 135, ¶ 8, 446, 47 P.3d 107	14
<u>State v. Marquez</u> , 2002 UT App 127, ¶ 12, 54 P.3d 637	14
<u>State v. Thomas</u> , 961 P.2d 299, 305 (Utah 1998)	14
<u>State Tax Commission v. Industrial Commission</u> , 685 P.2d 1051 (Utah 1984)	2
<u>Turtle Management, Inc. v. Haggis Management, Inc.</u> , 645 P.2d 667, 672 (Utah 1982)	9

UTAH LABOR COMMISSION CASES

Barton v. St. George Steel, Case No. 97887 (11/29/2000) 4, 7

Willard v. Thurston Cable Construction,
Case No. 98-0569 (7/29/02) 4, 5, 6, 10

STATUTES

Utah Code Annotated § 34A-2-417(4)(b)(ii)(A)(4) (2002 (2002)) 11

Utah Code Annotated § 34A-2-420 (2002) 12

Utah Code Annotated § 63-46a-3 (2001) 5

RULES

Rule 23(k) of the Utah Rules of Appellate Procedure 2

Rule 41 of the Utah Rules of Civil Procedure 10, 11

JURISDICTION OF THE COURT

The parties agree that this Court has jurisdiction to hear this dispute and as to the applicable Utah Statutes and Administrative Rules that may apply to this case.

STATEMENT OF ISSUES AND STANDARD OF REVIEW

Respondents do not dispute Petitioner's Statement of Issues and Standards of Review. However, Respondents do rephrase both issues on appeal in an effort to change the issues. We do not believe this is proper. All parts of their Brief relating to their alternative issues are irrelevant and should be discounted on appeal. This is not a complicated case, despite Respondent's attempts to obfuscate the issues. At their simplest and purest form the only issues properly raised before this Court are:

Issue1: Did the Petitioner have a right to withdraw her Application for Hearing prior to Hearing? Respondents in their Brief do not even list this as an issue although it goes to the very heart of the dispute before this Court.

This is clearly a question of law where appellate review gives no deference to the agency's determination, because the appellate court has the power and duty to say what the law is and to ensure that it is uniform throughout the jurisdiction. Drake v. Industrial Commission, 939 P.2d 177, 182 (Utah 1997). Such an Issue is reviewed for correctness. LaSal Oil Co. V. Department of Environmental Quality, 843 P.2d 1045, 1047 (Utah Ct. App. 1992).

Issue 2: Did the ALJ and the Appeals Board of the Labor Commission abuse

their discretion in dismissing this matter with prejudice and also by failing to set aside Petitioner's default? Respondents attempt to break this simple, straightforward issue into two different issues, rephrased and recharacterized in a manner contrary to that set out in Petitioner's Docketing Statement and in her Brief. This is also an unfortunate but nevertheless inaccurate attempt to cloud the issues and recast them in a manner different than the issues on Appeal raised by the Petitioner.

This issue as properly and succinctly stated by Petitioner is a question of law which is reviewed under a broad 'abuse of discretion' standard. Sierra Club v. Utah Solid Hazardous Waste Control Board, 964 P.2d 335, 344 (Utah Ct. App. 1998).

The Respondents filed neither a Petition for Review nor a Cross-Appeal. They further did not file a Docketing statement listing any additional issues on Appeal. Their belated attempt to rephrase and/or raise new issues is improper and should be stricken. Rule 23 (k) of the Utah Rules of Appellate Procedure.

Significantly, Respondents, do not dispute the long-standing view that in reviewing the proceedings below and given the scope of the Utah Workers Compensation Act, the Act is to be liberally construed and any doubt as to compensation is to be resolved in favor of the Petitioner. E.g., State Tax Commission v. Industrial Commission, 685 P.2d 1051, 1053 (Utah 1984); and McPhie v. Industrial Commission, 567 P.2d 153, 155 (Utah 1977).

DETERMINATIVE STATUTE AND RULE

There is no "determinative" Statute or Rule; however, the parties are not in

dispute as to the Statutes which have potential “applicable” value.

COURSE OF PROCEEDINGS/STATEMENT OF THE CASE

The relevant facts in this matter are simple, straightforward and are not in dispute. Respondents have not objected to Petitioner’s Statement of Facts, nor claimed that they are inadequate. Respondent’s Statement of Facts, however, is replete with irrelevant, immaterial and potentially prejudicial material, which recharacterizes the record in a light relevant to different issues.

SUMMARY OF REPLY

Under long-standing Labor Commission rules and practice, an Applicant for workers’ compensation benefits has had for the past 90 years, an unconditioned right to withdraw his/her Application for Hearing at any time. No formal Rule of the Labor Commission prohibits, limits or addresses this right in any way whatsoever. In order to change this practice, Administrative Rulemaking is required. If a case decision alters that custom and practice, rulemaking must be initiated in order to make it universally applicable to all industrial claims.

Further, the ALJ and Labor Commission failed to adequately weigh the reasons for Petitioner’s withdrawal of her Application for Hearing. There was no basis or justification to dismiss her Application for Hearing with prejudice, the Commission engaged in inadequate fact finding to support that harsh result, and there is no indication in the record that the dismissal with prejudice was done as a sanction.

ARGUMENT

I

THE PETITIONER HAD A RIGHT TO WITHDRAW HER APPLICATION FOR HEARING AT ANY TIME PRIOR TO HEARING.

A. Long Standing Commission Custom and Practice.

Respondents, without citation or argument, deny that there was ever any “custom” or “practice” to permit withdrawal of an Application for Hearing. In so doing they do not even address the precedent of Barton v. St. George Steel, Case No. 97-0887 (November 29, 2000), which interestingly involved the same counsel as appear in the present case. In Barton, both the ALJ and the Commission upheld the Applicant’s voluntary withdrawal and dismissal without prejudice of his Application for Hearing during the Hearing and over the objection of the Defendants.

The clear and undisputed fact is that the long course of practice before the Labor Commission is that an Applicant can and on numerous times has withdrawn his/her Application for Hearing. Respondents denial of this practice and custom is done without citation to authority.

The Utah Labor Commission’s 2002 opinion in Willard v. Thurston Cable Construction, Case No. 98-0569, recognizes this practice. In Willard, the Commission staff automatically responded to the Notice of Withdrawal by entering a voluntary dismissal. When the Respondents in that case objected, the ALJ upheld the dismissal on the basis of “Commission custom permitting applicants to withdraw

Applications for Hearing at any time...”. Id at 2. Respondent’s denial of a “custom” is disproved in the very case that they cite.

B. Failure to Engage in Rulemaking.

If Willard announced a departure from that long standing custom, it was inappropriate for such a monumental change and reversal of a long standing Commission practice and custom to be made by a single Commissioner in a single case. Labor Commission cases are not indexed and researchable. At present, they are only published on the Commission’s website for a scant six months, after which they are only available to those who know about them.

It is unknown if Willard in 2004 was published in any form or for how long. If one tried to research the law on voluntary dismissals, there would be no way to find the Willard case unless one already knew about it. In essence, Utah Labor Commission cases constitute a secret body of law unknown to the public at large.

The Utah Administrative Procedure Act, Utah Code Annotate § 63-46a-3 (2001) provides as follows:

In addition to other rulemaking required by law, each agency shall make rules when agency action:

- (a) authorizes, requires, or prohibits an action;
- (b) provides or prohibits a material benefit;
- (c) applies to a class of persons or another agency; and
- (d) is explicitly or implicitly authorized by statute.

A decision from the Labor Commission on a Motion for Review is clearly agency action and the result in Willard required Rulemaking in that it prohibited an

action, prohibited a material benefit and it applies to a class of persons (i.e. injured workers). The Commission failed to initiate Rule Making which this significant change in workers compensation practice required. Although Petitioner raised this issue before the Labor Commission in her Motion for Review and Brief on appeal, neither the Commission nor the Employer/Carrier referenced the failure to comply with Rule-Making requirements in their Order or in their responses at the Administrative level.

C. Willard v. Thurston Cable Construction is Inapplicable to This Case.

Respondents failed to respond to any of Petitioner's specific arguments that Willard is factually and legally distinguishable from this case.

As Petitioner previously argued and Respondents chose not to respond to, although the ALJ was under no general obligation to do so, she had adopted that practice and knew that Petitioner's counsel was within 5 minutes of the Hearing location. Under the circumstances, the failure to even try to contact Petitioner's counsel was extremely prejudicial and has principally resulted in the situation we now find the parties in. In contrast with the Willard precedent (to the extent it is any precedent), Petitioner and her counsel were deprived of the ability to "fully explain and substantiate the reasons" for the withdrawal.

D. Miscellaneous Points in Respondent's Brief.

Respondents advance six purposed reasons for sustaining the denial of the Withdrawal of the Application for Hearing.

First, Respondents argue that late notice was given and that the Motion had only been faxed to the Commission on the day of the Hearing. Although the Respondents speculate that “Judge Marlowe was concerned with the late notice,”¹ no significance is attached by them to the alleged “late notice”, nor any analysis as to the required advance notice that should be required. Petitioner has argued that she could withdraw her Application for Hearing at any time and Labor Commission precedent supports that on the day of a Hearing and even during the Hearing.²

Second, Respondents allege that no Notice of the withdrawal of the Application for hearing was sent to Respondents’ counsel. This is a specious argument. Respondents admit that it was a fax failure (apparently caused by their line being busy) that prevented the Notice from going through. Petitioner’s counsel did all that he could to give notice to Respondents and he was only stymied in doing so due to their counsel’s busy fax line. The Commission and the ALJ certainly received the Notice and was aware of the withdrawal.

Third, Respondents claim that they incurred a large expense due to the late notice. This expense is apparently the result of their preparation and travel time to the Hearing. Petitioner should not be penalized that the employer/carrier chose to employ counsel who resided hundreds of miles from the required Hearing site. In addition, withdrawal of the Application for Hearing would have resulted in a dismissal

¹ Respondent’s Brief at 18.

² Barton v. St. George Steel, Case No. 97-0887 (November 29, 2000)

without prejudice which means that the Respondents had won. All of their preparation time and expense was born out by the Application being dismissed. Although it is possible for such an Application to be refilled, that is a risk Respondents run in every case, because of the Commission's continuing jurisdiction. The Respondents' travel expenses were minimal when weighed against the impact of a dismissal with prejudice to the Applicant, and were partially the result of the Commission and ALJ's failure to act on the Notice of Withdrawal.

Fourth, Respondents allege that they had a witness available to testify and that, at the time, the Respondent restaurant would be closing within a month. There is no indication from the ALJ's Findings that the alleged witness even appeared at the Hearing or that the ALJ found the witness' testimony important to the claim. The witness is not identified in the Appearances section of the Decision and her testimony and the evidentiary value of it is never mentioned in the decision. It also defies logic and reason that the Respondent insurance carrier could not remain in contact with their sole witness and preserve some plates. If it was reasonably expected that the witness would not be available in the future, her deposition could have been taken to preserve her testimony. Respondents make no allegation that they no longer have possession of the plates or contact with their witness.

Fifth, Respondents allege that Petitioner has "already been compensated to the extent allowed by the Worker's Compensation Act for any injuries from this

accident.”³ This is a new argument on appeal and was not included in either the ALJ decision or that of the Labor Commission. The argument that she was allegedly “paid everything that she was entitled to”, raises a new issue on appeal which cannot be considered on appeal. Interiors Contracting v. Smith, Halander, 881 P.2d 929 (Utah App. 1994); James v. Preston, 746 P.2d 799,801-02 (Utah App. 1987); and Turtle Management, Inc. v. Haggis Management, Inc., 645 P.2d 667, 672 (Utah 1982). “Issues not raised in the trial court in timely fashion are deemed waived, precluding [the appellate court] from considering their merits on appeal.” Salt Lake County v. Carlston, 776 P.2d 653, 655 (Utah App. 1989). This rule is “stringently applied when the new theory depends on controverted factual questions whose relevance thereto was not made to appear at trial.” Id. (quoting Bogacki v. Board of Supervisors, 5 Cal.3d 771, 489 P.2d 537, 543-44, 97 Cal.Rptr. 657, 663-64 (1971), cert. denied, 405 U.S. 1030, 92 S.Ct. 1301,31 L.Ed.2d 488 (1972)).

Sixth, Respondents place heavy reliance on ALJ Marlowe’s Findings of Facts and Conclusions of Law; however, it is not her decision that is before this Court, but rather the decision of the Labor Commission, which did not adopt Judge Marlow’s Findings or Conclusions. It only affirmed her Order of Dismissal with prejudice - but made specific Findings of Fact on its own. Respondents missed or ignored this subtle but important distinction.

Seventh, Respondent’s objections as to Petitioner’s Withdraw are irrelevant

³ Respondent’s Brief at 19-20.

as mere conjecture and speculation. As pointed out above, the Willard decision requires that the injured worker be given the opportunity to “fully explain and substantiate the reasons for requesting permission to withdraw.”⁴ This was not done in this case.

D. Rule 41 of the Utah Rules of Civil Procedure.

The Appeals Board’s reliance on Rule 41 of the Utah Rules of Civil Procedure in Willard is misplaced. As the Board noted in that case “Rule 41(a) [Utah Rules of Civil Procedure] limits a plaintiff’s ability to voluntarily dismiss an action to the time before an adverse party has filed an answer or other response.” The Board went on:

Although the Rules of Civil Produced do not apply *per se* to administrative workers’ compensation proceedings such as this, it is appropriate for the Commission to turn to the Rules for guidance in situations where no other standards are directly applicable and application of the Rules is not contrary to the spirit or purpose of the administrative proceeding. Id. at 2.

The problem with that analysis is that there are, in fact, “other standards directly applicable.” The Administrative Procedures Act does not require a Motion or the consent of the adverse party or the ALJ for withdrawal of an Application for Hearing at any point in the proceedings. In fact, as noted by the ALJ in Willard, it is a long standing “Commission custom” to permit Applicants to withdraw Applications for Hearing at any time.

In addition, the Utah Labor Commission in its’ Order Affirming ALJ’s Decisions

⁴ Willard v. Thurston Cable Construction, 98-0569 (7/29//02).

specifically concluded that “Rule 41, U.R.C.P., although not directly applicable in the Labor Commission’s adjudicative proceedings, provided useful guidance by analogy.” (R. at 209) Thus, the Labor Commission, at best, elevated Rule 41 from being “useful guidance by analogy” to a new Rule replacing long-standing Commission custom and practice to the contrary. That the Labor Commission is reduced to extrapolating “useful guidance by analogy” to overrule long-standing Commission custom and practice points to the unequivocal and overwhelming need for the initiation of Administrative Rulemaking.

II

THE LABOR COMMISSION ABUSED ITS DISCRETION IN DISMISSING THIS MATTER WITH PREJUDICE.

This case should not have been dismissed with prejudice. Respondents argue for the first time that such is permitted by Utah Code Annotated, § 34A-2-417(4)(b)(ii)(A)(4) (2004) which provides in relevant part that:

(b) Under Subsection (4)(a), the Division of Adjudication may dismiss a claim:

- (i) without prejudice; or
- (ii) with prejudice only if:

(A) the Division or Adjudication adjudicates the merits of the employee’s entitlement to the compensation claimed in the application for hearing; or

(B) the employee fails to comply with Subsection (2)(a)(ii).

First, the problem with this analysis initially is that the statute is cited for the

first time by the Respondents on appeal, and further was not argued below by the Respondents or relied upon by the ALJ or the Labor Commission in either of their Orders.

Second, this statute conflicts with Utah Code Annotated, Section 34A-2-420, U.C.A. which specifically provides that:

(1)(a) The powers and jurisdiction of the commission over each case shall be continuing.

(b) After notice and hearing, the Division of Adjudication, commissioner, or Appeals Board in accordance with part 8, Adjudication, may from time to time modify or change a former finding or order of the Commission.

The concept of a “dismissal with prejudice,” meaning that a case can never again be revisited again for any reason, is inconsistent with the Commission’s statutorily mandated continuing jurisdiction.

Third, the Labor Commission did not make any Findings as to why the extraordinary and harsh remedy of a dismissal with prejudice was imposed. The Labor Commission’s Notice of Hearing indicates that if a party fails to appear, the “case may be dismissed or you may be defaulted,” but it does not state that a dismissal with prejudice could occur at all. (R1 at 30). Petitioner, therefore, was advised on the Labor Commission’s own form of the specific sanctions were she not to appear, and neither of them involved a dismissal with prejudice. Therefore she had no way of anticipating such a harsh result.

Fourth, the statute required that the ‘... merits of the employee’s entitlement

to compensation claimed in the application for hearing” be adjudicated. The merits of Mrs. Duran’s claim could not be adjudicated in her absence. At best the ALJ heard from one witness and heard the legal arguments of the Employer/Carrier’s attorney. This falls far short of an adjudication “on the merits”.

Fifth, Respondents case law authority are all cases from Courts of general jurisdiction which neither the Administrative Law Judge nor the Labor Commission are. Respondents cite no authority for their claimed position from any decision dealing with administrative agencies, generally, or the Labor Commission, specifically. What authority does exist is directly contrary. For example, the Utah Court of Appeals in Doubletree v. Industrial Commission, 797 P.2d 464 (Utah App. 1990) held that the Commission had authority under the Utah Administrative Procedures Act to dismiss “without” prejudice. See also Bourgeois v. Department of Commerce, 981 P.2d 414 (Ut. Ct. App. 1991) and Bacon v. Industrial Commission, 854 P.2d 548 (Ut. Ct. App. 1991).

Sixth, Respondents also argue that not dismissing this case with prejudice would violate the Equal Protection Clause of the 14th Amendment. They do not develop the argument and only refer to it in a single sentence.⁵ providing no argument, case citation or legal analysis to support it. Accordingly, there is nothing to address and that issue should not be considered on appeal. Kaiserman Associates, Inc. Francis Towns, 977 P.2d 462 (1998). “[T]his court is not a

⁵ Respondent’s Brief at 29.

depository in which the appealing party may dump the burden of argument and research." State v. Thomas, 961 P.2d 299, 305 (Utah 1998) (quotations and citations omitted). "[R]ule 24(a)(9) [of the Utah Rules of Appellate Procedure] requires not just bald citation to authority but development of that authority and reasoned analysis based on that authority." Id. It is well established that Utah appellate courts will not consider claims that are inadequately briefed. See, e.g., State v. Lucero, 2002 UT App 135, ¶ 8, 446, 47 P.3d 107; State v. Marquez, 2002 UT App 127, ¶ 12, 54 P.3d 637.

And finally, Respondents attempt to tar Petitioner's attorney with improper motives and dilatory conduct, but there is scant evidence for such a claim. Respondents go far beyond the record in this case to make that tortured claim. Respondents seek to justify the dismissal with prejudice as a sanction, but neither the ALJ or the Labor Commission characterized the case in that manner. The decision of the Labor Commission from which this Petition for Review is taken did not impose any sanction or make any allegation of improper conduct by Petitioner. Any contrary claims by Respondents are purely imaginary, argumentative and without support.

CONCLUSION/STATEMENT OF RELIEF SOUGHT

Petitioner was entitled to withdraw her Application for Hearing at any time prior to Hearing as she did in this case. Long-standing Labor Commission custom and practice supports it. Even if it had been proper to dismiss Petitioner's

Application for Hearing, it could only be dismissed without prejudice, which such relief Petitioner respectfully requests.

DATED this 1st day of October, 2007.

DABNEY & DABNEY, p.c.

Virginus Dabney
Counsel for Maria D. Duran

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of October, 2007, a copy of the foregoing REPLY BRIEF OF PETITIONER MARIA D. DURAN was hand-delivered and/or mailed, as follows:

UTAH COURT OF APPEALS
450 South State Street - 5TH Floor
P.O. Box 140230
Salt Lake City, Utah 84111-0230

(1) original and (7) copies

Mr. Alan L. Hennebold
UTAH LABOR COMMISSION
Post Office Box 146600
Salt Lake City, Utah 84114-6600

(2 copies)

Mr. Michael E. Dyer
BLACKBURN & STOLL
257 East 200 So. Suite 800
Salt Lake City, Utah 84111

(2 copies)

VIRGINIUS DABNEY
Counsel for Maria D. Duran