

1989

Mark D. Letham v. Industrial Commission of Utah, Big Basin Enterprises, and Workers' Compensation Fund : Brief in Opposition to Certiorari

Utah Supreme Court

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Keith E. Sohm; Sohm and Sohm; Attorney for Appellant.

James R. Black; Wayne L. Black and Associates; Attorney for Respondents.

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UTAH SUPREME COURT

BRIEF

890162

IN THE SUPREME COURT OF THE STATE OF UTAH

MARK D. LETHAM,	:	Industrial Commission Case
	:	No. 87000671
	:	
Applicant and Appellant,	:	Administrative Law Judge:
	:	Gilbert A. Martinez
	:	
vs.	:	Court of Appeals No.:
	:	88-0307-CA
	:	
INDUSTRIAL COMMISSION OF UTAH,	:	Certiorari Docket No.:
BIG BASIN ENTERPRISES, AND	:	890162
WORKERS' COMPENSATION FUND,	:	
	:	Priority No. 13(b)
	:	
Defendants and Respondents.:	:	

BRIEF OF WORKERS' COMPENSATION OF UTAH, ET AL.

IN OPPOSITION TO APPELLANT'S PETITION FOR WRIT

OF CERTIORARI

James R. Black, #0357
WAYNE L. BLACK & ASSOCIATES
of counsel to Callister, Duncan
& Nebeker
10 East South Temple, #800
Salt Lake City, Utah 84133
(801) 530-7300
Attorney for Respondents

Keith E. Sohm, #3038
SOHM & SOHM
2057 Lincoln Lane
Salt Lake City, Utah 84124
(801) 277-5874
Attorney for Appellant

FILED

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James R. Black, #0357
WAYNE L. BLACK & ASSOCIATES
of counsel to Callister, Duncan
& Nebeker
10 East South Temple, #800
Salt Lake City, Utah 84133
(801) 530-7300
Attorney for Respondents

Keith E. Sohm, #3038
SOHM & SOHM
2057 Lincoln Lane
Salt Lake City, Utah 84124
(801) 277-5874
Attorney for Appellant

Mark D. Letham
922 East 10715 South
Sandy, Utah 84070

Industrial Commission of Utah
160 East 300 South
P.O. Box 45580
Salt Lake City, Utah 84145-0580

Big Basin Enterprises
1959 South 4130 West
Salt Lake City, Utah 84127

Workers' Compensation Fund of Utah
560 South 300 East
Salt Lake City, Utah 84111

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

This is a Workers' Compensation case. The applicant appeals from an Order Denying Motion for Review of the Industrial Commission of Utah (Appendix 4 hereto) and an Order of Affirmance by the Utah Court of Appeals (Appendix 1 hereto).

Though not determinative to the Court's granting of this Petition, it is of significance that none of the criteria of Rule 46 of the Utah Rules of Appellate Procedure are met in this case. This case is not one in which:

1. A conflict exists between decisions of different panels of the Court of Appeals;

2. A decision of the Court of Appeals is in conflict with a decision of the Supreme Court;

3. There is a departure by the Court of Appeals from accepted judicial proceedings;

4. There is an important question of municipal, state or federal law not previously decided by the Supreme Court.

The central issue is whether the applicant in this case should be awarded any further Workers' Compensation benefits.

Appellant lists a number of issues in his Petition for Writ of Certiorari that can be narrowed to two. Though not stated in exactly this manner by applicant, they are:

1. Whether there was sufficient evidence to support the Findings of Fact of the Administrative Law Judge and the Industrial Commission or whether, to the contrary, the evidence supported an order in favor of Applicant for additional temporary total disability benefits and for permanent partial impairment benefits. (Appellant's Brief, pp 1-2, Issues I, II, III, IV, V.)

2. Whether Applicant was entitled to have his case reviewed by a medical panel for evaluation of the medical issues. (Appellant's Brief, p. 14)

GROUND FOR JURISDICTION

A. Defendants do not dispute the dates of the entry of the Court of Appeals decision nor extensions allowed to plaintiff for the filing of his brief.

B. The Supreme Court "...has sole discretion in granting or denying a petition for writ of certiorari for the review of a Court of Appeals adjudication..." Section 78-2-2(5) U.C.A.

CONTROLLING STATUTES AND
DETERMINATIVE AUTHORITY

Authority determinative of the first issue is the Court of Appeals statement of the standard of review in American Roofing Co. v. Indus. Comm., 752 P.2d 912, 914 (Utah App. 1988) and the Supreme Court decisions cited therein. Also pertinent is Sec. 35-1-88, Utah Code Ann. (1953, as amended). (Appendix 6 hereto) Authority determinative of the second issue discussed is the applicable version of Sec. 35-1-77, Utah Code Ann. (1953, as amended 1982) (Appendix 5 hereto).

STATEMENT OF THE CASE

A. THE NATURE OF THE CASE

This case involves the denial of an employee's claims for additional temporary total disability benefits and for permanent impairment benefits.

B. COURSE OF PROCEEDINGS AND
DISPOSITION IN COURT BELOW

Applicant Mark D. Letham claimed benefits under Utah Workers' Compensation Act. He alleged that he sustained injuries to his lower back from an industrial accident on March 19, 1985, and from a second industrial accident on February 10, 1986. (Record, pp. 2, 20, 30)

A hearing was held on October 22, 1987, before Administrative Law Judge Gilbert A. Martinez. (Record, p. 270) The Administrative Law Judge found that Applicant's claim was not

credible or trustworthy and that Applicant was not entitled to any benefits in connection with either of the alleged industrial accidents. (Record, p. 276) (Appendix 2 hereto)

Applicant sought review November 9, 1987. The Administrative Law Judge issued a Supplemental Order on January 27, 1988. (Appendix 3 hereto) The judge reiterated his finding that Applicant's claim was not credible or trustworthy; and he again denied Applicant's claims for benefits. (Record, pp. 283-285)

Applicant again sought review in February 1988. (Record, p. 293) The Industrial Commission of Utah issued its Order Denying Motion for Review on April 15, 1988. (Appendix 4 hereto) In its Order, the Commission reversed the Administration Law Judge's finding that no compensable accident had occurred. It found the March 19, 1985, industrial accident to be fairly well documented, even though the alleged February 10, 1986, industrial accident was questionable. (Record, pp. 316-317)

However, the Commission upheld the Administrative Law Judge's denial of further benefits. (Record, p. 317) The Commission agreed with the Administrative Law Judge that the medical evidence submitted was unreliable because Applicant had misrepresented his true physical condition to the physicians involved. (Record, p. 316) It noted that substantial benefits had already been paid, and it agreed that the evidence showed that temporary total compensation was paid at a time when Applicant was medically stable. The Commission concluded that there had been an overpayment of temporary total compensation during a period when

Applicant had been medically stable and that this overpayment would offset any award for permanent impairment that might be warranted. (Record, p. 317)

Applicant submitted a "Petition for Writ of Review" to the Court of Appeals on May 16, 1988; and the writ was issued May 23, 1988. (Record, pp. 319-321, 322) On February 24, 1989, the Court of Appeals issued its Order of Affirmance. (Appendix 1 hereto)

C. STATEMENT OF FACTS

Applicant Mark D. Letham was an electrician employed by Big Basin Enterprises, a general contractor that did industrial electrical work in Utah. (Record, p. 19) He was hired in September 1985 and worked until an accident in March of that year. (Record, p. 20)

On March 19, 1985, Applicant sustained an injury to his lower back when he and other workers tried to lift a large electrical cabinet on a job at Central Valley Water Treatment Plant in Salt Lake City. (Record, pp. 20-21) An ambulance was called; and Applicant was taken to St. Mark's hospital, where he was referred to a Dr. Robert Lamb. A CT Scan was taken, apparently showing only a slight bulge in one disc but nothing more. (Record, pp. 9, 23, 46)

Applicant was off work for about a month and a half following this incident, and he received benefits for this period. He returned to work in late April or May 1985, and he continued work until February 1986. (Record, pp. 23-24)

On February 10, 1986, Applicant allegedly sustained a second injury to his lower back at work. When he and three other men attempted to lift a steel highway grate, Applicant felt intense pain in his lower back. (Record, p. 30) The same day, Applicant saw Dr. Aaron Barson, an osteopath, in Ogden, Utah; and Dr. Barson instructed Applicant to stay off work. (Record, pp. 31-33) On February 12, 1986, a Dr. Walter Reichert took a repeat CT Scan showing no substantial changes from the previous CT Scan of March 1985. (Record, p. 49) Dr. Barson treated Applicant with injections in his back for two to four months. (Record, pp. 30, 50)

Notwithstanding Applicant's alleged back problems, he attended the Fourteenth Annual Mountain Man Rendezvous at Fort Bridger, Wyoming, in August 1986, where the activities included putting up tepees, shooting black powder rifles and selling crafts. (Record, pp. 72-74, 79, 262-265, 275) Applicant testified that he earned \$1,300 at the rendezvous by selling his craft wares. (Record, pp. 80, 275)

Applicant was eventually referred to Dr. Peter Heilbrun, a neurosurgeon with University of Utah Neurosurgical Center, who then became his treating physician. (Record, pp. 9, 34) Initial treatment under Dr. Heilbrun consisted of bed rest and no lifting. In November 1986, Dr. Heilbrun had X-rays taken and decided that surgery was required. He performed a diskectomy or laminectomy on Applicant at the University of Utah Hospital on November 4, 1986. (Record, pp. 14, 34-36)

In December 1986, Applicant slipped and fell at home on his front porch. As a result of this fall, the "stitch work" from Applicant's surgery had to be repaired. Following this second surgery, Applicant was again prescribed bed rest and no lifting. (Record, pp. 14, 38-39)

Applicant last saw Dr. Heilbrun in June or July of 1987. Applicant returned to work in August 1987 as an employee of USA Cable Connection. He has worked regularly ever since. (Record, pp. 40-41)

Within the first three months after his repair surgery, Applicant was able to do yard work, carry garbage cans out to the street, and the like. (Record, pp. 58-59) On or about May 2, 1987, Applicant was observed and videotaped putting up a 20-foot tepee, carrying a bag of tepee canvas weighing approximately 65 pounds, carrying large boxes, and engaging in other strenuous activities at Fort Buenaventura in Ogden, Utah. (Record, pp. 68-70, 235-237, 273-274) During the first week of June 1987, Applicant went on a gold-panning expedition in the San Gabriel mountains in California. (Record, pp. 69-70, 87-89) Videotape showed this to involve activities such as shoveling dirt, carrying five-gallon buckets of water and of dirt, climbing up and down hills, and pulling a wheel barrel containing several five-gallon buckets full of dirt up a mountain slope. (Record, pp. 237-240, 274-275) There is also evidence that Applicant was engaged in some construction work for the Dean's Hungry Eye

Restaurant, 4700 South and State Street, Salt Lake City, during part of May 1987. (Record, p. 71, 284)

During these periods of physical activity, Applicant claimed that he was, nevertheless, seriously incapacitated with his lower-back condition. Medical reports show that Applicant continued to claim problems with his back during this period.

On March 2, 1987, Dr. Heilbrun reported: "He generally is improving but continues to have this sharp pain in his back in various positions. I could not find evidence of abnormality on flexion and extension films." (Record, p. 107) Dr. Heilbrun reported on April 27, 1987: "The patient is unchanged in that he continues to have intermittent sharp pain in the back in the area of the incision" (Record, p. 162)

On May 22, 1987, Applicant's physical therapist, Kurt Dudley, wrote:

He returned to our clinic on 5-18-87, for re-evaluation. I tested him on most of his functional skills. His subjective complaints of pain, I feel, have remained about the same. He continues to complain of low back pain which is centered in the middle of his back. He has some groin pain and some buttock pain. When asked what is the heaviest object he has lifted in the last few months, he reported he had not lifted anything heavier than a "grocery bag." He also reports, "I can mow the lawn, but it will usually put me down."

- - -

My overall impression is that the patient's subjective complaint is the major focus of disability.

(Record, p. 182, 184) (emphasis added)

Finally, in his letter of July 8, 1987, Dr. Sherman Coleman stated:

This young man's current complaints consist of a "snapping in his back" which is located in the center of the lower portion, and pain that accompanies the snapping that radiates down as far as his knees bilaterally. He says he has an occasional pain in his groin. He has not been able to return to work since his "injury" in March 1986

(Record, p. 105)

SUMMARY OF ARGUMENTS

POINT I

The argument is that the Commission had ample evidence upon which to base its decision and that its decision was a reasonable one in light of the many heavy physical activities Applicant was undertaking while reporting to his physicians symptoms incompatible with his activity level.

POINT II

Sec. 35-1-77 Utah Code Ann. 1953 (as amended 1982) (Appendix 5 hereto), makes it clear that the Commission has full discretion about whether or not to convene a medical panel in a given case; and, therefore, the Commission did not err in not referring the medical issues to a medical panel in this case. There was sufficient, reliable, substantive medical evidence to support the Commission's denial.

ARGUMENT

POINT I

THE COMMISSION HAD SUFFICIENT EVIDENCE TO SUPPORT ITS ORDER AND DID NOT ACT IN AN ARBITRARY OR CAPRICIOUS MANNER AS SO FOUND BY THE COURT OF APPEALS.

In Points I, II and III of Appellant's Petition for Writ of Certiorari, Appellant raises issues concerning the sufficiency of the evidence.

Concerning issues of evidence, the standard of review has been stated recently in American Roofing Co. v. Indus. Comm., 752 P.2d 912, 914 (Utah App. 1988) which cites liberally to decisions of this Court:

In reviewing a decision by the Commission, "this Court will not disturb the findings and orders of the Commission unless they are arbitrary and capricious, and they are arbitrary and capricious when they are contrary to the evidence or without any reasonable basis in the evidence." Rushton v. Gelco Express, 732 P.2d 109, 111 (Utah 1986).

Another statement of the standard of review is found in Peck v. Eimco Process Equipment Co., 748 P.2d 572 , 575 (Utah 1987):

In reviewing the evidentiary basis for findings of fact made by the Industrial Commission, this Court inquires only whether the Commission's findings are supported by substantial evidence. Bigfoot's Inc. v. Industrial Comm'n, 714 P.2d 1152, 1153 (Utah 1986).

The Commission's findings are, indeed, amply supported by substantial evidence and that the Commission's findings are not arbitrary or capricious.

At Points I and II, Appellant relies entirely on the evidence of Dr. Peter Heilbrun. Dr. Heilbrun was one of Applicant's attending physicians. In a letter dated November 6, 1987, Dr. Heilbrun assigns Applicant a release date of August 22, 1987, and an impairment rating of 15% of whole man. (Record, p. 282) At Point I, Appellant claims, "No medical evidence was introduced to refute these medical claims."

Medical Evidence. First, it should be noted that the Commission is not required to give any special weight to the evidence of the attending physician. In Rushton v. Gelco Express, 732 P.2d 109 (Utah 1986), the applicant claimed benefits for a knee condition which her attending physician believed was caused by an industrial accident. According to the applicant in that case, the Administrative Law Judge was required to give preference to the findings of the treating physician. This contention however, was flatly rejected by the Supreme Court. 732 P.2d at 111-112.

Second, Appellant's Brief gives the impression that there was no medical evidence to support Defendants' side of this case; but that is incorrect.

There are CT Scan reports of March 19, 1985, and February 12, 1986. Both reports mention only a small disk bulge that does not displace any nerve roots. (Record, pp. 112, 118)

There is evidence from Dr. Robert Lamb. In his notes of April 16, 1985, he states: "I think that his back discomfort depends on his ability to improve his posture." (Record, p. 120)

His diagnosis was: "Possible central disk protrusion and acute lumbar strain." (Record, p. 121, 123)

In March, 1986, Dr. Aaron Barson stated that he did not think Applicant's back condition warranted surgery. (Record, p. 131)

There is also the letter of Dr. Gerald F. Vanderhooft, May 14, 1986, in which he confirms the diagnosis of Dr. Lamb that Applicant had "a lumbar sprain syndrome without significant disk herniation." (Record, p. 101) Dr. Vanderhooft states:

This man had what appears to be a reasonable industrial accident in March of 1985. He then improved in a reasonable amount of time and returns to work and six months later while doing ordinary work that is expected of him, he starts having back pain again. In the meantime, the evaluation has ruled out any significant intervertebral disc herniation. He has not then nor is he now a candidate for surgery. Enzyme injections in the disc space and surgery are both contraindicated in my opinion.

(Record, p. 102, emphasis added) Dr. Vanderhooft attributed Applicant's back problems primarily to his sway back, and Dr. Vanderhooft's evaluation was that "this man has no permanent impairment." (Record, p. 103)

In short, there was sufficient medical evidence in the record from which the Commission could reasonable have inferred an alternative theory of the case. The evidence supports conclusions that Applicant did no more than "sprain" his back in the March 1985 and/or February 1986 industrial accidents and that the herniated disk, which Dr. Heilbrun repaired in the November 1986 surgery, was the result of some non-industrial accident that

occurred after the CT Scans of March 1985 and February 1986 or was the result of a nonindustrial, postural problem.

Non-medical evidence. In addition to medical evidence, the Commission had a good deal of non-medical evidence bearing on Applicant's condition, namely, the video tape of Applicant's mountainman activities and the testimony of the investigators who did the taping.

It is not true, as Appellant seems to suggest, that the Commission is bound to consider only medical evidence (evidence from medical authorities) in making determinations about an applicant's alleged injury. (See appellant's arguments and comments at pages 1, 3, 4 and 8 of his brief discussing Section 35-1-66 U.C.A. which statute is attached hereto as Appendix 9) Section 35-1-88, Utah Code Ann. (1953, as amended) (attached hereto as Appendix 6), makes it clear that the Commission may receive any evidence (medical or non-medical) that is material and relevant for proof of any fact (medical or non-medical). Section 35-1-88 states in part:

The Commission may receive as evidence and use as proof of any fact in dispute all evidence deemed material and relevant"

(Emphasis added) See also, Rushton v. Gelco Express, 739 P.2d 109, 111-112 (Utah 1986). Moreover, the Commission is not required to accept opinions of medical experts and may, in fact, find contrary to the only medical evidence received. Griffith v. Indus. Comm., 754 P.2d 981 (Utah App. 1988); Rushton v. Gelco Express, 732 P.2d 109 (Utah 1986); Shipley v. C & W Contracting

Co., 528 P.2d 153 (Utah 1974). See also: Larson, Workmen's Compensation Law, Vol. 3, Sec. 79, "Evidence."

The Court should further note that medical evidence is only as probative as the foundational history provided the physician. Unfortunately, the appellant has been found by the trier of facts to have decimated that foundation by his misrepresentations as to his condition. That is the fatal flaw in his case. He simply was not believed by the trier of facts.

Appellant's claims for additional temporary total disability benefits and permanent partial impairment benefits are based on Dr. Heilbrun's letter of November, 1987. Appellant suggests in his brief that there was no other acceptable evidence (i.e., medical evidence) upon which the Commission could have based contrary findings. Yet, the video tape of Applicant's mountainman activities provided material and relevant evidence concerning Applicant's condition. This evidence was perfectly acceptable, non-medical evidence. Thus, the Commission had substantial evidence to support its Order.

Credibility. Furthermore, the Commission's assessment of the evidence presented, both medical and non-medical, must be considered in light of the concern over credibility, which arose in this case. Under the applicable standard of review, the reviewing court "has no power to determine the weight of the evidence and credibility of the witnesses . . ." Bigfoot's Inc. v. Indus. Comm., 714 P.2d 1152, 1153 (Utah 1986); Staker v. Indus. Comm., 61 Utah 11, 209 P. 880 (1922).

In his Supplemental Order, the Administrative Law Judge stated that "there existed a serious issue of credibility regarding the claim of the applicant." The Administrative Law Judge found "that the applicant's claim is not credible and trustworthy." (Record, p. 284) In its Order, the Commission agreed with these findings and pointed out that some of the medical reports of treating physicians were poisoned because they simply recounted what Applicant had inaccurately reported to them.

...The Commission agrees with the Administrative Law Judge that, per the video tape, temporary total compensation was paid at a time when the applicant was clearly medically stable. The Commission also agrees that the medical evidence that has been submitted is somewhat unreliable as the applicant clearly was misrepresenting to the doctor or doctors involved as to what his true physical condition was.

(Record, p. 316) (See Appendix 4 page 2 of the Order)

Liberal construction. Finally, Appellant cites a number of cases at Point III in his brief for the proposition that doubts on close questions concerning the evidence should be resolved in favor of the applicant. (Appellant's Brief, p. 13) The answer to this is simply that neither the Administrative Law Judge nor the Commission found the disputed factual issues to be close questions, and the available evidence certainly makes clear that such an assessment was reasonable. Further, the standard of review of issues of fact is to "...defer the Commission's Findings of Facts unless it makes findings not supported by substantial evidence (citations omitted.)" Bennett v. Industrial Commission, 726 P.2d 427 (Utah 1986) at 429. Mr. Letham fails to recognize

that substantial evidence in the record supports the Commission's Order.

It might also be noted that all the cases cited by Appellant speak of doubts concerning construction of workers' compensation statutes or acts being decided in favor of the applicant--not questions of fact. Presumably, the facts should be ascertained first, and only then should the relevant statutes be interpreted and applied. The central disputes in this case have been over factual issues regarding Applicant's condition and credibility and not over points of statutory interpretation.

Considering the problems with Applicant's credibility and considering all the medical and non-medical evidence presented to the Commission, it is clear that the Commission's findings were not arbitrary and capricious and that, to the contrary, they were amply supported by the evidence.

POINT II

THE COMMISSION'S DECISION CONCERNING THE CALLING OF A MEDICAL PANEL IS ENTIRELY DISCRETIONARY UNDER THE 1982 AMENDMENT TO SECTION 35-1-77 U.C.A. AND THE COMMISSION DID NOT COMMIT ERROR WHEN IT DID NOT CONVENE A MEDICAL PANEL.

In Point II of Appellant's Brief, Mr. Letham asserts that it was "mandatory" that the Commission refer the case to a medical panel, if it chose not to accept the treating physician's reports. In support of his position, Appellant refers to Section 35-1-77 and cites Schmidt v. Indus. Comm., 617 P.2d 693 (Utah 1983). (Appellant's Brief, p. 12) Indeed former Section 35-1-77 U.C.A.

made such a referral mandatory. The 1982 amendment, however, substituted "may" for "shall" in the first sentence, thus giving the Commission complete discretion concerning the appointment of medical panels. The relevant portion of the current version of Sec. 35-1-77 reads as follows:

(1)(a) Upon the filing of a claim for compensation for injury by accident, or for death, arising out of or in the course of employment, and if the employer or its insurance carrier denies liability, the commission may refer the aspects of the case to a medical panel(emphasis added)

The case of Schmidt v. Indus. Comm., cited by Appellant, refers to the pre-1982 version of Sec. 35-1-77. See 617 P.2d at 695-696. The Utah Supreme Court has confirmed that the Commission now has complete discretion as to whether a case is referred to a medical panel. Moore v. American Coal Co., 737 P.2d 989 (Utah 1987); Champion Home Builders v. Indus. Comm., 703 P.2d 306-308 (Utah 1985).

It is abundantly clear that the appointment of a medical panel by the Commission is no longer mandatory. Accordingly, the Commission did not commit error when, in its sound discretion, it decided not to appoint a medical panel in this case.

Letham also states that the Commission should have either accepted his treating physicians' analysis or referred the medical issues to a medical panel. As argued previously herein, the weight of that evidence was so lightened by its foundational weakness so as to be of no value to the Commission.

CONCLUSION

The Order of Affirmance of the Court of Appeals is based on sound grounds. There is no special reason for this Court to grant the Petition for Writ of Certiorari. The Order of the Commission should be affirmed. There is no error of law. The factual findings were not arbitrary and capricious with no foundation in fact. The findings of the Administrative Law Judge and the Commission are amply supported by substantial evidence in the record bearing on Applicant's credibility and his medical condition. The Commission was well within the bounds of its reasonable discretion when it decided not to appoint a medical panel.

The basic case presented to the reviewing courts is a reargument of facts that have been found against Mr. Letham at every review level. The appellant is dissatisfied with the Industrial Commission's findings. The appellant is dissatisfied with the Court of Appeals order sustaining the Commission. This Court is being asked to reweigh the facts. That is not the role of an appellate court.

Accordingly, Defendants respectfully request this Court to deny the Petition for Writ of Certiorari.

DATED this 24TH day of May, 1989.

161
James R. Black

CERTIFICATE OF MAILING

The undersigned hereby certifies that four true and correct copies of the foregoing Brief of Respondents was mailed, postage fully prepaid, this 24th day of May, 1989, to the following:

Keith E. Sohm
SOHM & SOHM
2057 Lincoln Lane
Salt Lake City, UT 84124

Barbara Elicerio
Attorney for Industrial Comm.
Industrial Commission of Utah
160 East 300 South
P.O. Box 45580
Salt Lake City, UT 84145-0580

/s/_____

APPENDIX 1

ORDER OF AFFIRMANCE, UTAH COURT OF APPEALS

FEB 24 1989
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Mary H. ...
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U.S. Court of Appeals

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Case No. 880307-CA

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DATED this 24 day of February, 1989.

Russell W. Bench
Russell W. Bench, Judge

APPENDIX 2

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

INDUSTRIAL COMMISSION OF UTAH

CASE No. 87000671

MARK D. LETHAM,

Applicant,

vs.

BIG BASIN ENT and/or
WORKERS COMPENSATION FUND OF UTAH,

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 October 22, 1987, at 8:30 a.m.; same being pursuant to Order and Notice of the Commission.

BEFORE: Gilbert A. Martinez, Administrative Law Judge.

APPEARANCES: The applicant was present and represented by Keith E. Sohm, Attorney at Law.

The defendants were represented by Burton K. Brasher, Attorney at Law.

At the commencement of the hearing, the parties set forth the issues to be resolved by the Administrative Law Judge, which include the following:

1. Whether or not the applicant's claim is credible and trustworthy?
2. Whether or not there is a direct medical causal relationship between the applicant's low back problems and the alleged industrial accidents?

3. Whether or not the applicant's low back problems occurred as a result of non-industrial events occurring after the industrial accidents?
4. Whether or not the applicant was temporarily and totally disabled during the period of May 30, 1987, to and including August 22, 1987?
5. Whether or not the applicant, in fact, sustained a permanent partial disability as a result of his alleged industrial accidents?
6. Whether or not the applicant was injured by accident arising out of or in the course of employment on February 10, 1986?
7. Attorney's fees and interest pursuant to Utah Code Annotated, Section 35-1-78 and 35-1-87.

This is a claim for benefits under the Utah Worker's Compensation Act. Pursuant to the Application for Hearing, the applicant alleges that he sustained an injury to his low back by accident arising out of or in the course of employment with the defendant employer on March 19, 1985, and from a second accident occurring on February 10, 1986.

The defendant employer has raised several defenses, as follows:

1. That the applicant did not injure his low back during the course of employment on either March 19, 1985, or February 10, 1986;
 2. That the applicant's low back injuries resulted from non-industrial events occurring after these alleged industrial accidents;
 3. That the applicant did not sustain a permanent partial disability as a direct result of either of these two industrial accidents, according to Dr. Gerard F. Vanderhooft;
 4. That the applicant's testimony is not credible and trustworthy that he was temporarily and totally disabled or that he sustained a permanent partial disability at any time.
- the teepees,

Based upon the testimony of the various witnesses at the time of the hearing, including the videotape demonstrating the applicant involved in heavy physical exertion, and good cause appearing herein, the Administrative Law Judge finds as follows.

FINDINGS OF FACT:

At the time of the formal hearing, the defendants attacked the credibility of the applicant's claim. The defendants presented clear and convincing evidence to establish that the applicant was not temporarily and totally disabled at any time after May 2, 1987. Furthermore, the defendants presented clear and convincing evidence to support that the applicant did not sustain a permanent partial disability in his low back from an industrial accident occurring on either March 19, 1985, or February 10, 1986.

Under the Utah Workers' Compensation Act the applicant carries the burden of proving by the preponderance of the evidence that he sustained an injury by accident during the course of employment, which is compensable under the Act. Furthermore, the applicant carries the burden of proof of establishing that he was totally and temporarily disabled as a result of the industrial accident and that he sustained a permanent partial disability. In those cases where the industrial injury is suspect, the Administrative Law Judge has the discretion of giving whatever weight is reasonable to the testimony of the applicant regarding his claim. Let the record show that the Administrative Law Judge also has the discretion of not accepting the testimony of the applicant when the credibility of the applicant is attacked, and where there is substantial evidence to show that the applicant did not remain temporarily and totally disabled after May 2, 1987, or that he sustained a permanent partial disability from the alleged industrial incidents.

In the case at bar, there exists a serious issue of credibility regarding the claim of the applicant. The applicant claims that he was temporarily and totally disabled and that he sustained a permanent partial disability as a result of his two industrial accidents. However, the evidence does not support the applicant's claim for benefits. At the hearing, the defendants presented evidence that was clear and convincing that the applicant had no physical limitations during the periods of time that he is claiming that he was totally disabled.

Dennis Dye, investigator for Intel Tech Services, testified at the hearing that he conducted a surveillance of the applicant in this matter, Mark D. Letham, on May 2, 1987, and again on June 5, 1987, and June 7, 1987. During this surveillance, Mr. Dye used a professional camera to visually tape the physical activities of the applicant during the periods that he was claiming that he was totally disabled. At the hearing, a videotape was presented into evidence and was shown to demonstrate that the applicant had no physical limitations following his industrial injuries. See the Fuji Videocassette marked: "Mark Letham, Hearing Tape."

After viewing the videotape at the hearing, the Administrative Law Judge finds that the applicant was not temporarily and totally disabled from May 2, 1987, to August 22, 1987. In this regard, the Administrative Law Judge questions whether or not the applicant was temporarily and totally disabled before May 2, 1987, when he was receiving temporary total disability compensation. Furthermore, the Administrative Law Judge finds that the applicant did not sustain a permanent physical impairment or disability as a direct result of either the alleged industrial accidents of March 19, 1985, or February 10, 1986.

The videotape demonstrating the physical activities of the applicant demonstrated that he was physically capable of setting up and dismantling a teepee on or about May 2, 1987, and that the applicant was physically capable of mining for gold in the mountains of San Gabriel in the State of California on June 5, 1987, and June 7, 1987. This videotape demonstrated the following:

1. That on or about May 2, 1987, the applicant was engaged in setting up a 20 foot teepee. In order to do so, the applicant was engaged in bending, carrying, and raising teepee poles. The applicant carried a sack of a teepee canvas on his shoulder from his truck to the place he was setting up the teepee. The applicant wrapped the canvas around the poles and tied it down with a rope. During this process, the applicant ran back and forth from the teepee to the truck and climbed up onto the truck to get material and poles. Furthermore, the applicant carried two large boxes, singlehandedly, from the truck to the teepee. Subsequently, the applicant was observed carrying a very large box from the truck to the teepee. These boxes contained equipment belonging to the applicant and some of his merchandise that he would sell as part of his business entitled, RamCo Enterprise. Included in this merchandise was furs and other leather goods. During the installation of the teepee, the applicant was observed to climb up and

down the boxes to tie down the canvas on the teepee poles. Furthermore, the applicant was observed to climb up and down his truck removing equipment from the truck to set up the teepee. Dennis Dye, investigator, testified at the hearing that the applicant was engaged in the physical activities of setting up the teepee during a one and one-half hour period. Furthermore, Mr. Dye testified that the applicant completely dismantled the teepee and that it took him 45 minutes to do so. From the videotape, one could observe the applicant carrying equipment to his truck, loading the truck with equipment, and tying down the truck with a rope. The applicant would be on the floor, pulling on a rope and rocking the truck, as he tied down the rope. All of these activities clearly established that the applicant was not totally and temporarily disabled at that time.

2. On or about June 5, 1987, Dennis Dye, private investigator, taped the applicant in the mountains of San Gabriel, California. At that time, the applicant was demonstrating techniques of panning for gold. The videotape presented at the hearing clearly establishes that the applicant had no physical limitations and no problems with movement involving his low back. Furthermore, the tape demonstrates no weakness in the applicant. The Administrative Law Judge observed from the film that the applicant was extremely active in performing unusual and extraordinary exertions. The applicant was observed carrying large equipment and climbing up and down hills. Furthermore, the applicant climbed up steep rocks. At other points in the film, the applicant was observed running up and down the hillside. As part of the search for gold, the applicant was shoveling loads of dirt and carrying 5-gallon buckets containing dirt and other material. At no time did it appear that the applicant was having any physical problems with his low back. In addition, the applicant was observed to be seated in a squatting position along the river panning for gold. Dennis Dye, investigator, testified at the hearing that the applicant would be in these positions for two or three hours without any observation of pain problems in the low back. While the applicant was in the river mining for gold, he was observed to be lifting gallons of water and pouring it into a mining machine. Again, the applicant did not appear to have any physical limitations in performing this activity. As part of the tape, the applicant was

observed carrying heavy rocks and lifting and carrying buckets of water and dirt in 5-gallon buckets. Of all of the activities that was most impressive, it was when the applicant and his partner, allegedly his brother, were pulling a wheelbarrow up the side of a mountain slope containing several of these 5-gallon buckets containing dirt in them. During this extreme amount of exertion, the applicant showed no ill effects in his low back. At the times that the applicant climbed up and down the mountain slopes and ran up and down the hillsides, he showed no physical limitations and weaknesses in his low back.

3. On June 7, 1987, the applicant was again panning for gold in the mountains of San Gabriel, California. Again, the applicant was involved in extremely physical exertion, which included bending, squatting, lifting, climbing up and down hills, lifting buckets of water and dirt, and carrying large equipment. At one point, it was impressive that the applicant was able to demonstrate such physical strength in pulling a wheelbarrow up the side of a hill. Because of the terrain involved, the applicant and his brother could no longer pull on the wheelbarrow and therefore lifted the wheelbarrow and carried it up the side of the hill. Such over exertion demonstrated that the applicant was having no low back problems, and that he was physically strong in performing these and other activities.

Let the record show that the videotape containing the physical activities of the applicant on May 2, 1987, when he was setting up the teepee, and the two days in June of 1987, when he was mining for gold in the State of California, contains 38 to 40 minutes of the applicant performing heavy and unusual exertion. The defendants stated for the record that they have six hours of videotape involving the applicant, which was condensed down to the 38 minute tape that was presented at the hearing. See the Fuji videocassette marked as "Mark Letham, Hearing Tape."

Randy Moser, private investigator, testified at the hearing that the applicant informed him toward the end of May of 1987, that he was performing construction work in the remodeling of a restaurant, entitled: Dean's Hungry Guy. The defendants also presented evidence showing that while the applicant was receiving compensation for temporary total disability, the applicant appeared on TV commercials for Lagoon. Furthermore, the applicant appeared in the September, 1986, issue of People Magazine. In that magazine, the applicant was involved in the Fourteenth Annual Mountain Man Rendezvous in Fort Bridger, Wyoming. See Exhibit "D-2". The applicant testified at the hearing that he earned \$1,300 at that rendezvous by selling his wares, which included mountain furs and leather.

Regarding the applicant's claim that he was temporarily and totally disabled during the year of 1987, Curt Dudley, physical therapist from the Cottonwood Back Institute, testified at the hearing that, in his opinion, the applicant overly exaggerated his pain problems during the time that he was being treated at the Cottonwood Back Institute in February and March of 1987. Mr. Dudley testified that the applicant was not very cooperative during the physical therapy training and that he missed several of the treatments. Mr. Dudley testified that he saw the applicant in May of 1987, when the applicant appeared to be limping at that time and complaining of pain. This, of course, was the month that the applicant was involved in setting up and dismantling the teepee. From a credibility standpoint, it appears that the applicant was physically capable of performing physical activities requiring unusual and extraordinary exertion in performing his hobby and commercial projects as a mountaineer, but would appear before his physical therapist with low back pains and limp in front of the physical therapist during the times he was involved with installing teepees. This is totally inconsistent with the applicant's physical capabilities, as demonstrated by the videotape presented at the hearing.

CONCLUSIONS OF LAW:

The applicant in this matter is not entitled to workers' compensation benefits as a result of an alleged industrial accident occurring on either March 19, 1985, or February 10, 1986.

The applicant's claim for additional compensation and medical benefits shall be denied on the basis that the applicant's claim is not credible and trustworthy. The Administrative Law Judge does not have to address the other issues presented above, the testimony and evidence presented at the hearing, specifically the videotape demonstrating the physical activities of the applicant, is clear and convincing evidence that the applicant's claim is not credible and trustworthy. This ruling is based upon the Findings of Fact herein, and that the record clearly establishes that the credibility of the applicant is suspect and not trustworthy.

It should be pointed out for the record that the applicant has been paid substantial benefits regarding these alleged claims. The record shows that the defendants have paid benefits amounting to over \$51,000. Temporary

total disability of \$20,782.57 was paid at the rate of \$272.00 per week from March 20, 1985, to May 27, 1985, and again from February 11, 1986, to May 29, 1987. Furthermore, the defendants have paid medical expenses amounting to \$31,286, this includes low back surgery performed on November 4, 1986, and on December 9, 1986. The facts in this case would, however, establish that these two surgeries were not necessitated by either of the industrial accidents. This is especially true of the second surgery performed on December 9, 1986, a couple of days after the applicant slipped and fell onto his low back at home on his front porch. The Administrative Law Judge makes no formal ruling in this regard. There exists a serious question regarding medical causation between these two surgeries and the alleged industrial incidents. Furthermore, the Administrative Law Judge makes no specific ruling regarding whether the applicant was improperly paid temporary total disability compensation during the calendar year of 1987. These benefits have been gratuitously paid, although they do not appear to be supported by the evidence in the case.

It is most likely that the applicant in this matter, Mark D. Letham, has received a windfall in this case. The amounts of \$20,782.57 in compensation and \$31,286.00 in medical expenses is probably more than what the applicant is rightfully entitled to. At this time, the applicant is gainfully employed by U.S.A. Cable Network and is not entitled to any additional benefits, pursuant to the above Findings of Fact.

ORDER:

IT IS THEREFORE ORDERED that the applicant's claim for additional temporary total disability compensation shall be, and the same is hereby, denied.

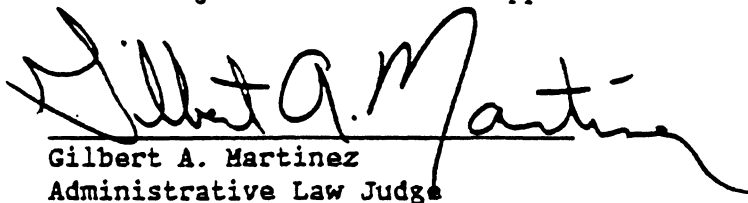
IT IS FURTHER ORDERED that the applicant's claim for permanent partial disability compensation shall be, and the same is hereby, denied.

IT IS FURTHER ORDERED that the applicant's claim for additional medical expenses shall be, and the same is hereby, denied.

IT IS FURTHER ORDERED that the applicant's claim for attorney fees and interest shall be, and the same is hereby, denied.

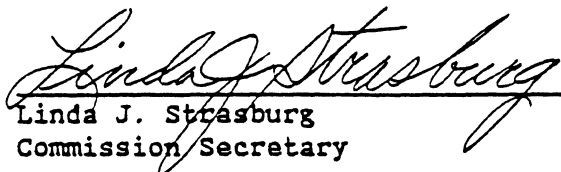
MARK D. LETHAM
FINDINGS AND ORDER
PAGE NINE

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.


Gilbert A. Martinez
Administrative Law Judge

Passed by the Industrial Commission
of Utah, Salt Lake City, Utah, this
3rd day of ~~October~~, 1987.

ATTEST: *November*


Linda J. Strasburg
Commission Secretary

CERTIFICATE OF MAILING

I hereby certify that on ~~October~~ ^{November} 3, 1987, a copy of the attached Findings of Fact, Conclusions of Law and Order was mailed to the following persons at the following addresses, postage paid:

Mark D. Letham
922 East 10715 South
Sandy, UT 84070

Keith E. Sohm
Attorney at Law
2057 Lincoln Lane
Salt Lake City, UT 84124

Burton K. Brasher
Attorney at Law
Workers Compensation Fund of Utah

Erie V. Boorman, Administrator
Second Injury Fund

INDUSTRIAL COMMISSION OF UTAH

By Janet N. Moriarty
Janet N. Moriarty

APPENDIX 3

SUPPLEMENTAL ORDER

024

THE INDUSTRIAL COMMISSION OF UTAH

Case No. 87000671

MARK D. LETHAM,

Applicant,

vs.

BIG BASIN ENT and/or
WORKERS COMPENSATION FUND

Defendants.

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SUPPLEMENTAL

ORDER

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HEARING: Hearing Room 334, Industrial Commission of Utah, 160 East 300 South, Salt Lake City, Utah, on October 22, 1987 at 1:00 p.m. o'clock. Said hearing was pursuant to Order and Notice of the Commission.

BEFORE: Gilbert A. Martinez, Administrative Law Judge.

APPEARANCES: The applicant was present and represented by Keith E. Sohm, Attorney at Law.

The defendants were represented by Burton K. Brasher, Attorney at Law.

At the commencement of the hearing, the parties set forth the issues to be resolved by the Administrative Law Judge, which included the following issue as being the most significant issue in the case.

1. Whether or not the applicant's claim is credible and trustworthy.

On November 3, 1987, the Administrative Law Judge issued a Findings of Fact, Conclusions of Law and Order, denying the applicant's claim for additional benefits. The Administrative Law Judge ruled that the applicant's claim for additional compensation and medical expenses are denied on the basis that the applicant's claim is not credible and trustworthy.

MARK LETHAM
ORDER
PAGE TWO

On November 10, 1987, the applicant, by and through legal counsel, filed a "Motion for Review" with the Industrial Commission of Utah. The applicant respectively requested 30 days in which to file a brief in the matter. On or about January 5, 1988, the applicant filed a "Applicant's Brief on Motion for Review". In the brief, the applicant alleges that the Administrative Law Judge erred in making up findings that were improper, inaccurate and contrary to the evidence.

The Administrative Law Judge does not agree. The testimony presented at the hearing by the witnesses, including Dennis Dye, investigator for Intel Tec Services and Randy Moser, investigator, clearly establishes that the applicant's claim is not credible and trustworthy.

In the case at bar, there existed a serious issue of credibility regarding the claim of the applicant. During the period that the applicant alleged that he was temporarily and totally disabled, the defendants presented evidence to clearly establish that the applicant was physically capable of performing physical activities requiring heavy exertion, including the setting up and dismantling a teepee and the physical performance of mining for gold in the mountains of San Gabriel, California. Randy Moser, private investigator, testified at the hearing that the applicant informed him in May of 1987, that the applicant was performing construction work in the remodeling of a restaurant, during a period that he was claiming that he was temporarily totally disabled. The defendants also presented evidence showing that while the applicant was receiving compensation for temporary total disability, the applicant appeared in T.V. commercials for Lagoon. Furthermore, the applicant appeared in the September, 1986, issue of People's Magazine. In that magazine, the applicant was involved in the 14th annual mountain man rendezvous in Fort Bridger, Wyoming. See exhibit D-2.

Based upon the testimony of all of the witnesses at the hearing and the evidence presented, and good cause appearing herein the Administrative Law Judge issues the following supplemental ruling:

SUPPLEMENTAL CONCLUSIONS OF LAW:

The Administrative Law Judge hereby finds that the applicant in this matter, Mark D. Letham, is not entitled to Utah workers compensation benefits as the result of an alleged industrial incident occurring on either March 19, 1985, or February 10, 1986.

Based upon the preponderance of the evidence presented at the hearing before the Industrial Commission of Utah, the Administrative Law Judge hereby

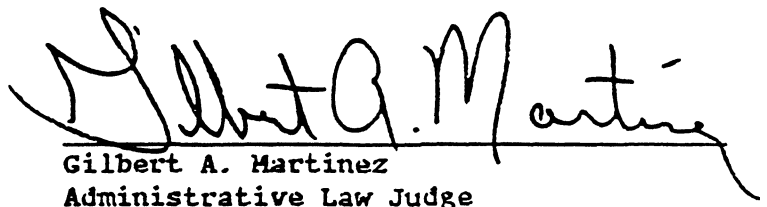
MARK LETHAM
ORDER
PAGE THREE

rules that the applicant did not sustain a compensable industrial accident on March 19, 1985, or February 10, 1986. The Administrative Law Judge rules that the applicant's claim for benefits arising out of or in the course of employment on these dates are not credible or trustworthy. This ruling is based upon the findings of fact contained in the original Order dated November 3, 1987, and that the record clearly establishes that the credibility of the applicant's claim for benefits is not credible and not trustworthy.

SUPPLEMENTAL ORDER:

IT IS THEREFORE ORDERED that the applicant's claim for additional temporary total disability and/or permanent partial disability compensation shall be, and the same is hereby, denied. Compensation and medical benefits are denied on the basis that the applicant's claim is not credible or trustworthy, and that the applicant did not sustain a viable industrial accident on either March 19, 1985, or February 10, 1986.

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.


Gilbert A. Martinez
Administrative Law Judge

Passed by the Industrial Commission
of Utah, Salt Lake City, Utah, this
27th day of January, 1988.

ATTEST:

/s/ Linda J. Strasburg

Linda J. Strasburg
Commission Secretary

CERTIFICATE OF MAILING

039

I certify that on January 27, 1988 a copy of the attached ORDER in the case of Mark D. Letham issued January 27 was mailed to the following persons at the following addresses, postage paid:

Mark Letham
922 East 10715 South
Sandy, Utah 84070

Keith E. Sohn
Attorney at Law
2057 Lincoln Ln
Salt Lake City, Utah 84124

Burton K. Brasher, Workers Compensation Fund

Erie V. Boorman, Second Injury Fund

THE INDUSTRIAL COMMISSION OF UTAH

By _____
Sherry

the personage a
Commission of

APPENDIX 4

ORDER DENYING MOTION FOR REVIEW

007

THE INDUSTRIAL COMMISSION OF UTAH

Case No: 87000671

MARK D. LETHAM,

Applicant,

vs.

BIG BASIN ENT and/or
WORKERS COMPENSATION FUND OF UTAH,

Defendants.

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ORDER DENYING

MOTION FOR REVIEW

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On November 3, 1987, an Administrative Law Judge of the Industrial Commission issued Findings of Fact, Conclusions of Law and Order denying the applicant in the above-captioned case additional temporary total compensation and permanent partial impairment benefits for two back injuries alleged to have occurred on March 19, 1985 and February 10, 1986. The Application for Hearing indicates a claim for additional temporary total compensation from approximately the beginning of June 1987 until the applicant returned to work in August 1987, plus a claim for permanent partial impairment benefits based on the treating physician's rating of 15% whole person. The Administrative Law Judge based his denial of these additional benefits on the fact that the applicant was clearly not temporarily totally disabled as of May 1987, and quite possibly stabilized much earlier than that date, resulting in an overpayment of temporary total compensation. The November 3, 1987 Order points to a video tape of the applicant's activities, taken by the defendant in May 1987, as being the most influential evidence convincing the Administrative Law Judge an overpayment had occurred. The video tape showed the applicant involved in extremely strenuous physical activity such as unloading a truck, carrying very heavy items, setting up a 20 ft. teepee, shoveling dirt, running and climbing and hauling large buckets of water. Based on the fact the applicant engaged in these activities while receiving temporary total compensation and representing to the professionals treating him that he was in pain and/or restricted in mobility, the Administrative Law Judge found the applicant's claim for further benefits as not supported by the facts and the Administrative Law Judge therefore denied the applicant's claim.

On January 5, 1988, counsel for the applicant filed a Motion for Review arguing that the Administrative Law Judge's denial of benefits resulted from the Administrative Law Judge ignoring certain evidence. Counsel for the applicant argues that the Administrative Law Judge ignored the applicant's testimony as well as the medical evidence. Per counsel for the applicant, the medical evidence reflect that the applicant was not stable during the period

MARK D. LETHAM
ORDER DENYING MOTION
PAGE TWO

of time at issue. With respect to the applicant's activities as reproduced in the video tape, counsel for the applicant finds these activities are non-strenuous and counsel for the applicant argued only a medical panel can determine whether the activities were such that a finding of temporary total disability is inconsistent with those activities.

On January 27, 1988, the Administrative Law Judge issued a Supplemental Order indicating that besides the fact that no further compensation is due the applicant, the Administrative Law Judge determined there was no compensable accident on either March 19, 1985 or February 10, 1986. Once again, the Administrative Law Judge cited the applicant's lack of credibility as the reason behind his conclusions. On January 29, 1988, counsel for the defendant/Workers Compensation Fund filed a Response to the applicant's Motion for Review. Counsel for the Workers Compensation Fund states that the Administrative Law Judge correctly listed in his Order just those facts upon which he relied on reaching his decision. As the Administrative Law Judge did not rely on the applicant's testimony, which the Administrative Law Judge found to be non-credible, counsel for the Workers Compensation Fund states it was not necessary for the Administrative Law Judge to reiterate in his Order what the applicant testified to at hearing. Furthermore, counsel for the Workers Compensation Fund states that the Administrative Law Judge did not rely on the medical records indicating medical instability as it is clear the applicant misrepresented to the medical care providers as well as to the insurance carrier. Finally, counsel for the Workers Compensation Fund states that the rating of Dr. Heilbrun does not require that the Industrial Commission award permanent partial impairment benefits. Dr. Heilbrun's rating is based on the American Medical Association's Guides to the Evaluations of Permanent Impairment and counsel for the Workers Compensation Fund states that publication is merely a guide. As the applicant's impairment is obviously minimal as demonstrated by the activities he is able to, and does perform, counsel for the Workers Compensation Fund states no impairment rating or benefits are warranted.

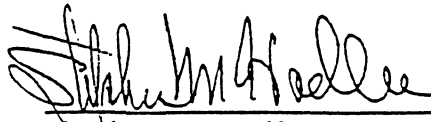
The Commission finds that the issue on review is whether the applicant is entitled to further workers compensation benefits beyond what has already been paid. The Commission notes it is clear from the file that the Workers Compensation Fund has already paid substantial compensation, including nearly a year and a half of temporary total compensation and medical expenses related to two separate surgeries. The Commission agrees with the Administrative Law Judge that, per the video tape, temporary total compensation was paid at a time when the applicant was clearly medically stable. The Commission also agrees that the medical evidence that has been submitted is somewhat unreliable as the applicant clearly was misrepresenting to the doctor or doctors involved as to what his true physical condition was.¹⁸ However, the Commission does not agree with the Administrative Law Judge's Supplemental Order that there is no compensable accident involved here. The


MARK D. LETHAM
ORDER DENYING MOTION
PAGE THREE

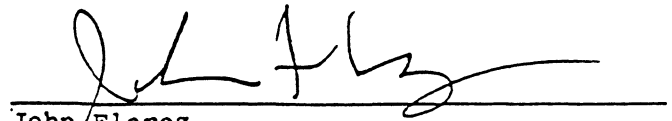
March 19, 1985 industrial accident is fairly well documented. The February 10, 1986 industrial accident is questionable. Presuming that there is at least one compensable industrial accident involved, some of the benefits paid were most likely legitimate. However, it is clear there was an overpayment of temporary total compensation during a period of time when the applicant had to be medically stable. The Commission agrees with counsel for the Workers Compensation Fund that the American Medical Association Guides to the Evaluation of Permanent Impairment are guides only and the Commission feels that the activities the applicant is able to perform prevent any finding that the applicant is permanently impaired. Even if a minimal permanent impairment does exist, the overpayment of temporary total compensation offsets any award for permanent impairment warranted in this case. Therefore, the Commission agrees with the Administrative Law Judge's denial of further benefits in this case and must therefore deny the applicant's Motion for Review.

ORDER:

IT IS THEREFORE ORDERED that the applicant's January 5, 1988 Motion for Review is hereby denied and the Administrative Law Judge's November 3, 1987 Order is hereby affirmed and final with further appeal to the Court of Appeals only within the thirty (30) day time limit as specified in U.C.A. 35-1-83.

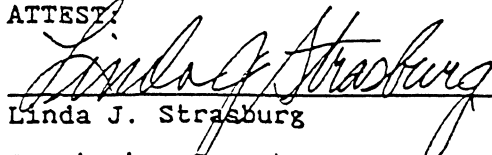

Stephen M. Hadley
Chairman


Lenice L. Nielsen
Commissioner


John Florez
Commissioner

Passed by the Industrial Commission
of Utah, Salt Lake City, Utah, this
15th day of April, 1988.

ATTEST:


Linda J. Strasburg
Commission Secretary

021

CERTIFICATE OF MAILING

I certify that on April 15th, 1988, a copy of the attached ORDER DENYING MOTION FOR REVIEW in the case of MARK D. LETHAM was mailed to the following persons at the following addresses, postage paid:

Mark D. Letham
922 East 10715 South
Sandy, UT 84070

Keith E. Sohm
Attorney at Law
2057 Lincoln Lane
Salt Lake City, UT 84124

Burton K. Brasher
Attorney at Law
Workers Compensation Fund of Utah
P.O. Box 45420
SLC, UT 84145-0420

Erie V. Boorman, Administrator, Second Injury Fund

Gilbert A. Martinez, Administrative Law Judge

Richard G. Sumsion, Administrative Law Judge

Janet L. Moffitt, Administrative Law Judge

INDUSTRIAL COMMISSION OF UTAH

By Pamela Hayes
Pamela Hayes

APPENDIX 5

UTAH CODE ANNOTATED SECTION 35-1-77

35-1-77. Medical panel - Discretionary authority of commission to refer case - Findings and report - Objections to report - Hearing - Expenses.

Upon the filing of a claim for compensation for injury by accident, or for death, arising out of or in the course of employment, and where the employer or insurance carrier denies liability, the commission may refer the medical aspects of the case to a medical panel appointed by the commission and having the qualifications generally applicable to the medical panel set forth in section 35-2-56. The medical panel shall then make such study, take such X-rays and perform such tests, including post-mortem examinations where authorized by the commission, as it may determine and thereafter make a report in writing to the commission in a form prescribed by the commission, and also make such additional findings as the commission may require. The commission shall promptly distribute full copies of the report of the panel to the applicant, the employer and the insurance carrier by registered mail with return receipt requested. Within fifteen days after such report is deposited in the United States post office, the applicant, the employer or the insurance carrier may file with the commission objections in writing thereto. If no objections are so filed within such period, the report shall be deemed admitted in evidence and the commission may base its finding and decision on the report of the panel, but shall not be bound by such report if there is other substantial conflicting evidence in the case which supports a contrary finding by the commission. If objections to such report are filed the commission may set the case for hearing to determine the facts and issues involved, and at such hearing any party so desiring may request the commission to have the chairman of the medical panel present at the hearing for examination and cross-examination. For good cause shown the commission may order other members of the panel, with or without the chairman, to be present at the hearing for examination and cross-examination. Upon such hearing the written report of the panel may be received as an exhibit but shall not be considered as evidence in the case except as far as it is sustained by the testimony admitted. The expenses of such study and report by the medical panel and of their appearance before the commission shall be paid out of the fund provided for by section 35-1-68.

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APPENDIX 6

UTAH CODE ANNOTATED SECTION 35-1-88

**35-1-88. Rules of evidence and procedure before commission and hearing examiner
— Admissible evidence.**

Neither the commission nor its hearing examiner shall be bound by the usual common-law or statutory rules of evidence, or by any technical or formal rules of procedure, other than as herein provided or as adopted by the commission pursuant to this act. The commission may make its investigation in such manner as in its judgment is best calculated to ascertain the substantial rights of the parties and to carry out justly the spirit of the Workmen's Compensation Act.

The commission may receive as evidence and use as proof of any fact in dispute all evidence deemed material and relevant including, but not limited to the following:

- (a) Depositions and sworn testimony presented in open hearings.
- (b) Reports of attending or examining physicians, or of pathologists.
- (c) Reports of investigators appointed by the commission.
- (d) Reports of employers, including copies of time sheets, book accounts or other records.
- (e) Hospital records in the case of an injured or diseased employee.

APPENDIX 7

UTAH CODE ANNOTATED SECTION 63-46b-16

63-46b-16. Judicial review — Formal adjudicative proceedings.

(1) As provided by statute, the Supreme Court or the Court of Appeals has jurisdiction to review all final agency action resulting from formal adjudicative proceedings.

(2) (a) To seek judicial review of final agency action resulting from formal adjudicative proceedings, the petitioner shall file a petition for review of agency action with the appropriate appellate court in the form required by the appellate rules of the appropriate appellate court.

(b) The appellate rules of the appropriate appellate court shall govern all additional filings and proceedings in the appellate court.

(3) The contents, transmittal, and filing of the agency's record for judicial review of formal adjudicative proceedings are governed by the Utah Rules of Appellate Procedure [Rules of the Utah Supreme Court], except that:

(a) all parties to the review proceedings may stipulate to shorten, summarize, or organize the record;

(b) the appellate court may tax the cost of preparing transcripts and copies for the record:

(i) against a party who unreasonably refuses to stipulate to shorten, summarize, or organize the record; or

(ii) according to any other provision of law.

(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:

(a) the agency action, or the statute or rule on which the agency action is based, is unconstitutional on its face or as applied;

(b) the agency has acted beyond the jurisdiction conferred by any statute;

(c) the agency has not decided all of the issues requiring resolution;

(d) the agency has erroneously interpreted or applied the law;

(e) the agency has engaged in an unlawful procedure or decision-making process, or has failed to follow prescribed procedure;

(f) the persons taking the agency action were illegally constituted as a decision-making body or were subject to disqualification;

(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;

(h) the agency action is:

(i) an abuse of the discretion delegated to the agency by statute;

(ii) contrary to a rule of the agency;

(iii) contrary to the agency's prior practice, unless the agency justifies the inconsistency by giving facts and reasons that demonstrate a fair and rational basis for the inconsistency; or

(iv) otherwise arbitrary or capricious.

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APPENDIX 8

UTAH CODE ANNOTATED SECTION 35-1-65

35-1-65. Temporary disability — Amount of payments — State average weekly wage defined.

(1) In case of temporary disability, the employee shall receive $66\frac{2}{3}\%$ of that employee's average weekly wages at the time of the injury so long as such disability is total, but not more than a maximum of 100% of the state average weekly wage at the time of the injury per week and not less than a minimum of \$45 per week plus \$5 for a dependent spouse and \$5 for each dependent child under the age of 18 years, up to a maximum of four such dependent children, not to exceed the average weekly wage of the employee at the time of the injury, but not to exceed 100% of the state average weekly wage at the time of the injury per week. In no case shall such compensation benefits exceed 312 weeks at the rate of 100% of the state average weekly wage at the time of the injury over a period of eight years from the date of the injury.

In the event a light duty medical release is obtained prior to the employee reaching a fixed state of recovery, and when no such light duty employment is available to the employee from the employer, temporary disability benefits shall continue to be paid.

(2) The "state average weekly wage" as referred to in Chapters 1 and 2 of this title shall be determined by the commission as follows: on or before June 1 of each year, the total wages reported on contribution reports to the department of employment security under the commission for the preceding calendar year shall be divided by the average monthly number of insured workers determined by dividing the total insured workers reported for the preceding year by twelve. The average annual wage thus obtained shall be divided by 52, and the average weekly wage thus determined rounded to the nearest dollar. The state average weekly wage as so determined shall be used as the basis for computing the maximum compensation rate for injuries or disabilities arising from occupational disease which occurred during the twelve-month period commencing July 1 following the June 1 determination, and any death resulting therefrom.

1981

APPENDIX 9

UTAH CODE ANNOTATED SECTION 35-1-66

35-1-66. Permanent partial disability — Scale of payments.

An employee who sustained a permanent impairment as a result of an industrial accident and who files an application for hearing under Section 35-1-99 may receive a permanent partial disability award from the commission.

Weekly payments may not in any case continue after the disability ends, or the death of the injured person.

In the case of the following injuries the compensation shall be $66\frac{2}{3}\%$ of that employee's average weekly wages at the time of the injury, but not more than a maximum of $66\frac{2}{3}\%$ of the state average weekly wage at the time of the injury per week and not less than a minimum of \$45 per week plus \$5 for a dependent spouse and \$5 for each dependent child under the age of 18 years, up to a maximum of four such dependent children, but not to exceed $66\frac{2}{3}\%$ of the state average weekly wage at the time of the injury per week, to be paid weekly for the number of weeks stated against such injuries respectively, and shall be in addition to the compensation provided for temporary total disability and temporary partial disability, to wit:

For the loss of:	Number of Weeks
(A) Upper extremity	
(1) Arm	
(a) Arm and shoulder (forequarter amputation)	218
(b) Arm at shoulder joint, or above deltoid insertion	187
(c) Arm between deltoid insertion and elbow joint, at elbow joint, or below elbow joint proximal to insertion of biceps tendon	178
(d) Forearm below elbow joint distal to insertion of biceps tendon	168
(2) Hand	
(a) At wrist or midcarpal or midmetacarpal amputation	168
(b) All fingers except thumb at metacarpophalangeal joints	101
(3) Thumb	
(a) At metacarpophalangeal joint or with resection of carpometacarpal bone	67
(b) At interphalangeal joint	50
(4) Index finger	
(a) At metacarpophalangeal joint or with resection of metacarpal bone	42
(b) At proximal interphalangeal joint	34
(c) At distal interphalangeal joint	18
(5) Middle finger	
(a) At metacarpophalangeal joint or with resection of metacarpal bone	34
(b) At proximal interphalangeal joint	27
(c) At distal interphalangeal joint	15
(6) Ring finger	
(a) At metacarpophalangeal joint or with resection of metacarpal bone	17
(b) At proximal interphalangeal joint	13

For the loss of:	Number of Weeks
(c) At distal interphalangeal joint	8
(7) Little finger	
(a) At metacarpophalangeal joint or with resection of metacarpal bone	8
(b) At proximal interphalangeal joint	6
(c) At distal interphalangeal joint	4
(B) Lower extremity	
(1) Leg	
(a) Hemipelvectomy (leg, hip and pelvis)	156
(b) Leg at hip joint or three inches or less below tuberosity of ischium	125
(c) Leg above knee with functional stump, at knee joint or Gritti-Stokes amputation or below knee with short stump (three inches or less below intercondylar notch)	112
(d) Leg below knee with functional stump	88
(2) Foot	
(a) Foot at ankle	88
(b) Foot partial amputation (Chopart's) ...	66
(c) Foot midmetatarsal amputation	44
(3) Toes	
(a) Great toe	
(i) With resection of metatarsal bone ...	26
(ii) At metatarsophalangeal joint	16
(iii) At interphalangeal joint	12
(b) Lesser toe (2nd — 5th)	
(i) With resection of metatarsal bone ...	4
(ii) At metatarsophalangeal joint	3
(iii) At proximal interphalangeal joint	2
(iv) At distal interphalangeal joint	1
(c) All toes at metatarsophalangeal joints	26
(4) Miscellaneous	
(a) One eye by enucleation	120
(b) Total blindness of one eye	100
(c) Total loss of binaural hearing	100

(C) Permanent and complete loss of use shall be deemed equivalent to loss of the member. Partial loss or partial loss of use shall be a percentage of the complete loss or loss of use of the member. This paragraph, however, shall not apply to the items listed [in] (B) (4).

Permanent hearing loss caused by accident shall be determined and paid as follows:

"Loss of hearing" is defined as the binaural hearing loss measured in decibels with frequencies of 500, 1000, 2000, and 3000 cycles per second (cps) using pure tone air conduction audiometric instruments (ANSI 1969) approved by nationally recognized authorities in the field of measurement of hearing impairment. Reduction of hearing ability in frequencies above 3000 cycles per second shall not be considered in determining compensable disability. If the average decibel loss at 500, 1000, 2000, and 3000 cycles per second is 25 decibels or less, usually no hearing impairment exists.

In measuring hearing loss, a medical panel of medical and paramedical professionals appointed by the commission shall measure the loss in each ear at the four frequencies 500, 1000, 2000, and 3000 cycles per second which shall be added together and divided by four to determine the average decibel loss. To determine the percentage of hearing loss in each ear, the average decibel loss for each decibel of loss exceeding 25 decibels shall be multiplied by $1\frac{1}{2}\%$ up to the maximum of 100% which is reached at 92 decibels.

Binaural hearing loss is determined by multiplying the percentage of hearing loss in the better ear by five, then adding the percentage of hearing loss in the

poorer ear and dividing by six. The resulting figure is the percentage of binaural hearing loss. Compensation for permanent partial disability for binaural hearing loss shall be determined by multiplying the percentage of binaural hearing loss by 100 weeks of compensation benefits as provided in this chapter. Where an employee files one or more claims for hearing loss the percentage of hearing loss previously found to exist shall be deducted from any subsequent award by the commission. In no event shall compensation benefits be paid for total or 100% binaural hearing loss exceeding 100 weeks of compensation benefits.

For any permanent impairment caused by an industrial accident that is not otherwise provided for in the schedule of losses in this section, permanent partial disability compensation shall be awarded by the commission based on the medical evidence. Compensation for any such impairment shall, as closely as possible, be proportionate to the specific losses in the schedule set forth in this section. Permanent partial disability compensation may not in any case exceed 312 weeks, which shall be considered the period of compensation for permanent total loss of bodily function. Permanent partial disability compensation may not be paid for any permanent impairment that existed prior to an industrial accident.

The amounts specified in this section are all subject to the limitations as to the maximum weekly amount payable as specified in this section, and in no event shall more than a maximum of $66\frac{2}{3}\%$ of the state average weekly wage at the time of the injury for a total of 312 weeks in compensation be required to be paid.