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Utah Court of Appeals

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Recommended Citation
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IN THE UTAH COURT OF APPEALS

980037-CA

HAVEN WHITEAR,	:	
Petitioner,	:	Court of Appeals Case No.: 980037-CA
vs.	:	
BROWN & ROOT, INC.,HIGHLANDS INSURANCE, EMPLOYERS REINSURANCE FUND, and THE LABOR COMMISSION OF UTAH,	:	Priority 7
	:	Labor Commission Case No.: 930229
Respondents.	:	

BRIEF OF RESPONDENTS
BROWN & ROOT, INC. and/or HIGHLANDS INSURANCE

Appeal from the Labor Commission of Utah
Administrative Law Judge Donald L. George

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RESPONDENTS RESPECTFULLY REQUEST ORAL ARGUMENT AND THAT THIS CASE BE REPORTED.

FILED
Court of Appeals
JUL 15 1998
Julia D'Alesandro
Clerk of the Court

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IN THE UTAH COURT OF APPEALS

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	:	Labor Commission Case No.: 930229
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JURISDICTION OF THE COURT OF APPEALS

This Petition for Review by Petitioner Haven Whitear is from an Order of the Appeals Board of the Labor Commission, State of Utah, dated December 19, 1997. This Court has jurisdiction over this appeal pursuant to Utah Code Annotated §§ 34A-2-801(8)(a) and 78-2a-3(2)(a) (1997).

ISSUES PRESENTED AND STANDARD OF REVIEW

1. Whether Petitioner's failure to marshal the evidence is fatal to his attack on the Labor Commission's evidentiary findings.

Standard of Review: "To effectively challenge the Board's findings of fact, a party must marshal '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 '" Id. (quoting Grace Drilling Co. v. Board of Review, 776 P.2d 63, 68 (Utah Ct. App.

1989)); accord Intermountain Health Care, Inc. v. Board of Review, 839 P.2d 841, 843-844 (Utah Ct. App 1992).

2. Whether the Labor Commission's factual findings that (1) Petitioner's depression was not caused by the industrial accident, and (2) Petitioner was not a credible witness, are supported by substantial evidence when viewed in light of the record as a whole.

Standard of Review: This Court's review of the Labor Commission's findings of fact is governed by Utah Code Annotated § 63-46b-16(4)(g) (1997) of the Utah Administrative Procedures Act (hereinafter "UAPA"). Under UAPA, the Labor Commission's findings of fact will be affirmed if they are "supported by substantial evidence when viewed in light of the whole record before the court." Merriam v Board of Review, 812 P.2d 447, 450 (Utah Ct. App. 1991). "Substantial evidence is that which a reasonable person 'might accept as adequate to support a conclusion.'" Id. (quoting Grace Drilling, 776 P.2d at 68). "It is not [the court's] prerogative on review to reweigh the evidence. Instead, [the court] defer[s] to the Commission's findings because, when reasonably conflicting views arise, it is the Commission's province to draw inferences and resolve these conflicts." Id.

3. Whether the Labor Commission properly ordered that the Administrative Law Judge hold a hearing to obtain additional information from the Labor Commission's Medical Panel regarding the Panel's conclusion that Petitioner's depression was not caused by the industrial accident.

Standard of Review: This Court's review is pursuant to Utah Code Ann. § 63-46b-16(4)(e) (1997), which provides relief if "the agency has engaged in an unlawful procedure or

decision-making process, or has failed to follow prescribed procedure." This Court reviews "questions under this section for correction of error and grant[s] no deference to the agency's conclusion of the appropriate procedure." Krantz v. Utah Dept. of Commerce, 856 P.2d 369 (Utah Ct. App. 1993).

4. Whether the Labor Commission properly dismissed Mr. Whitear's permanent total disability claim on the basis that he failed to satisfy his burden of proof to show that his asthma condition was the medical cause of his inability to return to work.

Standard of Review: This Court's review is pursuant to Utah Code Ann. § 63-46b-16(4)(d) (1997), which provides relief if an agency has erroneously interpreted or applied the law. "Every agency decision we review under [the Utah Administrative Procedures Act] necessarily involves an express statutory grant of discretion to the agency to ***apply*** the law at issue." Employers' Reinsurance v. Industrial Comm'n, 856 P.2d 648, 650 (Utah App. 1993) (emphasis added). "When an agency has discretion to apply its factual findings to the law, [the court] will not disturb the agency's application 'unless its determination exceeds the bounds of reasonableness and rationality.'" VanLeeuwen v. Industrial Comm'n, 901 P.2d 281 (Utah Ct. App. 1995) (quotations omitted).

5. Whether, under the Utah Administrative Procedures Act, an Administrative Law Judge may have the prevailing party prepare proposed findings of fact, conclusions of law and order which the Administrative Law Judge may review, modify, and adopt as his own.

Standard of Review: This Court's review is pursuant to Utah Code Ann. § 63-46b-16(4)(e) (1997), which provides relief if "the agency has engaged in an unlawful procedure or decision-making process, or has failed to follow prescribed procedure." This Court reviews "questions under this section for correction of error and grant[s] no deference to the agency's conclusion of the appropriate procedure." Krantz v. Utah Dept. of Commerce, 856 P.2d 369 (Utah Ct. App. 1993).

DETERMINATIVE LAW

The section of the Utah Workers' Compensation Act governing Petitioner's permanent total disability claim, Utah Code Annotated § 35-1-67 (1987), is attached hereto in the Addendum for the Court's reference.

Sections 63-46b-8 and 63-46b-12 of the Utah Administrative Procedures Act are attached hereto in the Addendum for the Court's reference. Section 63-46b-10 of the Utah Administrative Procedures Act is attached to the addendum to Petitioner's brief.

STATEMENT OF THE CASE

Nature of the Case, Course of the Proceedings, and Statement of Facts

This case concerns a disputed workers' compensation claim for permanent total disability benefits. Mr. Whitear suffered a compensable industrial accident on March 10, 1987 when he walked through a toxic oil spill at working, getting oil on his gloves and shoes.[1] (R. at 930-931.) Mr. Whitear awoke the next morning with symptoms of nausea, dizziness, and a

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[1]While Petitioner states that he was "drenched" by the oil, the correct description was recorded by Judge Allen in his 1994 Preliminary Order based upon Mr. Whitear's testimony at the February 22, 1994 hearing. (R. 930-931.)

headache. Mr. Whitear had missed the material handling class provided by Brown & Root and was informed by co-workers, when he returned to work the next day, regarding the toxicity of the oil. (R. at 931.) Mr. Whitear subsequently sought medical treatment for injuries of asthma and depression which he attributed to the March 10, 1987, exposure.

Mr. Whitear originally filed an application for hearing in 1987 for temporary total disability benefits and permanent partial disability benefits. Prior to the evidentiary hearing, the parties notified Administrative Law Judge (hereinafter "ALJ") Timothy Allen that Respondents, Brown & Root and Highland Insurance, (hereinafter referred to as Brown & Root"), was accepting liability for the medical expenses incurred to date by Mr. Whitear as a result of the March 10, 1987, industrial accident. (R. at 26.) While the claim was accepted as a compensable accident, the Judge Allen found that there was presently no evidence to support Mr. Whitear's claim of temporary total compensation and possible permanent partial impairment as a result of the industrial accident. (R. at 26.) This was based upon evaluations by Drs. Richard E. Kanner and Richard Johns. (R. at 463.) Brown & Root nevertheless agreed to pay for one more medical examination at Mr. Whitear's request. The claim was accordingly dismissed, pending further medical evaluation. (R. at 27.)

On October 13, 1988, Mr. Whitear's attorney requested Brown & Root pay for an out-of state medical examination. Brown & Root refused Mr. Whitear's request based upon reasonable concerns with an out-of-state physician and suggested two local experts. Mr. Whitear responded by requesting the Labor Commission to order Brown & Root to pay for the out-of-state examination. This request was denied by Judge Allen, who noted the following observation in his May 4, 1998, letter to Mr. Whitear's counsel:

> [T]he employer in this case has already paid for medical examinations of your clients [sic] which have proven to be negative. However, as an accommodation to you and your clients, Mr. Chai bent over backwards and graciously agreed to have his clients pay for yet another evaluation of your clients [sic] for the purpose of proving their case.

(R. at 28.)

Following Judge Allen's ruling, Mr. Whitear agreed to be seen by Dr. Renzetti, who examined Mr. Whitear on July 11, 1988. He found no evidence of temporary total disability or permanent partial impairment, although he did recommend the use of an inhaler, which Brown & Root agreed to pay for. (R. at 464.)

Eighteen months later, on November 16, 1989, counsel for Brown & Root was contacted by Attorney John Creer, a new attorney representing Mr. Whitear, requesting a settlement on Mr. Whitear's case. In response, Brown & Root explained that they had received no medical evidence showing that there was anything to settle. Nothing further was heard from Mr. Creer. (R. at 464.)

On April 6, 1990, Mr. Whitear's third attorney, Virginius Dabney contacted counsel for Brown & Root, requesting compensation benefits. Again, Brown & Root requested Mr. Whitear produce some medical evidence to support his claim. After various communications, Mr. Dabney withdrew as legal counsel to Mr. Whitear on September 13, 1991. (R. at 464.)

On October 24, 1991, Mr. Whitear's fourth attorney, Morris & Morris, contacted Brown & Root's counsel. After briefly explaining the status of the case, Morris & Morris withdrew as counsel on December 27, 1991. (R. at 465.)

Nothing further happened on the case until Brown & Root received the February 15, 1993, application for hearing -- six years, five attorneys and two applications for hearing after

the industrial accident -- still with no new additional medical evidence to support Mr. Whitear's claims, notwithstanding Brown & Root paying for three failed examinations. Brown & Root accordingly denied Mr. Whitear's claims for benefits as alleged in the February 15, 1993, application for hearing. (R. at 465.) On April 7, 1993, Brown & Root received medical records from Mr. Whitear's present counsel in support of the application for hearing. The focus of the new medical information submitted by Mr. Whitear was now a claim for a 50% psychological disability due to depression allegedly caused by the industrial accident. (R. at 468.)

On September 7, 1993, Mr. Whitear file a Motion to Amend Application for Hearing and Motion to Join the Employers' Reinsurance Fund, thereby adding an additional claim for permanent total disability benefits. (R. at 522-523.) The Commission issued a request for Answer on September 29, 1993, and Brown & Root filed a timely Answer to the Amendment, denying Mr. Whitear's claim to permanent total disability benefits. (R. at 530.)

Discovery proceeded on Mr. Whitear's claim and a hearing was held by Judge Allen on February 22, 1994.[2] At the 1994 hearing, Judge Allen received into evidence the Medical Records Exhibit (R.542 - 840), the Social Security Administration Decision and file (R. 42-445, 841-846), information from Habors Industries concerning the industrial knee injury Mr. Whitear sustained in 1988 while working for a subsequent employer, (R. 847 - 851), and documentation from the Utah State Office of Rehabilitation, reflecting the closure of Mr.

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[2]Brown & Root requested a transcript of the February 22, 1994, hearing. Unfortunately, the Commission has notified Brown & Root that the tapes for this hearing are missing, and therefore a transcript is unavailable.

Whitear's file due to his lack of interest and cooperation to receive services. (R. at 855 - 864.) Mr. Whitear also testified concerning his alleged injuries and disability. (R. at 930.)

On or about March 1, 1994, Judge Allen entered Preliminary Findings of Fact. Judge Allen summarized Mr. Whitear's testimony concerning his claims that he suffered from depression and asthma as a result of the industrial accident. (R. at 930-931.) Judge Allen found that following the industrial accident, Mr. Whitear was terminated by Brown & Root and began working for a new employer, a drilling company, for whom he worked without limitation. (R. at 1931.) Through approximately June 1990, Mr. Whitear was found to have been working, receiving unemployment compensation, or receiving workers compensation benefits from a knee injury (which he sustained while working for the subsequent employer). (R. at 931-932.) Judge Allen referred the case to the Medical Panel to evaluate the medical issues of causation of Mr. Whitear's alleged injuries of depression ***and*** asthma. The Panel was also requested to provide the Commission with an evaluation of Mr. Whitear's permanent impairments, if any, for ***both*** of these alleged injuries. (R. at 932-933.)

The Medical Panel's Report was produced on May 25, 1994, (R. at 938-945, 950-956), and circulated to the parties on September 29, 1994. (R. at 958.) The Medical Panel concluded that Mr. Whitear's asthma condition was caused by the 1987 industrial accident and rated Mr. Whitear with a 10% whole person permanent impairment for this condition. Notwithstanding this impairment, Dr. McCusker, the Panel's pulmonologist, concluded that "Mr. Whitear has good pulmonary function. His asthma episodes are very episodic, but infrequent. I see no reason for him to be totally disabled from a pulmonary point of view." (R. at 956.) In contrast, the Panel found that Mr. Whitear's depression was ***not*** due to the

1987 industrial accident, (R. at 944), but his psychological impairment, rated at 5% whole person, ***was***, according to Mr. Whitear's disability claim with Social Security, the medical reason for Mr. Whitear's inability to return to work. (R. at 938).

On October 26, 1994, after obtaining a time extension, Mr. Whitear filed an objection, with a request for hearing, on the Medical Panel's conclusion that his depression was not causally related to the industrial accident. (R. at 961.) Mr. Whitear expressly limited his objection to Panel's report on the issue of depression and never objected to the Panel's finding that the asthma condition did not disable him from returning to work. (R. at 961.) A hearing was set for March 8, 1995. (R. at 965-966.) This hearing was canceled by the Labor Commission when Brown & Root's counsel suffered an emergency hospitalization.[3] Mr. Whitear withdrew his request for a hearing without waiving his objection to the panel's report, and argued that the ALJ should enter an Order based upon the evidence that he had submitted. (R. at 967.) Understandably, Brown & Root never filed an objection to the Medical Panel's report since the report was favorable to their position.

Rather than request clarification from the Panel concerning the basis for its conclusion, Judge Allen entered an Interim Order on April 20, 1995, adopting the Medical Panel's report with the significant reversal of finding that Mr. Whitear's depression ***was*** caused by the industrial accident. (R. at 970-971.) With this reversal of the panel's findings, Judge Allen

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[3]Contrary to the representations of Mr. Whitear's counsel, on the day before the hearing, Brown & Root notified Mr. Whitear's counsel, via a phone call to his secretary, of the emergency and cancellation of the hearing. Notwithstanding this notice, Mr. Whitear's counsel appeared at the scheduled hearing time and was very upset at the continuance of the hearing. (R. at 967.)

entered a tentative finding of permanent total disability benefits based upon the Panel's findings, as modified, and in view of the Social Security Administration's award of disability benefits.[4] (R. at 971.)

Judge Allen accordingly referred Mr. Whitear to the Division of Rehabilitation Services for evaluation as required by the Workers Compensation Act. (R. at 971.)

Brown & Root filed a timely Motion for Review, asserting that Judge Allen's modification to the Panel's findings completely ignored the abundant evidence in the medical records which supported the Panel's conclusion that the depression was not caused by the industrial exposure. Brown & Root further argued that rather than summarily dismiss the Panel's report, Judge Allen should have, at a minimum, requested an explanation from the Medical Panel concerning the basis of their conclusion. (R. at 974-977.) On July 31, 1995, The Labor Commission granted Brown & Root's Motion for Review, concluding:

> [F]urther information is required from the medical panel regarding the cause of Mr. Whitear's depression. In particular, the Industrial Commission notes that the medical panel has expressed the opinion that Mr. Whitear's depression does not appear to be causally related to the exposure and without an explanation of this finding by the medical panel, any final determination on the merits of Mr. Whitear's claim may be flawed. In the judgment of the Industrial Commission, this issue can be resolved most easily and efficiently at this point in the proceeding.
>
> In light of the foregoing, Mr. Whitear's claim is remanded to the ALJ. The ALJ is instructed to conduct a hearing on the medical panel's report, particularly regarding the causes of Mr. Whitear's depression. The ALJ may

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[4]The Social Security file had been admitted into evidence previously. As will be discussed in the Argument, the Social Security Administration awarded Mr. Whitear disability benefits based upon a finding that his condition of ***depression*** met the listing for a severe impairment under Social Security guidelines. (See discussion in Section IV (A) of the Argument.)

> take such other action as is necessary and appropriate to fully develop the record regarding the cause and extent of Mr. Whitear's depression and related disability.

(R. at 985, underline in original.)

A hearing was scheduled for February 7, 1996.[5] Prior to the hearing, Judge George circulated a report received from the Division of Rehabilitation Services ("DRS").[6] Brown & Root objected to the Commission accepting the report, arguing that the report was irrelevant and premature until a final determination was made on the medical and causation issues in the case. Brown & Root further argued that admitting the report would be error because it was based upon incorrect medical information and conclusions, provided to DRS by Mr. Whitear, rather than the correct medical information from the Medical Panel. (R. at 996-999.) A responsive argument was filed by Mr. Whitear's counsel. (R. at 1000-1001.) On December 29, 1995, Judge George issued a faxed ruling, concurring with Brown & Root that the medical disputes needed to be addressed prior to receiving the report inasmuch as the findings on the medical issues could be conclusive on Mr. Whitear's claim. (R. at 1002-1003.) Judge George further found that if Mr. Whitear were successful in meeting his initial burden, then the matter would be re-submitted to DRS to correct any misinformation that had been given to DRS.

A hearing was held by Judge George on February 7, 1996. (The transcript of this hearing is found in the Record at 1005 - 1325.) The parties presented argument and testimony

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[5]By this time Judge Allen had resigned as an administrative law judge. Accordingly, Judge Donald L. George was assigned as the new ALJ for the matter.

[6]The Court will recall that Judge Allen referred Mr. Whitear to the Division of Rehabilitation Services based upon his tentative finding. This Order, however, was reversed by the Labor Commission and therefore the DRS report was prematurely requested..

was received from the following witnesses: Madison H. Thomas, M.D. (the Medical Panel chairman), Robert H. Burgoyne, M.D. (the Medical Panel's psychiatrist), David L. McCann, M.D. (Mr. Whitear's initial treating psychiatrist), Phillip Mark Cali (Mr. Whitear's subsequent treating psychologist), Jeff Scott O'Driscoll (Petitioner's friend), Craig Whitear (Petitioner's brother), Brent Bohman (Petitioner's friend), and Haven Whitear (the Petitioner).

At the conclusion of the hearing (9 hours later), Judge George orally ruled in favor of Brown & Root, providing an explanation of the basis for his ruling. (R. at 312 - 319.) Judge George found that the Medical Panel's conclusion that Mr. Whitear's depression was *not* caused by the industrial accident was supported by the preponderance of the evidence and testimony. He accepted the Panel's conclusion on this issue and consequently dismissed Mr. Whitear's claim for permanent total disability benefits on that ground. (R. at 317.) Judge George then turned to Mr. Whitear's claim as based upon his asthma injury. Judge George found that the Medical Panel's report was well reasoned and supported by a preponderance of the medical documentation. He accordingly received it into evidence and adopted the Panel's findings as his own. (R. at 318.) Based upon the Panel's finding and the other medical evidence in the file that Mr. Whitear was ***not*** medically disabled from work as a result of the asthma injury, Judge George found that Mr. Whitear had failed to sustain his burden of proof of medical causation, and therefore denied Mr. Whitear's claim for permanent total disability benefits based upon the asthma injury. (R. at 318-319.) Judge George then requested Brown & Root's counsel prepare proposed findings of fact, conclusions of law and an order. (R. at 319.) In a subsequent fax to the parties, Judge George indicated that upon his review of the proposed order, he would ask for a disk copy to modify the order as necessary. On February

13, 1996, Mr. Whitear filed a letter with Judge George styled as a motion for reconsideration, wherein Mr. Whitear again argued that Judge George should find that Mr. Whitear's depression was caused by the industrial accident. (R. at 1365-1366.) On February 20, 1996, Judge George reaffirmed his ruling, outlining the basis for his finding as supported by the hearing testimony. (R. at 1367-1368.)

After obtaining a copy of the hearing transcript in review in preparation of the proposed order, Brown & Root submitted proposed Findings of Fact, Conclusions of Law, and Order. The proposed order was sent to counsel for Mr. Whitear and the Employers' Reinsurance Fund for comment and objection. (R. at 1387-1388.) No objections were filed by counsel, and Judge George adopted the proposed Order on July 26, 1996. (R. at 1389-1400.)

Mr. Whitear filed a Motion for Review on August 16, 1996. (R. at 1401 - 1420.) Brown & Root filed a responsive memorandum on September 3, 1996. (R. at 1514 - 1550.) On December 19, 1997, the Appeals Board of the Labor Commission entered an Order on Motion for Review, affirming the dismissal of Mr. Whitear's permanent total disability claim. Mr. Whitear filed a Petition for Review with this Court on January 16, 1998, seeking review of the December 19, 1997, Order of the Appeals Board.

SUMMARY OF THE ARGUMENT

Mr. Whitear's appeal challenges the factual findings of the Labor Commission. Accordingly, Mr. Whitear has a duty to marshal the evidence in support of the Commission's finding, and then demonstrate that the findings are not supported by "substantial evidence." This Court regards the duty to marshal the evidence as an essential pre-requisite to a review on

the merits of a challenge to a factual finding. This Court has repeatedly affirmed that a party's failure to marshal the evidence may be fatal to the party's appeal. In the present case, Mr. Whitear made no attempt to marshal the evidence. This Court should therefore reject Mr. Whitear's challenge to the Labor Commission's findings regarding both the causation of his depression injury and Mr. Whitear's credibility on this basis alone.

On the merits of Mr. Whitear's challenge to the Commission's findings, a review of the record as a whole demonstrates that the Commission's findings are abundantly supported by substantial evidence. Accordingly, this Court should affirm the Commission's Order.

Mr. Whitear also challenges the Commission's order to hold a hearing on the report from the Labor Commission's Medical Panel to obtain additional information from the panel members concerning the basis for the Panel's conclusion that Mr. Whitear's depression was not caused by the industrial accident. The Commission's action was not only appropriate, but reasonable. The Commission is the ultimate fact finder and therefore has the privilege and duty to have before it all of the competent evidence that it deems necessary to consider in making or denying an award of benefits. Furthermore, Mr. Whitear was clearly not prejudiced by the hearing inasmuch as he was allowed, and in fact did provide, additional evidence and testimony in support of his claim.

The Labor Commission properly dismissed Mr. Whitear's permanent total disability claim in its entirety. At the conclusion of the February 1996 hearing, the ALJ properly dismissed Mr. Whitear's permanent total disability claim as it was based on his alleged depression injury **and** his asthma injury. The dismissal of Mr. Whitear's claim as it related to his asthma injury was properly dismissed upon the Commission's finding that Mr. Whitear had

failed to meet his burden of medical causation to show that his asthma impairment disabled him from returning to work. Rather, the uncontested finding of the Labor Commission's Medical Panel was that while Mr. Whitear did suffer from an impairment for his asthma injury, his asthma condition was not the medical cause of his inability to return to work. Further, Mr. Whitear's arguments that he was denied due process under UAPA and the Utah Constitution should be summarily denied by this Court inasmuch as Mr. Whitear failed to preserve this argument for appeal as it was never raised before the Commission. Finally, the record demonstrates that Mr. Whitear was given ample opportunity to present his permanent total disability claim as it related to asthma. A hearing was held by the Labor Commission on February 22, 1994, wherein the ALJ received testimony and evidence relevant to Mr. Whitear's claim for permanent total disability benefit on the basis of asthma ***and*** depression. At the conclusion of this hearing, the ALJ referred the case to the Commission's medical panel for evaluation. The Panel concluded that Mr. Whitear's asthma injury would not be a medical cause of his inability to work. This finding was never challenged by Mr. Whitear, and was adopted by the Labor Commission. Accordingly, the Labor Commission properly dismissed Mr. Whitear's claim for permanent total disability benefits as it related to asthma based upon Mr. Whitear's failure to meet his burden of proof on this issue.

ARGUMENT

I. BASED UPON PETITIONER'S FAILURE TO MARSHAL THE EVIDENCE, THIS COURT SHOULD REFUSE TO CONSIDER THE MERITS OF MR. WHITEAR'S CHALLENGE TO THE LABOR COMMISSION'S FINDINGS OF FACT AND ACCEPT THE FINDINGS AS VALID.

Mr. Whitear challenges the factual findings of the Labor Commission's Order that Mr. Whitear's depression was not medically caused by the industrial accident (Petitioner's Issue #2) and that Mr. Whitear lacked credibility (Petitioner's Issue #5). This Court has declared:

> [T]o successfully challenge findings of fact made in an administrative proceeding, the party seeking to upset those findings must show that the findings are "not supported by substantial evidence when viewed in light of the whole record before the court." Under this "whole record test," a party challenging the findings must "marshal 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."

Intermountain Health Care, Inc. v. Board of Review, 839 P.2d 841, 843-844 (Utah Ct. App. 1992) (citations and quotations omitted). This Court has "shown no reluctance to affirm when the petitioner fails to adequately marshal the evidence." West Valley City v. Majestic Inc. Co., 818 P.2d 1311, 1313 (Utah Ct. App. 1981).

In West Valley City, this Court explained:

> The marshaling process is not unlike becoming the devil's advocate. Counsel must extricate himself or herself from the client's shoes and fully assume the adversary's position. In order to properly discharge the duty of marshaling the evidence the challenger must present, in a comprehensive and fastidious order, every scrap of competent evidence introduced at trial which **supports** the very findings the Petitioner resists. After constructing this magnificent array of supporting evidence, the challenger must ferret out a fatal flaw in the evidence. The gravity of the flaw must be sufficient to convince the appellate court that the court's findings resting upon the evidence is clearly erroneous.

Id. at 1315 (emphasis in original).

As in the present case, "[a]ppellants often overlook or disregard this heavy burden," Mountain States Broadcasting Co v. Neale, 776 P.2d 643, 645 (Utah Ct. App. 1989), and elect instead to argue their "own position without regard for the evidence supporting the ALJ's findings." IHC, 839 P.2d at 844 (quotations omitted). "***When the duty to marshal is not properly discharged, [this court will] refuse to consider the merits of the challenges to the findings and accept the findings as valid.***" Mountain States Broadcasting, 776 P.2d at 645 (emphasis added).

In the present case, Mr. Whitear has made absolutely no attempt to marshal the evidence. Rather, Mr. Whitear cites ***only*** to the evidence which he contends supports his position.[7] As this Court has repeatedly confirmed, "because [the claimant] failed to "marshal 'all of the evidence supporting the [Commission's] 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,' [the court will] accept as conclusive the ALJ's findings of facts." Crapo v Industrial Comm'n, 922 P.2d 39, 41 (Utah Ct. App. 1996). See also Utah Medical Products, Inc. v. Searcy, 341 Utah Adv. Rep. 20 (April 24, 1998); Featherstone v. Industrial Comm'n, 877 P.2d 1251, 1254 (Utah Ct. App. 1994); IHC, 839 P.2d at 844; Bhatia v. Dept. of Emp. Sec., 834 P.2d 574, 579 (Utah Ct. App. 1992); Merriam v. Board of Review, 812 P.2d 447, 451 (Utah Ct. App. 1991); Nelson

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[7]Brown & Root contend that the evidence cited by Mr. Whitear was taken out of context of the entire testimony of Dr. Burgoyne and does **not**, in fact, support Mr. Whitear's position. This argument is addressed in full in section II(A) of the Argument.

v Department Emp Sec., 801 P.2d 158, 161 (Utah Ct. App. 1990); Pro-Benefit Staffing v Board of Rev., 775 P.2d 439, 441 (Utah Ct. App. 1989).

Mr. Whitear has completely ignored his duty to marshal the evidence in his challenges to the Commission's findings. Because Mr. Whitear's argument on Issues 2 (the Commission's finding concerning medical causation of Mr. Whitear's depression) and 5 (the Commission's finding that Mr. Whitear lacked credibility) are challenges to the Commission's factual findings, Mr. Whitear's failure to marshal the evidence is independently fatal to his appeal on these issues. Consequently, this Court should reject Mr. Whitear's's challenge to Labor Commission's factual findings and accept the findings as valid and conclusive in this case.

II. THE LABOR COMMISSION'S FACTUAL FINDINGS ARE SUPPORTED BY SUBSTANTIAL EVIDENCE WHEN VIEWED IN LIGHT OF THE RECORD AS A WHOLE.

A. The Labor Commission's Finding That Mr. Whitear's Depression Was Not Medically Caused by the Industrial Accident Is Supported by Substantial Evidence.

Independent of Mr. Whitear's failure to marshal the evidence, this Court should affirm the Commission's factual findings as they are supported by substantial evidence. The evidence of the Record overwhelmingly supports the Labor Commission's finding that the industrial accident did not cause Mr. Whitear's depression. Mr. Whitear reveals his desperation in his attempt to persuade the Court otherwise, by extracting from Dr. Burgoyne's lengthy testimony one answer to a leading question asked by Mr. Whitear's counsel and then taking said answer out of the context of Dr. Burgoyne's testimony as a whole. It should be noted that Dr.

Burgoyne concluded, along with Dr. Madison Thomas, in their Medical Panel report, that they could find no direct causal relationship between the accident and Mr. Whitear's depression, and that such depression was the result of both pre-existing and subsequent factors. (R. at 1336.) Dr. Burgoyne's testimony at the hearing clearly and distinctly supports that ultimate conclusion. Moreover, Dr. Madison Thomas, who personally participated in a psychological evaluation in connection with the Medical Panel's review, concurred in that opinion. (R. at 1032-1033.) In addition, Dr. McCann, Mr. Whitear's initial treating psychiatrist, has consistently determined that Mr. Whitear's depression is not causally related to the industrial accident.

Certainly Dr. Burgoyne's testimony should be considered in its entirety. On direct examination, Dr. Burgoyne testified:

> Q. * * * I understand that your conclusion is that whatever psychological problems he has is not causally related to the exposure; is that correct?
>
> A. That's true.

(R. at 1037.) Dr. Burgoyne then went on to detail all of the numerous factors in Mr. Whitear's life which did, in fact, cause his depression. He noted that Mr. Whitear was a hyperactive youth, which is noted to be a form of depression. Reference was made to Mr. Whitear's difficulty in school, the loss of a scholarship, his mother's death, his father's remarriage, his relationship with his step-mother, his lifestyle - which was in conflict with his religious training, his inevitable loss of youthful vigor, his loss of employment, his fathering of illegitimate children, his failed marriage, his lack of association with his children, his failure to support his children, his failed litigation attempts, his involvement in legal action

relating to paternity and collections, and his arrests for intoxication and disorderly conduct. (R. at 1038-1042.) Dr. Burgoyne reaffirmed his conclusion:

> Q. So it is your opinion, I take it, that whatever depression, though it may be slight, was not caused by the exposure at his work place?
>
> A. That's correct.

(R. at 1043.) On cross-examination, Dr. Burgoyne noted that it was his expert opinion that Mr. Whitear had been depressed all of his life, (R. at 1062), and that he suffered from depression before his industrial accident. (R. at 1066.)

The testimony cited by Mr. Whitear on pages 24 and 25 of his Brief does not of itself, contain any opinion on the part of Dr. Burgoyne to the effect that Mr. Whitear's industrial accident was even, in part, a cause of Mr. Whitear's depression. Such testimony only dealt with "factors" Dr. Burgoyne considered in connection with his opinion that Mr. Whitear's industrial accident did not cause his depression. Certainly, said quoted testimony cannot be construed to be an opinion by Dr. Burgoyne to the effect that the industrial accident was in any way a significant contributing cause of Mr. Whitear's depression. Even on continued cross-examination, Dr. Burgoyne clarified his position:

> Q. But you don't perceive that this accident and the exposure as being a contributing factor?
>
> A. No. I said that this was under the things that you brought out.

(R. at 1067.)

Such is also reinforced by Dr. Burgoyne's testimony on redirect examination:

> Q. Now, taking into consideration all the questions and factors and so forth that have been discussed with you during the course of your examination here, do you have any reason to change your conclusions as contained in the Medical Panel report.
>
> A. No reason.

(R. at 1071.) Moreover, when Dr. Burgoyne was later recalled for testimony he testified that he agreed with the conclusions of Dr. McCann, who had previously testified that Mr. Whitear's depression was not caused by his industrial accident. (R. at 1249.) Dr. Burgoyne also testified that he disagreed with Dr. Cali, who had rendered a contrary opinion:

> Q. Okay, do you disagree, then, with his conclusion that there is a causal relationship between the exposure and the depression on the basis of medical probability?
>
> A. Yes. I don't see any causal effect there at all.

(R. at 1051.)

It should also be noted that when Brown & Root' counsel sought to have Dr. Burgoyne reaffirm his conclusion that there was no causal relationship between the industrial accident and the depression, Mr. Whitear's counsel stipulated on the record that his answer would be the same as previously stated. (R. at 1053.) Thus, contrary to Mr. Whitear's claim that Dr. Burgoyne contradicted the Medical Panel's written report, it is clear that he in fact reinforced it by his confirmation of its conclusions and his explanation of the factors which did in fact cause Mr. Whitear's depression.

The Medical Panel's conclusion that Mr. Whitear's depression was not caused by the industrial accident is also confirmed by the reports and testimony of Dr. David L. McCann. Dr. McCann, like Dr. Burgoyne, is a psychiatrist. He initially analyzed Whitear's depression

back in July 1989 as a treating psychiatrist upon reference from Dr. Richard Johns at the U of U Medical Center. (R. at 659, 707-753.) Dr. McCann concluded that Mr. Whitear's depression did not come from his industrial chemical exposure. Mr. Virginius Dabney, who was then acting as Mr. Whitear's attorney, subsequently sought another evaluation from Dr. McCann, resulting in Dr. McCann's written report dated March 8, 1990, which notes:

> Mr. Whitear was evaluated in my office on July 20, 1989. His symptoms were compatible with a diagnosis of major depressive order. I advised him of the diagnosis and told him that his condition was not correlated with his industrial chemical exposure.

(R. at 727.)

Brown & Root later requested yet another examination and evaluation by Dr. McCann, resulting in his lengthy report dated February 16, 1994, wherein he again concluded:

> In short, a thorough evaluation of medical, psychological and psychiatric issues fails to establish any clear causative link between the patient's disability and the exposure to the toxic chemicals which occurred during the course of the patient's employment.

(R. at 753.) And again, in anticipation of the hearing on the Medical Panel report herein, Brown & Root requested an updated analysis by Dr. McCann in light of all of the evidence which had been submitted to the Commission at the original hearing. This resulted in his report dated January 11, 1996, in which Dr. McCann reaffirmed, after an exhaustive review of the matter, that there is no medical evidence which would support Mr. Whitear's claim that his depression was caused by his industrial exposure. (R. at 1352-1362.)

Dr. McCann also testified at the hearing, both as a treating and evaluating psychiatrist, that he had previously advised Mr. Whitear that his condition was not correlated with his industrial chemical exposure, (R. at 1078), and that:

> There was no foundation to establish a causal link between the industrial experience which occurred and the subsequent prolonged disabling depression which the patient experienced.

(R. at 1086-1087.) He further testified:

> A. I was unable to find any evidence that would enable me to link the industrial exposure to the subsequent depression that developed later.

(R. at 1090.) He also affirmed that he was in agreement with the Medical Panel as far as not being able to link the depression with the industrial exposure, (R. at 1092), and specifically rendered an opinion to the effect that the accident could not be linked to even a portion of Mr. Whitear's depression. Before being cut off in his answer to the inquiry by Mr. Whitear's counsel, Dr. McCann testified:

> A. Well, I came to the same conclusions, that the accident itself could not be linked, so if it can't be linked we can't assign a portion to --

(at this point Mr. Whitear's counsel cut off the answer which he obviously didn't want Dr. McCann to finish). (R. at 1100.)

It should be noted that during his cross-examination of Dr. McCann, Mr. Whitear's counsel mischaracterized the testimony of Dr. Burgoyne. Dr. McCann clarified his opinion to the effect that the industrial accident did not cause any portion of Mr. Whitear's depression:

> Q. Dr. Burgoyne testified that the exposure, the accident, was a factor in causing depression. My question now is, do you agree or disagree with that?

> A. I would disagree with that.
>
> MR. POELMAN: And I object to that question on the grounds that I believe Dr. Burgoyne's answer was that it could have been, but not that it was.
>
> THE COURT: I understand your objection. I remember what he said.

(R. at 1111.) Dr. McCann restated on various occasions during the course of his testimony his firm opinion to the effect that Mr. Whitear's depression was not causally related to the industrial accident. (R. at 1110, 1118, 1273-1274.)

Thus, the conclusion of the Labor Commission to the effect that Mr. Whitear's industrial accident did not cause his depression is overwhelmingly confirmed by the credible medical evidence. The only contrary medical evidence presented by Mr. Whitear came from Dr. Cali who, as opposed to Doctors Burgoyne and McCann, is not a psychiatrist and whose opinion was effectively rebutted by the testimony of both Dr. Burgoyne, (R. at 1250-1251), and the testimony of Dr. McCann. (R. at 1284, 1285, 1303.)

Mr. Whitear appears to take the approach that all of the expert testimony ought to be discarded in favor of the notion that since Mr. Whitear's depression prior to his industrial accident was not detected, and that sometime after his industrial accident he suffered depression, then the Commission ought to have concluded that his depression was the result of his industrial accident. Such an approach is not only overwhelmingly rebutted by the expert testimony, but it is not adequately supported by either the facts nor common sense reasoning in light of all of the other factors in Mr. Whitear's life which did cause his depression.

Mr. Whitear cites the testimony of his brother, Craig Whitear, and his friends Brent Bowman and Jeff O'Driscoll in support of his claim that his depression was not detectable prior to the industrial accident, and that he has become noticeably depressed at some time since the accident. The testimony of these three witnesses is extremely weak however since it lacks any professional understanding with respect to the concept of depression, and it does not contain any detail which would tie the subsequently detected depression to the industrial accident as opposed to numerous other emotional traumas which Mr. Whitear was then sustaining in connection with his other life's activities.

Craig Whitear cannot be faulted for wanting to support his brother in this case; but, his testimony really provided no conclusive evidence upon which to base an informed judgment on the basic issue of causation. Obviously, his testimony was devoid of any expertise on the subject. It was so devoid of substance, that he was not even subjected to cross-examination. Likewise, the testimony of Brent Bowman was that of a very close friend of the family, (R. at 1216), who is obviously interested in supporting Mr. Whitear's claim for personal reasons. However, cross-examination of Mr. Bowman revealed that his contact and conversations with Mr Whitear were so rare after the accident that he was not in a position to determine when or for what reasons Mr Whitear may have become depressed. (R. at 1222.) Certainly, Mr. Bowman has no expertise with respect to diagnosing depression and its causes. He is an attorney who was representing Mr Whitear in connection with his paternity suit. (R. at 1213) Finally, Mr O'Driscoll, who also characterized himself as a close friend of the family, (R. at 1213), admitted on cross-examination that he had no knowledge with respect to Mr Whitear's exposure and that he had no expertise with respect to depression. (R. at 1188.)

He also acknowledged that Drs. Burgoyne and McCann would have more expertise in that field than would Dr. Cali. (R. at 1290-1291.) Mr. Whitear's counsel specifically noted that O'Driscoll was not testifying as an expert, (R. at 1191-1192), and Mr. O'Driscoll himself denied that he was testifying as a medical expert. (R. at 1195.) He too noted that he had infrequent contact with Mr. Whitear after the 1980's and that he had no knowledge as to when Mr. Whitear's depression had developed. (R. at 1193.)

The testimony of these three lay witnesses concerning their perception of Mr. Whitear's mental condition prior to the industrial accident as opposed to that which later developed, is no proof whatever that the industrial accident was the cause of the depression. The before/after scenario lacks any weight, especially in light of the overwhelming evidence to the contrary.

It is not this Court's role to reweigh the evidence that was before the Labor Commission. Rather, the Commission's factual findings must be sustained by this Court if the findings are supported by substantial evidence. This Court has declared that "substantial evidence is that which a reasonable person might accept as adequate to support a conclusion." Merriam, 812 P.2d at 450 (quotation omitted). While the numerous above-cited references to expert psychiatric testimony may not be sufficient for Mr. Whitear, Brown & Root asserts that this evidence is clearly sufficient for a reasonable person and for this Court. Mr. Whitear's blind-folded view of the record misconstrues the testimony of Dr. Burgoyne. In contrast, the record as a whole and the Labor Commission's interpretation of Dr. Burgoyne's *entire* testimony reflects that there is substantial evidence to support the Commission's Order.

B. The Labor Commission's Finding That Mr. Whitear Was Not A Credible Witness Is Supported by Substantial Evidence.

Mr. Whitear erroneously attacks the finding of the ALJ that Mr. Whitear was not a credible witness. Rather, it is the Labor Commission's Order that is under review by this Court. The Labor Commission's Order on Motion for Review clearly reflects that the Labor Commission did not just "rubber stamp" the ALJ's conclusion as to the credibility of Mr. Whitear. Rather, the Appeals Board's conclusions were based upon their own thorough review of the Record. While the ALJ's ultimate conclusion concerning Mr. Whitear's credibility was persuasive inasmuch as the ALJ "was in the position to directly observe Mr. Whitear's demeanor during the hearing," (R. at 1641), the Appeals Board also found that it "agree[d] with Mr. Whitear that some of the ALJ's examples of Mr. Whitear's lack of credibility are unpersuasive." (R. at 1640.) The Appeals Board nevertheless found that "other factors do undercut Mr. Whitear's credibility, such as his claim of the ability to smell perfume at a distance of one mile and his unpersuasive performance on psychological and physical tests administered by the medical experts." (R. at 1640-1641.) The Appeals Board also adopted the ALJ's factual findings, including paragraph 6 of the ALJ's Order which outlines in detail numerous specific examples of facts that were found to undermine Mr. Whitear's credibility. (See Page 5 of Addendum 13 to Petitioner's Brief.) Again, it is not the province of this Court to reweigh the evidence. Rather, this Court must sustain the Commission's factual findings if they are supported by substantial evidence. The Commission's finding that Mr. Whitear is not a credible witness is sufficiently and appropriately supported when viewed by the record as a whole.

More importantly, as the Appeals Board noted, "Mr. Whitear's eligibility for workers' compensation benefits does not depend on his personal credibility, but rather, on the reasoned opinion of the qualified medical experts who have examined him." (R. at 1641, underline in original.) Accordingly, even if the Commission's finding that Mr. Whitear was not a credible witness was found to be unsupported by the record, any such error would be harmless since it did not affect the Commission's ultimate conclusion to deny Mr. Whitear permanent total disability benefits.

III. THE LABOR COMMISSION APPROPRIATELY ORDERED A HEARING ON THE MEDICAL PANEL'S REPORT TO OBTAIN ADDITIONAL INFORMATION FROM THE MEDICAL PANEL CONCERNING THE BASIS FOR THE PANEL'S CONCLUSION THAT MR. WHITEAR'S DEPRESSION WAS NOT CAUSED BY THE INDUSTRIAL ACCIDENT.

Mr. Whitear asserts that the Labor Commission erred in remanding Mr. Whitear's claim to the ALJ for a hearing on the Medical Panel's report. Mr. Whitear's claim that the hearing on February 7, 1996, should not have been held is not only wrong, but it is irrelevant to the substantive issues decided by the Labor Commission.

After an initial hearing on Mr. Whitear's claim, the case was referred to a medical panel to evaluate the significant medical issue of causation of Mr. Whitear's alleged injuries of asthma and depression. See, e.g., Willardson v. Industrial Comm'n, 904 P.2d 671 (1995). Medical panels serve as independent, objective, scientific consultants to the Commission, and it is intended that the medical panel's report be detailed and well-supported and to contain analysis and background sufficient to assist the Commission in its role as the ultimate fact

finder. See Id. (role of medical panel); United States Steel Corp v. Industrial Comm'n, 607 P.2d 807 (Utah 1980) (the Commission has the ultimate duty to make the findings of fact).

In the present case, the Medical Panel produced a report concluding that Mr. Whitear's depression was ***not*** caused by the industrial accident. The report did not contain a detailed explanation of the Panel's conclusion inasmuch as such was not requested by the ALJ. The Panel's report was circulated to the parties, and Mr. Whitear filed an objection to the Panel's report on the singular issue of the Panel's conclusion regarding causation of Mr. Whitear's depression.[8] Mr. Whitear requested a hearing and then withdrew his request when he grew weary of the delay. Since the report was favorable to Brown & Root's position, Brown & Root did not file an objection to the Medical Panel's report.

Surprisingly, rather than request clarification from the Panel concerning their conclusion, the ALJ entered an Interim Order on April 20, 1995, adopting the Medical Panel's report with the significant reversal in finding that Mr. Whitear's depression was caused by the industrial accident. (R. at 970 - 972.) In so doing, the ALJ summarily rejected the abundant evidence in the medical records which supported the Panel's conclusion. Brown & Root accordingly filed a timely motion for review of the ALJ's order, asserting that rather than completely dismissing the Panel's conclusion, the Panel should have, at least, been allowed to provide clarification of its report and conclusion.

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[8]Mr. Whitear did not object to any of the other findings of the Medical Panel, including the Panel's finding that Mr. Whitear was not disabled from performing gainful employment as a result of his pulmonary injury. This issue is discussed more thoroughly in subsection IV(A) of the Argument.

The Commission is the ultimate fact finder in adjudicative proceedings on workers compensation claim. United States Steel Corp., 607 P.2d at 810. In its Order of Remand, the Commission concluded,

> [F]urther information is required from the medical panel regarding the cause of Mr. Whitear's depression. In particular, the Industrial Commission notes that the medical panel has expressed the opinion that Mr. Whitear's depression does not appear to be causally related to the exposure and without an explanation of this finding by the medical panel, any final determination on the merits of Mr. Whitear's claim may be flawed. In the judgment of the Industrial Commission, this issue can be resolved most easily and efficiently at this point in the proceeding.

(R. at 985, underline in original.)

The provisions of UAPA governing the Commission's Order on Review expressly allow the Commission to remand "all or any portion of an adjudicative proceeding" for further proceedings. Utah Code Ann. § 63-46b-12(6)(c)(vi) (1995). As the Supreme Court in Hackford v. Industrial Commission declared,

> The trial of disputes, whether before courts or administrative tribunals, is not a game of tricks, but is a proceeding purposed to find the truth on contested issues of fact and to correctly apply the law thereto. ***It is both the privilege and the duty of the Commission to have before it all of the competent evidence having a material bearing on the issues necessary to consider in making the award.*** And that is what the parties are entitled to, nothing more nor less.

364 P.2d 1091, 1093 (Utah 1961) (emphasis added). In Hackford, the Supreme Court had vacated an order of the Commission because of a deficiency in the evidence to support the report of a medical panel appointed by the Commission. The court ruled that on remand the Commission was not required to make an award based solely on the plaintiff's evidence, but it was the prerogative of the Commission to hold a supplemental hearing to obtain additional evidence from the medical panel members. Id.

In the present case, an objection to the Medical Panel's report had been filed. The Commission then had every right to reschedule a hearing on the objections even though Mr. Whitear had withdrawn his request for a hearing. The Commission was correct in determining that a hearing on Mr. Whitear's objections to the Medical Panel report should be held. Certainly, from a procedural standpoint, it was far better to require such a hearing at that point of the proceedings in order to develop a proper record rather than to await a later order by the ALJ which would be subject to reversal. Ultimately, it is the full Commission who has the authority to make findings of facts and conclusions of law. It is therefore its right to assure that the proceedings before the ALJ are handled in a way to fairly present the full facts. Mr. Whitear's bald claims that he was prejudiced by the Commission's Order to hold hearing on this issue is completely without merit. To the contrary, the hearing allowed Mr. Whitear an opportunity to present additional evidence and testimony in support of his claim and cross-examine the physicians concerning their conclusions on the medical issues.

Accordingly, the Commission appropriately ordered that a hearing be held to obtain additional evidence on the issue of medical causation of Mr. Whitear's alleged depression injury. This Court should affirm the Commission's action as appropriate.

IV. THE LABOR COMMISSION PROPERLY DISMISSED MR. WHITEAR'S PERMANENT TOTAL DISABILITY CLAIM AS IT RELATED TO HIS ASTHMA INJURY.

A. The Labor Commission Properly Found That the Medical Evidence Does Not Support Mr. Whitear's Claim That He Is Unable to Work Because of His Asthma Injury.

In Points III and IV of his Brief, Mr. Whitear's asserts that the Labor Commission erred in dismissing Mr. Whitear's claim for permanent total disability benefits based upon his asthma injury. In essence, Mr. Whitear argues that the ALJ's Order was over expansive since the focus of the February 7, 1996, hearing was to address the medical cause of his depression. Mr. Whitear fails to inform the Court, however, that the reason for the focus of the February 7, 1996, hearing on Mr. Whitear's depression claim was that the extent of medical disability of Mr. Whitear's asthma condition had previously been determined by the Medical Panel, without objection by Mr. Whitear.

At the initial hearing on February 22, 1994, the ALJ received testimony from Mr. Whitear regarding his claim for permanent total disability benefits. (R. at 930.) Mr. Whitear asserted that he was permanently and totally disabled as a result of industrial injuries which he identified as "depression and asthma." (R. at 931.) The ALJ found that following the industrial accident, Mr. Whitear had continued to work for a drilling company without limitation from his 1987 industrial accident. (R. at 931.) Through approximately June 1990, Mr. Whitear was found to have been working, receiving unemployment compensation, or receiving workers compensation benefits for a knee injury he sustained while working for a subsequent employer. (R. at 931-932.)

The ALJ referred the case to the Medical Panel to evaluate whether Mr. Whitear's asthma and depression were caused by the 1987 industrial accident and to assign a permanent impairment rating that was due to these conditions. While the Medical Panel concluded that Mr. Whitear's asthma was caused by the 1987 industrial accident and rated Mr. Whitear with a 10% whole person permanent impairment for this condition, the Panel's pulmonologist concluded, "Mr. Whitear has good pulmonary function. His asthma episodes are very episodic, but infrequent. I see no reason for him to be totally disabled from a pulmonary point of view." (R. at 956.) Instead, the Panel noted that, pursuant to Mr. Whitear's Social Security claim, the medical reason for Mr. Whitear's inability to work was his depression, (R. at 938), which it concluded was not related to the 1987 industrial accident. (R. at 944.) Mr. Whitear's objection to the Medical Panel's report addressed ***only*** the Panel's conclusion that his depression was not causally related to the industrial accident. (R. at 961.) Mr. Whitear never objected to the Panel's finding that the pulmonary condition did not disable him from returning to gainful employment.

The Panel's conclusion on this issue was clearly understood by the parties and the prior ALJ. When Judge Allen entered his Interim Order, he adopted the findings of the Medical Panel with the reversed finding that Mr. Whitear's depression was caused by the industrial accident. (R. 970-971.) In doing so, Judge Allen adopted the Panel's finding that Mr. Whitear was not disabled from work as a result of the pulmonary condition, but was disabled from work as a result of depression. Judge Allen referred to the Social Security determination as evidence of Mr. Whitear's disability from work. As will be discussed below, the Social Security disability determination was made based on Mr. Whitear meeting the scheduled

impairment for depression. (R. at 44-46.) A review of the entire Social Security record, (R. 44-445), reveals that although asthma was alleged by Mr. Whitear as a basis for his disability, the determination of disability was ***actually*** made on the basis of depression. Accordingly, Judge Allen's tentative finding of permanent total disability was based upon the effect of the alleged depression injury, not the asthma injury. The remaining proceedings before the Commission were accordingly focused on the cause of the alleged depression injury since the Panel's finding that Mr. Whitear would be able to continue working with the asthma impairment was uncontested by the parties and accepted by the Commission.

The complete Social Security file was placed into evidence at the February 22, 1994 hearing as Exhibit D-2. (R. at 42-445.) A thorough analysis of that file reveals that it contains no underlying documentation whatever which would support a finding that Mr. Whitear is disabled because of his asthma. Rather, the file reflects that the Social Security Administration found that Mr. Whitear was <u>not</u> disabled because of his asthma. (R. at 59), concluding, "This condition is not severe enough to cause you a signification restriction in your ability to carry out your normal daily activities." (R. at 59.) Social Security further explained, "Although your condition prevents you from performing your past work as a roughneck, it would permit you to do other less demanding work which does not expose you to pulmonary irritants." (R. at 59, 277.) This finding is consistent with the conclusion of Labor Commission's Medical Panel. (R. at 956.) The Social Security finding is further supported by a March 4, 1991, statement to Social Security from Tracie Goodwin, Mr. Whitear's former wife, declaring that Mr. Whitear had lied to all of the doctors regarding his smoking habits and had no trouble breathing during the years following the industrial accident,

notwithstanding the fact that Mr. Whitear was performing hard labor and working on the farm with his brother. (R. at 125.)

While the above Social Security finding was made as a part of Mr. Whitear's initial denial of benefits, the subsequent award of benefits did not include ***any*** new finding regarding the asthma injury. Rather, the Social Security ALJ awarded benefits based *solely* upon the finding that Mr. Whitear met the required listing for a severe impairment due to *depression.* (R. at 44-46.) Specifically, the Social Security ALJ refers to the testimony of Dr. William W. Barrett, who testified that Mr. Whitear's "impairments are attended with the same findings as medical listing 12.04 dealing with affective disorders. . . . Dr. Barrett testified that the claimant's depressive syndrome has a marked restriction in his activities of daily living, marked difficulties in his ability to maintain social functioning, frequent deficiencies in his ability to concentrate, resulting in his failure to complete tasks in a timely manner, and that he suffers from continual episodes of deterioration in work or work-like settings." (R. at 45.) Thus, as the Social Security file demonstrates, the sole basis upon which a finding of disability could be made under the Social Security criteria was that which relates to his depression, not his asthma. Moreover, the Labor Commission's ALJ correctly noted that he is not bound by a Social Security disability finding. (R. at 1317.) His duty is to review all of the evidence and then make findings based upon a preponderance of the evidence.

As to the cited rehabilitation report of Anita Carver, said report was determined to be premature and thus was not admitted into evidence. More importantly, however, is the fact that this report does not provide any kind of independent opinion to the effect that Mr. Whitear is disabled from work because of his asthma. The report merely cites Mr. Whitear's own

opinion. The rehab counselor did not herself address the question of whether or not Mr. Whitear is actually disabled from work and, if so, for what reasons. The conclusion of Ms. Carver was simply that she accepted Mr. Whitear's own self-serving conclusion that "he would not be able to benefit from (the Agency's) services." Thus, the rehab report lends no independent support whatever to Mr. Whitear's claim to disability because of his asthma.

In a claim for permanent total disability, the claimant must demonstrate that his disability is medically caused by the industrial injury. It is only after the claimant has met his burden of showing medical causation for impairment from employment, that issues of vocational rehabilitation are properly reviewed by the ALJ. In the present case, Mr. Whitear never satisfied his initial burden of demonstrating that his asthma impairment was the medical cause of his inability to return to work. Rather, the Medical Panel concluded (as did the Social Security Administration) that Mr. Whitear could return to gainful employment notwithstanding his asthma impairment. This finding was never challenged by Mr. Whitear and was adopted by the Labor Commission. Accordingly, the ALJ was correct in pointing out at the hearing that Mr. Whitear had not provided evidence sufficient to show that he is permanently and totally disabled because of his asthma. This fact is confirmed in the testimony of Dr. McCann, who stated:

> The material from the records, from the other physicians found that there was no reason physically that he could not work, that he had sustained no physical injury from his exposure. And they had allowed that he could go to work full time someplace where fumes would not bother him.

(R. at 1107.)

Based upon the evidence in the Record, the ALJ was correct in his conclusions as stated at the hearing:

> As to the claim under the asthma, since you have expanded it to that, a reading in brief of that indicates that its not disabling except under certain circumstances, and I don't think there is sufficient evidence to show that he can't go back to work as a result of that condition.
>
> He may be restricted as to certain conditions. This indicates that maybe he can't go back to work in a farming situation because of the hay, the dander, those kinds of problems, but there are other jobs that he can do where the environment is relatively clean.

(R. at 1322-1323.)

The Labor Commission adopted the findings of the ALJ and thereby the conclusions of the Medical Panel. The Labor Commission appropriately dismissed Mr. Whitear's permanent total disability claim, as it related to his asthma injury, on the basis of the Medical Panel's finding that there was no medical inability to work due to the asthma impairment. Mr. Whitear never challenged this finding, and it has accordingly become the law of the case. This Court should accordingly affirm the Commission's complete dismissal of Mr. Whitear's claim for permanent total disability benefits.

B. Mr. Whitear Did Not Preserve His Due Process Argument for Appeal.

In Point VII of his Brief, Mr. Whitear claims that he has been denied a hearing on his claim for permanent total disability benefit as it relates to his asthma injury. Mr. Whitear claims that this denial is in violation of his due process rights under UAPA and the Utah Constitution.

This Court should reject Mr. Whitear's appeal on this issue on the basis that he failed to raise this argument below during the agency review.[9] See Brown & Root Indus. Serv. v. Industrial Comm'n, 947 P.2d 671 (Utah 1997). The Supreme Court in this case declared, "We have consistently held that issues not raised in proceedings before administrative agencies are not subject to judicial review except in exceptional circumstances. Pease v. Industrial Comm'n, 694 P.2d 613, 616 (Utah 1984); Alvin G. Rhodes Pump Sales v. Industrial Comm'n, 681 P.2d 1244, 1249 (Utah 1984). No reason has been suggested why an exception should be made here. The rule that courts should not reach issues on review that were not raised before an administrative agency is so basic and necessary to orderly procedure that we will enforce it despite the lack of a timely objection by [the other parties.]" Id. at 673.

C. Mr. Whitear Was Given Ample Opportunity to Present His Permanent Total Disability Claim as it Related to Asthma.

Notwithstanding Mr. Whitear's failure to raise his due process claim below, the Record clearly demonstrates that Mr. Whitear was, in fact, provided ample opportunity to present his asthma claim. The initial hearing on Mr. Whitear's permanent total disability claim was held on February 22, 1994. At this hearing, the ALJ received testimony from Mr. Whitear concerning his permanent total disability claim on the basis of ***both*** the alleged depression ***and*** asthma injury. Following this hearing, the ALJ referred the matter to the Medical Panel to

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[9]Mr. Whitear cites pages 1412-1413 and 1640 in references to his preservation of this issue for appeal. A review of these pages, however, reveals that absolutely no reference is made to an alleged violation of Mr. Whitear's due process rights under UAPA or the Utah Constitution.

review and evaluate the issues of medical causation and permanent impairment due to ***both*** of these alleged injuries. The Panel concluded that Mr. Whitear did suffer an asthma injury from the industrial accident and assigned a permanent impairment rating for this injury. Importantly, the Panel concluded that Mr. Whitear was ***not*** medically disabled from returning to work as a result of his asthma condition. The Panel's report was circulated to the parties for review. Mr. Whitear ***never*** objected to the Panel's conclusions that he could continue work with his asthma condition. Mr. Whitear therefore waived any right to challenge this finding. Based upon the Panel's findings, the ALJ appropriately dismissed Mr. Whitear's permanent total disability claim as it related to asthma injury. The ALJ's dismissal of Mr. Whitear's claim was properly made on the failure of Mr. Whitear to meet his burden of proof that his asthma condition was the medical cause of his inability to return to work. This finding was adopted by the Labor Commission. Accordingly, this Court should affirm the Order of the Labor Commission.

V. THE UTAH ADMINISTRATIVE PROCEDURES ACT DOES NOT PRECLUDE AN ALJ FROM REQUESTING THAT COUNSEL FOR THE PREVAILING PARTY PREPARE A DRAFT PROPOSED ORDER.

Mr. Whitear argues that the assignment by the ALJ to Brown & Root's counsel, as the prevailing party, to draft a proposed Order was in violation of the Utah Administrative Procedures Act. Section 63-46b-10 of UAPA provides as follows concerning the procedures for formal adjudicative proceedings:

> (1) Within a reasonable time after the hearing, or after the filing of any post-hearing papers permitted by the presiding officer, or within the time

required by any applicable statute or rule of the agency, the presiding officer shall sign and issue an order that includes:

(a) a statement of the presiding officer's findings of fact based exclusively on the evidence of record in the adjudicative proceedings or on facts officially noted;
(b) a statement of the presiding officer's conclusions of law;
(c) a statement of the reasons for the presiding officer's decision;
(d) a statement of any relief ordered by the agency;
(e) a notice of the right to apply for reconsideration;
(f) a notice of any right to administrative or judicial review of the order available to aggrieved parties; and
(g) the time limits applicable to any reconsideration or review.

Utah Code Ann. § 63-46b-10 (1997).

There is nothing in this statutory provision which precludes the practice of allowing the prevailing party to *draft* proposed findings. Such proposed findings are not entered by the prevailing party, but are merely submitted to the judge for his review and decision. The Findings of Fact, Conclusions of Law and Order of the ALJ in this proceeding were entered by him and bear his signature. Thus, he bears full responsibility therefor. Thus, he did not in any way violate the provisions of the Utah Administrative Procedures Act as claimed by Mr. Whitear. Certainly, the practice of allowing the prevailing party to draft proposed findings is not a delegation of statutory authority as claimed by Mr. Whitear. The ALJ properly retained unto himself the power to modify the proposed Findings in any way that he saw fit. (R. at 1363.) Thus, the Findings which the ALJ entered in this case on July 26, 1996, were in fact his Findings and bear his signature. Furthermore, these findings were prepared consistent with the ALJ's oral decision as announced at the hearing.

Most importantly is the fact that said Findings and Conclusions are well supported by the evidentiary record herein. To ensure the accuracy of the proposed findings of fact and

conclusions of law, Brown & Root's counsel made a careful and detailed review of all of the evidence presented in the voluminous record and lengthy transcript. The proposed Findings of Fact, Conclusions of Law, and Order were sent to Mr. Whitear's counsel and counsel for the Employers' Reinsurance Fund for comment and objection. (R. at 1387.) Brown & Root's counsel expressly requested that both Mr. Scheffler and Mr. Boorman contact him regarding the proposed order "so that an attempt [could] be made to resolve any differences prior to submitting them to [the ALJ] for resolution." (R. at 1387.) No objections to the form and content of the proposed Order were ever filed by Mr. Whitear's counsel.[10]

It is the routine practice of the courts to have counsel for the prevailing party draft findings to be considered by the judge. This is for good reasons. Obviously, on appeal, the prevailing party is in the position of having to defend the decision of the judge. Thus, it is in the interest of the prevailing party to make sure that the findings are properly supported by the record. In this case, the evidence was extensive and the likelihood of an appeal was aptly demonstrated by the hostility of Mr. Whitear and his counsel. The practice of having the prevailing party present a draft of findings to the judge for his consideration is not only appropriate under UAPA, but a routine practice and based upon good and proper judicial administration. Under such a practice, the judge always has the last word and is the one who enters the Findings of Fact, Conclusions of Law and Order as his own.

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[10]It is difficult to understand how Mr. Whitear may have been "substantially prejudiced," the standard required for the Court to grant relief under UAPA, when he didn't ever file an objection with the ALJ concerning the form and content of the proposed order.

The practice also allows for good judicial economy. There are five ALJ as the Labor Commission. Three of the ALJs share one support staff person. The other two ALJs are each allotted a portion of the time of another support staff member who is also assigned other Commission duties. The ALJs handle a voluminous number of cases in several very specialized areas of law, including workers compensation, discrimination/EEOC, fair housing, OSHA/UOSHA, Safety, and the Labor Standard Bureau - which governs wage claims and child labor laws. In the workers compensation arena alone, there are approximately 1600-1700 applications for hearing filed in a single year. Additionally, the ALJs are required **by statute** to approve any and all compensation agreements (which are required for **any** payment of permanent partial disability benefits) and any and all settlements on workers compensation claims (disputed **and** undisputed). The ALJs receive little or no assistance through their support staff in the preparation of the orders, but generally type their own orders. In fact, one ALJ recently explained that she was extremely behind in producing her orders because she had suffered a physical injury which limited her typing ability.

In light of the great demands on the ALJs, it is not only appropriate, but extremely reasonable for an ALJ to obtain draft orders from the prevailing party. The ALJ then may review the proposed findings and modify them as appropriate. The same practice is utilized by the ALJ in their review and evaluation of the medical issues. The medical panel serves the role of providing a review and evaluation of the medical issues, but the ultimate conclusion is left to the ALJ. The Panel's conclusions are regularly adopted by the ALJs as their own by reference rather than the ALJ specifically identifying each of the medical opinions and

conclusions. The ratification and adoption of the proposed findings of fact, conclusions of law and order accordingly meets any standard which is required under UAPA.

Finally, the Court should note that it is the Commission's Order which is on review. On a motion for review, the Commission performs essentially a de novo review. The fact that the Commission may adopt the findings as made by the ALJ certainly does not nullify their validity as long as they are supported by substantial evidence. The findings in the present case clearly are supported by the record. Accordingly, Mr. Whitear's appeal on this issue should be denied and the Order of the Labor Commission affirmed.

CONCLUSION

It is clear from the record in this case that the only permanent impairment which Mr. Whitear suffered as a result of his industrial accident on April 22, 1987, is a 10% permanent partial impairment resulting from his asthma. It is also clear that said asthma does not preclude his ongoing gainful employment. After this accident, he returned to work on drilling rigs and engaged in strenuous manual labor, working long hours for an extended period of time without any noticeable problem. Such is confirmed by his own wife, who should know. Mr. Whitear has only been rendered unable to work by his depression, which has obviously been caused and aggravated by numerous emotional and psychological traumas in Mr. Whitear's life not related to the industrial accident. The Commission's findings on these issues are supported by substantial evidence and should accordingly be affirmed.

Mr. Whitear has been tenacious in his attempt to generate out of his industrial accident a compensation award of permanent total disability, but the evidence is overwhelmingly

against such a claim. He was first informed by Dr. McCann in July 1989 that his depression was not from the industrial accident. This conclusion was reaffirmed and reasserted by Dr. McCann pursuant to further testing, examination and review. It has also been reaffirmed by Dr. Thomas and Dr. Burgoyne, as members of an independent Medical Panel commissioned by the Labor Commission. Finally, the Medical Panel concluded that Mr. Whitear's asthma condition did not preclude him from returning to work. This finding was never challenged by Mr. Whitear and was properly adopted by the Labor Commission. Accordingly, the Labor Commission's denial of Mr. Whitear's permanent total disability claim, as it related both to his alleged depression injury and to his admitted asthma injury, was properly dismissed on the basis the Mr. Whitear failed meet his burden of proof to show that his industrial injuries were the medical cause of his inability to return to work.

Other points raised by Mr. Whitear on appeal are not only without merit but do not raise issues which should affect the results. They simply do not prejudice Mr. Whitear. The decision of the Labor Commission to order a hearing to obtain additional evidence from the Medical Panel was appropriate and further allowed Mr. Whitear to present additional evidence and testimony regarding his claim. Likewise, Mr. Whitear's claim that the procedure followed by the ALJ is not proper has no merit, and is simply an attempt to avoid a decision on the merits of the case. Mr. Whitear was given ample opportunity to present his claim and failed in his efforts because he was unable to meet his burden of proof on the medical issues.

It is respectfully submitted that Mr. Whitear's appeal should be denied, and this Court should affirm the Order of the Labor Commission.

RESPECTFULLY SUBMITTED this 15th day of July, 1998.

BLACKBURN & STOLL

By _____

Stuart L. Poelman
Dori K. Petersen
Attorneys for Respondents
Brown & Root and/or
Highland Insurance

CERTIFICATE OF MAILING

I hereby certify that I serve two true and correct copies of the foregoing **BRIEF OF RESPONDENTS BROWN & ROOT, INC. and/or HIGHLANDS INSURANCE** by first class mail, postage prepaid, this 15th day of July, 1998, to:

Hans M. Scheffler
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BLACKBURN & STOLL

By _____
Stuart L. Poelman
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Attorneys for Respondents
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Highland Insurance

ADDENDUM

1. Utah Code Annotated § 35-1-67 (1987)
2. Preliminary Findings of Fact, Judge Timothy C Allen, on or about March 1, 1994
3. Utah Code Annotated § 63-46b-8 (1997)
4. Utah Code Annotated § 63-46b-12 (1997)

Tab 1

injury for a total of 312 weeks in compensation be required to be paid. 1983

35-1-67. Permanent total disability - Amount of payments - Vocational rehabilitation - Procedure and payments.

In cases of permanent total disability the employee shall receive 66 2/3% of his average weekly wages at the time of the injury, but not more than a maximum of 85% of the state average weekly wage at the time of the injury per week and not less than a minimum of $45 per week plus $5 for a dependent spouse and $5 for each dependent minor child under the age of 18 years, up to a maximum of four dependent minor children not to exceed the average weekly wage of the employee at the time of the injury, but not to exceed 85% of the state average weekly wage at the time of the injury per week. However, in no case of permanent total disability shall the employer or its insurance carrier be required to pay weekly compensation payments for more than 312 weeks. A finding by the commission of permanent total disability shall in all cases be tentative and not final until such time as the following proceedings have been had: If the employee has tentatively been found to be permanently and totally disabled, it shall be mandatory that the industrial commission of Utah refer the employee to the division of vocational rehabilitation under the state board of education for rehabilitation training and it shall be the duty of the commission to order paid to the vocational rehabilitation division, out of the second injury fund provided for by Subsection 35-1-68(1), not to exceed $1,000 for use in the rehabilitation and training of the employee; the rehabilitation and training of the employee shall generally follow the practice applicable under Section 35-1-69, relating to the rehabilitation of employees having combined injuries. If the division of vocational rehabilitation under the state board of education certifies to the industrial commission of Utah in writing that the employee has fully cooperated with the division of vocational rehabilitation in its efforts to rehabilitate him, and in the opinion of the division the employee may not be rehabilitated, the commission shall order that there be paid to the employee weekly benefits at the rate of 66 2/3% of his average weekly wages at the time of the injury, but not more than a maximum of 85% of the state average weekly wage at the time of the injury per week and not less than a minimum of $45 per week plus $5 for a dependent spouse and $5 for each dependent minor child under the age of 18 years, up to a maximum of four dependent minor children not to exceed the average weekly wage of the employee at the time of the injury, but not to exceed 85% of the state average weekly wage at the time of the injury per week out of the second injury fund provided for by Subsection 35-1-68(1), for such period of time beginning with the time that the payments,as in this section provided, to be made by the employer or its insurance carrier terminate and ending with the death of the employee. No employee shall be entitled to any such benefits if he fails or refuses to cooperate with the division of vocational rehabilitation under this section.

All persons who are permanently and totally disabled and entitled to benefits from the second injury fund under Subsection 35-1-68(1), including those injured prior to March 6, 1949, shall receive not less than $120 per week when paid only by the second injury fund, or when combined with compensation payments of the employer or the insurance carrier. The division of vocational rehabilitation shall, at the termination of the vocational training of the employee, certify to the industrial commission of Utah the work the employee is qualified to perform, and thereupon the commission shall, after notice to the employer and an opportunity to be heard, determine whether the employee has, notwithstanding such rehabilitation, sustained a loss of bodily function.

The loss or permanent and complete loss of use of both hands or both arms, or both feet or both legs, or both eyes, or of any two thereof, constitutes total and permanent disability, to be compensated according to the provisions of this section and no tentative finding of permanent total disability is required in those instances. In all other cases where there has been rehabilitation effected but where there is some loss of bodily function, the award shall be based upon partial permanent disability.

In no case shall the employer or the insurance carrier be required to pay compensation for any combination of disabilities of any kind as provided in Sections 35-1-65, 35-1-66 and this section, including loss of function, in excess of 85% of the state average weekly wage at the time of the injury per week for 312 weeks. 1983

35-1-68. Second Injury Fund - Injury causing death - Burial expenses - Payments to dependents.

(1) There is created a Second Injury Fund for the purpose of making payments in accordance with Chapters 1 and 2. This fund shall succeed to all monies heretofore held in that fund designated as the "Special Fund" or the "Combined Injury Fund" and whenever reference is made elsewhere in this code to the "Special Fund" or the "Combined Injury Fund" that reference shall be deemed to be to the Second Injury Fund. The state treasurer shall be the custodian of the Second Injury Fund and the commission shall direct its distribution. Reasonable administration assistance may be paid from the proceeds of that fund. The attorney general shall appoint a member of his staff to represent the Second Injury Fund in all proceedings brought to enforce claims against it.

(2) If injury causes death within the period of six years from the date of the accident, the employer or insurance carrier shall pay the burial expenses of the deceased as provided in Section 35-1-81, and further benefits in the amounts and to the persons as follows:

(a)(i) If there are wholly dependent persons at the time of the death, the payment by the employer or insurance carrier shall be 66-2/3% of the decedent's average weekly wage at the time of the injury, but not more than a maximum of 85% of the state average weekly wage at the time of the injury per week and not less than a minimum of $45 per week plus $5 for a dependent spouse and $5 for each dependent minor child under the age of 18 years, up to a maximum of four such dependent minor children not to exceed the average weekly wage of the employee at the time of the injury, but not to exceed 85% of the state average weekly wage at the time of the injury per week, to continue during dependency for the remainder of the period between the date of the death and not to exceed six years or 312 weeks after the date of the injury.

(ii) The weekly payment to wholly dependent persons during dependency following the expiration of the first six-year period described in Subsection (2)(a)(i) shall be an amount equal to the weekly benefits paid to those wholly dependent persons

Tab 2

THE INDUSTRIAL COMMISSION OF UTAH

Case No. 93-229

HAVEN WHITEAR,	*	
Applicant,	*	PRELIMINARY
vs.	*	FINDINGS OF FACT
BROWN AND ROOT and/or HIGHLAND INSURANCE and/or EMPLOYERS' REINSURANCE FUND,	*	
Defendants.	*	

* * * * * * * * * * * * * * * * * *

HEARING: Hearing Room 334, Industrial Commission of Utah, 160 East Broadway, Salt Lake City, Utah, on February 22, 1994, at 10:00 o'clock a.m., the same being pursuant to Order and Notice of the Commission.

BEFORE: Timothy C. Allen, Presiding Administrative Law Judge.

APPEARANCE: The applicant was present and represented by Hans Scheffler, Attorney at Law.

The defendants were represented by Stuart L. Poelman, Attorney at Law.

Employers' Reinsurance Fund was represented by Erie V. Boorman, Administrator.

The applicant herein, Haven Whitear, was called and testified regarding his claim for permanent total disability. Mr. Whitear was employed by Brown and Root as an instrumentation fitter and was assigned to a garbage burn plant in Davis County. The applicant testified that on February 17, 1987, he was installing high pressure valves, when he sustained a compensable industrial accident. At that time, the operation required the use of Fyrquel 220, which is an hydraulic oil which is used to purge hydraulic lines after they have been welded. The applicant was asked to help move a barrel of the 220 oil, which had spilled on the plant floor. The applicant testified that he walked through the oil, and got

some of it on his gloves which were cloth, and some on his shoes. The applicant did not feel well that evening and also had difficulty sleeping.

The following morning, the applicant was experiencing nausea, dizziness, and headaches. When he returned to work, he heard from some co-employees about the toxicity of the oil, he had been exposed to the prior day. The applicant was concerned, and as such, contacted the safety person of the employer, who briefed him on the hydraulic oil, apparently, the material handling class that had been given to the employees of Brown and Root had been missed by the applicant. That individual informed the applicant that his symptoms would pass in 24 hours, and in reliance on that advice, the applicant sought no medical treatment. The applicant continued working and sought medical treatment on March 20, 1987, from Dr. Hansen at the Tanner Memorial Clinic. The applicant testified that he sought medical care, because his symptoms were getting worse, and he had some different symptoms, for example, his eyes were burning, he was weak and he was experiencing rapid weight loss. The applicant last worked at Brown and Root on March 31, 1987. The applicant denied any prior depression or asthma before the industrial accident of February 17, 1987. The applicant testified that he is currently suffering from asthma. He also stated that he became depressed when he was unable to figure out his diagnosis and had the rapid weight loss, which caused him to think he was going to die. The applicant presently uses inhalers for his asthma complaints. Also at present, the applicant is receiving no current treatment for his depression. The applicant last worked on or about December 29, 1989, for Loffland Drilling in Wyoming.

The applicant is a high school graduate with one year of training at Ricks Junior College. The applicant has done construction and rough neck work in the past, along with some dairy farming. The applicant testified further that the exertion attendant to work and the dust of his prior work would aggravate his breathing problems. He also testified that hay, dust, manure and other airborne irritants bother him and his breathing.

In July of 1991, the applicant was treated at the Jewish Hospital in Denver, and the diagnosis was made of reactive depression to the injury.

On cross-examination, the applicant was involuntarily terminated on March 31, 1987, by Brown and Root. On or about May 5, 1988, the applicant went to work for Loffland Drilling as part of the rough neck crew. He worked for Loffland through July 25, 1989. On July 26, 1989, the applicant sustained a knee injury while working for Loffland, and was paid temporary total disability benefits by the Wyoming Workers Compensation Division for the

period July 26, 1989 through September 14, 1989. The applicant then worked from September 14, 1989 through December 28, 1989, for Loffland Drilling. The applicant testified that he had no problems with his work performance at Loffland Drilling. Exhibit D-3 of the evidence on the file, which is a compilation of records from Loffland, indicates that the applicant had no problems with his performance at Loffland during his employment there.

In January of 1988, after he had terminated from Brown and Root, the applicant filed for unemployment benefits and received 26 weeks of benefits. After receiving his unemployment, the applicant commenced working for Loffland Drilling.

After his termination from Loffland in late December of 1989, in January of 1990, the applicant represented to Job Service, once again, that he was ready, willing and <u>able</u> to work, and received 26 weeks of unemployment benefits which would have taken the applicant through the first six months of 1990. The applicant filed his unemployment claim in Wyoming for Utah benefits. The applicant testified that he received no medical treatment while working in Wyoming for Loffland Drilling. The applicant also admitted that he was smoking cigarettes for one year prior to the industrial accident. He also testified that he smokes but not regularly. The applicant did admit smoking at the Stoddard Inn in Morgan County, which he testified is a bar. He also admitted that the bar can be smoky at times.

The applicant has fathered two children since the industrial accident. One in wedlock and one out of wedlock. He was divorced in 1989, and testified that he has a brief association with the child of his marriage, but has no contact with the other child at all. The applicant testified that he does not know his children. The applicant's mother died in 1980, and his father has now remarried. The applicant admitted that there was some stress in the relationship between he and his stepmother. A paternity suit has also been filed against the applicant by the mother of the child that was born out of wedlock.

Because of the denial of liability, the case must be referred to the Medical Panel for its evaluation. The Medical Panel will be asked the following:

1. What is the permanent impairment due to the industrial accident of February 17, 1987?

2. Is the applicant's depression a result of the industrial accident of February 17, 1987?

3. Does the applicant have asthma as a result of the industrial accident?

4. What is the permanent impairment due to pre-existing conditions?

Timothy C. Allen
Presiding Administrative Law Judge

Tab 3

63-46b-8. Procedures for formal adjudicative proceedings - Hearing procedure.

(1) Except as provided in Subsections 63-46b-3(d)(i) and (ii), in all formal adjudicative proceedings, a hearing shall be conducted as follows.

(a) The presiding officer shall regulate the course of the hearing to obtain full disclosure of relevant facts and to afford all the parties reasonable opportunity to present their positions.

(b) On his own motion or upon objection by a party, the presiding officer:

(i) may exclude evidence that is irrelevant, immaterial, or unduly repetitious,

(ii) shall exclude evidence privileged in the courts of Utah,

(iii) may receive documentary evidence in the form of a copy or excerpt if the copy or excerpt contains all pertinent portions of the original document;

(iv) may take official notice of any facts that could be judicially noticed under the Utah Rules of Evidence, of the record of other proceedings before the agency, and of technical or scientific facts within the agency's specialized knowledge

(c) The presiding officer may not exclude evidence solely because it is hearsay

(d) The presiding officer shall afford to all parties the opportunity to present evidence, argue, respond, conduct cross-examination, and submit rebuttal evidence

(e) The presiding officer may give persons not a party to the adjudicative proceeding the opportunity to present oral or written statements at the hearing

(f) All testimony presented at the hearing, if offered as evidence to be considered in reaching a decision on the merits, shall be given under oath.

(g) The hearing shall be recorded at the agency's expense

(h) Any party, at his own expense, may have a person approved by the agency prepare a transcript of the hearing, subject to any restrictions that the agency is permitted by statute to impose to protect confidential information disclosed at the hearing.

(i) All hearings shall be open to all parties

(2) This section does not preclude the presiding officer from taking appropriate measures necessary to preserve the integrity of the hearing

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Tab 4

63-46b-12. Agency review - Procedure.

(1) (a) If a statute or the agency's rules permit parties to any adjudicative proceeding to seek review of an order by the agency or by a superior agency, the aggrieved party may file a written request for review within 30 days after the issuance of the order with the person or entity designated for that purpose by the statute or rule.

(b) The request shall.

(i) be signed by the party seeking review;

(ii) state the grounds for review and the relief requested;

(iii) state the date upon which it was mailed; and

(iv) be sent by mail to the presiding officer and to each party.

(2) Within 15 days of the mailing date of the request for review, or within the time period provided by agency rule, whichever is longer, any party may file a response with the person designated by statute or rule to receive the response One copy of the response shall be sent by mail to each of the parties and to the presiding officer

(3) If a statute or the agency's rules require review of an order by the agency or a superior agency, the agency or superior agency shall review the order within a reasonable time or within the time required by statute or the agency's rules.

(4) To assist in review, the agency or superior agency may by order or rule permit the parties to file briefs or other papers, or to conduct oral argument.

(5) Notice of hearings on review shall be mailed to all parties.

(6) (a) Within a reasonable time after the filing of any response, other filings, or oral argument, or within the time required by statute or applicable rules, the agency or superior agency shall issue a written order on review

(b) The order on review shall be signed by the agency head or by a person designated by the agency for that purpose and shall be mailed to each party

(c) The order on review shall contain:

(i) a designation of the statute or rule permitting or requiring review;

(ii) a statement of the issues reviewed;

(iii) findings of fact as to each of the issues reviewed;

(iv) conclusions of law as to each of the issues reviewed,

(v) the reasons for the disposition;

(vi) whether the decision of the presiding officer or agency is to be affirmed, reversed, or modified, and whether all or any portion of the adjudicative proceeding is to be remanded;

(vii) a notice of any right of further administrative reconsideration or judicial review available to aggrieved parties; and

(viii) the time limits applicable to any appeal or review.

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