

1998

Wilner A. Blakely v. Utah Labor Commission & Salt Lake County : Brief of Respondent

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

WILNER A. BLAKELY,	:	
Petitioner,	:	
v.	:	
UTAH LABOR COMMISSION & SALT	:	
LAKE COUNTY,	:	Case No. 9802688-CA
Respondent.	:	Priority No. 7
	:	

BRIEF OF RESPONDENT SALT LAKE COUNTY

PETITION FOR REVIEW OF AN ORDER OF THE UTAH LABOR COMMISSION
DENYING REQUEST FOR RECONSIDERATION ISSUED APRIL 30, 1998

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FILED

Utah Court of Appeals

SEP 30

Julia D'Alesandro
Clerk of the Court

**UTAH COURT OF APPEALS
BRIEF**

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CKET NO.

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TABLE OF CONTENTS

Table of Contents	i
Table of Authorities	iii
Statement of Jurisdiction	1
Statement of Issues and Standards of Review	1
Determinative statutes and constitutional provisions	2
Statement of the Case	2
Nature of the Case	2
Course of Proceedings	2
Disposition in Agency	4
Statement of Facts	4
Summary of Argument	7
Argument	8
POINT I	
BLAKELY FAILED TO MARSHALL THE EVIDENCE IN SUPPORT OF THE COMMISSION'S FINDING THAT HE FAILED TO ESTABLISH MEDICAL CAUSATION.	8
POINT II	
THE COMMISSION'S FINDING OF FACT THAT BLAKELY'S WORK WAS NOT THE MEDICAL CAUSE OF HIS INJURIES IS SUPPORTED BY SUBSTANTIAL EVIDENCE.	10
A. Blakely's work activities	12
B. Blakely's pre-existing conditions	14
C. Dr. Thueson's report	15
D. Medical Panel Report	16
E. Summary of Evidence	16

CONCLUSION	18
----------------------	----

Addendum

- A. Decision of Administrative Law Judge Elicerio
- B. Order of Utah Labor Commission Denying Motion
For Review
- C. Order of Utah Labor Commission Denying Request
For Reconsideration

TABLE OF AUTHORITIES

A. Utah Case Law

<u>Allen v. Industrial Commission</u> , 729 P.2d 15 (Utah 1986)	11, 13-14
<u>Chase v. Industrial Commission</u> , 872 P.2d 475 (Utah Ct. App. 1994)	11
<u>Grace Drilling v. Board of Review</u> , 776 P.2d 63 (Utah Ct. App. 1989)	9, 11
<u>Heinecke v. Dept. of Commerce</u> , 810 P.2d 459 (Utah Ct. App. 1991)	9
<u>Intermountain Health v. Bd. of Review</u> , 839 P.2d 841 (Utah Ct. App. 1992)	9, 10
<u>State v. Germondo</u> , 868 P.2d 50 (Utah 1993)	8
<u>State v. Jennings</u> , 875 P.2d 566 (Utah Ct. App. 1994)	18
<u>Winter v. Northwest Pipeline Corp.</u> , 820 P.2d 916 (Utah 1991) .	8

B. Utah Statutes

Utah Code Annotated Section 63-36b-16(4)(g) (1997)	10, 11
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STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction pursuant to U.C.A. § 34a-2-801(8)(a)(1997), U.C.A. §78-2a-3(2)(a)(1996) and U.C.A. § 63-46b-16(1)(1997).

STATEMENT OF ISSUES AND STANDARDS OF REVIEW

1. Whether Wilner A. Blakely ("Blakely") failed to marshall evidence in support of the Utah Labor Commission's ("Commission") finding that there was no medical causation barring appellate review of the Commission's finding?

Standard of Review: The failure to marshall evidence in support of the Commission's findings is an issue only addressed on appeal, therefore, there is no applicable standard of review.

2. Whether there was substantial evidence in support of the Commission's conclusion that Blakely failed to establish medical causation?

Standard of Review: The standard of review of Utah Labor Commission determination is stated in Utah Code Annotated Section 63-36b-16(4)(g)(1997) which provides in relevant part:

(4) The appellate court shall grant relief only if, on the basis of the agency's record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following: . . .

(g) the agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court;

DETERMINATIVE STATUTES AND CONSTITUTIONAL PROVISIONS

Utah Code Annotated Section 63-46b-16 (1997)

STATEMENT OF THE CASE

A. Nature of the Case.

Blakely claims workers' compensation benefits allegedly arising out of his work for Salt Lake County ("the County") as a van driver transporting the elderly. Blakely contends he sustained blisters and ulcers on his feet, which resulted in partial amputation of both feet, as a result of entering and exiting the van on two separate November days in 1994 and 1995.

B. Course of Proceedings.

On April 30, 1996 Blakely filed an Application for Hearing with the Industrial Commission of Utah. [R. 2]. On May 16, 1996 Salt Lake County filed an Answer to Blakely's Application for Hearing. [R. 14]. A hearing was held on January 23, 1997 before Administrative Law Judge Barbara Elicerio ("the ALJ"). [R.27, R. 716].

On May 8, 1997 the ALJ appointed a medical panel to evaluate the medical issues involved in Blakely's claims. [R. 696-697]. The ALJ asked the panel to address, among other questions:

1. Is there a medically demonstrable, causal connection between the petitioner's foot ulcers and amputations and his work as a van driver during 1994 and 1995?

[R. 696].

On June 9, 1997 the medical panel responded to the ALJ's

request and concluded that: "There is not a medically demonstrable causal connection between the petitioner's foot ulcers and amputations and his work as a van driver during 1994 and 1995" [R. 713]. On July 14, 1997 the ALJ provided notice to the parties of the Medical Panel Report. [R. 715].

On October 14, 1997 the ALJ, in a written decision, ruled that Blakely's claim was non compensable because Blakely failed to establish that the work activity was the medical cause of his injuries. [R. 725]. Blakely filed a "request for review" on November 10, 1997. [R. 728]. The County filed a Response to Motion for Review on December 11, 1997. [R. 787]. On March 19, 1998 the Utah Labor Commission issued an Order Denying Motion for Review. [R. 789-790]. The Utah Labor Commission ("the Commission") concluded that:

[t]he Labor Commission agrees with the ALJ's determination that the medical panel's report is persuasive on the issue of medical causation. Because Mr. Blakely has failed to establish medical causation, his claim for workers' compensation benefits must be denied.

[R. 789].

On April 1, 1998 Blakely filed a document requesting the Commission reconsider its Order. [R. 791]. On April 30, 1998 the Commission issued an Order Denying Request for Reconsideration. [R. 794]. On May 20, 1998 Blakely filed a Petition for Review of Utah Labor Commission's Order with the Utah Court of Appeals. [R. 797-798].

C. Disposition in the Utah Labor Commission.

After a hearing and referral to a medical panel the ALJ denied Blakely's claim for workers' compensation benefits based on his failure to establish medical causation. The Commission twice affirmed the ALJ's finding on medical causation.

STATEMENT OF FACTS

A. Salt Lake County Employment.

1. Blakely was working for Salt Lake County in May of 1994 as a van driver transporting senior citizens to and from the Friendly Neighborhood Seniors Center. [R. 838-839].

2. Blakely drove a Ford Van which provided sufficient room for him to enter and exit the vehicle without difficulty. [R. 843].

3. However, in November of 1994 the County assigned Blakely a new Dodge Van which had less room for him to enter and exit. Blakely found it more difficult to enter and exit this vehicle [879-880].

4. Blakely had to twist out of his seat with his feet to get out of the van. [R. 843].

5. After an unusually busy November 1994 workday Blakely testified that he noticed a blister on each foot. [838, 839, 840].

6. Sometime after he noticed the blisters, Blakely sought treatment at the VA Hospital. [204, 206, 846].

7. Blakely's condition worsened and on December 22, 1994 physicians at the Veterans Administration ("VA") Hospital amputated his great right toe. [846].

8. Blakely was discharged on December 24, 1994, but in June of 1995 his left great toe was amputated due to further complications. [846-848].

9. Blakely returned to work for the County in September of 1995. The County assigned Blakely a large van with more room. [R. 851].

10. Due to a scheduling mistake, Blakely was again assigned to the smaller Dodge Van in November of 1995. [R. 852, 879].

11. Again, during a busy day, Blakely claims he suffered further blisters. [R. 852].

12. On March 29, 1996 the VA Hospital performed a partial amputation of the right foot. [R. 852].

B. Pre-existing Conditions.

13. Prior to working for the County, Blakely had a nearly twenty year history of diabetes. [R. 206].

14. Blakely began insulin injections in 1991. [R. 167].

15. Blakely regularly visited the podiatry department of the VA Hospital for ten years prior to the alleged County accident. [R. 858].

16. At the hearing, Blakely conceded that prior to his alleged County injury he had a lack of feeling in his feet,

circulation problems and some numbness. [862-863].

17. Blakely checked his feet for sores or other problems every night, although he claimed not to recall any sores on his feet prior to 1994. [R. 858, 859].

18. Medical records indicate Blakely had prior problems with his feet. [R. 194, 197, 189].

19. Medical records also indicate prior use of tobacco and non compliance with diabetic diet. [R. 165, 168]

C. Course of Medical Treatment.

20. Although the alleged industrial event was approximated at November 17, 1994, the medical records indicate Blakely did not appear for treatment until December 12, 1994. [R. 204, 206].

21. On December 22, 1994 Blakely's right great toe was amputated at the VA Hospital. [R. 215-216].

22. On June 13, 1995 Blakely had additional surgery on his foot. [R. 275-276].

23. On March 26, 1996, Blakely had a partial amputation of the right foot and a resection of the Achilles tendon. [R. 680-682].

24. In support of Blakely's claim, Dr. Moritz wrote a note which reads:

Mr. Blakely is a patient under my care. He currently has an open wound to his right plantar foot. This happened due to driving a van for aging center, when Mr. Blakely stood up and pivoted on right foot, he broke open an ulcer to planar sub 2nd and 3rd metarsac phallangiac joint.

If you have any questions please call . . .
[R. 321].

25. On April 9, 1996, R. Kelley Thueson, M.D., at the County's request, issued a report based on his examination of Blakely and his medical records. [R. 328-333].

26. Dr. Thueson concluded that "[t]he events which occurred to Mr. Blakely are because of his underlying diabetes, not because of his job assignment." [R. 332].

27. On June 9, 1997 the medical panel commissioned by the ALJ, based on its examination of Blakely and a review of his medical records, concluded as follows: "There is not a medically demonstrable causal connection between the petitioner's foot ulcers and amputations and his work as a van driver during 1994 and 1995" [R. 713].

SUMMARY OF ARGUMENT

Blakely failed to marshall the evidence in support of the Commission's findings, as required by Utah case law. Given Blakely's failure to marshall the evidence, this Court should refrain from conducting its own review of the record to determine whether the Commission's findings were based on substantial evidence.

Even if this Court were to conduct its own review of the record, it would find the Commission's findings based on substantial evidence. There was substantial evidence that

Blakely's work activities were not the medical cause of his injuries. The Commission had before it evidence of Blakely's work activities, his extensive prior medical problems with diabetes as well as the medical opinions of a physician and medical panel.

ARGUMENT

POINT I

BLAKELY FAILED TO MARSHALL THE EVIDENCE IN SUPPORT OF THE COMMISSION'S FINDING THAT HE FAILED TO ESTABLISH MEDICAL CAUSATION.

Even with the latitude customarily provided *pro se* litigants, the Court should reject Blakely's appeal based on his failure to marshall all the evidence in support of the Commission's findings. See Winter v. Northwest Pipeline Corp., 820 P.2d 916, 919 (Utah 1991) ("Although this Court has generally been more lenient with *pro se* litigants and applied established fundamental rules of law in favor of a litigant who has not presented them with the precision of an attorney, it would nevertheless be beyond our role as judges to become advocates for a *pro se* party. . . . This Court will not, therefore, address [pro se litigant's arguments] because it is totally unsupported by legal analysis or authority.") and State v. Germonto, 868 P.2d 50, 55 (Utah 1993) (refusing to address issues for, among other reasons, failure of *pro se* litigant to marshall evidence in support of arguments).

The Utah Court of Appeals has stated that "a party challenging the Board's¹ findings of fact must *marshall* all of the evidence supporting the findings and show that despite the supporting facts, and in light of the conflicting and contradictory evidence, the findings are not supported by substantial evidence." Grace Drilling v. Board of Review, 776 P.2d 63, 68 (Utah Ct. App. 1989) (emphasis original). See also Heinecke v. Dept. of Commerce, 810 P.2d 459, 464 (Utah Ct. App. 1991).

Applying this rule of law in a workers' compensation case, this Court rejected an employers challenge to the Industrial Commission's findings in Intermountain Health v. Bd. of Review, 839 P.2d 841 (Utah Ct. App. 1992). In challenging the Industrial Commission ruling, the employer failed to marshall the evidence. Id. at 844. Noting the employer's failure to marshall, this Court declined to go forward and examine whether the Industrial Commission order was, in fact, supported by substantial evidence. This Court stated: "Since IHC has failed to comply with the marshaling requirement in this case, we have no occasion to consider the evidence supporting its position." Id. at 844 n. 3.

In the instant case, Blakely has failed to marshall the

¹ Grace Drilling involved a challenge to an Industrial Commission award of unemployment compensation benefits. However, the same marshaling requirement applies to claims for workers' compensation benefits. Intermountain Health v. Bd. of Review, 839 P.2d 841, 844 (Utah Ct. App. 1992).

evidence *in support* of the Commission's Order. Blakely simply argues against the conclusions of the medical panel, the ALJ and other medical records in his brief. [Blakely Brief, 6-14]. He does not, as required, marshal all evidence in support of the Commission's findings, and then explain why this evidence fails to provide substantial evidence in support of the Commission's findings. Evidence in support of the Commission's findings is addressed in Point II. Accordingly, this Court should "decline to disturb the findings made by the ALJ and ratified by the Industrial Commission." Intermountain Health, 839 P.2d at 844.

POINT II

THE COMMISSION'S FINDING THAT BLAKELY FAILED TO PROVE THAT HIS WORK WAS THE MEDICAL CAUSE OF HIS INJURIES IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

The Commission's finding that Blakely failed to establish that his work was the medical cause of his injuries is supported by substantial evidence contained in the record. The record contains (1) Blakely's testimony concerning the nature of his work activities [R. 839-845]; (2) Blakely's testimony about his pre-existing problems [R. 862-863]; (3) corroborating medical records of Blakely's pre-existing conditions [R. 32-203]; (4) the medical report of Dr. Thueson opining there was not medical causation [R. 328-333]; and (5) the Medical Panel Report opining there was not medical causation [R. 710-714].

The statutory basis for reviewing a Commission order is

stated in Utah Code Annotated Section 63-36b-16(4)(g) (1997).

This provision reads:

(4) The appellate court shall grant relief only if, on the basis of the agency's record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following: . . .

(g) the agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court;

"Medical causation demands that petitioner prove his disability is medically the result of an exertion or injury that occurred during a work-related activity." Chase v. Industrial Commission, 872 P.2d 475, 479 (Utah Ct. App. 1994) (internal quotations and citations omitted). Another statement of the rule is that "the claimant must show by evidence, opinion, or otherwise that the stress, strain, or exertion required by his or her occupation led to the resulting injury or disability." Allen v. Industrial Commission, 729 P.2d 15, 27 (Utah 1986). Further, "[m]edical causation is an issue of fact" and this Court "review[s] the Commission's findings under the substantial evidence standard." Chase, 872 P.2d at 479.

"Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Id. Finally, "[s]ubstantial evidence is more than a mere scintilla of evidence though something less than the weight of the evidence." Grace Drilling v. Board of Review, 776

P.2d 63, 68 (Utah Ct. App. 1989) (internal quotations and citations omitted).

In the instant case, the Commission's finding that Blakely failed to establish medical causation is supported by the following substantial evidence contained in the record.

A. Blakely's work activities.

Blakely's described the mechanism which allegedly caused his injury as follows:

My feet would be -- I would remove them off of the, off the gas and off of all pedals, place them on the floor -- which you can't even do with this shoe on now, but I could at the time because it had flex in it. You place them on the floor. And then I -- because -- and then I would press back against the seat. And I would twist like this and twist my feet like this. And then I get them out from under the steering wheel, then I could step down on the step.

Q. Uh-huh?

A. You just couldn't move your feet freely without having pressure against them. And with that pressure I twisted a blister on both feet.

Q. Okay. Now did you -- your feet were pressed against the floor of the van or, or -- is that what you said?

A. Yeah, the floor of the van, uh-huh (affirmative)

Q. Okay.

A. Yeah. They would be -- you would be pushing to get your body out.

[R. 843-844].

The ALJ attempted to get some clarification of Blakely's work activities:

Q. Okay. What part of the foot then would get pressed against the floor of the van?

A. Well, the bottom of my foot was pressed against the bottom of the floor.

Q. And your feet were flat on the floor when you were twisting?

A. Well, yeah, they would be as flat as you could, as you could be. And then as you twisted and then you -- why it would come over to the side of your foot.

Q. Uh-huh.

A. And then you would twist all the way the rest of the way out, to where you get them back out under the steering wheel, because this part of your body had to go under the steering wheel, till you get them out and down on the step.

Q. But the blisters that you had on -- you had one on your right foot, one on your left foot. They were both on the inside of the feet, is that right?

A. Yeah, they were on the -- up here, like this. Because of the pressure, you know, you're going out left.

Q. They were both on the big toe. So they were both on the inside?

Q. Yeah, the big toes were -- close to the big toes. They were on the side where you would -- where the pressure points when you would make your move out.

[R. 844-845].

Commenting on Blakely's description, the ALJ found that "the conclusion regarding the lack of contribution from the work to be logical, considering the difficulty in understanding how any significant trauma occurred, [sic] base on the mechanics of the work exposure testified to by the petitioner . . ." [R. 725].

The Utah Supreme Court recognized that "[e]vidence of the ordinariness or usualness of the employee's exertions may be relevant to the medical conclusion of causation. Where the injury results from latent symptoms with an illness such as heart disease, proof of medical causation may be especially difficult." Allen, 729 P.2d at 27 n. 9.

B. Blakely's pre-existing conditions.

The medical records indicated that Blakely had a long history of diabetes before his employment with Salt Lake County. [R. 33][medical record of June 29, 1984 indicating history of diabetes]. In fact, Blakely admitted he was diabetic and had regularly received treatment for his diabetes. Blakely testified on cross-examination:

A. . . . I talked about the Ureacin that they had me use on my feet every night and morning. I talked about the medication that I took. And the recommendation that I followed for diet.

THE COURT: Now, let me just ask you for a clarification on that, Mr. Blakely. Was that prior to the time that you had any problems, you were advised to do those things with your feet?

THE WITNESS: Oh, yeah. I have been going to the podiatry department at the VA Hospital for ten years every three months. And all they ever had to treat me at that time, which they do on a diabetic, was trim my toenails.

. . .

THE WITNESS: . . . You have a diabetic clinic that you go to; you have a podiatry clinic that you go to; you have an eye clinic you go to. I mean, that's part of the total treatment. And I have been doing that for

years.

[R. 858-859]

The medical records indicate Blakely had prior foot problems. In a January 24, 1994 medical record, it is stated that "diabetic footcare Hx [history] of L [left] Hallux [big toe] ulcer." [R. 194]. A medical record dated March 21, 1994 indicates a "preulcerative lesion" on the left. [R. 197]. It is noted that there was "drainage from left Hallux" in a medical record dated September 9, 1993. [R. 189].

C. Dr. Thueson's report.

After examining Blakely and reviewing his medical records, Dr. Thueson concluded that "[f]oot problems are a common complication for those suffering diabetes. I feel that the foot ulcerations, subsequent infections, and required surgeries are directly related to the diabetes." [R. 331]. Dr. Thueson also states that "[i]n my opinion, it is unlikely that assigning a different vehicle to the examinee would have had much bearing on the outcome of his diabetic foot problem." [R. 331].

Addressing Blakely's surgeries, Dr. Thueson stated that "I believe all surgeries performed on the examinee were necessary, and due to his underlying diabetic condition, and had little to do with his responsibilities as a driver. The examinee had documented lower extremity neuropathy in 1990, with his first reported foot infection and ulceration in 1993, well before the

examinee's reported job injury." [R. 331-332].

D. The Medical Panel Report.

The Medical Panel, consisting of Drs. Thomas and Clarke, concluded that "[t]here is not a medically demonstrable causal connection between the petitioner's foot ulcers and amputations and his work as a van driver during 1994 and 1995 . . ." [R. 713]².

The Medical Panel explained:

It is apparent to the panel that the petitioner had multiple factors which must be considered in relation to causation of his foot ulcers. He had long-standing poorly regulated diabetes. He had an extensive history of use of alcohol, which contributes to neuropathy. He has been obese, which adds to the potential trauma to the feet. He had a long history of smoking, which contributes to vascular disease. He had hypercholesteremia, which also contributes to vascular disease. He had extensive prior recording of symptoms of neuropathy, and prior indication of vascular susceptibility and need for special care and treatment.

[R. 713].

E. Summary of Evidence.

Based on the above-stated evidence, the Commission concluded that Blakely failed to establish that his work activities were the cause of his medical problems.

The Commission had before it Blakely's account of the

² The only medical evidence in support of Blakely's claim is a handwritten note from Dr. Mark Moritz stating that Blakely "currently has an open wound to his right plantar foot. This happened . . . driving a van for aging center, when Mr. Blakely stood up and pivoted on right foot, he broke open an ulcer to planar sub 2nd and 3rd metatarsal phalangeal joint." [R. 321].

mechanism for his injury. Blakely's account was vague, ambiguous and confused. From this account, the Commission could rationally infer, with the other evidence, that this activity was not the medical cause of Blakely's injury.

The Commission had before it evidence of Blakely's long-standing battle with diabetes. There was evidence that "[f]oot problems are common complications for those suffering diabetes." [R. 331]. Combine this with the fact that Blakely had prior problems with his feet, [R. 189, 194, 197], and Blakely's poor compliance with diabetes treatment, [R. 699-702]. Further, the medical records show that Blakely did not seek treatment until mid-December, several weeks after the alleged injury causing events. [R. 204, 206].

Finally, the Commission had the report of both the County's physician as well as the Medical Panel finding no medical causation. As stated above, the Medical Panel noted multiple contributing factors which led to Blakely's foot problems, including history of obesity, smoking and poorly regulated diabetes. [R. 713].

On this record, there is more than substantial evidence in favor of the Commission's finding and the Commission was well within its purview in finding against Blakely's claim of medical

causation³.

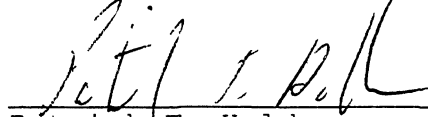
CONCLUSION

Blakely failed to marshall the evidence in support of the Commission's finding of fact that his work activities were not the cause of his medical problems. Accordingly, the Court should not conduct its own review of the record.

Even if this Court were to undertake such a review, there is substantial evidence in support of the Commission's findings. Salt Lake County requests the Court to affirm the Commission's Order.

DATED this 29th day of September, 1998.

OFFICE OF COUNTY LEGAL COUNSEL



Patrick F. Holden

County Legal Counsel

Attorneys for Respondent Salt Lake
County

³ Blakely raises a number of issues in the statement of issues section of his brief. [Blakely Brief, 4-5]. However, the County notes that Blakely failed to brief these issues and therefore, should not be addressed. See State v. Jennings, 875 P.2d 566, 569 (Utah Ct. App. 1994) (declining to address issues listed in statement of issues due to "no legal analysis or authority stated for these issues . . .").

CERTIFICATE OF MAILING

I hereby certify that on the 30 day of Sept.,

1998 I mailed a true and correct copy of the foregoing **RESPONDENT**

SALT LAKE COUNTY'S BRIEF to the following:

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Reiko Tateoka

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ADDENDUM

LABOR COMMISSION OF UTAH

Case No. 96413

WILNER BLAKELEY,	*	
	*	
	*	
Petitioner,	*	FINDINGS OF FACT
	*	
vs.	*	CONCLUSIONS OF LAW
	*	
SALT LAKE COUNTY (SELF-	*	AND ORDER
INSURED),	*	
	*	
Respondent.	*	
	*	
* * * * *		

HEARING: Hearing Room 334, Industrial Commission of Utah,
160 East 300 South, Salt Lake City, Utah, on
January 23, 1997 at 3:00 o'clock p.m. Said hearing
was pursuant to Order and Notice of the Commission.

BEFORE: Barbara Elicerio, Administrative Law Judge.

APPEARANCES: The petitioner represented himself.

The respondent was represented by Jay Stone,
Attorney.

This case involves a claim for workers compensation benefits related to partial toe/foot amputations that the petitioner underwent in December 1994, June 1995 and March 1996. The petitioner claims that these amputations were necessary as a result of aggravation to pre-existing diabetic neuropathy in his feet, caused by excessive rubbing/pressure on his feet at work in November 1994 and November 1995. The petitioner claims that the excessive rubbing/pressure occurred, due to exaggerated positions that became necessary, in order for him to get into, and out of, the driver's seat of the work van that he drove. In support of his position, the petitioner has submitted the opinion of his treating podiatrist, Dr. M. Moritz. Dr. Moritz states that the petitioner's right foot ulceration (leading to the March 1996 amputation) was caused, or aggravated, by his work as a van driver. The respondent does not contest that the petitioner was required to drive a van with limited space between the driver seat and the steering wheel in November 1994 and November 1995. However, the respondent contends that the petitioner's claim is non-compensable, because he has pre-existing diabetic neuropathy and: 1) this is the medical cause of his foot ulcerations and subsequent amputations, not his work as a van driver (per the opinion of Dr. R. Thueson, the

respondent's chosen physician), and 2) the petitioner's work as a van driver did not involve unusual exertion, so that it fails to meet the legal cause standard, applicable where there is a contributory pre-existing condition.

At hearing, the ALJ noted that there was a medical causal controversy, as between the opinions of Dr. M. Moritz and Dr. R. Thueson. The ALJ indicated that she would therefore refer the medical controversy to a medical panel for additional input on the issue. The ALJ indicated that she would address the legal cause determination, if necessary, in any final order to be issued. At hearing, the petitioner provided testimony, primarily related to his work duties and exposure during 1994 and 1995. A medical record exhibit was admitted (Exhibit D-1) which contains the only information submitted with respect to the petitioner's pre-injury medical history. The matter was referred to the medical panel on May 8, 1997 and the panel report was received at the Commission on July 9, 1997. The report was distributed to the parties on July 14, 1997, with 15 days allowed for the filing of objections. No objections were filed and the matter was therefore considered ready for order as of July 29, 1997.

FINDINGS OF FACT:

The first medical records, chronologically, involve a June 1984 admission to the VA Hospital in Boise, Idaho, primarily to deal with cardiac problems, but incidentally also describing the petitioner's diabetic status as well. Noted was the fact that the petitioner had type II diabetes for 14 years at that point. With respect to his diabetes, it was noted that he had had intermittent treatment for the disease with oral medication over the past 14 years. It was noted that he had been instructed in glucose monitoring, but didn't do it. It was also noted that the petitioner had been through diabetic instruction, but had a poor understanding of his disease and had been poorly compliant with a diabetic diet. He was informed, at that time, that it was possible for him to control his diet and get off diabinese as a result.

Medical records for 1986 through 1991 show generally poor compliance with a diabetic diet and oral medication for his diabetes. He was finally placed on insulin in 1991 and apparently had better control of his blood sugar thereafter, but this is not

always clear in the records. Numbness in the legs and feet are noted in a number of the records during this time frame, with some attention given to caring for the feet.

In May 1989, the petitioner was admitted to the VA Hospital due to persistent vision problems. With respect to his diabetes, it was noted that he had a 5-year history of diabetic neuropathy at that time. The petitioner's blood sugars were noted to be in the 250-350 range. It was noted that, during this hospitalization, the petitioner was non-compliant with the diabetic diet provided him and that he kept slipping out to eat ice cream and candy bars. The hospital records indicate that the petitioner was given additional instruction regarding the results of uncontrolled diabetes.

From 1989 through 1994, the petitioner was seen regularly at the VA Hospital for diabetic related concerns. Poor compliance with dietary requirements and poor monitoring of his blood sugar were often noted, with some notations simply indicating that his diabetes was poorly controlled. As noted above, the petitioner was begun on insulin injections in 1991. The petitioner also began regular visits to the podiatrist during this 5-year period. Symptoms in the legs and feet were often noted, with note of pre-ulcerative lesions and ulcers noted in 1994.

At hearing, the petitioner conceded that he had sensation problems, circulation problems and some numbness in his feet prior to November 1994, when he began driving the van for Salt Lake County. He conceded that, as a result of his diabetes, he was under doctor instructions to take very special care of his feet, using Eucerin lotion every night on them and checking them constantly for any sores or other problems. He admitted to having podiatry clinic visits going back 10 years prior to November 1994, under the VA plan for total diabetic care. However, he recalls no actual ulcers on his feet prior to November 1994.

After working several volunteer-type jobs with senior centers in 1993-94, in May 1994, the petitioner was hired under a "Title 5" training program to drive a van transporting seniors from their homes to the Friendly Neighborhood Senior Center. This job averaged 20 hours of work per week and the petitioner was paid \$6.60/hour. The petitioner would drive to the seniors homes, using a list of addresses he was provided, and he would pick the seniors up and assist them in getting into the van. When he had picked up

all on the list, or when the van was full, he would drive to the senior center and again assist the seniors out of the van and into the center. Later in the day, when the seniors were ready to go home, he would do the work in reverse order, taking the seniors back to their homes. The petitioner stated that the vans he drove held 13-14 people.

Per the petitioner, he began by driving a Ford van which had plenty of room for him in between the driver seat and the steering wheel. However, in November 1994, he was assigned a new Dodge van to drive, which had minimal room in between the driver seat and the steering wheel, with no tilt function on the steering wheel. The petitioner testified that his own personal car has a tilt function on the steering wheel, which allows him to tilt the steering wheel up when he needs to get in, or out, of his car. The petitioner tried to move the seat in the van back, but it would not move back far enough in order for him to slide into the seat easily. The petitioner complained to his supervisor, John Hutchinson, regarding the fact that his stomach nearly rested on the steering wheel, and he requested that the adjustable tracks for the seat be moved back. Per Monte Keele, the transportation program manager for the senior citizen transport, the adjustment of the van, as requested by the petitioner, could not be easily or quickly accomplished, because the van was actually owned by the state, and not the county. Therefore, per Keele, it would have been a complicated process to get authorization to make adjustments on the van.

The petitioner drove the Ford van, with plenty of room around the driver seat, from May through October 1994, with no new problems developing in his feet. However, when he was assigned the less spacious Dodge van in November 1994, the petitioner stated that this caused his feet to rub against his shoes excessively when he had to twist his way in and out of the seat. He stated that he would twist to the left to get out of the van and then apparently to the right as he got into the van. He attempted to demonstrate at hearing how his feet were positioned as he did this. This demonstration appeared to show the inside of his foot pressed against the floor, but the petitioner's testimony regarding what part of his foot was rubbing was fairly unclear. Per the petitioner, this became a particular problem on "Thanksgiving crunch day." On this day, which the petitioner approximated to be November 17, 1994, there was a special function or meal at the senior center, related to the upcoming Thanksgiving holiday, which was very popular with the seniors. As a result, the petitioner stated that he estimated he transported 20-25 seniors on that day,

resulting in him needing to get in and out of the van approximately 50 times. Neither party submitted any records for November 17, 1994 and thus there is no documentary evidence to refer to with respect to the number of seniors transported on that day.

The petitioner recalls noticing blisters just below the great toe on each foot, on the sole of the foot, on November 18, 1994. He stated that he did not go to the VA until the following Monday, November 21, 1994. However, there are no VA records whatsoever for this time frame in Exhibit D-1 (no records from August of 1994 until December of 1994). The closest records in time to November 21, 1994 are the admit records for the stay from December 12, 1994 through December 24, 1994. Those records reflect that the petitioner was admitted for right foot cellulitis and osteomyelitis of the hallux of the first metatarsal. The records reflect that the petitioner first noticed sores right underneath the right metatarsophalangeal joint 2 weeks prior to admission (approximately November 29, 1994). There was an initial incision and drainage procedure performed at the hospital on December 13, 1994, with complete amputation of the right great toe on December 22, 1994. The post-surgical pathology report noted that there were areas of bony erosion identified, with extensive soft tissue ulceration and necrosis, likely representing acute osteomyelitis. The petitioner was discharged on December 24, 1994, but he was under home nursing care for the next 8 months following the discharge. He was on IV antibiotics for approximately one month following the surgery and then had daily nursing care for the wound and his diabetes, until approximately mid-August 1995. He also had 3 to 5 follow-up visits per month with the podiatry clinic.

In late April 1995 or May 1995, there was apparent worsening of the left foot ulcer. The petitioner did do some very minimal volunteer work at a local bank at that time, but he was unable to make any connection himself with that work and the worsening of the left foot ulcer. The petitioner indicated that he felt that he had gone off his anti-biotics at that time and that this was the cause of the ulcer worsening. An X-ray done on May 22, 1995, was read to show obvious interval development of osteomyelitis, involving the region of the first metatarsal phalangeal joint, with concern for necrotizing fascitis. A June 8, 1995 X-ray was read to show progressive destruction and fragmentation of the first metatarsal head and base of the proximal joint, with associated periosteal reaction and air in the soft tissues, consistent with osteomyelitis. The left great toe was amputated on June 13, 1995.

The petitioner spoke with the county regarding returning to work, after he was released to do so by his treating physician in late August 1995. The petitioner had some conditions that he wanted met before he returned to work. He indicated that he wanted to drive a van with sufficient room in it, or where the seat could be moved back, so that he didn't have to wedge himself into the seat as he had to do in November 1994. The petitioner also requested to have a volunteer assigned to him, so that he would not have to get in and out of the van so much to help the seniors. The county agreed to provide the accommodations requested by the petitioner. Keele, the transportation manager, decided that it would be easier to have the petitioner drive a different van than to try to refit the state van that he had problems with. Therefore, the petitioner was simply assigned a van that did not have the problems the state van had. Betty Gikiu, a volunteer, was assigned to go along with the petitioner on trips to assist the seniors in and out of the van. She did not go on every trip with the petitioner, but went along most of the time.

There is only one notable medical record between September 1, 1995, when the petitioner returned to work (just 10.85 hours per week on the average, at \$6.60/hour) and when the petitioner again developed an ulcer in November 1995. That record is a November 1, 1995 record where the podiatrist noted that orthotics the petitioner was wearing were under the wrong feet. He reversed them with the petitioner noting that they felt more comfortable as a result. The "Thanksgiving crunch day," November 16, 1995, again came around and the petitioner believes that he again transported 20-25 people on that day. The respondent disagrees with this estimate, based on Exhibits D-2 and D-3. Those exhibits are worksheets that the petitioner used to determine which seniors needed to be picked up on several days in November 1995.

Per the exhibits, apparently different seniors went to the center on different days of the week. Thirteen seniors are listed for the Mondays in November 1995, ten seniors are listed for the Tuesdays, and twelve seniors are listed for the Wednesday pickups. Although D-2 contains the petitioner's worksheets, there are no handwritten markings on the Tuesday and Wednesday sheets. The petitioner stated he did not actually work on the Tuesdays in November 1995 and could not recall if he worked on the Wednesdays of that month. On the worksheets for the Thursday pickups, there are a total of 18 seniors listed and there are check marks after most of the names in the columns for the first (the 2nd) and second (the 9th) Thursdays of November 1995. At hearing, the petitioner

was asked whether these check marks indicated that the senior was picked up. The petitioner indicated that the sheets were not official records and that the check marks did not necessarily indicate which seniors were picked up and which were not. At any rate, there are no check marks at all for Thursday November 16, 1995, the date on which the petitioner feels he again developed an ulcer related to driving the van. For the Monday pickups only, the exhibit is the apparently more official county record, indicating just those seniors actually picked up. That record indicates thirteen seniors on the list, but just eight actually picked up.

Based on the foregoing information conveyed by Exhibits D-2 and D-3, the county contends that, on November 16, 1995, the petitioner actually picked up less than the total 18 seniors that are listed for Thursday pick-up on Exhibit D-2. In addition, based on the testimony of Betty Gikiu, the respondent contends that the petitioner had at least some help with getting the seniors in and out of the van on November 16, 1995 (she indicated that she did help the petitioner with this, but he also helped, and got in and out of the van, as a result). The county does not contest that the petitioner again had to drive the more cramped state Dodge van on that day, due to the fact that the van assignments got accidentally mixed up. The VA ulcer evaluation work sheet for November 20, 1995, indicates that the petitioner had developed a large ulcer just below the remaining toes of the right foot. On November 27, 1995, the ulcer was debrided. The December 27, 1995 VA record notes a neuropathic ulcer on the right foot, in existence for several weeks. The next record is dated March 6, 1996 and is a handwritten note prepared by the petitioner's treating podiatrist, Dr. M. Moritz. The note indicates that the petitioner had an open wound to the right plantar foot (sub 2nd & 3rd metatarsal phalangeal joint) and that it resulted from the petitioner driving a van for the aging center. It states that the petitioner broke it open when he stood up and pivoted on the right foot.

The petitioner was admitted to the VA Hospital from March 26, 1996 through March 29, 1996, during which he underwent surgery for a transmetatarsal amputation of the right foot along with a resection of 1 cm of the achilles tendon just proximal to the insertion site. The discharge summary for this admission indicates that the petitioner had a non-healing ulcer, in the area in question, for 12-16 months prior to the admission (i.e. since December 1994). It notes that radiographs confirmed spread of the

ORDERS
WILNER BLAKELEY
PAGE 8

infection to the bone including the head and shaft of the third metatarsal. Per the summary, this finding caused the physician to decide on the amputation. There are no further VA medical records dated more recent than the discharge summary.

On April 9, 1996, Dr. R. K. Thueson, an internist, examined the petitioner, at the request of the respondent. Dr. Thueson concludes in his report that the direct cause of the petitioner's foot problems is his diabetes (20-year history, with a requirement for insulin during the last 6 years) and not his driving assignments. Dr. Thueson notes that the petitioner has "significant end organ functions" resulting from his diabetes, including neuropathy, decreased peripheral vascular flow and impotence. In addition, Dr. Thueson notes that the petitioner has several risk factors which would aggravate his neuropathy and diminished vascular flow, including a history of alcohol abuse and a 120 pack year history of cigarette smoking. Dr. Thueson notes that foot problems are a common complication for those suffering diabetes. Dr. Thueson notes that it is unlikely that assigning a different vehicle to the petitioner would have had much bearing on the outcome of his diabetic foot problems. Finally, Dr. Thueson concludes that all of the surgeries performed on the petitioner were necessary due to the petitioner's underlying diabetic foot condition.

It should be noted that the petitioner was unable to outline the benefits he sought in relation to his workers compensation claim. Certainly, all his medical care has been, and will be, taken care of by the VA, and because of his relatively low wage and minimal work hours, plus his return to work in late 1995, he would have only a very minimal temporary total claim. He was off work altogether from December 8, 1994 through August 31, 1995. He worked a reduced 10.85 hours per week, at \$6.60/hour from September 1, 1995 through December 7, 1995 and then was off altogether from December 8, 1995 through May 23, 1996. He currently is working again 20 hours per week, as of May 24, 1996, albeit at a lower wage of \$4.75/hour. The low average weekly wage associated with his claim (\$132.00/week) would also result in a fairly low permanent impairment claim. The petitioner indicated that he had concern for his continued mobility and the possible need to revamp his vehicle in the future to allow him to continue driving. However, the petitioner was not clear on exactly why this would be necessary and just indicated he wanted to assure that unexpected expenses, that might arise due to his foot problems, will get paid, as some are not paid, like the cost of maintaining special shoes needed as a

00723

result of his amputations. The petitioner was advised that workers compensation provides for just a few very specific benefits and might not cover some of the unexpected expenses that might ensue related to his foot problems, especially considering that at least some of his foot problems are the result of a pre-existing condition.

MEDICAL PANEL REPORT:

The panel consisted of Chairman, Dr. M. Thomas and panelmember, Dr. D. Clarke. The panel concluded that there was no medical causal connection between the petitioner's work as a van driver in 1994 and 1995 and the development of the foot ulcers and amputations later necessary. The panel concluded that there were a number of pre-existing factors that led to the development of the ulcers, including, long-standing poorly regulated diabetes, an extensive history of alcohol use, obesity, smoking and hypercholesteremia. The panel noted that, at the time that he was hired as a van driver, the petitioner would have had a significant impairment rating for his type II diabetes, due to the fact that he was insulin dependent and had a history of complicating symptoms. Finally, the panel noted that there was no good reason to believe that there was any significant undue trauma to the feet based on the description of the work duties offered to the panel in the ALJ's summary.

CONCLUSIONS OF LAW:

The ALJ adopts the findings of the medical panel to resolve the medical causal controversy established between the opinions of Dr. Moritz and Dr. Thueson. The panel report restates Dr. Thueson's conclusions that the petitioner had many pre-existing factors that led to the development of osteomyelitis and the resulting amputations. In addition, the panel report restates Dr. Thueson's conclusions that the petitioner's work as a van driver, even in the cramped van he had to use on one occasion in 1994 and one occasion in 1995, did not contribute to the need to accomplish the foot amputations. Only Dr. Moritz's short one-paragraph statement indicates any medical causal connection between the petitioner's work and his eventual need to have the partial amputations. In light of the fact that it is unclear whether Dr. Moritz had a full understanding of the petitioner's extensive pre-existing history of risk factors and in light of the fact that the

ORDERS
WILNER BLAKELEY
PAGE 10

Dr. Thueson and the medical panel clearly had this history and relied upon it significantly in making their conclusions, the ALJ prefers to adopt the majority medical opinion stated by Dr. Thueson and the medical panel. The ALJ finds that this conclusion is underscored by the findings noted above, taken primarily from the medical records, documenting clearly the petitioner's extensive history of diabetes and other contributory risk factors. The ALJ also finds the conclusion regarding the lack of contribution from the work to be logical, considering the difficulty in understanding how any significant trauma occurred, base on the mechanics of the work exposure testified to by the petitioner (outlined above).

Based on the foregoing conclusions, the ALJ finds that the petitioner's claim for workers compensation benefits is non-compensable due to failure to establish medical cause. The ALJ will not formally address legal cause, as the failure to establish medical cause makes it unnecessary to do so. Failure of either medical or legal cause makes the claim non-compensable. Allen v. Industrial Commission, 729 P.2d 15 (Utah 1986). The ALJ will note that the higher legal cause standard would apply, based on the clear and significant contributory pre-existing conditions.

ORDER:


IT IS THEREFORE ORDERED that the petitioner's claim for workers compensation benefits is dismissed with prejudice due to non-compensability.

00725

ORDERS
WILNER BLAKELEY
PAGE 11

IT IS FURTHER ORDERED that any Motion for Review of the foregoing shall be received in the offices of the Division of Adjudication within thirty (30) days of the date hereof, specifying in detail the particular errors and objections, and, unless received by the Division of Adjudication within thirty (30) days of the date hereof, this Order shall be final and not subject to review or appeal. If a Motion for Review is received by the Division of Adjudication within thirty (30) days of the date hereof, any response of the opposing party shall be filed within fifteen (15) days of the date of the receipt of the Motion for Review by the Division of Adjudication in accordance with U.C.A. Section 63-46b-12. A Motion for Review will be decided by the Commissioner of the Labor Commission unless any of the parties requests that the Motion for Review be decided by the Appeals Board in accordance with U.C.A. Section 34A-1-205 within thirty (30) days of the date hereof, or in case of a party responding to the Motion for Review, the request must be made within 20 days of the date of the Motion for Review was filed with the Division of Adjudication.

DATED this 14th day of October, 1997.



Barbara Elicerio
Administrative Law Judge

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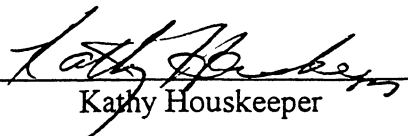
CERTIFICATE OF MAILING

I hereby certify that on the 4 day of Oct, 1997, I mailed a true and correct copy of the foregoing FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER, in the case of Wilner Blakely v. Salt Lake County, (Case Nol 96413) to the following parties:

POSTAGE PREPAID:

WILNER A BLAKLEY
1992 South 200 East, #B626
SLC UT 84110

JAY STONE, ESQ.
2001 South State Street, Suite S3400
SLC UT 84190-1200


Kathy Houskeeper

UTAH LABOR COMMISSION

WILNER BLAKELEY,

Applicant,

v.

SALT LAKE COUNTY,

Defendant.

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**ORDER DENYING
MOTION FOR REVIEW**

Case No. 96-0413

Wilner Blakeley asks the Utah Labor Commission to review the Administrative Law Judge's denial of Mr. Blakeley's claim for benefits under the Utah Workers' Compensation Act.

The Labor Commission 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

Was Mr. Blakeley's work for Salt Lake County the medical cause of the injuries for which he now seeks workers' compensation benefits?

FINDINGS OF FACT

After having reviewed the record in this matter in light of the points raised by Mr. Blakeley's motion for review, the Labor Commission concludes that the ALJ's findings of fact are supported by the evidence.

CONCLUSION OF LAW

An individual claiming workers' compensation benefits must prove that his or her work is the medical cause of the injury for which benefits are sought. In this case, the ALJ referred the issue to an impartial medical panel which examined Mr. Blakeley, reviewed his medical history, and concluded that his work was not the medical cause of his injury.

The Labor Commission agrees with the ALJ's determination that the medical panel's report is persuasive on the issue of medical causation. Because Mr. Blakeley has failed to establish medical causation, his claim for workers' compensation benefits must be denied.

00789


ADDENDUM B

**ORDER DENYING MOTION FOR REVIEW
WILNER BLAKELEY
PAGE 2**

ORDER

The Labor Commission affirms the ALJ's decision and denies Mr. Blakeley's motion for review. It is so ordered.

Dated this 19th day of March, 1998.


R. Lee Ellertson
Commissioner

NOTICE OF APPEAL RIGHTS

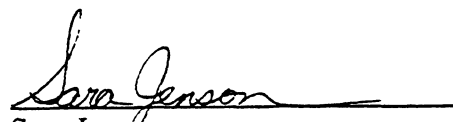
Any party may ask the Labor Commission to reconsider this Order. Any such request for reconsideration must be received by the Labor Commission within 20 days of the date of this order. Alternatively, any party may appeal this order to the Utah Court of Appeals by filing a petition for review with the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

CERTIFICATE OF MAILING

I certify that a copy of the foregoing Order Denying Motion For Review in the matter of Wilner Blakeley, Case No. 96-0413 , was mailed first class postage prepaid this 19th day of March, 1998, to the following:

Jay L. Stone
Deputy County Attorney
Salt Lake County Attorney's Office
2001 South State Street, S-3400
Salt Lake City Utah 84190-1200

Wilner Blakeley
1992 South 200 East #B626
Salt Lake City Utah 84110


Sara Jensen
Support Specialist
Utah Labor Commission

UTAH LABOR COMMISSION

WILNER BLAKELEY,

Applicant,

v.

SALT LAKE COUNTY,

Defendant.

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**ORDER DENYING REQUEST
FOR RECONSIDERATION**

Case No. 96-0413

Wilner Blakeley asks the Utah Labor Commission to reconsider its previous decision denying Mr. Blakeley's claim for benefits under the Utah Workers' Compensation Act.

The Labor Commission exercises jurisdiction over this request for reconsideration pursuant to Utah Code Ann. §63-46b-13 and Utah Admin. Code R602-2-1.O.

DISCUSSION

Mr. Blakeley's request for reconsideration does not set forth any basis for modification of the Labor Commission's previous decision. Mr. Blakeley does, however, ask the Commission to refer his claim for mediation under the Commission's alternative claims resolution program.

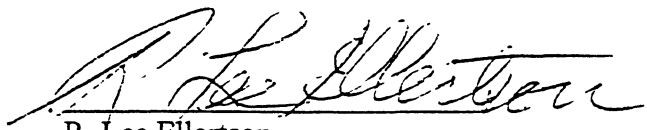
Having once again reviewed the record in this matter, the Labor Commission remains of the opinion that Mr. Blakeley is ineligible for workers' compensation benefits, for the reasons set forth in the Commission's previous decision.

As to Mr. Blakeley's request for mediation, the Commission finds no issues presented by Mr. Blakeley's claim that would benefit from mediation, particularly at this late stage of the proceedings.

ORDER

The Labor Commission reaffirms its previous decision and denies Mr. Blakeley's request for reconsideration. It is so ordered.

Dated this 30th day of April, 1998.



R. Lee Ellertson
Commissioner

IMPORTANT! NOTICE OF APPEAL RIGHTS FOLLOWS ON NEXT PAGE.

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APPENDIX C

**ORDER DENYING RECONSIDERATION
WILNER BLAKELEY
PAGE 2**

NOTICE OF APPEAL RIGHTS

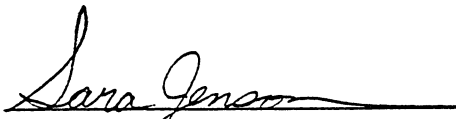
Any party may appeal this order to the Utah Court of Appeals by filing a petition for review with the court. Any such petition for review must be received by the court within 30 days of the date of this order.

CERTIFICATE OF MAILING

I certify that a copy of the foregoing Order Denying Request For Reconsideration in the matter of Wilner Blakeley, Case No. 96-0413 , was mailed first class postage prepaid this 31 day of April, 1998, to the following:

Jay L. Stone
Deputy County Attorney
Salt Lake County Attorney's Office
2001 South State Street, S-3400
Salt Lake City Utah 84190-1200

Wilner Blakeley
1992 South 200 East #B626
Salt Lake City Utah 84110


Sara Jenson
Support Specialist
Utah Labor Commission

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00795