

1988

Mark D. Letham v. Industrial Commission of Utah, Big Basin Ent, Workers Compensation Fund : Brief of Appellant

Utah Court of Appeals

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Keith E. Sohm; Sohm and Sohm, PC; Attorney for Appellant.

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BRIEF

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DOCKET NO. 880307-CA

IN THE COURT OF APPEALS OF THE STATE OF UTAH

MARK D. LETHAM , : BRIEF OF APPELLANT
Applicant and Appellant, : INDUSTRIAL COMMISSION
Case No. 87000671
vs. :
Administrative Law Judge:
INDUSTRIAL COMMISSION OF : Gilbert A. Martinez
UTAH, BIG BASIN ENT, and
WORKERS COMPENSATION FUND, : Court of Appeals No. 88-0307-CA
Defendants and Respondents.: Priority No. 6

BRIEF OF APPELLANT MARK D. LETHAM

Appeal From a Denial of Motion for Review of
Findings of Fact, Conclusions of Law, and Order of
the Industrial Commission of the State of Utah

Honorable Gilbert A. Martinez, Administrative Law Judge

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COURT OF APPEALS

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BRIEF OF APPELLANT MARK D. LETHAM

JURISDICTION

This is an action for review and determination of the lawfulness of an award of the Industrial Commission of Utah. The Court of Appeals has jurisdiction by virtue of Utah Code Annotated, Sections 35-1-83 and 35-1-84.

NATURE OF THE PROCEEDINGS

This is a Petition for Review of the failure of the Industrial Commission of Utah to order additional Temporary Total Disability and Permanent Impairment benefits to be paid to injured employee, Mark D. Letham as a result of a disabling industrial accident, which is for a review of two Orders of the Law Judge, dated November 3, 1987 (R-270) and January 27, 1988 (R-283), and the Order of the Industrial Commission of Utah, attached hereto as Addendum No. 1 (R-315).

STATEMENT OF THE ISSUES

The following issues are presented to the Court for review:

1. Whether the Judge and the Commission viewed the facts in a light most favorable to the applicant as required by law.

2. Whether the Judge and the Commission acted in an arbitrary and capricious manner amounting to an abuse of discretion or without substantial evidence in entering Orders not supported by the evidence in denying all benefits.

3. Whether the Judge and Commission abused their judicial discretion and acted contrary to the law in, refusing to allow the matter to go to a medical panel for evaluation.

4. Whether the case was fairly reviewed by the Commission when they heard and viewed a video presentation by the defendant but did not have a transcript to properly review the presentation of the applicant.

5. Whether there was, in fact, sufficient evidence to enter an Order in favor of the applicant, finding that he was entitled to additional Temporary Total Disability benefits and finding that the applicant was entitled to Permanent Partial Impairment benefits based on 10 or 15% of the whole man, there being no medical evidence to the contrary.

6. Whether the applicant was entitled to have the case reviewed by a medical panel, as required by Section 35-1-77, Utah Code Annotated and held to be mandatory by case law.

DETERMINATIVE AUTHORITY

The statutes, cases and authorities believed to be determinative of the respective issues raised include:

1. Section 35-1-45, Utah Code Annotated provides that an employee is entitled to compensation for an accident arising out of or during the course of employment (Addendum No. 6).

2. Section 35-1-77, Utah Code Annotated provides that an applicant is entitled to have his case reviewed by a medical panel (Addendum No. 5).

3. Section 35-1-84, Utah Code Annotated holding the Court of Appeals may set aside an award of the Industrial Commission.

4. Savage v. Industrial Commission, (Utah) 565 P2d 782; Henry v. Rocky Mountain Packing Corp., (Utah) 196 P2d 487; Utah Consolidated Mines v. Industrial Commission, (Utah) 36 P2d 979: if there is any doubt respecting the right to compensation, such doubt should be resolved in favor of the injured employee.

5. M & M Corp v. Industrial Commission, (Utah) 189 P2d 132; McPhie v. Industrial Commission, (Utah 1977) 567 P2d 153; Prows v. Industrial Commission, (Utah 1980) 610 P2d 1362; and many others: the statute should be liberally construed in favor of

awarding benefits, and if there is any doubt respecting the right to compensation, it should be resolved in favor of recovery of the applicant.

6. Lipmann v. Industrial Commission, (Utah 1979) 592 P2d 616, 618; Schmidt v. Industrial Commission, (Utah 1980) 617 P2d 693; Makoff Company v. Industrial Commission, (Utah) 368 P2d 70: requires appointment of a medical panel.

STATEMENT OF THE CASE

This is a typical case of a hard-working young man who suffers from a severe back injury incurred in March, 1985 while lifting. He returned to work and re-injured his lower back in February, 1986, again with heavy lifting, and received conservative treatment, but finally underwent disc excision surgery in November, 1986 (R-150), with repair surgery in December, 1986 (R-147). His neurosurgeon gave him a 10% pre-release rating (Addendum 2, R. 266) and later, after release, rated him at 15% Permanent Partial Impairment (Addendum 2) with no contradictory medical opinions, but the Law Judge refused to grant Permanent Impairment and refused to send him to a medical panel.

The facts material to a consideration of the questions presented are as follows:

1. The applicant, Mark D. Letham, was a skilled Journeyman Industrial Electrician with an excellent health record, an excellent work record, and with no previous claims. He was

involved in two severe, well-documented industrial accidents, the first of which on March 19, 1985 (R-20) and the other, February 10, 1986 (R-30). Both were the result of straining while lifting, and in each case resulting in an immediate, severe disabling lower back pain which finally required surgery to correct. The Law Judge, in an extreme abuse of discretion, acting arbitrarily, capriciously and without substantial evidence, found no accident had occurred (R-270, 283). The Commission on review reversed this portion of the ruling and found an accident had occurred. Based on the Order of the Commission (R-315, Addendum No. 1) finding that an accident occurred (as defined in Section 35-1-45, Utah Code Annotated), the question of "an accident" is NOT an issue.

2. Some benefits were paid. As the time drew near for a medical release, the defendants, rather than employing a doctor to perform an independent medical examination, selected rather to hire private investigators to prevaricate their way into the confidence of the applicant, promise him employment in the field of the hobby he loved most (R-88), and took pictures of the activities of the applicant (R-89), which pictures were substituted for and in lieu of medical opinions as to the medical questions determinative of a period of Temporary Total Disability and a percentage of Permanent Impairment.

3. At the hearing held on October 22, 1987, the applicant's evidence was overwhelming and undisputed that two

industrial accidents occurred (R-20, 30), that the applicant was disabled (R-21, 34), and required back surgery on November 4, 1986 (R-35) and suffered a Permanent Partial Impairment of 10% (R-266), later 15%. There was absolutely no testimony, evidence or medical evidence to the contrary. The defendants introduced video pictures taken in May and June, 1987 as the applicant was recovering from surgery, and the testimonies of the investigators were heard.

DISPOSITION BY COMMISSION

The Judge entered his Order November 3, 1987, totally disregarding the medical evidence introduced by the applicant, and in an extreme showing of prejudice and an unconscionable abuse of a discretion, ruled erroneously as follows:

1. Refused to refer the matter to a medical panel.
2. Ruled that no industrial accident had occurred, (a ruling reversed by the Commission on review).
3. Ruled that the applicant was not entitled to additional Temporary Total Disability; and
4. Ruled that the applicant was not entitled to Permanent Partial Impairment benefits.

The Administrative Law Judge issued a Supplemental Order on January 27, 1988; and in an equally extreme abuse of discretion, found that the applicant did not sustain a compensable

industrial accident on either of those alleged dates and that the applicant's testimony was not credible.

The Commission, without having heard the testimony of the applicant and without having a transcript of the proceedings (transcript was not made up until June 8, 1988 for purpose of appeal), presenting the applicant's testimony, purported to review the case. It appeared, however, that the Commission did view the video presentation of the defendant. Obviously, the Commission reviewed only the presentation of the defendants and were not able to consider or review the presentation of the applicant. The Administrative Law Judge and the Commission completely overlooked the fact that any patient recovering from surgery gradually increases his activities during the period of Temporary Total Disability in preparation for return to work. The applicant was increasing his activities when he set up his teepee in May, 1987, about five (5) months after back surgery beginning April 27, 1987 (R-261). The teepee poles weigh about five (5) pounds (R-92).

The Commission, in its Order Denying the Motion for Review, reversed the Administrative Law Judge in finding that an industrial accident did occur, but the Commission concurred in the result by finding no additional Temporary Total Disability or Permanent Partial Impairment benefits were due to the applicant (R-315).

Both the Administrative Law Judge and the Commission ignored very conservative medical opinion of the treating neurosurgeon, M. Peter Heilbrun, M.D., who is the highly respected head of the Neurosurgical Department of the University of Utah Medical Center. Dr. Heilbrun has acted as a medical panel for the Commission on previous occasions, and his opinions have been greatly respected by the Judges and the Commission. Such a reputable opinion, finding a minimal 10% impairment and later finding 15% (R-266, Addendum No. 2) should have caused the Judge and the Commission grant the amount requested or, at least, appoint a Medical Panel to determine a reasonable date of termination of Temporary Total Disability and a reasonable Permanent Partial Impairment rating. In my personal nine years as an Administrative Law Judge and subsequent years of practice in the field, I have never heard of an case where there was not a finding of at least 10% Permanent Partial Impairment resulting from major back surgery (see Addendums 3 and 4). Such would have been the testimony of Dr. Heilbrun or some other specialist if permitted to testify. Medical testimony other than medical records are not allowed at the original hearing. Medical testimony is allowed only in a second hearing if there is a disagreement with a Medical Panel based on specific objections to the Medical Panel. The applicant, therefore, was precluded from

putting on additional medical evidence by not having a Medical Panel review the case.

SUMMARY OF THE ARGUMENT

The Commission acted arbitrarily and capriciously, without substantial evidence in an exercise of an abuse of discretion in denying additional Temporary Total Disability benefits and in denying all Permanent Partial Impairment benefits and in refusing to have the applicant evaluated by a Medical Panel, which actions of the Commission were contrary to the medical evidence, contrary to case law and contrary to the statutory mandate that a Medical Panel must review the medical aspects of the case.

ARGUMENT

POINT I: THE APPLICANT IS ENTITLED TO COMPENSATION FOR HIS INDUSTRIAL INJURY.

Section 35-1-45, Utah Code Annotated (Addendum No. 6), provides every employee who is injured by accident arising out of or in the course of his employment shall be paid compensation for loss sustained on account of the injury.

The Commission found applicant was involved in an industrial accident. By statute, the applicant is entitled to compensation and payment of medical costs. The Worker's Compensation Fund stated they would not pay any further medical costs after June, 1987 (R-40) and Temporary Total Disability benefits were cut off June 2, 1987. As of Dr. Heilbrun's medical

report of July 21, 1987 (R-266), applicant had still not been released for either light duty or usual work, and the doctor only gave a preliminary estimate of 10% Permanent Partial Impairment.

The applicant returned to work without a release on August 22, 1987 (R-40). He still has some pain in his back and aching at night, but as a Foreman, he does not have to do the heavy work (R-42).

After the hearing, Dr. Heilbrun provided his final report dated November 6, 1987 acknowledging a release date of August 22, 1987 and finding a Permanent Impairment of 15% (Addendum 2).

The applicant, then, is entitled to Temporary Total Disability benefits from June 2, 1987 to August 22, 1987, Permanent Partial Impairment benefits based on 15% and continued medical treatment as needed.

No medical evidence was introduced to refute these medical claims.

The Commission had no medical evidence nor any other logical evidence upon which to base the denial.

The full extent of the Commission's unconscionable abuse of discretion is shown by the fact that all medical practitioners would agree that a person having undergone major back surgery has some percentage of Permanent Impairment. After over ten years of experience, I do not recall a case where major back surgery is not rated 10% or more.

The Manual for Orthopedic Surgeons, in evaluating Permanent Physical Impairment, states on page 30 (Addendum No. 3):

B. Surgical excision of disc, no fusion, good results, no persistent sciatic pain--10%.

C. Surgical excision of disc, no fusion, moderate persistent pain and stiffness, aggravated by heavy lifting with necessary modification of activity--20%.

The applicant fits in the 20% category. Applicant had a L5-S1 discectomy (removal of disc without a fusion) (R-162).

As late as April 27, 1987 Dr. Heilbrun notes:

Patient is unchanged in that he continues to have intermittent sharp pains in the back. . .radiating into both legs which occurs predominantly when he extends his back. (R-162)

The doctor is so concerned that he orders a lumbar myelogram on April 27, 1987 (R-152, 153).

The American Medical Association Guide to Evaluation (Addendum 4, p. 57, Table 53,13 (3), rates operated, clinically established disc dearrangement with residual 5% plus combining with appropriate residuals which involves loss of strength or range of motion (p. 74, Table 5) and pain and discomfort factors (p. 73, Table 4). Subparagraph 2 rates decreased sensation with or without pain which is forgotten during activity, 25%. (This residual is then added to the original 5%.)

POINT II: THE APPLICANT SHOULD HAVE BEEN AWARDED TEMPORARY TOTAL DISABILITY AND PERMANENT PARTIAL IMPAIRMENT BENEFITS BASED ON THE MEDICAL EVIDENCE OR SHOULD HAVE BEEN REFERRED TO A MEDICAL PANEL FOR EVALUATION.

Section 35-1-77 Utah Code Annotated provides that where there are medical questions involved, especially where there is a conflict in the medical evidence, the matter may be referred to a Medical Panel for evaluation.

In the present case, the ONLY medical evidence introduced after applicant's surgery provided for additional Temporary Total Disability, Permanent Partial Impairment and continued medical treatment (R-266, Addendum 2). No medical evidence provided otherwise. Neither the Judge nor the Commissioners can act as medical practitioners, nor can they rule without contradictory medical opinions. The Commission cannot substitute its opinion to override the opinion of a qualified, highly respected doctor such as Dr. Heilbrun. The Commission have used Dr. Heilbrun as a Medical Panel on numerous occasions and have highly regarded his opinions.

In such a case as this, it is mandatory that the Commission either accept the only medical opinion or refer the matter to a Medical Panel.

In the case of Schmidt v. Industrial Commission (Utah 1980), 617 P2d 693, in referring to Section 35-1-77, stated on page 696 as follows:

This statute mandates the submission of the medical aspects of the case to the medical panel. . .The language of the statute is clear. When an accidental injury, such as in the present case, has occurred, the submission of the medical aspects of the case, including those involving causation, is mandatory.

Because the present injury is of a type held by the Court to fall within the provisions of Section 35-1-45, the Administrative Law Judge's conclusion that no accident occurred should not be reached from the facts presented, without submission of the matter to the Medical Panel.

This case follows the case of Lipmann v. Industrial Commission (Utah 1979) 592 P2d 616.

POINT III: THE EVIDENCE MUST BE VIEWED IN A LIGHT MOST FAVORABLE TO THE APPLICANT AND ALL DOUBTS ARE TO BE RESOLVED IN FAVOR OF A WORKER'S COMPENSATION CLAIM.

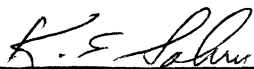
The overriding principle which governs adjudication of Workers' Compensation disability claims is that such claims are to be liberally construed in favor of awarding benefits and that any doubts from the evidence are to be resolved in favor of the claimant. Prows v. Industrial Commission, 610 P.2d 1362, 1363-64 (Utah 1980), citing Chandler v. Industrial Commission, 184 P.1020, 1021-22 (Utah 1919). The Church of Jesus Christ of Latter-Day Saints v. Industrial Commission, 590 P.2d 328, 332 (Utah 1979) (Dissenting opinion). McPhie v. Industrial Commission, 567 P.2d 153, 155 (Utah 1977). Askrew v. Industrial Commission, 391 P.2d 302, 304 (Utah 1964). M & K Corp. v. Industrial Commission, 189 P.2d 132, 134 (Utah 1948). The Applicant respectfully requests that to the extent that the questions raised herein are close questions, that all such doubts be resolved in favor of an award of benefits.

CONCLUSION

The applicant, Mark D. Letham, was a hard-working trained employee who was injured in an industrial injury, who underwent major low back surgery and yet was denied compensation and medical benefits by the Commission in total disregard of the medical evidence. The Commission's Order should be reversed to allow the benefits provided by law and as rated by Dr. Heilbrun.

Dated this 13th day of September, 1988.

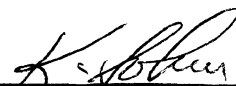
Respectfully submitted,



Keith E. Sohm
Attorney for Applicant

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing brief were personally delivered to the office of BLACK & MOORE and to the offices of the Industrial Commission, with a copy to Barbara Elicerio, this 19th day of September, 1988.



Keith E. Sohm

Addendum
No 1

THE INDUSTRIAL COMMISSION OF UTAH

Case No: 87000671

3 pages

MARK D. LETHAM,

Applicant,

vs.

BIG BASIN ENT and/or
WORKERS COMPENSATION FUND OF UTAH,

Defendants.

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ORDER DENYING

MOTION FOR REVIEW

* * * * *

On November 3, 1987, an Administrative Law Judge of the Industrial Commission issued Findings of Fact, Conclusions of Law and Order denying the applicant in the above-captioned case additional temporary total compensation and permanent partial impairment benefits for two back injuries alleged to have occurred on March 19, 1985 and February 10, 1986. The Application for Hearing indicates a claim for additional temporary total compensation from approximately the beginning of June 1987 until the applicant returned to work in August 1987, plus a claim for permanent partial impairment benefits based on the treating physician's rating of 15% whole person. The Administrative Law Judge based his denial of these additional benefits on the fact that the applicant was clearly not temporarily totally disabled as of May 1987, and quite possibly stabilized much earlier than that date, resulting in an overpayment of temporary total compensation. The November 3, 1987 Order points to a video tape of the applicant's activities, taken by the defendant in May 1987, as being the most influential evidence convincing the Administrative Law Judge an overpayment had occurred. The video tape showed the applicant involved in extremely strenuous physical activity such as unloading a truck, carrying very heavy items, setting up a 20 ft. teepee, shoveling dirt, running and climbing and hauling large buckets of water. Based on the fact the applicant engaged in these activities while receiving temporary total compensation and representing to the professionals treating him that he was in pain and/or restricted in mobility, the Administrative Law Judge found the applicant's claim for further benefits as not supported by the facts and the Administrative Law Judge therefore denied the applicant's claim.

On January 5, 1988, counsel for the applicant filed a Motion for Review arguing that the Administrative Law Judge's denial of benefits resulted from the Administrative Law Judge ignoring certain evidence. Counsel for the applicant argues that the Administrative Law Judge ignored the applicant's testimony as well as the medical evidence. Per counsel for the applicant, the medical evidence reflect that the applicant was not stable during the period

MARK D. LETHAM
ORDER DENYING MOTION
PAGE TWO

of time at issue. With respect to the applicant's activities as reproduced in the video tape, counsel for the applicant finds these activities are non-strenuous and counsel for the applicant argued only a medical panel can determine whether the activities were such that a finding of temporary total disability is inconsistent with those activities.

On January 27, 1988, the Administrative Law Judge issued a Supplemental Order indicating that besides the fact that no further compensation is due the applicant, the Administrative Law Judge determined there was no compensable accident on either March 19, 1985 or February 10, 1986. Once again, the Administrative Law Judge cited the applicant's lack of credibility as the reason behind his conclusions. On January 29, 1988, counsel for the defendant/Workers Compensation Fund filed a Response to the applicant's Motion for Review. Counsel for the Workers Compensation Fund states that the Administrative Law Judge correctly listed in his Order just those facts upon which he relied on reaching his decision. As the Administrative Law Judge did not rely on the applicant's testimony, which the Administrative Law Judge found to be non-credible, counsel for the Workers Compensation Fund states it was not necessary for the Administrative Law Judge to reiterate in his Order what the applicant testified to at hearing. Furthermore, counsel for the Workers Compensation Fund states that the Administrative Law Judge did not rely on the medical records indicating medical instability as it is clear the applicant misrepresented to the medical care providers as well as to the insurance carrier. Finally, counsel for the Workers Compensation Fund states that the rating of Dr. Heilbrun does not require that the Industrial Commission award permanent partial impairment benefits. Dr. Heilbrun's rating is based on the American Medical Association's Guides to the Evaluations of Permanent Impairment and counsel for the Workers Compensation Fund states that publication is merely a guide. As the applicant's impairment is obviously minimal as demonstrated by the activities he is able to, and does perform, counsel for the Workers Compensation Fund states no impairment rating or benefits are warranted.


The Commission finds that the issue on review is whether the applicant is entitled to further workers compensation benefits beyond what has already been paid. The Commission notes it is clear from the file that the Workers Compensation Fund has already paid substantial compensation, including nearly a year and a half of temporary total compensation and medical expenses related to two separate surgeries. The Commission agrees with the Administrative Law Judge that, per the video tape, temporary total compensation was paid at a time when the applicant was clearly medically stable. The Commission also agrees that the medical evidence that has been submitted is somewhat unreliable as the applicant clearly was misrepresenting to the doctor or doctors involved as to what his true physical condition was. However, the Commission does not agree with the Administrative Law Judge's Supplemental Order that there is no compensable accident involved here. The


MARK D. LETHAM
ORDER DENYING MOTION
PAGE THREE


March 19, 1985 industrial accident is fairly well documented. The February 10, 1986 industrial accident is questionable. Presuming that there is at least one compensable industrial accident involved, some of the benefits paid were most likely legitimate. However, it is clear there was an overpayment of temporary total compensation during a period of time when the applicant had to be medically stable. The Commission agrees with counsel for the Workers Compensation Fund that the American Medical Association Guides to the Evaluation of Permanent Impairment are guides only and the Commission feels that the activities the applicant is able to perform prevent any finding that the applicant is permanently impaired. Even if a minimal permanent impairment does exist, the overpayment of temporary total compensation offsets any award for permanent impairment warranted in this case. Therefore, the Commission agrees with the Administrative Law Judge's denial of further benefits in this case and must therefore deny the applicant's Motion for Review.

ORDER:

IT IS THEREFORE ORDERED that the applicant's January 5, 1988 Motion for Review is hereby denied and the Administrative Law Judge's November 3, 1987 Order is hereby affirmed and final with further appeal to the Court of Appeals only within the thirty (30) day time limit as specified in U.C.A. 35-1-83.



Stephen M. Hadley
Chairman


Lenice L. Nielsen
Commissioner


John Florez
Commissioner

Passed by the Industrial Commission
of Utah, Salt Lake City, Utah, this
15th day of April, 1988.

ATTEST:


Linda J. Strasburg
Commission Secretary

Date
Emplc

No. 2

BRIEF MEDICAL REPORT
(To be completed by treating physician)

2 pages

- RE: Permanent Impairment Evaluation for Mark Lethal _____
Name of Applicant
1. Has applicant been released for usual work? no What date? _____
2. Has applicant been released for light duty? No What date? _____
3. Has applicant a permanent injury? _____ If so, describe fully _____
4. In case of permanent injury, on what date did or will the applicant reach a final state of recovery? _____
5. If there is a permanent injury, give your estimate of impairment in terms of percentage of loss of function: 10% of whole man
6. Is there a medically demonstrated causal relationship between the industrial accident and the problems you have been treating? yes
Please explain as necessary: _____
7. What future medical treatment will be required as a result of the industrial accident? INDETERMINATE
8. What is the percentage of permanent physical impairment attributable to previously-existing conditions, whether due to accidental injury, disease or congenital causes? 0
9. What is the applicant's total physical impairment, if any, resulting from all causes and conditions, including the industrial injury? 10% of whole man
10. Did the industrial injury aggravate the applicant's pre-existing condition? Please explain as necessary. NO

Dated this 21 day of July 1987

Please return to:

Keith E. Sohm
Attorney at Law
2057 Lincoln Lane
Salt Lake City, 84124
Tele. 277-5874

M. P. Heilbrun
Physician's Name (Please Print)

Neurosurgery

Physician's Specialty

Physician's Signature
50 N. Medical Drive
Salt Lake City, UT 84132
Street Address

City, State, Zip



M. Peter Heilbrun, M.D.
Ronald L. Apfelbaum, M.D.
LaVerne S. Erickson, M.D.
Daniel W. Fuhs, III, M.D.
Marion L. Walker, M.D.

November 6, 1987

*This Final Report
was tendered after
the hearing.*

Keith E. Sohm
Sohm & Sohm
2057 Lincoln Lane
Salt Lake City, Utah 84124

Re: Mark Letham

Dear Mr. Sohm:

Thank you for your letter regarding Mark Letham. I believe that Mr. Letham should be granted an impairment rating of 15% of whole man related to residual back discomfort. I did not know he returned to work on August 22, 1987. I would be glad to give him a release date as of August 22, 1987.

I hope this information is sufficient.

Regards,

M. Peter Heilbrun, M.D.

MPH/dr

(Tr:11/17/87)

Addendum
No. 3

2 pages



MANUAL FOR
ORTHOPAEDIC SURGEONS
IN EVALUATING PERMANENT
PHYSICAL IMPAIRMENT

AMERICAN ACADEMY of ORTHOPAEDIC SURGEONS
430 NORTH MICHIGAN AVENUE • CHICAGO, ILLINOIS 60611

LOW LUMBAR cont'd.	Per cent Whole Body Permanent Physical Impairment and Loss of Physical Function to Whole Body
H. Posterior elements, partial paralysis with or without fusion, should be rated for loss of use of extremities and sphincters	
3. Neurogenic Low Back Pain – Disc Injury	
A. Periodic acute episodes with acute pain and persistent body list, tests for sciatic pain positive, temporary recovery 5 to 8 weeks	5
B. Surgical excision of disc, no fusion, good results, no persistent sciatic pain	10
C. Surgical excision of disc, no fusion, moderate persistent pain and stiffness aggravated by heavy lifting with necessary modification of activities	20
D. Surgical excision of disc with fusion, activities of lifting moderately modified	15
E. Surgical excision of disc with fusion, persistent pain and stiffness aggravated by heavy lifting, necessitating modification of all activities requiring heavy lifting	25

4 pages

Addendum
No. 4

Spinal Region — Two or More Ranges of Motion Involved

Abnormal Motion

Measure separately and record the impairment as contributed by each range of motion of the spine. Then, ADD the impairment values contributed by all ranges of motion of the spine. Their sum is the impairment of the whole person that is contributed by the spinal region.

Example: Cervical Region

Description	% Impairment of Whole Person
30° active flexion	1 (Table 47)
30° active extension	1 (Table 47)
60° active right rotation	1 (Table 49)
60° active left rotation	1 (Table 49)
(1 + 1 + 1 + 1 = 4)	4

TABLE 52
IMPAIRMENT DUE TO ABNORMAL MOTION
AND ANKYLOSIS OF THE THORACOLUMBAR
REGION—ROTATION

Abnormal Motion			
Average range of ROTATION is 60 degrees			
Value to total range of thoracolumbar motion is 35%			
Right rotation from neutral position (0°) to:	Degrees of Thoracolumbar Motion		Impairment of Whole Person
	LOST	RETAINED	
0°	30	0	6%
10°	20	10	4
20°	10	20	2
30°	0	30	0
Left rotation from neutral position (0°) to:			
0°	30	0	6%
10°	20	10	4
20°	10	20	2
30°	0	30	0
Ankylosis			
Region ankylosed at:			
0° (neutral position)			20%
10°			27
20°			34
30° (full right rotation)			40
Region ankylosed at:			
0° (neutral position)			20%
10°			27
20°			34
30° (full left rotation)			40
*position of function			

Ankylosis

Measure separately and record the impairment contributed by ankylosis in each position of the spinal region. The largest impairment value for ankylosis is the impairment of the whole person contributed by the spinal region.

Example: Cervical Region

Description	% Impairment of Whole Person
Ankylosis at 30° flexion	23 (Table 47)
Ankylosis at 20° right rotation	17 (Table 49)

The largest impairment value for ankylosis is 23%; therefore, the patient has 23% impairment due to ankylosis of the cervical region.

TABLE 53
IMPAIRMENT DUE TO OTHER DISORDERS
OF THE SPINE

Disorder	% Impairment of the Whole Person
A. Spondylolysis and Spondylolisthesis	
1. Grade I or II spondylolysis and spondylolisthesis with aggravation, persistent muscle spasm, rigidity and pain resulting from trauma	20
2. Grade III or IV spondylolysis or spondylolisthesis with persistent muscle spasm, rigidity and pain, aggravated by trauma	30
B. Intervertebral Disc Lesions	
1. Non-operated, clinically established disc derangement without residuals	0
2. Operated, disc removed without residuals	5
3. Operated or non-operated, clinically established disc derangement with residuals	5*

*This impairment rating should be combined with the appropriate value(s) for residuals based on.

- (a) Ankylosis (fusion) in spinal area or extremities;
- (b) Abnormal motion in spinal area or extremities;
- (c) Fractures of vertebrae;
- (d) Spinal cord injuries, with resulting neurologic impairment (Chapter 2);
- (e) Spinal nerve root injuries, with resulting neurologic impairment (Chapter 2);
- (f) Any combination of the above, using the Combined Values Chart

sensory disturbance, loss of muscle strength, or **altered** fine motor control.

Restrictions of motion and ankyloses may result from peripheral spinal nerve impairments. Consideration was given to such impairments when the percentage values set forth in this section were derived. Therefore, if an impairment results strictly from a peripheral nerve lesion, the evaluator *should not* apply both the impairment values from Chapter 1 relating to the **extremities and back** and those from this chapter, because this would result in a duplication and a multiplying of the impairment rating. However, when restricted motion or ankylosis occurs in conjunction with sensory involvement or muscle weakness, then values from Chapter 1 may be combined with values of this chapter using the Combined Values Chart.

It is necessary for the physician to establish as accurately as possible which peripheral spinal nerves are involved in an impairment before determining the percentage of permanent impairment. The diagnosis is based firmly on the patient's **signs** and symptoms. With a carefully obtained history, a thorough medical and neurological examination, and appropriate laboratory aids, the physician should be able to describe the amount of pain, discomfort, and loss of sensation occurring in the areas innervated by the affected nerve, and also the amount of muscle strength and fine motor control that has been lost.

Pain: A subjective sensation of **distress or agony**, called "pain," may be associated with **peripheral** spinal nerve impairment. Pain may be defined as a unique complex made up of afferent stimuli interacting with the emotional or affective state of the individual and modified by that individual's past experience and present state of mind. The two constituents, neural stimulation and central reaction, are extremely variable in make-up and duration.

The pain associated with peripheral spinal nerve impairment, and particularly with that of the median, sciatic, and tibial nerves, sometimes has a constant burning quality. This pain is described as a major or a minor causalgia in accordance with its **severity**, and it is evaluated on the same percentage **basis** as are other types of pain. Major causalgia that persists despite appropriate treatment can result in loss of function of the affected extremity and impairment that is as great as 100%.

In evaluating pain that is associated with peripheral

spinal nerve disorders, the physician should consider: (1) how the pain interferes with the individual's performance of the activities of daily living; (2) to what extent the pain follows the defined anatomical pathways of the root (dermatome), plexus, or peripheral nerve; and (3) to what extent the description of the pain indicates that it is caused by the peripheral spinal nerve impairment; that is, the **pain** should correspond to other kinds of **disturbances** of the involved nerve or nerve root.

Complaints of pain that cannot be substantiated as above are not considered within the scope of this chapter. The examiner must determine whether the sensory or motor deficit is due to involvement of one or more nerve roots or of one or more peripheral nerves in order to use the appropriate table. Table 6 relates to nerve roots, Table 7 relates to the brachial and lumbosacral plexuses, and Tables 8, 9, 12, 13 and 14 relate to the peripheral nerves.

TABLE 4
GRADING SCHEME AND PROCEDURE FOR
DETERMINING IMPAIRMENT OF AFFECTED
BODY PART DUE TO PAIN, DISCOMFORT,
OR LOSS OF SENSATION

a. Grading Scheme	
Description	Grade
1. No loss of sensation or no spontaneous abnormal sensations	0%
2. Decreased sensation with or without pain, which is forgotten during activity	5-25%
3. Decreased sensation with or without pain, which interferes with activity	30-60%
4. Decreased sensation with or without pain, which may prevent activity (minor causalgia)	65-80%
5. Decreased sensation with severe pain, which may cause outcries as well as prevent activity (major causalgia)	85-95%
6. Decreased sensation with pain, which may prevent all activity	100%
b. Procedure	
1. Identify the area of involvement, using the dermatome chart.	
2. Identify the nerve(s) that innervate the area(s).	
3. Find the value for maximum loss of function of the nerve(s) due to pain or loss of sensation or pain, using the appropriate table.*	
4. Grade the degree of decreased sensation or pain according to the grading scheme above.	
5. Multiply the value of the nerve (from the appropriate table) by the degree of decreased sensation or pain.	

*Table 6 for nerve roots; Table 7 for brachial and lumbosacral plexuses; Tables 8, 9, 12-14 for peripheral nerves.

A grading scheme and procedure for determining impairment of a body part that is affected by pain, discomfort, or loss of sensation are found in Tables 4a and 4b, respectively.

Example: Following an injury to his elbow, a worker, after reaching maximum medical rehabilitation, was left with pain and a loss of sensation that prevented activity and caused minor causalgia in the medial aspect of his right forearm (preferred side).

1. Area of involvement is medial aspect of right forearm; see Figures 1 and 2.
2. Nerve involved is medial antibrachial cutaneous nerve; see Table 3.
3. Maximum loss of function due to loss of sensation or pain is 5%; see Table 9.
4. Gradation of decreased sensation or pain is 65% -80%; see Table 4.
5. Therefore, impairment of the upper extremity is $80\% \times 5\%$, or 4%.

Strength: Involvement of peripheral spinal nerves or nerve roots may lead to paralysis or to weakness of the muscles supplied by them as well as to characteristic sensory changes. In the case of weakness, the patient often will attempt to substitute stronger muscles to accomplish the desired motion. Thus, the physician should have an understanding of the muscles that are involved in the performance of the various movements of the body and its parts.

Muscle testing, including tests for strength, duration, repetition of contraction, and function, aids evaluation of the functions of specific nerves. Muscle testing is based on the principle of gravity and resistance, that is, the ability to raise a segment of the body through its range of motion against gravity and to hold the segment at the end of its range of motion against resistance. In interpreting muscle testing, comparable muscle functions on both sides of the body should be considered.

A grading scheme and procedure for determining impairment of a body part that is affected by loss of strength are found in Tables 5a and 5b, respectively.

Example: A work-related injury of a patient's right knee resulted in surgery and prolonged therapy. Following maximum medical rehabilitation, the examining physician found that the patient could extend his leg fully against gravity and some resistance.

1. Motion involved is extension of the knee.
2. Muscle performing motion is quadriceps femoris; see Table 3.
3. Maximum loss of nerve due to loss of strength of femoral nerve is 30%; see Table 14.
4. Gradation of loss of strength is 5% to 20%; see Table 5.
5. Therefore, impairment of the lower extremity is $20\% \times 30\%$, or 6%.

After the individual values for loss of function due to sensory deficit, pain, or discomfort, and loss of function due to loss of strength have been determined, the impairment to the part of the body or to the whole person is calculated by combining the values using the Combined Values Chart.

Special Consideration—Since the basic tasks of everyday living are more dependent upon the preferred upper extremity, dysfunction of the

TABLE 5
GRADING SCHEME AND PROCEDURE FOR
DETERMINING IMPAIRMENT OF AFFECTED
BODY PART DUE TO LOSS OF STRENGTH

a. Grading Scheme	
Description	Grade
1. Complete range of motion against gravity and full resistance	0%
2. Complete range of motion against gravity and some resistance, or reduced fine movements and motor control	5-20%
3. Complete range of motion against gravity, and only without resistance	25-50%
4. Complete range of motion with gravity eliminated	55-75%
5. Slight contractibility, but no joint motion	80-90%
6. No contractibility	100%
b. Procedure	
1. Identify the motion involved, such as flexion, extension, etc.	
2. Identify the muscle(s) performing the motion.	
3. Determine the nerve(s) that innervate the muscle(s), and find the value for maximum percent loss, due to loss of strength, according to the appropriate table.*	
4. Grade degree of loss of strength according to the grading scheme above.	
5. Multiply the value of the nerve (from the appropriate table) by the degree of loss of strength.	

*Table 6 for nerve roots; Table 7 for brachial and lumbosacral plexuses; Tables 8, 9, 12-14 for peripheral nerves.

taken as the basis upon which to compute the weekly compensation. After the weekly compensation has been computed, round the nearest dollar.

Addendum
No 5
Section 35-1-77

35-1-76. Likelihood of increase to be considered that the injured employee was of such age and experience that under natural conditions his wages would be that fact may be considered in arriving at his average

35-1-77. Medical panel—Duty of commission to refer case to medical panel—Findings and report—Objections to report—Hearing expenses.—Upon the filing of a claim for compensation for injury by accident, or for death, arising out of or in the course of employment, and where the employer or insurance carrier denies liability, the commission may refer the medical aspects of the case to a medical panel appointed by the commission and having the qualifications generally applicable to the medical panel set forth in section 35-2-56. The medical panel shall then make such study, take such X-rays and perform such tests, including post-mortem examinations where authorized by the commission, and also make such additional findings as the commission may require. The commission shall promptly distribute full copies of the report of the panel to the applicant, the employer and the insurance carrier by registered mail with return receipt requested. Within fifteen days after such report is deposited in the United States post office, the applicant, the employer or the insurance carrier may file with the commission objection in writing thereto. If no objections are so filed within such period, the report shall be deemed admitted in evidence and the commission may base its findings and decision on the report of the panel, but shall not be bound by such report if there is other substantial conflicting evidence in the case which supports a contrary finding by the commission. If objections to such report are filed, the commission may set the case for hearing to determine the facts and issues involved, and at such hearing any party so desiring may request the commission to have the chairman of the medical panel present at the hearing for examination and cross-examination. For good cause shown the commission may order members of the panel with or without the chairman, to be present at the hearing for examination and cross-examination. Upon such hearing the written report of the panel may be received as an exhibit but shall not be considered as evidence in the case except as far as it is sustained by the testimony admitted. The expenses of such study and report by the medical panel and of their appearance before the commission shall be paid out of the fund provided for by section 35-1-68. *Effective 4-1-82*

WORKERS' COMPENSATION LAWS

35-1-45. Compensation for Industrial Accidents To Be Paid. - Every employee mentioned in Section 35-1-43 who is injured, and the dependents of every such employee who is killed, by accident arising out of or in the course of his 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 or death, and such amount for medical, nurse, and hospital services and medicines, and, in case of death, such amount of funeral expenses, as provided in this chapter. The responsibility for compensation and payment of medical, nursing, and hospital services and medicines, and funeral expenses provided under this chapter shall be on the employer and its insurance carrier and not on the employee.

Addendum
No. 6

Effective 3/29/84