

1998

Haven M. Whitear v. Brown & Root Inc and Highlands Insurance Company and the Employers' Reinsurance Fund : Brief of Petitioner

Utah Court of Appeals

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STATE COURT OF APPEALS
BRIEF

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DOCKET NO.

980037-CA

IN THE COURT OF APPEALS, STATE OF UTAH

HAVEN M. WHITEAR,)	BRIEF OF THE PETITIONER
)	HAVEN M. WHITEAR
Petitioner,)	
)	Case No. 980037-CA
vs.)	
)	Priority No. 7
BROWN & ROOT, INC. and)	
HIGHLANDS INSURANCE)	Labor Commission
COMPANY and the EMPLOYERS')	Case No. 93-229
REINSURANCE FUND,)	
)	
Respondents.)	

BRIEF OF PETITIONER HAVEN M. WHITEAR

**Petition for Review from
the Labor Commission of Utah**

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Julia D'Alesandro
Clerk of the Court

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Brief of Petitioner Haven M. Whitear

JURISDICTION OF THE COURT OF APPEALS

The Court of Appeals has jurisdiction in this matter pursuant to *Utah Code Ann.* §34A-1-30(2)(b), *Utah Code Ann.* §34A-1-303(2)(c)(ii), *Utah Code Ann.* §34A-1-303(6), *Utah Code Ann.* §34A-2-801(7), *Utah Code Ann.* §34A-2-801(8)(a), and *Utah Code Ann.* §63-46b-16 (1953, as amended.)

STATEMENT OF ISSUES AND STANDARDS OF REVIEW

Issues presented in this appeal and standards of review

(1) Did the respondents waive any entitlement they may have had for the Labor Commission to hold the hearing on February 7, 1996? (R. 1407-1408, 1640)

Standard of review: The appropriate standard of review to resolve this issue is the abuse of discretion standard. *Grace Drilling Company v. Board of Review*, 776 P.2d 63, 68 (Utah App. 1989)

(2) Was the February 7, 1987 industrial accident a factor in causing Mr. Whitear's depression? (R. 1408-1411, 1640)

Standard of review: The appropriate standard of review to resolve this issue is the abuse of discretion substantial evidence standard. *Grace Drilling Company v. Board of Review*, 776 P.2d 63, 68 (Utah App. 1989)

(3) Did the administrative law judge abuse his discretion when he dismissed Mr. Whitear's claim for permanent total disability benefits? (R. 1412-1413, 1640)

Standard of review: The appropriate standard of review to resolve this issue is the correction of error standard. *Grace Drilling Company v. Board of Review*, 776 P.2d 63, 68 (Utah App. 1989)

(4) Did the administrative law judge fail to comply with the Industrial Commission's order of remand, and his own prehearing ruling, when he resolved issues other than the cause of Mr. Whitear's depression? (R. 1408-1411, 1640)

Standard of review: The appropriate standard of review to resolve this issue is the correction of error standard. *Grace Drilling Company v. Board of Review*, 776 P.2d 63, 68 (Utah App. 1989)

(5) Did the administrative law judge abuse his discretion when he ruled that Mr. Whitear's testimony lacked credibility? (R. 1413-1414, 1640-1641)

Standard of review: The appropriate standard of review to resolve this issue is the substantial evidence standard. *Grace Drilling Company v. Board of Review*, 776 P.2d 63, 68 (Utah App. 1989)

(6) Did the administrative law judge violate the provisions of the Administrative Procedures Act by not making any findings of fact and conclusions of law but instructing the respondents' counsel to prepare such findings and conclusions? (R. 1415-1416, 1641)

Standard of review: The appropriate standard of review to resolve this issue is the correction of error standard. *Bruczynski v. Industrial Commission of Utah*, 934 P.2d 1169, 1172 (Utah App. 1997)

(7) Did the Industrial Commission violate the provisions of the Administrative Procedures Act by denying Mr. Whitear a hearing on his claim for permanent total disability benefits? (R. 1412-1413, 1640)

Standard of review: The appropriate standard of review to resolve this issue is the correction of error standard. *Bruczynski v. Industrial Commission of Utah*, 934 P.2d 1169, 1172 (Utah App. 1997)

(8) Did the Industrial Commission violate Article I, §11 of the Constitution of Utah by denying Mr. Whitear the right to a hearing on his claim for permanent total disability benefits? (R. 1412-1413, 1640)

Standard of review: The appropriate standard of review to resolve this issue is the correction of error standard. *Bruczynski v. Industrial Commission of Utah*, 934 P.2d 1169, 1172 (Utah App. 1997)

(9) Did the Industrial Commission violate Article I, §7 of the Constitution of Utah by denying Mr. Whitear the right to a hearing on his claim for permanent total disability benefits? (R. 1412-1413, 1640)

Standard of review: The appropriate standard of review to resolve this issue is the correction of error standard. *Bruczynski v. Industrial Commission of Utah*, 934 P.2d 1169, 1172 (Utah App. 1997)

DETERMINATIVE STATUTES

The determinative statutes, rules and constitutional provisions in resolving this case are set forth in full in the Addendum to this Brief. Those *Utah Code Ann.* §35-1-69, *Utah Code Ann.* §35-1-67, *Utah Administrative Procedures Act* §63-46b-8, *Utah Administrative Procedures Act* §63-46b-10, Article I, §7 of the Constitution of Utah, and Article I, §11 of the Constitution of Utah.

STATEMENT OF THE CASE

Nature of the case

This is a workers compensation claim by petitioner Haven M. Whitear (hereinafter “Mr. Whitear”) for permanent total disability benefits provided by the Workers Compensation Act of Utah. (R. 522)

Course of proceedings

On August 7, 1987 Judge Allen of the Industrial Commission of Utah entered Findings of Fact, Conclusions of Law and Order. (R. 26-27) That Order was entered after the respondents notified Judge Allen that “they were accepting liability for an industrial accident . . . when the applicant was drenched with fyrquel 220, which leaked from a damaged hydraulic hose.” The respondents also agreed “to pay all outstanding medical expenses to date incurred by the applicant.” Judge Allen’s August 7, 1987 Order expressly served as a protection of rights for Mr. Whitear and

reserved jurisdiction over this claim if any further dispute developed between the parties. (R. 26)

On February 16, 1993 Mr. Whitear filed a second Application for Hearing, claiming to be entitled to permanent partial disability benefits and also asserting that the respondents had failed to pay medical bills. (R. 453) The respondents in their answer to said Application for Hearing denied any liability. (R. 463-465) On September 7, 1993 Mr. Whitear filed an amended Application for Hearing asserting the additional claim of permanent total disability. (R. 522-523) The respondents in their answer to said amended Application for Hearing merely denied the claim for permanent total disability benefits and moved to join the Employers Reinsurance Fund. (R. 530) The respondents did not raise any affirmative defenses in their amended answer nor did they incorporate their prior answer into their amended answer. (R. 530)

A hearing was held on February 22, 1994. Following that hearing, Judge Allen entered his Preliminary Findings of Fact and referred the claim to a medical panel. (R. 930-933) The respondents did not object to the case being referred to a medical panel. The Medical Panel issued its report on or about May 25, 1994. (R. 938-945) Mr. Whitear filed an objection to the medical panel report. That objection was based upon the fact that the Medical Panel did not attribute any of his depression to the February 17, 1987 industrial accident. (R. 961) The respondents *did not* file a timely objection to the medical panel report.

On March 17, 1995 Mr. Whitear, the only party objecting to the medical panel report, withdrew his request for hearing on his objection to the medical panel's report without waiving his specific objection. (R. 967-968) Mr. Whitear not only withdrew his request for a hearing, he also requested that Judge Allen enter an appropriate Order based upon the medical evidence before him. (R. 968) Once again the respondents did not object. In fact, the respondents did not respond at all to Mr. Whitear's withdrawal of his request for a hearing on his objection to the medical panel report nor did they respond to Mr. Whitear's request that Judge Allen enter an appropriate Order.

On April 20, 1995, thirty-five days after Mr. Whitear withdrew his request for hearing and requested the entry of an appropriate order, Judge Allen entered his Interim Order referring the applicant to the Division of Rehabilitation Services for evaluation pursuant to §35-1-67. (R. 970-972) On May 9, 1995, 350 days after the Medical Panel report, 54 days after Mr. Whitear withdrew his request for a hearing and 20 days after the date of the Interim Order was entered, the respondents finally filed a vague Motion for Review. (R. 974-977) The Industrial Commission issued an Order of Remand on July 31, 1995 instructing the administrative law judge "to conduct a hearing on the medical panel's report, particularly regarding the causes of Mr. Whitear's depression. The ALJ may 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. 983-986) A hearing was scheduled on February 7, 1996. Prior to that hearing Mr. Whitear's counsel requested that Judge George

consider hearing evidence on the issue of Mr. Whitear's vocational rehabilitation. (R. 1000-1001) The respondents' counsel objected to this request. (R. 996-999) Judge George on December 29, 1996 notified all counsel that the February 7, 1996 hearing would be limited to resolving the issue of determining the causation of Mr. Whitear's depression. (R. 1002) Following the hearing, Judge George stated that the respondents were liable to pay all reasonable medical expenses related to the treatment for asthma. In fact, Mr. Poelman, the defendant's counsel, did not have any objections or questions when Judge George made his ruling requiring the respondents to pay all medical bills incurred by Mr. Whitear for the treatment of his asthma. (R. 1324)

Judge George entered his Findings of Fact, Conclusions of Law and Order on the 26th day of July 1996. (R. 1389-1400) The Labor Commission entered its Order on Motion for Review on December 19, 1997. (R. 1639-1645)

Disposition by the Industrial Commission

The Labor Commission of Utah entered its Order on Motion for Review on December 19, 1997. (R. 1639-1645) The Labor Commission of Utah essentially affirmed Judge George's Findings of Fact, Conclusions of Law and Order. (R. 1639-1645)

Statement of Facts

1. Mr. Whitear sustained an injury arising out of and during the course of his employment with Brown & Root on February 17, 1987. (R. 26-27)

2. On August 7, 1987 Judge Allen of the Industrial Commission of Utah entered Findings of Fact, Conclusions of Law and Order. That Order was entered after the respondents notified Judge Allen that “they were accepting liability for an industrial accident . . . when the applicant was drenched with fyrquel 220, which leaked from a damaged hydraulic hose.” The respondents further agreed “to pay all outstanding medical expenses to date incurred by the applicant.” Judge Allen’s August 7, 1987 Order expressly served as a protection of rights for Mr. Whitear and reserved jurisdiction over this claim if any further dispute developed between the parties. (R. 26-27)

3. Mr. Whitear filed a second Application for Hearing, dated February 15, 1993, claiming to be entitled to permanent partial disability benefits and asserting that the respondents failed to pay medical expenses as ordered by Judge Allen.¹ (R. 453)

4. The respondents in their answer to said Application for Hearing denied any liability. (R. 463-465)

5. On September 7, 1993 Mr. Whitear filed an amended Application for Hearing asserting the additional claim of permanent total disability. (R. 522-523)

6. The respondents in their answer to said amended Application for Hearing merely denied the claim for permanent total disability benefits and moved to join the Employers Reinsurance Fund. The respondents did not raise any affirmative defenses in their amended answer nor did they incorporate their prior answer into their amended answer. (R. 530)

¹On June 6, 1998 Mr. Whitear was forced to file another Application for Hearing because the respondents continue to refuse to pay for his medical expenses.

7. The respondents, through their adjusters at Black, Nichols & Guiver, began to deny liability for the payment of medical expenses in October 1990.

8. Mr. Whitear filed his responses to Interrogatories in June of 1990 and again in June of 1993. In both responses Mr. Whitear identified unpaid medical expenses. (R. 503-518)

9. A hearing was finally held on February 22, 1994. After that hearing, Judge Allen entered his Preliminary Findings of Fact and referred the claim to a medical panel. (R. 930-933)

10. The respondents did not object to this claim being referred to a medical panel.

11. The Medical Panel issued its report on or about May 25, 1994. (R. 938-945)

12. Mr. Whitear, after being granted an extension of time by Judge Allen to file an objection to the medical panel report, did file an objection to the medical panel report. The objection was based upon the fact that the Medical Panel did not attribute any of Mr. Whitear's depression to the February 17, 1987 industrial accident. (R. 961)

13. The respondents *did not* file a timely objection to the medical panel report.

14. Mr. Whitear's objection to the medical panel report was scheduled for hearing on March 8, 1995 at 8:30 a.m. Mr. Whitear appeared along with his three witnesses, including Dr. Cali. The respondents failed to appear at the hearing. The hearing was canceled because of Mr. Poelman's alleged health problems. However,

neither Mr. Whitear nor his counsel were notified that the hearing had been canceled.
(R. 967-968)

15. On March 17, 1995 Mr. Whitear, the only party objecting to the medical panel report, withdrew his request for hearing on his objection to the medical panel's report without waiving his specific objection. (R. 967-968)

16. Mr. Whitear not only withdrew his request for a hearing, he also requested that Judge Allen enter appropriate Order based upon the medical evidence before him.
(R. 968)

17. Once again the respondents did not object. In fact, the respondents did not respond to Mr. Whitear's withdrawal of his request for a hearing on his objection to the medical panel report nor did they respond to Mr. Whitear's request that Judge Allen enter an appropriate Order.

18. On April 20, 1995, thirty five days after Mr. Whitear withdrew his request for hearing and requested the entry of an appropriate order, Judge Allen entered his Interim Order referring Mr. Whitear to the Division of Rehabilitation Services for evaluation pursuant to §35-1-67. (R. 970-972)

19. On May 9, 1995, 350 days after the medical panel report, 54 days after Mr. Whitear withdrew his request for a hearing and 20 days after the date of the Interim Order, the respondents filed a vague Motion for Review. (R. 974-977)

20. As a result of that Motion for Review the Industrial Commission issued an Order of Remand on July 31, 1995 instructing the ALJ "to conduct a hearing on the medical panel's report, particularly regarding the causes of Mr. Whitear's depression.

The ALJ may 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. 983-986)

21. Prior to the February 7, 1996 hearing, Mr. Whitear's counsel requested that Judge George consider hearing evidence on the issue of Mr. Whitear's vocational rehabilitation. (R. 1000-1001)

22. The respondents' counsel objected to Mr. Whitear's request. On December 29, 1995 Judge George notified counsel that the February 7, 1996 hearing would be limited to the issue of determining the causation of Mr. Whitear's depression. (R. 1002-1003)

23. Dr. Burgoyne, a member of the Medical Panel testified at the February 7, 1996 hearing. During his testimony Dr. Burgoyne admitted that the industrial accident was a factor in causing Mr. Whitear's depression. (R. 1043, 1054)

24. The respondents failed to produce any evidence at the February 7, 1996 hearing that they are not liable for the payment of medical expenses incurred by Mr. Whitear with respect to the treatment he has received for asthma.

25. At the conclusion of the hearing, Judge George stated that the respondents were liable to pay all reasonable medical expenses related to the treatment for asthma. Mr. Poelman, the defendant's counsel, did not question or object to Judge George's ruling that the respondents pay for all of Mr. Whitear's medical care and treatment related to Mr. Whitear's asthma. (R. 1324)

26. The only evidence presented to Judge George at the February 7, 1996 hearing as to the cause of Mr. Whitear's disability was the uncontradicted testimony of Mr. Whitear with respect to asthma, the finding by social security that Mr. Whitear is disabled primarily due to the asthma (R. 57, 852-854) and the August 18, 1995 report from the Utah State Office of Rehabilitation that Mr. Whitear is not a viable candidate for vocational rehabilitation. (R. 1510)

27. All medical experts who submitted records and/or testimony in this claim agree that Mr. Whitear suffers from depression. The only doctor who did not attribute any causal connection of the depression to the industrial accident was the respondents' doctor.

SUMMARY OF ARGUMENT

Once again this Court is the forum of last resort for an injured worker who, after sustaining an injury while working, has had the effects of the physical injuries compounded by the Labor Commission's actions. This is not a case of an injured worker asking this Court to award him anything to which he is not entitled under the Utah Workers' Compensation Act.

This case is about Mr. Whitear who was injured in an industrial accident on February 17, 1987 and his claim for permanent total disability benefits. The respondents are under order to pay Mr. Whitear for all medical expenses he incurs in the treatment of the injuries he sustained in the February 17, 1987 industrial accident.

There is no dispute that Mr. Whitear suffers from asthma, which was caused by the February 17, 1987 industrial accident. There is also no dispute that Mr.

Whitear has been found to be totally disabled by the Social Security Administration primarily due to the asthma from which he suffers. There is also no dispute that Mr. Whitear has been evaluated by the Utah State Office of Rehabilitation and found by that office not to be a viable candidate for vocational rehabilitation primarily due to the limitations of his asthma.

Mr. Whitear presented his claim for permanent total disability benefits to the Labor Commission of Utah. Judge Allen, after reviewing all of the evidence, entered an Interim Order making a tentative finding that Mr. Whitear was indeed permanently and totally disabled, and referring this claim to the Utah State Office of Rehabilitation for an evaluation.

Before entering his Interim Order, Judge Allen had this claim reviewed by a medical panel. The medical panel issued a written report wherein it concluded that Mr. Whitear had a substantial whole person impairment due to the asthma. The respondents never objected to Judge Allen's referral of the claim to a medical panel. The respondents never filed a timely objection to the report issued by the medical panel. The respondents never filed a timely request for a hearing disputing any portion of the medical panel's report.

Only Mr. Whitear filed an objection to a minor portion of the medical panel's report. There is no dispute that Mr. Whitear suffers from depression. The medical panel concluded that Mr. Whitear's depression, although significant, was not caused by the February 17, 1987 industrial accident. Mr. Whitear, based upon his doctor's

opinion challenged the medical panel's conclusion that the depression was not caused by the industrial accident.

A hearing was scheduled by Judge Allen on Mr. Whitear's objection to the medical panel's report. Mr. Whitear and all of his witnesses appeared at the hearing only to learn it had been cancelled. Thereafter, Mr. Whitear withdrew his request for a hearing, without waiving his objections to the medical panel report and requested that Judge Allen enter an appropriate Order. Judge Allen entered such an Order and concluded that Mr. Whitear's depression was caused by the February 17, 1987 accident. Judge Allen reached this conclusion because the medical panel did not address the issue of causation and the respondents' doctor also failed to state the cause of Mr. Whitear's depression.

The respondent did not object to Mr. Whitear withdrawing his request for a hearing. The respondents did not object to Mr. Whitear's request that Judge Allen enter an appropriate Order.

It was not until May 9, 1995, 350 days after the medical panel report, 54 days after Mr. Whitear withdrew his request for a hearing and 20 days after the date of the Interim Order, that the respondents finally responded by filing a vague Motion for Review.

The Labor Commission granted the respondents' Motion for Review and remanded the case for further hearing. The hearing was limited to resolving the issue of what caused Mr. Whitear's depression.

On remand, the claim was assigned to Judge George. Judge George had no familiarity with this claim. Judge George took it upon himself to expressly limit the hearing, pursuant to the Order of Remand, to resolving the issue of causation. Judge George, and the Labor Commission, were under the mistaken impression that Mr. Whitear was totally disabled due to his depression. The records clearly demonstrate two points. First, Mr. Whitear is primarily totally disabled due to asthma. Second, Mr. Whitear never suffered from depression until after the February 17, 1987 industrial accident.

Nonetheless, Judge George, after hearing overwhelming evidence in support of Mr. Whitear's claim that the depression was indeed caused by the industrial accident, and, after hearing the medical panel expert on depression concede that the industrial accident did contribute to Mr. Whitear's depression, Judge George still concluded that Mr. Whitear's depression was not caused by the industrial accident. Judge George reached this conclusion even after receiving the testimonial concession by the medical panel's expert that the February 17, 1987 was indeed a factor in causing Mr. Whitear's depression. That testimony by the medical panel expert modified the panel's written report.

After Judge George ignored the evidence, he augmented his error by dismissing Mr. Whitear's claim for permanent total disability benefits. Judge George concluded that Mr. Whitear was not totally disabled due to asthma. The only evidence before Judge George was contrary to this conclusion.

The Labor Commission and Judge George notified Mr. Whitear that a hearing would be held to determine what caused his depression. At the conclusion of that hearing, not only did Judge George make, and the Labor Commission affirmed, an insupportable ruling on the only issue which ostensibly was to be resolved, but Mr. Whitear's entire claim was dismissed.

Mr. Whitear was never given a hearing on his claim for permanent total disability benefits. Mr. Whitear has a right to such a hearing. That right is given to him by the Constitution of the State of Utah and by the Administrative Procedures Act.

Our system of jurisprudence is controlled and regulated by laws and rules. Underlying all those laws and rules are fundamental principles of justice and fairness. Where is the fairness and the justice when a judge can limit a party to presenting evidence at a hearing on only one issue and then the judge, at the end of the hearing, enters an order resolving all the issues? That is what Judge George and the Labor Commission did to Mr. Whitear. Judge George and the Labor Commission reversed the tentative finding of permanent total disability made by Judge Allen without the benefit of any additional or new evidence. The only evidence before Judge George and the Labor Commission which was not available to Judge Allen was the admission by the medical panel expert on depression that Mr. Whitear's industrial accident was a factor in causing Mr. Whitear's depression. Such an admission reaffirmed the appropriateness of Judge Allen's Order. Such an admission emphasizes the fallacy of Judge George's ruling and the Labor Commission's adoption of that ruling.

The Labor Commission and Judge George abused their discretion at nearly every turn in this case. They granted the respondents a hearing when the respondents failed to file a timely request for a hearing. The respondents waited nearly one year, 350 days, before they made any objections or requests for hearing on the report issued by the medical panel. Had Mr. Whitear been so utterly lackadaisical in requesting a hearing, it is unlikely that he would have been granted such leeway by the Labor Commission. By ruling against Mr. Whitear, Judge George and the Labor Commission totally ignored the mountain of evidence which was presented in support of Mr. Whitear's claim.

Judge George failed to make any findings of fact. Instead he delegated his legal obligation to counsel for the respondents to make appropriate findings of fact. The Labor Commission, instead of reprimanding a judge for shirking his duties, merely fell in lock step with the judge and affirmed what he did and how he did it.

To remedy the injustice inflicted on Mr. Whitear by Judge George and the Labor Commission, this Court must reinstate the order entered by Judge Allen and then order the Labor Commission to hold appropriate hearings on the issue of Mr. Whitear's vocational rehabilitation.

ARGUMENT

Point I

DID THE RESPONDENTS WAIVE ANY ENTITLEMENT THEY MAY HAVE HAD FOR THE LABOR COMMISSION TO HOLD THE HEARING ON FEBRUARY 7, 1996.

The February 7, 1996 hearing should not have been held because the respondents waived any entitlement to such hearing. It was Mr. Whitear who had objected to the medical panel report. (R. 961) Specifically, Mr. Whitear objected that the medical panel failed to conclude that the February 17, 1987 industrial accident was the cause of his depression. Mr. Whitear requested and was granted a hearing on his objection. On March 17, 1995 Mr. Whitear withdrew his request for hearing. (R. 967-968) The respondents failed to object to Mr. Whitear's withdrawal of his request for hearing. It was not until after Judge Allen entered his Interim Order on April 20, 1995 that the defendants finally objected. (R. 974-977)

The Industrial Commission entered an Order of Remand on July 31, 1995 recognizing that the order was not based on any statutory or rule authorizing the remand. The question this Court must now answer is how a party who fails to object to a report of a medical panel, who fails to request a hearing, and who fails to object to the other party's withdrawal of a request for a hearing, is still entitled to a hearing on an issue involving the medical panel's report?

The answer to that question must be that the party failing to object is NOT entitled to a hearing. The statutes and rules are full of time limitations within which certain action must be taken. Rule 568-1-5 of the Workers' Compensation Rules

provides for the computation of time limits. The day of the act shall not be included but the last day is unless it is a Saturday, Sunday or legal Holiday. The parties are given 15 days to object to the medical panel report. Failure to act within the prescribed time limits bars further action. The party who fails to act within the prescribed time limits has in essence waived any right to object.

In this case, the respondents never objected to the medical panel report. The respondents did not request a hearing on Mr. Whitear's objections to the medical panel for 350 days after the date the medical panel report was issued. The respondents did not request or obtain an extension of time to seek a hearing on the objections to the medical panel report.

It is submitted that if Mr. Whitear had waited 350 days to file his objections to the report of the medical panel, his claim for hearing would have been denied by the Labor Commission. So why can an employer and an insurance carrier obtain a hearing when they waited so long to request the hearing?

Under these circumstances, this Court can only conclude that the respondents waived any right to a hearing they may have had on objecting to the report of the medical panel. That based upon that waiver, this Court must also rule that the Labor Commission abused its discretion in allowing the respondents to have their hearing. This abuse of discretion substantially prejudiced Mr. Whitear. *Willardson v. Industrial Commission*, 904 P.2d 671, 675 (Utah 1995)

Point II

THE FEBRUARY 7, 1987 INDUSTRIAL ACCIDENT WAS A FACTOR IN CAUSING MR. WHITEAR'S DEPRESSION.

This claim was remanded to the Administrative Law Judge by the Labor Commission for the purpose of determining the cause of Mr. Whitear's depression. (R. 983-986) Mr. Whitear objected to a hearing being held in this matter after the respondents had failed to file a timely objection to the report of the medical panel and had failed to object to Mr. Whitear's withdrawal of his request for a hearing on his objection to the medical panel report. (R. 1016-1020)

In its July 31, 1995 Order of Remand the Labor Commission acknowledges that its interference in claims in which a final order had not been entered, could disrupt the adjudicatory process. (R. 983-986) Yet that is exactly what the Labor Commission did by entering its Order of Remand. It interrupted the process and gave the respondents a reprieve from their failure to file timely objections to the report of the medical panel.

The Labor Commission's interruption of the judicial process culminated in the hearing scheduled before Judge George on February 7, 1996. Instead of Mr. Whitear being evaluated for vocational rehabilitation, Judge George determined that a hearing was necessary, because the respondents had requested it, to resolve the issue of what caused Mr. Whitear's depression. Judge George expressly limited the hearing to the resolution of that one issue. (R. 1002-1003) But the interruption and corruption of the judicial process continued when Judge George dismissed Mr.

Whitear's claim for permanent total disability benefits at the conclusion of the February 7, 1996 hearing.

Since the issue to be resolved at the hearing was the cause of Mr. Whitear's depression, the only real credible medical evidence presented was the testimony of Dr. Burgoyne, the medical panel expert, although Dr. Cali and Dr. McCann also testified on the issue. Their testimony was actually irrelevant since their disagreement on the issue is what resulted in the matter being referred to the medical panel by Judge Allen.

Dr. Burgoyne, the psychiatrist and expert on depression for the medical panel, testified *that the industrial accident was a factor in causing Mr. Whitear's depression.*

The following exchange took place between Mr. Whitear's counsel and Dr. Burgoyne:

"Q. [by counsel to Dr. Burgoyne] Your statement that the ongoing legal dispute between Mr. Whitear and his former employer, the insurance company, is a factor in his depression; is that right?

A. It's a factor.

Q. Okay, So if that is a factor, then is it not true to say that the accident then in some way is also a factor in causing his depression?

A. I would have to say yes, but -- well there are many things in life. Yes." (R. 1054)

Dr. Burgoyne further testified as follows:

"Q [by counsel to Dr. Burgoyne] Dr. Burgoyne, will you concede that an individual who suffers an injury on the job, besides the physical injury, that may also cause depression?

A. Injury on the job could cause depression, yes.

Q. However, in this case you concluded it didn't?

A. I concluded it wasn't a very big factor."
(R. 1043)

Through his testimony Dr. Burgoyne contradicted and clarified the medical panel's written report in which the panel concluded that Mr. Whitear's depression was not caused by the industrial accident. This clarification should have been sufficient for Judge George to rule that Mr. Whitear's depression was caused, at least in part, by the industrial accident.

Mr. Whitear presented additional evidence that his depression was caused by the industrial accident.

Craig Whitear testified to Mr. Whitear's ability to work and how his behavior changed dramatically after the industrial accident. Craig Whitear testified that Mr. Whitear liked school, did not have a conflict with his step-mother and that Mr. Whitear grieved as any normal person does when losing his mother. Craig Whitear further testified that after the industrial accident Mr. Whitear became withdrawn and reclusive. (R. 1196-1211)

The testimony of Craig Whitear was supported by the testimony of Brent Bohman. Mr. Bohman testified that he personally noticed a striking change in the behavior of Mr. Whitear from before accident to after accident. (R. 1214-1223)

Jeff O'Driscoll also testified about the changes he observed in Mr. Whitear's behavior after the industrial accident. (R. 1185-1187)

The respondents did not present *any* evidence to contradict the testimony of Craig Whitear, Brent Bohman and Jeff O'Driscoll.

The only evidence that the respondents presented on the issue of the cause of Mr. Whitear's depression was the testimony of Dr. McCann. That doctor even contradicted himself when he testified that he "cannot identify specific -- a single, specific cause for his depression." (R. 1304)

The respondents did not present any credible evidence that Mr. Whitear was depressed before the industrial accident. In fact, the only evidence presented was the testimony of the people who knew Mr. Whitear before and after the accident. Not one of them testified about Mr. Whitear being depressed before the accident.

The medical panel clarified its written report when Dr. Burgoyne testified that the industrial accident was a factor in causing Mr. Whitear's depression. Thus, for Judge George to conclude that the depression was not caused, at least in part, by the industrial accident was an arbitrary and capricious ruling which is not supported by any credible, relevant and substantial evidence as required by *Utah Code Ann.* §63-46b-16(4)(h)(iv).

Judge George's failure to consider the substantial evidence presented in support of Mr. Whitear and in light of the medical panel expert clarified that panel's written report by testifying that the industrial accident did contribute to Mr. Whitear's depression, is an abuse of discretion. That abuse was compounded by the Labor Commission affirming Judge George's ruling. That abuse of discretion had the ultimate prejudicial result. The dismissal of Mr. Whitear's claim.

Point III

THE ADMINISTRATIVE LAW JUDGE ABUSED HIS DISCRETION WHEN HE DISMISSED MR. WHITEAR'S CLAIM FOR PERMANENT TOTAL DISABILITY BENEFITS.

Given the very narrow and limited issue to be resolved at the February 7, 1996 hearing, it was a clear abuse of discretion to dismiss Mr. Whitear's claim for permanent total disability benefits.

The Labor Commission in its July 31, 1995 Order of Remand instructed Judge George to "conduct a hearing on the medical panel's report, particularly regarding the cause of Mr. Whitear's depression. The ALJ may 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. 983-986)

Judge George on December 29, 1995 instructed counsel that the issue to be resolved at the February 7, 1996 hearing was the "causal connection" between the industrial accident and Mr. Whitear's depression. There would not be any evidence presented or considered concerning vocational rehabilitation. (R. 1002-1003)

In spite of Judge George's effort to limit the hearing issue, he did receive evidence about Mr. Whitear's inability to work. First, Judge George received evidence that the Social Security Administration had found Mr. Whitear to be totally disabled primarily due to his asthma. (R. 944) Second, Judge George received a report from the Utah State Office of Rehabilitation which indicates that due to Mr. Whitear's "*severe respiratory condition, including asthma and shortness of breath*" he probably would not benefit from rehabilitation services. (R. 1510-1511)

There is no dispute that Mr. Whitear's asthma and respiratory problems are caused by the industrial accident. (R. 944)

Neither the Social Security Administration nor the Office of Rehabilitation considered the primary reason for their respective decisions to be Mr. Whitear's depression. Those agencies considered Mr. Whitear's asthma the primary reason for his disability and their inability to offer any vocational rehabilitation services. Incredibly, Judge George signed, and the Labor Commission approved, an order which concludes that Mr. Whitear is receiving social security benefits due to his depression. (R. 1393)

Judge George limited the February 7, 1996 hearing issue to the cause of Mr. Whitear's depression. Judge George did not take evidence on Mr. Whitear's asthma which was caused by the industrial accident and for which the medical panel attributed a 10% whole person impairment, a significant impairment rating. (R. 944) Judge George received no evidence as to Mr. Whitear's inability to work, other than the report from the Office of Rehabilitation, the Social Security Administration's conclusion and some testimony from the lay witnesses. Nonetheless, Judge George signed an order which concludes that Mr. Whitear is not totally disabled due to his asthma. (R. 1395)

By limiting the issue for the February 7, 1996 hearing, and then entering Findings of Fact, Conclusions of Law and Order resolving the entire claim filed by Mr. Whitear is contrary to the Labor Commission's Order of Remand and is so arbitrary and capricious it smacks of prejudice.

Point IV

THE ADMINISTRATIVE LAW JUDGE FAILED TO COMPLY WITH THE LABOR COMMISSION'S ORDER OF REMAND AND HIS OWN PREHEARING RULING.

Mr. Whitear is alleging that Judge George acted arbitrary and capricious when he dismissed Mr. Whitear's claim for permanent total disability benefits at the end of the February 7, 1996 hearing. The best evidence supporting this argument is the Labor Commission's Order of Remand (R. 583-586) and Judge George's December 29, 1995 ruling. (R. 1002-1003) Both limit the February 7, 1996 hearing to one narrow and specific issue. That issue was the causation of Mr. Whitear's depression. Yet Judge George, at the end of that hearing, entered an Order which reached far beyond resolving that very narrow issue. Judge George's Order wiped out Mr. Whitear's claim for permanent total disability benefits. (R. 1398) There is no justification or explanation for such an arbitrary and capricious act. The judge's ruling is the judicial equivalent of the "bait and switch" sales method. The Labor Commission, in failing to correct the error made by the judge, is even more culpable than the judge. The Labor Commission should protect injured workers from judicial abuse by a judge. The Labor Commission should not become an accomplice to such abuse. In this case, the Labor Commission chose to support an abuse of discretion. Thus, it falls upon this Court to provide the appropriate relief.

Point V

THE ADMINISTRATIVE LAW JUDGE ABUSED HIS DISCRETION WHEN HE RULED THAT MR. WHITEAR LACKED CREDIBILITY.

Judge George entered Findings of Fact to support his conclusion that Mr. Whitear lacked credibility.² (R. 1393-1395) Some of these Findings were based upon Judge George's idiosyncratic notions about perfumes, bathroom disinfectants and Mr. Whitear's sex life. (R. 1393-1395, 1319-1320)

There was no evidence presented that any person in the courtroom during the hearing was wearing any perfumes or colognes. Nor was there any evidence presented at the hearing about the "alleged" disinfectants used in the restroom near the courtroom. This Court can, and should, take judicial notice of the fact that there are walls and doors which separate the courtrooms from the restroom, and that the odors from one room cannot be detected in the other room.

Judge George did conclude that Mr. Whitear's sex life had not been adversely affected by the accident and his depression. This conclusion was based upon the fact that Mr. Whitear did become a father after the industrial accident. In fact, Judge George stated that Mr. Whitear had sexual relations at least two times after the 1987 accident. (R. 1319-1320)

²It should be noted that Judge George only made two findings of fact on his own. One relating to Mr. Whitear's sex life and the other relating to his testimony that he became reclusive. (R. 1309-1321) The first is totally irrelevant to any issue in this claim and the second demonstrates a complete failure on the part of ALJ to listen to the testimony. Finally, it must be noted that the Findings signed by the ALJ are not his findings but are the findings of Mr. Poelman, defendants' counsel.

Judge George continued to dismiss Mr. Whitear's testimony by remarking on Mr. Whitear's habit of smoking. The fact that Mr. Whitear smoked and made attempts to quit smoking does not demonstrate a lack of credibility. Smoking is not and was not the cause of Mr. Whitear's depression or asthma. The medical panel did not find or attribute any physical impairment or injury to Mr. Whitear's smoking. It did attribute the significant impairment to Mr. Whitear's asthma which was caused by the industrial accident. (R. 944)

Dr. McCann did initially express concerns about Mr. Whitear "faking" on some tests. However, after hearing the testimony from Mr. Whitear's friends and brother, Dr. McCann testified that he was touched by the support Mr. Whitear has received from his friends and family. In fact, after hearing the testimony of the lay witnesses, Dr. McCann was impressed how socially isolated Mr. Whitear had become. Judge George, however, found that the testimony of the witnesses who stated that Mr. Whitear had become isolated, "runs counter" to Mr. Whitear's testimony that he has become withdrawn. (R. 1321) Every witness agreed that Mr. Whitear has become withdrawn. Dr. McCann, the respondents' expert, realized that Mr. Whitear had become socially withdrawn. Only Judge George and the Labor Commission failed, or refused, to understand how much Mr. Whitear has withdrawn from his friends and family since the industrial accident. Presented with such overwhelming testimony, Judge George remarkably concluded Mr. Whitear has not socially withdrawn. (R. 1321)

Dr. McCann, the witness whose testimony was most hostile toward Mr. Whitear, testified that he realized Mr. Whitear has a real problem with depression and that he felt very sympathetic toward him. (R. 1304)

Judge George stretched his enmity toward Mr. Whitear when he found that there is an implication that Mr. Whitear may be using this system for some kind of gain when he concludes that “[Mr. Whitear] is wise to the workers compensation system.” (R. 1395) That Finding is totally unsupported by any evidence. It is another example of counsel for the respondents making a finding of the judge.

Considering how very little Mr. Whitear has gained financially and the hardship Mr. Whitear has had to endure since the industrial accident, it would be fair to ask just how wise is Mr. Whitear really? How much gain has Mr. Whitear’s “use” of the system brought him?

The Findings concerning Mr. Whitear’s alleged lack of credibility were drafted by Mr. Poelman, without any guidance from Judge George. These Findings were included, in an unethical attempt, to make it nearly impossible for Mr. Whitear to challenge the findings on appeal. Those findings are in actuality the argument of counsel and are unsupported by any evidence. There is not a scintilla of evidence to support such findings and thus they must be reversed. Clearly, if Mr. Whitear had credibility, then Judge George’s ruling would have been in favor of the claim. Instead the unsupported findings concerning Mr. Whitear’s lack of credibility have contributed to the substantial prejudice suffered by Mr. Whitear through the indiscretion of the Labor Commission.

Point VI

JUDGE GEORGE VIOLATED THE ADMINISTRATIVE PROCEDURES ACT BY NOT MAKING ANY FINDINGS OF FACT AND CONCLUSIONS OF LAW BUT INSTRUCTING MR. POELMAN TO PREPARE THEM FOR HIM.

The Utah Administrative Procedures Act §63-46b-10 (1988, as amended) provides as follows:

“In formal adjudicative proceedings:

(1) Within a reasonable time after the hearing . . . 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*.” [Emphasis added]

In this case, Judge George did not satisfy or comply with any of the above cited provisions of §63-46b-10. Other than making the two findings of fact at the conclusion of the hearing, on February 7, 1996, Judge George sent a FAX to Mr. Poelman containing the following instructions:

“Mr. Poelman--Although I recited some specifics in my decision this evening, that was not all-inclusive. You may utilize all the support evidenced in your defense that you feel is appropriate. If I feel that something more or less is necessary, I'll ask for a disk so I can modify it. Thank you.***DLG” (R. 1363)

In other words, Judge George delegated his statutory obligation to the defense attorney. It may be appropriate for a judge to make specific findings and conclusions

as required by law and then direct counsel to draft the order in accordance therewith. It is totally inappropriate for a judge to allow defense counsel to make any findings and conclusions that *counsel* deems appropriate.

This Court must reject the Findings and Conclusions signed by Judge George on July 26, 1996 since they are not his Findings and Conclusions as required by law. The fact that the Labor Commission adopted those Findings of Fact and Conclusions of Law does not remedy the underlying problem.

Point VII

MR. WHITEAR HAS BEEN DENIED A HEARING ON HIS CLAIM FOR PERMANENT TOTAL DISABILITY BENEFITS.

The Administrative Procedures Act, *Utah Code Ann.* §63-46b-8, provides in part,

“that in all formal adjudicative proceedings, a hearing shall be conducted.”

Such a hearing shall provide all parties a reasonable opportunity to present their positions.

Article 1, §7 of the Constitution of Utah provides that

“No person shall be deprived of life, liberty or property, without due process of law.”

Article 1, §11 of the Constitution of Utah provides that

“all courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.”

Judge George and the Labor Commission have denied Mr. Whitear the hearing to which he is entitled pursuant to the Administrative Procedures Act. More importantly, Judge George and the Labor Commission have deprived Mr. Whitear of his right to due process and closed the door the Constitution guarantees will be open.

This was done to Mr. Whitear when he was informed that the February 7, 1996 hearing would only address the issue of establishing the causation of his depression. The hearing was expressly limited to the resolution of that issue by Judge George and the Labor Commission's July 31, 1995 Order of Remand. At the end of that hearing, not only did Judge George rule in opposition to the evidence presented on the issue of causation, but also dismissed Mr. Whitear's claim for permanent total disability benefits.

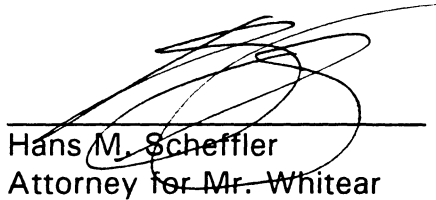
The Labor Commission has never granted Mr. Whitear a hearing on the issue of whether he is entitled to permanent total disability benefits based upon the fact that he suffers from asthma. Asthma which was caused by the February 17, 1987 industrial accident.

The Constitution of the State of Utah and the Administrative Procedures Act entitled Mr. Whitear to a hearing.

CONCLUSION

Mr. Whitear respectfully prays that this Court set aside the December 19, 1997 Order on Motion for Review, reinstate the April 20, 1995 Interim Order entered by Judge Allen and remand this case to the Labor Commission for further proceeding consistent with Judge Allen's April 20, 1995 Interim Order.

Dated this 14th day of May 1998.



Hans M. Scheffler
Attorney for Mr. Whitear

CERTIFICATE OF DELIVERY

I hereby certify that on this 14th day of May 1998 I delivered two true and correct copies of the foregoing Brief of Mr. Whitear to the following:

Alan L. Hennebold
160 East 300 South, 3rd Floor
Salt Lake City, Utah 84111

Attorney for Labor Commission

Stuart L. Poelman
77 West 200 South, Suite 400
Salt Lake City, Utah 84101

Attorney for Brown & Root and
Highlands Insurance

Erie V. Boorman
160 East 300 South, 3rd Floor
Salt Lake City, Utah 84111

Attorney for Employers' Reinsurance Fund

Dated this 14th day of May 1998.

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right, positioned above a solid horizontal line.

INDEX TO ADDENDUM

1. Utah Administrative Procedures Act §63-46b-8
2. Utah Administrative Procedures Act §63-46b-10
3. Article I, §11 of the Constitution of Utah
4. Article I, §7 of the Constitution of Utah
5. August 7, 1987 Order
6. April 20, 1995 Interim Order
7. July 31, 1995 Order of Remand
8. Judge George's December 29, 1995 FAX transmission
9. Hearing Transcript pages cited in this Brief
10. August 18, 1995 report from Utah State Office of Rehabilitation
11. Social Security Disability Determination & Transmittal form
12. Judge George's instructions to Mr. Poelman re Findings of Fact
13. July 26, 1996 Findings of Fact, Conclusions of Law and Order
14. December 19, 1997 Order on Motion for Review

Tab 1

ADDENDUM 1: Utah Code Ann. §63-46b-10

63-46b-10. Procedures for formal adjudicative proceedings — Orders.

In 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.

(2) The presiding officer may use his experience, technical competence, and specialized knowledge to evaluate the evidence.

(3) No finding of fact that was contested may be based solely on hearsay evidence unless that evidence is admissible under the Utah Rules of Evidence.

(4) This section does not preclude the presiding officer from issuing interim orders to:

(a) notify the parties of further hearings;

(b) notify the parties of provisional rulings on a portion of the issues presented; or

(c) otherwise provide for the fair and efficient conduct of the adjudicative proceeding.

History: C. 1953, 63-46b-10, enacted by L. 1987, ch. 161, § 266; 1988, ch. 72, § 20.

Tab 2

ADDENDUM 2: Utah Code Ann. §63-46b-8

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.

History: C. 1953, 63-46b-8, enacted by L. 1987, ch. 161, § 264; 1988, ch. 72, § 19.

Cross-References. — Judicial notice, Utah R. Evid. 201.

Privileges, Utah R. Evid. 501 et seq.

Tab 3

ADDENDUM 3: Constitution of Utah, Article 1, §11

Sec. 11. [Courts open — Redress of injuries.]

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

History: Const. 1896.

Tab 4

ADDENDUM 4: Constitution of Utah, Article 1, §7

Sec. 7. [Due process of law.]

No person shall be deprived of life, liberty or property, without due process of law.

Tab 5

ADDENDUM 5: August 7, 1987 Order

FILE

THE INDUSTRIAL COMMISSION OF UTAH

Case No. 87000446

HAVEN WHITEAR

Applicant,

vs.

BROWN & ROOT, INC. and/or
HIGHLAND INSURANCE

Defendants.

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FINDINGS OF FACT

CONCLUSIONS OF LAW

AND ORDER

* * * * *

HEARING: Hearing Room 334, Industrial Commission of Utah, 160 East 300 South, Salt Lake City, Utah, on August 6, 1987 at 2:30 p.m. o'clock. Said hearing was pursuant to Order and Notice of the Commission.

BEFORE: Timothy C. Allen, Administrative Law Judge.

APPEARANCES: The applicant was present and represented by David Bert Havas, Attorney at Law.

The defendants were represented by Henry K. Chai, Attorney at Law.

At the time and place set for the evidentiary hearing, the defendants, by and through counsel, notified the Administrative Law Judge that they were accepting liability for an industrial accident sustained by the applicant on March 10, 1987. On March 10, 1987, the applicant was drenched with fyrquel 220, which leaked from a damaged hydraulic hose. The defendants have accepted liability for that industrial accident and have also agreed to pay all outstanding medical expenses to date incurred by the applicant. It was also discussed by the parties that at the present time the file contains insufficient evidence to support the applicant's claim of temporary total compensation or possible permanent partial impairment as the result of the industrial accident. The parties have agreed that they will consult and agree upon a mutually acceptable physician to examine the applicant further. In the event dispute develops, then such further proceedings will be had by the Commission as are indicated.

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ORDER
PAGE TWO

ORDER:

IT IS THEREFORE ORDERED that the claim of Haven Whitear is hereby dismissed at this time, pending further medical evaluation, which shall be paid for by the defendant. The application for hearing shall serve as a protection of rights, and in the event dispute develops such further proceedings as are necessary will be convened by the Commission.

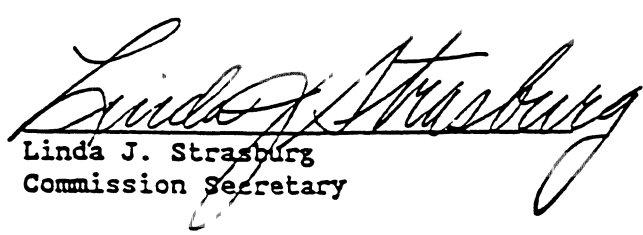
IT IS FURTHER ORDERED that any Motion for Review of the foregoing shall be filed in writing within fifteen (15) days of the date hereof, specifying in detail the particular errors and objections, and, unless so filed, this Order shall be final and not subject to review or appeal.



Timothy C. Allen
Administrative Law Judge

Passed by the Industrial Commission
of Utah, Salt Lake City, Utah, this
7th day of August, 1987.

ATTEST:



Linda J. Strasburg
Commission Secretary

CERTIFICATE OF MAILING

I certify that on August 7, 1987 a copy of the attached ORDER in the case of Joe Ramirez issued August 7 was mailed to the following persons at the following addresses, postage paid:

Haven Whitear
Box 131
Morgan, Utah 84050

David B. Havas
Attorney at Law
2604 Madison Ave
Ogden, Utah 84401

Highlands Insurance
c/o Black, Nichols & Guiver
P.O. Box 2615
Salt Lake City, Utah 84110

Henry K. Chai
Attorney at Law
P.O. Box 45000
Salt Lake City, Utah 84145

THE INDUSTRIAL COMMISSION OF UTAH

By _____
Sherry

✓

Tab 6

ADDENDUM 6 · April 20, 1995 Interim Order

THE INDUSTRIAL COMMISSION OF UTAH

Case No. 93-229

HAVEN WHITEAR,
Applicant,

vs.

BROWN & ROOT, INC. and/or
HIGHLANDS INSURANCE, EMPLOYERS
REINSURANCE FUND,
Defendants,

INTERIM ORDER

* * * * *

HEARING: Hearing Room- 334, Industrial Commission of
Utah, 160 East 300 South, Salt Lake City,
Utah, on February 22, 1994, at 10:00 o'clock
a. m. Said hearing was pursuant to Order and
Notice of the Commission.

BEFORE: Timothy C. Allen, Presiding Law Judge.

APPEARANCES: The applicant was present and represented
by Hans Scheffler, Attorney.

The defendants were represented by Stuart
Poelman, Attorney.

The Employers Reinsurance Fund was represented
by Erie Boorman, Attorney.

Following the hearing in this matter, the Presiding Law Judge referred the file to a Medical Panel for its evaluation. The Medical Panel Report was forwarded to the parties by certified mail. The applicant, by and through counsel, filed Objections to the Medical Panel Report for the failure of the Panel to attribute any of the psychiatric impairment to the industrial accident of February 17, 1987. Thereafter, the matter was scheduled for a hearing on the applicant's Objections. On March 21, 1995 the applicant, by and through counsel, withdrew his request for a hearing on the Objections to the Panel Report, noting that the medical evidence on the file did not sustain the Panel's finding of pre-existing psychiatric impairment.

After reviewing the Medical Panel Report and the other medical evidence contained on the file, I find that the Objection of the

HAVEN WHITEAR
ORDER
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applicant is well founded. As I review the psychiatric portion of the Panel Report, I can find no evidence to support the Panel's finding that the applicant had pre-existing psychiatric impairment. Therefore, I adopt the Panel's finding that the applicant has a 5% permanent impairment due to depression, however, I take exception to the Panel's finding that none of that impairment is due to the industrial accident. Rather, I adopt the finding of Dr. Cali that the applicant's depression is a result of the industrial accident of February 17, 1987. Accordingly, the applicant shall be entitled to treatment for his depression on an industrial basis.

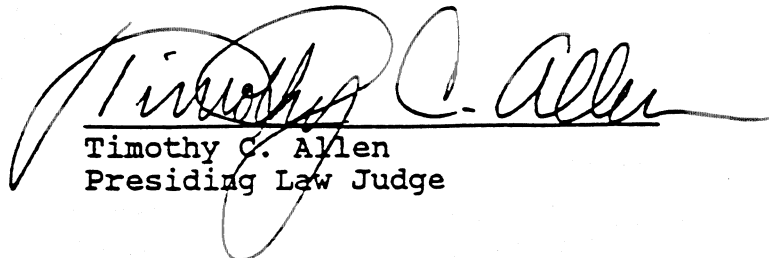
The applicant has also requested a tentative finding of permanent total disability. After reviewing the file, it appears the applicant is entitled to a tentative finding of permanent total disability based on the findings of the Panel as amended, and in view of the finding of disability since December 29, 1989 made by Social Security. Accordingly, the applicant shall be referred to the Division of Rehabilitation Services for their evaluation as required by Section 67 of the Workers Compensation Act.

INTERIM ORDER:

IT IS THEREFORE ORDERED that the Objections of the applicant to the Medical Panel Report should be and the same are hereby granted. Accordingly, the defendants shall pay all medical expenses incurred as the result of the industrial injury, including but not limited to treatment for depression, in accordance with the medical and surgical fee schedule of the Commission.

IT IS FURTHER ORDERED that the applicant is tentatively permanently and totally disabled as the result of the industrial accident of February 17, 1987, and is hereby referred to the Division of Rehabilitation Services for its evaluation pursuant to §35-1-67.

DATED this 20th day of April, 1995.


Timothy C. Allen
Presiding Law Judge

CERTIFICATE OF MAILING

I certify that on April 20, 1995, a copy of the attached Interim Order in the case of Haven Whitear was mailed to the following persons at the following addresses, postage paid:

Haven Whitear
Rt.2, Box 131
Morgan, UT 84050

Hans Scheffler, Esq.
311 South State, #180
SLC, Utah 84111

Stuart Poelman, Esq.
77 W. 200 S., #400
SLC, UT 84101

Erie Boorman, Esq.
ERF
P.O. 146611
SLC, UT 84114-6611

Black, Nichols & Guiver
P.O. 2615
SLC, UT 84110-2615

INDUSTRIAL COMMISSION OF UTAH



Tim Allen

Tab 7

ADDENDUM 7: July 31, 1995 Order of Remand

THE INDUSTRIAL COMMISSION OF UTAH

HAVEN WHITEAR,

Applicant,

vs.

BROWN AND ROOT, INC., HIGHLAND
INSURANCE COMPANY and THE
EMPLOYERS' REINSURANCE FUND,

Defendants.

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ORDER OF REMAND

Case No. 93-0229

Brown and Root, Inc. and its workers' compensation insurance carrier, Highland Insurance Company, (referred to jointly as "Brown and Root" hereafter) ask The Industrial Commission of Utah to review the Administrative Law Judge's interim order regarding Haven Whitear's claim for benefits under the Utah Workers' Compensation Act.

The Industrial Commission exercises jurisdiction over this Motion for Review pursuant to Utah Code Ann. §63-46b-12, Utah Code Ann. §35-1-82.53 and Utah Admin. Code R568-1-4.M.

BACKGROUND

Mr. Whitear has filed a claim for permanent total disability compensation alleging he is unable to work as a result of an industrial injury suffered on February 17, 1987, while employed by Brown & Root.

After an initial hearing, the ALJ referred the medical aspect of Mr. Whitear's claim to a medical panel with instructions to answer the following questions:

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.

ORDER OF REMAND
HAVEN WHITEAR
PAGE TWO

On May 25, 1994, the medical panel reported to the ALJ that Mr. Whitear suffered a 10% impairment from a pulmonary disorder that was entirely due to his industrial accident. The medical panel further reported that Mr. Whitear suffered a 5% impairment from depression. As to the cause of such depression, the medical panel stated:

There does not appear to be a direct causal relationship between the exposure (to toxic substances at Brown & Root) and his psychiatric status, which is interpreted as being equally due to pre-existing and subsequent factors.

Mr. Whitear objected to the medical panel's conclusion regarding the causes of his depression and the ALJ scheduled a hearing on such objections. However, prior to hearing, Mr. Whitear withdrew his request for hearing and argued instead that the medical panel's report failed to identify any preexisting cause of Mr. Whitear's depression.

Based upon Mr. Whitear's arguments, the ALJ canceled the hearing that had been scheduled to address the medical panel's report. Then, the ALJ rejected the medical panel's finding that Mr. Whitear's depression was due to preexisting and subsequent factors other than his industrial accident at Brown & Root. Instead, the ALJ adopted the opinion of Dr. Cali, Mr. Whitear's treating psychologist, that a causal connection existed between the industrial accident and depression. The ALJ then issued an interim order holding Mr. Whitear permanently and totally disabled and referring him to the Division of Rehabilitation Services for determination of his potential for rehabilitation.

DISCUSSION

Brown & Root asks the Industrial Commission to intervene in this matter, despite the fact that the ALJ has not yet issued his final decision on Mr. Whitear's claim. While the Industrial Commission is unaware of any statutory limit to its jurisdiction over cases pending before its Administrative Law Judges, the Industrial Commission also recognizes that its interference could potentially disrupt the adjudicatory process. Therefore, the Industrial Commission will exercise jurisdiction over cases pending before an ALJ only in certain unusual cases, this being one.

ORDER OF REMAND
HAVEN WHITEAR
PAGE THREE

With respect to Mr. Whitear's claim for disability compensation under the workers' compensation system, the key issue is the medical causes of his depression. Consequently, the ALJ's preliminary determination on that point will materially affect the final outcome of the case. The Industrial Commission has reviewed the medical evidence in this matter and concludes that further 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.

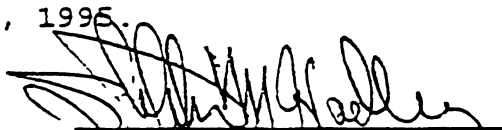
In light of the foregoing, Mr. Whitear's claim is remanded to the ALJ. The ALJ is instructed to conduct a hearing on the medical panel's report, particularly regarding the causes of Mr. Whitear's depression. The ALJ may take such other action as is necessary and appropriate to fully develop the record regarding the cause and extent of Mr. Whitear's depression and related disability.

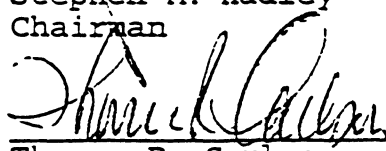
ORDER

The Industrial Commission hereby grants Brown & Root's motion for review and remands this matter to the ALJ for further proceedings consistent with this decision. It is so ordered.

Dated this 21 day of July, 1996.




Stephen M. Hadley
Chairman

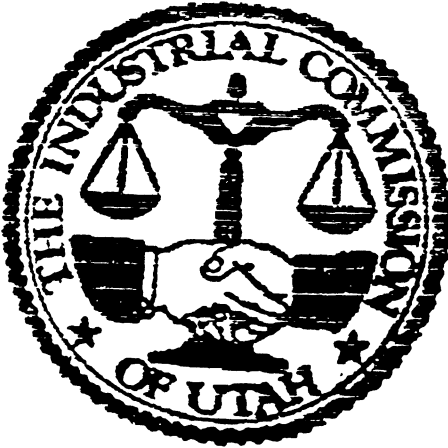

Thomas R. Carlson
Commissioner


Colleen S. Colton
Commissioner

Tab 8

**ADDENDUM 8: Judge George's December 29, 1995 FAX transmission
re the limitation of the issues for the February 7, 1996
Hearing**

FAX COVER SHEET



PAGES INCLUDING COVER SHEET: 2

DATE: DECEMBER 29, 1995

FROM: DON GEORGE
ADJUDICATION DIVISION

FAX#: 530-6804

TEL#: 530-6865

TO:

SCHEFFLER, H.
POELMAN, S.

FAX#:

521-3731
521-7965

TEL.#:

531-6600
521-7900

RE: HAVEN WHITEAR

93229

MESSAGE: COUNSELORS--I REVIEWED THE OBJECTIONS TO THE REHAB SERVICES REPORT, & THE RESPONSE. IN SENDING THE REPORT OUT, MY THOUGHT WAS THAT BY GETTING IT OUT, PERHAPS WE COULD BE ADVANCING ON BOTH TRACKS. HOWEVER, MR. POELMAN IS PERSUASIVE IN POINTING OUT THAT IT IS LOGICAL TO FIRST HAVE THE CAUSAL CONNECTION (if any) ESTABLISHED BETWEEN THE INDUSTRIAL ACCIDENT & THE DEPRESSION. IF NO CONNECTION IS SHOWN, THAT WILL LIKELY END THE MATTER. IF A CONNECTION IS SHOWN, ALTHOUGH THE DEFENDANTS CAN BE AFFORDED THE OPPORTUNITY TO DEVELOP A RE-EMPLOYMENT PLAN, GET A CONTRASTING VOC REHAB REPORT & HAVE A HEARING, A TENTATIVE FINDING OF PTD CAN BE MADE IN THE INTERIM. SINCE THAT FINDING COULD BE MADE AT THE CONCLUSION OF THE 2/07/96 HEARING ON OBJECTIONS TO THE MEDICAL PANEL REPORT, THERE IS NO HARM IN NOT EXPANDING THE SCOPE OF THE HEARING TO INCLUDE OBJECTIONS TO THE REHAB SERVICES REPORT. MR. SCHEFFLER'S REQUEST IS DENIED. HOWEVER, IF THE HEARING RESULT IS FAVORABLE TO THE APPLICANT, MR. POELMAN'S LETTER MIGHT BE A START FOR A RE-REFERRAL TO STATE REHAB WITH MORE SPECIFIC QUESTIONS? WE'LL SEE WHAT THE HEARING BRINGS.

MR. SCHEFFLER, AS I LOOKED OVER THE FILE QUICKLY, I NOTED THAT

THE LAST HEARING NOTICE DID NOT HAVE DR. CALI COPIED AS HAD BEEN
DONE ON PRIOR SETTING NOTICES. I ASKED MS. MELE & SHE INDICATED SHE
HAD BEEN INFORMED IT WAS YOUR RESPONSIBILITY TO ARRANGE FOR YOUR
WITNESS TO BE HERE. THAT SEEMS RIGHT AS MR. CALI WILL NOT GET PAID
IF YOU DON'T BRING HIM.

THANK YOU GENTLEMEN!***DLG



CERTIFICATE OF MAILING

I certify that I have mailed the attached FAX to the following by first class
prepaid postage on the _____ day of DECEMBER, 1995:

HAVEN WHITEAR, ROUTE 2, BOX 131, MORGAN, UT 84050

Tab 9

ADDENDUM 9: Hearing transcript pages cited in Mr. Whitear's Brief

THE INDUSTRIAL COMMISSION OF UTAH

* * *

HAVEN WHITEAR,

Applicant,

vs.

BROWN & ROOT, INC.,
HIGHLANDS INSURANCE and
EMPLOYERS-REINSURANCE-FUND

Defendants.

Case No. 93229

Deposition of:

HEARING ON ORDER OF
REMAND TO OBJECTIONS OF
THE MEDICAL REPORT

* * *

CERTIFIED COPY

BE IT REMEMBERED that on the 7th day of February, 1996, the above entitled matter came on for Hearing on Order of Remand to Objections of the Medical Report before the Honorable Donald L. George, Administrative Law Judge, beginning at approximately 8:50 a.m., at 160 East 300 South, Salt Lake City, Utah.

* * *

Teri L. Hansen

Registered Merit Reporter

MERIT
REPORTERS

5 DAY DELIVERY
(801) 322-3742

185 South State Street #380
Salt Lake City, Utah 84111

UTAH'S MOST CERTIFIED REPORTING FIRM

1 93229.

2 MR. SCHEFFLER: That sounds right, Your
3 Honor.

4 THE COURT: Okay.

5 MR. SCHEFFLER: That ultimately led to a
6 hearing, and on or about March 1st of 1994 Judge Alle
7 did refer the claim to the medical panel, and the
8 reason it was referred to a medical panel is obvious.
9 There was conflict in the medical evidence that was
10 presented to Judge Allen at the hearing. Neither
11 party objected to the referral of the claim to the
12 panel.

13 The medical panel report at issue is dated
14 May 24, 1994. I, on Mr. Whitear's behalf, filed a
15 timely objection to that report. The defense never
16 filed an objection to the medical panel report, nor
17 did they seek an extension of time to file an
18 objection to the medical panel report.

19 The objection that we had to the medical
20 panel report was very limited, and it was limited to
21 this issue, and that is, what is the cause of
22 Mr. Whitear's depression? The independent medical
23 report of Dr. McCann, the reports of Dr. Cali, and
24 even the medical panel all agree that Mr. Whitear is
25 suffering from depression, so whether or not he has

1 depression is a nonissue. He has it. The issue and
2 what we objected to was the causation.

3 The hearing which was scheduled -- and there
4 was a communication problem of some sort when
5 Mr. Poelman had his health problems -- didn't occur.
6 Subsequent to the hearing on March 17, 1995, I
7 consulted with Mr. Whitear, and in an effort to move
8 this case along, because it is so old, I withdrew our
9 request for hearing.

10 Again, Mr. Poelman did not object to my
11 withdrawing of that request. I reserved the issue,
12 and that is the causation of the depression, but I
13 withdrew the request for hearing and asked Judge Allen
14 to enter an order based upon the medical evidence that
15 was before him; again, Dr. McCann's reports, Dr.
16 Cali's records, the medical panel reports, and all the
17 other medical records from the International Jewish
18 Center, all of the records that were submitted in the
19 original evidentiary hearing.

20 On April 20th, over a month -- 1995, over a
21 month after I withdrew my request for a hearing, Judge
22 Allen entered his interim order making a tentative
23 finding of permanent total disability and referring
24 Mr. Whitear appropriately to the state rehab for
25 evaluation.

1 It wasn't until May 9, 1995 -- keep in mind
2 I withdrew my request for hearing in March. It wasn't
3 until May 9 of 1995 that Mr. Poelman filed an
4 objection to Judge Allen's report, and that objection
5 basically outlined what he's saying here today. Gee,
6 we want to question the doctors. We're entitled to do
7 that. There's a conflict. There may or may not be a
8 conflict, and he may be entitled to, but he has waived
9 any time to do that.

10 And it is interesting to note, one of the
11 objections stated is that they lost the opportunity to
12 cross-examine the witnesses, specifically, I believe,
13 Dr. Cali, that if they can't cross-examine, they want
14 time to take his deposition.

15 Well, defense counsel had scheduled Dr.
16 Cali's deposition in August of 1993, and it was
17 defense counsel who cancelled the deposition. It
18 wasn't us. It wasn't Dr. Cali. It was defense
19 counsel, and now they come back years later and say,
20 "Gee, we can't question him."

21 For all of those reasons, I believe that
22 this hearing should not be held, that you should in
23 essence reinstate Judge Allen's interim order and
24 proceed on that basis.

25 Now, I don't want to go forward -- I mean,

1 excuse me. I do want to go forward. I want to
2 reserve my objections, but I have witnesses here
3 today, and I want to put the evidence on so that if
4 there is a subsequent motion for review or an appeal
5 that I don't want to have to come back and have
6 another hearing and bring these witnesses in again.

7 Quite frankly, Mr. Whitear can't afford to
8 keep paying Dr. Cali, who is very cooperative and
9 reasonable, but nonetheless -- and he's entitled to be
10 paid. He's taken time out of his day, so I do want to
11 go forward today, but I do want to make sure that my
12 objections to this whole hearing and the reasons for
13 my objections are on the record.

14 I'd like to make one correction to the
15 representation Mr. Poelman made. Mr. Whitear is
16 getting Social Security disability benefits. The
17 Social Security Administration has found him to be
18 totally disabled as of December 29, 1989, and the
19 primary diagnosis for that disability is asthma, not
20 depression, unlike Mr. Poelman represented to you.

21 MR. POELMAN: Your Honor, I think Counsel's
22 statement does refresh my recollection with respect to
23 the Social Security findings. I think you'll find
24 that the actual documentary basis for the disability
25 was based on the schedules of disability under Social

1 Security, and they all related to the depression.
2 They did not relate to the asthma, and there was no
3 record in the file that noted -- and you'll have to
4 look at the full Social Security file on that, I
5 think. And is that in the record? I think it's in
6 the record.

7 THE COURT: It's there, but I didn't read
8 it. Explain that to me again. You're correct in --

9 MR. POELMAN: Right, that if you'll review
10 the basis upon -- in the Social Security file, the
11 basis upon which disability was determined, this is an
12 itemization of factors and so forth that they look to,
13 and they have to find at least, I think, three major
14 factors in order to find their -- disability and so
15 forth. Those factors which were found by Social
16 Security all related to the depression, and there is
17 nothing in that record that supports a disability
18 based on the asthma.

19 MR. SCHEFFLER: May I approach, Your Honor?

20 THE COURT: Surely.

21 MR. SCHEFFLER: This should be in the
22 record. If it's not, I'll offer it now. (Inaudible)
23 also indicates this is a pre-1988 case, so
24 technically, we don't have to meet the standards and
25 the requirements of Social Security. I think the fact

1 conclusions you came to in your medical panel report?

2 A No. I read over them two or three times.
3 This worries me to come to court, and I have no reason
4 to change my mind.

5 Q So it is your opinion, I take it, that
6 whatever depression, though it may be slight, was not
7 caused by the exposure at his workplace?

8 A That's correct.

9 MR. POELMAN: Thank you, Your Honor. I hand
10 the witness for cross-examination.

11 THE COURT: Mr. Scheffler?

12 MR. SCHEFFLER: Thank you.

13 CROSS-EXAMINATION

14 BY MR. SCHEFFLER:

15 Q Dr. Burgoyne, will you concede that an
16 individual who suffers an injury on the job, besides
17 the physical injury, that that may also cause
18 depression?

19 A Injury on the job could cause depression,
20 yes.

21 Q It can?

22 A It can.

23 Q However, in this case you concluded it
24 didn't?

25 A I concluded it wasn't a very big factor.

1 contributes to the continuing depression. Now what?

2 MR. SCHEFFLER: So then can we not say that
3 then the incident, the accident, then is a factor, if
4 that's true?

5 THE COURT: Well, then ask that question.

6 MR. SCHEFFLER: Okay.

7 Q You understand that?

8 A Okay. Ask the question.

9 Q Your statement that the ongoing legal
10 dispute between Mr. Whitear and his former employer,
11 the insurance company, is a factor in his depression;
12 is that right?

13 A It's a factor.

14 Q Okay. So if that is a factor, then is it
15 not true to say that the accident then in some way is
16 also a factor in causing his depression?

17 A I would have to say yes, but -- well, there
18 are many things in life. Yes.

19 Q Thank you. Another factor that you talked
20 about with Mr. Poelman is the loss of physical
21 ability. Mr. Whitear, I think you said, told you how
22 fast he could run.

23 A Yes.

24 Q And you and I are in agreement that rodeo is
25 a physically demanding --

1 MR. BOORMAN: Your Honor, it appears to me
2 that Judge Allen attributed the disability to the
3 depression, and the motion for review dealt with that
4 as the disability. And the motion to remand was -- is
5 clearly limited to whether or not the depression was
6 caused by the industrial exposure.

7 THE COURT: Yeah. I understand your
8 objection, and while I appreciate that, and
9 fortunately or unfortunately, as the case may be, the
10 Industrial Commission isn't here to guide me, so I'll
11 just have to wing it on my own. Your objection is
12 overruled.

13 Q (By Mr. Scheffler) During your high school
14 years, how would you characterize or how would you
15 describe Mr. Whitear's behavior in terms of -- did you
16 at any time notice signs, what you would perceive as
17 signs of depression?

18 A I never saw anything that I would interpret
19 as depression.

20 Q How would you describe his -- during those
21 years, his personality? Would you describe that for
22 us?

23 A I think he was a jovial, personable
24 gentleman who was arguably the most popular person in
25 the school.

1 Q Are you aware of the accident that occurred
2 on Haven's job when he was exposed to the chemicals?

3 A I know very little about the accident.

4 Q Have you had an opportunity to be with Haven
5 after this accident?

6 A Not much. Haven and I used to spend more
7 time together. He used to initiate those times
8 together periodically. He doesn't call any more.

9 Q Let me ask you, in the times that you have
10 been together since the accident which occurred in
11 February of 1987, have you noticed a change in Haven's
12 personality or behavior?

13 A Yes. I think there's a notable change.

14 Q And can you describe what you have observed
15 in terms of a change?

16 A I think he's withdrawn. He's angry, and
17 he's, I think, depressed. And anhedonia would be a
18 good way to describe it, as was used earlier today.

19 Q Was Haven angry before this accident?

20 MR. POELMAN: Well, I'm going to -- well, go
21 ahead.

22 A I don't think he had directed, continual,
23 frustrated anger before this accident.

24 Q Okay. How about withdrawn? Was he
25 withdrawn before this?

1 A No.

2 Q Did you -- during the time that you've known
3 Haven, have you had an occasion to work with him?

4 A We worked a lot together, yes.

5 Q Where at?

6 A We worked in Wyoming building an oil
7 refinery together. We worked on his dairy.

8 THE COURT: Give some dates along with
9 those, okay?

10 Q Okay. When did you work in Wyoming?

11 A I think that would have been '83 or '84.

12 Q Okay.

13 A We worked a lot on the farm much earlier
14 than that in the late 70's.

15 Q What kind of work did you do on the farm?

16 A Haul hay, repair fences, milk cows, move
17 sprinkler pipes, whatever was necessary, mostly
18 hauling hay.

19 Q Did you ever observe Haven having any
20 difficult doing any of those farm chores?

21 A No. Haven could do them better than anyone
22 else.

23 MR. SCHEFFLER: At this point I don't have
24 any further questions.

25 THE COURT: Cross?

1 don't have any further questions.

2 MR. POELMAN: I don't have any questions.

3 THE COURT: Thank you. You may step down.
4 Step out into the hall, please.

5 THE WITNESS: Am I free to go now?

6 MR. SCHEFFLER: Sure.

7 MR. POELMAN: No objection.

8 THE COURT: You're excused. Thank you.
9 Step up here, please.

10 CRAIG WHITEAR,
11 called as a witness on behalf of the applicant, being
12 duly sworn, was examined and testified as follows:

13 DIRECT EXAMINATION

14 BY MR. SCHEFFLER:

15 Q Would you please state your name?

16 A Craig Whitear.

17 Q What's your relationship to Haven?

18 A I'm his older brother.

19 Q How much older?

20 A Seven years.

21 Q Where do you live right now?

22 A I live on the family farm, 4060 West 4000
23 North in Peterson, Morgan County.

24 Q Is that where Haven lives?

25 A No.

1 Q Where does he live?

2 A He lives in the basement of my dad's house,
3 if you can call it living.

4 Q Is that also in Morgan?

5 A Yes. That's one block from my house.

6 Q Mr. Whitear, have you been here all day?

7 A Since 15 after eight.

8 Q And you have heard the testimony of Dr.
9 Burgoyne, Dr. McCann?

10 A Uh-huh.

11 Q Is that a yes?

12 A Yes.

13 Q Trying to record everything, so I want to
14 make sure it's all clear. Do you recall the testimony
15 first elicited by Mr. Poelman and then by myself from
16 Dr. Burgoyne about a list, literally a laundry list of
17 things that may cause depression?

18 A Yes, I do.

19 Q What I'd like you to -- I would like to go
20 through that list with you, and tell me about Haven.
21 The first item on the list was school, specifically
22 that Haven may be depressed in part because he was
23 getting poor grades in high school. Did he get bad
24 grades in high school?

25 A They weren't A's, but he enjoyed school. He

1 enjoyed the association with his --

2 MR. POELMAN: Object to the answer, not

3 responsive. He's asked about the grades in high

4 school.

5 THE COURT: Sustained.

6 Q Okay. Tell me about what kind of student

7 Haven was besides the grades he received.

8 A What kind of student?

9 Q Yeah. Did he like going to school?

10 A He enjoyed going to school, not for the

11 study aspect.

12 Q Why? For what aspect did he enjoy going to

13 school?

14 A To associate with his friends and to have

15 fun. School was a stage.

16 Q Was Haven a popular student in high school?

17 A Yes.

18 Q Do you know whether or not Haven went to --

19 I'm sorry. Did Haven graduate from high school?

20 A Yes, he did.

21 Q From Morgan High School?

22 A Yes, he did.

23 Q Did he graduate on time with his class?

24 A No, he didn't.

25 Q When did he graduate?

1 A He graduated, if I recall, a year later.
2 One of the reasons he didn't graduate --

3 MR. POELMAN: I'm going to object to this on
4 the grounds of lack of foundation.

5 Q Were you living with Haven at the time he
6 was in high school?

7 A I was living in Peterson at the time.

8 Q Were you aware of him going to high school?

9 A Yes, I was.

10 Q How often would you see him while he was in
11 high school on average time per week?

12 A I would see him come and go every day from
13 school because I run the dairy on the farm, and he has
14 to walk by the dairy to get to the house.

15 Q And would you also communicate with Haven
16 during this time period?

17 A Yes, I would. I would have him help me on
18 the farm.

19 Q Okay. Did you go to Haven's high school
20 graduation?

21 A No, I didn't.

22 Q Do you know if he went to the high school
23 graduation ceremony?

24 A I don't recall.

25 Q Do you recall the year he graduated from

1 high school?

2 A Just by subtraction or addition, so it would
3 have to be '77.

4 Q It's your testimony that he graduated a year
5 later than the rest of his class?

6 A Yes.

7 Q Was he held back?

8 A Yes, he was.

9 Q During the time that Haven was in high
10 school, did you observe any signs of depression?

11 A No.

12 MR. POELMAN: I'm going to object to the
13 question and ask the answer be stricken on the grounds
14 that he's not qualified to clinically diagnose
15 depression.

16 THE COURT: Sustained.

17 Q Would you describe -- during the years in
18 high school describe for me Haven's personality.

19 A It was fun. It was exciting. He enjoyed
20 life, and he enjoyed being with his friends. One of
21 the big reasons he went back to school is to show the
22 teachers who had prejudice against him because he
23 goofed off in their classes that he could do it. He
24 wasn't afraid of the establishment, quote, quote. One
25 of the teachers literally went into the faculty

1 meeting one day --

2 MR. POELMAN: Your Honor, it's going beyond
3 the question and beyond the expertise of the witness.

4 THE COURT: Sustained.

5 MR. SCHEFFLER: This is not professional
6 testimony. This is observations.

7 THE COURT: Wait, wait.

8 MR. SCHEFFLER: Maybe he was there.

9 THE COURT: Just a second.

10 MR. POELMAN: Well, there's no foundation.

11 THE COURT: If we continue to allow this
12 witness to go way beyond the question, we're going to
13 be here until midnight. Ask him a question and get an
14 answer to it and then go on. You know, he's
15 volunteering lots of information about this, that, and
16 the other thing.

17 If you want to explore some of those things,
18 then ask him a question specifically about that. I'm
19 assuming that you're aware of them, but the volunteer
20 statements are going to take us forever to deal with.

21 MR. SCHEFFLER: We have a right to present
22 our evidence.

23 THE COURT: You have a right to present your
24 evidence.

25 MR. SCHEFFLER: And that's what we're trying

1 to do.

2 THE COURT: I assume you know what the
3 evidence is, and you will ask questions accordingly.
4 I don't want him to volunteer. Just answer the
5 question. Stop. Ask the next question.

6 MR. SCHEFFLER: I've asked him about high
7 school, and Mr. Poelman --

8 THE COURT: High school is a four year
9 experience. I don't want to go through four years of
10 experience today.

11 MR. SCHEFFLER: Well, we may have to, with
12 all due respect. If you like that or not, that
13 doesn't matter. We may have to. These doctors here
14 behind me have placed great weight on these supposed
15 poor grades and that supposed depression, and there is
16 absolutely no basis for their opinions. These are
17 people who lived with Mr. Whitear, who saw him, who
18 don't have to rely upon reports from other people.

19 THE COURT: Mr. Scheffler, proceed with your
20 questioning. If Mr. Poelman has an objection, he'll
21 voice it. I'll rule on it. We'll go on from there.

22 Q Describe for me Haven's personality during
23 the four years he was in high school.

24 MR. POELMAN: It's been asked and answered.

25 THE COURT: Sustained.

1 MR. SCHEFFLER: All right.

2 Q Mr. Poelman and his doctors have made a
3 great deal about the supposed conflict between your
4 stepmother and Haven. Did you hear that testimony
5 this morning?

6 MR. POELMAN: Your Honor, I object to that
7 question on the grounds that it's referred to "my
8 doctors." It's not my doctors.

9 THE COURT: Overruled. Go ahead.

10 Q Did you hear that testimony?

11 A Yes, I did.

12 Q And I -- when did your father remarry?

13 A He remarried in December of 1980.

14 Q Describe for me the relationship -- I assume
15 she lives with your father still.

16 A Yes.

17 Q How close to your home?

18 A One block away.

19 Q Describe -- and Haven lives with his father
20 and stepmother right now?

21 A Yes, he does.

22 Q Describe for me the relationship between
23 stepmother and Haven.

24 A I have never heard her say one mean or
25 degrading comment about any of my father's children.

1 Q I know you haven't read the records, but
2 there are some notes in the records that -- where
3 Haven has indicated that there is some stress between
4 himself and your stepmother, but you've not observed
5 that.

6 A If it's stress, it's not from her.

7 Q Okay. Thank you. During Haven's high
8 school years, did he work at all, to your knowledge?

9 A He worked on the farm.

10 Q Would that be for you?

11 A It would be for me or for dad. At that time
12 until about -- until mom's death, me and my father
13 worked jointly on the dairy.

14 Q Okay. So during high school he would have
15 worked for you and your father?

16 A Correct.

17 Q Can you describe the kind of work that Haven
18 did on the farm during that time period?

19 A Haven did everything that a farm boy is
20 required to do.

21 Q Which means?

22 A Haul hay, milk cows, dig fence post holes,
23 chase cows from morning until night. In the summer it
24 would be an average of a 16 hour day. In the winter,
25 before and after school.

1 Q During his high school years when he worked
2 on the farm, either before or after school or in the
3 summer, did he have any difficulty doing that work?

4 A No. He could stand and lift a bale, 70
5 pound bale of hay, take it from the ground and throw
6 it the equivalent of nine feet in the air to the top
7 layer of hay. That was a contest that the brothers
8 always had every hay season.

9 Q Between -- let me interrupt you now.

10 A Between me, my brother Ron, and Haven, who
11 could throw hay the highest.

12 Q How about after Haven graduated from
13 school? Did he ever work with you or on your father's
14 farm after high school?

15 A Yes, he did. He would --

16 Q When -- let me slow you down. When did he
17 work on the farm after high school?

18 A After high school, he would work -- it would
19 be around mother's death. So it would be 1980,
20 and 'til his accident.

21 Q In 1987?

22 A In 1987. He would work when he wasn't
23 working somewhere else.

24 Q And doing the same kinds of jobs?

25 A Same kind of -- it was his joy to work my

1 hired hands into the ground.

2 Q Did you pay him when he worked for you?

3 A No. He had another job that paid far better
4 than I could pay him, and I would ask him -- if I had
5 trouble with a hay crew, I'd say, "Haven, could you
6 come out and speed these guys up? I got to get the
7 hay in before it rains."

8 Q And would he come out and do that for you?

9 A Yes, he would.

10 Q Any problems doing that for you?

11 A No. He enjoyed it. He loved it. His ego
12 was to work a 16-year-old kid right in the ground
13 until that kid couldn't pick up a bale, and then he
14 would say, "When you get big enough like me, maybe
15 you'll be able to handle this."

16 Q Now, let me ask you, you're aware of the
17 accident that occurred?

18 A Yes, I am.

19 Q February of '87. You weren't there.

20 A I wasn't there.

21 Q Have you had occasion to work with Haven
22 since that accident?

23 A Once.

24 Q When?

25 A It was the summer of that year.

1 Q So summer of 1987?

2 A Correct.

3 Q And where were you working?

4 A On the farm.

5 Q With Haven?

6 A I asked Haven if he would come out and help
7 this hay crew get going because the weather was bad.

8 Q Same kind of job?

9 A Same kind of job, and he was tickled to do
10 it.

11 Q And did he come out?

12 A He came out.

13 Q Did he try to do it?

14 A He tried.

15 Q What happened?

16 A By the time he got the tractor started, the
17 heat of the day, the dust from the hay and the
18 alfalfa, he hadn't lifted five bales. As soon as he
19 broke a sweat, he started to cough. He became
20 clammy. He couldn't breathe. He went in the house.
21 He laid down. Twenty-four hours later he got up.

22 Q Did you ever witness anything like that
23 before the February '87 accident?

24 A Never.

25 Q Another factor that Dr. Burgoyne considered

1 was the death of your mother. She died in 1980?

2 A Correct.

3 Q How did Haven deal with that loss?

4 MR. POELMAN: I'm going to object to that on
5 the grounds that it's beyond the expertise of this
6 witness.

7 THE WITNESS: She was my mother, too.

8 THE COURT: Wait just a second.

9 MR. POELMAN: He's diagnosing how --

10 MR. SCHEFFLER: Let me rephrase it.

11 Q How did you observe Haven act after your
12 mother passed away in 1980?

13 A He hurt, just like I hurt.

14 Q It is painful. I appreciate that, but can
15 you describe for me how you observed Haven hurt --

16 A The only --

17 Q -- when your mother passed away?

18 A Okay. The only visual effect was actually
19 at the funeral itself, and he was teary eyed, but he
20 is -- he was no different a week later than he was a
21 week before.

22 Q Before her death?

23 A Correct.

24 Q How often do you see Haven now?

25 A If I can catch him when he comes out of the

1 basement, I won't see him once a month. If I initiate
2 the visit, then I'll check on him once a week, but
3 he's reclusive.

4 Q Let me just stop you. So you see him once a
5 week maybe?

6 A Yes.

7 Q Have you observed the change in Haven's
8 personality and behavior from the time before the 1987
9 accident to after?

10 A He used to come out and harass my hay crew
11 because they couldn't throw hay as high as he could or
12 as fast as he could. He could unload a load of hay of
13 a hundred bales in four minutes. That means you put a
14 bale of hay on a loader one after another every two to
15 three seconds, and he could continue that until the
16 load of hay was gone.

17 After the accident, he was unable to do any
18 of that. He no longer came out and teased and
19 harassed my hay crew because he had nothing to brag
20 about. He could no longer participate.

21 Q Let me -- was there a change in the
22 relationship from the time before the accident between
23 yourself and Haven to the time after the accident?

24 A It became -- I guess the word is reclusive
25 or shy off. Before when I would come up to him, he

1 would -- if he had time, he'd ask, "You got something
2 for me to do?" Now it's hello at best. There is
3 nothing for him to talk about.

4 Q Have you observed any other changes? You
5 mentioned the work habit and the reclusiveness. Have
6 you noticed any other changes in his personality or
7 behavior from the time before the accident in '87 to
8 the time after the accident in 1987?

9 A My best comparison would be that he looks
10 like a whipped puppy.

11 Q What do you mean by that?

12 A Like a puppy's interested in you and comes
13 up and jumps up on your leg and wants to associate
14 with you. Afterward, after the continual failure of
15 not being able to do the things he used to do, he used
16 to go out and work --

17 MR. POELMAN: Your Honor, the answer is not
18 responsive. I object to it.

19 THE COURT: Sustained.

20 Q Just describe what he used to do before the
21 accident in 1987, what kind of activities. You've
22 mentioned work. Was Haven an outgoing person?

23 A Haven would work all day, and then he would
24 go out and go with his friends and associate. He
25 would participate with other people. He would

1 participate with my crew. He would associate with
2 my -- with the hired hands.

3 Q Okay.

4 A He would come and play with my children.

5 Q How about after the accident? Does he come
6 play with your kids?

7 A Not like he used to.

8 Q Does he come harass your crew?

9 A No, not at all.

10 Q Does he come and offer to work any more?

11 A He can't. He doesn't.

12 Q Does he go out and socialize with his
13 friends the way he used to?

14 A No.

15 MR. SCHEFFLER: I don't believe I have any
16 further questions at this time, Your Honor.

17 THE COURT: Mr. Poelman?

18 MR. POELMAN: I have no questions.

19 THE COURT: You indicated that Haven had
20 been held back at school. What do you mean, held back
21 at school?

22 THE WITNESS: One of the reasons he was held
23 back is because a teacher went into the faculty room.

24 THE COURT: I'm not interested in the
25 story. I asked you a question about, he was held

1 called as a witness on behalf of the applicant, being
2 duly sworn, was examined and testified as follows:

3 DIRECT EXAMINATION

4 BY MR. SCHEFFLER:

5 Q Would you please state your name?

6 A Brent Bohman.

7 Q How do you know Mr. Whitear?

8 MR. POELMAN: Excuse me. I didn't get the
9 name.

10 THE WITNESS: Brent Bohman, B-O-H-M-A-N.

11 MR. POELMAN: Thank you.

12 A I grew up in the summers and spent time in
13 Morgan County, virtually every Christmas and Easter
14 and school holidays, for most -- I would say from when
15 I was born until after I graduated from graduate
16 school.

17 Q Where did you go to graduate school?

18 A Hastings College of Law. Mr. Haven Whitear
19 grew up on a dairy farm, and I spent my time when I
20 was in Morgan County on a cattle ranch that were very
21 closely --

22 Q Are they adjacent farms?

23 A They're not adjacent. Our lower farms are
24 adjacent in some respects, but our upper range and the
25 dairy itself have some land in between them. They're

1 very close in proximity. They're both in Peterson.

2 Q Did you know Haven when he was going to high
3 school?

4 A I have known Haven since I have earliest
5 memories of being a person.

6 Q I guess the answer is yes?

7 A I knew Haven before he went to
8 kindergarten. I knew Haven when he went to grammar
9 school. I knew Haven when he went to high school, and
10 I have known Haven since then.

11 Q Okay.

12 THE COURT: Take a break for a minute.
13 Mr. Poelman, Mr. Scheffler, if you'll come forward,
14 please.

15 MR. POELMAN: Thank you.

16 (Discussion held off the record.)

17 THE COURT: Back on the record. The purpose
18 of that departure from the courtroom was to make both
19 counsel aware, Mr. Bohman, that you and I have had
20 contact previously on both a professional basis, as
21 well as occasional acquaintance-type conversations.

22 THE WITNESS: That is correct. I struggled
23 for a while, however, to put your name to your face.

24 THE COURT: Okay. Having disclosed that --
25 and everybody seems comfortable with it. Is that

1 correct, Mr. Scheffler?

2 MR. SCHEFFLER: Yes.

3 THE COURT: Mr. Poelman?

4 MR. POELMAN: That's correct.

5 THE COURT: You may proceed.

6 Q (By Mr. Scheffler) You are a licensed
7 attorney, Mr. Bohman?

8 A I am.

9 Q Do you still practice?

10 A I do.

11 Q Let's go back to the high school years when
12 you knew Haven. Would you -- how frequently during
13 the -- take an average week -- would you see him
14 during the high school years?

15 A In the wintertime when I wasn't on a school
16 vacation, I would not see him. In the summer times I
17 would see him multiple times any given week. To
18 explain that, Haven's family and my family all had
19 brothers the same ages, and in a rural community we
20 were the closest families that had kids our similar
21 age, so we all associated with each other.

22 Q Did you work together?

23 A Yes. I would do work on the Whitear dairy,
24 and Haven would do work on our ranch. We would haul
25 hay for a him, and his family would help us come haul

1 hay, depending on who had hay down.

2 Q We have had descriptions in what is involved
3 in hay hauling, so let me just ask you, did you ever
4 observe during your high school years Haven having any
5 difficulty doing that kind of work?

6 A No. Haven excelled at that type of work.
7 Any type of physical work Haven was pretty good at.
8 He enjoyed it.

9 Q Let's go post high school. What's your
10 relationship or your association from graduating high
11 school to 1987, in that time period?

12 A Between graduating from high school and
13 1987, Haven and I were on different paths. I was on a
14 pregraduate education path, and I went to school and
15 graduate school, whereas Haven chose not to pursue
16 that path. Haven continued -- was employed in more
17 physical labor type of activities. He was a roughneck
18 for a period of time in those latter years that you
19 speak of.

20 Q Did you during that time period have any
21 contact with Haven?

22 A We continued to be -- we continued to
23 maintain our friendship, and we continued to socialize
24 frequently during that time period.

25 Q During that time period, how would you

1 describe Haven's personality?

2 A I would describe Haven's personality from
3 the high school time period, if we're post high school
4 to that time period, as outgoing, energetic. I think
5 he had a zest for life. He was not a lazy person. He
6 was an energetic person. He was a person who did not
7 shirk from physical labor but actually enjoyed it. He
8 was -- he had a sense of humor.

9 He was a very popular person. He was
10 popular with women. He was popular with other males
11 his age. Haven was probably during that time period
12 the most popular person in the county for his age
13 group.

14 Q Sure. Since 1987 -- well, let me backtrack,
15 Mr. Bohman. You're aware of the accident that
16 occurred in February of 1987 while Mr. Whitear was at
17 work?

18 A I was aware of the accident after the fact.

19 Q You weren't there, obviously.

20 A Within that general time frame I was aware
21 of the accident. He spoke to me about it. At the
22 time of the accident, which I believe was around 1986,
23 I was a licensed attorney in the state.

24 Q You were?

25 A I was. I graduated and moved here in 1984,

1 and during, I would say the first three years after
2 the accident, not immediately after, but two or three
3 years after, he did call me regarding that accident.

4 Q Did you -- let's take the time period from
5 February 1987 to now. How would you characterize your
6 relationship with Haven for that time period?

7 A I would have to break that time period up.
8 I would say between the time I moved here in 1984,
9 when I was admitted to the bar here, and 1990, 1992,
10 we continued, to a decreasing extent, to socialize
11 together. And I would say in the last five years my
12 contact with Mr. Whitear has been much more
13 infrequent.

14 Q Okay. Let's take the first time period that
15 you outlined. How frequently would you see or
16 socialize with Haven?

17 A That time period I would be employed as an
18 attorney, and during periods of that time I actually
19 lived on my ranch, and during other periods of time I
20 maintained residence here, sometimes at my brother's
21 and sometimes not. I would say that it would -- it
22 had decreased in the first part of the time period to
23 several times a year.

24 Q Did you observe during that first time
25 period a change in Haven's personality and behavior

1 from pre-1987?

2 A I observed a change in -- I observed a
3 change -- your time frame analysis doesn't fit exactly
4 how I testify.

5 Q Well, let me just ask you this.

6 MR. POELMAN: Well, let him answer the
7 question.

8 MR. SCHEFFLER: Pardon?

9 MR. POELMAN: Are you going to let him
10 answer the question?

11 THE WITNESS: I'm happy to answer the
12 question.

13 Q Go ahead.

14 A Postaccident through the present period, I
15 have observed a marked change in Mr. Whitear from
16 preaccident personality, interests, the extent of his
17 outgoingness.

18 Q Describe it for us.

19 A I would describe the change as being --
20 whereas, prior to 1986 Mr. Whitear was a fairly happy
21 person, a person who joked, who was outgoing, who
22 would come by my house when I was there at my ranch
23 and ask me to go out and have a beer or do something
24 with him, to a person who became reclusive, does not
25 joke like he used to, does not have the same

1 personality in any regard that he used to have,
2 withdrawn.

3 And my contact with him during this -- and
4 if you want to take -- I split it from '86 to '90
5 and '90 and '95. To the extent I have had contact
6 with Mr. Whitear, say from '90 to present, most of
7 that contact has been legal in nature, not specific to
8 this case, but when he would call me with respect, for
9 instance, children that he hasn't seen that he might
10 want to see, and where he would express
11 disillusionment with the fact that he doesn't have
12 money to pursue legal actions.

13 And usually those conversations would be
14 where he tried to do something but didn't have the
15 resources to do it, and then he would call me after
16 having paid an attorney, for instance, \$400 and
17 have -- and not have achieved a result and call me to
18 see if there is anything I could do to it.

19 I am not a psychologist. -- I am not a
20 psychiatrist, so I couldn't opine as to his mental
21 state, but I would say he was very -- from
22 observations, I would say he was very withdrawn, very
23 reclusive, very -- in some respects embarrassed. In
24 some respects, the best word I could use for it is
25 frustrated. Most of the conversations I had during

1 this period would focus on lack of resources and lack
2 of money to do anything to effectuate a purposeful
3 life.

4 We specifically had conversations as friends
5 regarding whether he could get employment and try to
6 better his life, and we talked about things that
7 prohibited that. He would talk about his inability to
8 work on his family's farm, that he couldn't haul hay,
9 that he couldn't maintain certain types of things. It
10 was conversations in that nature, and they were rare.
11 Frankly, they were rare.

12 I have not seen much of Haven in the last
13 five or six years. The last time I talked to Haven
14 before this for any extent was, last year when this
15 hearing was going to happen, he called and asked if I
16 would appear. And I think I've talked to him twice
17 since then when he called me and asked me to appear.
18 And one of those conversations had to do with the fact
19 the state is seeking -- the state on behalf of a woman
20 who is alleged to have his child is seeking -- or has
21 filed a civil action. And he asked me if I could help
22 him on that, and I agreed to do that.

23 Q A paternity action?

24 A It's a paternity action with claims for
25 reimbursement to the state for payment of welfare

1 moneys to the mother of the child. And I don't
2 normally do that, but I agreed to help Haven on that.
3 And I am the attorney of record on that, and so I
4 think I've had three conversations with Haven this
5 last year.

6 MR. SCHEFFLER: I don't have any further
7 questions.

8 CROSS-EXAMINATION

9 BY MR. POELMAN:

10 Q Do you deem yourself to be a close friend of
11 the family?

12 A I deem my family and the Whitear family to
13 be close friends.

14 Q Yes. Now, what -- you talked about trying
15 to assist Haven on a paternity action. Is that
16 something that's ongoing?

17 A Yeah. It was filed -- I think it was filed
18 a couple months ago.

19 Q I see. And had you represented him in the
20 prior paternity suit?

21 A I do not recollect having represented him in
22 a prior paternity suit.

23 Q Did you represent him in any other prior
24 legal action?

25 A A couple things have been mentioned here

1 Q I realize you disagree on that issue with
2 him. It's just that you made a statement of sometimes
3 an event happens. There is a consequence, a
4 reaction.

5 A All the time. That's what life's about.
6 Things happen to us and we react. We learn from it.
7 When we find we don't want to beat our heads against
8 something any more, we do something else. A
9 prosecutor may become a judge.

10 Q Could that happen?

11 A (Indecipherable.)

12 Q So then it's your opinion that you cannot
13 identify the cause of Haven's depression. Is that
14 right?

15 A I cannot identify specific -- a single,
16 specific cause for his depression. My report
17 indicates that personality factors are probably
18 significant, a contributor, but there are other people
19 with these same kind of traits that don't develop this
20 kind of depression. Again, I can't explain why Haven
21 is as depressed as he is. He's profoundly depressed.
22 It has persisted for a prolonged period of time, and I
23 think he's got a real problem, and I'm really
24 sympathetic with him. You may not think so, but I
25 am.

1 please? I mean, what portion of the record doesn't
2 bear him out? If you ever make any findings, I'd like
3 to have specifics on that. I'd also like to note for
4 the record that at no time did you step out in the
5 hallway and see him use his medication, which might
6 explain why you didn't see him coughing.

7 THE COURT: That may well be.

8 MR. SCHEFFLER: If you want people coughing
9 in your courtroom, Your Honor, from now on I will
10 instruct all my clients not to take their medications
11 before they appear before you.

12 THE COURT: I appreciate your testimony, Mr.
13 Scheffler.

14 MR. SCHEFFLER: It's not testimony. It's a
15 statement of fact.

16 THE COURT: Okay. Let's give a specific and
17 particular, then. Both in the medical records and in
18 his representations to the doctor the specific
19 statement was that his sex life is essentially shot.
20 Sexual function is down. He tries to have sex, it
21 gives him asthma. Okay. That's out of the medical
22 panel report. I don't see a particular page number on
23 it, but it's in Dr. Burgoyne's addendum.

24 Now, I find that not at all to be the
25 circumstance. He testified as well that his sex life

1 has not been very good since 2-17 of '87, the date of
2 the industrial accident. Well, it's kind of
3 interesting that after that point he managed to
4 miraculously conceive two other children. It doesn't
5 appear to me from that that his sex life is impaired,
6 nor does it appear to me from that that his social
7 life is impaired at all.

8 MR. SCHEFFLER: Let me make sure the record
9 is clear. You're saying that somebody who has
10 intercourse two times in the course of nine years has
11 a satisfying sex life. Is that your finding, Your
12 Honor?

13 THE COURT: Is that what I said?

14 MR. SCHEFFLER: Well, you've only identified
15 two times where he could have possibly had sexual
16 intercourse, and so I just want to make sure the
17 record is clear that that's what your finding is.

18 THE COURT: Well --

19 MR. POELMAN: Well, Your Honor, are we in
20 the posture here of debating this with you or arguing
21 this with you?

22 THE COURT: It appears to be. He asked for
23 some specific examples, so for the record I'll point
24 that out.

25 MR. SCHEFFLER: I want specific findings.

1 That's why I'm asking these things.

2 THE COURT: And I'm giving them to you. In
3 addition, both of the doctors who came on for the
4 defendants have indicated that they are essentially
5 very much surprised at the support of family and
6 friends, and I don't think that can be disregarded.
7 By their observation or by what has transpired here
8 today, there's lots of people that are supporting him,
9 and once again, that runs counter to his
10 representations to us here today, as well as to the
11 doctors, that he is withdrawn.

12 Now, the purpose of this hearing basically
13 today was to deal with the remand as to whether the
14 depression was the cause or was caused by the
15 industrial accident. And I finally conclude that
16 that's not the case at all, that there is not a
17 preponderance of evidence in support of the conclusion
18 that there was a medically caused connection between
19 the industrial accident and his depression, and
20 therefore, claims for perm and total disability that
21 was made in this case is dismissed on that ground.

22 MR. SCHEFFLER: Your Honor, what about the
23 asthma?

24 THE COURT: Will you give me just a minute?

25 MR. SCHEFFLER: Yes.

1 MR. SCHEFFLER: Payment of medical bills. I
2 didn't present any evidence, since it wasn't an issue,
3 as to causation, but I think there's a prior order
4 from 1989, whereby the defense is required to pay all
5 reasonable medical expenses related to the asthma, and
6 I would --

7 THE COURT: And as to the asthma I would
8 agree all the medical expenses there should be paid.

9 THE COURT: Any questions, Mr. Poelman?

10 MR. POELMAN: I don't believe so.

11 THE COURT: Okay. Thank you.

12 (Whereupon the hearing was concluded.)

13 * * *

14 Original transcript submitted to Mr. Scheffler.

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Tab 10

**ADDENDUM 10: August 18, 1995 report from Utah State Office of
Rehabilitation**



**Utah State Office
of Rehabilitation**

Blaine Petersen
Executive Director

**Division of
Rehabilitation
Services**

Donald R. Uchida
Director

Ogden District
856 24th Street
Ogden, UT 84401

Voice/TDD
(801) 399-9231

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Utah State Board
of Education

Applied Technology
Education

Scott W. Bean
Chief Executive Officer

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August 18, 1995

Honorable Judge Timothy C. Allen
Industrial Commission of Utah
160 East, 300 S. 3rd Floor
P.O. Box 146615
Salt Lake City, UT 84114-6615

RE: Haven Whitear

Dear Judge Allen:

Haven Whitear made application for services through the Division of Rehabilitation July 10, 1995 and we gathered medical information on him to determine whether or not he could benefit from services of our agency.

Mr. Whitear suffers from severe asthma and his condition has put a lot of restrictions on him as to the types of work that he can and cannot do. Environmental factors such as fumes, dust, smoke, and vapor associated with some types of work exacerbate his condition. Because of these restrictions, it was felt that the client should undergo a vocational evaluation to determine his aptitudes and interests and to better assist him in finding a new career since he can no longer do the type of work that he had done previously because of the above environmental factors.

After receiving the results of the vocational evaluation, Haven and I sat down and discussed his situation. It was felt by the client that because of the severe respiratory condition, including asthma and shortness of breath, reduction of physical capacity with reference to heavy lifting and carrying, weakness of extremities and being susceptible to environmental influences that are associated with most work areas to some degree, he probably could not benefit from Rehabilitation services at this point in time.



REC'D

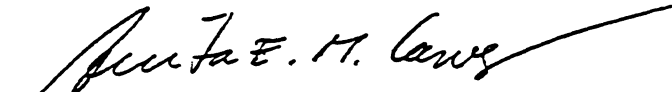
COMMUNITY SERVICES

Haven Whitear
August 18, 1995
Page two

After evaluating this client's overall situation and the number and severity of limitations placed upon him, I would have to agree with Haven that he would not be able to benefit from our services. It is unlikely that his condition will improve enough at this point to make him feasible for Rehabilitation Services.

If you have questions, or require more specific information, please feel free to contact me at 399-9231.

Sincerely,



Anita E.M. Carver, M.S., CRC
Rehabilitation Counselor

AEMC:rw

Tab 11

ADDENDUM 11: Social Security Disability Determination & Transmittal form

DISABILITY DETERMINATION AND TRANSMITTAL

1. DESTINATION DDS <input type="checkbox"/> ODO <input type="checkbox"/> DRS <input type="checkbox"/> DOB <input type="checkbox"/> INTPSC <input type="checkbox"/>		2. DOS CODE 550	3. FILING DATE 08/15/90	4. SSN 52908-7667	5. NAME AND ADDRESS OF CLAIMANT (include ZIP Code) Haven M. White Route 2 - Box 131 Morgan, Wt 84050	6. WE'S NAME (if COB or DWB CLAIM)	7. TYPE CLAIM (Title II) DIB <input checked="" type="checkbox"/> FZ <input type="checkbox"/> DWS <input type="checkbox"/> COB-R <input type="checkbox"/> COB-D <input type="checkbox"/> RD-R <input type="checkbox"/> RD-D <input type="checkbox"/> RD <input type="checkbox"/> P-R <input type="checkbox"/> P-D <input type="checkbox"/> MQFE <input type="checkbox"/>
9. DATE OF BIRTH 09/26/58		10. PRIOR ACTION PD <input type="checkbox"/> PT <input type="checkbox"/>		11. REMARKS Concurrent Title II - Title XVI		8. TYPE CLAIM (Title XVI) DI <input type="checkbox"/> DS <input type="checkbox"/> DC <input type="checkbox"/> BI <input type="checkbox"/> BS <input type="checkbox"/> BC <input type="checkbox"/>	
12. DISTRICT BRANCH OFFICE ADDRESS (include ZIP Code) P.O. Box 1640 324 25th St Garden, Wt 84402		DO-BO CODE 90		13. DO-BO REPRESENTATIVE		14. DATE	
15. CLAIMANT DISABLED A. <input checked="" type="checkbox"/> Disability Began 12/29/89 B. <input type="checkbox"/> Disability Ceased		16A. PRIMARY DIAGNOSIS BODY SYS. 03 CODE NO. 4930 Asthma		16B. SECONDARY DIAGNOSIS CODE NO. 2960 Depression		17. DIARY TYPE NRN 9401953	
18. CASE OF BLINDNESS AS DEFINED IN SEC. 1614a(2)(216)(1) A. <input type="checkbox"/> Not Disab. for Cash Bene. Purp. B. <input type="checkbox"/> Disab. for Cash Benefit Purp. Beg.		19. CLAIMANT NOT DISABLED A. <input type="checkbox"/> Through Date of Current Determination B. <input type="checkbox"/> Through C. <input type="checkbox"/> Before Age 22 (COB only)		20. VOCATIONAL BACKGROUND 54-13 OCC YRS. 05 ED YRS. 13		21. VR ACTION SC IN <input type="checkbox"/> SC OUT <input type="checkbox"/> Prev Ref <input type="checkbox"/>	
22. REG-BASIS CODE		23. MED LIST NO.		24. MOB CODE		25. REVISED DET <input checked="" type="checkbox"/>	
26. LIST NO. <input checked="" type="checkbox"/> A		27. RATIONALE <input type="checkbox"/> See Attached SSA-4258-U4/C4 <input checked="" type="checkbox"/> Check if Vocational Rule Met. Cite Rule		28. A. <input checked="" type="checkbox"/> Period of Disability B. <input type="checkbox"/> Disability Period C. <input checked="" type="checkbox"/> Etab Beg. 12/29/89 D. <input checked="" type="checkbox"/> Continues E. <input type="checkbox"/> Term		29. LTR/PAR NO.	
30. DISABILITY EXAMINER-DOO		31. DATE		32. PHYSICIAN OR MEDICAL SPEC. SIGNATURE		33. DATE	
34. REMARKS This revision determ of 7/23/91 See decision of ALJ-Rand S. Foster dtd 2/21/92 Non atty Rep		35. BASIS CODE D5		36. REV. OF CODES J.B. Galloway		37. SSA REPRESENTATIVE	
38. DATE 07/05/28/91		39. DATE		40. DATE		41. DATE	

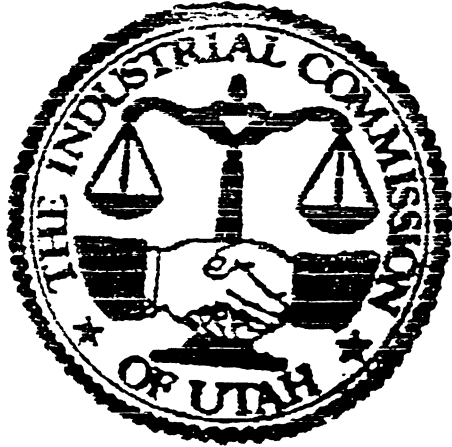
DETERMINATION PURSUANT TO THE SOCIAL SECURITY ACT, AS AMENDED

15. CLAIMANT DISABLED A. <input checked="" type="checkbox"/> Disability Began 12/29/89 B. <input type="checkbox"/> Disability Ceased		16A. PRIMARY DIAGNOSIS BODY SYS. 03 CODE NO. 4930 Asthma		16B. SECONDARY DIAGNOSIS CODE NO. 2960 Depression		17. DIARY TYPE NRN 9401953	
18. CASE OF BLINDNESS AS DEFINED IN SEC. 1614a(2)(216)(1) A. <input type="checkbox"/> Not Disab. for Cash Bene. Purp. B. <input type="checkbox"/> Disab. for Cash Benefit Purp. Beg.		19. CLAIMANT NOT DISABLED A. <input type="checkbox"/> Through Date of Current Determination B. <input type="checkbox"/> Through C. <input type="checkbox"/> Before Age 22 (COB only)		20. VOCATIONAL BACKGROUND 54-13 OCC YRS. 05 ED YRS. 13		21. VR ACTION SC IN <input type="checkbox"/> SC OUT <input type="checkbox"/> Prev Ref <input type="checkbox"/>	
22. REG-BASIS CODE		23. MED LIST NO.		24. MOB CODE		25. REVISED DET <input checked="" type="checkbox"/>	
26. LIST NO. <input checked="" type="checkbox"/> A		27. RATIONALE <input type="checkbox"/> See Attached SSA-4258-U4/C4 <input checked="" type="checkbox"/> Check if Vocational Rule Met. Cite Rule		28. A. <input checked="" type="checkbox"/> Period of Disability B. <input type="checkbox"/> Disability Period C. <input checked="" type="checkbox"/> Etab Beg. 12/29/89 D. <input checked="" type="checkbox"/> Continues E. <input type="checkbox"/> Term		29. LTR/PAR NO.	
30. DISABILITY EXAMINER-DOO		31. DATE		32. PHYSICIAN OR MEDICAL SPEC. SIGNATURE		33. DATE	
34. REMARKS This revision determ of 7/23/91 See decision of ALJ-Rand S. Foster dtd 2/21/92 Non atty Rep		35. BASIS CODE D5		36. REV. OF CODES J.B. Galloway		37. SSA REPRESENTATIVE	
38. DATE 07/05/28/91		39. DATE		40. DATE		41. DATE	

Tab 12

**ADDENDUM 12: Judge George's February 7, 1995 FAX transmission re
drafting of the Findings of Fact**

FAX COVER SHEET



PAGES INCLUDING COVER SHEET: 1

DATE: FEBRUARY 7, 1996

FROM: DON GEORGE
ADJUDICATION DIVISION

FAX#: 530-6804

TEL#: 530-6865

TO:

POELMAN, S.
SCHEFFLER, H.

FAX#:

521-7965
521-3731

TEL.#:

521-7900
531-6600

RE: HAVEN WHITEAR

93229

MESSAGE: MR. POELMAN--ALTHOUGH I RECITED SOME SPECIFICS IN MY DECISION THIS EVENING, THAT WAS NOT ALL-INCLUSIVE. YOU MAY UTILIZE ALL THE SUPPORT EVIDENCED IN YOUR DEFENSE THAT YOU FEEL IS APPROPRIATE. IF I FEEL THAT SOMETHING MORE OR LESS IS NECESSARY, I'LL ASK FOR A DISK SO I CAN MODIFY IT. THANK YOU. ***DLG

CERTIFICATE OF MAILING

I certify that I have mailed the attached FAX to the following by first class prepaid postage on the _____ day of FEBRUARY, 1996:

HAVEN WHITEAR, ROUTE 2, BOX 131, MORGAN, UT 84050

Tab 13

ADDENDUM 13: July 26, 1996 Findings of Fact, Conclusions of Law and Order

THE INDUSTRIAL COMMISSION OF UTAH

Case No. 93229

HAVEN WHITEAR,

Applicant,

FINDINGS OF FACT

vs.

CONCLUSIONS OF LAW

BROWN & ROOT, INC.,
HIGHLANDS INSURANCE, and
EMPLOYERS REINSURANCE FUND

AND ORDER

Defendants.

HEARING: Hearing Room 334, Industrial Commission of Utah,
 160 East 300 South, Salt Lake City, Utah on
 February 22, 1994 at 10:00 a.m. Said hearing
 pursuant to Order and Notice of the Commission.
 Further hearing in Room 334, February 7, 1996
 pursuant to Order and Notice of Commission.

BEFORE: The Honorable Donald L. George, Administrative Law
 Judge.

APPEARANCES: The Applicant was present and represented by Hans
 Scheffler, Attorney at Law.

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

 The Employers Reinsurance Fund was represented by
 Erie Boorman, Administrator.

HAVEN WHITEAR

ORDER

PAGE 2

PROCEDURAL HISTORY:

By an Application for Hearing filed with the Commission on April 22, 1987, Applicant sought a declaration of Defendants' liability for workers compensation benefits arising out of an accident which he claimed to have occurred on February 17, 1987 while employed by the defendant Brown & Root at a plant site in Clearfield, Utah. Applicant alleged that a toxic chemical identified as Fyrquel 220 had spilled on him causing him injury. Hearing on said Application was held before Administrative Law Judge Timothy C. Allen on August 6, 1987, resulting in an Order issued by Judge Allen dated August 7, 1987, noting that the Defendants had accepted liability for said claimed industrial accident and had agreed to pay all outstanding medical expenses incurred by the Applicant to date. It was further noted that the parties would consult and agree to a mutually-acceptable physician to examine the Applicant further, with Brown & Root and Highlands Insurance (herein called "Defendants") to pay the cost of said examination. Thereafter, Applicant filed a Motion for Appointment of Physician dated April 13, 1988, seeking an order from the Commission appointing an out-of-state physician to perform the contemplated examination of Applicant. Said order was opposed by Defendants and resulted in the denial of said Motion issued by Judge Allen in his letter dated May 4, 1988. Thereafter, Whitear was examined by Dr. Attilio D. Renzetti at the University of Utah Medical Center, who issued his report dated July 14, 1988, noting that Applicant suffers from a bronchial asthma secondary to his exposure to organic phosphates, but that there was no evidence of either temporary or permanent disability as a result thereof. At various times thereafter, Defendants' counsel was contacted by Attorneys Virginius Dabney, John Preston Creer and Morris & Morris representing Applicant and requesting that Defendants accept liability for additional workers compensation benefits arising out of said accident. Defendants continued to deny liability for additional benefits

HAVEN WHITEAR
ORDER
PAGE 3

based upon the evidence which had been generated, including the medical report of Dr. Renzetti.

On February 15, 1993, Attorney Hans M. Scheffler filed the Application for Hearing in this case on behalf of Applicant, asserting that Defendants are liable for unpaid medical expenses, permanent partial compensation, and travel expenses. Defendants answered this Application by denying Defendants' liability for further benefits, and affirmatively alleging that Defendants' liability for any further medical expenses being claimed is barred by the three-year statute of limitations set forth in the Workers Compensation Act as amended in 1988. The Application was thereafter amended to include a claim for permanent total disability, which was denied by Defendants. Hearing on Applicant's amended Application was held on February 22, 1994 before Judge Allen, at which time the testimony of Applicant was taken and documentary evidence was received. Thereafter, Judge Allen issued his Preliminary Findings of Fact and referred the case to a Medical Panel for its evaluation of the medical issues. The Medical Panel, consisting of Doctors Madison H. Thomas, Robert H. Burgoyne, and Kevin T. McCusker, submitted its report to the Commission and said report was then served upon the parties on September 28, 1994. Applicant objected to the Medical Panel report, and a hearing on said objections was set but then cancelled pursuant to Applicant's withdrawal of his objections. Judge Allen then entered an Interim Order dated April 20, 1995, containing a tentative finding that Applicant was permanently and totally disabled as a result of said industrial accident. By their letter dated May 19, 1995, Defendants objected to said Interim Order and moved for a review thereof. Pursuant to Defendants' motion for review, the full Commission entered its Order of Remand dated July 31, 1995, whereby it ordered that a further hearing be held on the Medical Panel report. Thereafter, this case was reassigned to Judge Donald L. George for further handling. A rehabilitation report from the Division of

HAVEN WHITEAR
ORDER
PAGE 4

Rehabilitation Services, which had been ordered by Judge Allen, was then received by the Commission and served upon the parties by Judge George. Defendants objected to said rehabilitation report, and Applicant responded, resulting in the determination by Judge George that the objections of Defendants were well taken and that a determination of the Defendants' liability for the claimed permanent total disability benefits should be made prior to dealing with the question of rehabilitation. A hearing on the remand was then scheduled and conducted on February 7, 1996, at which time Doctors Thomas and Burgoyne of the Medical Panel were present and testified, and the parties presented additional evidence by way of testimony and documentation. Following the taking of evidence at the hearing, the Administrative Law Judge announced his decision with respect to the issues, and requested that Defendants' counsel prepare a proposed Findings of Fact, Conclusions of Law and Order for his consideration.

Having been fully advised in the premises, the Administrative Law Judge now enters the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT:

1. On February 17, 1987, Applicant sustained injuries as a result of an accident arising out of and in the course of his employment with the defendant Brown & Root, when his clothes and person were contaminated with a chemical identified as Fyrquel 220.

2. At the time of his accident, Applicant was receiving a wage of \$8.00 per hour, which resulted in an average weekly wage of \$340.00 per week. He was not married and had no dependent children at that time. His compensation rate for his said industrial accident is \$213.00 per week.

HAVEN WHITEAR
ORDER
PAGE 5

3. Applicant was terminated from his employment with Brown & Root on March 31, 1987.

4. Beginning January 8, 1988, Applicant applied for and received unemployment compensation for a period of 20 weeks. He then became employed by Loffland Brothers as a roughneck working on drilling rigs commencing May 5, 1988, which employment continued until his termination on December 29, 1989. He was rendered unable to work between July 26, 1989 and September 14, 1989, because of a knee injury which he sustained in an industrial accident while working for Loffland Brothers. Following the termination of his employment with Loffland Brothers, he applied for and received unemployment compensation for a period of 26 weeks, extending into June 1990.

5. Applicant applied for and received Social Security disability benefits commencing December 29, 1989. The Social Security file reveals that the award of Social Security benefits was made pursuant to criteria relating to Applicant's depression.

6. Applicant's own testimony lacks credibility and is therefore unreliable. His demeanor during the hearing on February 7, 1996, demonstrated his unusual hostility resulting in substantial exaggeration relating to many facts which he claims. He maintained that he was bothered by the smell of perfumes and colognes "a mile away", yet he did not appear to be affected by those substances which were present in the hearing room. He also made specific reference to his inability to tolerate the disinfectants used in restrooms, yet he registered no complaint toward those which were present in the restroom adjacent to the hearing room. He maintains that his sex life has been dramatically affected as a result of the industrial accident. Such testimony is suspect in light of the fact that he has

HAVEN WHITEAR
ORDER
PAGE 6

fathered three children since that time. He has consistently claimed that he has had problems with his breathing since the industrial accident, but the statement of his wife, Tracy Godwin, which is contained in the Social Security file, represents that he had no trouble breathing. He has also made inconsistent statements to doctors who have treated and examined him over the years since the industrial accident. In March 1987 he told the doctor at the Tanner Clinic that he had smoked a pack a day for several years. He then represented to Dr. Butler in July 1988 that he had recently quit smoking. In November 1988 he told Dr. Able that he was a non-smoker. This was during his marriage to Tracy Godwin, who represents in her statement that he was then smoking regularly but representing to his doctors that he was a non-smoker. In February 1991, he told Dr. Nelson that he had quit smoking over a year ago, and he represented to the National Jewish Center in Denver that he had quit smoking in February 1989. However, in his deposition taken in August 1993, he admitted to having smoked within the last week. Then at the hearing held on February 7, 1996, when asked if he had a smoking history, his response was "slightly". Moreover, Dr. Madison Thomas testified at the hearing that the physical tests which he performed on the Applicant showed inconsistencies which demonstrated that the Applicant putting forth less than an appropriate amount of effort. Dr. Burgoyne also testified that he was bothered by the Applicant's lack of credibility. In addition, Dr. McCann indicated that the psychological testing showed that the Applicant had engaged in attempts to fake the results. He also noted that those tests demonstrated malingerings on the part of Applicant. Applicant's representation that his physical abilities have been severely restricted since this accident is belied by the fact that during the years 1988 and 1989 he was engaged in hard physical labor and worked extremely long hours while working on a drilling rig for Loffland Brothers. His representations concerning physical limitations is also contradicted by the statement of his wife Tracy Godwin in her

HAVEN WHITEAR

ORDER

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statement given to the Social Security Administration. It is also noted that the Applicant is wise to the workers compensation system, having claimed workers compensation benefits in connection with several industrial accidents in the past, including one for which he received compensation not long before he ended his employment with Loffland Brothers. Applicant's testimony was also at odds with regard to his plans to go on a church mission. A letter of recommendation sent to Ricks College noted that he intended to go on a mission after a year of school, but Applicant denied that he ever told anyone of such an intention. The Applicant's lack of credibility not only raises questions concerning the testimony which he has provided at hearing, but also diminishes the credence to be given to self-serving representations which he has made to his treating and examining doctors.

7. This Administrative Law Judge adopts the findings of the Medical Panel as contained in the Medical Panel report herein, identified as Exhibit D-3 at the hearing conducted on February 7, 1996. The conclusions of the Medical Panel as contained in its report are strongly confirmed by other medical facts and opinions of record herein.

8. The industrial accident of February 17, 1987 caused Applicant's asthma. His asthma has resulted in a 10% whole person permanent partial impairment.

9. Said asthma has not prohibited Applicant from continuing his employment, and is not the cause of his claimed permanent total disability.

10. Applicant suffers from depression, which has prohibited him from working regularly during various periods of time since his industrial accident. However, his depression is not the result of his industrial accident of February 17, 1987, but

HAVEN WHITEAR
ORDER
PAGE 8

rather the result of numerous factors which either preceded or were subsequent to said industrial accident.

11. Applicant was provided with vocational rehabilitation training but failed to pursue it.

12. Applicant's depression is treatable and treatment would likely be effective in improving his condition. However, he has failed to take depression medication which had been prescribed for him and he has otherwise failed to pursue treatment.

13. The record is without substantial evidence that Applicant has himself paid medical expenses for which claim can be made against Defendants in this case, nor is there evidence that any such medical expenses are yet unpaid. The medical expense arising out of Applicant's evaluation at the National Jewish Center in Denver, Colorado was incurred on his own and at the instigation of his attorney, and was contrary to the order of Judge Allen with respect to an evaluation to be paid for by Defendants. The last medical expense claimed by Applicant which was paid by Defendants prior to the filing of the Application herein was the billing of Dr. Renzetti in the sum of \$28.00 for services rendered November 28, 1989. Said expense was paid by Defendants on January 12, 1990. No other claimed medical expenses for treatment were submitted to Defendants for payment between January 12, 1990 and the filing of the Application herein on February 16, 1993.

14. Prior to his said industrial accident, Applicant had sustained a 1% whole person permanent partial impairment as a result of surgery to his left knee. In addition, one-half of the 5% permanent partial impairment assessed by the Medical Panel relating to Applicant's psychiatric problems are attributed to his condition before the industrial accident. Thus, Applicant

HAVEN WHITEAR
ORDER
PAGE 9

suffered from a total of 3-1/2% whole person impairment which was existing prior to his industrial accident.

CONCLUSIONS OF LAW:

1. Applicant is entitled to compensation from Defendants for a 10% permanent partial impairment relating to his asthma caused by his industrial accident of February 17, 1989.

2. The Employers Reinsurance Fund is liable to Applicant for permanent partial impairment compensation amounting to 3-1/2% of the whole person for left knee and psychological impairment attributed to his condition prior to the industrial accident herein.

3. Applicant is entitled to recover from Defendants and from the Employers Reinsurance Fund interest on his awards of compensation herein at the statutory rate of 8% per annum from May 25, 1994, the date of the Medical Panel report.

4. Applicant's attorney, Hans M. Scheffler, is entitled to receive an attorney's fee for his services rendered to Applicant in connection with this Application. Said attorney's fee should be deducted from the benefits due to Applicant and paid directly to Attorney Scheffler.

5. Applicant's claim for additional medical expenses arising out of his industrial accident of February 17, 1989 is barred by the three-year statute of limitations contained in Section 35-1-99(2) of the 1988 Utah Workers Compensation Act.

6. Applicant is not entitled to permanent total disability benefits as a result of the industrial accident.

HAVEN WHITEAR

ORDER

PAGE 10

ORDER:

IT IS THEREFORE ORDERED that Defendants Brown & Root, Inc. and Highlands Insurance, pay the Applicant Haven Whitear permanent partial disability compensation at the rate of \$213.00 per week for 31.2 weeks, for a total of \$6,645.60, for the 10% whole person permanent partial impairment which he sustained in connection with his asthmatic condition caused by the industrial accident of February 17, 1987.

IT IS FURTHER ORDERED that the Employers Reinsurance Fund shall pay Applicant compensation at the rate of \$213.00 per week for 11.12 weeks, for a total of \$2,368.56 for the 3.5% impairment attributable to Applicant's impairment prior to the industrial accident.

IT IS FURTHER ORDERED that Defendants and the Employers Reinsurance Fund pay Applicant interest on the compensation awarded herein at the statutory rate of 8% per annum beginning May 25, 1994, the date of the Medical Panel report, and continuing until said compensation is paid.

IT IS FURTHER ORDERED that Defendants pay Hans M. Scheffler, attorney for Applicant, the sum of \$1,802.83 plus 20% of the interest payable on the awards made herein for services rendered in this matter, the same to be deducted from the aforesaid awards to Applicant.

IT IS FURTHER ORDERED that any and all additional workers compensation benefits claimed by Applicant herein be and are hereby denied.

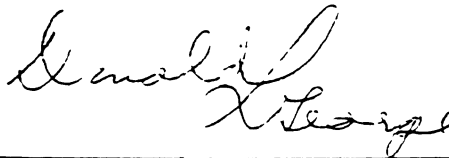
IT IS FURTHER ORDERED that any motion for review of the foregoing shall be filed in writing within thirty (30) days of the date hereof, specifying in detail the particular errors and

HAVEN WHITEAR
ORDER
PAGE 11

objections, and, unless so filed, this Order shall be final and not subject to review or appeal.

DATED this 26th day of July, 1996.

INDUSTRIAL COMMISSION OF UTAH

A handwritten signature in cursive script, appearing to read "Donald L. George", is written over a horizontal line.

DONALD L. GEORGE
Administrative Law Judge

Tab 14

ADDENDUM 14: December 19, 1997 Order on Motion for Review

**APPEALS BOARD
UTAH LABOR COMMISSION**

HAVEN WHITEAR,

Applicant,

v.

**BROWN & ROOT, INC., HIGHLANDS
INSURANCE, and EMPLOYERS'
REINSURANCE FUND,**

Defendants.

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**ORDER ON MOTION
FOR REVIEW**

Case No. 93-0229

Haven Whitear asks the Appeals Board of the Utah Labor Commission to review the Administrative Law Judge's decision regarding Mr. Whitear's claim for benefits under the Utah Workers' Compensation Act.

The Appeals Board exercises jurisdiction over this motion for review pursuant to Utah Code Ann. §63-46b-12, Utah Code Ann. §34A-2-801(3) and Utah Admin. Code R602-2-1.M.

ISSUE PRESENTED

Mr. Whitear presents a wide variety of procedural and substantive issues, as follows: 1) The propriety of The Industrial Commission of Utah's previous order remanding Mr. Whitear's claim to the ALJ for further proceedings; 2) Whether Mr. Whitear's work accident was a cause of his depression; 3) Mr. Whitear's right to permanent total disability compensation under the Act; 4) The credibility of Mr. Whitear's testimony; 5) The ALJ's reliance on defense counsel to draft proposed findings of fact and conclusions of law; 6) Defendant's liability for Mr. Whitear's medical expenses related to his asthma; and 7) Mr. Whitear's claim to additional permanent partial disability benefits from the Employers' Reinsurance Fund. ("ERF").

FINDINGS OF FACT

The Appeals Board adopts the findings of fact set forth in the decision of the ALJ.

DISCUSSION AND CONCLUSIONS OF LAW

For clarity, each issue raised by Mr. Whitear will be addressed separately.

**ORDER ON MOTION FOR REVIEW
HAVEN WHITEAR
PAGE 2**

I. PROPRIETY OF REMAND FOR FURTHER PROCEEDINGS.

Mr. Whitear contends the Industrial Commission erred in remanding Mr. Whitear's claim to the ALJ for a hearing on the medical panel's report. The Appeals Board does not agree.

The Utah Administrative Procedures Act ("UAPA") requires that hearings be conducted to obtain full disclosure of all relevant facts. Section 63-46b-8(1)(a), Utah Code Ann. At the time it issued its order of remand, the Industrial Commission was the ultimate fact finder in workers' compensation cases. United States Steel Corp. v. Industrial Commission, 607 P.2d 807 (Utah 1980). Section 63-46b-12 of UAPA specifically authorized the Industrial Commission to remand "all or any portion of an adjudicative proceeding" for further proceedings. Furthermore, the medical panel serves as an independent, objective, scientific consultant to the Commission. In light of the Industrial Commission's determination that further explanation was necessary regarding the cause of Mr. Whitear's depression, the Industrial Commission's remand to obtain specific clarification from the medical panel was a reasonable application of its authority to obtain all relevant facts.

II. MR. WHITEAR'S WORK ACCIDENT AS A CAUSE OF HIS DEPRESSION.

In every workers' compensation case, it is the applicant's burden to prove that his or her work accident is a cause of the disability for which compensation is sought. In this case, Mr. Whitear has argued that his work accident was a cause of his depression. However, the Appeals Board agrees with the ALJ that the contrary evidence, including the expert opinions of Dr. Burgoyne and Dr. McCann, is more persuasive. The Appeals Board therefore concludes, as did the ALJ, that Mr. Whitear has failed to establish that his work accident caused his depression.

III. MR. WHITEAR'S RIGHT TO PERMANENT TOTAL DISABILITY COMPENSATION.

Mr. Whitear contends he is entitled to permanent total disability compensation because of his impairment from work-related asthma. In support of this contention, Mr. Whitear points to the Social Security Administration's finding that he is totally disabled. However, the Social Security Administration's decision is not determinative on the question of Mr. Whitear's eligibility for workers' compensation benefits. Having reviewed the evidence on this issue, the Appeals Board concludes that Mr. Whitear has failed to establish that he is permanently and totally disabled as a result of his asthma.

IV. MR. WHITEAR'S CREDIBILITY.

Mr. Whitear contends the ALJ erred in concluding he lacked credibility. The Appeals Board agrees with Mr. Whitear that some of the ALJ's examples of Mr. Whitear's lack of credibility are unpersuasive. However, 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

ORDER ON MOTION FOR REVIEW
HAVEN WHITEAR
PAGE 3

and physical tests administered by the medical experts. Furthermore, the ALJ was in the position to directly observe Mr. Whitear's demeanor during the hearing. Consequently, the Appeals Board accepts the ALJ's conclusion regarding Mr. Whitear's credibility. More importantly, the Appeals Board notes that Mr. Whitear's eligibility for workers' compensation benefits does not depend on his personal credibility, but rather, on the reasoned opinions of the qualified medical experts who have examined him.

V. PREPARATION OF FINDINGS AND CONCLUSIONS BY COUNSEL.

At the conclusion of the hearing on Mr. Whitear's claim, the ALJ instructed counsel for defendants to prepare proposed findings of fact and conclusions. Mr. Whitear contends the ALJ failed to give any guidance to defense counsel as to the content of the decision. Mr. Whitear therefore argues that the ALJ failed to perform his duty to decide the case.

The record shows that at the conclusions of Mr. Whitear's hearing, the ALJ explained the factual and legal basis for his decision, thereby guiding defense counsel's preparation of a proposed decision. Obviously, the ALJ retained authority to accept, reject, or modify the proposed decision and it is the ALJ who ultimately is responsible for the decision's content. The Appeals Board notes that the decision, as issued, is consistent with the ALJ's oral decision announced at the end of the hearing. Furthermore, the Appeals Board has full power to correct any error contained in the ALJ's decision. Consequently, the Appeals Board finds no basis to reverse the ALJ's decision because of defense counsel's participation in the drafting process.

VI. BROWN & ROOT'S LIABILITY FOR ASTHMA-RELATED MEDICAL EXPENSES.

The ALJ concluded that "(a)pplicant's claim for additional medical expenses arising out of his industrial accident of February 17, 1987 is barred by the three-year statute of limitations contained in Section 35-1-99(2) of the 1988 Utah Workers' Compensation Act." At the time the ALJ issued his decision, the foregoing conclusion was supported by the Utah Court of Appeals' decision in Brown & Root, 905 P.2d 305 (Utah App. 1995). However, on October 14, 1997, the Utah Supreme Court reversed the Court of Appeals and held that the "three year provision" of §35-1-99(2) is not applicable to claims for medical treatment arising from accidents prior to 1988. Brown & Root v. Industrial Commission, Nos. 960083 and 960084, slip op. (UT October 14, 1997). Consequently, defendants remain liable for all medical care necessary to treat Mr. Whitear's asthma arising from his 1987 accident.

VII. ADDITIONAL PERMANENT PARTIAL DISABILITY BENEFITS FROM THE ERF.

The ALJ found that Mr. Whitear suffered a combined permanent partial disability of 7% for impairments arising from injuries to his knees and from his depression. Based on the medical panel's report, the ALJ also found that one-half of this 7% disability existed prior to his work

**ORDER DENYING MOTION FOR REVIEW
HAVEN WHITEAR
PAGE 4**

accident of February 17, 1987, while the remaining one-half arose after the work accident. The ALJ therefore awarded permanent partial disability compensation to Mr. Whitear for a whole person impairment of 3.5%, based on the preexisting impairment.

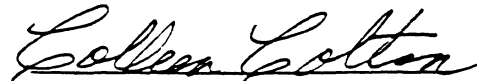
Mr. Whitear contends the ALJ should have awarded permanent partial disability for the entire 7% impairment, regardless of whether the impairment arose before or after his work accident. However, §35-1-69 of the Act in effect at the time of Mr. Whitear's accident authorizes the ERF to pay compensation only for permanent impairments that existed prior to the work accident. Consequently, the ALJ's order directing the ERF to pay permanent partial disability compensation based on Mr. Whitear's preexisting 3.5% impairment is correct.

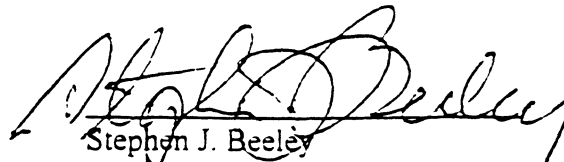
ORDER

The Appeals Board reverses the ALJ's conclusion that Mr. Whitear's right to payment of medical expenses necessary to treat his work-related asthma is barred by §35-1-99(2) of the Act. The Appeals Board hereby orders defendants to pay the reasonable expense of such medical care.

The Appeals Board affirms all other portions of the ALJ's decision. It is so ordered.

Dated this 19th day of December, 1997.


Colleen Colton, Chair


Stephen J. Beeley

DISSENT

I dissent from the following points of the majority decision.

I. PROPRIETY OF REMAND FOR FURTHER PROCEEDINGS.

Although the former Industrial Commission may have had the legal right to remand Mr. Whitear's claim for further proceedings, I believe such authority should not have been exercised under the circumstances of this case.

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At the time the Industrial Commission remanded Mr. Whitear's claim for further proceedings, the record contained sufficient evidence to allow the Industrial Commission to render a fair and reasoned decision on the issue of medical causation. The ALJ assigned to the case at that time was correct in his conclusion that, on the central issue of medical causation, there was no evidence to support the medical panel's opinion that Mr. Whitear had suffered from depression prior to his work accident of February 17, 1987. To the contrary, the underlying evidence showed that Mr. Whitear's depression did not appear until after the work accident, and as a result of that accident. Consequently, I believe the Industrial Commission should not have remanded the case for further proceedings, but instead should have adopted the ALJ's tentative finding that Mr. Whitear was permanently and totally disabled as a result of his work-related depression.

II. MR. WHITEAR'S WORK ACCIDENT AS A CAUSE OF HIS DEPRESSION

As discussed in Point I, I would not have remanded Mr. Whitear's claim for a second hearing. Nevertheless, the testimony adduced at the second hearing also supports Mr. Whitear's right to benefits for his work-related depression. The opinion of Mr. Whitear's expert psychologist that Mr. Whitear's depression was caused by his work accident was consistent with Mr. Whitear's actual history, as described by Mr. Whitear himself and other witnesses who had worked and socialized with Mr. Whitear before the accident. It was their universal observation that Mr. Whitear was completely free of depression prior to the accident.

The medical panel supported its hypothesis that Mr. Whitear suffered from pre-existing depression based on a shopping list of theoretical causes for such depression. However, one by one, such theoretical causes were specifically refuted by witnesses with personal knowledge of the facts. By the end of the second hearing, the foundation of the medical panel's report was undermined, leaving the expert opinion in support of Mr. Whitear's claim as the most credible evidence on the issue of causation.

I do not lightly disregard the ALJ's determinations, but reversal of the ALJ's decision is warranted in this case. I believe Mr. Whitear has established a causal connection exists between his work accident and his depression. He has met his burden of proof and his claim should move forward to determine the extent of his disability.


IV. MR. WHITEAR'S CREDIBILITY

I agree with the majority's statement that the outcome of this case does not turn on Mr. Whitear's credibility. However, I strongly disagree with the ALJ's opinion that Mr. Whitear and every witness who supported him lacked credibility. Obviously, Mr. Whitear's testimony was given under stressful conditions. Nevertheless, the testimony of Mr. Whitear and his witnesses was straight forward, based on direct personal knowledge, and internally consistent. In my view, such testimony was not only worthy of belief, but was essentially uncontradicted.

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V. PREPARATION OF FINDINGS AND CONCLUSIONS BY COUNSEL

I do not consider it improper in every case for the ALJ to rely upon prevailing counsel to draft proposed findings and conclusions. However, in those cases where the ALJ makes such an assignment to prevailing counsel, opposing counsel should be provided the opportunity to review and comment on the proposed findings and conclusions before they are entered by the ALJ. Such a practice is followed in district courts, with good results.



L. Zane Gill

NOTICE OF APPEAL RIGHTS

Any party may ask the Appeals Board to reconsider this Order. Any such request for reconsideration must be received by the Appeals Board within 20 days of the date of this order. Alternatively, any party may appeal this order to the Utah Court of Appeals by filing a petition for review with the court. Any such petition for review must be received by the court within 30 days of the date of this order.

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CERTIFICATE OF MAILING

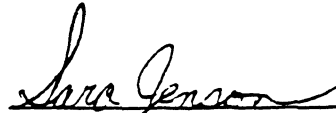
I certify that a copy of the foregoing Order Denying Motion For Review in the matter of Haven Whitear, Case No.93-0229 , was mailed first class postage prepaid this 19th day of December, 1997, to the following:

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Sara Jensen
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Utah Labor Commission