

2006

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

Utah Court of Appeals

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UTAH COURT OF APPEALS

MARIA D. DURAN

:

Petitioner/
Appellant,

:

Court of Appeals
Case No.: 2006-1122

:

vs.

Agency No: 04-0077

:

UTAH LABOR COMMISSION ,
SHONEY'S RESTAURANT and/or
WAUSAU INSURANCE CO.,

:

Priority 7

:

Respondents/
Appellees.

:

BRIEF OF APPELLEES

SHONEY'S RESTAURANT and/or WAUSAU INSURANCE CO.

Appeal from the Utah Labor Commission

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**APPELLEES RESPECTFULLY REQUEST ORAL ARGUMENT
AND THAT THIS CASE BE REPORTED.**

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JURISDICTION OF THE COURT OF APPEALS

This Petition for Review by Appellant Maria Duran is from a final order of the Labor Commission of Utah dated November 30, 2006. This Court has jurisdiction over this appeal pursuant to Utah Code Annotated §§ 34A-2-801(8)(a), 63-46b-16, and 78-2a-3(2)(a).

ISSUES PRESENTED AND STANDARDS OF REVIEW

1. **Issue:** Did the Labor Commission properly deny Ms. Duran's motion to set-aside default and proceed to hear the merits of the case when Petitioner filed a Withdrawal of her Application for Hearing only hours prior to the evidentiary hearing without giving notice to opposing counsel? This issue was preserved at Rule 213 et al.

Standard of Review: A court is endowed with considerable latitude of discretion in granting or denying a motion to set a default judgment aside. See Board of Educ. v. Cox, 384 P.2d 806 (Utah 1963). A trial court's ruling on a motion to set aside a default involves the trial court's discretionary power, and the Court of Appeals will not disturb the trial court's decision in such matters absent a clear abuse of such discretion. See Miller v. Brocksmith, 825 P.2d 690, 693 (Utah Ct. App. 1992).

2. **Issue:** Did the Commission properly dismiss this case "with prejudice" when Petitioner failed to attend the long-scheduled evidentiary hearing and present evidence to support her claim and, when, based upon the resulting hearing record, Administrative

Law Judge Marlowe found that Petitioner was not entitled to further benefits? This issue was preserved at Rule 213 et al.

Standard of Review: The Utah Administrative Procedures Act allows this court to grant relief where the Commission "has erroneously interpreted or applied the law," Utah Code Ann. § 63-46b-16(4)(d), or where "the statute or rule on which the agency action is based, is unconstitutional on its face or as applied." Utah Code Ann. § 63-46b-16(4)(a). "When reviewing an application or interpretation of law we use a correction of error standard, giving no deference to the Commission's interpretation of the law." Discretion is granted to the Commission's "application of the law to particular facts only when 'there is a grant of discretion to the agency concerning the language in question, either expressly made in the statute or implied from the statutory language.'" In this case, whether the Commission properly dismissed a case "with prejudice" involves a correction of error standard of review as no discretion has been granted under the applicable Utah statute. See Avis v. Board of Review, 837 P.2d 584, 586 (Utah Ct. App. 1992).

DETERMINATIVE LAW

There is no determinative appellate law. However, several statutes and rules are applicable.

Utah Code Ann. § 63-46b-11 provides:

- (1) The presiding officer may enter an order of default against a party if:
 - (a) a party in an informal adjudicative proceeding fails to participate in the adjudicative proceeding;
 - (b) a party to a formal adjudicative proceeding fails to attend or participate in a properly scheduled hearing after receiving proper notice; oRule..
- (2) An order of default shall include a statement of the grounds for default and shall be mailed to all parties.
- (3)
 - (a) A defaulted party may seek to have the agency set aside the default order, and any order in the adjudicative proceeding issued subsequent to the default order, by following the procedures outlined in the Utah Rules of Civil Procedure.
 - ...
- (4)
 - (a) In an adjudicative proceeding begun by the agency, or in an adjudicative proceeding begun by a party that has other parties besides the party in default, the presiding officer shall, after issuing the order of default, conduct any further proceedings necessary to complete the adjudicative proceeding without the participation of the party in default and shall determine all issues in the adjudicative proceeding, including those affecting the defaulting party.
 - (b) In an adjudicative proceeding that has no parties other than the agency and the party in default, the presiding officer shall, after issuing the order of default, dismiss the proceeding.

Id.

Utah Rule Civ. Proc. 41 provides:

(a) *Voluntary dismissal; effect thereof.*

(1) *By plaintiff.* Subject to the provisions of Rule 23(e), of Rule 66(I), and of any applicable statute, an action may be dismissed by the plaintiff without order of court by filing a notice of dismissal at any time before service by the adverse party of an answer or other response to the complaint permitted under these rules. Unless otherwise stated in the notice of dismissal, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

(2) *By order of court.* **Unless the plaintiff timely files a notice of dismissal under paragraph (1) of this subdivision of this rule, an action may only be dismissed at the request of the plaintiff on order of the court based either on:**

(i) a stipulation of all of the parties who have appeared in the action; or

(ii) upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

(b) *Involuntary dismissal; effect thereof.* For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue or for

lack of an indispensable party, operates as an adjudication upon the merits.

Id. (Emphasis added).

Utah Code Ann. § 63-46b-3(2)(a)(vii) provides:

if the administrative proceeding is to be formal, or if a hearing is required by statute or rule, a statement of the time and place of any scheduled hearing, a statement of the purpose for which the hearing is to be held, and a statement that a party who fails to attend or participate in the hearing **may be held in default.**

Id. (Emphasis added).

Utah Code Ann. § 34A-2-417(4) provides:

(4)(a)(i). Subject to Subsections (2)(c) and (4)(b), after an employee files an application for hearing within six years from the date of the accident, the Division of Adjudication may enter an order to show cause why the employee's claim should not be dismissed because the employee has failed to meet the employee's burden of proof to establish an entitlement to compensation claimed in the application for hearing.

(ii) The order described in Subsection (4)(a)(I) may be entered on the motion of the:

(A) Division of Adjudication;

(B) employee's employer; or

(C) employer's insurance carrier.

(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 of 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).

Id. (Emphasis added).

STATEMENT OF THE CASE

Nature of the Case

This case presents the question of whether the Utah Labor Commission properly determined that an employee who files for worker's compensation benefits cannot withdraw her Application for Hearing only hours before trial without leave of the court. Additionally, the Court of Appeals must consider whether the Commission, upon reviewing the merits of this case, properly dismissed this case "with prejudice".

Course of the Proceedings / Statement of Facts

1. On January 23, 2004, Ms. Duran ("Petitioner"), through legal counsel Virginus Dabney, filed an Application for Hearing with the Labor Commission seeking entitlement to workers' compensation benefits arising from an alleged accident on January 1, 2003 while working for Shoney's Restaurant. She alleged that she slipped on juice, but did not fall, while carrying plates, with injuries to her spine and lower extremities. (Rule, 1.)
2. On March 3, 2004, respondents filed an Answer to the Application for Hearing. Respondents denied the injuries alleged by Petitioner. (Rule, 26).
3. On January 6, 2005, the Labor Commission set this matter for hearing in St. George on April 26, 2005 at 1:00 p.m. (Rule, 30). That notice stated:

“YOU MUST NOTIFY US WITHIN 10 DAYS IF YOU WANT TO CHANGE THE TIME OR DATE, OTHERWISE YOU WILL BE REQUIRED TO SHOW GOOD CAUSE. If you fail to appear at the time your case is to be heard, your case may be dismissed or you may be defaulted.”

Id. (Emphasis in original.)

4. On January 26, 2005, petitioner’s counsel, Virginius Dabney, wrote to Judge Marlowe indicating that a “. . . half day may not be long enough so I would appreciate a setting for a full day. However, we do not want to give up the half-day setting if there is no full day available. We want to have the hearing because the case has been pending for so long.” (Rule, 31)
5. On February 7, 2005, the Court informed the parties that the hearing would proceed on April 26, 2005, with an additional date given later if necessary. (Rule, 32)
6. On March 11, 2005, Mr. Dabney again requested a full day for the hearing. (Rule, 37). In a hand-written response dated March 16, 2005, Judge Marlowe again indicated that she would go forward on the scheduled half day, with any remaining evidence to be presented in Salt Lake City or on the next St. George calendar, if necessary. (Rule, 37)
7. On March 16, 2005, Mr. Dabney again wrote to Judge Marlowe requesting a full day for a hearing. (Rule, 38).

8. On March 18, 2005, counsel for respondents objected to a continuance, noting that only three witnesses had been identified for the hearing: Ms. Duran, Ken Lister, and Louise Randall (a manager from Shoney's). With only three nominated witnesses, respondents' counsel argued that the case should not last longer than three hours, let alone the four hours as scheduled. (Rule, 40).
9. On April 8, 2005, Respondents filed a Motion to preclude Petitioner's expert witness from testifying on the basis that Petitioner had refused to provide an outline of testimony of that witness or otherwise make the witness available to be deposed. (Rule, 62).
10. On April 22, 2005, petitioner's counsel again requested that the case be rescheduled for a full day of hearing. (Rule, 75).
11. On April 22, 2005 the ALJ granted Respondents' motion to exclude Petitioner's expert witness. (Rule, 77).
12. Late in the afternoon of April 25, 2005, on or about 2:30 pm (the day prior to the scheduled hearing), Mr. Dabney faxed a letter to the Labor Commission indicating that petitioner was withdrawing her Application for Hearing. Petitioner did not request permission to withdraw; rather the letter simply notified the ALJ of this intent. Petitioner indicated that she would file an Amended Application for Hearing in order to allow Mr. Lister, a vocational expert, to testify on behalf of

petitioner.¹ (Rule, 81.) Judge Marlowe had already left Salt Lake City for the hearing and did not receive the letter.

13. Mr. Dabney did not provide notice to Respondents' counsel relative to the withdrawal of the claim. To the contrary, even petitioner's fax shows that it did not successfully transmit to respondents' counsel. (Rule, 82)
14. On April 26, 2005, Respondents' counsel traveled from Salt Lake City to St. George for the scheduled hearing. At the time of the scheduled hearing, Judge Marlowe informed respondents' counsel of the withdrawal of the Application for Hearing. The issues outlined in Willard v. Thurston Cable, Labor Commission 98-0569 (7/29/02) were addressed and, since neither petitioner nor her counsel were present, petitioner's default was entered. In addition, Judge Marlowe conducted an evidentiary hearing whereby the court took sworn testimony from Louise Randall, Shoney's manager. Ms. Randall testified that Shoney's will close in May 2005, having sold out to Ruby River. Ms. Randall also brought evidence with her to court which included forty-five plates from Shoney's— the number of plates allegedly being carried by Petitioner at the time of her accident. A transcript of that hearing is provided at Rule, 213.

¹The court had previously excluded Mr. Lister as a witness since petitioner's counsel had not provided to respondents a summary of Mr. Lister's proposed testimony, had not made Mr. Lister available to be deposed on a timely basis, and had not objected to respondents' Motion to Exclude Mr. Lister as a witness.

15. At the hearing, Respondents counsel noted that there was no reason why Petitioner nor her attorney, both St. George residents, could not attend the hearing. Respondents stressed that both Respondents' legal counsel and the ALJ had traveled from Salt Lake City to St. George for this hearing. Respondents also noted that they had brought evidence and a witness that may be otherwise unavailable if the hearing was continued. (Rule, 213).
16. On May 3, 2005, Judge Marlowe entered her Findings of Fact, Conclusions of Law and Order detailing nearly 10 pages. Based upon her review of the medical records and the testimony of Ms. Randall, Judge Marlowe denied any further benefits to petitioner. (Rule, 83-91).² The ALJ stated in her Order that a default order was appropriate under section 63-46b-11 of the Utah Code since Petitioner failed to appear at the hearing. The ALJ also agreed that, under Rule 41 of the Utah Rules of Civil Procedure and Labor Commission precedent, Petitioner was

² In fact, the medical records show very little support, if any for Petitioner's claim. An MRI taken of her lumber spine on May 5, 2003 returned normal. See Rule, 212, at 52. Additionally, an MRI taken of her cervical spine show only minor degenerative changes. See Rule, 212, at 51. In addition, Petitioner did not begin to complain of neck pain for four months after the claimed industrial accident. See Rule, 212, at 49, 51. Even Petitioner's treating doctor opined that her neck condition "could" be related to work, an opinion which does not satisfy the medical probability standard and is, at best, speculative. See Rule, 212, at 49. Even a chiropractor, Dr. Labrum, found that Petitioner was able to return to work in January 2003. See Rule, 212, 23. Nonetheless, temporary total disability benefits were paid to Petitioner well after this stability date until Dr. Richard Knoebel saw Petitioner on August 26, 2003. See Rule, 212 at 34-46. Hence, there is arguably a large overpayment of temporary total disability in this case.

required to receive permission from the court to withdraw her Application for Hearing and could not unilaterally do so by her letter of April 25, 2005. The ALJ ruled that she would treat Petitioner's letter as a motion to withdraw the Application for Hearing. Finding no good reason for Petitioner to withdraw her Application for Hearing, the ALJ denied the motion and proceeded with the hearing. Upon considering the merits, the ALJ ultimately denied further benefits. (Rule, 83-91).

17. On June 3, 2005, petitioner filed her Motion for Review. (Rule, 92).
18. On June 22, 2005, respondents filed a memorandum in opposition to petitioner's Motion for Review. (Rule, 102).
19. On July 7, 2005, Judge Marlowe, treating petitioner's Motion for Review as a Motion to Set Aside Default, entered an Order Denying Petitioner's Motion to Set Aside Default. (Rule, 136).
20. On July 29, 2005, petitioner filed a reply memorandum in response to the memorandum filed by respondents. (Rule, 141).
21. On July 29, 2005, petitioner also filed a second Motion for Review of Judge Marlowe's Order Denying Motion to Set Aside Default. (Rule, 139).
22. On November 30, 2006, the Commission entered an Order Affirming ALJ's Decision. (Rule, 207).

23. On December 13, 2006, petitioner filed a Petition for Review and Docketing Statement. Following unsuccessful mediation, petitioner's brief was set for May 4, 2007.
24. On April 30, 2007, petitioner filed a Motion for Summary Disposition and supporting memorandum.
25. On May 16, 2007 the Court denied Petitioner's Motion.
26. On July 30, 2007 Petitioner filed her Appellate Brief with the Court of Appeals.

SUMMARY OF THE ARGUMENT

There was no error by the Commission in dismissing Petitioner's case with prejudice. Under Rule 41 of the Utah Rules of Civil Procedure, Petitioner was required to have permission of the court to withdraw her Application for Hearing and could not unilaterally do so by her letter of April 25, 2005. Even assuming that Petitioner's letter of April 25, 2005 was properly treated as a motion to withdraw the Application for Hearing (although not phrased as a motion), the ALJ appropriately determined that Petitioner's purported reason to withdraw her Application for Hearing --based upon the fact that she wanted a full day hearing -- was inadequate, and she properly denied the motion to withdraw and proceeded with the evidentiary hearing. Since Petitioner failed to attend the hearing, despite having proper notice, an Order of Default was fittingly entered under section 63-46b-11 of the Utah Code. Additionally, the Court appropriately proceeded to conduct further proceedings by hearing the merits of this case as allowed by Utah Code Ann. § 63-46b-11(4). Having heard the case on the merits, and finding no further benefits appropriate in this case, the ALJ properly denied benefits to Petitioner and entered a dismissal with prejudice as allowed by Utah Code Ann. § 34A-2-417(4)(b)(ii)(A).

ARGUMENT

POINT 1: THE COMMISSION PROPERLY RULED THAT MS. DURAN DOES NOT HAVE THE RIGHT TO UNILATERALLY WITHDRAW HER APPLICATION FOR HEARING, PARTICULARLY WHEN THE WITHDRAWAL OCCURS LESS THAN 24 HOURS BEFORE THE SCHEDULED HEARING WITHOUT GIVING NOTICE TO OPPOSING COUNSEL.

Ms. Duran submits that the Utah Labor Commission erred in upholding the ALJ's entry of default and proceeding to hear the case on the merits since "long standing commission custom and practice" allows an applicant, at any time, to withdraw an Application for Hearing prior to hearing. Indeed, Petitioner argues that the Labor Commission committed error in dismissing her case with prejudice since she filed a Withdrawal of the Application for Hearing, albeit only hours prior to the scheduled hearing. In other words, Petitioner essentially argues that it is somehow appropriate for the Labor Commission to allow the ALJ, opposing counsel, the parties, and the witnesses in a case to prepare for and to travel to a hearing and, only hours before the hearing, to permit the petitioner, without notice to opposing counsel, to withdraw the claim, without prejudice, with the expressly stated intent to re-file immediately with the Commission the exact same claim.

Petitioner cites two Labor Commission decisions, Willard v. Thurston Cable, Case No. 98-0568 (7/29/02), and Barton v. St. George Steel, 97-0887 (11/29/00) to support her position that "long standing custom and practice" allows voluntary withdrawal of the

Application for Hearing on the day before trial. This allegation, of course, is not correct. In fact, the Commission in Willard squarely addresses this issue and supports Respondents' position that, once an answer or responsive pleading is filed, judicial approval is needed before an applicant may withdraw his or her Application for Hearing.

In Willard, the claimant filed a "Withdrawal of Application for Hearing Without Prejudice" purporting to withdraw his Application for Hearing on the grounds that he was incarcerated and could not participate in the adjudicative process. The ALJ cancelled the hearing without giving the opposing party the opportunity to respond. The Commission held that the ALJ erred in allowing the unilateral withdrawal of the Application for Hearing. The court cited to Rule 41 of the Utah Rules of Civil Procedure noting that Rule 41(a) allows a plaintiff to voluntarily dismiss an action unilaterally at any time prior to the opposing party's answer or other response. The Commission further cited to Rule 41(b) which indicates that where an Answer has already been filed, "an action may only be dismissed based either on: (i) stipulation of the parties who have appeared in the action; or (ii) upon such terms and conditions as the court deems proper..."

In Willard, the Commission ultimately concluded:

"In view of the foregoing provisions of Rule 41, and in the absence of any stipulation for dismissal between the parties, the Commission concludes that **Commission permission is required before Mr. Willard may withdraw his Application for Hearing in this matter.**"

Id. (Emphasis added).

In the present case, petitioner Duran blanketly argues that she has an unconditional right to withdraw her Application for Hearing at any time, prior to the actual hearing, with or without notice to opposing counsel and with or without permission from the Labor Commission. She argues that the Commission's decision in Willard, is not applicable to her case, arguing that long standing "Commission custom" allows the withdrawal of Applications for Hearing at any time.

Petitioner's analysis is seriously flawed. The Labor Commission's ruling in Willard applies specifically to any case where a petitioner seeks to voluntarily withdraw an Application for Hearing prior to the scheduled hearing. The Labor Commission's analysis is clearly set forth in Willard. Moreover, respondents specifically deny the existence of a "Commission custom" of allowing a withdrawal of the claim at any time prior to a hearing. Willard, decided by the Labor Commission in 2002, itself stands to the contrary of that proposition. Petitioner has failed to cite to any Labor Commission ruling indicating that one may simply withdraw an Application for Hearing the day prior to a scheduled hearing. Even if there had been such a "custom" prior to 2002 (which Respondents deny), that "custom" was expressly revoked by the Labor Commission's decision in Willard.

In this case, since an Answer was filed and, in fact, the hearing was only hours away, Petitioner was required to obtain permission of the ALJ to withdraw her

Application for Hearing. Since the court did not grant her leave to withdraw, she was under a clear obligation to appear at the hearing.

POINT 2: THE COMMISSION WAS FULLY JUSTIFIED IN NOT ACCEPTING PETITIONER'S VOLUNTARY DISMISSAL OF HER APPLICATION FOR HEARING.

The Commission did not commit error in holding that it would not accept Petitioner's voluntary dismissal of her Application for Hearing. As noted, under Rule 41 of the Utah Rules of Civil Procedure, in the absence of a stipulation by the parties, Commission permission is required before a petitioner may obtain dismissal of their legal action. Such action may only be dismissed "upon such terms and conditions as the court deems proper". See Utah Rule Civ. P. 41. Petitioner fails to show why the reasons given in the ALJ's Order of May 3, 2005 constitute error. Additionally, Petitioner failed to even attend the hearing to explain why leave would be appropriate. In fact, Judge Marlowe had sufficient grounds for denying petitioner's motion to withdraw which was affirmed by the Commission:

First, Judge Marlowe correctly noted that the motion to withdraw had only been faxed to the Labor Commission on the day prior to the scheduled hearing at 2:39 p.m. Obviously, Judge Marlowe was concerned with the late notice having been provided to the Commission regarding the withdrawal of the Application for Hearing.

Second, Judge Marlowe noted that the withdrawal of the Application for Hearing had never been sent to respondents' counsel. This finding is supported by the evidence attached to petitioner's own Motion for Review, indicating that petitioner's attempted fax to Blackburn & Stoll was not successful.

Third, due to the lack of notice to respondents' counsel, a large expense was incurred on behalf of respondents. In this regard, counsel for respondents spent a great deal of time on April 25, 2005 preparing for the hearing. Counsel for respondents also incurred the cost of flying to St. George on April 26 and renting a car in order to appear at the scheduled hearing. Respondents also had to incur the legal fees of having Mr. Dyer spend a day in St. George for the hearing and meet with and prepare his witness for hearing.

Fourth, Judge Marlowe noted that Louise Randall appeared as a witness to testify on behalf of respondents. However, in her testimony, Ms. Randall noted that Shoney's had already been sold to Ruby River and would be closing within a month's time. Thus, the withdrawal of the Application for Hearing could significantly jeopardize the availability of respondents' witness.³

Fifth, it appears that Petitioner has already been compensated to the extent allowed by the Worker's Compensation Act for any injuries from this accident. The medical

³Respondents note that it has now been two years since Shoney's closed in St. George.

evidence presented at hearing revealed that following the January 1, 2003 accident Petitioner continued to work until January 6, 2003. Dr. Labrum found her unable to work from January 6, 2003 until January 15, 2003 and he then released her to return to work. Despite this release, Respondents continued to pay temporary total disability to Petitioner until August 26, 2003 when she was evaluated by Dr. Knoebel. At that time, Dr. Knoebel found her to be medically stable with no permanent partial disability. He also noted that there were no significant objective findings by x-ray or MRI. Based upon these records, ALJ Marlowe would have been justified in terminating temporary total disability on January 15, 2003. However, she generously continued those benefits to Petitioner through August 26, 2003. See Rule, 88.

Additionally, the MRI of Petitioner's back on May 3, 2005 returned normal. See Rule, 212 at 53. Based upon this MRI, Judge Marlowe was also justified in not awarding any permanent partial disability for Petitioner's lumbar spine. Likewise, Petitioner did not complain of cervical problems for nearly four months after the accident. Her treating doctor, Dr. Smith, opined that this condition "could be" related to the industrial event. See Rule, 212, at 49. Thus, based upon medical possibility, Judge Marlowe was again justified in not awarding permanent partial disability. See Southern Pac. Co. v. Industrial Comm'n, 96 Utah 510 (1939) (holding that while finding of the Commission may not rest on possibilities, it may properly rest on probabilities).

Sixth, Judge Marlowe noted that Louise Randall had brought with her forty-five plates from Shoney's Restaurant as evidence for the hearing. (In her deposition, petitioner claimed that she was carrying forty-five plates at the time of her slip.) However, due to the closure of Shoney's, respondents would be seriously disadvantaged at not having available the same evidence.

Petitioner now argues that Judge Marlowe and the Commission did not adequately weigh the reasons for withdrawal. She argues that she was deprived of the ability to fully explain and substantiate the reasons for the withdrawal of the claim.

In response to the arguments raised by petitioner, respondents note initially that petitioner did, in fact, have notice of the scheduled hearing. Had she wanted to appear to discuss the matter before Judge Marlowe, she certainly could have done so. Petitioner and her counsel both live in St. George and, should they have desired, could have appeared at the hearing by means of a five minute drive. Thus, if petitioner was deprived of the ability to explain the reason for the withdrawal of her claim, that deprivation was certainly self-inflicted. She chose not to appear at the scheduled hearing, and she did so at her own peril. Additionally, Petitioner's placement of blame on the ALJ is meritless. Petitioner places blame on the ALJ in failing to rule immediately on her notice of withdrawal, noting that had the judge promptly ruled, she would have been on notice to appear. Obviously, any intent to inform Petitioner of an immediately ruling would not have been possible since Petitioner did not attend the hearing. Nonetheless, Petitioner did

not frame her April 25, 2005 letter as a “motion”. Rather, the April 22, 2005 letter filed by Petitioner is simply a notice to the court that she was withdrawing her claim. The judge kindly treated this letter as a motion, although she clearly was not required by law to do so. See Rule, 81.

Moreover, even if Petitioner had appeared at the hearing, the purported basis for the withdrawal of the claim is insufficient from a legal standpoint. According to petitioner’s letter of April 25, 2005, she was withdrawing her Application for Hearing in order to file an Amended Application for Hearing which could allow Mr. Lister to testify on behalf of petitioner. In this regard, petitioner is clearly attempting to obtain a “second bite at the apple.” Petitioner did not cooperate in discovery, nor did she respond to respondents’ motion to exclude Mr. Lister from testifying.⁴ Thus, petitioner’s true reason for withdrawing her Application for Hearing was that she was not prepared for the hearing, having disdained following appropriate legal rules for preparing for trial. This is not a situation when emergent circumstances prevented Petitioner and her attorney’s attendance at hearing. Petitioner and her attorney, both residents of St. George, simply chose not to attend the scheduled hearing, knowing that both the ALJ and respondents’ legal counsel had to travel from Salt Lake City to St. George to attend the hearing.

⁴Judge Marlowe noted in her Order that, in a letter dated April 22, 2005, Mr. Dabney explained that he had “neither the time nor the interest to respond” to the Motion.

Certainly, Petitioner and her attorney's legal delay tactics in this case should not be rewarded.

Respondents respectfully submit that, on balance, Judge Marlowe and the Commission were justified in denying petitioner's motion to withdraw her Application for Hearing on the day prior to the scheduled hearing. The Commission's affirmance of Judge Marlowe's Order certainly does not constitute error.

POINT 3: THERE WAS NO ERROR IN DISMISSING PETITIONER'S CASE "WITH PREJUDICE" SINCE THE CASE WAS HEARD ON THE MERITS.

Petitioner also argues that the Commission is not allowed to enter a dismissal "with prejudice" based upon a default. However, petitioner was not merely defaulted; rather, a hearing was held on the merits with medical records reviewed by the judge and hearing testimony taken. Because petitioner did not prove the *prima facie* elements necessary to support her claims, dismissal of her case "with prejudice" was allowed pursuant to Utah Code Ann. § 34A-2-417(4)(b)(ii)(A) since this claim was heard on the merits.

Utah Code Ann. § 34A-2-417(4)(b)(ii)(A) provides:

- (4) (a) (i) Subject to Subsections (2)(c) and (4)(b), after an employee files an application for hearing within six years from the date of the accident, the Division of Adjudication may enter an order to show cause why the employee's claim should not be dismissed because the employee has failed

to meet the employee's burden of proof to establish an entitlement to compensation claimed in the application for hearing.

(ii) The order described in Subsection (4)(a)(i) may be entered on the motion of the:

(A) Division of Adjudication;

(B) employee's employer; or

(C) employer's insurance carrier.

(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 of 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).

...

Utah Code Ann. § 34A-2-417. (Emphasis added).

Additionally, Utah Code Ann. §§ 63-46b-3 and -11 provide for the entry and penalty of a default when a party fails to properly attend or participate in a properly scheduled evidentiary hearing. Section 63-46b-3(2)(a)(vii) of the Utah Code states:

if the administrative proceeding is to be formal, or if a hearing is required by statute or rule, a statement of the time and place of any scheduled hearing, a statement of the purpose for which the hearing is to be held, and a statement that a party who fails to attend or participate in the hearing **may be held in default.**

Id. (Emphasis added).

The Notice from the Labor Commission in this case fully complied with the above strictures and was not deficient in any way, stating that a default may be entered if the parties fail to attend or participate in the hearing. Because this Labor Commission form fully complies with the Utah Code, petitioner's argument lacks merit. In any event, petitioner's attorney, a seasoned practitioner for over 20+ years, should be familiar with the Utah Code and other applicable Utah Worker's Compensation laws and should know that the failure to participate in a hearing could subject his client to default.⁵

In this case, a hearing had been scheduled since January 6, 2005 and was known by the parties. The last hour withdrawal in this case constitutes dilatory action and/or intentional manipulation by Attorney Dabney and his client. To allow a default under the circumstances of this case to result merely in a dismissal "without prejudice" -- as proposed by petitioner -- would be more than unjust: it should shock the conscience of the court. Petitioner's proposed "solution" will cause the potential for extreme delay and enormous expense to respondents **in every single case** since any counsel for a petitioner, if not feeling entirely prepared in any given case, could simply withdraw the claim only hours before the scheduled hearing. Respondents urge the Court to reject petitioner's

⁵ Petitioner's counsel has also been defaulted for this same practice by other ALJ's in other cases. See, e.g. *Thiel v. Jack B. Parsons*, case number 04-0058 (6-16-06) and *Nelson v. Canyon*, 05-0394 (10-3-05).

request for unfettered discretion relative to withdrawing an Application for Hearing at the Labor Commission.

Utah's appellate courts have considered similar issues in Panos v. Smith's Food & Drug Ctrs., 913 P.2d 363, 364 (Utah Ct. App. 1996). There, the court cited Rule 41(b) and held:

For failure of the plaintiff to prosecute or to comply with these rules or any order of the court, a defendant may move for dismissal of an action or of any claim against him. . . . Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue or for lack of an indispensable party, operates as an adjudication upon the merits.

Utah Rule Civ. P. 41(b).

Although the express language of Rule 41(b) states a defendant must bring a motion to dismiss to enforce a court order, we have ruled that a court may dismiss a claim sua sponte, without a motion by the defendant. "The language in Rule 41(b) merely permits, not requires, a motion by defendant. . . . 'In dismissing an action for want of prosecution, the court may proceed under [Rule 41(b)], or it may, of its own motion, take action to that end.'" . . . **.Therefore, under Rule 41(b), a trial court may dismiss claims with or without prejudice absent a motion by defendants.**

Id. (emphasis added).

Similarly, 63-46b-8 of the Utah Code "does not preclude the presiding officer from taking appropriate measures to preserve the integrity of the hearing." The Labor Commission's powers under the Utah Code (and UAPA) in conjunction with the Utah Rules of Civil Procedure certainly give the ALJ the discretion to impose the sanction of

dismissal with or without prejudice against a party who has failed to attend a properly scheduled hearing and who has engaged in dilatory and contumacious behavior.

Respondents also note that the inherent powers of this tribunal permit the ALJ and Board to dismiss a case with prejudice and to award sanctions. In Barnard v. Wasserman, 855 P.2d 243 (Utah 1993), the Supreme Court stated:

It is undoubtedly true that courts of general and superior jurisdiction possess certain inherent powers not derived from any statute. Among these are the power to punish for contempt, to make, modify, and enforce rules for the regulation of the business before the court, . . . to recall and control its process, to direct and control its officers, including attorneys as such, and to suspend, disbar, and reinstate attorneys. Such inherent powers of courts are necessary to the proper discharge of their duties. . . .

The summary jurisdiction which the court has over its attorneys as officers of the court . . . is inherent, continuing, and plenary . . . and ought to be assumed and exercised . . . not only to maintain and protect the integrity and dignity of the court, to secure obedience to its rules and process, and to rebuke interference with the conduct of its business, but also to control and protect its officers, including attorneys. . . . Courts of general jurisdiction . . . **possess certain inherent power to impose monetary sanctions on attorneys who by their conduct thwart the court's scheduling and movement of cases through the court.**

Id. (emphasis added); see Griffith v. Griffith, 1999 UT 78, 985 P.2d 255 (same).

In Barnard, the Supreme Court held that because Mr. Barnard's actions as an attorney interfered with the administration of justice and wasted the court's time, the trial court had the authority to sanction him. The Supreme Court explained that "[a]lthough not explicitly provided for by rule, such awards are within the inherent powers of the

court and are in fact imposed regularly as a means of controlling the conduct of attorneys and litigants.” Barnard, supra.

Similarly, in Griffith, the Supreme Court held that sanctions, while available under Rule 11 under limited circumstances, were properly awarded by the trial court under its “inherent powers to impose monetary sanctions on an attorney for wasting judicial resources” when a party made a meritless motion to disqualify. Griffith, 1999 UT 78 at ¶12. In Griffith, the court awarded sanctions to “compensate for delay, inconvenience and the expenses resulting from [the attorney’s] behavior.” Id. at ¶14 (quoting Barnard, 855 P.2d at 248).

Like traditional courts of general and superior jurisdiction, the ALJ, acting on behalf of this administrative tribunal, had the inherent authority to impose sanctions which included dismissal of this case with prejudice, even if no statute or rule explicitly provided for such an award. Of course, in this case Utah statute allows for dismissal with prejudice.

Adopting petitioner’s reasoning would put respondents at a gross disadvantage. Dismissal “without prejudice” would allow petitioner the opportunity to re-file a new Application for Hearing under the Commission’s continuing jurisdiction (section 34A-2-420) and would allow her the opportunity for another hearing. See Doubletree v. Industrial Comm’n, 797 P.2d 464 (Utah Ct. App. 1990) (noting effect of dismissal without prejudice). Respondents had prepared for the hearing and had traveled to St.

George for the hearing on this matter. Similarly, the ALJ had traveled and had reviewed the hearing file which consisted of hundreds of medical records. To allow a claimant and her attorney simply to not attend the hearing on this matter and dismiss his or her case “without prejudice” is, in effect, a dilatory tactic that can only advance the interests of the petitioner.

If an employer or its carrier fails to attend a hearing, and good cause is not found to excuse a default, the sanction is an adjudication of the case without participation of that party. The employer/carrier is not afforded the luxury of essentially “wiping the slate clean” and engaging in an entirely new hearing when and if they file a Request for Agency Action. Under the Equal Protection Clause of the 14th Amendment, respondents stress that the parties must be treated similarly and fairly. Since an employer/carrier would not be afforded the luxury of a new hearing if they had engaged in such tactics, petitioner, having failed to show good cause, should not either. Indeed, respondents would be prejudiced by dismissal without prejudice since they, the ALJ, and witnesses (if they are still available) would have to prepare for and travel, at their expense, to St. George for a new hearing.

Petitioner further claims that the ALJ prejudiced her and committed a “sham” hearing since the hearing was conducted without her and resulted in dismissal “with prejudice”. She argues that she was prejudiced because the ALJ did not notify her that the hearing would go forward without her. She also complains that the ALJ, having twice

denied petitioner's request for a full day hearing, did not respond immediately to petitioner's subsequent motions for reconsideration.

As noted, the Commission set the matter for hearing in St. George, Utah for April 26, 2005 at 1:00 pm. On January 26, 2005, petitioner's counsel wrote Judge Marlowe a letter asking for a full day hearing, but indicated that she would not want to give up a half-day slot if no full day slot was available. On February 7, 2005, the court informed the parties that the hearing would proceed on April 26, 2005 with an additional day given later, if needed. On March 11, 2005 petitioner again requested a full day for the hearing. In a handwritten response dated March 16, 2005 Judge Marlowe again indicated that she would go forward on the scheduled half-day hearing, with any remaining evidence to be presented in Salt Lake City, or on the next St. George calendar. if necessary.

On March 16, 2005, Mr. Dabney again wrote Judge Marlowe requesting a full day hearing. On April 2, 2005, despite the prior rulings by the judge, Mr. Dabney again wrote to the judge asking for a full day hearing. The ALJ did not respond to these additional motions from Mr. Dabney since she had already rendered her rulings on two prior occasions.

Late in the afternoon of April 25, 2005, Mr. Dabney faxed a letter to the Labor Commission (in Salt Lake City) indicating that his client was withdrawing her Application for Hearing. No notice was given to Shoney's (or to their legal counsel) relative to the withdrawal of the claim. On April 26, 2005 Shoney's counsel traveled

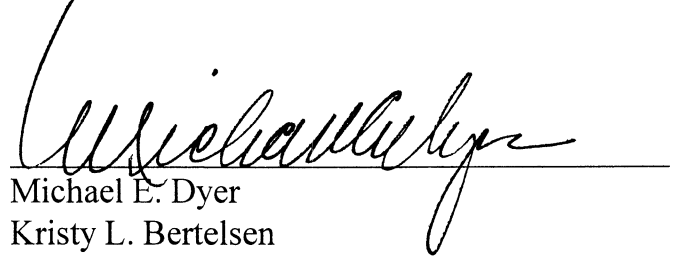
from Salt Lake City to St. George for the scheduled hearing. The judge in this case had previously traveled to St. George to conduct the hearing (there was no local judge on staff at the time to hold hearings in St. George), and, therefore, the ALJ was not in Salt Lake City to receive petitioner's faxed notice. At the time of the hearing, the judge informed Shoney's legal counsel of petitioner's withdrawal of the Application for Hearing. Shoney's legal counsel asked the court to enter Ms. Duran's default based upon the Labor Commission's prior ruling in Willard v. Thurston Cable. He also asked to present witness testimony and to proceed on the merits. As a result of Ms. Duran and her counsel's failure to obtain leave of the court to withdraw the Application for Hearing, the court considered Petitioner's notice as a motion to withdraw and, finding no good reason to grant it, entered petitioner's default and allowed respondents to present testimony pursuant to section 63-46b-11(4) of the Utah Code. Based upon her review of all of the medical evidence and hearing testimony, the ALJ entered an Order addressing the merits of this case, ultimately finding in favor of Shoney's. This ruling was later affirmed by the Labor Commission.

CONCLUSION

The Court of Appeals should affirm the Labor Commission's Order Affirming ALJ Decisions. Petitioner had the opportunity to participate in a scheduled hearing but failed to attend. Her attempt to withdraw her Application for Hearing on the eve of trial in the hopes of refileing at a later date is not allowed by Utah law and should not be rewarded by this court.

Respectfully submitted this 24th day of August, 2007.

BLACKBURN & STOLL, LC

A handwritten signature in black ink, appearing to read "Michael E. Dyer", is written over a horizontal line.

Michael E. Dyer

Kristy L. Bertelsen

Attorneys for Appellees Shoney's Restaurant
and/or Wausau Insurance Company

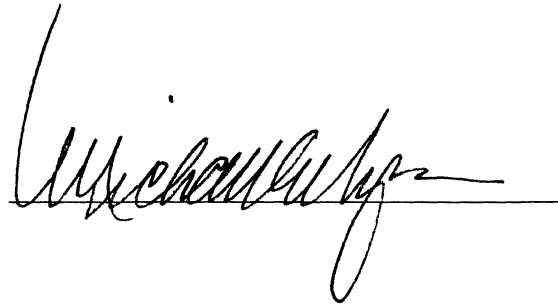
CERTIFICATE OF SERVICE

I certify that true and correct copies of the foregoing document were mailed, first class, postage prepaid on the 17th day of August, 2007, to:

Utah Court of Appeals (8 copies, one w/orig. signature)
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A handwritten signature in black ink, appearing to read "Michael J. Duran", is written over a horizontal line.