

2007

Linda Lee Hymas v. Labor Commission, SOS Staffing, Hyclone, and Insurance Co. of the State of Pennsylvania : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

LINDA LEE HYMAS,

Petitioner/Appellant,

vs.

LABOR COMMISSION, SOS
STAFFING, HYCLONE, and
INSURANCE CO. OF THE STATE
OF PENNSYLVANIA,

Respondents/Appellee,

)
) **REPLY BRIEF OF APPELLANT**
)

) Labor Commission
) Case No. 06-0370
)

) Honorable Deidra Marlowe
)

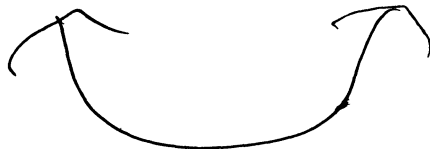
) 20070875
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) Appellate Court Case Number
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Labor Commission
Case No. 06-0370

Honorable Deidra Marlowe

20070875
Appellate Court Case Number

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ARGUMENT

The essence of this reply brief is that the Respondents/Appellees have failed to rebut the main point on appeal, which is the ALJ should have sent this case to a medical panel, and she should have taken evidence on legal causation before dismissing the case. Linda Hymas was denied due process. The Petitioner/Appellant submitted an autopsy report, which showed that the heart attack could have been contributed to by the exertions of work. The Respondents/Appellees failed to supply any rebuttal medical evidence and purely denied medical causation. That created an automatic controversy in the medical evidence where referral to the medical panel is mandatory. Referral to a medical panel is also mandatory under Rule 602-2-2, “where one or more **significant medical issues** may be involved,” and although generally significant medical issues are shown by conflicting medical reports, significant medical issues are also involved when a person dies on the job, for unknown reasons, with no eye witnesses and medical expenses and funeral expenses in the controversy amount to more than \$10,000.00. Mr. Hymas’ internal failure was allegedly a heart attack, however it may have been from an idiopathic fall. Both of these causes of death involve highly technical medical issues, and, failure to refer the case to a medical panel is an abuse of discretion. Moreover, the cases cited by Respondents in their brief do not actually stand for what Appellees claim they stand for.

POINT I

THE MEDICAL EVIDENCE ON CAUSATION WAS CONFLICTING ENOUGH, COMPLICATED ENOUGH AND THE WORK EXERTIONS COMBINED WITH THE INTRICACIES OF THE HEART WERE HIGHLY TECHNICAL ENOUGH TO MANDATORILY REQUIRE A MEDICAL PANEL.

The Respondents' brief entirely overlooks the law on when a medical panel is mandatorily required. Respondent and the ALJ rely heavily upon Lancaster v. Gilbert Development, 736 P.2d 237 (Utah 1987), which involved an employee who had a heart attack at Brian Head Ski Resort while clearing snow at approximately 10,000 feet elevation. The outside temperature was cold, but the backhoe used to clear snow was heated. While climbing in and out of the backhoe two or three times that day, claimant experienced chest pains. He had chest pains the week prior. He informed the supervisor and paramedics were called, taking the employee to the hospital in Cedar City. The employee remained at the hospital for one week and was released to his primary care physician. The employee had a twenty-year history of smoking, an elevated serum cholesterol level, elevated uric acid level, borderline diabetes, and chest pains a week or two prior.

It is important to note in Lancaster that the Industrial Commission held a full hearing, received all the evidence and then referred the case to the medical panel. When the medical panel was concluded, another hearing was conducted on the medical panel findings. Then, and only then, did the Administrative Law Judge issue his Findings of Fact and Conclusions of Law and Order. In addition, the Insurance Fund hired its own doctor to review the medical records and concluded that the type of work activities by claimant could

not have precipitated the mild cardio infraction.

Accordingly, Lancaster actually supports holding a full hearing with referral to a medical panel. Bill Hymas' heart attack occurred on the job, resulting in death on the job, with no known pre-existing conditions except controlled Type II diabetes, which was unrelated to the heart. The ALJ did not even take evidence or hold a hearing. She refused to refer the case to a medical panel. The autopsy report gave indications that unusual work exertions can trigger an employment heart attack, but no work exertion evidence was given to the medical examiner. The ALJ made no legal causation findings. SOS and Hyclone did not hire their own independent medical expert, but merely denied liability.

The whole action violated due process for Mrs. Hymas. The case of Willardson v. Industrial Commission, 904 P.2d 671 (Utah 1995) is more on point because it directly dealt with what type of case should be submitted to a medical panel. There, the employer/insured failed to rebut the medical evidence and just denied liability. The employees medical evidence also lacked detail.

Willardson held: **"It is the medical panel's report that is intended to be detailed and well supported and to contain the analysis and background insisted upon by Respondents...Where the evidence of casual connection between the work-related event and the injury is uncertain or highly technical, failure to refer the case to a medical panel may be an abuse of discretion."** Id. 675.

Willardson concluded the ALJ abused its discretion.

Respondents also relied upon Olson v. Industrial Commission, 776 P.2d 937 (Utah App. 1989) which involved a man with known pre-existing conditions who had a heart attack while on vacation, not at work! Factually, the evidence between the Hymas case and the

Olson case is so different that Olson has no applicability. In addition, the ALJ referred the case to the medical panel. The panel concluded that Mr. Olson had a history of heart disease, had previously had a heart attack, had evidence of diabetes, high blood pressure, had been smoking for years and had high cholesterol and found no medical causation because there was no unusual work exertion contributing to the heart attack that occurred while Mr. Olson was on vacation.

Respondents cite Roberts v. Labor Commission, 2006 UT App 403 (Utah App. 2006) for the proposition that mandatory medical panels are called only when there is a significant medical controversy as evidence by conflicting medical reports. However, in Roberts, both the employee and the employer filed medical reports in an attempt to create a medical controversy. The report filed by the employee's doctor failed to answer whether the exertions at work were medically tied to the back injury. In fact, the doctor failed to circle a yes or no answer involving medical causation, which was the primary basis for not finding a medical controversy. In the Hymas case, however, the autopsy does suggest that physical activity, such as repeated lifting of heavy boxes and freight, causes the heart rate to go up which increases the demands on the heart muscle for blood to flow and oxygen to deliver to the tissues, which can lead to heart attack and death. The employer or insurance company failed to file any rebuttal medical evidence and merely denied the report. It is interesting that Respondent argued in their own brief that medical evidence is necessary to deny medical causation but they themselves failed to produce any medical evidence to deny causation at the hearing. See bottom of page 11 of Respondents brief. The fact that the employer/insurance

company submitted no medical evidence should be held against them, not in their favor.

The Petitioner has already proven that referral to a medical panel is not discretionary where Rule 602-2-2 requires mandatory referral. Mandatory referrals to the panel include not only cases where medical evidence creates a genuine controversy over causation, but also where there exists uncertainty regarding medical causation, coupled with unusual or extraordinary work exertion, coupled with an incomplete autopsy report regarding an internal failure on highly technical matters of idiopathic fall or heart attack. Mandatory referral to the panel is also needed when medical expenses exceed \$10,000. See Rule 602-2-2(A)(5). Bill Hymas' bills, including hospital, doctor, ambulance, autopsy, funeral and last illness fees exceed \$10,000.

POINT II

RESPONDENTS TOTALLY IGNORED THE IDIOPATHIC FALL DOCTRINE AS DID THE ALJ, WHEN SHE REFUSED TO TAKE ANY EVIDENCE.

The ALJ must determine if there is a pre-existing condition that caused the injury. Note: Bill Hymas had no known heart problems. They were simply dormant. If Bill Hymas was hit in the head, for example, by a forklift and was knocked to the ground in an idiopathic fall, which triggered a heart attack, then he would have been entitled to compensation based on the fall, causing his head injury which triggered his death. Or, if Bill's heart caused weakness, dizziness and Bill fell, hitting his head, thus triggering death, he would be entitled to compensation. In other words, the weakness that precipitates or causes the fall need not be work related as long as the fall happened at work placing the employee in a dangerous

position, such as falling off high places or near machinery, or sharp corners. See generally, Kennecott Corp. v. Industrial Commission, 675 P.2d 1187 at 1192 (Utah 1983).

Bill Hymas was working around forklift type equipment, equipment had to be moved in order to even get to him to perform CPR, his hat and glasses lay on one side of the shop while his body was located at the other side, and he had a severe bump and cut on the back of his head. The autopsy report said that the type of goose egg and cut on the back of his head was frequently seen in people who have a sudden cardiac event, which may cause unconsciousness, so the person collapses without being able to protect themselves while going down. R. 3A and Exhibit A on Brief on Appeal. Dr. Plowman's report at the emergency room indicated: "I was not sure if he fell and struck his head and became unresponsive at that point, or if he had a sudden heart attack and fell." R.4. It was an abuse of discretion for the ALJ to simply ignore this evidence, refuse to take evidence thereon and thereafter refuse to submit this complicated and highly technical medical issue to a medical panel.

POINT III

TO PROVE A CONTROVERSY REGARDING MEDICAL CAUSATION DOES NOT NECESSARILY REQUIRE OPINIONS BY MEDICAL DOCTORS BUT CAN EXIST BASED ON OTHER EVIDENCE IN HIGHLY TECHNICAL CASES.

Respondent claims that internal failures can only be proven or evidence submitted thereon by medical doctors. Respondent claims that lay opinion is of no benefit to the court. This is an incorrect statement of law. It is already well known that the rules before the labor

commission are more informal than in litigated district court cases. For example, hearsay evidence is allowed before the ALJ. In addition, it is clear under Rule 701 of Utah Rules of Evidence, that opinion testimony by lay witnesses in the form of opinion or inferences can be submitted when rationally based on the perception of the witness and helpful to a clear understanding of the witnesses testimony. Rule 702 of Utah Rules of Evidence also makes it clear that scientific, technical or other specialized knowledge is generally given by expert witnesses. Rule 803(18) regarding hearsay allows learned treatises on medical issues or medicine and certainly the ALJ can rely on the same. The highly cited case of Allen v. Industrial Commission, 729 P.2d 15 at 27 allows causation evidence to be produced by any “evidence, opinion, or otherwise...” In fact, Allen stated, at page 30 at footnote 9:

“Evidence of the ordinariness or usualness of the employees exertions may be relevant to the medical conclusion or the causal connections. Where the injuries result from latent symptoms such as heart disease, proof of medical causation may be especially difficult. Larson’s treatise cites many examples of cases where compensation claims were defeated because of inadequate proof of medical causation.”

That is why, in the Allen decision, at page 33, the court specifically stated,

“with the issue being one primarily of causation, importance of the medical panel becomes manifest. It is through the use of the medical panel that the commission should be able to make the determination on whether the injury sustained by a claimant is casually connected or contributed to by the claimants employment.”

There is no question that proof of legal causation, i.e. unusual exertions at the workplace is generally produced by lay opinion and that this evidence assists with and is supportive of medical causation. Workplace exertion and prior work history is particularly relevant

because the medical experts rely on said information to determine medical causation. Because the ALJ refused to take any legal causation testimony, then refused to submit the medical causation issue to a medical panel, she abused her discretion.

The cases cited by Respondent claiming that only doctor's medical evidence is required to prove controversy is erroneous. See Sabos v. Electronics Service v. Sabo, 642 P.2d 722 (Utah 1982) (which allows denials by the employer to create a controversy). Utah has simplified causation into two areas: legal cause and medical cause. In the case of Price River Coal Co. v. Industrial Commission 731 P.2d 1079 at 1082 (Utah 1986) the court made it clear that legal cause is normally proven by lay opinion, which facts are then relied on to refer the matter to a medical panel to determine medical causation. See footnote 1 on page 1082. The cases cited by Respondent of Griffiths v. Industrial Commission, Harlan v. Industrial Commission, and Cooper v. Industrial Commission actually stand for the proposition that Bill Hymas is entitled to have a doctor appointed, such as a mandatory medical panel, to determine the medical cause of injury where the injury is from an internal failure. These cases support referral to a medical panel, especially where death results by internal heart failure not witnessed by anyone on the job site. Even Respondent's case of Owens v. Labor Commission, 2004 Utah App. 352 (Utah App. 2004) involved referred to a medical panel to review the facts to determine causation.

POINT IV

THE COMMISSION DID NOT PROPERLY FOLLOW THE HEARING RULES, REFUSED TO REOPEN THE CASE TO OBTAIN EVIDENCE AND REFUSED TO CONTINUE THE CASE FOR GOOD CAUSE.

Ms. Hymas was a grief stricken widow whose husband died unattended at his place of employment, without witnesses. The medical examiner performing the autopsy report was given no work exertion information. R. 3A and Exhibit A to Brief on Appeal. OSHA failed to investigate based on the autopsy report. R. 14. Mr. Hymas' own doctor, Dr. Strong, refused to write an opinion. R. 52. When the Administrative Law Judge refused to take lay testimony regarding legal causation, which testimony would have been foundational to support medical causation, and refused to submit the matter to a medical panel, she effectively denied Ms. Hymas due process. There are several provisions in the Rules allowing the ALJ to hire medical research or experts in highly technical cases. See U.C.A. §§ 34A-2-601(d), 34A-2-602 and 34A-2-603. Furthermore, allowing Ms. Hymas to continue the case to obtain that information herself is the right and fair thing to do. See Rule 602-2-1(I)(7). The Industrial Commission could have reopened the case to provide for a full hearing and receive additional evidence but neglected to do so. Rule 602-2-1(M)(l) required the ALJ to mandatorily reopen the case and hold a hearing.

There are numerous medical articles written on workplace heart attack, with amply studies to support that Mr. Hymas had a workplace induced heart attack, showing that the workplace could have contributed to his heart attack given the exertions he was going through. Mrs. Hymas submitted this supplemental evidence purely to show the Appellate

Court the injustice of this case and need for a full hearing on legal causation and then to submit medical causation to a medical panel. This is particularly important because the ALJ did not even hold a hearing and refused to take any evidence. Mrs. Hymas was never even given the opportunity to present such evidence, which is her legal right. It would be totally different if a full evidentiary hearing was held, witnesses called and cross-examined and the opportunity to present evidence had been given. However, when no opportunity is given, to then deny introduction of such evidence later on is, again, an abuse of discretion.

CONCLUSION

The Court of Appeals should remand this case back to the ALJ to hold a full evidentiary hearing and then submit the evidence to a medical panel in this highly technical case which requires medical expert review. Then, if another hearing is needed on the medical panel findings, it should likewise be granted. The minimum notions of due process and fair dealing demand such a result.

ADDENDUM "A"

A. Utah Admin. Rule 602-2-I(7). Hearing.

7. Parties are expected to be prepared to present their evidence on the date the hearing is scheduled. Requests for continuances may be granted or denied at the discretion of the administrative law judge for good cause shown. Lack of diligence in preparing for the hearing shall not constitute good cause for a continuance.

B. Utah Admin. Rule 602-2-1(M)(1). Motions for Review.

1. Any party to an adjudicative proceeding may obtain review of an Order issued by an Administrative Law Judge by filing a written request for review with the Adjudication Division in accordance with the provisions of Section 63G-4-301 and Section 34A-1-303, Utah Code. Unless a request for review is properly filed, the Administrative Law Judge's Order is the final order of the Commission. If a request for review is filed, other parties to the adjudicative proceeding may file a response within 20 calendar days of the date the request for review was filed. If such a response is filed, the party filing the original request for review may reply within 10 calendar days of the date the response was filed. Thereafter the Administrative Law Judge shall:

- a. Reopen the case and enter a Supplemental Order after holding such further hearing and receiving such further evidence as may be deemed necessary;
- b. Amend or modify the prior Order by a Supplemental Order; or
- c. Refer the entire case for review under Section 34A-2-801, Utah Code.

C. Utah Admin. Rule 602-2-2. Guidelines for Utilization of Medical Panel.

Pursuant to Section 34A-2-601, the Commission adopts the following guidelines in determining the necessity of submitting a case to a medical panel:

A. A panel will be utilized by the Administrative Law Judge where one or more significant medical issues may be involved. Generally a significant medical issue must be shown by conflicting medical reports. Significant medical issues are involved when there are:

- 1. Conflicting medical opinions related to causation of the injury or disease;
- 2. Conflicting medical reports of permanent physical impairment which vary more than 5% of the whole person,
- 3. Conflicting medical opinions as to the temporary total cutoff date which vary more than 90 days;
- 4. Conflicting medical opinions related to a claim of permanent total disability, and/or
- 5. Medical expenses in controversy amounting to more than \$10,000.

B. A hearing on objections to the panel report may be scheduled if there is a proffer of conflicting medical testimony showing a need to clarify the medical panel report. Where there is a proffer of new written conflicting medical evidence, the Administrative Law Judge may, in lieu of a hearing, re-submit the new evidence to the panel for consideration and clarification.

C. The Administrative Law Judge may authorize an injured worker to be examined by another physician for the purpose of obtaining a further medical examination or evaluation pertaining to the medical issues involved, and to obtain a report addressing these medical issues in all cases where:

1. The treating physician has failed or refused to give an impairment rating, and/or
2. A substantial injustice may occur without such further evaluation.

D. Any expenses of the study and report of a medical panel or medical consultant and of their appearance at a hearing, as well as any expenses for further medical examination or evaluation, as directed by the Administrative Law Judge, shall be paid from the Uninsured Employers' Fund, as directed by Section 34A-2-601.

D. Rule 701. Opinion testimony by lay witnesses.

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

E. Rule 702. Testimony by experts.

(a) Subject to the limitations in subsection (b), if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

(b) Scientific, technical, or other specialized knowledge may serve as the basis for expert testimony if the scientific, technical, or other principles or methods underlying the testimony meet a threshold showing that they (i) are reliable, (ii) are based upon sufficient facts or data, and (iii) have been reliably applied to the facts of the case.

(c) The threshold showing required by subparagraph (b) is satisfied if the principles or methods on which such knowledge is based, including the sufficiency of facts or data and the manner of their application to the facts of the case, are generally accepted by the relevant expert community.

F. Utah Rules of Evidence 803 (18): Hearsay exceptions; availability of declarant immaterial.

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(18) Learned treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

G. Utah Code § 34A-2-601(d). Medical panel, director, or consultant -- Findings and reports -- Objections to report -- Hearing -- Expenses.

(d) As an alternative method of obtaining an impartial medical evaluation of the medical aspects of a controverted case, the division may employ a medical director or one or more medical consultants:

(i) on a full-time or part-time basis; and

(ii) for the purpose of:

(A) evaluating the medical evidence; and

(B) advising an administrative law judge with respect to the administrative law judge's ultimate fact-finding responsibility.

(e) If all parties agree to the use of a medical director or one or more medical consultants, the medical director or one or more medical consultants shall be allowed to function in the same manner and under the same procedures as required of a medical panel.

H. 34A-2-602. Physical examinations.

(1) The division or an administrative law judge may require an employee claiming the right to receive compensation under this chapter to submit to a medical examination at any time, and from time to time, at a place reasonably convenient for the employee, and as may be provided by the rules of the commission.

(2) If an employee refuses to submit to an examination under Subsection (1), or obstructs the examination, the employee's right to have the employee's claim for compensation considered, if the employee's claim is pending before an administrative law judge, commissioner, or Appeals Board, or to receive any payments for compensation theretofore granted by a final order of the commission, shall be suspended during the period of the refusal or obstruction.

I. **4A-2-603. Autopsy in death cases -- Certified pathologist -- Attending physicians -- Penalty for refusal to permit -- Liability.**

(1) (a) On the filing of a claim for compensation for death under this chapter or Chapter 3, Utah Occupational Disease Act, when, in the opinion of the commissioner or the commissioner's designee it is necessary to accurately and scientifically ascertain the cause of death, an autopsy may be ordered by the commissioner or the commissioner's designee.

(b) The commissioner or the commissioner's designee shall:

(i) designate the certified pathologist to make the autopsy; and

(ii) determine who shall pay the charge of the certified pathologist making the autopsy.

(2) Any person interested may designate a duly licensed physician to attend the autopsy ordered under Subsection (1).

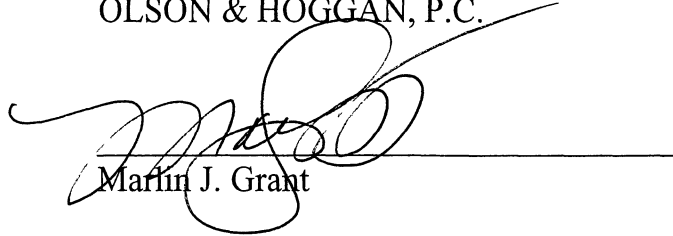
(3) The findings of the certified pathologist performing the autopsy shall be filed with the commission.

(4) All proceedings for compensation shall be suspended upon refusal of a claimant or claimants to permit such autopsy when ordered under Subsection (1).

(5) When an autopsy has been performed pursuant to an order of the commissioner or the commissioner's designee no cause of action shall lie against any person, firm, or corporation for participating in or requesting the autopsy.

DATED this 29 day of August, 2008.

OLSON & HOGGAN, P.C.

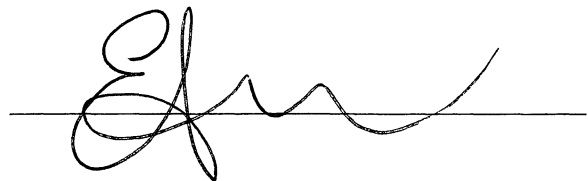


Marlin J. Grant

CERTIFICATE OF MAILING

I hereby certify that on the 29 day of August, 2008, I mailed a true and correct copy of the foregoing **REPLY BRIEF**, postage prepaid, to the following:

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