

2010

Columbia HCA and Zurich American Insurance v. Stewart Seely and Utah Labor Commission : Reply Brief

Utah Court of Appeals

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ARGUMENT

I. THE ADMINISTRATIVE LAW JUDGE COMMITTED REVERSIBLE ERROR WHEN THE CONFLICTS IN THE EVIDENCE REGARDING RESPONDENT'S WORK RESTRICTIONS WERE NOT RESOLVED.

The Utah Labor Commission, through the Administrative Law Judge (hereinafter "ALJ") and Appeals Board, erred by failing to resolve the conflicts in the evidence regarding respondent's work restrictions. Utah Code Ann. §§ 63G-4-403(4)(h)(i); 34A-2-413; Utah R.Civ.P. 60(b)(1),(6); Utah Admin. Code R. 612-1-10(C)(1)(2)(e). The Findings of Fact and Conclusions of Law issued on January 5, 2007 contain numerous inconsistencies and various different medical restrictions all of which are supported by medical opinions. The ALJ made reference to the various restrictions but failed to provide any sort of resolution. As a result, petitioners were not able to properly draft a reemployment plan because it was unclear which set of restrictions actually applied to the respondent.

Despite respondent's assertion that the confusion is unwarranted, the final order shows that ALJ failed to resolve the inconsistencies and even cited to them in her order. The January 5, 2007 Final Order (R. 93) provides the following conflicting restrictions:

- 1) "Dr. Chung indicted that Petitioner may perform job in the light to moderate categories of work – he should not lift greater than 50 pounds nor 25 pounds repeatedly." (R. 94).
- 2) "On January 20, 2004 the Petitioner was evaluated by Dr. Junius Clawson, who recommended a lifting restriction of 50 lbs."(R. 95).

- 3) “Dr. Chung noted in March of 2002 that claimant could return to work with “no lifting, pushing or pulling with greater than 30 pounds of force.” (R. 94).
- 4) “Dr. Gaufin opined that the Petitioner could not return to work with the advanced degeneration in his back.” (R. 95).
- 5) Dr. Gordan George noted that the Petitioner reported he could sit/stand for 30 minutes at a time. (R. 96).
- 6) Dr. Chung indicated on May 3, 2006 that the Petitioner had a maximum lift of 35 pounds and was not capable of transferring bedridden or wheelchair patients as he used to do. (R. 96).
- 7) Dr. Gaufin indicated that claimant may be able to work “in light to medium category work.”(R. 95).

These restrictions provided little guidance for petitioners when drafting their reemployment plan.

Respondent even admits in his brief that there was confusion regarding the lifting restrictions. (Respondent’s brief p. 15). Respondent states that he infers from the ALJ’s order that a 35 pound lifting restriction controlled. (Respondent’s brief p. 15). However, in order to reach this conclusion, respondent interprets such words as “opined”, “indicated” and “recommended” and assigns them various degrees of importance. (Respondent’s brief p. 15). Using this complex interpretation, respondent determines that he is subject to a 35 pound weight restriction. (Respondent’s brief p. 15). Respondent’s brief only further petitioners’ argument that there was conflicting evidence regarding the lifting restriction and, as a result, a comprehensive reemployment could not be drafted.

The ALJ had an obligation to resolve the conflicts in the evidence regarding respondent's restrictions so that a comprehensive reemployment plan could be submitted for consideration.

In his response brief, respondent argues that the issue of conflicting evidence was waived because petitioners failed to timely object, that the reemployment was defective despite confusion with the lifting requirements and that there were no conflicts left unresolved. Respondent's arguments are without merit. Petitioners drafted the best reemployment plan that they could under the circumstances without any clear restrictions provided. However, once the final order was issued it was clear that these efforts were futile as no guidance had been provided with regard to respondent's work restrictions. As a result, Petitioners only remaining option was to file an objection to the Order of Permanent and Total Disability issued by the ALJ on September 3, 2007. (R. 130). Petitioners' objection was timely and made pursuant to the Notice of Appeal Rights placed at the bottom of the September 3, 2007 order. (R. 125). As a result, the appeal was timely and the issues were properly preserved for review.

Respondent next argues that the reemployment was defective for numerous reasons and, therefore, petitioners were not prejudiced by the ALJ's failure to resolve the lifting restrictions. However, the importance of the ALJ reaching a conclusion on the medical restrictions and the reemployment plan following those restrictions detailed by the Court of Appeals of Utah in Color Country Management v. Labor Comm'n, 38 P.3d 969, 973-4 (Utah App. 2001). In Color Country Management, the court held that respondent's reemployment plan was defective because it failed to provide subsistence

benefits and because the work restrictions contained in the plan were not similar to those provided in the ALJ's order awarding permanent total disability benefits. *Id.* Here, there was no guidance given with respect the work restrictions, therefore, petitioners could not provide a reemployment consistent with the ALJ's order.

Petitioners fail to see how there can be an argument that they were not prejudiced by the ALJ's failure to resolve the conflicts in the evidence. The ALJ is obligated to resolve the conflicts in the evidence and the failure to do so resulted in the petitioners' inability to draft a comprehensive reemployment plan. If petitioners were given the appropriate parameters to produce a viable plan, they would have done so. However, without knowing the restrictions it was not possible. In his response brief, respondent states that his lifting restriction is 35 pounds – such a restriction is 25 pounds greater than the restriction used in petitioners' reemployment plan. The ALJ did not appropriately resolve the conflicts in the evidence and petitioners were prejudiced by not being able to rely on the final order to draft a reemployment plan.

More specifically, the ALJ should not have been able to conclude that rehabilitation was not possible without resolution of the medical restriction issue. The ALJ denied the reemployment plan by finding that “with regard to the jobs identified, there is no indication of what weight and frequencies the petitioner would be able to lift.” (R. 124). Accordingly, petitioners request that this matter be remanded for determination of the medical restrictions issue so that petitioners are given the opportunity to craft a specific rehabilitation plan for respondent that coincides with his restrictions.

II. THE ADMINISTRATIVE LAW JUDGE COMMITTED REVERSIBLE ERROR BY FAILING TO MAKE THE REQUISITE FINDINGS REGARDING WHETHER REHABILITATION WAS POSSIBLE.

Until an ALJ reviews the reemployment plan and activities, a finding of permanent total disability is not final. Utah Code Ann. § 34A-2-413 asks the Commission to determine if other work is reasonably available, “taking into consideration the employee's[] ... age; ... education; ... past work experience; ... medical capacity; and ... residual functional capacity.” Martinez v. Media-Paymaster Plus, 164 P.3d 384, 393 (Utah 2007). And, the Court of Appeals has held that:

“In order for us to meaningfully review the findings of the Commission, the findings must be sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached.... The failure of an agency to make adequate findings of fact on material issues renders its findings arbitrary and capricious unless the evidence is clear, uncontroverted and capable of only one conclusion.”

Strate v. Labor Com'n, 136 P.3d 1273, 1276 (Utah App. 2006).

Respondent argues that petitioners have failed to show that the ALJ's finding of permanent and total disability was improper. However, the ALJ failed to make adequate findings of fact on material issues. There is significant evidence, including the various opinions of numerous physicians, showing that respondent could be returned to work within certain restrictions. (R. 94-96). Instead of making the requisite findings, the ALJ proceeded to the next step and held that the reemployment plan was not reasonably designed to return the respondent to gainful employment.

Respondent asserts in his response brief that petitioners' argument fails because the ALJ must follow a process for determining permanent disability and that said process

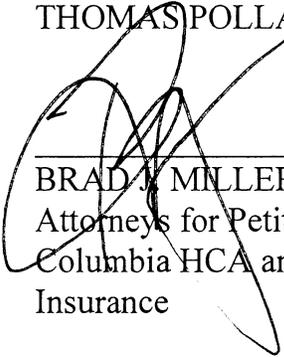
consists of many more considerations than work restrictions alone. Petitioners' position is not contrary to this assertion. However, without proper resolution of the medical restrictions issue, petitioners could not submit a meaningful rehabilitation plan, one of the steps necessary to determining permanent and total disability. The process of determining permanent and total disability cannot be deemed conclusive without following all of the steps. The ALJ could not reach a proper conclusion regarding whether successful rehabilitation is possible without determining which restrictions were controlling respondent's ability to return to work. Therefore, petitioners request that this matter be remanded for determination of the medical restrictions issue so that petitioners are given the opportunity to craft a specific rehabilitation plan so that it can be fairly determined if respondent is permanently and totally disabled.

CONCLUSION AND PRAYER FOR RELIEF

WHEREFORE, petitioners respectfully request that this Court reverse the final order of the Labor Commission, below as an abuse of discretion, arbitrary and capricious, and not supported by substantial evidence, and remand for such other proceedings as necessary.

DATED this 11th day of March, 2011.

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CERTIFICATE OF SERVICE

I certify that a copy of the attached **REPLY BRIEF OF APPELLANTS'** was served upon the party(ies) listed below by mailing it by first class mail, personal delivery, or fax to the following address(es):

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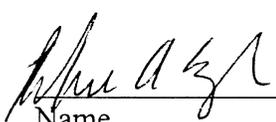
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