

2008

Lex L. Brady v. Utah Labor Commission : Brief of Respondent

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

LEX L. BRADY,)	BRIEF OF
)	DEFENDANT/APPELLEE
Petitioner/Appellant)	YOUNG ELECTRIC SIGN CO.
)	
vs.)	Case No. 20080976-CA
)	
UTAH LABOR COMMISSION, and)	Labor Comm. Case No. 2003948
YOUNG ELECTRIC SIGN CO.)	
)	
Respondent/Appellee)	
)	
)	
)	

BRIEF OF RESPONDENT/APPELLEE, YOUNG ELECTRIC SIGN CO.

**Appeal From the Utah Labor Commission
Honorable Richard M. La Jeunesse, Administrative Law Judge**

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BRIEF OF RESPONDENT/APPELLEE, YOUNG ELECTRIC SIGN CO.

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JURISDICTION OF THE COURT OF APPEALS

The Court of Appeals has jurisdiction in this matter pursuant to Utah Code Ann. §§34A-1-303(2)(b); 34A-1-303(6); 34A-2-801(7); 34A-2-801(8)(a); 63G-4-403; and 78A-4-103(2)(a).

STATEMENT OF THE ISSUES AND STANDARDS OF REVIEW

Issue 1:

The first issue raised by Lex L. Brady (hereinafter “Mr. Brady”) is whether

there is “substantial evidence” of record supporting the Labor Commission’s finding that the January 24, 2001 industrial accident was not the direct cause of Lex Brady’s permanent total disability.

Standard of Review:

The Commission’s factual findings should be affirmed by the Court of Appeals whenever they are “supported by substantial evidence when viewed in light of the whole record before the court.”¹ Findings supported by substantial evidence will not be overturned even if another conclusion from the evidence is permissible.² “Substantial evidence” is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”³

The burden is on the party seeking to overturn the Commission’s factual findings to “...marshall [sic] all of the evidence supporting the findings and show that despite the supporting facts, and in light of the conflicting or contradictory evidence, the findings are not supported by substantial evidence.”⁴ In making such determinations, the appellate

¹Utah Code Ann. § 63G-4-403(4)(g) as renumbered, “Laws of Utah 2008”, Chapter 382 Section 1393.

²*Hurley v. Board of Review of Indus. Comm’n*, 767 P.2d 524, 526-27 (Utah 1988).

³*Department of Air Force v. Swider*, 824 P.2d 448, 451 (Utah App. 1991) quoting Utah Code Ann. § 63-14b-16(4)(g) (1989) and also quoting *Grace Drilling Co. v. Board of Review*, 776 P.2d 63, 67 *infra*.

⁴*Grace Drilling Co. v. Board of Review of Indus. Comm’n*, 776 P.2d 63, 68 (UT App 1989). See also generally, *Betty L. Stokes v. Board of Review of the Industrial Commission of Utah et al.* 832 P.2d 56 (Utah App. 1992).

court reviews the whole record on appeal.⁵ "It is the petitioner's duty to properly present the record, by marshaling all of the evidence supporting the findings and showing that, despite that evidence and all reasonable inferences that can be drawn therefrom, the findings are not supported by substantial evidence."⁶

Issue 2:

The second issue raised by petitioner is whether the Labor Commission abused its discretion by not allowing further review of a letter submitted by Petitioner's physician after the medical panel report was issued.

Standard of Review:

Petitioner's opening brief incorrectly asserts that the standard of review for challenging an agency's application of one of its rules is the substantial evidence standard used in reviewing adequacy of the evidence. The proper standard is abuse of discretion. The Court of Appeals should uphold a state agency's application of one of its rules as long as it is reasonable or rational.⁷

The standard on appeal regarding evidence submitted after evidentiary hearing continues to be that established in *Brown and Root, supra*. More recently, the Court of Appeals explained:

⁵*Department of Air Force v. Swider*, 824 P.2d 448, 451 (Utah App. 1991).

⁶*Id.* at 451.

⁷*Brown & Root Industrial Service and Highland Insurance v. Industrial Commission*, 947 P.2d 671, 677 (Utah 1997).

*Mrs. Hymas raises several issues, each sharing the core argument that the Labor Commission abused its discretion and violated her due process rights by not allowing additional evidence and testimony after the initial hearing before the ALJ. “[T]he Legislature has granted the Labor Commission discretion to determine the facts and apply the law to the facts in all cases coming before it.” [Citation omitted.] We will uphold the Labor Commission’s determination unless it “exceeds the bounds of reasonableness and rationality.”*⁸

DETERMINATIVE STATUTES and RULES

1. **Utah Code Ann. Section 34A-2-413.** Permanent total Disability – Amount of payments – Rehabilitation.

(1) ...

(b) To establish entitlement to permanent total disability compensation, *the employee must prove by a preponderance of evidence that:*

(iii) *the industrial accident...is the direct cause of the employee's permanent total disability.*⁹

2. **Labor Commission R602-2-2. Guidelines for Utilization of Medical Panel.**

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

⁸*Hymas v. Labor Commission et al.*, 2008 UT App 471, ¶5; 2008 Utah App. LEXIS 472; citing to *AE Clevite, Inc. V. Labor Comm’n*, 2000 UT App 35, P 7, 996 P.2d 1072.

⁹Utah Code Ann. Section 34A-2-413. Emphasis added. The complete code section can be found as Appendix 1 hereto.

B. A hearing on objections to the panel report *may* be scheduled *if there is a proffer of conflicting medical testimony showing a need to clarify the medical panel report*. Where there is a proffer of *new written conflicting medical evidence*, the Administrative Law Judge *may*, in lieu of a hearing, *re-submit* the new evidence to the panel for consideration and clarification...¹⁰

STATEMENT OF THE CASE

Statement of the Nature of the Case

Mr. Brady brought a workers compensation claim for injuries to his neck, an aggravation of lower back problems, and hypoxemia he claims to have occurred on January 24, 2001 while in the course and scope of his employment with Young Electric Sign Co., Inc. (herein after referred to as “YESCO”). Mr. Brady filed an application for hearing with the Labor Commission requesting permanent total disability compensation.¹¹ Appellee, YESCO, answered denying Mr. Brady’s permanent total disability was, if he was so found to be, caused by the industrial accident of January 24, 2001.¹²

Statement of the Course of the Proceedings

An evidentiary hearing was held before an Administrative Law Judge at the Utah Labor Commission on April 19, 2004. The parties stipulated that petitioner became permanently and totally disabled on June 6, 2003. The main issue was whether the

¹⁰Labor Commission R602-2-2. Guidelines for Utilization of Medical Panel. Emphasis added. The complete rule can be found as Appendix 2 hereto.

¹¹R. Vol 1 of 4, 1.

¹²Id. at 12-15.

January 24, 2001 industrial accident was the direct cause of the Mr. Brady's permanent total disability.¹³ Administrative Law Judge La Jeunesse referred the matter to a medical panel for consideration due to a conflict in the medical records as to the issue of causation.¹⁴

The medical panel issued its report on August 1, 2005 in which it determined that "Mr. Brady likely had no significant or functional restrictions caused by the incident of 1/24/01 over and above those he had experienced prior thereto."¹⁵

Following receipt of the medical panel report, Mr. Brady filed an objection dated August 17, 2005, arguing that the evidence supports contrary conclusions to those reached by the medical panel.¹⁶ With his Medical Panel objection, Mr. Brady included a letter report in which his treating physician reported on his office examination of the same date—August 15, 2005. His doctor essentially restated his and other physicians' medical causation opinions that had been considered by the Medical Panel.¹⁷

On November 29, 2005 Judge LaJeunesse issued Findings of Fact, Conclusions of

¹³Id. at 40.

¹⁴Id. at 44.

¹⁵Id. at 83. See the entire Medical Panel Report of August 1, 2005 as Appendix 3 hereto.

¹⁶Id. at 85-86.

¹⁷Id. at 87.

Law, and Order¹⁸ wherein he concluded that “Mr. Brady’s industrial accident on January 24, 2001, and the medical problems resultant therefrom, were not the direct cause of his permanent total disability.”¹⁹

Mr. Brady filed a motion for review arguing “. . . the greater weight of the record supports contrary conclusions such that it should be found that Mr. Brady is permanently and totally disabled due to the effects of the January 24, 2001 industrial injury.”²⁰ Additionally, Mr. Brady requested to have the matter sent back to the medical panel for the panel to reconsider the opinions of his treating physician that had accompanied his objection to the Medical Panel Report.²¹

Statement of the Disposition at the Agency

The Labor Commission affirmed the administrative law judge’s findings and order and further denied Mr. Brady’s request to have the medical panel review the letter from petitioner’s treating physician.²² The Labor Commission explained, in part:

...Mr. Brady argues that the panel’s opinion was contrary to other, more persuasive medical evidence. Alternatively, Mr. Brady argues that a new letter from one of his medical

¹⁸Id. at 88-109. See the entire November 29, 2005, Findings of Fact, Conclusions of Law, and Order of Judge LaJeunesse as Appendix 4 hereto.

¹⁹Id. at 108.

²⁰Id. at 110-111.

²¹Id. at 115.

²²Id. at 118-121. See, Order Affirming ALJ’S Decision dated October 28, 2008, as Appendix 5 hereto.

providers should have been submitted to the medical panel for further consideration.

The Commission first notes Mr. Brady's request to submit a new letter from one of his physicians to the medical panel for consideration...The Commission has reviewed the medical records exhibit previously submitted to the medical panel, and Dr. Pearl's letter and finds that the letter does not provide any new written conflicting evidence that was not previously available to the medical panel for consideration.

*...Based on all this information [the medical records exhibit] 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. Given the panel's expertise and independence, the Commission finds the panel's opinion persuasive.²³*

Mr. Brady thereafter filed a Petition for Court of Appeals review October 28, 2008.²⁴

STATEMENT OF FACTS

The facts to follow are presented in accordance with the standards of review previously stated. Since the marshaling requirement only applies to the appellant, the following fact statement includes the facts and reasonable inferences therefrom upon which the Labor Commission could rely in support of its conclusion that the January 24,

²³Id. at 119 and 120. See Appendix 5

²⁴Id. at 122-123.

2001 Industrial Accident is not the direct cause of Mr. Brady's permanent total impairment:

1. Mr. Brady was involved in an accident arising out of and in the course of his employment with Young Electric Sign Company ("YESCO") on January 24, 2001. A sign he was taking down came loose and pinned him against the side of the raised bucket of a man lift.²⁵

2. At the evidentiary hearing in this matter, the parties stipulated Mr. Brady was permanently and totally disabled. The parties did not stipulate as to the cause of the disability. YESCO alleged multiple injuries and medical conditions suffered by Mr. Brady both before and after the January 2001 accident were the *significant and direct causes*.²⁶

A medical chronology divided by the nature of the injury follows:

Cervical Spine Injuries Sustained Before the January 24, 2001 Industrial Accident

First Automobile Accident, August 1996

3. Five years before the January 24, 2001 industrial accident, Mr. Brady was involved in a motor vehicle accident in August of 1996. His pick-up truck collided head on with a Jeep at around 20 miles per hour.²⁷ Thereafter, Mr. Brady suffered continuing

²⁵R. Vol. 2 of 4, 124 p. 58.

²⁶R. Vol. 1 of 4, 14

²⁷R. Vol. 2 of 4, 124 p. 31.

neck and bilateral shoulder problems.²⁸

4. A cervical spine CT scan taken December 19, 1996 reported “broad disk bulging with possible protrusion seen centrally and to the left at C4-C5 and centrally and to the right at C5-C6 and C6-C7”.²⁹

5. On January 21, 1997 Dr. John McFarlane diagnosed Mr. Brady with a C5-6 and C6-7 herniated nucleus pulposus and later that day performed a disectomy and fusion and inserted a plate at C5-6 and C6-7.³⁰

6. On October 12, 1998 an MRI study reported degenerative disc disease at C4-5.³¹

7. On October 13, 1998 Dr. Stephen Warner observed that “his plain films demonstrate backing out of the lower screws of his anterior cervical plate”.

Dr. Warner also noted, “At C4-5 there is a diffuse intervertebral disc bulge without significant central canal stenosis . . . there is some mild foraminal narrowing . . . The disc is desiccated and collapsed...[T]he patient appears to have a non-union . . . at the C5-6... [The prior surgery] did not provide any relief of his symptoms . . . [T]he patient now has

²⁸R. Vol. 3 of 4, 128.

²⁹Id. at 287.

³⁰Id. at 318.

³¹Id. at 62.

progressive neck pain which radiates towards his shoulders.”³²

8. On November 30, 1998 Dr. Warner performed surgery to address Mr. Brady’s cervical problems. He removed the anterior cervical plate, explored the cervical fusion at C5-6 and C6-7, performed an anterior cervical discectomy and fusion at C4-5.³³

9. Nearly two years before the industrial accident (March 1, 1999), Dr. Warner concluded, “[Mr. Brady] is going to have chronic problems with . . . his cervical spine.”³⁴

**Second Automobile Accident December 26, 2001
(11 Months Following the Industrial Event of January 24, 2001)**

10. Eleven months after his industrial accident Mr. Brady was involved in a second serious non-industrial motor vehicle accident. On December 26, 2001, the truck he was driving “T-boned” another vehicle. He estimated the collision speed to be roughly 40 miles per hour. He was not wearing a seat belt. The left side of his body struck the steering wheel. His head hit the windshield. He lost consciousness.³⁵

11. January 24, 2002, one month following the second nonindustrial automobile accident, Dr. Warner observed:

Since the motor vehicle accident on December 26, 2001, the

³²Id. at 32.

³³Id. at 55.

³⁴Id. at 24.

³⁵Id. at 477

*patient has had a marked increase in neck pain, shoulder pain especially on the left side, pain between the shoulder blades in the upper thoracic spine area, and chest wall pain. The patient states that he has been off of work since the motor vehicle accident on December 26, 2001*³⁶

12. Nearly four months after the second nonindustrial accident, April 16, 2002, Dr. Warner reported that “since the motor vehicle accident, he has had constant worsening neck pain.”³⁷

13. Seven months following the nonindustrial second automobile accident, July 23, 2002, Dr. Sheridan, Mr. Brady’s primary care physician, charted:

...Lex experienced a car wreck in December 2001 which significantly aggravated his existing musculoskeletal problems...Since then, I have been unable to get any significant control of his pain. I have recommended that he retire from his position at YESCO...

[This accident] “...has really tipped him over the edge, and I believe . . . has been a prime factor in his downturn . . . this recent car wreck has really messed things up.”³⁸

14. At YESCO’s request, Dr. Jayne Clark examined Mr. Brady. She reviewed all of the medical records then available³⁹. She reported April 1, 2004:

It appears that none of Mr. Brady’s treating physicians have appreciated that he has had a small cervical spinal cord

³⁶Id.

³⁷Id. at 464.

³⁸Id. at 445-446.

³⁹See Dr. Clark’s complete reports as Appendix 6 hereto.

*syrinx, at least as early as 8/98. It is most likely that this syrx occurred just after the 1996 MVA or that it was congenital. This syrx can account for the pain in his neck and upper back and scapular area, and the resolved sensory deficit that Dr. Warner noted in his upper thoracic region.*⁴⁰

15. Dr. Clark opined:

A. the cervical degenerative disc disease at C5-6 and C6-7 pre-existed

Mr. Brady's January 24, 2001, industrial accident;

B. The industrial accident "likely strained his nonfusion levels of C5-6 and C6-7" but also that "the MVA of 12/26/01 . . . caused worse neck and low back problems."⁴¹

C. "[T]he "MVA of 12/01 was a much more disabling accident that (sic) the [industrial] sign incident of 1/24/01."⁴²

D. "[T]here is no evidence that any fracture of his neck occurred ever, let alone on 1/24/01." There was no evidence of new callus or bone healing between an MRI taken on 1/30/01 and another MRI taken on 04/17/01.⁴³

16. The medical panel concurred:

Mr. Brady had post-operative cervical spine problems (non-union at C5-6, C6-7) and no evidence of a fracture due to the

⁴⁰R. Vol. 1 of 4, 11.

⁴¹Id. at 13-14.

⁴²Id. at 16c.

⁴³Id. at 16A.

*incident on 1/24/01.*⁴⁴

Lower Back Injuries Sustained Before the Industrial Accident

17. November 3, 1998 Dr. Warner diagnosed Mr. Brady with “progressive disc space collapse at the L4-5 level.”⁴⁵

18. Dr. Clark agreed. Mr. Brady had pre-existing lumbar degenerative disc disease.⁴⁶

Left and Right Upper Extremity Injuries Sustained Before and Subsequent to the January 24, 2001, Industrial Accident

19. May 1994, Mr. Brady dislocated his right shoulder while lifting a bale of hay with subsequent pain in that shoulder.⁴⁷

20. Mr. Brady suffered serious bilateral shoulder injuries in the August 1996 motor vehicle accident.⁴⁸

21. August 10, 2000, Dr. Sheridan diagnosed tendinitis in Mr. Brady’s left arm.⁴⁹

⁴⁴R. Vol. 1 of 4, 82.

⁴⁵R. Vol. 3 of 4, 30.

⁴⁶Id. at 12.

⁴⁷Id. at 143.

⁴⁸Id. at 32, 128.

⁴⁹Id. at 88.

22. September 14, 2000, Dr. Warner examined Mr. Brady. He complained of left wrist pain. The doctor confirmed the diagnosis left upper extremity tendinitis.⁵⁰
23. Following the December 2001 motor vehicle accident, Dr. Warner reported:
- The patient's left shoulder now is extremely painful. He has difficulty moving his left arm because of the pain in the shoulder . . . since the motor vehicle accident on December 26, 2001 the patient has had a marked increase in . . . shoulder pain especially on the left side.*"⁵¹
24. Dr. Clark analyzed that although there was:
- "...aggravation of the left shoulder, impingement syndrome and AC degeneration by the 1/24/01 incident . . . it was the 12/26/01 MVA which really caused this to be problematic."*⁵²
25. September 16, 1996 Dr. Dean Walker charted:
- 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. The exact cause of this is due to either an impingement process which has been incited by the [August, 1996] accident, or perhaps a rotator cuff tear.*⁵³
26. On December 2, 1997, Dr. Warner diagnosed:
- He has rotator cuff tendinitis clearly seen on the MRI scan. He also has significant right AC arthritis as well as a ganglion*

⁵⁰Id. at 18.

⁵¹Id. at 477.

⁵²Id. at 14.

⁵³Id. at 167.

cyst sitting in the corner of the spine of the scapula.”⁵⁴

27. January 24, 1998, Dr. Warner surgically repaired a fractured non-union acromium and did a subacromial decompression in the right shoulder. The postoperative diagnoses included: (1) “impingement, syndrome, right shoulder. (2) Intact rotator cuff. (3) right acromion fracture nonunion.”⁵⁵

28. When Mr. Brady’s right shoulder condition failed to improve, he was referred to Dr. Hugh West. Dr. West performed surgery on the right shoulder May 19, 1998. Dr. West diagnosed right AC joint arthritis and right acromium non-union [fracture]⁵⁶.

29. October 13, 1998, Dr. Warner entered the following in his chart:

This is a very difficult case as evidenced by the patient’s persistent symptoms in spite of his previous treatment. He has had a 2 level anterior cervical discectomy and fusion in the past which did not provide any relief of his symptoms. The patient then had subacromial injections done into his right shoulder which seemed to alleviate the symptoms. He..had 2 surgical procedures on his right shoulder and has not faired well...This is secondary to an acromion non-union.

The patient now has progressive neck pain which radiates towards his shoulders...further surgery on his cervical spine would involve an anterior approach...This is quite extensive surgery. I am not sure that it would alleviate any of his

⁵⁴Id. at 48.

⁵⁵Id. at 704.

⁵⁶Id. at 698

*symptoms...*⁵⁷

30. Mr. Brady continued on the same difficult medical path. March 1, 1999, Dr. Warner observed Mr. Brady “is going to have chronic problems with . . . his right shoulder.”⁵⁸

31. Similar comment is found in Dr. Sheridan’s chart. He confirmed continuing chronic arm pain in a December 27, 2000, chart entry.⁵⁹

32. Again, Dr. Jayne Clark reviewing the circumstances at YESCO’s request diagnosed a cervical spinal cord syrinx. She reported the syrinx had probably formed as early as August 1998. She opined that the syrinx could “...account for some of his shoulder pains.”⁶⁰

Dr. Clark expressed her opinion, based her physical examination and her review of all of the medical records, Mr. Brady may be permanently disabled in part due to the right shoulder problems. She added, “but none of this disability causing him to be unable to work is due, in any significant part, to any of the industrial injury incidents.”⁶¹

33. The Medical Panel came to the same conclusion as Dr. Clark that there is: “no evidence indicating injuries to the shoulders . . . related to the [industrial] incident on

⁵⁷Id. at 31-32.

⁵⁸Id. at 24.

⁵⁹Id. at 82.

⁶⁰Id. at 11.

⁶¹Id. at 11 and 14.

1/24/01.”⁶²

Respiratory Problems Before and Subsequent to the January 24, 2001, Industrial

Accident

34. Dr. Sheridan observed on June 30, 1994 and November 10, 1994 that Mr. Brady had “asthma with marginal control.”⁶³ Dr. Sheridan also commented on July 14, 2000 of “asthma with inadequate control.”⁶⁴

35. On January 4, 2000, Mr. Brady reported to Dr. Sheridan with “unusual nocturnal shortness of breath.”⁶⁵ It was on this date that Mr. Brady was first found to be hypoxemic with the source being “bronchitis with a flare of asthma.”⁶⁶ Mr. Brady had begun using oxygen to address the shortness of breath he was experiencing by June 8, 1999.⁶⁷

36. Apparently, because there were no new symptoms, Mr. Brady’s first recorded direct complaint of shortness of breath after the industrial accident came 23 months later on December 4, 2002.⁶⁸

⁶²R. Vol. 1 of 4, 82.

⁶³R. Vol 3 of 4, 139 and 143.

⁶⁴Id. at 89.

⁶⁵Id. at 94.

⁶⁶Id. at 488A.

⁶⁷Id. at 100.

⁶⁸Id. at 505

37. Mr. Brady continued working at YESCO until June 6, 2003—nearly 2 ½ years after the January 24, 2001 industrial event.⁶⁹

38. On June 9, 2003 Dr. Gregory Elliott observed that “Mr. Brady’s chief complaint is that of episodic breathlessness . . . This system complex may represent simple anxiety attacks, alternatively it may represent exacerbations of asthma.” Dr. Elliott also notes that Mr. Brady had chronic hypoxemia which may be caused by his asthma “in combination with alveolar hypoventilation caused by his dependence upon methadone and other analgesics.”⁷⁰

39. On December 15, 2003 Dr. Tom Cloward determined there was “evidence of underlying lung disease, consistent with chronic pulmonary disease [asthma].”⁷¹

40. Dr. Clark opined that “his hypoxia is due to a combination of the right hemidiaphragm paralysis or paresis, the Patent Foramen Ovale, and his years of asthmatic condition with years of steroid use for asthma as well as multiple uses for spinal and other joint problems.”⁷²

⁶⁹Id. at 16C.

⁷⁰Id. at 387.

⁷¹Id. at 345.

⁷²Id. at 12.

Various Theories for Paralysis of the Right Hemidiaphragm Leading to Hypoxia

41. Mr. Brady was first diagnosed with paralysis of his right hemidiaphragm in January of 2004.⁷³ Evidence of this condition was present as early as 1997 as seen in x-rays from 1997, 1999, and 2000.⁷⁴

42. April 8, 2004, Dr. James Pearl commented that, “His hypoxemia is most likely based on his paralyzed hemidiaphragm and atelectasis related to that.”⁷⁵ Dr. Pearl referred Lex to Dr. David Ryser with concerns that the phrenic nerve was damaged which he believed may have accounted for the paralysis of the hemidiaphragm.⁷⁶

43. Dr. Ryser subsequently conducted a nerve conduction study in which he discovered “no electrodiagnostic evidence of acute phrenic denervation bilaterally. Morphology of early-recruited motor units in the right hemidiaphragm showed changes consistent with subacute to chronic [phrenic] denervation, however, but this was neither marked nor unequivocal.”⁷⁷

44. Dr. Clark concluded that the paralysis of the diaphragm:

... could have been a side effect of cervical injections or surgeries, but also could be due to the presence of the syrinx causing dysfunction of the anterior horn cells at the C3-5

⁷³Id at 630.

⁷⁴Id. at 12, 625.

⁷⁵Id. at 624A.

⁷⁶Id.

⁷⁷Id. at 656A.

*levels which innervate the vagus nerve to the diaphragm . . . it clearly was present long before the 1/24/01 incident.*⁷⁸

45. Dr. Clark explained:

“the phrenic nerve has innervation typically from the C3,C4, and C5 anterior horn cells and nerve roots. It is possible that the syrinx has expanded to cause this right phrenic neuropathy.”⁷⁹

46. Dr. Pearl, in reference to the January 24, 2001 accident, posed an alternative theory not adopted by Dr. Clark, the Medical Panel or the Labor Commission. He postulated that the paralyzed right hemidiaphragm may be related to “his traumatic chest injury and that would seem to be a likely etiology.”⁸⁰

47. In contrast to Dr. Pearl, the Medical Panel and the Labor Commission agreed with Dr. Clark:

*...The MVA of 12/01 was a much more disabling accident that (sic) the sign accident of 1/24/01. The change from 80.7% to 71.7% right lung height compared to left, is medically more likely related to the most severe and disabling accident, which was the 12/01 MVA.*⁸¹

48. The medical panel determined there is:

...no evidence that Mr. Brady's hypoxia should be considered

⁷⁸Id. at 12. Emphasis added.

⁷⁹Id. at 16B.

⁸⁰Id. at 339.

⁸¹Id. at 16C. Emphasis added.

*a consequence of the incident on 1/24/01. The right hemi-diaphragm is clearly elevated well before 2001. There is evidence that the phrenic nerve function is intact . . . clinical records in this case indicate that . . . onset of the hypoxia occurred after the auto incident of 12/01. Therefore, **the medical panel finds it likely that Mr. Brady would not have encountered hypoxia absent the auto accident in December 2001.***⁸²

49. The Labor Commission correctly relied on the medical records and Medical

Panel report:

Mr. Brady's medical problems caused by his January 24, 2001 industrial accident resulted in no physical or functional restrictions above and beyond those he already endured . . . [and] did not serve as the direct cause of his permanent total disability."⁸³

SUMMARY OF THE ARGUMENT

Mr. Brady raises two issues for this Court to consider. The first is whether there is substantial evidence supportive of the Labor Commission's finding that the January 24, 2001 industrial accident **was not** the "direct cause" of his permanent total disability.⁸⁴ It is Mr. Brady's burden to marshal all the evidence that supports this finding. In response, he must then show there is "no substantial evidence" supportive of the Commission's denial of his claim. Mr. Brady has failed to meet his burden.

There is substantial evidence in the medical records confirming Mr. Brady suffered

⁸²Id. at 82-83. Emphasis added.

⁸³R. Vol. 1 of 4, 105.

⁸⁴Utah Code Ann. 34A-2-413(1)(b)(iii)).

from significant pre-existing and subsequent non-industrial injuries. Many of the pre-existing conditions date back to a 1996 motor vehicle accident. The pre-existing conditions were later exacerbated by a December 26, 2001 motor vehicle accident. In that accident Mr. Brady hit his head on the windshield of his vehicle. It was a serious impact from which, among other things he suffered a lapse of consciousness.

Mr. Brady's permanent total disability resulted from a combination of conditions including injuries to his cervical spine, shoulders, back, along with a respiratory disorder. The medical records document significant cervical spine and shoulder problems originating at least as early as the 1996 motor vehicle accident. The medical records also reveal a 1994 dislocated shoulder while throwing a bail of hay. Mr. Brady had multiple surgeries to treat his cervical and shoulder problems that predated the current claim. He suffered chronic pain as a result of the pre-existing injuries. Multiple surgeries were not successful in alleviating his pain. He was treated by a continuing regimen of pain medications. The medical records show a severe exacerbation of Mr. Brady's cervical and shoulder problems from the second motor vehicle accident in December 2001 and not from the industrial event of January 24, 2001.

Mr. Brady's respiratory symptoms also predate the industrial accident. Mr. Brady's asthma was poorly controlled as early as the mid 1990's. That was a continuing problem as reflected in the medical records. He complained of shortness of breath even the year before the industrial accident. His respiratory disorder resulted in part, from partial

paralysis of the nerve that controls the diaphragm. The differential causal diagnoses included trauma to the chest area, constant use of painkillers, and damage to the nerve from his cervical spine injuries. Each those diagnoses has origins predating the industrial injury event.

Subsequent developments also support the Labor Commission's denial of Mr. Brady's claim. The medical records show Mr. Brady made no complaint of industrially related shortness of breath to treating physicians for nearly two years (23 months) after the work-related accident.

Comparing the medical records following both the industrial event and the December 2001 motor vehicle accident, it is clear the later event was the more debilitating of the two. By the greater weight of the evidence, the motor vehicle accident was correctly determined to be the direct cause of the permanent total disability. It was much closer in time to the ensuing career ending complaints of shortness of breath than the industrial incident.

The Labor Commission correctly found the January 24, 2001 industrial incident **was not** the direct cause of Mr. Brady's permanent total disability.

The second issue raised on appeal challenges the Labor Commission's decision to not resubmit issues to the medical panel based on a letter proffered as part of Mr. Brady's objection to the completed Medical Panel Report. Under Labor Commission Rule 602-2-2B the Commission has discretion whether or not to allow new written conflicting

evidence for further review by the panel after it has issued a report. As long as the commission's decision interpreting this rule is reasonable or rational it should be upheld.⁸⁵

The letter submitted by Mr. Brady's physician after the Medical Panel Report was completed presented no new evidence. The letter discussed a theory that the diaphragm paralysis resulted from damage to the nerve that controls the diaphragm and that such nerve damage could be caused by cervical spine injuries. The nerve damage theory was discussed by several physician's and those reports were a part of the medical records given to the Medical Panel for consideration. The Medical Panel itself discussed potential damage to the nerve at issue. The Labor Commission did not abuse its discretion concluding the letter did not add substantively to the body of evidence. Therefore, the error, if any at all, was harmless.

ARGUMENT

I.

THE LABOR COMMISSION'S FINDINGS THAT THE JANUARY 24, 2001 INCIDENT WAS NOT THE DIRECT CAUSE OF APPELLANT'S PERMANENT TOTAL DISABILITY MUST BE AFFIRMED BECAUSE THERE IS SUBSTANTIAL EVIDENCE OF SIGNIFICANT PRIOR AND SUBSEQUENT INJURIES NOT RELATED TO THE INDUSTRIAL ACCIDENT WHICH WERE THE DIRECT CAUSES.

The Commission's factual findings should be affirmed by the Court of Appeals whenever they are "supported by substantial evidence when viewed in light of the whole

⁸⁵ *Brown & Root Industrial Service and Highland Insurance v. Industrial Commission*, 947 P.2d 671, 677 (Utah 1997).

record before the court.”⁸⁶ Findings supported by substantial evidence will not be overturned even if another conclusion from the evidence is permissible.⁸⁷ "Substantial evidence" is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."⁸⁸

The burden is on the party seeking to overturn the Commission’s factual findings to “...marshall [sic] all of the evidence supporting the findings and show that despite the supporting facts, and in light of the conflicting or contradictory evidence, the findings are not supported by substantial evidence.”⁸⁹ In making such determinations, the appellate court reviews the whole record on appeal.⁹⁰

"It is the petitioner's duty to properly present the record, by marshaling all of the evidence supporting the findings and showing that, despite that evidence and all reasonable inferences that can be drawn therefrom, the findings are not supported by

⁸⁶Utah Code Ann. § 63G-4-403(4)(g) as renumbered, “Laws of Utah 2008”, Chapter 382 Section 1393.

⁸⁷*Hurley v. Board of Review of Indus. Comm’n*, 767 P.2d 524, 526-27 (Utah 1988).

⁸⁸*Department of Air Force v. Swider*, 824 P.2d 448, 451 (Utah App. 1991) quoting Utah Code Ann. § 63-14b-16(4)(g) (1989) and also quoting *Grace Drilling Co. v. Board of Review*, 776 P.2d 63, 67 *infra*.

⁸⁹*Grace Drilling Co. v. Board of Review of Indus. Comm’n*, 776 P.2d 63, 68 (UT App 1989). See also generally, *Betty L. Stokes v. Board of Review of the Industrial Commission of Utah et al.* 832 P.2d 56 (Utah App. 1992).

⁹⁰*Id.* at 451.

substantial evidence."⁹¹ "...The burden of proof is upon [the petitioner]...to establish [his] claim for compensation" and "it is not [an appellate court's] duty to say what inference or conclusion [it] would have drawn from the facts presented to the Commission."

Therefore, the Court of Appeals will not reweigh the medical experts' testimonies.⁹²

Utah law directs that the Commission is the ultimate fact finder for workers' compensation proceedings.⁹³ When two or more "conflicting inferences" or opinions are presented to the Commission on causation and the Commission enters a finding on causation, appellate court will not "substitute [its] opinion as to the preponderance of the evidence for that of the [C]ommission."⁹⁴ In this case, the Commission made causation findings to which the Court of Appeals should give deference.

Mr. Brady had the burden below to show by a preponderance of the evidence that "the industrial accident . . . was the direct cause of the permanent total disability."⁹⁵ There is substantial evidence supporting the Commission's decision that the January 24, 2001 industrial accident was not the direct cause of Mr. Brady's permanent total disability as discussed in the following sections:

⁹¹Id.

⁹²*Wherritt v. Industrial Comm'n*, 100 Utah 68, 110 P.2d 374, 376 (1941).

⁹³ See, e.g., *Speirs v. Southern Utah Univ.*, 2002 UT App 389, P 10, 60 P.3d 42.

⁹⁴*Tintic Standard Mining Co. v. Industrial Comm'n*, 100 Utah 96, 110 P.2d 367, 368-69 (1941)

⁹⁵Utah Code Ann. §34A-2-413

A. Mr. Brady had significant cervical problems before the January 24, 2001, industrial event. The pre-existing cervical condition was greatly exacerbated by the December 26, 2001, motor vehicle accident 11 months later and not by the industrial event.

Mr. Brady had significant cervical spine injuries dating at least back to a 1996 motor vehicle accident when he collided head on with a Jeep going 20 miles per hour. As a result of this accident Mr. Brady was diagnosed with herniated cervical discs from C4-C7.⁹⁶ Mr. Brady underwent surgery in 1997 for this condition. Dr. McFarlane performed a discectomy and fusion and inserted a plate to stabilize the neck.⁹⁷ Mr. Brady was diagnosed in 1998 with degenerative disc disease at C4-5.⁹⁸

Mr. Brady's cervical problems persisted despite a second surgery in October of 1998. Dr. Warner removed the cervical plate. The screws were backing out. The surgery also included a discectomy at section C4-5.⁹⁹ Significantly, Dr. Warner concluded at that time, "[Mr. Brady] is going to have chronic problems with his cervical spine."¹⁰⁰ History has proven that to be true. The chronic cervical problems continued unabated before the January 24, 2001, industrial accident.

Mr. Brady was involved in another motor vehicle accident 11 months after the

⁹⁶R. Vol. 3 of 4, 287.

⁹⁷Id. at 318

⁹⁸Id. at 62

⁹⁹Id. at 55.

¹⁰⁰Id. at 24.

industrial accident on December 26, 2001 when he T-boned a car. He testified the impact speed was roughly 40 miles per hour. He was not buckled in and hit his forehead on the windshield with enough force for him to lose consciousness. Physicians uniformly reported the chronic pain in his neck was greatly exacerbated by trauma of December 2001 accident.¹⁰¹ Dr. Sheridan, Lex's primary care physician, made note the December 2001 accident "significantly aggravated his existing musculoskeletal problems . . . since then, I have been unable to get any significant control of his pain." Dr. Sheridan added the December 2001 accident, "has been a prime factor in his downturn."¹⁰² Prior to the December 2001 motor vehicle accident the treating physicians had adequate control of appellant's preexisting chronic cervical pain.

Despite Mr. Brady's insistence that the industrial accident broke his neck, the medical evidence is not supportive. Dr. Clark opined, "...there is no evidence that any fracture of his neck occurred ever, let alone on 1/24/01." Dr. Clark also concluded that the "MVA of 12/01 was a much more disabling accident that (sic) the sign incident of 1/24/01."¹⁰³ More importantly, the cervical fusion surgery attempted in the 1990's was not successful. There was a non-union (separation) of the cervical vertebrae in the neck as far

¹⁰¹Id. at 477.

¹⁰²Id. at 446.

¹⁰³Id. at 16A-C.

back as 1998.¹⁰⁴ No objective evidence supports Mr. Brady's claim of a neck fracture attributed to the January 2001 industrial event.

Finally, the medical panel concluded "Mr. Brady had post-operative cervical spine problems (non-union at C5-6, C6-7) and no evidence of a fracture due to the incident on 1/24/01."¹⁰⁵ There is clearly substantial medical evidence that Mr. Brady had significant and substantial cervical spine problems long before the industrial accident. Those problems were permanently exacerbated by the motor vehicle accident of December 26, 2001. The Labor Commission correctly found the December 2001 accident was the direct cause of petitioner's current cervical spine issues.

B. Mr. Brady's shoulder problems existed long before the industrial accident. Examining physicians and Medical Panel physicians determined the shoulder problems were severely and permanently exacerbated by the December 26, 2001 motor vehicle accident and not by the January 2001 industrial event.

Similar to Mr. Brady's cervical spine issues, his shoulder problems date back to at least 1996 when he injured both shoulders in the August 1996 car accident.¹⁰⁶ Even earlier, in 1994, he dislocated his right shoulder while lifting a bale of hay.¹⁰⁷ Mr. Brady was diagnosed with tendinitis in his right upper extremity in May of 1996 and in his left

¹⁰⁴Id. at 32.

¹⁰⁵R. Vol. 1 of 4, 82.

¹⁰⁶R. Vol. 3 of 4, 477.

¹⁰⁷Id. at 143.

upper extremity in August of 2000.¹⁰⁸

Mr. Brady's preexisting woes were unrelenting. In December 1997 he was diagnosed with rotator cuff tendinitis. The physicians found arthritic changes in the right shoulder. That lead to right shoulder impingement syndrome. Dr. Warner attempted to correct the right shoulder symptoms. He performed a right acromium fracture repair.¹⁰⁹ It failed to relieve the pain he was experiencing.

Chronic arm pain continued as charted by his physician December 27, 2000. His physicians concluded Mr. Brady "is going to have chronic problems . . . with his right shoulder."¹¹⁰ Again, all of this predates the Industrial accident of January 24, 2001.

Following Dr. Warner's office chart there is minimal change, if any, in Mr. Brady's condition until following the December 26, 2001, motor vehicle accident. Then, Dr. Warner reports, "since the motor vehicle accident . . . the patient has had a marked increase in . . . shoulder pain especially on the left side."¹¹¹

Dr. Jayne Clark looked at the flow of the medical records. She concluded, "...it was the 12/26/01 MVA which really caused this to be problematic."¹¹²

Dr. Clark also found a cervical spinal cord syrinx that formed as early as August

¹⁰⁸Id. at 88.

¹⁰⁹Id. at 704.

¹¹⁰Id. at 24 and 82.

¹¹¹Id. at 477.

¹¹²Id. at 14.

1998 could account for some of the shoulder pains. She affirmatively concluded, “none of this disability causing him to be unable to work is due, in any significant part, to any of the industrial incidents.”¹¹³

Reviewing the same evidence as Dr. Clark, the Medical Panel advised the administrative law judge, “[We find]...no evidence indicating injuries to the shoulders . . . related to the incident on 1/24/01.”¹¹⁴

Mr. Brady argues there is not a “scintilla of evidence” that supports the Labor Commission’s denial of his claim for permanent total disability benefits.¹¹⁵ Quite to the contrary, the medical evidence provided abundantly supports a factual disconnect between the January 24, 2001, industrial event and Mr. Brady’s total disability. The industrial accident was not the “direct” cause.

C. Mr. Brady’s respiratory limitations associated with poorly controlled asthma and diaphragm paralysis existed long before the industrial accident. Examining physicians and Medical Panel physicians determined the respiratory limitations were severely and permanently exacerbated by the December 26, 2001, motor vehicle accident and not by the January 24, 2001, industrial event.

1. Respiratory Problems/Hypoxemia

As with every medical complaint raised by Mr. Brady, he had significant respiratory

¹¹³Id. at 11 and 14.

¹¹⁴R. Vol. 1 of 4, 82.

¹¹⁵See “Brief of Petitioner”

problems long before his January 24, 2001, industrial accident. It is noteworthy that Mr. Brady suffered from breathing problems and was diagnosed with hypoxemia long before the industrial accident.¹¹⁶ His chronic asthma was noted by Dr. Sheridan to be inadequately controlled as early as 1994.¹¹⁷ He complained of shortness of breath and was reportedly hypoxemic in January of 2000, about one year before the industrial event. June 8, 1999, one and one half years before his work related accident, he had been prescribed oxygen.¹¹⁸

Amazingly, 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.¹¹⁹

Various theories were discussed by his treating physician's as to the cause of the hypoxemia, including simple anxiety attacks or exacerbations of asthma, both unrelated to the industrial accident.¹²⁰

Mr. Brady argues that his chronic hypoxemia was caused, in part, by his use of methadone and other opioids to treat his chronic pain following the industrial event.¹²¹ Dr. Mark Passey, however, noted that "there is actually very little real evidence in the

¹¹⁶R. Vol. 1 of 4, 488A.

¹¹⁷Id. at 139, 143, and 82.

¹¹⁸Id. at 488A and 100.

¹¹⁹Id. at 505.

¹²⁰Id. at 387.

¹²¹Id. and See "Brief of Petitioner" pp. 32-33.

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.”¹²²

Alternatively, even if opioid use was a contributing factor to appellant's hypoxia, the necessity to use such drugs to treat the chronic pain in appellant's cervical spine and shoulders is unrelated to and predates the industrial accident.

Of great significance, as reported by him, his symptoms were greatly exacerbated by the December 2001 auto accident, necessitating continued and even increased use of the opioids. There was substantial evidence for the Labor Commission to conclude that Mr. Brady's respiratory problems predate the industrial accident and that use of opioids such as methadone did not contribute to appellant's hypoxia. In the alternative, if opioids do contribute to hypoxia, there was substantial evidence that the use of such drugs to treat Mr. Brady's chronic pain predates the industrial accident and was increased significantly only after the increased pain symptoms experienced as a result of his second major automobile accident in December 2001.

2. Diaphragm Paralysis

An alternative theory for the cause of Mr. Brady's hypoxia advanced by multiple physicians is his right hemidiaphragm, which controls breathing of the right lung, was paralyzed resulting in reduced lung expansion on the right side.¹²³ Mr. Brady was indeed

¹²²Id. at 213 and 382.

¹²³Id. at 630.

diagnosed with paralysis of the right hemidiaphragm in January of 2004.¹²⁴ He argues that this paralysis occurred as a result of the industrial accident. However, as early as 1997 evidence of reduced lung expansion was present as seen in x-rays from 1997, 1999, and 2000.¹²⁵ Dr. Clark determined that paralysis of the diaphragm could have occurred from damage to the nerves leading to the diaphragm as a result of numerous cervical injections and surgeries that took place before the industrial accident as well as the presence of a syringe as discussed earlier.¹²⁶

There is substantial evidence that hemidiaphragm paralysis predated the industrial accident.

Dr. Pearl also posed the theory that the paralysis occurred from the force on Mr. Brady's chest of being pinned against the side of the bucket by a sign.¹²⁷ However, Dr. Clark concluded that "the MVA of 12/01 was a much more disabling accident than (sic) the sign accident of 1/24/01. The change from 80.7% to 71.7% right lung height compared to left, is medically more likely related to the most severe disabling accident, which was the 12/01 MVA."¹²⁸

Dr. Clark's opinion is given greater credence when one considers Mr. Brady made

¹²⁴Id.

¹²⁵Id. at 12 and 265.

¹²⁶Id. at 12.

¹²⁷Id. at 339.

¹²⁸Id. at 16C.

no recorded complaint of shortness of breath he associated with the industrial event for nearly two years.¹²⁹ The length of time between the industrial accident and the initial complain of shortness of breath makes the causal connection between the two medically tenuous. That is especially so when one considers the intervening serious automobile accident in December 2001.

Even if Dr. Pearl's theory about the force on Mr. Brady's chest is correct, there was substantial evidence for the Labor Commission to conclude that the December 2001 motor vehicle accident was the more debilitating accident. It was the direct cause of the paralyzed diaphragm leading to Mr. Brady's hypoxia.

The medical panel advised the Labor Commission there is

*...no evidence that Mr. Brady's hypoxia should be considered a consequence of the incident on 1/24/01. The right hemi-diaphragm is clearly elevated well before 2001. There is evidence that . . . onset of the hypoxia occurred after the auto incident of 12/01. Therefore, the medical panel finds it likely that Mr. Brady would not have encountered hypoxia absent the auto accident in December 2001...*¹³⁰

Relying on the depth of the on point medical records, the reviews of Dr. Clark and,

¹²⁹Id. at 505.

¹³⁰R. Vol. 1 of 4, 82-83.

more particularly, the conclusions of the medical panel, the Labor Commission determined,:

...Mr. Brady's medical problems caused by his January 24, 2001 industrial accident resulted in no physical or functional restrictions above and beyond those he already endured . . . [and] did not serve as the direct cause of his permanent total disability.¹³¹

Mr's Brady criticizes Dr. Clark's summary of the extensive medical records for a very few irrelevant and harmless perceived misstatements of the medical history.¹³² The foundation for Dr. Clark's opinions remains solid. Mr. Brady had significant pre-existing conditions of a similar nature to those of which he now complains. Mr. Brady had and industrial accident in January of 2001 with relatively minimal complicating symptoms. Mr. Brady suffered a very serious automobile accident in December 2001 which materially complicated, aggravated and added to and caused his inability to continue his profession.

Even if Dr. Clark's opinion is not considered, the Medical Panel so found based on the very substantial medical evidence before the Labor Commission. The Commission's order denying permanent total disability stands solidly supported.

¹³¹R. Vol. 1 of 4, 105.

¹²⁴ See "Brief of Petitioner", pp. 37-41.

II.

THE LABOR COMMISSION'S DENIAL OF MR. BRADY'S REQUEST TO SUBMIT A POST MEDICAL PANEL OPINION LETTER PREPARED BY APPELLANT'S PHYSICIAN TO THE MEDICAL PANEL FOR FURTHER REVIEW WAS WITHIN THE LABOR COMMISSION'S DISCRETION. THE TREATING PHYSICIAN'S LETTER PRESENTED NO NEW CONFLICTING EVIDENCE. IT DUPLICATES AND IS CUMULATIVE OF MEDICAL OPINION EVIDENCE ALREADY OF RECORD AND CONSIDERED BY THE MEDICAL PANEL.

The Labor Commission properly exercised its discretion when it ruled that Dr. Pearl's letter did not present any new or conflicting evidence, and thus should not have been considered by the medical panel after it issued its report. Where there is a proffer of *new* written conflicting medical evidence, the administrative law judge *may*, in lieu of a hearing, re-submit the new evidence to the panel for consideration and clarification.¹³³ It is within the Labor Commission's discretion whether or not to submit new conflicting evidence to a medical panel for review after it has issued its report.

In the alternative, any error the Labor Commission may have made in refusing to let the evidence be considered by the medical panel was harmless.

The Court of Appeals should sustain the Labor Commission's interpretation or application of one of its rules if the action is reasonable or rational.¹³⁴ The refusal to submit Dr. Pearl's letter to the medical panel after it issued its report was reasonable and

¹³³Utah Administrative Code Rule 602-2-2B. Emphasis added.

¹³⁴*Brown & Root Industrial Service and Highland Insurance v. Industrial Commission*, 947 P.2d 671, 677 (Utah 1997)

rational because the letter did not present new conflicting evidence that was not already before the medical panel for consideration.

Mr. Brady argues that the letter submitted by Dr. Pearl presented new evidence because it discussed the theory that damage to Mr. Brady's cervical region in the industrial accident affected the nerve that controlled the diaphragm, which then led to hypoxemia.¹³⁵ However, the medical records clearly show that this theory was not new and was discussed by several physicians and the medical panel.

First, on April 4, 2008 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.¹³⁶ Dr. Ryser conducted a nerve conduction study which reported signs of "chronic denervation" of the nerve leading to the diaphragm.¹³⁷

Dr. Clark also opined that paralysis could be a result of denervation resulting from Mr. Brady's multiple cervical injections and surgeries.¹³⁸ The medical panel considered these opinions and determined that "the phrenic nerve function is intact."¹³⁹ The Labor Commission was reasonable and rational in its discretion by concluding that "the letter

¹³⁵See Petitioner's Brief, p. 42.

¹³⁶R. Vol. 3 of 4, 624A.

¹³⁷Id. at 656A.

¹³⁸Id. at 16B.

¹³⁹R. Vol. 1 of 4, 82.

does not provide any new written conflicting evidence that was not previously available to the medical panel for consideration.”¹⁴⁰

Alternatively, even if the Labor Commission’s decision was in error, that error was harmless.

CONCLUSION

Mr. Brady raises two issues for this court to consider. The first is whether there was substantial evidence to show that the acknowledged January 24, 2001, industrial accident was not the direct cause of Mr. Brady’s permanent total disability. The Labor Commission found that the industrial accident was not the direct cause and there was substantial evidence to support that finding.

Mr. Brady had significant pre-existing cervical, shoulder, and respiratory problems. These conditions date at least as far back as 1996 when he was involved in a motor vehicle accident that caused substantial injuries. Additionally, Mr. Brady was involved in another motor vehicle accident 11 months after the industrial accident in which he t-boned a car. The collision speed was estimated to be about 40 miles per hour. Mr. Brady was thrown into the windshield of his truck. He lost consciousness. That accident totally disrupted the pain management of his preexisting conditions. It is well documented in the medical history that this accident greatly exacerbated Mr. Brady’s prior cervical, shoulder, and respiratory problems.

¹⁴⁰Id. at 119-120.

There is substantial evidence to show that the industrial accident was not the direct cause of appellant's permanent total disability. Mr. Brady did not satisfy his burden below to show by the preponderance of the evidence that the industrial accident was "the direct cause" of his total disability. It was not.

Mr. Brady did not sustain his burden on appeal "to properly present the record, by marshaling all of the evidence supporting the findings and showing that, despite that evidence and **all reasonable inferences** that can be drawn therefrom, the findings are not supported by substantial evidence."¹⁴¹

The second issue raised on appeal challenges the Labor Commission's decision to not allow the medical panel to review a letter submitted after the panel issued its report. Under Labor Commission Rule 602-2-2B the Commission has discretion whether or not to allow new written conflicting evidence for further review by the panel after it has issued a report. As long as the commission's decision interpreting this rule is reasonable or rational then it should be upheld.¹⁴² The commission's decision to not submit the letter for further review of the issues they had already considered was reasonable and rational. The Commission correctly determined the letter did not present any new evidence about the cause of diaphragm paralysis that had not already been before the medical panel in its initial evaluation. There were several physicians whose opinions regarding theories of

¹⁴¹*Department of Air Force v. Swider*, 824 P.2d 448, 451 (Utah App. 1991).

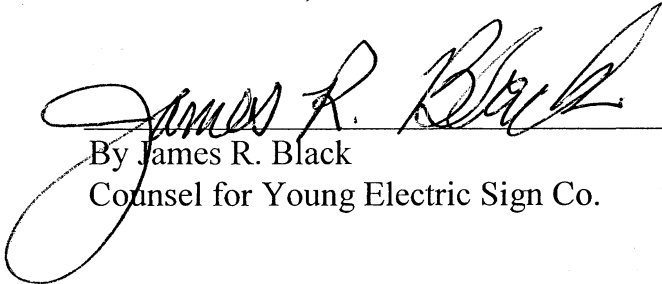
¹⁴²*Brown & Root Industrial Service and Highland Insurance v. Industrial Commission*, 947 P.2d 671, 677 (Utah 1997).

denervation of the diaphragm were in the medical records exhibit and were of record. The Medical Panel Report discussed denervation. The Labor Commission properly exercised its discretion. It properly declined to reopen the Medical Panel process.

The Utah Labor Commission order should be sustained.

DATED this 7TH day of October, 2009.

James R. Black, P.C.



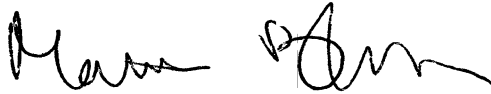
By James R. Black
Counsel for Young Electric Sign Co.

MAILING CERTIFICATE

I certify that I mailed two copies of the BRIEF OF DEFENDANT/APPELLEE
YOUNG ELECTRIC SIGN COMPANY the 7th day of October 2009 to the following:

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Tab 1

APPENDIX 1

Utah Code Ann. § 34A-2-413

34A-2-413. Permanent total disability - Amount of payments - Rehabilitation.

(1) (a) In the case of a permanent total disability resulting from an industrial accident or occupational disease, the employee shall receive compensation as outlined in this section.

(b) To establish entitlement to permanent total disability compensation, the employee must prove by a preponderance of evidence that:

(i) the employee sustained a significant impairment or combination of impairments as a result of the industrial accident or occupational disease that gives rise to the permanent total disability entitlement;

(ii) the employee is permanently totally disabled; and

(iii) the industrial accident or occupational disease is the direct cause of the employee's permanent total disability.

(c) To establish that an employee is permanently totally disabled the employee must prove by a preponderance of the evidence that:

(i) the employee is not gainfully employed;

(ii) the employee has an impairment or combination of impairments that limit the employee's ability to do basic work activities;

(iii) the industrial or occupationally caused impairment or combination of impairments prevent the employee from performing the essential functions of the work activities for which the employee has been qualified until the time of the industrial accident or occupational disease that is the basis for the employee's permanent total disability claim; and

(iv) the employee cannot perform other work reasonably available, taking into consideration the employee's:

(A) age;

(B) education;

(C) past work experience;

(D) medical capacity; and

(E) residual functional capacity.

(d) Evidence of an employee's entitlement to disability benefits other than those provided under this chapter and Chapter 3, Utah Occupational Disease Act, if relevant:

- (i) may be presented to the commission;
- (ii) is not binding; and
- (iii) creates no presumption of an entitlement under this chapter and Chapter 3, Utah Occupational Disease Act.

(e) In determining under Subsections (1)(b) and (c) whether an employee cannot perform other work reasonably available, the following may not be considered:

(i) whether the employee is incarcerated in a facility operated by or contracting with a federal, state, county, or municipal government to house a criminal offender in either a secure or nonsecure setting; or

(ii) whether the employee is not legally eligible to be employed because of a reason unrelated to the impairment or combination of impairments.

(2) For permanent total disability compensation during the initial 312-week entitlement, compensation is 66-2/3% of the employee's average weekly wage at the time of the injury, limited as follows:

(a) compensation per week may not be more than 85% of the state average weekly wage at the time of the injury;

(b) (i) subject to Subsection (2)(b)(ii), compensation per week may not be less than the sum of \$45 per week and:

(A) \$5 for a dependent spouse; and

(B) \$5 for each dependent child under the age of 18 years, up to a maximum of four dependent minor children; and

(ii) the amount calculated under Subsection (2)(b)(i) may not exceed:

(A) the maximum established in Subsection (2)(a); or

(B) the average weekly wage of the employee at the time of the injury; and

(c) after the initial 312 weeks, the minimum weekly compensation rate under Subsection (2)(b) is 36% of the current state average weekly wage, rounded to the nearest dollar.

(3) This Subsection (3) applies to claims resulting from an accident or disease arising out of and in the course of the employee's employment on or before June 30, 1994.

(a) The employer or its insurance carrier is liable for the initial 312 weeks of permanent total disability compensation except as outlined in Section 34A-2-703 as in effect on the date of injury.

(b) The employer or its insurance carrier may not be required to pay compensation for any combination of disabilities of any kind, as provided in this section and Sections 34A-2-410 through 34A-2-412 and Part 5, Industrial Noise, in excess of the amount of compensation payable over the initial 312 weeks at the applicable permanent total disability compensation rate under Subsection (2).

(c) The Employers' Reinsurance Fund shall for an overpayment of compensation described in Subsection (3)(b), reimburse the overpayment:

(i) to the employer or its insurance carrier; and

(ii) out of the Employers' Reinsurance Fund's liability to the employee.

(d) After an employee receives compensation from the employee's employer, its insurance carrier, or the Employers' Reinsurance Fund for any combination of disabilities amounting to 312 weeks of compensation at the applicable permanent total disability compensation rate, the Employers' Reinsurance Fund shall pay all remaining permanent total disability compensation.

(e) Employers' Reinsurance Fund payments shall commence immediately after the employer or its insurance carrier satisfies its liability under this Subsection (3) or Section 34A-2-703.

(4) This Subsection (4) applies to claims resulting from an accident or disease arising out of and in the course of the employee's employment on or after July 1, 1994.

(a) The employer or its insurance carrier is liable for permanent total disability compensation.

(b) The employer or its insurance carrier may not be required to pay compensation for any combination of disabilities of any kind, as provided in this section and Sections 34A-2-410 through 34A-2-412 and Part 5, Industrial Noise, in excess of the amount of compensation payable over the initial 312 weeks at the applicable permanent total disability compensation rate under Subsection (2).

(c) The employer or its insurance carrier may recoup the overpayment of compensation described in Subsection (4) by reasonably offsetting the overpayment against future liability paid before or after the initial 312 weeks.

(5) (a) Subject to Subsection (5)(b) and notwithstanding the minimum rate established in Subsection (2), an employer, its insurance carrier, or the Employers' Reinsurance Fund, after an employee receives compensation from the employer or the employer's insurance carrier for any combination of disabilities amounting to 312 weeks of compensation at the applicable total disability compensation rate, shall reduce the compensation payable:

(i) to the extent allowable by law;

(ii) by the dollar amount of 50% of the Social Security retirement benefits the employee is

eligible to receive for a four week period as of the first day the employee is eligible to receive a Social Security retirement benefit; and

(iii) that the employee receives during the same period as the Social Security retirement benefits.

(b) (i) An employer, its insurance carrier, or the Employers' Reinsurance Fund may not reduce compensation payable under this section on or after May 5, 2008; to an employee by an amount related to a cost-of-living increase to the Social Security retirement benefit that the employee is first eligible to receive for a four week period, notwithstanding whether the employee is injured on or before May 4, 2008.

(ii) For purposes of an employee whose compensation payable is reduced under this Subsection (5) on or before May 4, 2008, the reduction is limited to the amount of the reduction as of May 4, 2008.

(6) (a) A finding by the commission of permanent total disability is not final, unless otherwise agreed to by the parties, until:

(i) an administrative law judge reviews a summary of reemployment activities undertaken pursuant to Chapter 8a, Utah Injured Worker Reemployment Act;

(ii) the employer or its insurance carrier submits to the administrative law judge:

(A) a reemployment plan as prepared by a qualified rehabilitation provider reasonably designed to return the employee to gainful employment; or

(B) notice that the employer or its insurance carrier will not submit a plan; and

(iii) the administrative law judge, after notice to the parties, holds a hearing, unless otherwise stipulated, to:

(A) consider evidence regarding rehabilitation; and

(B) review any reemployment plan submitted by the employer or its insurance carrier under Subsection (6)(a)(ii).

(b) Before commencing the procedure required by Subsection (6)(a), the administrative law judge shall order:

(i) the initiation of permanent total disability compensation payments to provide for the employee's subsistence; and

(ii) the payment of any undisputed disability or medical benefits due the employee.

(c) Notwithstanding Subsection (6)(a), an order for payment of benefits described in Subsection (6)(b) is considered a final order for purposes of Section 34A-2-212.

(d) The employer or its insurance carrier shall be given credit for any disability payments made under Subsection (6)(b) against its ultimate disability compensation liability under this chapter or Chapter 3, Utah Occupational Disease Act.

(e) An employer or its insurance carrier may not be ordered to submit a reemployment plan. If the employer or its insurance carrier voluntarily submits a plan, the plan is subject to Subsections (6)(e)(i) through (iii).

(i) The plan may include, but not require an employee to pay for:

(A) retraining;

(B) education;

(C) medical and disability compensation benefits;

(D) job placement services; or

(E) incentives calculated to facilitate reemployment.

(ii) The plan shall include payment of reasonable disability compensation to provide for the employee's subsistence during the rehabilitation process.

(iii) The employer or its insurance carrier shall diligently pursue the reemployment plan. The employer's or insurance carrier's failure to diligently pursue the reemployment plan is cause for the administrative law judge on the administrative law judge's own motion to make a final decision of permanent total disability.

(f) If a preponderance of the evidence shows that successful rehabilitation is not possible, the administrative law judge shall order that the employee be paid weekly permanent total disability compensation benefits.

(g) If a preponderance of the evidence shows that pursuant to a reemployment plan, as prepared by a qualified rehabilitation provider and presented under Subsection (6)(e), an employee could immediately or without unreasonable delay return to work but for the following, an administrative law judge shall order that the employee be denied the payment of weekly permanent total disability compensation benefits:

(i) incarceration in a facility operated by or contracting with a federal, state, county, or municipal government to house a criminal offender in either a secure or nonsecure setting; or

(ii) not being legally eligible to be employed because of a reason unrelated to the impairment or combination of impairments.

(7) (a) The period of benefits commences on the date the employee became permanently totally disabled, as determined by a final order of the commission based on the facts and

evidence, and ends:

(i) with the death of the employee; or

(ii) when the employee is capable of returning to regular, steady work.

(b) An employer or its insurance carrier may provide or locate for a permanently totally disabled employee reasonable, medically appropriate, part-time work in a job earning at least minimum wage, except that the employee may not be required to accept the work to the extent that it would disqualify the employee from Social Security disability benefits.

(c) An employee shall:

(i) fully cooperate in the placement and employment process; and

(ii) accept the reasonable, medically appropriate, part-time work.

(d) In a consecutive four-week period when an employee's gross income from the work provided under Subsection (7)(b) exceeds \$500, the employer or insurance carrier may reduce the employee's permanent total disability compensation by 50% of the employee's income in excess of \$500.

(e) If a work opportunity is not provided by the employer or its insurance carrier, a permanently totally disabled employee may obtain medically appropriate, part-time work subject to the offset provisions of Subsection (7)(d).

(f) (i) The commission shall establish rules regarding the part-time work and offset.

(ii) The adjudication of disputes arising under this Subsection (7) is governed by Part 8, Adjudication.

(g) The employer or its insurance carrier has the burden of proof to show that medically appropriate part-time work is available.

(h) The administrative law judge may:

(i) excuse an employee from participation in any work:

(A) that would require the employee to undertake work exceeding the employee's:

(I) medical capacity; or

(II) residual functional capacity; or

(B) for good cause; or

(ii) allow the employer or its insurance carrier to reduce permanent total disability benefits as provided in Subsection (7)(d) when reasonable, medically appropriate, part-time work is offered,

but the employee fails to fully cooperate.

(8) When an employee is rehabilitated or the employee's rehabilitation is possible but the employee has some loss of bodily function, the award shall be for permanent partial disability.

(9) As determined by an administrative law judge, an employee is not entitled to disability compensation, unless the employee fully cooperates with any evaluation or reemployment plan under this chapter or Chapter 3, Utah Occupational Disease Act. The administrative law judge shall dismiss without prejudice the claim for benefits of an employee if the administrative law judge finds that the employee fails to fully cooperate, unless the administrative law judge states specific findings on the record justifying dismissal with prejudice.

(10) (a) The loss or permanent and complete loss of the use of the following constitutes total and permanent disability that is compensated according to this section:

- (i) both hands;
 - (ii) both arms;
 - (iii) both feet;
 - (iv) both legs;
 - (v) both eyes; or
 - (vi) any combination of two body members described in this Subsection (10)(a).
- (b) A finding of permanent total disability pursuant to Subsection (10)(a) is final.

(11) (a) An insurer or self-insured employer may periodically reexamine a permanent total disability claim, except those based on Subsection (10), for which the insurer or self-insured employer had or has payment responsibility to determine whether the employee remains permanently totally disabled.

(b) Reexamination may be conducted no more than once every three years after an award is final, unless good cause is shown by the employer or its insurance carrier to allow more frequent reexaminations.

(c) The reexamination may include:

- (i) the review of medical records;
- (ii) employee submission to one or more reasonable medical evaluations;
- (iii) employee submission to one or more reasonable rehabilitation evaluations and retraining efforts;
- (iv) employee disclosure of Federal Income Tax Returns;

(v) employee certification of compliance with Section 34A-2-110; and

(vi) employee completion of one or more sworn affidavits or questionnaires approved by the division.

(d) The insurer or self-insured employer shall pay for the cost of a reexamination with appropriate employee reimbursement pursuant to rule for reasonable travel allowance and per diem as well as reasonable expert witness fees incurred by the employee in supporting the employee's claim for permanent total disability benefits at the time of reexamination.

(e) If an employee fails to fully cooperate in the reasonable reexamination of a permanent total disability finding, an administrative law judge may order the suspension of the employee's permanent total disability benefits until the employee cooperates with the reexamination.

(f) (i) If the reexamination of a permanent total disability finding reveals evidence that reasonably raises the issue of an employee's continued entitlement to permanent total disability compensation benefits, an insurer or self-insured employer may petition the Division of Adjudication for a rehearing on that issue. The insurer or self-insured employer shall include with the petition, documentation supporting the insurer's or self-insured employer's belief that the employee is no longer permanently totally disabled.

(ii) If the petition under Subsection (11)(f)(i) demonstrates good cause, as determined by the Division of Adjudication, an administrative law judge shall adjudicate the issue at a hearing.

(iii) Evidence of an employee's participation in medically appropriate, part-time work may not be the sole basis for termination of an employee's permanent total disability entitlement, but the evidence of the employee's participation in medically appropriate, part-time work under Subsection (7) may be considered in the reexamination or hearing with other evidence relating to the employee's status and condition.

(g) In accordance with Section 34A-1-309, the administrative law judge may award reasonable attorney fees to an attorney retained by an employee to represent the employee's interests with respect to reexamination of the permanent total disability finding, except if the employee does not prevail, the attorney fees shall be set at \$1,000. The attorney fees awarded shall be paid by the employer or its insurance carrier in addition to the permanent total disability compensation benefits due.

(h) During the period of reexamination or adjudication, if the employee fully cooperates, each insurer, self-insured employer, or the Employers' Reinsurance Fund shall continue to pay the permanent total disability compensation benefits due the employee.

(12) If any provision of this section, or the application of any provision to any person or circumstance, is held invalid, the remainder of this section is given effect without the invalid provision or application.

History: C. 1953, 35-1-67, enacted by L. 1988, ch. 116, § 4; 1988 (2nd S.S.), ch. 12, § 1; 1991, ch. 136, § 12; 1992, ch. 53, § 2; 1994, ch. 266, § 2; 1995, ch. 177, § 2; renumbered by L. 1996, ch. 240, § 156; renumbered by L. 1997, ch. 375, § 121; 2005, ch. 261, § 1; 2006, ch. 295, § 5; 2008, ch. 27, § 2; 2008, ch. 349, § 3; 2009, ch. 158, § 1.

Repeals and Reenactments. - Laws 1988, ch. 116, § 4 repeals former § 35-1-67, as last amended by Laws 1985, ch. 160, § 1, relating to permanent total disability, effective July 1, 1988, and enacts the present section.

Amendment Notes. - The 2005 amendment, effective May 2, 2005, substituted "Before commencing the procedure required by Subsection (6)(a)" for "Prior to the finding becoming final" in Subsection (6)(b); added Subsection (6)(c); and made related and stylistic changes throughout the section.

The 2006 amendment, effective May 1, 2006, substituted "must prove" for "has the burden of proof to show" in the introductory clause in Subsection (1)(b) and rewrote the introduction to Subsection (1)(c), which read: "To find an employee permanently disabled, the commission shall conclude that."

The 2008 amendment by ch. 27, effective May 5, 2008, in (5)(a), added "Subject to Subsection (5)(b) and"; substituted (5)(a)(ii) and (iii) beginning with "benefits" for "benefits received by the employee during the same period"; added (5)(b); in (6)(e)(i), added "but not require an employee to pay for" and deleted "funded by the employer or its insurance carrier" from the end; in (7)(b), substituted "except that the employee may not be required to accept the work" for "provided that employment may not be required"; in (11)(b)(ii), (11)(b)(iii), and (11)(b)(vi), added "one or more"; in the second sentence of (11)(f)(i), substituted "The insurer or self-insured employer shall include with the petition" for "The petition shall be accompanied by"; and made related redesignations and stylistic changes.

The 2008 amendment by ch. 349, effective July 1, 2008, added (1)(e), the (2)(b)(i) designation, and (2)(b)(ii); in the introductory language of (2)(b)(i), added "subject to Subsection (2)(b)(ii)"; added the (6)(e)(i)(A) through (6)(e)(i)(E) designations; in (6)(e)(i), added "but not require an employee to pay for"; in (6)(e)(i)(E), deleted "funded by the employer or its insurance carrier" at the end; added (6)(g); in (11)(g), added "awarded"; and made related and stylistic changes.

The 2009 amendment, effective May 12, 2009, substituted "Chapter 8a" for "Chapter 8" in (6)(a)(i).

Legislative intent. - Laws 2006, ch. 295, which amended this section, provides in § 8 that the amendments are to be "interpreted as merely clarifying an existing principle that the employee bears the burden of proving that the employee is permanently totally disabled based on those factors listed as matters on which the commission is to make a conclusion in Subsection 34A-2-413 (1)(c), as enacted before the amendments of this bill."

NOTES TO DECISIONS

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Burden of proof.

Even before the 2006 amendments, the employee bore the burden of proof under Subsection (1)(c) because, when Subsections (1)(b) and (c) were read in context, it was clear that Subsection (1)(c) delineated elements that the employee was required to prove to meet his burden under Subsection (1)(b) of establishing that he was permanently totally disabled. *Martinez v. Media-Paymaster Plus*, 2007 UT 42, 578 Utah Adv. Rep. 20, 164 P.3d 384.

Commencement of benefits.

It is within the sound discretion of the commission to determine the commencement date of benefits

for total permanent disability so long as the determination is supported by substantial evidence and not patently unreasonable. *Oman v. Industrial Comm'n*, 735 P.2d 665 (Utah Ct. App.), cert. denied, 765 P.2d 1277 (Utah 1987). But see *Heaton v. Second Injury Fund*, 796 P.2d 676 (Utah 1990), noted under catchline "Permanent disability - Benefits," below.

Determination of character of disability.

Whether an employee is totally disabled or permanently disabled are ultimate matters to be decided by the commission, as is also amount and time compensation may be awarded upon all the evidence; and upon these ultimate questions expert witnesses may not properly express opinions, nor may such opinions relating to loss of bodily function become measure of compensable function possessed by an employee prior to his injury. *Spencer v. Industrial Comm'n*, 87 Utah 336, 40 P.2d 188, aff'd, 87 Utah 358, 48 P.2d 1120 (1935).

Where there had never been a determination by the commission that the injured employee was permanently disabled, and where he did not have injuries which entitled him to a conclusive presumption of permanent disability, whether or not he was permanently disabled is a question of fact to be decided by the commission on all the evidence after notice to and hearing of the parties. *Utah State Rd. Comm'n v. Industrial Comm'n*, 109 Utah 553, 168 P.2d 319 (1946).

Estoppel.

Although state insurance fund, the insurance carrier, apparently without any decision of the commission, voluntarily paid the medical and hospital expenses and \$16 per week to applicant for a period of six years from date of accident, defendant was not estopped from claiming that applicant was not totally and permanently disabled. *Crow v. Industrial Comm'n*, 104 Utah 333, 140 P.2d 321, 148 A.L.R. 316 (1943).

Evidence.

Commission could not overturn an administrative law judge's decision granting benefits on the sole basis of a vocational evaluation because the report, although admissible in the Commission's proceedings, was hearsay, and a residuum of other legally competent evidence was required to support rehabilitation. *Hoskings v. Industrial Comm'n*, 918 P.2d 150 (Utah Ct. App. 1996), cert. denied, 925 P.2d 963 (Utah 1996).

Final order.

Because an order to initiate temporary subsistence payments was based on the initial finding, it was not a "final order" from which an abstract could have been issued. While §§ 34A-1-303 and 34A-2-801 set forth a broad definition of what constitutes a final order, § 34A-2-413 excepts an initial finding of permanent total disability from the broad definition of "final order" by expressly stating that the initial, tentative finding is not final. (But see Subsection (6)(c), added in 2005.) *Thomas v. Color Country Mgmt.*, 2004 UT 12, 492 Utah Adv. Rep. 9, 84 P.3d 1201.

Interim order awarding the claimant permanent total disability was not final and appealable because a

reemployment plan had not been prepared by the employer and considered in accordance with this section. *Target Trucking v. Labor Comm'n*, 2005 UT App 70, 519 Utah Adv. Rep. 11, 108 P.3d 128.

Utah Labor Commission's finding that an employee was permanently totally disabled was a final agency action subject to judicial review because, although the finding was not final under this section until certain second-step proceedings occurred, it was a final agency action within the meaning of § 63-46b-14 (renumbered as § 63G-4-401). *Ameritemps, Inc. v. Utah Labor Comm'n*, 2007 UT 8, 569 Utah Adv. Rep. 24, 152 P.3d 298.

Findings.

Finding of commission upon ultimate fact of total and permanent disability, where evidence is conflicting, will not be disturbed on appeal. Commission is not bound by opinions of expert witnesses upon such question. *Kelly v. Industrial Comm'n*, 80 Utah 73, 12 P.2d 1112 (1932).

Where employee's leg was shorter than other, and he needed crutches to get about, commission's finding that he was not totally and permanently disabled was supported by evidence since loss of use of one limb is not a permanent total disability. *Mijat v. Industrial Comm'n*, 86 Utah 371, 44 P.2d 705 (1935).

If there is no substantial conflict in the evidence, an award of the commission as and for total and permanent disability will be sustained. *Caillet v. Industrial Comm'n*, 90 Utah 8, 58 P.2d 760 (1936).

Where committee of physicians examined claimant and found 75% disability in one arm and 25% in other, with which findings claimant's physician agreed but contended also that claimant was totally and permanently disabled, evidence did not compel finding of total permanent disability. *Johnson v. Industrial Comm'n*, 93 Utah 493, 73 P.2d 1308 (1937).

Order of the commission denying additional compensation on ground workman had not become totally and permanently disabled since original finding and award for temporary disability was affirmed although medical testimony was in conflict; failure to recover within six years after an accident is not conclusive that injury is permanent and total. *Spencer v. Industrial Comm'n*, 97 Utah 140, 91 P.2d 439 (1939).

Although there was substantial evidence from which the commission could reasonably find that the applicant was not totally and permanently disabled, the case was reversed inasmuch as the only commissioner who heard the evidence did not participate in the decision. *Crow v. Industrial Comm'n*, 104 Utah 333, 140 P.2d 321, 148 A.L.R. 316 (1943).

Injuries.

- Arm.

Where there was no complete and permanent loss or loss of use of both arms so that claimant would be permanently disabled as matter of law, it was for commission to decide from all the facts and circumstances in evidence whether he was so disabled. *Johnson v. Industrial Comm'n*, 93 Utah 493, 73 P.2d 1308 (1937).

- Eye.

Injury to vision of employee from electric flash was not permanent total disability within this section. *Moray v. Industrial Comm'n*, 58 Utah 404, 199 P. 1023 (1921).

- Multiple.

A motorman, 64 years old at the time he was injured while uncoupling cars on an underground railroad in a mine, who lost his leg and suffered additional injuries including fracture of shoulder blade, dislocation of breastbone-collarbony joint, severe internal injuries to the chest and lung, including comminuted fractures of ribs three through seven on right side with attending traumatic pneumonia, and injuries to the scrotum and perineum, was entitled to compensation on basis of total and permanent disability. *United Park City Mines Co. v. Prescott*, 15 Utah 2d 410, 393 P.2d 800 (1964).

Law in effect.

The law in effect when the injury was sustained governs the amount of the award for a permanent total disability. *Utah State Rd. Comm'n v. Industrial Comm'n*, 109 Utah 553, 168 P.2d 319 (1946).

An administrative rule promulgated after claimant's industrial accident, but before claimant's application for a hearing in the matter, which purports to modify this section by adding a quantitative requirement to the causation of the disability analysis when an injured worker has already qualified for Social Security disability benefits, could not be applied retroactively. Rather, the board should have applied this section, the law existing at the time of claimant's injury. *Abel v. Industrial Comm'n*, 860 P.2d 367 (Utah Ct. App. 1993).

Maximum benefits.

Plaintiff, who received temporary total disability compensation commencing with the date of his injury and later was paid permanent total disability benefits prior to his return to work, was not entitled to maximum compensation for both temporary total and permanent partial disability but was entitled only to permanent partial disability benefits subject to the limitations set forth in this section. *Johnson v. Harsco/Heckett*, 737 P.2d 986 (Utah 1987).

Odd-lot doctrine.

When an employee demonstrates that he can no longer perform his normal duties as a result of a work-related accident, and that he cannot be rehabilitated, the burden shifts to the employer to prove that suitable, steady work is available, considering the age, mental capacity, and education of the employee, in order to preclude a determination of total and permanent disability under the odd-lot doctrine. *Marshall v. Industrial Comm'n*, 681 P.2d 208 (Utah 1984).

For discussion of the odd-lot doctrine, see *Hardman v. Salt Lake City Fleet Mgt. & Second Injury Fund*, 725 P.2d 1323 (Utah 1986); *Zimmerman v. Industrial Comm'n*, 785 P.2d 1127 (Utah Ct. App. 1989); *Smith v. Mity Lite*, 939 P.2d 684 (Utah Ct. App. 1997), cert. granted, 945 P.2d 1118 (Utah 1997).

Employee presented a prima facie case entitling him to permanent total disability benefits under the odd-lot doctrine, where the record was replete with evidence that he was unable to perform the normal duties of his occupation, that he required the aid of his fellow employees who performed the bulk of his work for him, and that he suffered continual pain as a result of his industrial injuries. *Peck v. Eimco Process Equip. Co.*, 748 P.2d 572 (1987).

For the odd-lot doctrine to apply, the commission must first determine that there is medical causation between the petitioner's industrial accident and his now-claimed permanent total disability. *Zupon v. Industrial Comm'n*, 860 P.2d 960 (Utah Ct. App. 1993).

Other work.

The question of whether other work is "reasonably available" is a factual determination. The Labor Commission must determine if other work is reasonably available, taking into consideration the employee's age, education, past work experience, medical capacity, and residual functional capacity. *Martinez v. Media-Paymaster Plus*, 2007 UT 42, 578 Utah Adv. Rep. 20, 164 P.3d 384.

Permanent disability.

If injured employee's earning power is wholly and permanently destroyed, and because of his injuries he is incapable of performing remunerative employment, such employee is permanently totally disabled and to make out a case of total disability, the employee is not required to show that he is incapacitated from performing any and all kinds of work. He is required, however, to put forth an active effort to procure such employment as he is able to perform, for if injured employee is not prevented from securing and retaining employment because of his injuries, and if he can perform the duties of such employment without pain or suffering and without unduly endangering his health, life, or limb, the employee is not totally disabled. *Spring Canyon Coal Co. v. Industrial Comm'n*, 74 Utah 103, 277 P. 206 (1929).

An injured employee is not permanently and totally disabled if, by putting forth a reasonable effort, he is able to prepare himself by training or otherwise to secure and retain remunerative employment. Accordingly, a disability which may be overcome by a reasonable effort is not permanent, and it is the duty of an injured employee, just as it is the duty of every person sustaining an injury, to put forth a reasonable effort to minimize his injury. If, however, that injured employee cannot by training or otherwise secure and retain remunerative employment, the injured employee is excused from exerting an effort which of necessity must result in failure. *Utah Fuel Co. v. Industrial Comm'n*, 76 Utah 141, 287 P. 931 (1930).

A moron was regarded as having been permanently and totally disabled where he was rendered unfit to perform manual labor, and because of his mental condition was incapable of learning a trade which would fit him for employment in any line of industry. *Utah Fuel Co. v. Industrial Comm'n*, 76 Utah 141, 287 P. 931 (1930).

Where evidence conclusively shows that employee is permanently and totally disabled from either securing or performing work of the general character that he was performing when injured, he by such evidence establishes a prima facie case; and in the absence of any showing that he is able to secure and perform work of a special nature not generally available, he is, as a matter of law, entitled to an award as and for permanent total disability. *Caillet v. Industrial Comm'n*, 90 Utah 8, 58 P.2d 760 (1936).

Rule that there is permanent and total disability as a matter of law when it appears that applicant for compensation cannot secure or perform work of general character he has been doing, and there is no

showing that he is able to secure and perform work of a special nature not generally available, does not operate where specific compensation for loss of a member or function of a member is provided by statute for permanent partial disability. *Babick v. Industrial Comm'n*, 91 Utah 581, 65 P.2d 1133 (1937).

Award on basis of total and permanent disability is justified where workman's injuries precluded his doing any work requiring that he walk, stand, or sit for long periods of time, and he was not of sufficient mental training to enable him to rehabilitate himself in purely mental work. *Carbon Fuel Co. v. Industrial Comm'n*, 92 Utah 410, 68 P.2d 894 (1937).

- Benefits.

Employee who was totally and permanently impaired from the time of his injury in 1975 to the time when permanent partial payments terminated, when it had been stipulated that referral to the division of vocational rehabilitation was unnecessary, was entitled to permanent total benefits on termination of the permanent partial benefits. *Heaton v. Second Injury Fund*, 796 P.2d 676 (Utah 1990).

Prior accidents contributing to disability.

Employee who was permanently and totally disabled due to a combination of prior and present accidents was entitled to lifetime benefits payable from the special fund provided for in § 35-1-68. *McPhie v. Industrial Comm'n*, 567 P.2d 153 (Utah 1977).

Proceedings before commission.

In proceeding before commission, doctors may testify as to amount of functional disability of bodily member of human being and impairment person would suffer in ordinary and common activities of life, but not as to percentage of industrial or economic impairment consequent on loss of certain physical functions unless it is clear they know what bodily activities or functions a vocation or work embraces, and they cannot testify as to ultimate question as to whether applicant is economically totally disabled. *Price v. Industrial Comm'n*, 91 Utah 152, 63 P.2d 592 (1937).

Refusal to submit to operation.

Finding of commission that employee was permanently and totally disabled was sustained by evidence, and by refusing to submit to operation employee did not lose his right to compensation where employee had undergone three major operations which did not prove successful and there was no definite assurance that another would result differently. *Standard Coal Co. v. Industrial Comm'n*, 81 Utah 118, 16 P.2d 926 (1932).

Review of plan.

In requiring a "review" of an employer's reemployment plan (see Subsection (6)(a)(iii)), the Legislature intended an independent evaluation and approval of the plan. *Color Country Mgmt. v. Labor Comm'n*, 2001 UT App 370, 38 P.3d 969, cert. denied, 42 P.3d 951 (Utah 2002), *aff'd sub nom. Thomas v. Color*

Country Mgmt., 2004 UT 12, 84 P.3d 1201.

Standard of review.

The question of whether an employee can perform the "essential functions" of prior employment is a factual determination that should be overturned on appeal only if substantial evidence fails to support it. *Martinez v. Media-Paymaster Plus*, 2007 UT 42, 578 Utah Adv. Rep. 20, 164 P.3d 384.

Statute of limitations.

This section governs permanent total disability claims and contains no statute of limitations for such claims; therefore, where employee suffered an injury in October of 1961 and notice of injury and claim was properly given and filed in accordance with requirements of former §§ 35-1-99 and 35-1-100, and employee was found to have suffered permanent partial disability and received 40 weeks of compensation through December of 1964 and payment of medical bill through 1966, employee's claim filed in December of 1982 for permanent total disability resulting from the slow deterioration of a condition caused by 1961 injury was timely filed under this section and, under § 35-1-78, commission had continuing jurisdiction to award permanent total disability compensation. *Mecham v. Industrial Comm'n*, 692 P.2d 783 (Utah 1984).

Total disability.

Although employee is incapacitated from performing the kind of labor required in his former employment, if he is able to perform the work of some other employment, he is not totally disabled. *Spring Canyon Coal Co. v. Industrial Comm'n*, 74 Utah 103, 277 P. 206 (1929).

If employee suffers an injury which permanently and totally disables him, he is entitled to the compensation provided for in the act without regard to his physical or mental condition before he received such injury. *Utah Fuel Co. v. Industrial Comm'n*, 76 Utah 141, 287 P. 931 (1930).

Workman may be found totally disabled if by reason of the disability resulting from his injury he cannot perform work of the general character he was performing when injured or any other work which a man of his capabilities may be able to do or learn to do. *United Park City Mines Co. v. Prescott*, 15 Utah 2d 410, 393 P.2d 800 (1964).

Employee, who was almost 60, with a limited education and an even more limited work background, presented a prima facie case of tentative permanent total disability, where he suffered from headaches and dizziness after sustaining a skull fracture, and despite his employer's contentions that it offered various jobs to employee, the record was devoid of any concrete evidence that he was offered work of the general nature that he had been performing. *Hardman v. Salt Lake City Fleet Mgt. & Second Injury Fund*, 725 P.2d 1323 (Utah 1986).

- Question of fact.

The question of whether an employee was totally and permanently disabled was one of fact to be decided by the commission, upon all of the evidence in the case. *Kerans v. Industrial Comm'n*, 713 P.2d 49 (Utah 1985).

Cited in *Booms v. Rapp Constr. Co.*, 720 P.2d 1363 (Utah 1986); *American Roofing Co. v. Industrial Comm'n*, 752 P.2d 912 (Utah Ct. App. 1988); *Large v. Industrial Comm'n*, 758 P.2d 954 (Utah Ct. App. 1988); *Ortiz v. Industrial Comm'n*, 766 P.2d 1092 (Ct. App. 1989).

COLLATERAL REFERENCES

Journal of Contemporary Law. - Note, *Peck v. Eimco Process Equip. Co.*: At Odds over the Odd-Lot Doctrine, 15 J. Contemp. L. 111 (1989).

C.J.S. - 100 C.J.S. Workers' Compensation §§ 567 to 572.

A.L.R. - Workers' compensation: vocational rehabilitation statutes, 67 A.L.R.4th 612.

Tab 2

APPENDIX 2

Utah Rules of Administrative Procedure - Rule 602-2-2

R602-2-2. Guidelines for Utilization of Medical Panel.

Rule text

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

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

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

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

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

Tab 3

APPENDIX 3

Medical Panel Report - August 1, 2005.

August 1, 2005

Hon. Richard M. La Jeunesse
Administrative Law Judge
Utah Labor Commission
160 East 300 South, 3rd Floor
Salt Lake City, UT 84114

RE: Lex Brady Case No.: 2003948

Dear Judge La Jeunesse,

I am in receipt of your letter dated November 3, 2004, concerning the above-referenced matter. The delay in response to your letter has been caused by a number of factors. End of year schedule conflicts prevented the medical panel from convening for this case prior to the first of the current year. The medical panel met with Mr. Brady on February 3, 2005, with a follow-up encounter on February 15, 2005. The initial evaluation occurred at the office of Dr. Dennis Gordon, located at 1151 East 3900 South, Suite B-175, Salt Lake City, UT 84124. Both members of the medical panel considered this case to be complex and both have invested considerable time over a number of months in reviewing the documentation and questions presented. I have within the past few days received Dr. Gordon's written opinions concerning this matter. Prior to the begin of the initial interview and examination, I informed Mr. Brady that members of the medical panel were not acting as his personal or treating physicians, but were instead responding to your request for answers to specific questions posed in your letter of 11/3/04. I explained that the medical panel opinion would be submitted to your office in writing. Mr. Brady articulated his understanding of and agreement to the terms of the medical panel evaluation. This letter is the complete and consensus report of the medical panel. Opinions contained in this report are rendered to a reasonable degree of medical probability.

The medical panel answers the questions contained in your letter of 11/3/04 as follows:

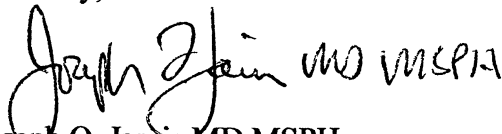
- 1) Question: Please identify individually and with specificity each medical problem caused Lex Brady by the industrial accident of January 24, 2001. Answer: a) Fracture of the L5 pedicle with disc protrusion at L5-S1; b) aggravation of pre-existing lower cervical spine (C5-T1) problems, magnifying pain related to muscle spasm and degenerative disease. The medical panel specifically finds evidence that Mr. Brady had post-operative cervical spine problems (non-union at C5-6, C6-7) and no evidence of a fracture due to the incident on 1/24/01. The medical records contain no evidence indicating injuries to the shoulders, thoracic spine, knees, or elbows related to the incident on 1/24/01. Finally, the medical panel finds no evidence that Mr. Brady's hypoxia should be considered a consequence of the incident on 1/24/01. The right hemi-diaphragm is clearly elevated well before 2001. There is evidence that phrenic nerve function is intact. Mr. Brady does have obstructive pulmonary disease of longstanding (asthma). He

has been using opioid medication for some time, which likely leads to reduced pulmonary drive (at least one measure of hypoventilation is the pCO₂, which has been elevated at 48 in Mr. Brady's case). While it is true that the incident on 1/24/01 did likely increase pain problems for Mr. Brady, the clinical records in this case indicate that difficulties in management of the overall pain problems and onset of the hypoxia occurred after the auto accident of 12/01. Therefore, the medical panel finds it likely that Mr. Brady would not have encountered hypoxia absent the auto accident in December 2001.

- 2) Question: For each medical problem identified in your answer to No. 1 above, please state in detail the physical and functional restrictions medically caused Lex Brady by the specific medical problem identified. Answer: The record is clear that Mr. Brady remained fully employed after the industrial accident, though likely with increased discomfort related to the spinal problems noted above. Therefore, the medical panel finds that Mr. Brady likely had no significant physical and functional restrictions caused by the incident of 1/24/01 over and above those he had experienced prior thereto.
- 3) Question: For each medical problem identified in your answer to question No. 1 above, please calculate the appropriate impairment caused Lex Brady by the specific medical problem identified. Answer: a) cervical spine: Utah 2002 Impairment Guide, Schedule 1, Category 1C, medically documented injury and subjective symptoms per se seen for a minimum of six months with a clinical history of significant injury event. May have evidence of moderate to severe degenerative changes including spondylosis. Should have permanent activity restrictions. 5% whole man impairment. b) lumbar spine: Utah 2002 Impairment Guide, Category 1D: medically documented injury and subjective symptoms persisting for a minimum of six months, including imaging evidence of identifiable disc herniation, displaced nervous tissue; treated without surgery with permanent activity restrictions: 7% whole man impairment. The Combined Values Chart (AMA Guides) indicates that these two impairments, taken together, equal a whole man impairment of 12%.

I trust that these answers provide you with the currently needed information. If further information is required, please do not hesitate to contact me.

Sincerely,



Joseph Q. Jarvis MD MSPH
Medical Panel Chair

Tab 4

APPENDIX 4

Findings of Fact, Conclusions of Law, and Order
November 29, 2005.

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

LEX L. BRADY,

Petitioner,

vs.

YOUNG ELECTRIC SIGN CO.,

Respondent,

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

Case No. 2003948

Judge Richard M. La Jeunesse

HEARING: Room 334 Labor Commission, 160 East 300 South, Salt Lake City, Utah,
on April 19, 2004 at 1:00 p.m. Said Hearing was pursuant to Order and
Notice of the Commission.

BEFORE: Richard M. La Jeunesse, Administrative Law Judge.

APPEARANCES: The petitioner, Lex L Brady, was present and represented by his attorney
Phillip Shell Esq.

The respondent, Young Electric Sign Co. (YESCO), was represented by
attorney James R. Black Esq.

I. STATEMENT OF THE CASE.

The petitioner, Lex L. Brady, filed an Application for Hearing with the Utah Labor Commission on September 24, 2003, and claimed entitlement to permanent total disability compensation. Mr. Brady's claim for workers' compensation benefits arose out of an industrial accident that occurred on January 24, 2001.

The respondents stipulated that Mr. Brady was permanently and totally disabled. However, the respondents denied that Mr. Brady's industrial accident on January 24, 2001 medically caused the injuries that left him permanently and totally disabled. The respondents argued that Mr. Brady suffered preexisting or subsequent medical problems unrelated to his industrial accident of January 24, 2001 that directly caused his permanent and total disability.

II. ISSUE.

Did the industrial accident of January 24, 2001 cause the medical problems that in turn left Lex Brady permanently and totally disabled?

III. COURSE OF PROCEEDINGS.

Mr. Brady filed his Application for Hearing with the Utah Labor Commission on September 24, 2003. I held an evidentiary hearing in this matter on April 19, 2004. At the request of the parties I left the evidentiary record open for 30 days in order to receive some additional records from Dr. Jane Clark M.D.

On October 7, 2004 I issued my Interim Findings of Fact, Conclusions of Law and Order. Also on October 7, 2003 I sent the parties my proposed Medical Panel Referral and allowed them 15 days to file objections to the form of the letter. November 3, 2004 I sent the Medical Panel Referral to the appointed Medical Panel..

The Medical Panel filed a report on August 2, 2005. I sent the Medical Panel Report to the parties on August 3, 2005 and allowed them 15 days to file objections to the admissibility of the report. Mr. Brady filed his objections to the Medical Panel Report on August 18, 2005.

IV. FINDINGS OF FACT.

A. Employment.

Young Electric Sign Co. employed Mr. Brady from November 30, 1992, to June 6, 2003.

B. Compensation Rate.

At the time of the accident in issue, Mr. Brady was married, but had no dependent children less than 18 years of age. Mr. Brady's testimony provided the unrefuted evidence concerning his wages with YESCO. Mr. Brady's compensation with YESCO at the time of the accident in issue equaled \$18.00 per hour, 40 hours per week average, for the maximum permanent total disability compensation rate of \$450.00 per week. [$\$18.00/\text{hour} \times 40 \text{ hours/week} = \$720.00/\text{week} \times 2/3 = \$480.00/\text{week} + \$5.00/\text{week} = \$485.00/\text{week}$].

C. January 24, 2001 Industrial Accident.

Mr. Brady's testimony provided the lone, un rebutted, evidentiary account of his January 24, 2001 industrial accident. Mr. Brady worked as a sign installer for YESCO. Mr. Brady routinely worked on crews that installed building signs, billboards, and other outdoor signs.

On January 24, 2004 Mr. Brady worked for YESCO removing a sign from a Conoco station in Orem, Utah. The sign being removed by Mr. Brady and his crew at the Conoco station measured 30' x 10' and weighed one ton.

Mr. Brady located in the basket of a man-lift supervised the sign removal. The crew first hooked the sign to the rigging of a crane. The crew then cut the pole supporting the sign. The sign did not immediately break loose. Mr. Brady still in the basket of the man-lift approached the center of the pole and began to hit it with a 5 lb. Sledge hammer. The one ton sign swung loose from the pole and hit Mr. Brady in the chest. The sign bent Mr. Brady backward in the basket and pinned him for 30 seconds. Mr. Brady estimated that he supported 500 pounds of the sign's weight on his chest while pinned in the basket.

Mr. Brady complained that during the incident on January 24, 2001, his whole body felt numb. Mr. Brady then experienced pain in his neck, shoulders, and low back. Mr. Brady missed no work immediately following his January 24, 2001 industrial accident. But, as time progressed Mr. Brady's pain increased, and he experienced breathing difficulties to the point that he could no longer work as of June 6, 2003.

D. Lex Brady's Medical Problems Prior to January 24, 2001.

1. Cervical Spine Problems.

While Mr. Brady drove his ¾ ton Ford pick-up truck in August of 1996 a Jeep CJ hit him head on at about 20 miles per hour. Mr. Brady sustained neck and bi-lateral shoulder problems after the 1996 motor vehicle collision. A CT scan of Mr. Brady's cervical spine taken on December 19, 1996 disclosed:

Broad disk bulging with possible protrusion seen centrally and to the left at C4-C5 and centrally and to the right at C5-C6 and C6-C7 as above. [Exhibit "J-1" at 287].

On January 21, 1997 Dr. John MacFarlane M.D. diagnosed Mr. Brady with: "C5-C6, C6-C7 herniated nucleus pulposes." [id. At 318]. The same day Dr. MacFarlane operated on Mr. Brady and performed an:

[a]nterior cervical discectomy and fusion with bank bone grafting and Synthes Plating at C5-C6 and C6-C7. [id.].

On October 12, 1998 Dr. Duane Blatter M.D. conducted an MRI scan of Mr. Brady's cervical spine that revealed in addition to his fusion from C5 to C7:

Degenerative disc disease at C4-5. No definite disc herniation is appreciated although there is a superior margin osteophyte on the left side at C5 does slightly indent the central surface of the cord. [id. At 62].

On October 13, 1998 Dr. Stephen Warner M.D. examined Mr. Brady and observed that:

His plain films demonstrate backing out of the lower screws of his anterior cervical plate.

At C4-C5 there is a diffuse intervertebral disc bulge without significant central canal stenosis ... There is some foraminal narrowing noted. The disc is desiccated and collapsed. [id. At 32].

On November 30, 1998 Dr. Warner surgically addressed Mr. Brady's cervical problems with:

PROCEDURE PERFORMED: 1. Removal of anterior cervical plate C-5 to C-7.
2. Exploration of anterior cervical fusion C-5 to C-7, with solid arthrodesis found at the time of exploration.
3. Anterior cervical discectomy at C-4/C-5.
4. Harvesting right tricortical iliac strust graft.
5. Anterior cervical fusion C-4/C-5 using tricortical iliac crest graft. [id. at 55].

On March 1, 1999 Dr. Warner observed that Mr. Brady "[i]s going to have chronic problems with ... his cervical spine" [id. at 24]. The undisputed medical evidence in this case verified significant cervical spine problems suffered by Mr. Brady prior to January 24, 2001 that resulted in cervical spinal fusions from C4 to C7.

2. Low Back Problems.

On November 3, 1998 Dr. Warner noted:

I reviewed the MRI scan as well as plain films. He has progressive disc space collapse at the L4-5 level. [Exhibit "J-1" at 30].

Accordingly, the medical evidence in this confirmed problems with Mr. Brady's lumbar spine at the L4-5 level prior to January 24, 2001.

3. Right Upper Extremity Problems.

On June 30, 1994 Dr. Scott Sheridan M.D. recorded that Mr. Brady:

[h]as a right shoulder problem ... dates back to about a month ago when he apparently dislocated the shoulder transiently while lifting a bale of hay. [Exhibit "J-1" at 143].

On February 5, 1996 Dr. Odell Rigby M.D. diagnosed Mr. Brady with a "2-year history of bilateral epicondylitis." [id. at 571]. On May 7, 1996 Dr. Sheriden confirmed the diagnosis that Mr. Brady suffered from "Right lateral epicondylitis."

On September 19, 1996 Dr. John Rizzi M.D. took an MRI of Mr. Brady's right shoulder that disclosed: "Thinning of the supraspinatus tendon suspicious for partial thickness tear. [id. at 186]." On August 2, 1997 Dr. Warner evaluated Mr. Brady and concluded:

He has right rotator cuff tendonitis clearly seen on the MRI scan. He also has significant right AC arthritis as well as a ganglion cyst sitting in the corner of the scapula. [id. at 48].

On January 22, 1998 Dr. Warner approached Mr. Brady's right shoulder surgically who:

[u]nderwent an open reduction and internal fixation of his acromium fracture followed by a subacromial decompression. [id. at 66].

Dr. Warner postoperatively diagnosed Mr. Brady's right shoulder with:

1. Impingement syndrome.
2. Intact rotator cuff.
3. Right acromium fracture nonunion. [id. at 703].

On May 19, 1998 Dr. Hugh West also operated on Mr. Brady's right shoulder performing:

1. Diagnostic arthroscopy.
2. Right distal clavicle resection. [id. at 698].

Dr. West postoperatively diagnosed Mr. Brady with:

1. Right AC joint arthritis.
2. Right Acromium nonunion. [id.].

On October 13, 1998 Dr. Warner determined that Mr. Brady's "[r]ight shoulder pain is secondary to the acromium fracture." [id. at 32]. An MRI taken of Mr. Brady's right shoulder on February 27, 1999 revealed postoperative metallic artifacts and:

Findings consistent with synovial inflammation of subacromial/subdeltoid bursa. Infraspinatus/supraspinatus tendonitis without full-thickness tendon tear.... [id. at 65].

On March 1, 1999 Dr. Warner observed that Mr. Brady “[i]s going to have chronic problems with ... his right shoulder.” [id. at 24]. On December 27, 2000 Dr. Sheriden confirmed that Mr. Brady suffered from chronic arm pain. [id. at 82].

The uniform medical evidence in this case established that prior to January 24, 2001 Mr. Brady suffered chronic right arm and shoulder pain resultant from: (1) right lateral epicondylitis; (2) right rotator cuff tendonitis; (3) right AC arthritis, and a right acromium fracture nonunion.

4. Left Upper Extremity Problems.

On February 5, 1996 Dr. Rigby diagnosed Mr. Brady with a “2-year history of bilateral epicondylitis.” [Exhibit “J-1” at 571]. On August 10, 2000 Dr. Sheriden verified the diagnosis of left lateral epicondylitis.”

O September 14, 2000 Dr. Warner annotated an event where Mr. Brady:

[f]ell out of his basket at work approximately 1 month ago sustaining an injury to his left wrist and elbow.

IMPRESSION: 1. Left wrist pain. He is tender over the first dorsal compartment and this most likely represents de Quervain’s disease: however, I cannot rule out intercalary instability of the left wrist following traumatic injury.
2. Left extension tendonitis. [id. at 18].

The uncontradicted medical evidence in this case substantiated the fact that Mr. Brady had left lateral epicondylitis prior to January 24, 2001.

5. Respiration Problems.

On June 30, 1994 Dr. Sheridan recorded that Mr. Brady suffered from “asthma with marginal control.” [Exhibit “J-1” at 143]. On June 21, 1999 Dr. Sheridan noted that Mr. Brady was then on oxygen. [id. at 100]. On January 4, 2000 Dr. Sheridan assessed Mr. Brady with:

1. URI with unusual nocturnal shortness of breath of unknown significance.
2. Asthma.

Lab Data: Pulse oximetry on room air is 89 to 91%. [id. at 94].

On June 14, 2000 Dr. Sheridan determined that Mr. Brady's asthma lacked adequate control. [id. at 89]. In sum, the medical records established that prior to January 24, 2001 Mr. Brady suffered from poorly controlled asthma and nocturnal shortness of breath that required the use of oxygen.

E. Lex Brady's Medical Problems Caused by the January 24, 2001 Industrial Accident.

1. Cervical Spine Problems.

On January 24, 2001 Mr. Brady went to see Dr. Tom Schuman M.D. with respect to his industrial accident that day. Dr. Schuman recorded Mr. Brady's complaints of neck pain. On February 12, 2001 Mr. Brady went back to his regular treating physician Dr. Sheridan who diagnosed him with: "Chronic neck and shoulder pain with recent injury." [Exhibit J-1" at 80].

On March 1, 2001 Dr. Terry Sawchuck examined Mr. Brady and concluded:

[w]ork related accident, which occurred on approximately January 24, 2001.
IMPRESSION: 1. Subacute cervical sprain/strain.
2. Chronic cervicalgia or neck pain.
3. Status post cervical discectomy and anterior interbody fusion at C5-5 and C6-7 with anterior plating in January 1977.
4. Status post anterior cervical discectomy at C4-5 with interbody fusion using allograft ... November 1998. [id. at 173].

On March 10, 2001 Dr. William Halden M.D. took an MRI scan of Mr. Brady's cervical spine that showed:

1. Anterior fusion at the C4-5 level.
2. A plate and screw fixation device across the C5-6 and C6-7 disc spaces seen ... has been removed. There is no definite bony fusion across these disc levels.
3. There is some degenerative disc change at the C6-7 and to a milder degree C7-T1 levels. There is mild narrowing of the right C6-7 neural foramen. There is no central canal stenosis at any level. [id. at 254].

On April 17, 2001 Dr. Warner evaluated Mr. Brady and determined:

The patient has had a significant increase in his neck pain since the industrial accident. When I look through the current cervical spine films compared to the previous cervical spine films, the patient now clearly has a pseudoarthrosis at the C5-6 and C6-7 levels. When I performed removal of the loose plate and the C4-5 fusion, the patient had anterior bridging bone at both C5-6 and C6-7. I believe that the patient sustained a fracture through the fusion at C5-6 and C6-7 directly related to the industrial accident. He now has developed a large anterior callous

at C5-6 which was not seen on previous x-rays. This suggests an attempt by Lex's body to heal the C5-6 level. Again there is clear motion at C5-6 and C6-7. [id. at 461].

On April 25, 2001 Dr. Sawchuck diagnosed Mr. Brady with a:

Cervical disc protrusion and cervical radicular syndrome and status post cervical fusion. [id. at 243].

On December 26, 2001 Mr. Brady had another motor vehicle accident when a car ran a red light and hit Mr. Brady's ¾ ton Ford pick-up truck. Mr. Brady wore no seat belt and hit his head on the truck cab interior roof. Mr. Brady acknowledged that the December 26, 2001 automobile accident aggravated his neck pain. On January 24, 2002 Dr. Warner recounted that: "Since the motor vehicle accident on December 26, 2001, the patient has had marked increase in neck pain...." [id. at 477].

On February 21, 2002 Mr. Brady underwent another cervical spine MRI at the hands of Dr. Steven Hunt M.D. that demonstrated:

IMPRESSION: 1. Anterior fusion C4-5, this appears solid.
2. Postoperative changes C5-6 and C6-7, with degenerative changes. No central spinal stenosis at these levels.
3. C7-T1 demonstrative mild degenerative change with broad-based grade I disc bulge. [id. at 236].

On October 7, 2003 Dr. Warner recorded:

I repeated a lateral x-ray of the cervical spine. Where he had the fracture through the fusion at C5-6 with a large amount of callous appears to have healed. This further supports the contention that he refractured the C5-6 level. [id. at 324].

On April 1, 2004 Dr. Jane Clark M.D. evaluated Mr. Brady and opined:

It appears that none of Mr. Brady's treating physicians have appreciated that he has had a small spinal cord syrinx, at least as early as 8/98. It is most likely that this syrinx occurred just after the 1996 MVA or that it was congenital. This syrinx can account for the pain in his neck and upper back and scapular area, and the resolved sensory deficit that Dr. Warner noted in his upper thoracic region. It possibly could account for some of his shoulder pains as well, particularly when they couldn't really be influenced by Dr. Sawchuck's injections. [id. at 11].

Dr. Clark found that the following problems preexisted Mr. Brady's industrial accident on January 24, 2001:

Cervical degenerative disc and facet disease with attempted fusions of C5-6 and C6-7 on 1/21/97. subsequently the screws loosened which caused more swallowing problems. They were removed in 11/98.

Dr. Clark stated that Mr. Brady's January 24, 2001 industrial accident "[l]ikely strained his nonfusion levels of C5-6 and C6-7." [id. at 13]. Dr. Clark also concluded that Mr. Brady's motor vehicle accident on December 26, 2001 "caused worse neck ... problems." [id. at 14].

Dr. Warner provided a rebuttal to Dr. Clark's opinions wherein he opined:

I believe 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 stimulus to lead to the fusion of the C5-C6 level. The patient still has a failure of the fusion at the C6-C7 level ... It is my contention that the patient sustained a fracture through these fusions in the industrial accident of January 24, 2001. [id. at 323A-B].

Dr. Warner went on to state that he reviewed Mr. Brady's cervical MRI's with two other neurosurgeons who all concluded that with respect to the variant observed as a syrinx by Dr. Clark "[i]t is an insignificant finding." [id. at 323B]. Dr. Warner determined that "[i]f this indeed represented a syrinx, it would be asymptomatic." [id.].

On August 2, 2005 the Medical Panel filed a report. The Medical Panel consisted of the chair, Dr. Joseph Jarvis M.D. an occupational medicine specialist, and Dr. Dennis Gordon M.D., an orthopedic surgeon. The Medical Panel determined that Mr. Brady's industrial accident on January 24, 2001 caused an:

Aggravation of pre-existing lower cervical spine (C5-T1) problems, magnifying pain related to muscle spasm and degenerative disease. [Medical Panel Report p. 1 ¶ 1.b.].

I found the Medical Panel Report well considered and supported by other medical evidence in the record. Consequently, the preponderance of the medical evidence in this case established that Mr. Brady's industrial accident on January 24, 2001 caused an:

Aggravation of pre-existing lower cervical spine (C5-T1) problems, magnifying pain related to muscle spasm and degenerative disease.

2. Low Back problems.

On March 1, 2001 Dr. Sawchuck diagnosed Mr. Brady in relevant part with:

6. Myofascial type pain.
7. Acute lumbar sprain/strain.
8. lumbar radicular syndrome. [id. at 173].

On March 10, 2001 Dr. Holden took an MRI scan of Mr. Brady's lumbar spine that revealed:

IMPRESSION: 1. Grade I-II right posterolateral broad based disc protrusion at the L5-S1 level touching but not displacing the descending S1 root.
2. Some disc degenerative change at the L3-4, L2-3, and L1-L2 levels ... no central canal stenosis or neural impingement at any level.
3. Mild facet degenerative arthritic change bilateral at the L4-5 and L5-S1 levels.
[id. at 177].

On April 2, 2001 Dr. Sawchuck assessed Mr. Brady with "Lumbar disc protrusion and lumbar radicular syndrome." [id. at 248]. On April 17, 2001 Dr. Warner concluded that: "The industrial accident precipitated symptoms of low back pain." [id. at 462]. Dr. Hunt did another MRI of Mr. Brady's lumbar spine on June 6, 2002 that showed:

IMPRESSION: 1. Multilevel degenerative disc and facet changes particularly at L4-5 on the right.
2. Unusual sclerotic appearing region in the right L5 pedicle....

L5-S1 ... There is a grade I right posterolateral disc bulge with possible annular tear. No frank disc herniation. [id. at 227].

On July 1, 2002 Dr. Jerry Handly M.D. conducted a bone scan on Mr. Brady's lumbar spine that disclosed:

IMPRESSION: 1. focal increased activity in the region of the right pedicle and facet at the L5 level consistent with an occult fracture at this site. [id. at 225].

On July 31, 2002 Dr. Sawchuck reviewed the bone scan results and concurred that Mr. Brady had "[s]ome type of fracture at L5 on the right side in the pedicle region." [id. at 223]. In her report of April 1, 2004 Dr. Clark assayed that Mr. Brady had "Lumbar degenerative disc disease" prior to his industrial accident on January 24, 2001. [id. at 12]. However, Dr. Clark 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 L5 pedicle." [id.].

The Medical panel concurred that Mr. Brady's industrial accident on January 24, 2001 caused a "Fracture of the L5 pedicle with disc protrusion at L5-S1." [Medical Panel Report p. 1 ¶ 1.a.]. The preponderance of the medical evidence in this case confirmed that Mr. Brady's industrial accident on January 24, 2001 caused a "Fracture of the L5 pedicle with disc protrusion at L5-S1."

3. Right Upper Extremity Problems.

February 12, 2001 Mr. Brady saw his regular treating physician Dr. Sheridan who diagnosed him with: "Chronic neck and shoulder pain with recent injury." [Exhibit J-1" at 80]. On April 1, 2004 Dr. Jane Clark M.D. evaluated Mr. Brady and opined:

It appears that none of Mr. Brady's treating physicians have appreciated that he has had a small spinal cord syrinx, at least as early as 8/98. It is most likely that this syrinx occurred just after the 1996 MVA or that it was congenital. This syrinx can account for the pain in his neck and upper back and scapular area, and the resolved sensory deficit that Dr. Warner noted in his upper thoracic region. It possibly could account for some of his shoulder pains as well, particularly when they couldn't really be influenced by Dr. Sawchuck's injections. [id. at 11].

Dr. Clark concluded that all of Mr. Brady's right upper extremity problems preexisted his industrial accident on January 24, 2001. [id. pp. 12-14].

Dr. Warner examined Mr. Brady's cervical MRI's with two other neurosurgeons who all concluded that with respect to the variant observed as a syrinx by Dr. Clark "[i]t is an insignificant finding." [id. at 323B]. Dr. Warner determined that "[i]f this indeed represented a syrinx, it would be asymptomatic." [id.].

Dr. Warner disputed Dr. Clark's theory about a syrinx causally contributing to Mr. Brady's right shoulder problems. Nevertheless, none of the medical experts attempted to causally relate Mr. Brady's ongoing right upper extremity problems to his industrial accident of January 24, 2001. To the contrary, the medical evidence in this case fairly established that prior to January 24, 2001 Mr. Brady suffered chronic right arm and shoulder pain resultant from: (1) right lateral epicondylitis; (2) right rotator cuff tendonitis; (3) right AC arthritis, and a right acromium fracture nonunion.

4. Left Upper Extremity Problems.

On April 17, 2001 Dr. Warner observed that Mr. Brady: "[n]ow has significant complaints of left shoulder pain. His previous problems have been localized primarily to the right side. [Exhibit "J-1" at 461]. On January 24, 2002 Dr. Warner commented:

Since the motor vehicle accident on December 26, 2001, the patient has had marked increase in ... shoulder pain especially on the left side [id. at 477].

On June 6, 2002 Dr. Hunt took an MRI of Mr. Brady's left shoulder that disclosed:

IMPRESSION: 1. No full thickness/ complete rotator cuff tear identified.
2. There is moderate tendinopathy of the supraspinatus tendon and mild tendinopathy of the subscapularis tendon associated with a down-sloping type II acromium and AC joint hypertrophic change. [id. at 229].

Dr. Clark noted that prior to January 24, 2001 Mr. Brady had:

Left shoulder problems due to a down slopping acromium and degenerative changes and trauma from a MVA of 12/26/01. [id. at 13].

Dr. Clarke acknowledged that Mr. Brady suffered an:

Aggravation of the left shoulder impingement syndrome and AC degeneration by the 1/24/01 incident. [id.].

Nevertheless, Dr. Clark insisted that: "[i]t was the 12/26/01 MVA which really caused this to be problematic." [id. at 14]. The Medical Panel refuted any causal connection between Mr. Brady's left shoulder problems and his industrial accident on January 24, 2001. [Medical Panel Report p. 1 ¶ 1.a.]. Accordingly, the preponderance of the evidence in this case verified that none of Mr. Brady's left shoulder problems causally resulted from his industrial accident on January 24, 2001.

5. Respiratory Problems.

On March 17, 2003 Dr. James Wilcox M.D. diagnosed Mr. Brady with:

Polycythemia almost assuredly secondary polycythemia. Probably due to both central sleep apnea and obstructive sleep apnea [Exhibit "J-1" at 407].

On March 14, 2003 Dr. Tom Cloward M.D. assessed Mr. Brady with:

DIAGNOSTIC IMPRESSION: 1. I think that he has obesity-hyperventilation syndrome complicated by obstructive sleep apnea. In addition he has airway obstruction on pulmonary function tests. This is consistent with "Mixed Syndrome." The above problems are exacerbated by narcotic pain medication, benzodiazepines and muscle relaxants. I think a majority of his sleep apnea can be explained by concomitant use of these medications. [Id. at 400].

On June 3, 2003 Dr. C. Gregory Elliot weighed in on the nature of Mr. Brady's respiratory problems:

ASSESSMENT: 1. Arterial hypoxemia associated with alveolar hypotension in the absence of significant abnormalities of the respiratory mechanics suggests that this is on the basis of depressed respiratory drive related to his chronic requirement for methadone and analgesics.
2. Chronic asthma and chronic obstructive pulmonary disease.
3. History of obstructive sleep apnea.
4. Episodic dyspnea, etiology remains unclear. [id. at 390].

On June 6, 2003 Dr. Elliot elaborated on his prior assessment of Mr. Brady's respiratory problems:

[M]y impression is that Mr. Brady has multiple cardiorespiratory problems compounded by his chronic pain syndrome, depression and anxiety.

Mr. Brady does have polycythemia which I believe is most likely related to his chronic hypoxemia. The etiologies for his chronic hypoxemia include chronic obstructive pulmonary disease (asthma) in combination with alveolar hypoventilation caused by his dependence upon methadone and other analgesics for relief of chronic musculo-skeletal pain. [id. 387].

Dr. Mark Passey M.D. concluded on July 22, 2003:

Based on the level of hypoxemia and the patient's exam it would seem apparent that he has intrinsic lung disease at this time. [id. at 213].

On August 6, 2003 Dr. Andrew Colletti M.D. conducted a Color Doppler Echocardiogram on Mr. Brady that revealed a "Patent Foramen Ovale" referred elsewhere in the medical records as a PFO. [id. at 369].¹ On October 7, 2003 Dr. Warner noted that Mr. Brady had:

[b]een diagnosed with pulmonary hypertension and is on oxygen. He most likely has a ventricular septal defect with pulmonary hypertension. [id. at 324].

Dr. Cloward on December 15, 2003 updated his assessment of Mr. Brady:

IMPRESSION: 1. Persistent hypoxemia. The most likely etiology of his hypoxemia is due to chronic hypoventilation due to his large narcotic doses.

¹ However, on March 29, 2004 Dr. Sherman Sorensen M.D. determined that: "He does not have a significant PFO." [id. at 488B].

2. he also has evidence of underlying lung disease, consistent with chronic obstructive pulmonary disease.

3. There may be some element of right to left shunting.... [id. at 344-345].

Yet, on December 17, 2003 Dr. Wayne Adams M.D. found: "No evidence of right to left shunt." [id. at 346]. Then, on January 6, 2004 Dr. Cloward determined after testing:

I then had him perform a 100% F102 shunt study at LDS Hospital which revealed that he does have a significant shunt fraction measuring approximately 17% (normal less than 5%). He has a known PFO.

DIAGNOSTIC IMPRESSION: Significant right to left shunt by physiological testing in the laboratory. His shunt fraction is approximately 17%. [id. at 341].

On January 8, 2004 Dr. Robert Farney M.D. examined Mr. Brady and concluded he had:

IMPRESSION: 1. Sleep disorder breathing
2. Persistent hypoxemia secondary to hypoventilation secondary to narcotics.
3. Polycythemia secondary to above.
4. Patent Foramen Ovale with shunt.
5. Chronic obstructive pulmonary disease. [id. at 661].

On January 22, 2004 a pulmonary specialist, Dr. James Pearl M.D., diagnosed Mr. Brady with:

IMPRESSION: 1. Mr. Brady has hypoxemia of unclear etiology. He does have atelectosis² at the right base which may relate to a paralyzed right hemidiaphragm. It is possible that this occurred with his traumatic chest injury and that would seem to be a likely etiology. [id. at 339].

On January 29, 2004 Dr. Margaret Ensign M.D. performed a thoracic fluoroscopy on Mr. Brady that revealed: "Findings most consistent with eventration³ right hemidiaphragm." [id. at 337]. In her evaluation of April 4, 2004 Dr. Clark opined:

The right hemidiaphragm paralysis or paresis was not diagnosed until 1/2004 by Dr. Pearl. But apparently review of x-rays even from 1997 note this problem. It possibly could have been a side effect of a cervical injections or surgeries, but also could be due to the presence of the syrinx causing dysfunction of the anterior

² Partial or complete collapse of the lung.

³ Wound of large extent.

horn cells at the C3-5 levels which innervate the vagus nerve to the diaphragm
It clearly was present long before the 1/24/01 incident. [id. at 12].

In an alternative theory espoused by Dr. Clark on May 13, 2004 she postulated:

It is my conclusion from the statements of Mr. Brady and his treating physicians that the MVA of 12/01 was a much more disabling accident than (sic) the sign accident of 1/24/01. The change from 80.7% to 71.7% right lung height compared to left, is medically more likely related to the most severe and disabling accident, which was the 12/01 MVA. [id. at 16C].

On April 8, 2004 Mr. Brady's treating physician Dr. Sheridan provided a rebuttal to some of the conclusions reached by Dr. Clark:

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, 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 turning of his asthma medication.

A second statement which I believe to be an error, is that one of the reasons for Mr. Brady's hypoxemia is his long-term steroid use and his asthma. To my knowledge, long-term steroid use does not create hypoxemia. Secondly, none of specialists whom Mr. Brady has seen recently to evaluate his hypoxemia believes that Mr. Brady's low oxygen saturations can be explained by reactive airway disease. I think that Mr. Brady's hypoxemia is due to paralysis of part of his diaphragm muscle. [id. at 488A].

Dr. David Ryser M.D. subjected Mr. Brady to an Electromyography/Nerve conduction study on April 9, 2004 that revealed:

IMPRESSION: No electrodiagnostic evidence of acute phrenic denervation bilaterally. Morphology of early-recruited motor units in the right hemidiaphragm showed changes consistent with subacute to chronic denervation, however, but this was neither marked nor unequivocal. [id. at 656A].

Dr. Ryser's tests further demonstrated:

Phrenic nerve compound motor action potential amplitude on the right was almost twice that of the response on the left but both were in normal limits. This finding is added assurance that no significant neuromuscular lesion is present on the right. [id. 656B].

On April 15, 2004 Dr. Warner also challenged Dr. Clark's analysis that causally linked Mr. Brady's respiration problems with the syrinx observed by Dr. Clark. Dr. Warner stated that he reviewed Mr. Brady's cervical MRI's with two other neurosurgeons who all concluded that with respect to the variant observed as a syrinx by Dr. Clark "[i]t is an insignificant finding." [id. at 323B]. Dr. Warner determined that "[i]f this indeed represented a syrinx, it would be asymptomatic." [id.].

The Medical Panel Report stated:

The medical panel finds no evidence that Mr. Brady's hypoxia should be considered a consequence of the accident on 1/24/01. The right hemi-diaphragm is clearly elevated well before 2001. There is evidence that phrenic nerve function is intact. Mr. Brady does have obstructive pulmonary disease of longstanding (Asthma). He has been using opioid medication for some time, which likely leads to reduced pulmonary drive (at least one measure of hypoventilation is the pCO₂, which has been elevated at 48 in Mr. Brady's case). While it is true that the incident on 1/24/01 did likely increase pain problems for Mr. Brady, the clinical records in this case indicate that difficulties in management of the overall pain problems and onset of the hypoxia occurred after the auto accident of 12/01. Therefore, the medical panel finds it likely that Mr. Brady would not have encountered hypoxia absent the auto accident in December 2001. [Medical Panel Report pp.1-2 ¶ 1].

Again, I found the Medical Panel Report well considered. Accordingly, the preponderance of the medical evidence in this case verified that Mr. Brady's industrial accident on January 24, 2001 did not cause his respiratory problems and more specifically his hypoxia.

F. Permanent Total Disability.

1. Permanent Total Disability.

As found *infra*, the parties stipulated that Mr. Brady became permanently and totally disabled on June 6, 2003. However, the parties disagreed over the direct cause of Mr. Brady's permanent total disability.

2. The Direct Cause of Lex Brady's Permanent Total Disability.

On July 23, 2002 Dr. Sheridan noted that:

Lex experienced a car wreck in December 2001 which significantly aggravated his existing musculoskeletal problems. Prior to that we were battling chronic pain with him, but we were seeing him on an every two-or-three month basis. Since

then, I have been unable to get any significant control of his pain. I have recommended that he retire from his position at YESCO Sign Company, because his daily activities routinely aggravate his medical condition, but he is dedicated to working, and because of personal things in his life. He feels that he would be better off emotionally if he continues working. [id. at 445].

Dr. Sheridan went on to observe that:

I think his overall condition has been aggravated by numerous issues, but this recent car wreck has really messed things up. [id. at 446].

On October 7, 2003 Dr. Warner concluded that:

At this point, it is my opinion that the patient is totally disabled for the performance of work related activities due to his multiple medical problems as well as the severe degeneration of his cervical as well as lumbar spine. I do not feel that the patient will be able to be gainfully employed in any manner. [id. at 324].

On October 15, 2003 Dr. Sheridan determined that Mr. Brady's "[p]ain level is pretty much out of control." [id. at 490].

On April 1, 2004 Dr. Clark opined that: "It really is Mr. Brady's hypoxia which ultimately caused his quitting work." [id. at 12]. Dr. Clark within her same opinion elaborated:

It is my opinion that because of his slowly progressive symptoms from the cervical syrinx and the degenerative problems with his cervical, thoracic, and lumbar spine, including the hypoxia, he is no longer able to work or be gainfully employed. But none of this disability causing him to be unable to work is due, in any significant part, to any of the industrial injury incidents. [id. at 14].

The Medical Panel declared that:

[M]r. Brady likely had no significant physical and functional restrictions caused by the incident of 1/24/01 over and above those he had experienced prior thereto. [Medical Panel Report p.2 ¶ 2].

Once more, I found the Medical panel Report determinative on this issue. Therefore, the preponderance of the evidence in this case established that Mr. Brady's medical problems caused by his January 24, 2001 industrial accident resulted in no physical or functional restrictions above and beyond those he already endured. Consequently, the medical problems caused by Mr. Brady's industrial accident on January 24, 2001 did not serve as the direct cause of his permanent total disability.

3. Conclusion.

Mr. Brady's industrial accident on January 24, 2001, and the medical problems resultant therefrom, did not serve as the direct cause of his permanent total disability. Consequently, Mr. Brady's claim for permanent total disability compensation must be denied.

V. CONCLUSIONS OF LAW

A. Employment.

YESCO employed Mr. Brady from November 30, 1992, to June 6, 2003.

B. Compensation Rate.

At the time of the accident in issue, Mr. Brady was married, but had no dependent children less than 18 years of age. Mr. Brady's compensation with YESCO at the time of the accident in issue equaled \$18.00 per hour, 40 hours per week average, for the maximum permanent total disability compensation rate of \$450.00 per week. [$\$18.00/\text{hour} \times 40 \text{ hours/week} = \$720.00/\text{week} \times 2/3 = \$480.00/\text{week} + \$5.00/\text{week} = \$485.00/\text{week}$].

C. January 24, 2001 Industrial Accident.

Mr. Brady worked as a sign installer for YESCO. Mr. Brady routinely worked on crews that installed building signs, billboards, and other outdoor signs.

On January 24, 2004 Mr. Brady worked for YESCO removing a sign from a Conoco station in Orem, Utah. The sign being removed by Mr. Brady and his crew at the Conoco station measured 30' x 10' and weighed one ton.

Mr. Brady located in the basket of a man-lift supervised the sign removal. The crew first hooked the sign to the rigging of a crane. The crew then cut the pole supporting the sign. The sign did not immediately break loose. Mr. Brady still in the basket of the man-lift approached the center of the pole and began to hit it with a 5 lb. Sledge hammer. The one ton sign swung loose from the pole and hit Mr. Brady in the chest. The sign bent Mr. Brady backward in the basket and pinned him for 30 seconds. Mr. Brady estimated that he supported 500 pounds of the sign's weight on his chest while pinned in the basket.

Mr. Brady complained that during the incident on January 24, 2001, his whole body felt numb. Mr. Brady then experienced pain in his neck, shoulders, and low back. Mr. Brady missed no work immediately following his January 24, 2001 industrial accident. But, as time progressed Mr. Brady's pain increased, and he experienced breathing difficulties to the point that he could no longer work as of June 6, 2003.

D. Lex Brady's Medical Problems Prior to January 24, 2001.

1. Cervical Spine Problems.

Mr. Brady suffered significant cervical spine problems prior to January 24, 2001 that resulted in cervical spinal fusions from C4 to C7.

2. Low Back Problems.

Mr. Brady had problems with his lumbar spine at the L4-5 level prior to January 24, 2001.

3. Right Upper Extremity Problems.

Prior to January 24, 2001 Mr. Brady suffered chronic right arm and shoulder pain resultant from: (1) right lateral epicondylitis; (2) right rotator cuff tendonitis; (3) right AC arthritis, and a right acromium fracture nonunion.

4. Left Upper Extremity Problems.

Mr. Brady had left lateral epicondylitis prior to January 24, 2001.

5. Respiration Problems.

Before January 24, 2001 Mr. Brady suffered from poorly controlled asthma and nocturnal shortness of breath that required the use of oxygen.

E. Lex Brady's Medical Problems Caused by the January 24, 2001 Industrial Accident.

1. Cervical Spine Problems.

Mr. Brady's industrial accident on January 24, 2001 caused an:

Aggravation of pre-existing lower cervical spine (C5-T1) problems, magnifying pain related to muscle spasm and degenerative disease.

2. Low Back problems.

Mr. Brady's industrial accident on January 24, 2001 caused a "Fracture of the L5 pedicle with disc protrusion at L5-S1."

3. Right Upper Extremity Problems.

Dr. Warner disputed Dr. Clark's theory about a syrinx causally contributing to Mr. Brady's right shoulder problems. Nonetheless, none of the medical experts attempted to causally relate Mr. Brady's ongoing right upper extremity problems to his industrial accident of January 24, 2001. To the contrary, the medical evidence in this case fairly established that prior to January 24, 2001 Mr. Brady suffered chronic right arm and shoulder pain resultant from: (1) right lateral epicondylitis; (2) right rotator cuff tendonitis; (3) right AC arthritis, and a right acromium fracture nonunion.

4. Left Upper Extremity Problems.

none of Mr. Brady's left shoulder problems causally resulted from his industrial accident on January 24, 2001.

5. Respiratory Problems.

Mr. Brady's industrial accident on January 24, 2001 did not cause his respiratory problems and more specifically his hypoxia.

F. Permanent Total Disability.

1. Permanent Total Disability.

Mr. Brady became permanently and totally disabled on June 6, 2003. However, the parties disagreed over the direct cause of Mr. Brady's permanent total disability.

2. The Direct Cause of Lex Brady's Permanent Total Disability.

Utah Code Ann. §34A-21-413(1) (1995) provides in pertinent part:

(b) To establish entitlement to permanent total disability compensation, the employee has the burden of proof to show by a preponderance of the evidence that:

(iii) the industrial accident or occupational disease was the direct cause of the employee's permanent total disability.

Mr. Brady's medical problems caused by his January 24, 2001 industrial accident resulted in no physical or functional restrictions above and beyond those he already endured. Consequently, the medical problems caused by Mr. Brady's industrial accident on January 24, 2001 did not serve as the direct cause of his permanent total disability.

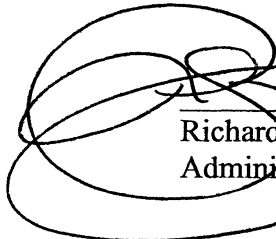
3. Conclusion.

Mr. Brady's industrial accident on January 24, 2001, and the medical problems resultant there from, did not serve as the direct cause of his permanent total disability. Consequently, Mr. Brady's claim for permanent total disability compensation must be denied.

VI. ORDER

IT IS THEREFORE ORDERED that Lex Brady's claim for permanent total disability compensation against Young Electric Sign Co. is hereby dismissed with prejudice.

DATED November 29, 2005.



Richard M. La Jeunesse
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.

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 November 29, 2005, to the persons/parties at the following addresses:

Lex L Brady
7162 W 3800 S
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James R Black Esq
265 E 100 S Ste 255
Salt Lake City UT 84111

UTAH LABOR COMMISSION



Clerk, Adjudication Division
PO Box 146615
Salt Lake City, UT 84114-6615

Tab 5

APPENDIX 5

Order Affirming ALJ's Decision - October 28, 2008.

UTAH LABOR COMMISSION

LEX L. BRADY,

Petitioner,

vs.

YOUNG ELECTRIC SIGN CO.,

Respondent.

**ORDER AFFIRMING
ALJ'S DECISION**

Case No. 2003948

Lex L. Brady asks the Utah Labor Commission to review Administrative Law Judge La Jeunesse's denial of Mr. Brady's claim for benefits under the Utah Workers' Compensation Act, Title 34A, Chapter 2, Utah Code Annotated.

The Labor Commission exercises jurisdiction over this motion for review pursuant to Utah Code Annotated § 63G-4-301 and § 34A-2-801(3).

BACKGROUND AND ISSUE PRESENTED

Mr. Brady filed a claim for workers' compensation benefits from Young Electric Sign Co. ("YESCO") for a work accident that occurred on January 24, 2001. Mr. Brady sought permanent total disability benefits and YESCO stipulated that Mr. Brady was permanently totally disabled, but disputed that the work injuries were the direct cause of his disability. Judge La Jeunesse held an evidentiary hearing and then, due to conflicts in the medical opinions, referred the medical aspects of the case to a medical panel. After adopting the panel's report, Judge La Jeunesse denied benefits.

In his motion for review, Mr. Brady argues that the panel's opinion was contrary to other, more persuasive medical evidence. Alternatively, Mr. Brady argues that a new letter from one of his medical providers should have been submitted to the medical panel for further consideration.

FINDINGS OF FACT

The Commission adopts Judge La Jeunesse's findings of fact. The facts relevant to the motion for review are as follows:

In 1996, Mr. Brady was involved in an auto accident and underwent a cervical spinal fusion. Prior to his work accident, Mr. Brady had a history of medical problems related to his lower back, right and left upper extremities, and asthma.

On January 24, 2001, Mr. Brady was assisting in the removal of a one-ton sign at work when the sign swung loose and hit him in the chest, pinning him for about 30 seconds. He reported neck, shoulder, low back pain, and, later, breathing difficulties. Over the next several months, he

ORDER AFFIRMING ALJ'S DECISION
LEX L. BRADY
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continued to receive medical care for his complaints. Then, on December 26, 2001, Mr. Brady was involved in another car accident. Mr. Brady was able to continue working, however, until June 6, 2003, when his hypoxia (respiratory condition) became too severe and he could no longer work.

The parties stipulated that Mr. Brady was permanently totally disabled; however, they disputed whether the medical impairments that left Mr. Brady disabled were directly caused by the work accident. There were multiple medical opinions that indicated either the work accident caused Mr. Brady's injuries or that the injuries were caused by preexisting conditions and subsequent injuries, particularly the second car accident. Dr. Pearl, Mr. Brady's pulmonologist, provided three reports regarding Mr. Brady's hypoxia. Dr. Pearl's March 10, 2004, report stated:

I suspect that with his history, that when he was crushed, he strained very hard and made the eventration much worse, thus contributing to loss of diaphragmatic movement and atelectases¹ on the right lung which has caused his hypoxemia. I can say this with reasonable medical certainty.

Therefore, Judge La Jeunesse appointed a medical panel to review issues of medical causation. The panel concluded that Mr. Brady's injuries from the January 24, 2001, work accident did not directly cause his disability. Specifically, the panel opined:

The medical panel finds no evidence that Mr. Brady's hypoxia should be considered a consequence of the accident on 1/24/01. . . . While it is true that the incident on 1/24/01 did likely increase pain problems for Mr. Brady, the clinical records in this case indicate that difficulties in management of the overall pain problems and onset of the hypoxia occurred after the auto accident of 12/01. Therefore, the medical panel finds it likely that Mr. Brady would not have encountered hypoxia absent the auto accident in December 2001.

After receiving the medical panel's report, Mr. Brady submitted another letter from Dr. Pearl, dated August 15, 2005, for additional consideration from the medical panel. The letter disagreed with the panel's opinion and summarized Dr. Pearl's opinion of the medical evidence, stating:

It is most likely that Mr. Brady's injury of January 2001 caused his neck injury which affected the nerves which innervate the diaphragm #'s 3, 4, and C3-C4 and C4-C5. This is the cause of his hypoxia as his other workup has been completely negative.

DISCUSSION AND CONCLUSIONS OF LAW

The Commission first notes Mr. Brady's request to submit a new letter from one of his physicians to the medical panel for consideration. Commission Rule R602-2-2(b) permits the ALJs,

¹ Collapse of all or part of a lung.

ORDER AFFIRMING ALJ'S DECISION
LEX L. BRADY
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at their discretion, to submit new medical evidence to the panel “[w]here there is a proffer of new written conflicting medical evidence.” The Commission has reviewed the medical records exhibit, previously submitted to the medical panel, and Dr. Pearl’s letter and finds that the letter does not provide any new written conflicting evidence that was not previously available to the medical panel for consideration.

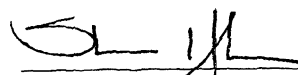
Mr. Brady’s primary argument, in his motion for review, is that the evidence shows his January 24, 2001, work injury is the direct cause of his permanent and total disability. Both Mr. Brady and YESCO submitted various medical opinions supporting their respective arguments on direct causation. In light of these conflicting opinions, the Commission appointed an impartial medical panel to evaluate Mr. Brady’s claim. The panelists reviewed Mr. Brady’s entire relevant medical history, personally examined Mr. Brady, and reviewed the opinions of both parties’ medical consultants and treating physicians. 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. Given the panel’s expertise and independence, the Commission finds the panel’s opinion persuasive.

In summary, the Commission denies Mr. Brady’s request for the medical panel to consider further evidence. The Commission concurs with Judge La Jeunesse’s denial of benefits based on a determination that Mr. Brady’s permanent total disability was not directly caused by his work injury.

ORDER

The Commission affirms Judge La Jeunesse’s decision. It is so ordered.

Dated this 28th day of October, 2008.



Sherrie Hayashi
Utah Labor Commissioner

NOTICE OF APPEAL RIGHTS

Any party may ask the Labor Commission to reconsider this Order. Any such request for reconsideration must be received by the Labor Commission 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.

ORDER AFFIRMING ALJ'S DECISION
LEX L. BRADY
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CERTIFICATE OF MAILING

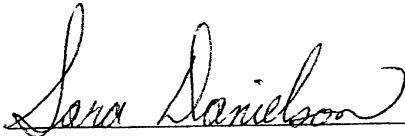
I certify that a copy of the foregoing Order Affirming ALJ's Decision the matter of Lex L. Brady, Case No. 2003948, was mailed first class postage prepaid this 28th day of October, 2008, to the following:

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Utah Labor Commission