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Stampede, Inc., and/or Workers Compensation Fund of Utah v. John R. Kimball and Industrial Commission of Utah: Reply Brief

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

DOCKET NO. 950815-CA

STAMPEDE, INC., and/or WORKERS COMPENSATION FUND OF UTAH, Petitioners,	*	**Reply Brief of Petitioners Stampede Trucking and Workers Compensation Fund of Utah**
v.	*	Court of Appeals Case No. 950815-CA
JOHN R. KIMBALL and INDUSTRIAL COMMISSION OF UTAH, Respondents.	*	Industrial Commission Case No. 94967
	*	Priority 7

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WRIT OF REVIEW FROM AN ORDER OF
THE INDUSTRIAL COMMISSION OF UTAH

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I. ARGUMENT

A. EVIDENCE NOT IN THE RECORD BEFORE THE INDUSTRIAL COMMISSION CANNOT BE ADDED FOR CONSIDERATION ON APPEAL.

To support his argument regarding the prejudicial effect of the submission of Dr. Knorpp's report, Kimball incorrectly cited to and included evidence in his brief which was not contained in the record before the Industrial Commission. (Kimball Brief at 9-10, 18, Appendix B). Likewise, the Industrial Commission inappropriately relied upon and cited this evidence in its statement of facts and in its concurrence with Kimball's argument on prejudicial effect (Commission Brief at 4-5,12).

It is well-settled law that this Court is limited to an appellate review of only evidence contained in the record properly before the trial court in its proceedings below. Hartford Leasing Corp. v. State, 888 P.2d 694, 698 n.3 (Utah App. 1994); Territorial Sav. & Loan Ass'n v. Baird, 781 P.2d 452, 455-56 (Utah App. 1989)(citing Conder v. A.L. Williams & Assocs., Inc., 739 P.2d 634, 635-36 (Utah App. 1987)). In Baird, this Court refused to admit a deposition that had not been introduced to the trial court, declaring that "we consider only facts properly before the trial court, notwithstanding that both parties to this action repeatedly cite to Baird's deposition in their appellate briefs." 781 P.2d at 456.

This principle applies equally to the quasi-judicial administrative proceedings in the case at bar. Accordingly, evidence not available to the Commission, either in the

evidentiary hearing before the ALJ or to the Commissioners during their review process, cannot now be introduced, cited to and relied upon to support countervailing arguments on appeal made by both Kimball and the Commission itself.

B. THE COMMISSION'S APPLICATION OF RULE R568-1-4.J. WAS VAGUE, INCONSISTENT, UNJUSTIFIED AND CONSTITUTES AN ABUSE OF DISCRETION.

Notwithstanding the Commission's authority to promulgate rules which govern the manner in which it conducts its proceedings, it abused its discretion in applying Rule R568-1-4.J in the instant case. The Commission, in its Order, noted that "under appropriate circumstances, the requirements of the rule may be relaxed," yet failed to articulate just what these circumstances are and why these circumstances were not met in the case of Dr. Knorpp's report.[1] (WCF Brief Appendix C at 2; R at 470). The rule on its face does not provide for such exceptions, and notably, does not provide sanctions for noncompliance. As a matter of fundamental fairness, WCF is entitled to know exactly what the exceptions and sanctions of the rule are so that it may act in accordance to the rule and understand the consequences for not doing so.

Further, the Commission contends that its suggestion of a continuance as a means to cure untimeliness under Rule 568-1-4.J would be proper only if requested in advance of the hearing

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[1]Surely the Commission should not resort to something akin to the Supreme Court's famous test for pornography, i.e., "I know it when I see it." Jacobellis v. Ohio, 378 U.S. 184, 197 (1964).

(Commission Brief at 11). However, even an advance request for continuance, made in every instance that medical records were delayed, would still be a burden on the administrative system and a hardship upon a distant out-of-state applicant.

C. KIMBALL'S RECEIPT OF DR. KNORPP'S REPORT ONE DAY PRIOR TO THE HEARING DOES NOT CREATE AN "EXCEPTIONAL" CIRCUMSTANCE TO JUSTIFY RAISING THE ISSUE OF TIMELINESS INITIALLY ON APPEAL.

Kimball incorrectly relies on the "exceptional" or "unusual circumstances" exception, State v. Archambeau, 820 P.2d 920, 925 (Utah App. 1991), to the general rule barring appellate review of issues that had not been raised at the trial level. While this exception is widely recognized by Utah appellate courts, the conditions which comprise Kimball's exceptional circumstances fail to meet the courts' limited application of this exception.

In a case analogous in issue to the case at bar, this Court held that the appellant cannot raise the issue of statutory noncompliance with a search warrant in order to suppress evidence. State v. Webb, 790 P.2d 65, 77 (Utah App. 1990). "In this case, there is nothing in the record to suggest that the statutory noncompliance ground now asserted by Webb was unknown or unavailable to him before or at trial." Webb, 790 P.2d at 78 (emphasis added). Thus, according to Webb absent exceptional circumstances such as grounds unknown or unavailable at trial, statutory noncompliance cannot be first raised on appeal. Similarly, Kimball is attempting to raise the issue of timeliness based on noncompliance with an administrative rule in order to exclude Dr. Knorpp's report, after having failed to do so at the

evidentiary hearing despite an extensive discourse on the admissibility of this report based on other grounds. Certainly both the ALJ and Kimball knew of Rule R568-1-4.J, yet both did not consider the issue of timeliness vis à vis admissibility.

Furthermore, Kimball erroneously contends that his mention of "late" and "too little too late" was sufficient to constitute raising the issue at the evidentiary hearing (R. at 483, 486; WCF Brief Appendix E at 11, 14). This Court has held that "for an issue to be sufficiently raised, even if indirectly, it must at least be raised to a level of consciousness such that a trial judge can consider it." State v. Brown, 856 P.2d 358, 361 (citations omitted) (Utah App. 1993). A careful reading of Kimball's discussion and the ALJ's ensuing reaction to Dr. Knorpp's report indicates that the issue of timeliness was not considered or even acknowledged by the ALJ. Instead, the ALJ focused exclusively on the fact that this report represented a second independent medical examination and that it was a file review without an actual examination of Kimball.

II. CONCLUSION

There are no "exceptional circumstances" present in this case that would enable Kimball to raise the issue of timeliness when he had not done so at the evidentiary hearing. Furthermore, Kimball and the Industrial Commission have improperly relied on evidence that is not part of the record below.

However, the ultimate error lies with the Industrial

Commission itself. Its application of Rule 568-1-4.J, with vague, unstated exceptions, constitutes an abuse of discretion.

Accordingly, WCF respectfully requests this Court reverse the decision of the Industrial Commission, admit Dr. Knorpp's report, and remand this case back to the Industrial Commission for a medical panel referral.

DATED this 23rd day of August, 1996.

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CERTIFICATE OF MAILING

I hereby certify that four true and correct copies of the REPLY BRIEF OF PETITIONERS STAMPEDE TRUCKING AND THE WORKERS COMPENSATION FUND OF UTAH were mailed, postage prepaid, on this day of 23 August, 1996 to the following:

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