

2008

William Revene v. Nationwide Insurance Co., Employer's Insurance of Wausau, Utah Labor Commission : Brief of Appellee

Utah Court of Appeals

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William Revene; Petitioner.

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IN THE UTAH COURT OF APPEALS

WILLIAM REVENE,

Appellant,

vs.

NATIONWIDE INSURANCE CO.
and/or EMPLOYER'S INSURANCE
OF WAUSAU; the UTAH LABOR
COMMISSION,

Appellees.

:
Court of Appeals

:
Case No.: 20080076-CA

:
Priority 7

:
Labor Commission No.: 07-0271

BRIEF OF APPELLEE

NATIONWIDE INSURANCE CO. and/or EMPLOYER'S INSURANCE OF
WAUSAU

Appeal from the Utah Labor Commission

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FILED
UTAH APPELLATE COURTS
MAY 19 2008

APPELLEES DO NOT REQUEST ORAL ARGUMENT NOR
THAT THIS CASE BE REPORTED.

IN THE UTAH COURT OF APPEALS

WILLIAM REVENE,	:	Court of Appeals
	:	Case No.: 20080076-CA
Appellant,	:	
	:	Priority 7
vs.	:	
	:	
NATIONWIDE INSURANCE CO.	:	
and/or EMPLOYER'S INSURANCE	:	
OF WAUSAU; the UTAH LABOR	:	Labor Commission No.: 07-0271
COMMISSION,	:	
	:	
Appellees.	:	

BRIEF OF APPELLEE
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Appeal from the Utah Labor Commission

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JURISDICTION OF THE COURT OF APPEALS

This Petition for Review by Appellant William Revene is from a final order of the Labor Commission of Utah dated December 21, 2007. 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) (1997).

ISSUES PRESENTED AND STANDARDS OF REVIEW

1. Issue: Should the Court of Appeals strike Claimant's brief for lack of adequate argument.

Standard of Review: Not applicable.

2. Issue: Is there jurisdiction for the Labor Commission to consider Claimant's allegations of bad faith. This issue was preserved at R. 152 et. al.

Standard of Review: Whether an agency has jurisdiction is a question of law, reviewed for correctness. See Utah Code Ann. § 63-46b-16(4)(b); see also Stokes v. Flanders, 970 P.2d 1260, 1262 (Utah 1998).

3. Issue: Whether Claimant has established that he is entitled to further workers' compensation benefits. This issue was preserved at R. 1, et. al.

Standard of Review: This involves the interpretation of case law and agency specific statutory law where the Labor Commission has been given

a grant of authority. Reasonableness and rationality standards apply. See A.E. Clevite, Inc. v. Labor Comm'n, 2000 UT App 35, ¶¶6-7, 996 P.2d 1072.¹

4. Issue: Whether the Appeals Board's ruling is based upon competent evidence when it admitted medical records of Nationwide's doctor. This issue was preserved at R., 147 et. al.

¹ In A.E. Clevite, Inc. v. Labor Comm'n, 2000 UT App 35, ¶6, 996 P.2d 1072, the court stated:

The applicable standard of review for a formal adjudicative hearing is governed by the Utah Administrative Procedures Act (UAPA). See Utah Code Ann. § 63-46b-16 (1997); see also Caporoz v. Labor Comm'n, 945 P.2d 141, 143 (Utah Ct. App. 1997). "When the Legislature has granted an agency discretion to determine an issue, we review the agency's action for reasonableness." Caproz, 945 P.2d at 143; see Cross v. Board of Review of Indus. Comm'n, 824 P.2d 1202, 1204 (Utah Ct. App. 1992) (stating, "when there exists a grant of discretion, 'we will not disturb the Board's application of its factual findings to the law unless its determination exceeds the bounds of reasonableness and rationality'" (citation omitted)). Absent a grant of discretion, we use a correction-of- error standard "in reviewing an agency's interpretation or application of a statutory term." Cross, 824 P.2d at 1204 (citation omitted).

In this case, the Legislature has granted the Commission discretion to determine the facts and apply the law to the facts in all cases coming before it. See Utah Code Ann. § 34A-1-301 (1997). As such, we must uphold the Commission's determination that [petitioner's] injury "arose out of and in the course of" his employment, unless the determination exceeds the bounds of reasonableness and rationality so as to constitute an abuse of discretion under section 63-46b-16(h)(i) of the UAPA. See Caporoz, 945 P.2d at 143 (indicating agency has abused its discretion when agency action is unreasonable).

Standard of Review: Whether factual findings were based on a residuum of competent evidence is a question of law which the Court reviews for correctness. See Industrial Power Contractors v. Industrial Comm'n, 832 P.2d 477, 479 (Utah Ct. App. 1992).

DETERMINATIVE LAW

The determinative law is Utah Code Ann. § 34A-2-401 (Utah Workers' Compensation Act), the provision authorizing workers' compensation for industrial accidents. This section reads as follows:

An employee described in Section 34A-2-104 who is injured . . . by accident arising out of and in the course of the employee's employment, wherever such injury occurred, if the accident was not purposely self-inflicted, shall be paid . . . compensation for loss sustained on account of the injury . . . such amount for medical, nurse, and hospital services . . . [and] medicines

Utah Code Ann. § 34A-2-401 (1997).

The section emphasized above was interpreted by the Utah Supreme Court in Allen v. Industrial Commission, 729 P.2d 15, 18, 22-23 (Utah 1986), to require a claimant to prove both medical and legal causation.

STATEMENT OF THE CASE

Nature of the Case and Course of the Proceedings

This case presents the question of whether a worker is entitled to compensation benefits.

William Revene, (hereinafter, the "Claimant") sustained an industrial injury on October 9, 1997 while working for Nationwide Insurance as a claims adjustor.

On March 15, 2007, Claimant filed an Application for Hearing seeking entitlement to medical expenses, recommended medical care, temporary total disability, temporary partial disability and permanent partial disability from the accident of October 9, 1997. (R., 1-121).

Appellee (hereinafter, "Nationwide") filed an Answer on May 29, 2007 asserting that all benefits from the accident had been paid to the Claimant. In addition, Nationwide filed a Motion to Dismiss claimant's Application for Hearing for failing to provide supporting medical documentation with his Application for Hearing. (R., 125-30).

On June 30, 2007, the administrative law judge issued an Order denying Nationwide's Motion to Dismiss, holding that the Commission maintains a low threshold in establishing a *prima facie* claim. (R., 138).

A hearing was held at the Utah Labor Commission on September 18, 2007. Claimant has not produced a copy of that hearing transcript.

On October 16, 2007, the ALJ issued her Findings of Fact, Conclusions of Law and Order denying benefits to Claimant. The ALJ determined that Nationwide had paid all benefits required by law and that no additional benefits were owed to Claimant by Nationwide at this juncture. (R., 147-51).

On November 13, 2007, Claimant filed a Motion for Review, Motion to Vacate Decision and Order and Motion for Medical Panel Review. (R., 152).

On December 21, 2007, the Appeals Board issued its Order Affirming ALJ's Decision. (R., 161-63).

On January 8, 2008, the Claimant filed for further review in a document entitled, "Appeal of Decision by ALJ by the Appeals Board [and] Motion for Medical Panel Review Under Rule 35-1-77". (R., 164).

The Appeals Board determined this was to be considered a Motion for Reconsideration. (R., 168). However, rather than awaiting the Appeals' Board's ruling, the Claimant then filed a Petition for Review on January 25, 2008.

While Nationwide did file a Response to the Motion for Reconsideration on January 31, 2008, it is not contained in the Appellate Record. This is likely because the Commission divested itself of jurisdiction once Claimant filed his Petition for Review seeking review from the final order of the Labor Commission.

On February 25, 2008, Claimant filed a Docketing Statement.

Statement of Facts

1. Nationwide Insurance Company employed William Revene on October 9, 1997 as a claims adjustor.
2. On October 9, 1997, Claimant was in a drive bay inspecting vehicles that could be driven into the bay. Claimant was lying down on a creeper, which is a flat board with four wheels attached to the bottom. He crawled under the vehicle to inspect the undercarriage of the vehicle. When he completed his inspection, he reached out with both hands to grab the front bumper and pulled himself out from under the vehicle. In doing so, Claimant felt pain in his neck and spine region. (R., 148).
3. Claimant returned to work two days later and exacerbated his injury by pulling himself out from under another vehicle. (R., 148).
4. Claimant was off work for one week in October 1997 but was paid for his time off. He then returned to full-time work. Dr. Chung later found Claimant medically stable as of January 11, 1999, and assessed a 3% permanent partial impairment rating (R., 175 at 51-52). Nationwide paid Claimant for the 3% impairment rating. Dr. Chung did not assess any permanent work restrictions to Claimant.
5. Additionally, Nationwide paid Claimant's medical expenses through January 11, 1999, when it was determined that he was medically stable.

6. Claimant was examined by Dr. Dall on January 10, 2007 for treatment. Dr. Dall commented that Claimant is not apt to respond to further medical care. (R., 175 at 11).
7. Claimant returned to Dr. Dall on May 23, 2007. Dr. Dall discussed surgery with him, but indicated that surgery was not currently recommended. (R., 175 at 148).
8. A hearing was held on this matter on September 18, 2007. No evidence was presented by Claimant at the hearing to show that he was entitled to medical or indemnity benefits beyond that which has already been paid by Nationwide. He also presented no evidence to show entitlement to travel expenses or interest.
9. On October 16, 2007, the ALJ issued her Findings of Fact, Conclusions of Law and Order denying benefits to Claimant. The ALJ determined that Nationwide had paid all benefits required by law and that no additional benefits were owed to Claimant at this juncture. (R., 147-51). The Appeals Board agreed with the ALJ. The Appeals Board also indicated that the Commission was without jurisdiction to review the Claimant's allegations of bad faith. The Appeals Board also ruled that Nationwide's medical expert's opinion was admissible hearsay under Utah law.
10. The Claimant has since appealed the ruling of the ALJ and the Appeals Board.

SUMMARY OF THE ARGUMENT

First, the Court of Appeals should strike the Claimant's Appellate Brief for failing to comply with appellate briefing rules. His brief lacks meaningful argument, citation to authority and sufficient grounds for review.

Second, the Court of Appeals should reject Claimant's argument that Nationwide acted in bad faith. There is no basis for Claimant's challenge as the Commission properly ruled that they did not have jurisdiction to review such a claim.

Third, Claimant has failed to show that the Appeals Board erred in denying him workers' compensation benefits. Not only has the Claimant failed to provide meaningful argument on this point, he has also failed to establish that the Appeal's Board acted unreasonably or irrationally in rendering its ruling. Indeed, Claimant failed to present evidence at the hearing, as is his burden, to establish entitlement to additional compensation or medical benefits. Additionally, Claimant has failed to marshal any evidence to support the Board's ruling and then ferret out the fatal flaw in the Board's findings.

Finally, Claimant has not proven that the Board incorrectly admitted medical evidence of Nationwide's doctor. The evidence of the independent medical evaluator was properly admitted into the record pursuant to Labor Commission rules. There is no basis to challenge such evidence based upon

hearsay as these records may be admitted under an exception to the hearsay rule. Additionally, even if the records were considered hearsay, relaxed rules of evidence and procedure apply in these administrative proceedings to allow for the presentation of hearsay evidence.

ARGUMENT

POINT 1: Claimant's Appellate Brief Contains Inadequate Argument and Should be Stricken.

Nationwide asks the Court to strike the Claimant's Appellate Brief under Rule 24 of the Utah Rules of Appellate Procedure for inadequate briefing.

Rule 24 of the Utah Rules of Appellate Procedure requires a party to clearly define the issues and support them with pertinent authority and analysis. Utah R. App. P. 24. The Utah Supreme Court has stated that a party's brief, "shall contain the contentions and reasons of the appellant with respect to the issues presented, including the grounds for reviewing any issue not presented to the trial court, with citations to authorities, statutes and parts of the record relied on." State v. Thomas, 974 P.2d 269, 272 (Utah 1999) (quoting Utah R. App. P. 24(a)(9)). Under this rule, a party challenging a factual finding, "must first marshal all record evidence that supports the challenged finding." Utah R. App. P. 24(a)(9). Additionally, this rule provides that:

all briefs under this rule must be concise, presented with accuracy, logically arranged with proper headings and free from burdensome, irrelevant, immaterial or scandalous matters. Briefs which are not in compliance may be stricken, on motion or sua sponte by the court . . .

Id.

The Claimant's Brief contains little, if any, legal argument. His argument section is one-page in length and fails to present any meaningful legal or

logical argument and fails to cite to any legal authority in his argument section to support his claims of error by the Appeals Board. His brief does not clearly define the issues on appeal or provide support with pertinent authority and analysis. Aside from mere reference to a few cases in his statement of the issues, he has not provided any analysis applying the cases to the present action. Accordingly, Nationwide asks the Court to strike his brief and dismiss this appeal for inadequate briefing.

POINT 2: There is No Jurisdiction for the Commission to Review Claimant's Allegations of Bad Faith.

The Claimant also alleges that Nationwide has engaged in, “bad faith” in handling this claim. (Br., 18). However, Claimant fails to point to any error by the Appeals Board in reviewing this argument. Indeed, the Appeals Board held:

Appeals Board notes Mr. Revene's allegation that Nationwide has engaged in improper insurance adjusting practices. However, the Appeals Board lacks jurisdiction over this issue. Mr. Revene should direct his complaints regarding Nationwide's adjusting practices to the Utah Insurance Commission, which regulates the insurance industry.

(R., 162).

It is well-settled under Utah law that the Utah Labor Commission is an administrative tribunal with limited jurisdiction. See Industrial Comm'n v.

Evans, 52 Utah 394, 174 P. 825 (1918) (holding the jurisdiction of the commission is special and limited). Indeed, the Commission may exercise such powers only as are either expressly or by necessary implication conferred upon it by statute. See University of Utah v. Industrial Comm'n, 64 Utah 273, 229 P. 1103 (1924); Parker v. Industrial Comm'n, 66 Utah 256, 241 P. 362 (1925). Section 34A-1-301 of the Utah Labor Code provides that, "the commission has the duty and the full power, jurisdiction and authority to determine the facts and apply the law in this chapter [Chapter 34A], or any other chapter it administers." No where in Chapter 34A, or any other chapter, does the Utah Legislature grant the Utah Labor Commission authority to regulate bad faith insurance claims. On this basis, the Appeals Board's ruling, dismissing this argument for lack of jurisdiction, was correct.

Even if jurisdiction existed, Nationwide address the merits of Claimant's argument. Claimant contends that Nationwide has raised factual misrepresentations and/or engaged in improper insurance adjusting practices. Claimant's contention is inaccurate and without merit. At the September 18, 2007 evidentiary hearing, the ALJ found that Claimant presented no evidence at the evidentiary hearing to demonstrate that Claimant was entitled to any temporary total compensation, temporary partial compensation, permanent partial compensation, medical expense payment or reimbursement, travel expense reimbursement or interest.

Nationwide has paid all temporary total disability benefits to which Claimant was entitled to receive after the accident. Claimant's accident did not give rise to a claim for temporary partial disability benefits. Nationwide paid to Claimant a permanent partial impairment benefit award corresponding to a 3% whole person permanent partial impairment. Nationwide has also paid approximately \$7,800.00 in medical expenses incurred by Claimant from the accident through his medical stability date of January 11, 1999, and Claimant acknowledged at the hearing that he was not entitled to receive any past accrued workers' compensation benefits from Nationwide.

It is true that Nationwide has denied Claimant's demand that Nationwide continue to pay for Claimant's ongoing medical care. Nationwide contends that Claimant's present claim for medical care is not reasonably and/or necessarily related to the October 9, 1997 industrial accident and/or that Claimant's claim for medical care is not supported by the medical records of his own attending physician, Dr. Joel Dall. Nationwide has denied Claimant's recommended medical care claim in good faith for lack of medical evidence in support of the claim. Such a denial does not constitute improper insurance practices. The Labor Commission provides a forum for the Claimant to be heard when not satisfied by a claim denial. The Claimant's claims were thoroughly discussed with the ALJ, and both the ALJ and the Appeals Board

have ruled. Claimant has been employed several years as a claims adjuster. He is well familiar with the process of claims administration in the event of such a denial. Accordingly, such a claim of bad faith is wholly without merit.

POINT 3: Claimant Failed to Establish Any Right to Additional Medical Care or Indemnity Compensation under Utah's Workers' Compensation Act.

The Claimant also, very briefly, argues that he is entitled to additional worker's compensation benefits under a, "lighting up" aggravation theory. He indicates that even if he has a pre-existing condition, the "lighting up" of such conditions allow for him to receive additional workers' compensation benefits. (Br., 5, 19).

Again, Claimant is mistaken that he is entitled to additional workers' compensation benefits. Moreover, Claimant provides insufficient legal argument on this point. The ALJ correctly indicated that the Claimant had not established entitlement to further workers' compensation benefits as required by Utah Code Ann. § 34A-2-401 (Utah Workers' Compensation Act), the provision authorizing workers' compensation for industrial accidents. This section reads as follows:

An employee described in Section 34A-2-104 who is injured . . . by accident arising out of and in the course of the employee's employment, wherever such injury occurred, if the accident was not purposely self-inflicted, shall be paid . . . compensation for loss

sustained on account of the injury . . . such amount for medical, nurse, and hospital services . . . [and] medicines

Utah Code Ann. § 34A-2-401 (1997).

The section emphasized above was interpreted by the Utah Supreme Court in Allen v. Industrial Commission, 729 P.2d 15, 18, 22-23 (Utah 1986), to require a claimant to prove both medical and legal causation.

At the evidentiary hearing, the ALJ was asked by Claimant to review his attending physicians last chart note prior to the hearing dated May 23, 2007 prepared by Dr. Dall. (R., 175 at 10). Dr. Dall's May 23, 2007 chart note clearly opines that cervical spine surgery was not recommended for Claimant at that time. At the conclusion of this chart note, Dr. Dall states as follows:

In the end, I don't have much to offer him. Dr. Evans is currently working him up for a possible rotator cuff tear. He will follow with Dr. Evans and get back to me based on how he is doing.

(R., 175 at 10).

Claimant has failed to present any medical evidence from his own doctor to the ALJ which supported his claim that he was entitled to any further medical treatment from the accident which had not been paid for or authorized by Nationwide. Dr. Dall merely noted that Claimant was to follow-up with Dr. Evans for a rotator cuff problem not in any way related to the industrial accident. Dr. Dall did not recommend surgery, and Claimant made no demand

from Nationwide to authorize surgery prior to the hearing date. See generally Hilton Hotel v. Industrial Commission, 897 P.2d 352, 356 (Ut. Ct. App. 1995) (If a party fails to raise an issue and present evidence regarding the same, it has waived the right to do so).

Claimant now argues that he has received additional post-hearing medical treatment from Dr. Hood in the form of surgery. (Br., 19). This treatment post-dates the September 18, 2007 evidentiary hearing, and of course, was not raised by Claimant and considered by the ALJ at the hearing. Since such a claim was not raised by Claimant at the hearing (because the claim - authorization for cervical spine surgery - did not exist at the time), neither the ALJ nor the Appeals Board could address such claim.

Moreover, Claimant was examined by Dr. Jeffrey Randle on September 9, 2007. Dr. Randle did not believe that Claimant required any further medical treatment to his lumbar spine, cervical spine or any other affected body part from the industrial accident almost ten years earlier (R., 175 at 176-182). In any event, Nationwide also notes that Claimant has failed to assert that his need for recent cervical spine surgery was directly related to the industrial accident. Accordingly, there is no basis for reversal of the Appeals Board's ruling on this basis.

POINT 4: The Appeals Board Properly Admitted Medical Records of Nationwide's Doctor.

Claimant also argues that the Appeals Board erred in allowing hearsay evidence into the record. Again, the Claimant does not provide any meaningful argument but merely makes a generalized statement in his brief. (Br., 6, 19-20).

Rule 612-2-7, *Utah Admin. Code*, provides that the insurance carrier or the employer has the privilege of medical examination of the injured worker at any reasonable time. In compliance with this Rule, Nationwide referred Claimant to Dr. Randle for examination. Dr. Randle's report was prepared and then timely submitted to the Labor Commission in the medical record exhibit and to Claimant, in accordance with Labor Commission rules (R.602-2-1(H)), prior to the hearing.

The inclusion of the medical record exhibit, which also includes the records of Claimant's own treating doctors, is not considered hearsay evidence for the purpose of allowing such records into evidence as part of the administrative hearing process. Claimant's archaic reference to an out-dated statutory section of the Utah Code speaks to the Labor Commission's referral to, and use of, written reports prepared by a Labor Commission medical panel, and not to the admission of medical records proffered by either party prior to an evidentiary hearing.

If the Labor Commission were to take Claimant's argument on the admissibility of medical records as hearsay evidence to its logical conclusion, then the medical records of Claimant's own treating physicians would also be deemed hearsay evidence and should not be admitted into evidence. If medical records from Claimant's own treating doctors were not allowed in to evidence, Claimant would lack the medical evidence required to support his claim since Claimant did not intend to, nor did he call Dr. Dall, or any other medical provider, to provide live testimony at the hearing on his behalf. The frailty of Claimant's argument should be clear. The Labor Commission does not impose on either party the costly and time consuming obligation to require the party's own doctor to attend and testify at the evidentiary hearing.

In any event, medical records are an exception to the hearsay rule. Indeed, Utah R. Evid. 803(4) provides that, "statements made for purposes of medical diagnosis or treatment and describing medical history or past or present symptoms are not excluded by the hearsay rule." Also, 34A-2-802(2), *Utah Code*, provides that the Labor Commission, "may receive as evidence and use as proof of any fact . . . reports of attending or examining physicians, or pathologist (and) hospital records in the case of an injured or diseased employee." Utah Code Ann. § 34A-2-802(2) . Moreover, even if the medical records are considered "hearsay," Utah's court allow hearsay in Utah Labor Commission administrative proceedings under Utah Code Ann. § 34A-2-802,

although hearsay cannot form a basis for findings without a residuum of legally competent evidence. Since the Commission's findings in this case were based on admissible hearsay, they were based upon legally competent evidence. See Industrial Power Contractors v. Industrial Comm'n, 832 P.2d 477, 480 (Utah Ct. App. 1992). Accordingly, there was no error by the ALJ or Appeals Board in admitting the records of Nationwide's independent medical evaluator into the record.

CONCLUSION

Based upon the arguments set forth herein, Nationwide respectfully requests that the Claimant's appeal be denied and the Appeals Board's Order be affirmed.

Respectfully submitted this ^{4th} day of May, 2008.

BLACKBURN & STOLL, LC



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and/or Employer's Ins. of Wausau

ADDENDUM

- A. Findings of Fact, Conclusions of Law, and Order**
- B. Order Affirming ALJ's Decision**

Tab A

UTAH LABOR COMMISSION
ADJUDICATION DIVISION
PO Box 146615
Salt Lake City, Utah 84114-6615
801-530-6800

WILLIAM REVENE,
Petitioner,

vs.

NATIONWIDE INSURANCE COMPANY
and/or EMPLOYERS INSURANCE OF
WAUSAU,
Respondent.

**FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER**

Case No. 07-0271

Judge Colleen Trayner

HEARING: Room 332, Labor Commission, 160 East 300 South, Salt Lake City, Utah,
on September 18, 2007 at 8:30 AM. Said Hearing was pursuant to Order
and Notice of the Commission.

BEFORE: Colleen Trayner, Administrative Law Judge.

APPEARANCES: The petitioner, William Revene, was present and represented by himself.

The respondents, Nationwide Insurance Company and Employers
Insurance of Wausau were represented by attorney Bret Gardner Esq.

STATEMENT OF THE CASE

The petitioner, William Revene, filed an "Application for Hearing" with the Utah Labor Commission on March 19, 2007 and claimed entitlement to the following workers' compensation benefits: Medical expenses; recommended medical care; temporary total disability compensation; temporary partial disability compensation; permanent partial disability compensation; travel and interest.

The respondents originally accepted the claim and contend that all benefits have been paid.

FINDINGS OF FACT

A. Employment

The respondent, Nationwide Insurance Company, employed William Revene on October 9, 1997.

B. Compensation Rate

At the time of the accident in issue, William Revene was not married and had no dependent children. Petitioner indicated he worked 40 hours a week making approximately \$26,500 a year which equates to \$509.61 a week. Thus, petitioner's weekly compensation rate is \$340.00 a week. [$\$509.61 \times 66 \frac{2}{3} = \339.73].

C. Industrial Accident and Injury

Petitioner worked as a claims adjuster. On October 9, 1997, the day of the injury, petitioner was in the drive bay inspecting vehicles that could be driven into the bay. Petitioner was lying down on a creeper, which is a flat board with four wheels attached to the bottom, he crawled under the front of the vehicle to inspect the undercarriage of the vehicle. When petitioner was finished inspecting the vehicle he reached out with both hands to grab the front bumper and pulled himself out from under the vehicle when he felt a tear from his neck to the base of his spine. He felt immediate pain. This incident occurred on a Friday. When petitioner returned to work two days later he was inspecting the undercarriage of a different vehicle when he exacerbated his injury by pulling himself out from under another vehicle. Again, he felt immediate pain.

Petitioner was off work for one week in October but was paid for his time off. Petitioner returned to work full-time. Dr. Chung found petitioner medically stable as of January 11, 1999 and assessed a 3% whole person impairment rating. [Joint Exhibit 1 at 51-52]. Petitioner was paid for the 3% whole person rating. Dr. Chung did not assess any permanent or long standing work restrictions.

Petitioner's medical expenses were paid through January 11, 1999 when it was determined that he was medically stable.

Petitioner was seen by Dr. Dall on January 10, 2007 regarding treatment. It is Dr. Dahl's opinion that "... I would not recommend Chiari, and I do not feel that he is a great candidate for Botox. In fact, given the duration of symptoms, his depression, and everything taken together, he is not likely to respond to much of anything. In fact, he needs to be careful in regards to people who will happily take advantage of him." [Joint Exhibit at 11].

Petitioner was seen by Dr. Dall on May 23, 2007. Dr. Dall discussed surgery with petitioner. Dr. Dall indicated that: "We talked a lot more about surgery today than we have in the past. I told him that ACDF is very predictable in helping people with arm pain, but not so much with neck pain. However, his symptoms are such that I feel that if anyone's neck pain would benefit from an ACDF, it would be him. Still, I don't think he is to a level where I would recommend that. Should his condition, deteriorate, especially as far as function goes, we would need to repeat his MRI to see where things stand. A two-level ACDF would not be that bad, but a three-level would be a significant procedure." [Joint Exhibit at 10].

DISCUSSION AND CONCLUSIONS OF LAW

Utah Code Ann. Section 34A-2-401 of the Utah Workers' Compensation Act provides that "(e)ach employee . . . injured . . . by accident arising out of and in the course of the employee's employment, wherever such injury occurred, . . . shall be paid compensation . . . and medical . . . expenses, as provided by this chapter." In this matter, it is undisputed that petitioner suffered an industrial accident on October 9, 1997 and sustained injuries to his back.

Petitioner has presented no evidence that he is entitled to temporary total compensation, temporary partial compensation, permanent partial compensation, medical expenses, travel and interest. There is no dispute that petitioner was off work for approximately one week after the industrial accident and was paid by respondent. Petitioner returned to work full-time and never worked part-time with restrictions. Thus, petitioner is not entitled to any temporary partial compensation. Respondent paid petitioner for a 3% whole person impairment which is the only rating given by any doctor in the medical record. Petitioner's medical expenses were paid through January 11, 1999 when petitioner reached medical stability. Petitioner did not present any medical expenses that should have been paid by respondent. Lastly, petitioner did not provide any evidence that he is entitled to travel or interest. Thus, these claims must be dismissed with prejudice.

The only remaining issue is what future care is medically necessary to treat petitioner based upon the October 9, 1997 industrial injury. Utah Code Ann. Section 34A-2-418 provides that the employer and/or insurance carrier are responsible to pay reasonable sums for necessary medical expenses to treat the injured employee.

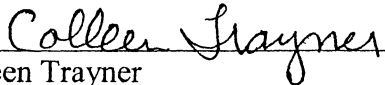
Petitioner contends that Dr. Dall is recommending ACDF surgery. However, Dr. Dall indicates that petitioner may benefit from the surgery but he does not recommend the surgery at this time. Thus, petitioner's claim is not ripe for adjudication. Petitioner may have a claim for surgery in the future but there must be medical documentation which recommends the surgery and indicates that the surgery is medically necessary as a result of the October 9, 1997 industrial accident. Thus, petitioner's claim for future medical treatment must be dismissed without prejudice.

ORDER

IT IS THEREFORE ORDERED that petitioner's claims for medical expenses; temporary total disability compensation; temporary partial disability compensation; permanent partial disability compensation; travel and interest are dismissed with prejudice.

IT IS FURTHER ORDERED that petitioner's claim for future surgery is dismissed without prejudice.

DATED this 16th day of October, 2007.



Colleen Trayner
Administrative Law Judge

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 request review by the Appeals Board, the review will be conducted by the Utah Labor Commission.

William Revene vs. Nationwide Insurance Company and/or Employers Insurance of Wausau
Case No. 07-0271

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the attached Findings of Fact, Conclusions of Law, and Order, was mailed by prepaid U.S. postage on October 16, 2007, to the persons/parties at the following addresses:

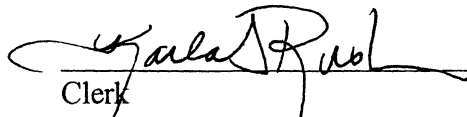
William Revene
875 W Meadowbrook Expressway G108
Salt Lake City UT 84123

Nationwide Insurance Company
990 W 5370 S
Murray UT 84123

Employers Insurance of Wausau
Designated Agent Liberty Mutual Group
764 E Winchester #100
Salt Lake City UT 84107

Bret Gardner Esq
257 E 200 S Ste 800
Salt Lake City UT 84111

UTAH LABOR COMMISSION


Clerk
Adjudication Division

Tab B

**APPEALS BOARD
UTAH LABOR COMMISSION**

WILLIAM REVENE,

Petitioner,

vs.

**NATIONWIDE INSURANCE
COMPANY and EMPLOYERS
INSURANCE OF WAUSAU,**

Respondents.

**ORDER AFFIRMING
ALJ'S DECISION**

Case No. 07-0271

William Revene asks the Appeals Board of the Utah Labor Commission to review Administrative Law Judge Trayner's denial of Mr. Revene'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 AND ISSUE PRESENTED

Mr. Revene seeks disability compensation, past medical expenses and future medical expenses for neck and low back injuries resulting from a work accident at Nationwide Insurance Company on October 19, 1997. After an evidentiary hearing, Judge Trayner concluded that Mr. Revene had already been paid the disability compensation and past medical expenses that were due for the injury. Judge Trayner therefore dismissed those claims with prejudice. Judge Trayner also concluded that Mr. Revene did not require any additional medical care at the present time. Judge Trayner dismissed Mr. Revene's claim for future medical care "without prejudice" so that the claim could be refiled if medical care became necessary in the future.

In requesting review of Judge Trayner's decision, Mr. Revene argues that Nationwide Insurance Company and its workers' compensation insurance carrier, Employers Insurance of Wausau (referred to jointly as "Nationwide" hereafter), have engaged in improper insurance adjusting practices. Mr. Revene also asserts that it is Nationwide's obligation to return Mr. Revene to the same condition he was in prior to his work accident. Additionally, Mr. Revene argues that Judge Trayner erred in concluding that his prior medical expenses have been paid. Finally, Mr. Revene contends that the report prepared by Nationwide's medical consultant should have been excluded from evidence as hearsay.

ORDER AFFIRMING ALJ'S DECISION
WILLIAM REVENE
PAGE 2 OF 3

DISCUSSION

The Appeals Board notes Mr. Revene's allegation that Nationwide has engaged in improper insurance adjusting practices. However, the Appeals Board lacks jurisdiction over that issue. Mr. Revene should direct his complaints regarding Nationwide's adjusting practices to the Utah Insurance Commission, which regulates the insurance industry.

Mr. Revene is incorrect in his assertion that Nationwide is obligated to return him to the same condition that he was in prior to his work accident. While the Utah Workers' Compensation Act requires employers and their insurance carriers to provide all medical care necessary to treat a workplace injuries, in some instances injured workers are left with permanent impairments that cannot be corrected by additional medical treatment. In such a case, the Act compensates the injured worker for his or her permanent impairment by requiring the employer or insurance carrier to pay additional disability compensation. It appears that in Mr. Revene's case that he has already received compensation for his permanent impairment.

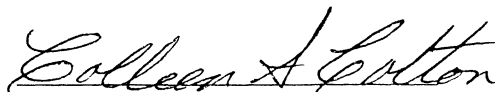
Although Mr. Revene argues that not all his past work-related medical expenses have been paid, he has not submitted any documentation to support that argument.

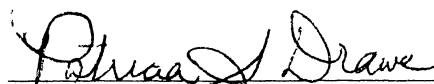
Finally, Mr. Revene is incorrect in asserting that the report of Nationwide's medical consultant is inadmissible hearsay. The Utah Workers' Compensation Act and Utah Administrative Procedures Act both permit hearsay to be admitted and considered as evidence in these proceedings.

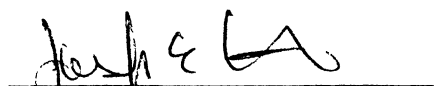
ORDER

The Appeals Board affirms Judge Trayner's decision. It is so ordered.

Dated this 21st day of December, 2007.


Colleen S. Colton, Chair


Patricia S. Drawe


Joseph E. Hatch

IMPORTANT! NOTICE OF APPEAL RIGHTS FOLLOWS ON NEXT PAGE.

ORDER AFFIRMING ALJ'S DECISION
WILLIAM REVENE
PAGE 3 OF 3

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

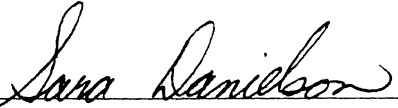
I certify that a copy of the foregoing Order Affirming ALJ's Decision in the matter of William Revene 07-0271, was mailed first class postage prepaid this 21st day of December, 2007, to the following:

William Revene
875 W Meadowbrook Expressway G108
Salt Lake City UT 84123

Nationwide Insurance Company
990 W 5370 S
Murray UT 84123

Employers Insurance of Wausau
Designated Agent Liberty Mutual Group
764 E Winchester #100
Salt Lake City UT 84107

Bret Gardner, Esq.
257 E 200 S Ste 800
Salt Lake City UT 84111



Sara Danielson
Utah Labor Commission

CERTIFICATE OF SERVICE

I certify that true and correct copies of the foregoing document were mailed, first class, postage prepaid on the 19th day of May, 2008, to:

Utah Court of Appeals (8 copies, one w/ original signature)
Scott M. Matheson Courthouse
450 South State Street
P.O. Box 140230
Salt Lake City, Utah 84114-0230

Alan L. Hennebold, General Counsel (2 copies)
Labor Commission of Utah
160 East 300 South
P.O. Box 1466
Salt Lake City, Utah 84114-6615

William Revene (2 copies)
875 West Meadowbrook, G108
SLC, UT 84123
Appellant

Scott M. Matheson