

2006

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

Utah Court of Appeals

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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

BRIEF OF PETITIONER MARIA D. DURAN

PETITION FOR REVIEW FROM ORDER OF THE UTAH LABOR COMMISSION

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

FILED
UTAH APPELLATE COURTS

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**PETITIONER RESPECTFULLY REQUEST ORAL ARGUMENT
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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
Statement of the Case	2
A. Nature of the Case	2
B. Course of Proceedings/Statement of the Case	2
Summary of Argument	4
Argument:	
I. THE PETITIONER HAD A RIGHT TO WITHDRAW HER APPLICATION FOR HEARING AT ANY TIME PRIOR TO HEARING ...	5
II. THE UTAH APPEALS BOARD ABUSED ITS DISCRETION IN DISMISSING THIS MATTER WITH PREJUDICE AND ALSO BY FAILING TO SET ASIDE PETITIONER'S DEFAULT. ...	10
Conclusion/Statement of Relief Sought	14
Addenda	16

TABLE OF AUTHORITIES

CASES:

	<u>Page</u>
<u>Askrew v. Industrial Commission</u> , 391 P.2d 302 (Utah 1964)	9
<u>Baker v. Industrial Commission</u> , 405 P.2d 613 (Utah 1965)	9
<u>Bacon v. Industrial Commission</u> , 854 P.2d 548 (Ut. Ct. App. 1991)	12
<u>Bourgeois v. Department of Commerce</u> , 981 P.2d 414 (Ut. Ct. App. 1991) . . .	12
<u>Chandler v. Industrial Commission</u> , 184 P. 1020 (Utah 1919)	9
<u>Doubletree v. Industrial Commission</u> , 797 P.2d 464 (Utah App. 1990)	12
<u>Drake v. Industrial Commission</u> , 939 P.2d 177 (Utah 1997)	1
<u>Heaton v. Second Injury Fund</u> , 796 P.2d 676 (Utah 1990)	9
<u>J & W Janitorial Co. v. Industrial Commission</u> , 661 P.2d 949 (Utah 1983)	9
<u>LaSal Oil Co. V. Department of Environmental Quality</u> , 843 P.2d 1045 (Utah Ct. App. 1992)	1
<u>M & K Corp. v. Industrial Commission</u> , 189 P.2d 132 (Utah 1948)	9
<u>McPhie v. Industrial Commission</u> , 567 P.2d 153 (Utah 1977)	2, 9
<u>Prows v. Industrial Commission</u> , 610 P.2d 1362 (Utah 1980)	9
<u>Sierra Club v. Utah Solid Hazardous Waste Control Board</u> , 964 P.2d 335 (Utah Ct. App. 1998)	1
<u>State Tax Commission v. Industrial Commission</u> , 685 P.2d 1051 (Utah 1984)	2

UTAH LABOR COMMISSION CASES

<u>Barton v. St. George Steel</u> , Case No. 97887 (11/29/2000)	5
---	---

<u>Willard v. Thurston Cable Construction,</u> Case No. 98-0569 (7/29/02)	5, 6, 7, 8, 9
--	---------------

STATUTES

Utah Code Annotated § 34A-2-420 (2002)	12
Utah Code Annotated. § 34A-2-801 (8) (1997)	1
Utah Code Annotated, § 63-46b-11 (1988)	2, 12
Utah Code Annotated § 78-2a-3 (2) (a) (1953)	1

RULES

Rule 14 of the Utah Rules of Appellate Procedure	1
Rule 41 of the Utah Rules of Civil Procedure	8, 9

JURISDICTION OF THE COURT

This appellate review proceeding arises from the Utah Labor Commission's November 30, 2006 Order affirming the decision of the Administrative Law Judge to enter Petitioner's default below and the denial of Petitioner's Motion to set Aside Default. The Utah Court of Appeals has jurisdiction to hear this case pursuant to Utah Code Annotated § 78-2a-3 (2) (a) (1953, as amended), Utah Code Annotated § 34A-2-801 (8) (1997) and Rule 14 of the Utah Rules of Appellate Procedure.

STATEMENT OF ISSUES AND STANDARD OF REVIEW

Issue 1: Did the Petitioner have a right to withdraw her Application for Hearing prior to Hearing?

Standard of Review: This is 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?

Standard of Review: This 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).

Furthermore, in reviewing the proceedings below and the scope of the Utah Workers Compensation Act, it is important to recognize that 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).

Preservation for Appeal: All of the above issues were raised by Petitioner before the Utah Labor Commission/Utah Appeals Board. A Petition for Review was timely filed with this Court.

DETERMINATIVE STATUTE AND RULE

There is no particular “determinative” Statute or Rule, however Utah Code Annotated, § 63-46b-11 is applicable. Said Statute is set forth in full in Addendum “A” hereto.

STATEMENT OF THE CASE

Nature of the Case: The Petitioner seeks review of the Utah Labor Commission/Utah Appeal Board’s Order affirming the decision of the Administrative Law Judge dismissing Petitioner’s Application for workers’ compensation benefits with prejudice and the denial of Petitioner’s Motion to set Aside Default.

Course of Proceedings/Statement of Facts: The relevant facts in this matter are simple, straightforward and not really disputed by the parties.

1. On January 1, 2003, Petitioner sustained an industrial injury while working for Respondent, Shoney’s Restaurant. She subsequently filed an Application for

Hearing with the Utah Labor Commission seeking workers' compensation benefits for her injuries. (R1 at 1).

2. The ALJ assigned to hear the case set it for a half day hearing on April 26, 2005 in St. George, Utah, where the parties and witnesses resided. (R1 at 30). Petitioner's counsel objected to the half day setting and requested that the Hearing be continued to a date when a full day setting would be available. (R1 at 31). That objection was denied and Petitioner's counsel filed a Motion for Reconsideration. (R1 at 32). The ALJ failed to respond to the Motion for Reconsideration.

3. On April 8, 2005, a mere 18 days before Trial and well after the Motion cut off date in the Pre-Hearing Order, Respondent Shoney's moved to exclude Petitioner's vocational expert from testifying at the Hearing. (R1 at 61). The Motion was granted on April 22, 2005, four days before the scheduled Hearing. (R1 at 77).

4. Petitioner, pursuant to long-standing Labor Commission custom and practice, notified the ALJ that she was withdrawing her Application for Hearing and thus the Hearing need not be held. (R1 at 81). The ALJ again failed to respond to this Notice.

5. On April 26, 2006, the ALJ commenced the evidentiary hearing and entered Petitioner's default. (R2). On May 4, 2005, the ALJ entered Findings of Fact, Conclusions of Law and an Order of Default dismissing this matter with prejudice. (R1 at 83-91).

6. On June 3, 2005, Petitioner filed her Motion for Review of the ALJ's Order. (R1 at 92-100). On July 7, 2005, the ALJ, treating Petitioner's Motion for Review as

a Motion to set Aside Default, entered an Order Denying Petitioner's Motion to Aside Default. (R1 at 136-138).

7. On July 29, 2005, Petitioner filed a Motion for Review of Order Denying Motion to Set Aside Default. In said Motion, Applicant requested the Utah Labor Commission consolidate her prior Motion for Review filed on July 3, 2005, which had not been ruled upon by the Commission with her July 29, 2005 Motion for Review of Order Denying Motion to Set Aside Default, and treat them as a single proceeding for the purpose of issuing an Order on Motion for Review. (R1 at 139-140).

8. On November 30, 2006 the Utah Appeals Board entered an Order Affirming ALJ's Decisions. (R1 at 207-211, See also Addendum "B"). Mrs. Duran timely filed a Petition for Review of that Order with this Court on December 13, 2006.

SUMMARY OF ARGUMENT

Under long-standing Utah Labor Commission rules and practice, an Applicant for workers' compensation benefits has a right to withdraw his/her Application for Hearing at any time prior to Hearing. Petitioner simply followed and relied upon that custom and practice. No formal Rule of the Utah Labor Commission prohibits, limits or addresses this right.

The ALJ and Utah Labor Commission failed to adequately weigh the reasons for Petitioner's withdraw of her Application for Hearing. There was no basis or justification to dismiss her Application for Hearing with prejudice and the Commission engaged in inadequate fact finding to support that harsh result.

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.

The long course of practice before the Utah Labor Commission is that an Applicant can and on numerous times has withdrawn his/her Application for Hearing, without leave of the Commission. The ALJ's actions in this case are unprecedented and the sanction of a dismissal with prejudice is unwarranted and contrary to this practice.

The Utah Labor Commission's 2002 opinion in Willard v. Thurston Cable Construction, Case No. 98-0569, ((copy attached hereto as Exhibit "C"), 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.

In like regard, is the Utah Labor Commission's decision in Barton v. St. George Steel, Case No. 97-0887 (November 29, 2000), (See copy attached as Addenda "D"), which interestingly involved the same counsel as the present case. In Barton, both the ALJ and the Commission upheld the Applicant's voluntary withdrawal dismissal of his Application for Hearing during the Hearing and over the objection of the Defendants.

In Willard the Commission decided to depart from that long standing custom. This monumental change and reversal of a long standing Commission practice and custom required compliance with the Utah Rule Making Act in order to properly announce the new practice. However, the Commission failed to initiate Rule Making.

The Utah Appeals Board in its Order Affirming ALJ's Decision addresses none of these points although they were fully briefed in the parties' Memoranda.

B. Willard v. Thurston Cable Construction.

Both the Commission and the Respondents place a great deal of reliance on the Commission's 2002 opinion in Willard v. Thurston Cable Construction, Case No. 98-0569, (July 29, 2002, copy attached hereto as Exhibit "C"), for the proposition that an Petitioner can not unilaterally withdraw his or her Application for Hearing. Neither, however, responds to Petitioner's specific challenges to the application and relevance of the Willard decision. The ALJ does not even reference or rely upon Willard in her July 7, 2005 Order denying Motion to Set Aside Default.

In Willard, the Applicant unilaterally withdrew his Application for Hearing. No Motion or Request for permission to Withdraw was made to the ALJ. Both the Commission Staff and the ALJ dismissed the Application on Motion of the Applicant without Prejudice. Although the Respondents subsequently filed a Motion for Review and the Commission on Order Granting Motion for Review/Order or Remand held that the unilateral dismissal was improper, they sent the case back to the ALJ for further review. The voluntary withdrawal and dismissal without prejudice was again upheld and no review was apparently sought by the Respondents. The

Applicant in that case subsequently refilled his Application and his case was settled. It does not stand for the proposition for which the Respondents have claimed.

Second, Willard only supported a dismissal without prejudice. In sharp contrast in this case the ALJ dismissed the case with prejudice. Although the propriety of a “dismissal with prejudice” is discussed below it is important to note that in Willard, neither the ALJ nor the Commissioner held or even suggested a dismissal with prejudice was appropriate. It is also important to note that the ALJ in Willard did not proceed with a Hearing on the merits despite knowing that the Applicant would not be appearing in reliance on the Notice of Withdrawal of Application.

Finally, the ALJ and Commission in this case failed to follow the requirements of the Willard decision, to the extent they are even applicable. The Commissioner in Willard made clear that:

At a minimum, the ALJ should require the applicant to fully explain and substantiate the reasons for requesting permission to withdraw. The ALJ must then allow adverse parties to respond. Id. at 3.

In this case the ALJ gave no notice that she was not going to accept the voluntary Notice of Withdrawal. Although the record is replete with examples of where the ALJ responded to letters within minutes by return fax or had her secretary/clerk immediately contact counsel for the parties by phone to convey rulings, no attempt was made in this case to reach the Petitioner or her counsel by phone to indicate that the ALJ and opposing counsel were in St. George and that the ALJ was going to proceed with the Hearing and the ALJ expected them to appear to argue the Withdrawal of her Application for Hearing, and if necessary

proceed with the case.

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 this situation. 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.

C. 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 to note that:

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, consent of the adverse party or the ALJ for the 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. The Commission’s reliance on Rule 41 of the Utah Rules of Civil Procedure in Willard is misplaced.

In addition, few principles of workers compensation law are as well established in this State as that workers' compensation disability claims are to be liberally construed in favor of awarding benefits, and any doubts raised from the evidence are to be resolved in favor of the claim. Utah Courts have consistently reiterated this principle from 1919 to the present. Heaton v. Second Injury Fund, 796 P.2d 676 (Utah 1990); J & W Janitorial Co. v. Industrial Commission, 661 P.2d 949 (Utah 1983); Prows v. Industrial Commission, 610 P.2d 1362 (Utah 1980); McPhie v. Industrial Commission, 567 P.2d 153 (Utah 1977); Baker v. Industrial Commission, 405 P.2d 613 (Utah 1965); Askrew v. Industrial Commission, 391 P.2d 302 (Utah 1964); M & K Corp. v. Industrial Commission, 189 P.2d 132 (Utah 1948); and Chandler v. Industrial Commission, 184 P. 1020 (Utah 1919).

The Utah Supreme Court in Chandler, *supra*, first discussed the proper construction of the Workers' Compensation Act and the underlying purposes of the Act, and stated as follows:

[O]ur statute requires that the statutes of this state are to be 'liberally construed with a view to effect the objects of the statutes and to promote justice.'

* * * * *

The beneficent purpose of such acts are therefore apparent to all, and for that reason, if for no other, should receive a very liberal construction in favor of the injured employee. We are all united upon the proposition that in view of the purposes of such acts, in case there is any doubt respecting the right to compensation, such doubt should

be resolved in favor of the employee or his dependents as the case may be. Id. at 1021-1022. (Emphasis added)

The Appeals Board in rendering its Order Affirming Decision of the ALJ did not properly apply this vital rule of construction and the Order fails to evidence a "liberal construction" and "resolution of doubt in favor of the claim".

Whenever any doubt or uncertainty appears in the record, it must be resolved in favor of the injured worker and the awarding of benefits. In this case doubt and uncertainty were construed against - rather than for - the Petitioner and her claim. In short, the Utah Appeals Board disregarded this fundamental principle of Utah Workers' Compensation law.

II

THE UTAH APPEALS BOARD ABUSED ITS DISCRETION IN DISMISSING THIS MATTER WITH PREJUDICE AND ALSO BY FAILING TO SET ASIDE PETITIONER'S DEFAULT.

There is no Statute or Rule which requires that a Withdrawal of an Application for Hearing be done by Motion and that such a Withdrawal, even if done mere days before a Hearing, is subject to denial by an ALJ. 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, without leave of the ALJ. The ALJ's and Commission's actions in this case are unprecedented and the sanction of a dismissal with prejudice was unwarranted and improper.

The ALJ and Commission did not adequately weigh the reasons for Petitioner's withdrawal of her Application for Hearing. Little or no prejudice would

have occurred to the Respondents in this case had the Hearing been canceled and the Application dismissed *without* prejudice. Had the ALJ promptly ruled on the Withdrawal, the Petitioner would have been on notice to appear or the Respondent's Counsel would have been on notice not to appear.

The allegation that the Respondents had a witness and some plates that might not be available in the future is speculative at best and ludicrous at worst. There is no indication from the ALJ's Findings that the alleged witness even appeared at the Hearing. It is not so noted in the Appearances section of the decision and her testimony and the evidentiary value of the plates is never mentioned.

The parties were put on Notice that Petitioner intended to refile her Application for Hearing at a latter time. It defies logic and reason that so knowing, they could not preserve a plate and remain in contact with their sole witness. If it was reasonably expected that the witness would not be available in the future, her deposition could be taken to preserve her testimony.

The Petitioner was severely prejudice by the ALJ not notifying the parties that a Hearing would be held on the Motion to Withdraw and that in the event the Withdrawal was not permitted, the Hearing would go ahead as scheduled. The Hearing that resulted in a "dismissal with prejudice" was a sham since it was conducted without the Petitioner even being present.

The Commission did not make any Findings as to why the extraordinary and harsh remedy of a dismissal with prejudice was imposed. The 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 may occur, at all. (R1 at 30).

Petitioner concedes that it may have been reasonable and proper to dismiss the Application without prejudice. This would have required her to refile her case, if at all, within the Statute of Limitations and wait for a new Hearing date which would most likely be over a year away. Any Applicant withdrawing a claim would suffer the delay and the possibility of the loss of evidence to support his/her claim. This alone is a sufficient sanction to guard against frivolous withdrawals of Applications.

Even the statute cited by the Commission (UCA § 63-46b-11) does not authorize a dismissal “with prejudice.” Neither the Administrative Procedures Act nor the adopted Administrative Rules of the Labor Commission provide any support for a dismissal with prejudice. No cases from the Court of Appeals or the Utah Supreme Court authorize such an sanction.

Indeed, 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. That rational has subsequently been upheld in 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).

Utah Code Annotated, Section 34A-2-420, U.C.A. 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 refilled, is entirely inconsistent with the Commission’s statutorily mandated continuing jurisdiction.

In any event, even assuming that a “dismissal with prejudice” was permissible such an extreme sanction would require detailed Findings of Fact supporting that harsh result. In this case, both the ALJ and Commission only cite the Respondent’s preparation time, travel expenses and the possibility that witnesses and exhibits will not be available in the future. Those reasons alone are not sufficient to support a dismissal “with prejudice”.

For all intents and purposes a dismissal without prejudice means that the Respondents have won. All of their preparation time and expense are 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. The possibility that witnesses will be unavailable in the future is pure speculation and certainly could be avoided by the Respondents as indicated above.

CONCLUSION/STATEMENT OF RELIEF SOUGHT

Petitioner was entitled to withdraw her Application at any time prior to Hearing as she did in this case. Long standing Commission custom supports this practice. Even if it had been proper to dismiss Petitioner's Application for Hearing, it could only be dismissed without prejudice. No statute, rule or case law supports any other result.

Petitioner respectfully requests that the Court of Appeals reverse the Utah Appeals Board/Utah Labor Commission and direct that the case be dismissed without prejudice.

DATED this 27th day of July, 2007.

DABNEY & DABNEY, p.c.



Virginius Dabney
Counsel for Maria D. Duran

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of July, 2007, a copy of the foregoing 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

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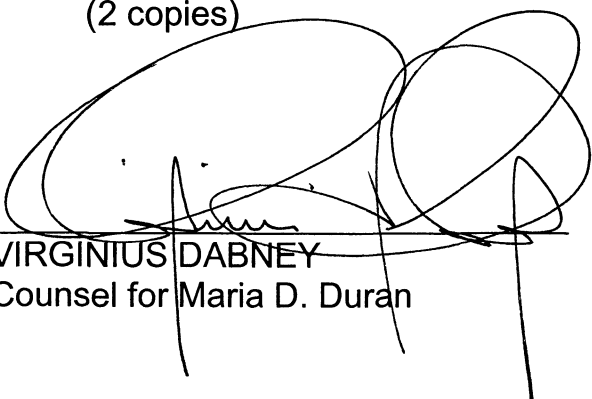
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VIRGINIUS DABNEY
Counsel for Maria D. Duran

Addendum A

Utah Code Annotated, § 63-46b-11 (1988)

63-46b-11 Default.

(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; or

(c) a respondent in a formal adjudicative proceeding fails to file a response under Section 63-46b-6 .

(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.

(b) A motion to set aside a default and any subsequent order shall be made to the presiding officer.

(c) A defaulted party may seek agency review under Section 63-46b-12 , or reconsideration under Section 63-46b-13 , only on the decision of the presiding officer on the motion to set aside the default.

(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.

Addendum B

Order Affirming ALJ's Decision

Appeals Board, Utah Labor Commission

(November 30, 2006)

**APPEALS BOARD
UTAH LABOR COMMISSION**

MARIA D. DURAN,

Petitioner,

vs.

**SHONEY'S RESTAURANT and
WASAU INSURANCE COMPANY,**

Respondents.

**ORDER AFFIRMING
ALJ'S DECISIONS**

Case No. 04-0077

Maria Duran asks the Appeals Board of the Utah Labor Commission to review Administrative Law Judge Marlowe's decisions regarding Ms. Duran's claim for benefits under the Utah Workers' Compensation Act ("the Act"; Title 34A, Chapter 2, Utah Code Annotated).

The Appeals Board exercises jurisdiction over this motion for review pursuant to Utah Code Annotated §63-46b-12 and §34A-2-801(3).

BACKGROUND

Ms. Duran, through her attorney, Viginus Dabney, filed an Application For Hearing with the Commission. The purpose of this Application was to compel Shoney's Restaurant and its insurance carrier, Wasau Insurance Company (referred to jointly hereafter as "Shoney's"), to pay workers' compensation benefits for injuries Ms. Duran allegedly suffered while working for Shoney's on January 1, 2003.

Judge Marlowe was assigned to preside over Ms. Duran's claim. Because Ms. Duran and Mr. Dabney reside in St. George, Utah, Judge Marlowe scheduled Ms. Duran's claim for hearing in St. George, to begin at 1 p.m. on April 26, 2005. Notice of the hearing was mailed to the parties on January 6, 2005.

In a letter dated January 26, 2005, Mr. Dabney advised Judge Marlowe that he would prefer that a full day be reserved for the hearing. However, Mr. Dabney also stated that "we do not want to give up the half-day setting if there is no full day available." Judge Marlowe's clerk responded with a letter dated February 7, 2005, which advised Mr. Dabney that a full day hearing slot was not available, but that Judge Marlowe could continue the hearing in Salt Lake City if more time were actually required.

On March 11, 2005, Mr. Dabney sent another letter to Judge Marlowe. In this letter, Mr. Dabney stated that, because he, his client, and her witnesses all lived in St. George, it would be expensive and inconvenient for them to travel to Salt Lake City. On that basis, he requested that the half-day hearing that had already been scheduled in St. George on April 26, 2005, be continued to a

ORDER AFFIRMING ALJ'S DECISIONS

MARIA D DURAN

PAGE 2

later date when a full day hearing could be held in St George Mr Dabney's letter contained no explanation for his assertion that Ms Duran's claim could not be heard in the half day that had already been allotted

Judge Marlowe responded by letter to Mr Dabney on March 16, 2005 She advised that the hearing would go forward on April 26, 2005 She also advised that, if more time was required to complete the hearing, an additional hearing could be held in either St George or Salt Lake City In yet another letter, also dated March 16, 2005, Mr Dabney asked Judge Marlowe to reconsider Having already denied Mr Dabney's request for continuance, Judge Marlowe did not respond to Mr Dabney's request that she reconsider The hearing remained scheduled for April 26, 2005, at 1 p m

On April 8, 2005, Shoney's moved to exclude Ms Duran's vocational expert, Kenneth Lister, from testifying at the upcoming hearing After allowing time for Ms Duran to respond, and her failure to do so, Judge Marlowe granted the motion on Friday, April 22, 2005 On Monday, April 25, 2005, at 2 30 p m , Mr Dabney faxed a letter to Judge Marlowe's office in Salt Lake City purporting to withdraw Ms Duran's Application For Hearing and stating that neither he nor Ms Duran would attend the hearing scheduled for the next day By the time Mr Dabney sent this letter, Judge Marlowe had already left for St George Mr Dabney did not provide a copy of the letter to Shoney's attorney, who flew to St George the morning of Tuesday, April 26, 2005, to attend the hearing Judge Marlowe learned of Mr Dabney's attempt to withdraw Ms Duran's application in a telephone call from her clerk on Tuesday morning

At 1 p m on Tuesday, April 26, 2005, Judge Marlowe commenced the evidentiary hearing that had been scheduled on Ms Duran's claim Shoney's attorney and witness were present Ms Duran and Mr Dabney were absent Judge Marlowe entered Ms Duran's default and then proceeded with the hearing On May 3, 2005, Judge Marlowe issued her decision confirming Ms Duran's default and concluding that Ms Duran had failed to establish that she was entitled to the workers' compensation benefits she had requested Judge Marlowe therefore denied Ms Duran's claim with prejudice Judge Marlowe appended to her decision a statement of the procedures available for Ms Duran to request relief from her default, as well as a statement of Ms Duran's appeal rights This statement of appeal rights specifically advised that any appeal must be filed within 30 days from the date Judge Marlowe signed her decision

On June 3, 2005, 31 days after Judge Marlowe signed her decision, Mr Dabney filed a motion for review of the decision on behalf of Ms Duran The motion for review included three arguments 1) Ms Duran had an unconditional right to withdraw her application at any time prior to the hearing, 2) Judge Marlowe's failure to immediately act on Mr Dabney's letter of April 25, 2005, purporting to withdraw Ms Duran's application, had led Mr Dabney and Ms Duran to believe they need not appear at the hearing the following day, and 3) Judge Marlowe's dismissal of Ms Duran's claim with prejudice was unwarranted

Judge Marlowe treated the foregoing motion as a request that Ms Duran be relieved from her default On July 7, 2005, Judge Marlowe issued her second decision in this matter, which decision

ORDER AFFIRMING ALJ'S DECISIONS
MARIA D DURAN
PAGE 3

rejected her request to set aside Ms. Duran's default. On August 1, 2005, Mr. Dabney submitted a motion for review of Judge Marlowe's second decision.

ISSUE PRESENTED

Although Mr. Dabney has submitted two documents labeled as "motions for review," Judge Marlowe properly treated the first of those motions as a request that she relieve Ms. Duran from her default. On July 7, 2005, Judge Marlowe issued her decision denying the request, and Mr. Dabney filed a timely request for review. Consequently, the issue now before the Appeals Board is whether Judge Marlowe properly denied Ms. Duran's request for relief from default.

DISCUSSION AND CONCLUSIONS OF LAW

Section 63-46b-11(1) of the Utah Administrative Procedures Act ("UAPA") authorizes an administrative law judge to "enter an order of default against a party if . . . [that] party to a formal adjudicative proceeding fails to attend or participate in a properly scheduled hearing after receiving proper notice." The record in this matter clearly establishes that the hearing on Ms. Duran's claim was properly scheduled for April 26, 2005, at 1 p.m. The record also establishes that Ms. Duran and her attorney, Mr. Dabney, received proper notice of the hearing. Nevertheless, Ms. Duran and Mr. Dabney failed to attend or participate. Under these circumstances, it was appropriate for Judge Marlowe to enter Ms. Duran's default.

After an order of default is entered, § 63-46b-11(3)(a) of UAPA allows the defaulted party to ask the administrative law judge to set aside the default pursuant to the procedures established by the Utah Rules of Civil Procedure. These procedures, found in Rule 55, U.R.C.P. and, by reference, in Rule 60(b), U.R.C.P., provide that a party's default may be set aside for "good cause shown," such as mistake, inadvertence, excusable neglect, newly discovered evidence, fraud, or other similar reasons. Judge Marlowe concluded that none of these reasons was present in this case so as to warrant relieving Ms. Duran from default.

Ms. Duran now challenges Judge Marlowe's refusal to set aside Ms. Duran's default by arguing that Ms. Duran had an unconditional right to withdraw her application at any time prior to the actual hearing. According to this argument, Mr. Dabney's letter of Monday, April 25, 2005, was sufficient to withdraw Ms. Duran's application. Consequently, when Judge Marlowe convened the evidentiary hearing the next day, on Tuesday, April 26, 2005, there was no claim to be adjudicated and Ms. Duran could not be in default for failing to appear.

The Utah Labor Commissioner has previously considered and rejected this same argument in Willard v. Thurston Cable Construction (Case No. 98-0560; decided July 29, 2002). There, the Commissioner concluded that Rule 41, U.R.C.P., although not directly applicable in the Labor Commission's adjudicative proceedings, provided useful guidance by analogy. On that basis, the Commissioner concluded that, after a respondent has filed an answer to an application, the administrative law judge's permission is required before an applicant may withdraw the application.

ORDER AFFIRMING ALJ'S DECISIONS
MARIA D DURAN
PAGE 4

The Appeals Board concurs with this reasoning and, on that basis, rejects Ms. Duran's assertion that she had an absolute right to withdraw her application in this matter.

Next, Ms. Duran argues that Judge Marlowe's "failure" to immediately act on Ms. Duran's purported withdrawal of her Application For Hearing misled Mr. Dabney and Ms. Duran into believing that the hearing would not be held and that they need not appear. The Appeals Board finds no merit to this argument. Mr. Dabney had received notice of the hearing. He had received nothing that countermanded that hearing notice. Under these circumstances, it was his clear obligation to appear at the hearing with his client.

Finally, Ms. Durant contends that dismissal of her claim "with prejudice" was unwarranted. The Appeals Board disagrees. Ms. Duran's claim was scheduled for hearing on the merits. Ms. Duran had every opportunity to appear at that hearing and present evidence to support her claim. She and her attorney chose not to avail themselves of this opportunity. However, Shoney's did appear and did present evidence. Based on the resulting hearing record, Judge Marlowe made a determination on the merits and concluded that Ms. Duran was not entitled to benefits. It was therefore proper to dismiss her claim with prejudice.

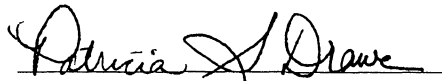
In summary, the Appeals Board concludes that Judge Marlowe properly entered Ms. Duran's default and dismissed her claim with prejudice. Judge Marlowe also properly declined to relieve Ms. Duran from her default.

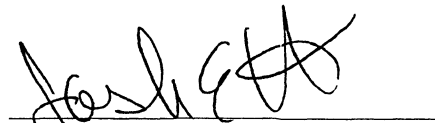
ORDER

The Appeals Board affirms Judge Marlowe's order denying Ms. Duran's motion to set aside default. It is so ordered.

Dated this 30th day of November, 2006.


Colleen S. Colton, Chair


Patricia S. Drawe


Joseph E. Hatch

IMPORTANT! NOTICE OF APPEAL RIGHTS FOLLOWS ON NEXT PAGE.

ORDER AFFIRMING ALJ'S DECISIONS
MARIA D DURAN
PAGE 5

NOTICE OF APPEAL RIGHTS

Any party may ask the Appeals Board of the Utah Labor Commission to reconsider this Order. Any such request for reconsideration must be received by the Appeals Board within 20 days of the date of this order. Alternatively, any party may appeal this order to the Utah Court of Appeals by filing a petition for review with the court. Any such petition for review must be received by the court within 30 days of the date of this order.

CERTIFICATE OF MAILING

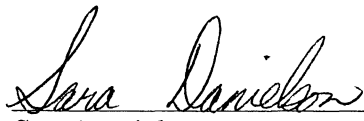
I certify that a copy of the foregoing Order Affirming ALJ's Decisions in the matter of Maria D Duran 04-0077, was mailed first class postage prepaid this 30th day of November, 2006, to the following:

Maria D Duran
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St George UT 84770

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Virginius Dabney Esq
1060 S Main St Ste 2
St George UT 84770

Michael E Dyer Esq
257 E 200 S Ste 800
Salt Lake City UT 84111


Sara Danielson
Utah Labor Commission

Addendum C

Willard v. Thurston Cable Construction

Utah Labor Commission

Case No. 98-0569

(July 29, 2002)

UTAH LABOR COMMISSION

DALE T. WILLARD,

Applicant,

v.

THURSTON CABLE CONSTRUCTION
and FREMONT COMP.,

Defendants.

ORDER GRANTING
MOTION FOR REVIEW

ORDER OF REMAND

Case No. 98-0569

Thurston Cable Construction and its workers compensation insurance carrier, Fremont Comp. (referred to jointly as "Thurston") ask the Utah Labor Commission to review the Administrative Law Judge's dismissal without prejudice of Dale T. Willard's claim for benefits under the Utah Workers' Compensation Act ("the Act"; Title 34A, Chapter 2, Utah Code Ann.).

The Labor Commission exercises jurisdiction over this motion for review pursuant to Utah Code Ann. §63-46b-12, Utah Code Ann. §34A-2-801(3) and Utah Admin. Code R602-2-1.M.

BACKGROUND AND ISSUES PRESENTED

Mr. Willard filed an Application For Hearing with the Commission on July 9, 1998, claiming workers' compensation benefits from Thurston for a work-related injury that had occurred on February 18, 1994. Thurston filed an Answer to Mr. Willard's claim and the parties engaged in substantial pre-hearing preparation and negotiation. On June 21, 2000, Judge Switzer conducted an evidentiary hearing on Mr. Willard's claim, then issued a preliminary Order referring the medical aspects of the claim to a medical panel.

Mr. Willard filed objections to Judge Switzer's preliminary Order. At about the same time, Judge Switzer left her position with the Commission and Mr. Willard's claim was reassigned to Judge George. Because the recording of the first evidentiary hearing had been lost, Judge George scheduled a second evidentiary hearing. The hearing was rescheduled several times and the parties again engaged in substantial pre-hearing preparation. Then, before the second hearing could be held, Mr. Willard filed a "Withdrawal Of Application For Hearing Without Prejudice" purporting to withdraw his Application For Hearing on the grounds he was "currently incarcerated and cannot fully cooperate in the discovery process."

Apparently at Judge George's direction, but without any opportunity for Thurston to respond, Commission support staff issued a Notice canceling the upcoming hearing. The Notice included the

ORDER GRANTING MOTION FOR REVIEW/REMAND
DALE T. WILLARD
PAGE 2

statement that “Per Petitioner’s 2/14/2002 withdrawal of Application For Hearing (attached), this matter is hereby dismissed without prejudice.”

Thurston immediately filed a written objection to the dismissal. In a fax dated February 25, 2002, Judge George reaffirmed the dismissal without prejudice of Mr. Willard’s claim. Judge George based the dismissal on a “Commission custom” permitting applicants to withdraw Applications for Hearing at any time and a perfunctory finding of good cause to allow Mr. Willard to withdraw his claim.

Thurston now asks the Commission to review this matter. Although Thurston raises a variety of issues, the Commission believes two questions are dispositive. First, is Commission permission required before Mr. Willard may withdraw his Application For Hearing? If so, under the facts of this case, should permission to withdraw be granted?

DISCUSSION AND CONCLUSION OF LAW

In Doubletree v. Industrial Commission, 797 P.2d 464 (Utah App. 1990), the Utah Court of Appeals held that the Commission has authority under the Utah Administrative Procedures Act “UAPA”; Title 63, Chapter 46b, Utah Code Annotated) to dismiss Applications For Hearing without prejudice. In Doubletree and its companion cases, the Commission used its authority to dismiss as a sanction against applicants who failed to cooperate with the adjudicative process. Here, the situation is somewhat different. It is Mr. Willard himself, rather than the Commission, who seeks to terminate this adjudicative proceeding.

The parties have not identified any provision of statute or any appellate decision that addresses the specific question of whether an applicant in a workers’ compensation adjudicative proceeding may, as a matter of right, withdraw his or her Application. However, Thurston points out that Rule 41 of the Utah Rules of Civil Procedure addresses the issue in the analogous context of litigation in Utah’s civil courts. Although the Rules of Civil Procedure 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.

Rule 41(a) limits a plaintiff’s ability to voluntarily dismiss an action to the time before any adverse party has filed an answer or other response. In this case, Thurston long ago filed its Answer to Mr. Willard’s Application. Consequently, Mr. Willard would have no automatic right under Rule 41(a) to withdraw his Application.

Rule 41(b) provides that in cases where an Answer has already been filed, “an action may only be dismissed . . . 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. . . .” Furthermore, “Rule

ORDER GRANTING MOTION FOR REVIEW/REMAND
DALE T. WILLARD
PAGE 3

41(a)(2), U.R.C.P., invests the court with a reasonable discretion in the matter of dismissals.”
Murray First Thrift & Loan Co. v. Benson , 563 P.2d 185 (Utah 1977).

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.

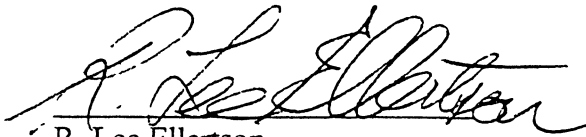
The remaining question is under what circumstances permission to withdraw an Application should be given. It is impossible to foresee all possible permutations of this question. For that reason, ALJs must have reasonable discretion to consider the particular facts and circumstances of each request. At a minimum, the ALJ should require the applicant to fully explain and substantiate the reasons for requesting permission to withdraw. The ALJ must then allow adverse parties to respond. With the information so obtained, the ALJ should weigh the reasons for withdrawal against the delay, expense and duplication of effort that withdrawal would entail. The ALJ should also carefully consider whether some other course of proceeding might satisfy the legitimate needs of the parties while allowing the adjudicative process to go forward. The items identified herein for consideration are illustrative rather than exhaustive; other relevant items may also exist and should be considered. The ALJ should then issue a decision sufficient to allow further agency review as appropriate.

Because the foregoing procedures were not followed with respect to Mr. Willard’s withdrawal of his Application, the Commission finds it necessary to remand this matter to the ALJ. After allowing Mr. Willard to submit explanation and substantiation of his reasons for requesting withdrawal and providing Thurston an opportunity to respond, the ALJ will weigh the relevant considerations, evaluate possible alternative methods for proceeding, then issue his decision.

ORDER

The Commission grants Thurston’s motion for review and remands this matter to the ALJ for further proceedings consistent with this decision. It is so ordered.

Dated this 27th day of July, 2002.


R. Lee Ellertson
Utah Labor Commissioner

ORDER GRANTING MOTION FOR REVIEW/REMAND
DALE T. WILLARD
PAGE 4

CERTIFICATE OF MAILING

I certify that a copy of the foregoing Order Granting Motion For Review/Order Of Remand in the matter of Dale T. Willard, Case No. 98-0569, was mailed first class postage prepaid this 21st day of July, 2002, to the following:

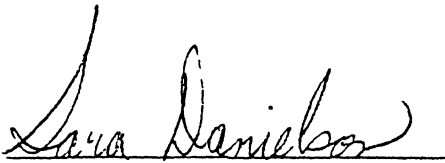
DALE T. WILLARD
176 W 615 N
LAVERKIN UT 84745

THURSTON CABLE CONSTRUCTION
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WASHINGTON UT 84780

FREMONT COMP.
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ST GEORGE UT 84770

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SALT LAKE CITY UT 84101


Sara Danielson
Support Specialist
Utah Labor Commission

Addendum D

Barton v. St. George Steel Fabrication

Utah Labor Commission

Case No. 97-0887

(November 29, 2000)

Utah Labor Commission
Adjudication Division
Case No. 97887

JOHN C BARTON

Petitioner,

vs.

ST GEORGE STEEL FABRICATION
and/or LIBERTY MUTUAL INS CO

Respondents.

ORDER OF DISMISSAL

The above captioned matter having been duly considered, and it having been determined that:

"This matter is dismissed without prejudice as Mr. Barton withdrew his application on the record before presentation of further evidence at the beginning of the hearing set for May 27, 2000 at 9:00, claiming that he was not prepared to proceed on the rehabilitation aspects of his claim at this time, nor would he be for several months. The matter may be re-opened by letter to the Judge, with supporting documentation, rather than filing a new application."

And it appearing that the foregoing constitutes good cause for dismissing the claim,

NOW, THEREFORE, IT IS ORDERED that the claim of the Petitioner be, and the same is hereby, dismissed without prejudice.

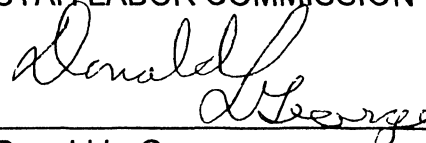
NOTICE OF APPEAL RIGHTS

A party aggrieved by the decision may file a Motion for Review with the Adjudication Division of the Utah Labor Commission. The Motion for Review must set forth the specific basis for review and must be received by the Commission within 30 days from the date this decision is signed. Other parties may then submit their Responses to the Motion for Review within 20 days of the date of the Motion for Review.

Any party may request that the Appeals Board of the Utah Labor Commission conduct the foregoing review. Such request must be included in the party's Motion for Review or its Response. If none of the parties specifically requests review by the Appeals Board, the review will be conducted by the Utah Labor Commissioner.

DATED THIS May 2, 2000.

UTAH LABOR COMMISSION



Donald L. George
Administrative Law Judge

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UTAH LABOR COMMISSION

JOHN C. BARTON,

Applicant,

v.

ST. GEORGE STEEL FABRICATION
and LIBERTY MUTUAL INSURANCE
COMPANY,

Defendants.

ORDER DENYING
MOTION FOR REVIEW

Case No. 97-0887

St. George Steel Fabrication and its workers compensation insurance carrier, Liberty Mutual Insurance Company, (jointly referred to as "St. George Steel") ask the Utah Labor Commission to review the Administrative Law Judge's refusal to impose sanctions against Virginius Dabney, the attorney representing John C. Barton in his claim for benefits under the Utah Workers' Compensation Act ("the Act"; Title 34A, Chapter 2, Utah Code Ann.).

The Labor Commission exercises jurisdiction over this motion for review pursuant to Utah Code Ann. §63-46b-12, Utah Code Ann. §34A-2-801(3) and Utah Admin. Code R602-2-1.M.

ISSUE PRESENTED

Does the Labor Commission have authority to impose the sanctions sought by St. George Steel?

BACKGROUND AND DISCUSSION

On November 5, 1997, Mr. Barton filed an application for workers' compensation benefits for injuries allegedly arising from a work-related accident at St. George Steel on October 28, 1994. After various adjudicative proceedings, including an evidentiary hearing in St. George during September 1999, a second hearing was scheduled in St. George on April 27, 2000.

The ALJ and St. George Steel intended that the second hearing would address Mr. Barton's rehabilitation. Mr. Barton and Mr. Dabney believed the second hearing was a continuation of the first hearing and would address the cause, extent and effect of Mr. Barton's work-related injuries. When the second hearing began, and faced with the confusion regarding the purpose of the hearing, Mr. Dabney asked to withdraw Mr. Barton's application, subject to refileing at a later date. The ALJ granted the request and dismissed Mr. Barton's application "without prejudice."

ORDER DENYING MOTION FOR REVIEW
JOHN C. BARTON
PAGE 2

St. George Steel then asked the ALJ to impose sanctions against Mr. Dabney by requiring him to reimburse St. George Steel for expenses incurred in appearing at the second hearing. The ALJ denied St. George Steel's request for sanctions. St. George Steel then filed its motion for review with the Commission and renewed its request for sanctions against Mr. Dabney.

Before the Commission can consider whether sanctions are warranted, it must determine whether it has authority to impose sanctions. St. George Steel contends the Commission has such authority under the provisions of the Utah Rules of Civil Procedure, the Utah Code of Judicial Administration and the Commission's inherent authority.

Utah's appellate courts have already ruled that the Utah Rules of Civil Procedure do not apply wholesale to administrative proceedings. Rather, the Rules of Civil Procedure apply only when incorporated by some other governing statute or regulation. Beaver County v. Utah State Tax Commission, 916 P.2d 344, 352 (Utah 1996). By extension, the same principle is true with respect to the Utah Code of Judicial Administration. The Commission is unaware of any statute or rule that incorporates into the workers' compensation system the provisions of the Rules of Civil Procedure or Code of Judicial Administration authorizing sanctions.¹

St. George Steel also argues that the Commission has "inherent" authority to impose sanctions. The Commission disagrees. The Labor Commission is a creature of statute; it has only such jurisdiction and authority as has been conferred by the Utah Legislature. As the Utah Court of Appeals stated in Bevans v. Industrial Commission, 790 P.2d 573, 576 (Utah App. 1990):

. . . the Industrial Commission (predecessor to the Labor Commission) remains a statutorily-created agency, not a court of equity. As such, the Industrial Commission has only those powers expressly or impliedly granted to it by the legislature. (Citation omitted.)"

The powers which the Legislature have granted to the Commission do not include the authority to imposition monetary sanctions under the circumstances of this case.²

¹ St. George Steel cites an ALJ's decision in another unrelated case as authority to impose sanctions. However, neither the Commission nor the Appeals Board reviewed the ALJ's action in the cited case. The Commission does not endorse the ALJ's action in that case. Furthermore, the cited case has no precedential value.

² Section §63-46b-8 of the Utah Administrative Procedures Act, applicable to workers' compensation proceedings, authorizes a presiding officer to take "appropriate measures necessary to preserve the integrity of the hearing. This provision provides sufficient authority, short of penalties, to prevent overreaching, delaying tactics or other improper conduct by a party.

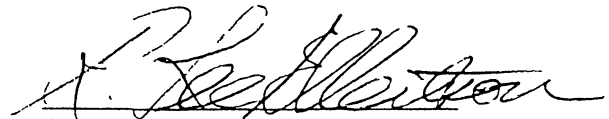
ORDER DENYING MOTION FOR REVIEW
JOHN C. BARTON
PAGE 3

In summary, the Commission concludes that neither the Utah Rules of Civil Procedure, the Utah Rules of Judicial Administration, nor "inherent" powers allow the Commission to impose the sanctions requested by St. George Steel against Mr. Dabney.

ORDER

The Commission affirms the Order of the ALJ and denies St. George Steel's motion for review. It is so ordered.

Dated this 27th day of November, 2000.


R. Lee Ellertson
Utah Labor Commissioner

NOTICE OF APPEAL RIGHTS

Any party may ask the Labor Commission to reconsider this Order. Any such request for reconsideration must be received by the Labor Commission within 20 days of the date of this order. Alternatively, any party may appeal this order to the Utah Court of Appeals by filing a petition for review with the court. Any such petition for review must be received by the court within 30 days of the date of this order.