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Lex L. Brady v. Utah Labor Commission : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

LEX L. BRADY, Petitioner, vs. UTAH LABOR COMMISSION, and YOUNG ELECTRIC SIGN CO., Respondents,	Appellate Case No. 20080976 Labor Comm. Case No. 2003948
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REPLY BRIEF OF PETITIONER

This Appeal is from a final Order of the Utah Labor Commission dated October 28, 2008, and signed by Sherrie Hayashi, a Utah Labor Commissioner. The Order affirmed the decision of Administrative Law Judge Richard La Jeunesse to deny worker compensation benefits to the Petitioner.

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LIST OF PARTIES

Petitioner: Lex L. Brady

Respondent: Utah Labor Commission

Respondent: Young Electric Sign Company (YESCO)

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	4
INTRODUCTION	5
LEFT SHOULDER	6
LOW BACK	8
FRACTURE OF CERVICAL FUSION AND SIGNIFICANT AGGRAVATION OF CERVICAL PAIN	10
DISCUSSION WITH MEDICAL PROVIDERS <u>BETWEEN</u> INDUSTRIAL ACCIDENT AND AUTO ACCIDENT REGARDING APPELLANT QUITTING WORK DUE TO DISABILITY	12
HYPOXIA	13
DR. CLARK	18
ISSUE NO. 2: DID DR. PEARL’S LETTER OF AUGUST 15, 2005, PRESENT ANY NEW EVIDENCE	20
REWEIGHING OF MEDICAL EXPERTS’ TESTIMONIES AND STANDARD OF REVIEW	21
CONCLUSION	23

TABLE OF AUTHORITIES

CASES CITED

Wherritt v. Industrial Comm'n, 100 Utah 68, 100 P.2d 374, 376 (1941)

ARGUMENT

INTRODUCTION

There is not substantial evidence supporting the finding of the Labor Commission.

In support of its argument that there is substantial evidence, Appellee quotes from the ruling of the Labor Commission as follows:

Based on all this information it was the panel's opinion that the onset of Mr. Brady's hypoxia and pain management difficulties occurred after the December 2001 auto accident, and thus, it was the auto accident that was the direct cause of Mr. Brady's permanent and total disability—not the January 2001 work accident.¹

While Appellant will show that this statement regarding the hypoxia is factually incorrect, it is also significant to note what is not in this statement, which is any reference to left shoulder and low back injuries, which are a main cause of Appellant's disability. It is apparent from the Appellee's brief, and the Labor Commission's ruling, that these entities have not been able to fully grasp the significance of the left shoulder and low back components of Appellant's disability. To gain a proper understanding, it is primarily important to review the facts of how the industrial accident in question happened, which the Appellee has conveniently left out of its brief. It should be remembered that when the 2,000 pound sign was pressing on Appellant's chest, Appellant's low back was being pressed up against a metal railing that was around the lift box that Appellant was in. Due to the great pressure from the sign, and due to the railing being positioned against Appellant's low back, the Appellant was being bent over backwards at almost a 90°

¹ Brief of Appellee, p. 8

angle.² These facts would naturally indicate that there very well could have been significant injuries to the left shoulder and the low back, which indeed, there was.

LEFT SHOULDER

Appellee stated in its Brief “Mr. Brady suffered serious bilateral shoulder injuries in the August 1996 motor vehicle accident.”³ While it is true that Appellant suffered some symptoms in both shoulders, it is also true that, as shown by the subsequent treatment history, the symptoms relating to the right shoulder were much more extensive, and that there was no significant injury to the left shoulder until the industrial accident in question. After the auto accident in August of 1996, Appellant first saw Dr. Sheriden, his family doctor. What is significant about this first visit is that there is no mention of symptoms relating to the left shoulder.⁴ In the next visit with Dr. Sheridan, there is a note that there was some pain in “both shoulders,” but then that is followed with a note of “right greater than left.”⁵ Dr. Walker was the next doctor Appellant saw regarding injuries from the August 1996 auto accident. Dr. Walker stated that “Lex . . . was involved in a head on motor vehicle accident . . . He injured his right shoulder. He states that it felt like it came out of joint . . . Lex has inflamed painful right shoulder.”⁶ What is significant is that there is not any mention in this note about problems with the left shoulder, just the right shoulder.

² R. Vol. 2 of 4, p. 58.

³ Appellee’s Brief, p. 14, ¶20.

⁴ R. Vol. 3 of 4, at 132.

⁵ *Id.* at 131.

A review of Dr. Sheridan's records between September of 1996 and January of 2001 (the month of the industrial accident), reveals that there are numerous notes regarding problems with the right shoulder, including two surgeries on the right shoulder in 1998, but there is hardly any mention of any problems with the left shoulder.⁷ Conversely, after the industrial accident of January 24, 2001, Appellant definitely complained of serious left shoulder pain,⁸ and between the industrial accident and the auto accident in December of 2001, the focus was on the left shoulder.⁹ In fact, on April 17, 2001, Dr. Warner observed that Appellant, "now has significant complaints of left shoulder pain. His previous problems have been localized primarily to the right side."¹⁰ It is very significant to note that Appellant worked for about seven years following the injury to the right shoulder, but, as will be expounded upon below, almost immediately after the serious injury to the left shoulder in the industrial accident, Appellant and his doctors begin talking about Appellant retiring from work due to his disability.¹¹ In addition, surgery on the left shoulder was subsequently recommended.¹²

In spite of all the evidence outlined herein, and in Appellant's initial brief, documenting the serious injury to the left shoulder as a result of the industrial accident, it is astounding that Dr. Clark and the medical panel can justifiably say that there is "no

⁶ *Id.* at 167.

⁷ *Id.* at 81-131.

⁸ *Id.* at 602 and 609.

⁹ *Id.* at 17, 532 and 533.

¹⁰ *Id.* at 461.

¹¹ See *Id.* at 538 as an example.

evidence indicating injuries to the shoulders . . . related to the [industrial] accident on 1/24/01.”¹³ This is a major reason why the opinions of the Dr. Clark and the medical panel (who relied heavily on Dr. Clark), are not reasonably justified, and why Appellee can not meet the substantial evidence test.

LOW BACK

Prior to the industrial accident on January 24, 2001, there is no documentation of any significant lumbar problems. The only thing that the Appellee can counter with in regard to the prior history of the lumber is its statement that on “November 3, 1998 Dr. Warner diagnosed Mr. Brady with ‘progressive disc space collapse at the L4-5 level.’”¹⁴ However, as a matter of record, the statement made by Dr. Warner is not true, and Appellee knows it is not true. On October 18, 2004, Dr. Warner authored a letter wherein he indicated that there was a typographical error in the prior note of November 3, 1998, and that the reference he made to the disc space collapse at the “L4-5” level should actually be the “C4-5” level.¹⁵ Dr. Warner even attached to the October 18th letter a corrected copy of the November 3, 1998 office note.¹⁶

12. *Id.* at p. 508.

13 R. Vol. 1 of 4, at p. 82.

14 See Brief of Appellee at p. 14, para. 17.

15 R. Vol. 1 of 4, p. 74.

The fact of the matter is that as a result of the industrial accident there were serious injuries to the lumbar region. Immediately after the industrial accident, Appellant complained of low back pain.¹⁷ On March 1, 2001, Dr. Sawchuck diagnosed Appellant with acute lumbar sprain/strain, and lumbar radicular syndrome.¹⁸ Dr. Sawchuck noted that the low back injury from the industrial accident was totally new.¹⁹ After a lumbar MRI on March 10, 2001, Dr. Sawchuck assessed Appellant with “lumbar disc protrusion and lumbar radicular syndrome.”²⁰ On April 17, 2001, Dr. Warner concluded that, “the industrial accident precipitated symptoms of low back pain. The patient has a difficult time straightening and bending due to the lower back pain”²¹ This serious symptom did not exist at all prior to the industrial accident. It is significant to note that all of these diagnoses and opinions were before the auto accident of December 2001. Furthermore, on July 31, 2002 Dr. Sawchuck reviewed the bone scan results and diagnosed “some type of fracture at L5 on the right side in the pedicle region.”²² Even Dr. Clark, the IME doctor hired by Appellee, conceded that “the industrial accident of 1/24/02 is documented to have caused some . . . lumbar pain, which is possibly due to the occult fracture of the

16 *Id.* at p. 75. Even a cursory contextual reading of the original office note of November 3, 1998 will reveal that Dr. Warner was clearly discussing the cervical spine and not the lumbar spine.

17 R. Vol. 3 of 4, p. 609.

18 *Id.* at p. 173.

19 *Id.* at p. 169.

20 *Id.* at p. 248.

21 *Id.* at p. 462.

22 *Id.* at p. 223.

L5 pedicle.”²³ Finally, the medical panel itself concluded that the fracture at L5 was due to the industrial accident.²⁴ Once again, it is astounding and irrational to think that Dr. Clark and the medical panel could conclude that in spite of Appellant suffering a lumbar fracture, a lumbar musculoskeletal strain that has developed in to a chronic condition, and a protruding disc that is causing radicular problems, in no way do these problems, which were clearly caused by the industrial accident, have any thing to do with Appellant’s disability. This is further persuasive evidence that there is not substantial evidence to support the Labor Commission’s denial of benefits.

FRACTURE OF CERVICAL FUSION AND SIGNIFICANT AGGRAVATION OF CERVICAL PAIN

Another factor supporting the conclusion that Dr. Clark’s and the medical panel’s opinions are not rational is the evidence regarding injuries to the cervical region as a result of the industrial accident. Appellee argues that “despite Mr. Brady’s insistence that the industrial accident broke his neck, the medical evidence is not supportive.”²⁵ Appellee then quotes Dr. Clark who opined that “. . . there is no evidence that any fracture of his neck occurred ever, let alone on 1/24/01.”²⁶ However, on November 30, 1998, Dr. Warner performed exploratory surgery of the C5-7 fusion, and found that it was intact and solid.²⁷ Dr. Warner noted in his letter of April 15, 2004, that “on January 24,

²³ *Id.*

²⁴ R. Vol. 1 of 4, p. 82.

²⁵ See Appellee’s brief at 29.

²⁶ *Id.*

²⁷ R. Vol. 3 of 4, at p. 28 and 323A.

2001, Mr. Brady was involved in an industrial accident . . . at that time, the patient distinctly remembered feeling a snap in his neck. Following this the patient had a significant increase in neck pain.”²⁸ Dr. Warner then went on to note that,

The patient had x-rays of the cervical spine done 3 months after his industrial accident. The patient developed a large callus reaction anterior to the spine at C5-6 and subsequently went on to completely fuse the C5-C6 level as seen on the film dated October 7, 2003. The findings of these x-rays are consistent with a fracture of his fusion with subsequent healing due to the stimulus of the trauma. I believe that the patient’s industrial accident caused a fracture of the patient’s tenuous fusion at the C5-C6 and C6-C7 levels. This was enough stimuli to lead to the fusion of the C5-C6 level. The patient still has a failure of the fusion at the C6-C7 level. As noted above, when I explored the patient’s fusion at the time of surgery on November 30, 1998, there was solid bridging bone consistent with a fusion. It is my contention that the patient sustained a fracture through these fusions in the industrial accident of January 24, 2001.²⁹

In summary, based on the findings of the orthopedic surgeon who directly visualized the fusion before the industrial accident, and then reviewed the x-rays and symptoms immediately after the industrial accident, there was a fracture of the cervical spine related to the industrial accident. As to how Dr. Clark and the medical panel, who Appellee is relying upon extensively, can say there is absolutely no evidence of a fracture, is mind boggling.

Perhaps what has led to the misguided and unsubstantiated opinions of Dr. Clark and the medical panel is their mistaken reliance on the office note of Dr. Warner dated October 13, 1998. In its brief, Appellee argues that “more importantly, the cervical fusion surgery attempted in the 1990’s was not successful. There was a non-union (separation)

²⁸ *Id.* at 323A.

²⁹ *Id.* at p. 323A, 323B.

of the cervical vertebrae in the neck as far back as 1998.”³⁰ In support of this statement, Appellee cites in footnote 104 the office note of Dr. Warner dated October 13, 1998. In this office note Dr. Warner stated, “on the plain films, the patient appears to have a non-union or pseudoarthrosis at the C5-C6 interspace.”³¹ However, this was just Dr. Warner’s opinion based on his review of plain x-rays, and it is well understood that a doctor’s pre-operative diagnosis can be wrong. What Appellee has not pointed out, and what Dr. Clark and the medical panel have failed to appreciate, is that the following month, on November 30, 1998, Dr. Warner did exploratory surgery where he could actually visualize the C5-7 fusion, and he could see that he was mistaken as to his prior opinion, and that the fusion was indeed solid, as he subsequently said. As Dr. Warner said, “the best way to evaluate a spinal fusion is direct inspection at the time of surgery.”³² This analysis casts even further doubt on the rationality of the opinions of Dr. Clark and the medical panel.

**DISCUSSION WITH MEDICAL PROVIDERS BETWEEN INDUSTRIAL
ACCIDENT AND AUTO ACCIDENT REGARDING APPELLANT QUITTING
WORK DUE TO DISABILITY**

Prior to the industrial accident, there is no evidence in the record that Appellant had any serious discussions with his medical providers regarding quitting work due to physical disabilities. Conversely, soon after the industrial accident, when Appellant now

30 See Appellee’s Brief at p. 29, 30.

31 R. Vol. 3 of 4, at p. 32.

32 *Id.* at p. 323A.

has a serious left shoulder injury, a fracture to his cervical fusion, and significant low back injuries, Appellant then started having serious discussions about quitting work due to his physical problems. In fact, in or about May of 2001, Appellant was advised by his orthopedist to cease work altogether and seek disability.³³ Also, as early as five days after the industrial accident Dr. Sheridan noted that “he’s (appellant), just terribly worried that this (the industrial accident), represents a critical change in his situation that will necessitate his retirement.”³⁴ It is absolutely significant that these retirement discussions occurred before the subsequent auto accident in December of 2001. As mentioned in Appellant’s initial brief, even though he was advised to quit work, Appellant decided to continue working because it was his therapy for dealing with the violent death of his son, and because he believed Appellee would fight the application for disability as they had done with other employees.³⁵

HYPOXIA

Appellee in its Brief does not refute the facts that after the industrial accident, and before the subsequent auto accident, Appellants pain medications substantially increased. The significance of this is that Drs. Elliot, who is chief of the pulmonary division at LDS Hospital, and a professor of medicine at the University of Utah Hospital, opined that the hypoxia was a result of the increased use of pain medications.³⁶ To further substantiate

33 R. Vol. 3 of 4, p. 538.

34 *Id.* at p. 81.

35 R. Vol. 2 of 4, at p. 58.

36 R. Vol. 3 of 4, at p. 344 and 390,

this opinion, Dr. Thomas Cloward also opined that the most likely etiology of Appellant's hypoxia was “. . . chronic hypoventilation due to his large narcotic doses.”³⁷ It is important to remember that the pain medications were substantially, and gradually, increased after the industrial accident due to the injuries cited above to the left shoulder, the low back, and the fracture of the cervical fusion. Putting two and two together leads to only one conclusion – the chronic hypoxia was caused by the industrial accident.

Appellee argues that “. . . Mr. Brady suffered from breathing problems and was diagnosed with hypoxia long before the industrial accident.”³⁸ In support of this assertion, Appellee cited in footnote 116 to a letter written by Dr. Sheridan on April 8, 2004.³⁹ Indeed, in that letter Dr. Sheridan did say that “a statement was made that Mr. Brady was first found to be hypoxemic on January 4, 2000. In fact, Mr. Brady was hypoxemic at that time. . . .”⁴⁰ However, what follows in Dr. Sheridan's letter is of utmost importance, and substantially qualifies and limits the prior statement. Dr. Sheridan went on to state, “. . . but my estimation is that the source of his hypoxemia was bronchitic with a flare of asthma, since he had a considerable period of time after that where he was not complaining of difficulty breathing. He responded well to Biaxin and tuning of his asthma medications.” (emphasis added)⁴¹ Dr. Clark, the medical panel and Appellee would have us believe that the hypoxia was a chronic condition before the industrial

³⁷ *Id.* at p. 344.

³⁸ See Appellee's Brief at p. 33.

³⁹ R. Vol. 3 of 4, at p. 488A.

⁴⁰ *Id.*

accident, and they have taken out of context a partial statement to support that invalid assertion. However, as can plainly be seen by reading Dr. Sheridan's entire letter, he was of the definite opinion that the hypoxia he diagnosed in January of 2000 was temporary and caused by a flare up in Appellant's asthma, and that it went away with appropriate medication. Even more important is the fact, as noted by Dr. Sheridan, that there was a considerable period after January 2000, that Appellant did not have any complaints of difficulty breathing. This means that at the time of the industrial accident, Appellant did not have chronic hypoxia.

In an attempt to counter the relation between heavy narcotic use and hypoxia, Appellee cites a statement by Dr. Mark Passey (a pain management doctor at the Intermountain Spine Institute), that "there is very little real evidence in the scientific literature that chronic opioid use has any effect on ventilation . . . I doubt that the patient's methadone has any contribution to his daytime hypoxemia."⁴² It is interesting to note that this statement is actually contradicted by the medical panel, which Appellee relies heavily upon in support of its position herein. In its report to the administrative law judge, the medical panel stated that, "he (the Appellant) has been using opioid medication for some time, which likely leads to reduced pulmonary drive"⁴³

It is quite apparent that an important factor to the Appellee and to the medical panel in concluding that the hypoxia is not related to the industrial accident is the

⁴¹ *Id.*

⁴² See Appellee's Brief at p. 33 and 34; and R. Vol. 3 of 4 at p. 213 and 382.

allegation that “. . . Mr. Brady didn’t complain about shortness of breath to his healthcare providers after the industrial accident until December 4, 2002, nearly 23 months later.”⁴⁴

The provider visit that Appellee is referring to is a visit with Dr. Sheridan. In his office note regarding that visit, Dr. Sheridan stated:

Lex is complaining more of shortness of breath than anything. Chronic pain is about the same . . . He also needs a refill on a Provential inhaler. The Advair is not helping him very much. He is on 250/50. The presumption has always been of asthma, but Lex just does not seem to be doing very well. He is polycythemic, short of breath and ruddy-faced. I wonder if he has got some sort of chronic hypoxemia going on.⁴⁵

It goes without saying that just because December 4, 2002, is supposedly the first note of shortness of breath complaints to a medical provider, that is not necessarily the first date that Appellant actually experienced shortness of breath. The statements by Dr. Sheridan that “the presumption has always been of asthma,” and “I wonder if he has got some sort of chronic hypoxemia going on,” (emphasis added), would suggest that the shortness of breath symptom had been going on for quite some time. Indeed, it had. Appellant did not have any significant chronic breathing problems before the industrial accident, but soon thereafter, and before the subsequent auto accident, Appellant had problems breathing, especially when he would carry items up stairs.⁴⁶ Appellant just did not address this issue with medical providers for a long time because he believed, based on what other people

43 R. Vol. 1 of 4, at p. 83 and 84.

44 See Appellee’s Brief at p. 33; and R. Vol. 3 of 4, at p. 505.

45 R. Vol. 3 of 4, at p. 505.

46 R. Vol. 4 of 4, at p. 51 and 52.

had told him, it was just a reaction to stress related to the tragic death of his son.⁴⁷

Additional corroboration of the prior shortness of breath problem is the visit with Dr. Sheridan on November 5, 2002, where Dr. Sheridan noted that “his oxygen saturation is borderline today and I wonder if his asthma might be a little bit more important than we think.”⁴⁸ Going further back, in April of 2002, Appellant complained to Dr. Sheridan at that time about what the thought was his asthma acting up, and that he was having to use his inhaler a lot more than usual.⁴⁹

It is also important to consider that, as noted above, one of the plausible theories for the hypoxia was due to heavy narcotic use. This is why Appellant in his initial brief took pains to outline the significant increase in narcotic use after the industrial accident. The increase in narcotic use is something that occurred over a substantial period of time, and with that substantial increase of use or a lengthy period of time there was a corresponding gradual increase in respiration problems. Unfortunately, we have the intervening auto accident in December of 2001, but nevertheless, the genesis of the breathing problems were first noticed by the Appellant after the industrial accident, but before the auto accident.

~~It should also be remembered that the theory of the hypoxia resulting from the increased narcotic use is only one of three plausible theories that were propounded by Appellant’s doctors. The other two theories were either a direct crush injury to the chest~~

⁴⁷ *Id.*

⁴⁸ R. Vol. 3 of 4, at p. 506.

as a result of the 2,000 pound sign landing on Appellant's chest, or damage to the nerves in the cervical region as a result of the industrial accident which in turn caused paralysis in the semi diaphragm. The significant point is that all three of these theories have their causal roots in the industrial accident. So, it really doesn't matter which theory is correct, because all three were caused by the industrial accident.

DR. CLARK

The credibility of Dr. Clark's opinions are significant, because it is quite apparent that the medical panel relied to a great degree upon her opinions. In its Brief, Appellee states that "Mr. Brady criticizes Dr. Clark's summary of the extensive medical records for a very few irrelevant and harmless perceived misstatements of the medical history."⁵⁰ In response to this statement, it is important first to note that Appellee does not refute any of Appellant's allegations about the listed mistakes made by Dr. Clark. Appellee just simply tries to characterize those mistakes as "irrelevant," and "harmless." Those mistakes made by Dr. Clark are not irrelevant or harmless. For example, when Dr. Clark stated in her report that her review of the x-rays from 3/31/97 showed that the cervical fusion was solid, she was not only mistaken as to the history of when the cervical fusion was done (it was done in November of 1998), she also brings in to question her ability to accurately read x-rays. This is significant because her opinions are based to a great degree on her review of the x-rays. Dr. Clark's inability to accurately read x-rays is further called in to

49 *Id.* at p. 516.

50 See Appellee's Brief at p. 37.

question when she reviewed one set of x-rays of the left shoulder and supposedly found degenerative changes, and then she reviewed a subsequent set of x-rays of the left shoulder and supposedly found no degenerative changes. As noted above, Appellant claims that the problems associated with his left shoulder are a major factor in his disability, so what is seen or not seen on x-rays of the left shoulder certainly is relevant, and a misreading of those x-rays is not harmless, especially when Dr. Clark claims that the left shoulder problems were not caused by the industrial accident. Furthermore, Dr. Clark said that there was a lumbar myelogram performed on 12/19/96, but no such myelogram can be found in the record, and Appellant does not remember any such myelogram being done. Once again, this is relevant because Appellant claims that problems with his low back are another major contributing factor to his disability.

It should also be remembered that in response to Dr. Clark's contention that the cause of Appellant's pain and hypoxia was supposedly a cervical syrinx, Dr. Warner had two neurosurgeons and two neuroradiologists, none of which were treating physicians, review the MRIs from before and after the industrial accident, and all of them determined that there was no syrinx, but if there was one it was very small and could not cause the symptoms in question.⁵¹ It is amazing that the medical panel sided with Dr. Clark and her syrinx theory, even in light of them knowing about all the other imminently more qualified independent physicians who disagreed with Dr. Clark. Once again, it shows that there was no justifiable basis for the opinion of the medical panel.

ISSUE NO. 2: DID DR. PEARL’S LETTER OF AUGUST 15, 2005, PRESENT ANY NEW EVIDENCE

Appellee states in its Brief that “the refusal to submit Dr. Pearl’s letter to the medical panel after it issued its report was reasonable and rational because the letter did not present new conflicting evidence that was not already before the medical panel for consideration.”⁵² In support of this assertion, Appellee refers to Dr. Pearl’s letter of April 8, 2004, and alleges that in that prior letter “. . . Dr. Pearl himself discussed the possibility that the nerves leading to the diaphragm from the cervical region may have been damaged and referred Appellant to Dr. David Ryser to evaluate the function of those nerves.”⁵³ While it is true that in the prior letter Dr. Pearl did discuss the possibility that the phrenic nerve may have been damaged, there are at least two new items that Dr. Pearl discussed in his August 15, 2005 letter that should have been presented to the medical panel for review. First, Dr. Pearl noted that the EMG that Dr. Jarvis was basing his opinion on was “equivocal.”⁵⁴ This means, as Dr. Pearl noted, that the result of the test could not show one way or another whether the phrenic nerve was intact. And second, in the prior letter Dr. Pearl had noted that he thought the hypoxia was a result of paralysis to the hemidiaphragm, and he questioned whether the phrenic nerve leading to the hemidiaphragm had been damaged, whereas, in the second letter Dr. Pearl raised the

51 R. Vol. 3 of 4, at p. 323B.

52 *Id.* at p. 38, 39.

53 *Id.* at p. 39.

54 R. Vol. 1 of 4, at p. 87.

question as to whether there was a relationship between the neck injuries alleged as a result of the industrial accident, and the paralysis to the hemidiaphragm. Stated another way, in the prior letter Dr. Pearl was wondering if there was some damage to the phrenic nerve, at any point along it's course from the cervical region to the diaphragm, whereas, in the second letter Dr. Pearl was questioning whether there was some damage to the nerves as a result of a specific alleged cervical injury from the industrial accident. It was Dr. Pearl's opinion that based on the fact that there was no change in the cervical radiographs between the industrial accident and the subsequent auto accident, it must have been the cervical injuries from the industrial accident which caused the paralysis in the hemidiaphragm since the paralysis of the hemidiaphragm was demonstrated prior to the auto accident.⁵⁵ This new evidence should have been presented to the medical panel for their review.

REWEIGHING OF MEDICAL EXPERTS' TESTIMONIES AND STANDARD OF REVIEW

Appellee states in its Brief that “. . . the Court of Appeals will not reweigh the medical experts' testimonies.”⁵⁶ In support of this assertion the Appellee cites in footnote 92 to the case of *Wherritt v. Industrial Comm'n*, 100 Utah 68, 110 P.2d 374, 376 (1941). It should first be noted that Appellee did not insert any quotation marks on the sentence quoted from Appellee's Brief, and there is good reason for such because nowhere in the *Wherritt* case does it say what Appellee claims it said. The *Wherritt* case dealt with the

⁵⁵ *Id.*

question of whether an employee was within the course and scope of his employment when he as on his way to work. It did not deal with expert medical testimonies at all.

In implementing the substantial evidence standard, this court necessarily has to reweigh some, if not all, of the medical experts' testimonies or else how can it come to a conclusion as to whether there is “. . . substantial evidence, which exists when the factual findings support more than a scintilla of evidence, though something less than the weight of the evidence.”⁵⁷ In order to determine if the findings support more than a scintilla of evidence, though something less than the weight of the evidence, this Court necessarily has to look at and weigh the evidence, and some of the evidence are the testimonies of the medical experts.

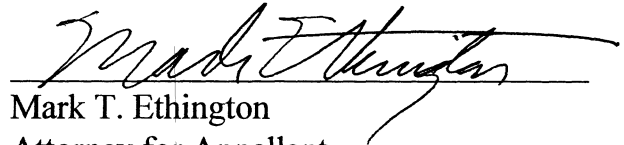
⁵⁶ See Appellee's Brief at p. 27.

⁵⁷ *Martinez v. Media-Playmaster et al.*, 164 P.3d 384, 394 (UT 2007).

CONCLUSION

Appellee can not meet the Substantial evidence test because the opinions of Dr. Clark and the medical panel can not be justifiably supported by the undisputed evidence in this matter. Thus, the decision of the Labor Commission upholding the denial of benefits should be over turned.

Respectfully submitted this 9 day of December 2009.


Mark T. Ethington
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PROOF OF SERVICE

I hereby certify that a true and correct copy of the foregoing Reply Brief of
Petitioner was mailed December 9, 2009 first class postage prepaid to the following:

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A handwritten signature in black ink, appearing to read "Mark E. Heston", written over a horizontal line.