

1989

Letham v. Industrial Commission of Utah : Petition for Writ of Certiorari

Utah Supreme Court

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UTAH SUPREME COURT
BRIEF

IN THE SUPREME COURT OF THE STATE OF UTAH

MARK D. LETHAM :
Applicant and Appellant, : INDUSTRIAL COMMISSION
Case No. 87000671
vs. :
Administrative Law Judge:
INDUSTRIAL COMMISSION OF : Gilbert A. Martinez
UTAH, BIG BASIN ENT, and
WORKERS COMPENSATION FUND, : Court of Appeals No. 88-0307-CA
Defendants and Respondents.: Priority No. 13B

PETITION FOR WRIT OF CERTIORARI

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Clerk, Supr

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QUESTIONS PRESENTED FOR REVIEW

The questions presented for review are as follows:

I. Has the appellant been denied due process of law when he has been refused compensation and medical benefits as provided for in Sections 35-1-45, 35-1-65 and 35-1-66, Utah Code Annotated (Addendums 6, 7, 8), when an accident and industrial injury was found to have occurred resulting in major back surgery and extensive time off work, and yet the appellant was denied additional Temporary Total Disability benefits and was DENIED ALL PERMANENT PARTIAL IMPAIRMENT BENEFITS.

II. Can the lower Judge make a medical decision which is contrary to the medical evidence, denying the appellant additional Temporary Total Disability benefits and denying any and all Permanent Partial Impairment benefits without referring

the matter to a medical panel as provided in Section 35-1-77, Utah Code Annotated (ADDENDUM 9).

III. Can the lower Judge, the Commission and the Court of Appeals ignore the Law, Section 35-1-66, that requires Permanent Partial Disability "shall be awarded based on medical evidence" by making a medical decision that the appellant is not entitled to Permanent Partial Impairment benefits when all of the medical evidence is entirely to the contrary.

IV. Can the Industrial Commission and the Utah Court of Appeals ignore and reject the unequivocal medical evidence of a highly respected neurosurgeon from the University of Utah Medical Center stating that the appellant had a 15% Permanent Partial Impairment (Addendum 3) as the result of his industrial accident when there is absolutely no medical evidence to the contrary.

V. Can the Industrial Commission and the Utah Court of Appeals ignore and reject the medical evaluation manuals published by the American Academy of Orthopedic Surgeons and the American Medical Association, both of which rate the appellant as having a substantial permanent impairment when there is absolutely no medical evidence to the contrary (Addendum 4 and 5).

OPINION ISSUED BY THE COURT

The opinion of the Court of Appeals is an unpublished Order of Affirmation (attached as Addendum 1 hereto).

GROUND S ON WHICH JURISDICTION IS INVOKED

A. The decision to be reviewed was filed February 24, 1989.

B. An Order granting an extension of time within which to Petition for Certiorari was entered March 23, 1989. It extended the time to petition to April 24, 1989.

C. Rule 44(c) is inapplicable.

D. Section 78-2-2(3)(a) confers on this Court jurisdiction to review the decision in question by a Writ of Certiorari, stating:

The Supreme Court has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(a) a judgment of the Court of Appeals;

. . .

CONTROLLING PROVISIONS OF LAW

The controlling provisions of the law are those set for in Section 35-1-45, which provides benefits for an employee who is injured by accident arising out of and in the course of his employment "the responsibility for compensation and payment of medical, nursing, and hospital services and medicines, and funeral expenses provided under this chapter shall be ON THE EMPLOYER AND ITS INSURANCE CARRIER AND NOT ON THE EMPLOYEE.

Section 35-1-65 provides in part "in case of Temporary Total Disability, the employee shall receive 66 2/3 of that

employee's average weekly wage at the time of the injury, so long as such disability is total."

Section 35-1-66 states in part "an employee who sustains a permanent impairment as a result of an industrial accident and who files an application for hearing. . .may receive a Permanent Partial Impairment award from the Commission. . .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 MEDICAL EVIDENCE. IT SHOULD BE NOTED THAT THE LANGUAGE IS MANDATORY THAT AN AWARD SHALL BE MADE BASED ON MEDICAL EVIDENCE.

Section 35-1-77 refers to the appointment of a medical panel or a medical consultant. (Addendums 6-9)

STATEMENT OF THE CASE

1. The Nature of the Case and the Course of Proceedings.

This case involves the plaintiff's claim for additional Temporary Total Disability benefits and for Permanent Partial Impairment benefits from the defendant and its insurance carrier. At the hearing, the defendants produced video pictures taken of the plaintiff, showing him engaged in activities which the defendant used as a basis to cut off Temporary Total Disability benefits. After viewing the video pictures, the Administrative

Law Judge denied further Temporary Total Disability and Permanent Partial Impairment benefits as well as further medical treatment. The Judge made this ruling without any supporting medical testimony, medical evidence or without a medical panel's recommendation. The Judge entered his Order November 3, 1987, followed by a Supplemental Order January 27, 1988. A Motion for Review was filed. The Denial on the Motion for Review is attached as Addendum 2. The Commission did reverse the Administrative Law Judge in finding that an industrial accident did occur but denied payment of further Temporary Total Disability benefits or Permanent Partial Impairment benefits. The Court of Appeals affirmed the Commission's decision.

2. Statement of Facts.

This is a typical case of a hard-working young man who suffers from a severe back injury incurred in March, 1985 while lifting. He returned to work and re-injured his lower back in February, 1986, again with heavy lifting. He received conservative treatment, but finally underwent disc excision surgery in November, 1986 (R-150), followed by repair surgery in December, 1986 (R-147). His neurosurgeon gave him a 10% pre-release rating (Addendum 3, R. 266) and later, after release, rated him at 15% Permanent Partial Impairment (Addendum 3). There were no contradictory medical opinions, but the Law Judge refused

to grant Permanent Impairment and refused to send him to a medical panel.

The facts material to a consideration of the questions presented are as follows:

1. The applicant, Mark D. Letham, was a skilled Journeyman Industrial Electrician with an excellent health record, an excellent work record, and with no previous claims. He was involved in two severe, well-documented industrial accidents, the first of which on March 19, 1985 (R-20) and the other, February 10, 1986 (R-30). Both were the result of straining while lifting, and in each case resulting in an immediate, severe disabling lower back pain which finally required surgery to correct. He had no pre-existing back problems. The Law Judge, in an extreme abuse of discretion, acting arbitrarily, capriciously and without substantial evidence, found no accident had occurred (R-270, 283). The Commission on review reversed this portion of the ruling and found an accident had occurred. Based on the Order of the Commission (R-315, Addendum No. 2) finding that an accident occurred (as defined in Section 35-1-45, Utah Code Annotated), the question of "an accident" is NOT an issue.

2. Some benefits were paid. As the time drew near for a medical release, the defendants, rather than employing a doctor to perform an independent medical examination, selected rather to hire private investigators to prevaricate their way into the

confidence of the applicant, promise him employment in the field of the hobby he loved most (R-88), and took pictures of the activities of the applicant (R-89), which pictures were substituted for and in lieu of medical evidence as to the medical questions determinative of a period of Temporary Total Disability and a percentage of Permanent Impairment.

3. At the hearing held on October 22, 1987, the applicant's evidence was overwhelming and undisputed that two industrial accidents occurred (R-20, 30), that the applicant was disabled (R-21, 34), and required back surgery on November 4, 1986 (R-35) and suffered a Permanent Partial Impairment of 10% (R-266), and finally rated as 15% (Addendum 3). There was absolutely no testimony, evidence or medical evidence to the contrary. The defendants introduced video pictures taken in May and June, 1987 as the applicant was recovering from surgery, and the testimonies of the investigators were heard.

4. Both the Administrative Law Judge and the Commission ignored the very conservative medical opinion of the treating neurosurgeon, M. Peter Heilbrun, M.D., who is the highly respected head of the Neurosurgical Department of the University of Utah Medical Center. Dr. Heilbrun has acted as a medical panel for the Commission on previous occasions, and his opinions have been greatly respected by the Judges and the Commission. Such a reputable opinion, finding a minimal 10% impairment and later

finding 15% (R-266, Addendum No. 3) should have caused the Judge and the Commission grant the amount requested or, at least, appoint a Medical Panel to determine a reasonable date of termination of Temporary Total Disability and a reasonable Permanent Partial Impairment rating. In my personal nine years as an Administrative Law Judge and subsequent years of practice in the field, I have never heard of an case where there was not a finding of at least 10% Permanent Partial Impairment resulting from major back surgery (see Addendums 4 and 5). Such would have been the testimony of Dr. Heilbrun or any of our medical panel specialists if permitted to testify. Medical testimony other than medical records are not allowed at the original hearing. Medical testimony is allowed only in a second hearing if there is a disagreement with a Medical Panel based on specific objections to the Medical Panel. The applicant, therefore, was precluded from putting on additional medical evidence by not having a Medical Panel review the case.

ARGUMENT

I. The Significance of the Case

This case is significant because if allowed to stand, the Administrative Law Judges and the Commission are given free reign to make medical decisions contrary to Section 35-1-66 concerning injured employees appearing before them without the benefit of medical opinions or the opinions of a medical panel.

Though Section 35-1-77 was amended to no longer require all cases involving medical issues to be submitted to a medical panel, it was not intended to allow the Judge or the Commission to substitute their lay judgement for solid medical opinions. The Judge is allowed to rule without a medical panel only when there is a conflict of medical opinions.

In the case of Entwistle v. Wilkins, 626 P2d 495 (Utah 1981), the Court held that the period of time terminating Temporary Total Disability (which is called the date of stabilization) "is a factual question to be determined by medical evidence contained in the record".

In the case of Champion Home Builders v. Industrial Commission, 703 P2d 306 (Utah 1985), the Judge did not refer the matter to a medical panel, which was held not to be an abuse of discretion, but it was a case where the Judge ruled on the medical evidence before him and not against the medical evidence before him. In the Champion case, the Judge ruled that the question of lifting a heavy beam, causing perforated ulcers, was NOT UNCERTAIN NOR HIGHLY TECHNICAL, AND THEREFORE, THE JUDGE ACCEPTED THE PLAINTIFF'S MEDICAL REPORTS AND GRANTED BENEFITS WHICH WERE UPHELD BY THE SUPREME COURT.

Obviously, in all of the cases before the Supreme Court some kind of medical evidence has been essential in making a medical decision, such as the date of termination of Temporary

Total Disability and the existence of and the percentage of Permanent Impairment. OBVIOUSLY, FINDING A PERCENTAGE OF PERMANENT IMPAIRMENT IS A TECHNICAL MEDICAL QUESTION WHICH CANNOT BE DECIDED BY A JUDGE UNLESS HE IS ADOPTING A COMPETENT MEDICAL OPINION. The results in the Letham case, as affirmed by the Court of Appeals, is in grave conflict with the decisions of this Court.

In the Hardman v. Salt Lake City Fleet case, 725 P2d 1323 (Utah 1986), the Utah Supreme Court remarked on the Utah Commission's Conclusions of Law, in footnote, as follows:

(3) EVALUATION (RATING) OF PERMANENT IMPAIRMENT. -- This is a function that physicians alone are competent to perform. Evaluation of Permanent Impairment defines the scope of medical responsibility and therefore represents the physician's role in the evaluation of permanent disability.

In the Northwest Carriers v. Industrial Commission case, 639 P2d 138 (Utah 1981), the Court of Appeals held:

Benefits accrue when there is sufficient medical evidence that the claimant's impairment of earnings capacity/loss of ability to earn has stabilized. . .

The Utah Court of Appeals in its recent case Sharon L. Heaton v. Second Injury Fund, 88 Utah Adv. Rep. 9 (August 1988), the Court held that:

We find that the Commission's interpretation of the statute that Permanent Total Disability benefits accrue when there is sufficient medical evidence that the claimant's Permanent Total Disability has stabilized is both reasonable and rational.

All of these cases and many others hold that the question of permanent impairment and medical stability must be based on SUFFICIENT MEDICAL EVIDENCE.

POINT I: THE APPLICANT IS ENTITLED TO COMPENSATION FOR HIS INDUSTRIAL INJURY.

Section 35-1-45, Utah Code Annotated (Addendum No. 6), provides every employee who is injured by accident arising out of or in the course of his employment shall be paid compensation for loss sustained on account of the injury.

The Commission found applicant was involved in an industrial accident. By statute, the applicant is entitled to compensation and payment of medical costs. The Worker's Compensation Fund stated they would not pay any further medical costs after June, 1987 (R-40) and Temporary Total Disability benefits were cut off June 2, 1987. As of Dr. Heilbrun's medical report of July 21, 1987 (R-266), applicant had still not been released for either light duty or usual work, and the doctor only gave a preliminary estimate of 10% Permanent Partial Impairment.

The applicant returned to work without a release on August 22, 1987 (R-40). He still has some pain in his back and aching at night, but as a Foreman, he does not have to do the heavy work (R-42).

After the hearing, Dr. Heilbrun provided his final report dated November 6, 1987 acknowledging a release date of August 22, 1987 and finding a Permanent Impairment of 15% (Addendum 3).

The applicant, then, is entitled to Temporary Total Disability benefits from June 2, 1987 to August 22, 1987, Permanent Partial Impairment benefits based on 15% and continued medical treatment as needed.

No medical evidence was introduced to refute these medical claims.

The Commission had no medical evidence nor any other logical evidence upon which to base the denial.

The full extent of the Commission's unconscionable abuse of discretion is shown by the fact that all medical practitioners would agree that a person having undergone major back surgery has some percentage of Permanent Impairment. After over ten years of experience, I do not recall a case where major back surgery has not rated 10% or more.

The Manual for Orthopedic Surgeons, in evaluating Permanent Physical Impairment, states on page 30 (Addendum No. 3):

B. Surgical excision of disc, no fusion, good results, no persistent sciatic pain--10%.

C. Surgical excision of disc, no fusion, moderate persistent pain and stiffness, aggravated by heavy lifting with necessary modification of activity--20%.

The applicant fits in the 20% category. Applicant had a L5-S1 discectomy (removal of disc without a fusion) (R-162).

As late as April 27, 1987 Dr. Heilbrun notes:

Patient is unchanged in that he continues to have intermittent sharp pains in the back. . radiating into

both legs which occurs predominantly when he extends his back. (R-162)

The doctor is so concerned that he ordered a lumbar myelogram on April 27, 1987 (R-152, 153).

The American Medical Association Guide to Evaluation (Addendum 4, p. 57, Table 53,13 (3), rates operated, clinically established disc dearrangement with residual 5% plus combining with appropriate residuals which involves loss of strength or range of motion (p. 74, Table 5) and pain and discomfort factors (p. 73, Table 4). Subparagraph 2 rates decreased sensation with or without pain which is forgotten during activity, 25%. (This residual is then added to the original 5%.)

POINT II: THE APPLICANT SHOULD HAVE BEEN AWARDED TEMPORARY TOTAL DISABILITY AND PERMANENT PARTIAL IMPAIRMENT BENEFITS BASED ON THE MEDICAL EVIDENCE OR SHOULD HAVE BEEN REFERRED TO A MEDICAL PANEL FOR EVALUATION.

Section 35-1-77 Utah Code Annotated provides that where there are medical questions involved, especially where there is a conflict in the medical evidence, the matter may be referred to a Medical Panel for evaluation.

In the present case, the ONLY medical evidence introduced after applicant's surgery provided for additional Temporary Total Disability, Permanent Partial Impairment and continued medical treatment (R-266, Addendum 3). No medical evidence provided otherwise. Neither the Judge nor the Commissioners can act as medical practitioners, nor can they rule

without contradictory medical opinions. The Commission cannot substitute its opinion to override the opinion of a qualified, highly respected doctor such as Dr. Heilbrun. The Commission have used Dr. Heilbrun as a Medical Panel on numerous occasions and have highly regarded his opinions.

In such a case as this, it is mandatory that the Commission either accept the only medical opinion or refer the matter to a Medical Panel.

In the case of Schmidt v. Industrial Commission (Utah 1980), 617 P2d 693, in referring to Section 35-1-77, stated on page 696 as follows:

This statute mandates the submission of the medical aspects of the case to the medical panel. . . The language of the statute is clear. When an accidental injury, such as in the present case, has occurred, the submission of the medical aspects of the case, including those involving causation, is mandatory.

Because the present injury is of a type held by the Court to fall within the provisions of Section 35-1-45, the Administrative Law Judge's conclusion that no accident occurred should not be reached from the facts presented, without submission of the matter to the Medical Panel.

This section has been amended so that submission to a medical panel is not mandatory, but the section does not allow the Judge to rule on medical evidence without a conflicting medical opinion.

POINT III: THE EVIDENCE MUST BE VIEWED IN A LIGHT MOST FAVORABLE TO THE APPLICANT AND ALL DOUBTS ARE TO BE RESOLVED IN FAVOR OF A WORKER'S COMPENSATION CLAIM.

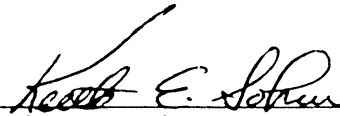
The overriding principle which governs adjudication of Workers' Compensation disability claims is that such claims are to be liberally construed in favor of awarding benefits and that any doubts from the evidence are to be resolved in favor of the claimant. Prows v. Industrial Commission, 610 P.2d 1362, 1363-64 (Utah 1980), citing Chandler v. Industrial Commission, 184 P.1020, 1021-22 (Utah 1919). The Church of Jesus Christ of Latter-Day Saints v. Industrial Commission, 590 P.2d 328, 332 (Utah 1979) (Dissenting opinion). McPhie v. Industrial Commission, 567 P.2d 153, 155 (Utah 1977). Askrew v. Industrial Commission, 391 P.2d 302, 304 (Utah 1964). M & K Corp. v. Industrial Commission, 189 P.2d 132, 134 (Utah 1948). The Applicant respectfully requests that to the extent that the questions raised herein are close questions, that all such doubts be resolved in favor of an award of benefits.

CONCLUSION

The applicant, Mark D. Letham, was a hard-working, skilled employee who was injured in an industrial injury, who underwent major low back surgery and yet was denied compensation and medical benefits by the Commission in total disregard of the medical evidence. The Court of Appeal's Order should be reversed to allow the benefits provided by law and as rated by Dr. Heilbrun.

Dated this 21st day of April, 1989.

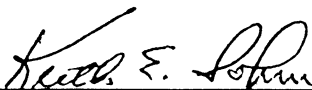
Respectfully submitted,



Keith E. Sohm
Attorney for Applicant

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Writ of Certiorari were personally delivered to the office of BLACK & MOORE and to the offices of the Industrial Commission, with a copy to Barbara Elicerio, this 24th day of April, 1989.



Keith E. Sohm

FEB 24 1989
Mary T. Noonan
Clerk of the Court
Utah Court of Appeals

---oo0oo---

**Before Judges Bench, Garff and Dee (Senior District Judge
Sitting by Special Assignment) (On Rule 31 Hearing).**

DATED this 24th day of February, 1989.

Russell W. Bench
Russell W. Bench, Judge

Addendum #1

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.

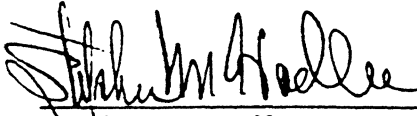
The Commission finds that the issue on review is whether the applicant is entitled to further workers compensation benefits beyond what has already been paid. The Commission notes it is clear from the file that the Workers Compensation Fund has already paid substantial compensation, including nearly 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. 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

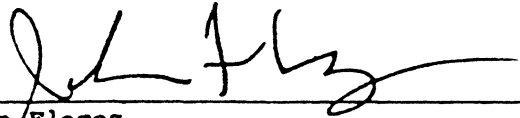
March 19, 1985 industrial accident is fairly well documented. The February 10, 1986 industrial accident is questionable. Presuming that there is at least one compensable industrial accident involved, some of the benefits paid were most likely legitimate. However, it is clear there was an overpayment 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.

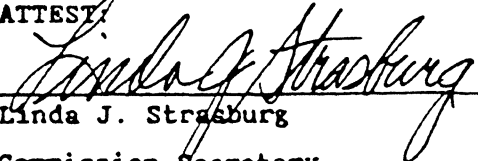

Stephen M. Hadley
Chairman


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



M. Peter Heilbrun, M.D.
Ronald L. Apfelbaum, M.D.
LeAnne S. Erickson, M.D.
David W. Falt, III, M.D.
Morton L. Walker, M.D.

November 6, 1987

Addendum No. 3

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

Re: Mark Letham

Dear Mr. Sohm:

Thank you for your letter regarding Mark Letham. I believe that Mr. Letham should be granted an impairment rating of 15% of whole man related to residual back discomfort. I did not know he returned to work on August 22, 1987. I would be glad to give him a release date as of August 22, 1987.

I hope this information is sufficient.

Regards,

M. Peter Heilbrun, M.D.

MPH/dr

(Tr:11/17/87)

2-1-86
Date of Injury 3/19/85
Employer Big Basin Ent.

BRIEF MEDICAL REPORT
(To be completed by treating physician)

- RE: Permanent Impairment Evaluation for Mark Letham Name of Applicant
1. Has applicant been released for usual work? no What date? _____
2. Has applicant been released for light duty? No What date? _____
3. Has applicant a permanent injury? _____ If so, describe fully _____
4. In case of permanent injury, on what date did or will the applicant reach a final state of recovery? _____
5. If there is a permanent injury, give your estimate of impairment in terms of percentage of loss of function: 10% of whole man
6. Is there a medically demonstrated causal relationship between the industrial accident and the problems you have been treating? yes
Please explain as necessary: _____
7. What future medical treatment will be required as a result of the industrial accident? INDETERMINATE
8. What is the percentage of permanent physical impairment attributable to previously-existing conditions, whether due to accidental injury, disease or congenital causes? 0
9. What is the applicant's total physical impairment, if any, resulting from all causes and conditions, including the industrial injury? 10% of whole man
10. Did the industrial injury aggravate the applicant's pre-existing condition? Please explain as necessary. NO

Dated this 21 day of July 1987

Please return to:

Keith E. Sohm
Attorney at Law
2057 Lincoln Lane
Salt Lake City, 84124
Tele. 277-5874

M. P. Heilbrun
Physician's Name (Please Print)

Neurosurgery

Physician's Specialty

Physician's Signature

50 N. Medical Drive
Salt Lake City, UT 84132

Street Address

City, State, Zip

Addendum
No. 4

2 pages



MANUAL FOR
ORTHOPAEDIC SURGEONS
IN EVALUATING PERMANENT
PHYSICAL IMPAIRMENT

AMERICAN ACADEMY of ORTHOPAEDIC SURGEONS

430 NORTH MICHIGAN AVENUE • CHICAGO, ILLINOIS 60611

LOW LUMBAR cont'd.	Per cent Whole Body Permanent Physical Impairment and Loss of Physical Function to Whole Body
H. Posterior elements, partial paralysis with or without fusion, should be rated for loss of use of extremities and sphincters	
3. Neurogenic Low Back Pain – Disc Injury	
A. Periodic acute episodes with acute pain and persistent body list, tests for sciatic pain positive, temporary recovery 5 to 8 weeks	5
B. Surgical excision of disc, no fusion, good results, no persistent sciatic pain	10
C. Surgical excision of disc, no fusion, moderate persistent pain and stiffness aggravated by heavy lifting with necessary modification of activities	20
D. Surgical excision of disc with fusion, activities of lifting moderately modified	15
E. Surgical excision of disc with fusion, persistent pain and stiffness aggravated by heavy lifting, necessitating modification of all activities requiring heavy lifting	25

Guides to the

Adelphi
No. 5

8 pages

Evaluation of Permanent Impairment

2nd Edition



Spinal Region — Two or More Ranges of Motion Involved

Abnormal Motion

Measure separately and record the impairment as contributed by each range of motion of the spine. Then, ADD the impairment values contributed by all ranges of motion of the spine. Their sum is the impairment of the whole person that is contributed by the spinal region.

Example: Cervical Region

Description	% Impairment of Whole Person
30° active flexion	1 (Table 47)
30° active extension	1 (Table 47)
60° active right rotation	1 (Table 49)
60° active left rotation	1 (Table 49)
(1 + 1 + 1 + 1 = 4)	4

**TABLE 52
IMPAIRMENT DUE TO ABNORMAL MOTION
AND ANKYLOSIS OF THE THORACOLUMBAR
REGION—ROTATION**

Abnormal Motion			
Average range of ROTATION is 60 degrees			
Value to total range of thoracolumbar motion is 35%			
Right rotation from neutral position (0°) to:	Degrees of Thoracolumbar Motion		Impair- ment of Whole Person
	LOST	RETAINED	
0°	30	0	6%
10°	20	10	4
20°	10	20	2
30°	0	30	0
Left rotation from neutral position (0°) to:			
0°	30	0	6%
10°	20	10	4
20°	10	20	2
30°	0	30	0
Ankylosis			
Region ankylosed at:			
0° (neutral position)			20%
10°			27
20°			34
30° (full right rotation)			40
Region ankylosed at:			
0° (neutral position)			20%
10°			27
20°			34
30° (full left rotation)			40
*position of function			

Ankylosis

Measure separately and record the impairment contributed by ankylosis in each position of the spinal region. The largest impairment value for ankylosis is the impairment of the whole person contributed by the spinal region.

Example: Cervical Region

Description	% Impairment of Whole Person
Ankylosis at 30° flexion	23 (Table 47)
Ankylosis at 20° right rotation	17 (Table 49)
The largest impairment value for ankylosis is 23%; therefore, the patient has 23% impairment due to ankylosis of the cervical region.	

**TABLE 53
IMPAIRMENT DUE TO OTHER DISORDERS
OF THE SPINE**

Disorder	% Impair- ment of the Whole Person
A. Spondylolysis and Spondylolisthesis	
1. Grade I or II spondylolysis and spondylolisthesis with aggravation, persistent muscle spasm, rigidity and pain resulting from trauma	20
2. Grade III or IV spondylolysis or spondylolisthesis with persistent muscle spasm, rigidity and pain, aggravated by trauma	30
B. Intervertebral Disc Lesions	
1. Non-operated, clinically established disc derangement without residuals	0
2. Operated, disc removed without residuals	5
3. Operated or non-operated, clinically established disc derangement with residuals	5*

*This impairment rating should be combined with the appropriate value(s) for residuals based on:

- (a) Ankylosis (fusion) in spinal area or extremities;
- (b) Abnormal motion in spinal area or extremities;
- (c) Fractures of vertebrae;
- (d) Spinal cord injuries, with resulting neurologic impairment (Chapter 2);
- (e) Spinal nerve root injuries, with resulting neurologic impairment (Chapter 2);
- (f) Any combination of the above, using the Combined Values Chart

isory disturbance, loss of muscle strength, or
ered fine motor control.

strictions of motion and ankyloses may result
m peripheral spinal nerve impairments. Consid-
tion was given to such impairments when the
centage values set forth in this section were
ived. Therefore, if an impairment results strictly
m a peripheral nerve lesion, the evaluator
ould not apply both the impairment values from
apter 1 relating to the extremities and back and
se from this chapter, because this would result
i duplication and a multiplying of the impairment
ng. However, when restricted motion or ankylo-
occurs in conjunction with sensory involvement
muscle weakness, then values from Chapter 1
y be combined with values of this chapter using
Combined Values Chart.

necessary for the physician to establish as
arately as possible which peripheral spinal
ves are involved in an impairment before
etermining the percentage of permanent impair-
it. The diagnosis is based firmly on the patient's
s and symptoms. With a carefully obtained
ory, a thorough medical and neurological
nination, and appropriate laboratory aids, the
sician should be able to describe the amount of
v, discomfort, and loss of sensation occurring in
areas innervated by the affected nerve, and also
amount of muscle strength and fine motor
trol that has been lost.

is: A subjective sensation of distress or agony,
ed "pain," may be associated with peripheral
al nerve impairment. Pain may be defined as a
que complex made up of afferent stimuli
racting with the emotional or affective state of
ndividual and modified by that individual's
experience and present state of mind. The two
stituents, neural stimulation and central reaction,
xtremely variable in make-up and duration.

pain associated with peripheral spinal nerve
airment, and particularly with that of the
ian, sciatic, and tibial nerves, sometimes has a
stant burning quality. This pain is described as
ajor or a minor causalgia in accordance with its
rity, and it is evaluated on the same percentage
s as are other types of pain. Major causalgia
persists despite appropriate treatment can
lt in loss of function of the affected extremity
impairment that is as great as 100%.

aluating pain that is associated with peripheral

spinal nerve disorders, the physician should con-
sider: (1) how the pain interferes with the individual's
performance of the activities of daily living; (2) to
what extent the pain follows the defined anatomical
pathways of the root (dermatome), plexus, or
peripheral nerve; and (3) to what extent the
description of the pain indicates that it is caused by
the peripheral spinal nerve impairment; that is, the
pain should correspond to other kinds of distur-
bances of the involved nerve or nerve root.

Complaints of pain that cannot be substantiated as
above are not considered within the scope of this
chapter. The examiner must determine whether the
sensory or motor deficit is due to involvement of
one or more nerve roots or of one or more peri-
pheral nerves in order to use the appropriate table.
Table 6 relates to nerve roots, Table 7 relates to the
brachial and lumbosacral plexuses, and Tables 8, 9,
12, 13 and 14 relate to the peripheral nerves.

TABLE 4
GRADING SCHEME AND PROCEDURE FOR
DETERMINING IMPAIRMENT OF AFFECTED
BODY PART DUE TO PAIN, DISCOMFORT,
OR LOSS OF SENSATION

a. Grading Scheme	
Description	Grade
1. No loss of sensation or no spontaneous abnormal sensations	0%
2. Decreased sensation with or without pain, which is forgotten during activity	5-25%
3. Decreased sensation with or without pain, which interferes with activity	30-60%
4. Decreased sensation with or without pain, which may prevent activity (minor causalgia)	65-80%
5. Decreased sensation with severe pain, which may cause outcries as well as prevent activity (major causalgia)	85-95%
6. Decreased sensation with pain, which may prevent all activity	100%
b. Procedure	
1. Identify the area of involvement, using the dermatome chart.	
2. Identify the nerve(s) that innervate the area(s).	
3. Find the value for maximum loss of function of the nerve(s) due to pain or loss of sensation or pain, using the appropriate table.*	
4. Grade the degree of decreased sensation or pain according to the grading scheme above.	
5. Multiply the value of the nerve (from the appropriate table) by the degree of decreased sensation or pain.	

*Table 6 for nerve roots; Table 7 for brachial and lumbosacral
plexuses; Tables 8,9,12-14 for peripheral nerves.

A grading scheme and procedure for determining impairment of a body part that is affected by pain, discomfort, or loss of sensation are found in Tables 4a and 4b, respectively.

Example: Following an injury to his elbow, a worker, after reaching maximum medical rehabilitation, was left with pain and a loss of sensation that prevented activity and caused minor causalgia in the medial aspect of his right forearm (preferred side).

1. Area of involvement is medial aspect of right forearm; see Figures 1 and 2.
2. Nerve involved is medial antibrachial cutaneous nerve; see Table 3.
3. Maximum loss of function due to loss of sensation or pain is 5%; see Table 9.
4. Gradation of decreased sensation or pain is 65%-80%; see Table 4.
5. Therefore, impairment of the upper extremity is 80% x 5%, or 4%.

Strength: Involvement of peripheral spinal nerves or nerve roots may lead to paralysis or to weakness of the muscles supplied by them as well as to characteristic sensory changes. In the case of weakness, the patient often will attempt to substitute stronger muscles to accomplish the desired motion. Thus, the physician should have an understanding of the muscles that are involved in the performance of the various movements of the body and its parts.

Muscle testing, including tests for strength, duration, repetition of contraction, and function, aids evaluation of the functions of specific nerves. Muscle testing is based on the principle of gravity and resistance, that is, the ability to raise a segment of the body through its range of motion against gravity and to hold the segment at the end of its range of motion against resistance. In interpreting muscle testing, comparable muscle functions on both sides of the body should be considered.

A grading scheme and procedure for determining impairment of a body part that is affected by loss of strength are found in Tables 5a and 5b, respectively.

Example: A work-related injury of a patient's right knee resulted in surgery and prolonged therapy. Following maximum medical rehabilitation, the examining physician found that the patient could extend his leg fully against gravity and some resistance.

1. Motion involved is extension of the knee.
2. Muscle performing motion is quadriceps femoris; see Table 3.
3. Maximum loss of nerve due to loss of strength of femoral nerve is 30%; see Table 14.
4. Gradation of loss of strength is 5% to 20%; see Table 5.
5. Therefore, impairment of the lower extremity is 20% x 30%, or 6%.

After the individual values for loss of function due to sensory deficit, pain, or discomfort, and loss of function due to loss of strength have been determined, the impairment to the part of the body or to the whole person is calculated by combining the values using the Combined Values Chart.

Special Consideration—Since the basic tasks of everyday living are more dependent upon the preferred upper extremity, dysfunction of the

TABLE 5
GRADING SCHEME AND PROCEDURE FOR DETERMINING IMPAIRMENT OF AFFECTED BODY PART DUE TO LOSS OF STRENGTH

a. Grading Scheme	
Description	Grade
1. Complete range of motion against gravity and full resistance	0%
2. Complete range of motion against gravity and some resistance, or reduced fine movements and motor control	5-20%
3. Complete range of motion against gravity, and only without resistance	25-50%
4. Complete range of motion with gravity eliminated	55-75%
5. Slight contractibility, but no joint motion	80-90%
6. No contractibility	100%
b. Procedure	
1. Identify the motion involved, such as flexion, extension, etc.	
2. Identify the muscle(s) performing the motion.	
3. Determine the nerve(s) that innervate the muscle(s), and find the value for maximum percent loss, due to loss of strength, according to the appropriate table*	
4. Grade degree of loss of strength according to the grading scheme above.	
5. Multiply the value of the nerve (from the appropriate table) by the degree of loss of strength.	

*Table 6 for nerve roots; Table 7 for brachial and lumbosacral plexuses; Tables 8, 9, 12-14 for peripheral nerves.

WORKERS' COMPENSATION LAWS

35-1-45. Compensation for Industrial Accidents To Be Paid. - Every employee mentioned in Section 35-1-43 who is injured, and the dependents of every such employee who is killed, by accident arising out of or in the course of his employment, wherever such injury occurred, if the accident was not purposely self-inflicted, shall be paid compensation for loss sustained on account of the injury or death, and such amount for medical, nurse, and hospital services and medicines, and, in case of death, such amount of funeral expenses, as provided in this chapter. The responsibility for compensation and payment of medical, nursing, and hospital services and medicines, and funeral expenses provided under this chapter shall be on the employer and its insurance carrier and not on the employee.

*Addendum
No. 6*

Effective 3/29/84

Addendum No.7

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.

(as last amended by Chapter 287, Laws of Utah 1981)

Addendum No 8

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 66-2/3% of

Skip one whole page - NA.

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 66-2/3% 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.

(as last amended by Chapter 116, Laws of Utah 1988)

35-1-77. Medical panel—Duty of commission to refer case to medical panel—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, 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 objection 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 findings 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 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. *EFFECTIVE 4-1-82*