

2011

Waste Management and Indemnity Insurance of North America v. Cathie Hartley : Brief of Petitioner

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

Agency Decision No. 07-0705

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IN THE UTAH COURT OF APPEALS

WASTE MANAGEMENT and
INDEMNITY INSURANCE OF
NORTH AMERICA,

Petitioners

vs.

CATHIE HARTLEY,
The Utah Labor Commission

Respondents

PETITIONERS' BRIEF

Appeal No. 20110450-CA

Agency Decision No. 07-0705

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STATEMENT OF JURISDICTION

This appeal is from a final order of the Utah Labor Commission. This Court has jurisdiction pursuant to Utah Code Ann. §§ 34A-1-303(6); 34A-2-801(8)(a); 63G-4-403(1); and 78A-4-103(2)(a). Petitioners have exhausted all administrative remedies available at law pursuant to Utah Code Ann. § 63G-4-401.

STATEMENT OF ISSUES PRESENTED

ISSUE ONE

Whether the Administrative Law Judge and Labor Commission committed reversible clear error when impermissibly inferring that Respondent wanted the coccyx surgery (and prematurely ordering temporary disability benefits when Respondent is refusing to undergo the coccyx surgery upon request).

Standard of review: The application of law by the Labor Commission should be reviewed for correctness, with no deference given to the Labor Commission. Whitaker v. Labor Comm'n, 973 P.2d 982, 984 (Utah App 1998).

ISSUE TWO

Whether the Administrative Law Judge's Finding of Facts, Conclusions of Law, and Order should be vacated because the ALJ's decision is not supported by sufficient evidence and the findings of fact are inadequate.

Standard of Review: The determination of the Labor Commission should be set aside as an abuse of discretion if it “exceeds the bounds of reasonableness and rationality.” Hymas v. Labor Comm’n, 996 P.2d 1072 (Utah App. 2008).

**DETERMINATIVE PROVISIONS OF STATUTES, RULES, OR
CONSTITUTIONS**

ISSUE ONE

Utah Code Ann. 63G-4-403(4)(d);

Utah R.Civ.P. 60(b)(1),(6);

ISSUE TWO

Utah Code Ann. 63G-4-403(4)(d);

Utah R.Civ.P. 60(b)(1),(6);

STATEMENT OF THE CASE

On August 16, 2007, Respondent filed an Application for Hearing on the issues of medical expenses, recommended medical care, temporary total disability compensation, permanent partial compensation, travel expenses and interest. (R. 1). Petitioners filed their answer on September 21, 2007. (R. 13-19). On June 5, 2008, a hearing was held on Respondent’s application for hearing.

After the hearing, the ALJ requested a medical panel which provided opinions on how to handle the medical disputes on the case. The medical panel found that Respondent's right knee condition was not work related, but found medical causation for the bilateral ankles, feet, great right toe, and coccyx conditions. The medical panel further found that the bilateral ankles, feet, and great right toe were medically stable as of February 17, 2007. The medical panel also stated as follows:

“[I]f Ms. Hartley does undergo a coccygectomy as suggested by Dr. Bean, I would not anticipate her reaching a point of Maximum Medical Improvement [stabilization] of her coccygeal status until approximately 6 months after the contemplative coccygectomy is undertaken. ***If Ms. Hartley does not wish to undergo that surgical procedure, it is my opinion that she would have reached a point of medical stability ... one year after her date of injury, that being on and/or about 07/17/07.***” (R. 75).

On February 26, 2009, Administrative Law Judge Lorrie Lima issued her Findings of Fact, Conclusions of Law and Order. (R. 77-87). The ALJ ordered Petitioners to pay TPD benefits from July 17, 2006 to August 26, 2006, and TTD benefits from August 27, 2006 to October 23, 2006 (during the periods when claimant had reduced hours or between jobs). (R. 85). The ALJ also inferred that Respondent had elected the coccyx surgery, as evidenced by her pursuit of litigation and medical treatment, and therefore she was not at MMI. (R. 84-85).

Petitioners filed a Motion for Review with the Utah Labor Commission on March 30, 2009. (R. 88-90). The Labor Commission issued its order on April 26, 2011 and denied Petitioners' argument that any award of TTD benefits was premature and sua sponte (and without support) may have potentially ordered additional benefits to be paid in the interim. Specifically, the Labor Commission generally indicated that Respondent was entitled to "temporary disability compensation until she reaches medical stability after the surgery." (R. 93-96). The ALJ had not provided such an award in her Order probably due to the fact that there was uncertainty as to whether the petitioner would undergo the coccyx surgery.

Petitioners timely filed a *Petition for Review* to the Utah Court of Appeals on May 25, 2011, for review of the entire Order of the Commission.

SUMMARY OF FACTS

Respondent alleged an injury to her right foot, knees, hip, thighs, chest, tailbone, low and mid back and across her arms as a result of an alleged industrial injury on July 17, 2006. (R. 78). This matter then came before the Labor Commission at a hearing on June 5, 2008. The ALJ referred the medical aspects of this case to a medical panel, chaired by Dr. Alan Goldman, with the medical panel report issued on November 21, 2008. (R. 70-76). The ALJ issued

her Findings of Fact, Conclusions of Law, and Order on February 26, 2009. (R. 77-87).

The ALJ found that Respondent's right knee condition was not work related, but found medical causation for the bilateral ankles, feet, great right toe, and coccyx conditions. (R. 83-84). The ALJ further found that the bilateral ankles, feet, and great right toe were medically stable as of February 17, 2007 in accordance with the findings of the medical panel. (R. 84).

The ALJ adopted the medical panel's findings that further medical treatment, including a coccygectomy, may be reasonable and necessary to treat this industrial injury. Specifically, the medical panel had found as follows with regard to this issue:

"[I]f Ms. Hartley does undergo a coccygectomy as suggested by Dr. Bean, I would not anticipate her reaching a point of Maximum Medical Improvement [stabilization] of her coccygeal status until approximately 6 months after the contemplative coccygectomy is undertaken. ***If Ms. Hartley does not wish to undergo that surgical procedure, it is my opinion that she would have reached a point of medical stability ... one year after her date of injury, that being on and/or about 07/17/07.***" (R. 75).

The ALJ ultimately inferred that Respondents has sought to have the coccygectomy by generally pursuing medical treatment and litigation and, therefore, was not at MMI. (R. 84). Accordingly, the ALJ found that Respondent is not at MMI and ordered the Petitioners to pay ongoing temporary disability payments from February 24, 2007 to October 29, 2007. (R. 85). The

ALJ, however, did not order the ongoing payment of TTD benefits probably in part because Respondent had not formally agreed to proceed with the coccygectomy.

The Commission agreed with the ALJ and determined that the coccygectomy was necessary to treat the work injury and, therefore, Respondent was entitled to benefits even though her condition was stable with regard to everything but the coccyx surgery in July, 2007. (R. 94-95). The Labor Commission agreed with the ALJ and sua sponte may have ordered additional temporary disability benefits to be paid in the interim. Specifically, the Labor Commission generally ordered respondents to pay for ongoing TTD benefits (which the ALJ did NOT order) without any explanation on this issue.

SUMMARY OF ARGUMENT

The Administrative Law Judge's Finding of Facts, Conclusions of Law, and Order and the Utah Labor Commission's Order should be vacated because the decisions are not supported by sufficient evidence and the findings of fact are inadequate. The ALJ committed reversible clear error when she inferred that Respondent wanted the coccyx surgery and prematurely ordered benefits when Respondent had not yet undergone the surgery or agreed to undergo the surgery. Further, the Labor Commission failed to address the fact that Respondent has still not specifically agreed to proceed with the surgery upon

request. Moreover, the Labor Commission indicated that Petitioners need to pay ongoing temporary disability benefits (when the ALJ refused to order ongoing benefits) even though Respondent still has not agreed to proceed with the surgery.

ARGUMENT

The Administrative Law Judge committed reversible clear error where she prematurely ordered benefits when Respondent had not yet undergone the surgery. Respondent's condition was medically stable as of July 17, 2007 as to all conditions but the coccyx surgery. As a result of this stabilization, Respondent is not entitled to additional temporary disability benefits until she decides to pursue surgery. If and when she decides to pursue surgery, she may become entitled to additional compensation benefits. However, in the interim, Respondent should not be awarded additional benefits because she decided to delay pursuit of surgery. Such a determination by this Court would allow Respondent to wait and delay treatment simply to gain additional benefits. Once a determination of stabilization has been made, temporary benefits should cease and only be reopened once an event has occurred which alters this determination of stabilization.

This case came before the Labor Commission at a hearing on June 5, 2008. The ALJ referred the medical aspects of this case to a medical panel,

chaired by Dr. Alan Goldman, with the medical panel report issued on November 21, 2008. The ALJ issued her Findings of Fact, Conclusions of Law, and Order on February 26, 2009.

The ALJ found that Respondent's right knee condition was not work related, but found medical causation for the bilateral ankles, feet, great right toe, and coccyx conditions. The ALJ further found that the bilateral ankles, feet, and great right toe were medically stable as of February 17, 2007 in accordance with the findings of the medical panel.

The ALJ adopted the medical panel's findings that further medical treatment, including a coccygectomy, may be reasonable and necessary to treat this industrial injury. Specifically, the medical panel found as follows:

“[I]f Ms. Hartley does undergo a coccygectomy as suggested by Dr. Bean, I would not anticipate her reaching a point of Maximum Medical Improvement [stabilization] of her coccygeal status until approximately 6 months after the contemplative coccygectomy is undertaken. ***If Ms. Hartley does not wish to undergo that surgical procedure, it is my opinion that she would have reached a point of medical stability ... one year after her date of injury, that being on and/or about 07/17/07.***”

The ALJ implicitly inferred that Respondent had, by generally pursuing the claim and medical treatment, sought to have the coccygectomy and, therefore, was not at MMI. Accordingly, the ALJ found that Respondent is not at MMI and ordered respondents to pay ongoing temporary disability payments

from February 24, 2007 to October 29, 2007, the day she began work with a new employer.

Petitioners argue that the ALJ's order regarding benefits paid after July 17, 2007 is premature. Specifically, Respondent has not yet undergone the surgery so it is premature to assume that the surgery will take place. If Respondent fails to proceed with the surgery, she was found to have reached MMI by July 17, 2007. Any benefits awarded by the ALJ after this date, therefore, is premature until the surgery takes place. Specifically, the Utah Court of Appeals has held that temporary disability benefits are intended to provide an employee with benefits during the time she recuperates from a work injury and should terminate at stabilization. *Griffith v. Industrial Comm'n of Utah*, 754 P.2d 981, 983 (Utah Ct. App. 1988). Stabilization has been defined as a factual question to be determined by the medical evidence in the record. *Id.* at 984.

Respondent was found to be at MMI on July 17, 2007 until the surgery takes place. If she decides to pursue surgery, then her temporary disability benefits may resume. However, in the interim she should not be awarded benefits since her work related injury was found to have stabilized.

The ALJ impermissibly presumed or inferred that Respondent wanted the coccyx surgery. In fact, she has refused to proceed with the surgery despite

inquiries from respondents. This is the problem with the ALJ's order. She presumed that the Respondent may want surgery based on filing the claim and generally pursuing medical treatment instead of direct evidence on the issue.

This error has been potentially compounded by the Labor Commission. Even though the ALJ did not order ongoing TTD benefits (there was an end date provided), the Labor Commission made a open ended statement that Respondent is entitled to "temporary disability compensation until she reaches medical stability after the surgery." If this is somehow considered an additional finding, it expands the benefits awarded by the ALJ (as the ALJ only awarded closed ended benefits). This new potential finding by the Labor Commission constitutes an error of law.

Petitioners contend that petitioner was at MMI as of July 17, 2007, and should not have been found eligible for temporary disability benefits after that date. Petitioners further argue that any alleged increase in benefits awarded by the Labor Commission is impermissible. The Labor Commission should not be permitted to sua sponte order an increase in benefits to be paid in the interim (and it is not clear that this is what the Labor Commission did anyway). If the Labor Commission believed that additional benefits should have been awarded, the matter should have been remanded to the ALJ or there should have been

direct evidence that the petitioner will proceed with the surgery. Again, Respondent has refused to proceed with the surgery and instead is trying to obtain additional temporary disability benefits (that were not ordered by the ALJ) even though she has refused to proceed with the possible surgery.

Petitioners argue that this matter should be remanded so the ALJ can amend her findings, conclusions, and orders to find Respondent at MMI as of July 17, 2007 and, if petitioner elects to undergo the coccygectomy, Respondent would be entitled to further temporary disability benefits only after the surgery takes place. The other option would be to affirm the ALJ's order with the end date for TTD already provided (without including the additional time frame of temporary disability benefits potentially discussed by the Labor Commission) and then Respondent can refile for hearing if she actually wants to the coccyx surgery.

In any case, it is unacceptable that the Labor Commission has discussed the possibility of ongoing temporary disability benefits which were not awarded by the ALJ (especially when the Respondent has not agreed to proceed with the disputed surgery). Respondent did not appeal the ALJ's order so it would be impermissible to consider a possible increase in the award provided by the ALJ. In addition, the Labor Commission only affirmed the ALJ's Order so there should not be any additional benefits awarded. If Respondent wants additional

temporary disability benefits that were not awarded by the ALJ, she would need to refile for hearing.

Petitioners also allege that the order is generally not supported by applicable law or substantial evidence. Petitioners argue that the order must be overturned with regard to the award of any additional temporary disability benefits and medical benefits on this case.

Petitioners respectfully request that this matter be remanded and the ALJ be instructed to enter a Supplementary Order amending her prior Findings of Fact, Conclusions or Law, and Order to find petitioner at MMI as of July 17, 2007, strike the order of temporary disability benefits from July 17, 2007 to October 29, 2007, and order further temporary disability benefits only if petitioner actually undergoes the coccygectomy. Petitioners also request that the order be clarified in that the Labor Commission should not have awarded any additional temporary disability benefits or medical benefits. Ultimately, either the matter needs to be remanded or ongoing temporary disability benefits should not be awarded until Respondent agrees to proceed with the surgery.

Petitioners, therefore, ask for one of the two following remedies to address this issue:

- * The matter should be remanded to the ALJ so that she will reach a supported factual determination on whether Respondent wants the coccyx surgery instead of impermissibly inferring this

fact (with a full explanation of any ongoing temporary disability benefits that are due); or, at a minimum

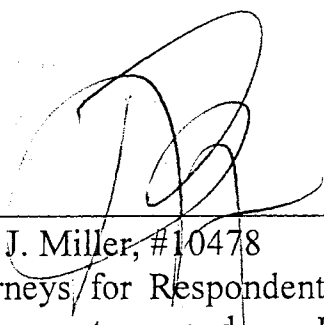
- * The Labor Commission's appellate review should not be accepted as an expansion of temporary disability benefits to Respondent which were not awarded by the ALJ -- the Labor Commission's Order should only be viewed as affirming the award of benefits provided by the ALJ instead of expanding any benefits (as Respondent did not even appeal the Order and the potential expansion of benefits is not clear in the Order or justified due to the impermissible inference regarding the surgery);

CONCLUSION AND PRAYER FOR RELIEF

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

Dated this 9th day of April, 2012.

THOMAS POLLART & MILLER LLC

By: 
Brad J. Miller, #10478
Attorneys for Respondents Waste
Management and Indemnity
Insurance of North America

ADDENDUM

- A. **Reproduction of opinion, memorandum decision, findings of fact, conclusions of law, orders, jury instructions.**

None.

- B. **Reproduction of parts of the record of central importance such as contracts or other documents.**

None.

- C. **Reproduction of determinative constitutional provisions, statutes, or rules.**

Utah Code Ann. § 63G-4-403(4)(h)(i)-(iv): “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: 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.”

Utah R.Civ.P. 60(b)(1): “(b) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc. On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect;”

Utah R.Civ.P. 60(b)(6): “(b) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc. On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . (6) any other reason justifying relief from the operation of the judgment.”

Utah Code Ann. § 63G-4-403(4)(g): “(4) The appellate court shall grant relief only if, on the basis of the agency's record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following: . . . (g) the agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court; . . .”

78A-4-103. Court of Appeals jurisdiction: “(1) The Court of Appeals has jurisdiction to issue all extraordinary writs and to issue all writs and process necessary:

- (a) to carry into effect its judgments, orders, and decrees; or
- (b) in aid of its jurisdiction.

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(a) the final orders and decrees resulting from formal adjudicative proceedings of state agencies or appeals from the district court review of informal adjudicative proceedings of the agencies, except the Public Service Commission, State Tax Commission, School and Institutional Trust Lands Board of Trustees, Division of Forestry, Fire, and State Lands actions reviewed by the executive director of the Department of Natural Resources, Board of Oil, Gas, and Mining, and the state engineer;

(b) appeals from the district court review of:

(i) adjudicative proceedings of agencies of political subdivisions of the state or other local agencies; and

(ii) a challenge to agency action under Section **63G-3-602**;

(c) appeals from the juvenile courts;

(d) interlocutory appeals from any court of record in criminal cases, except those involving a charge of a first degree or capital felony;

(e) appeals from a court of record in criminal cases, except those involving a conviction or charge of a first degree felony or capital felony;

(f) appeals from orders on petitions for extraordinary writs sought by persons who are incarcerated or serving any other criminal sentence, except petitions constituting a challenge to a conviction of or the sentence for a first degree or capital felony;

(g) appeals from the orders on petitions for extraordinary writs challenging the decisions of the Board of Pardons and Parole except in cases involving a first degree or capital felony;

(h) appeals from district court involving domestic relations cases, including, but not limited to, divorce, annulment, property division, child custody, support, parent-time, visitation, adoption, and paternity;

(i) appeals from the Utah Military Court; and

(j) cases transferred to the Court of Appeals from the Supreme Court.

(3) The Court of Appeals upon its own motion only and by the vote of four judges of the court may certify to the Supreme Court for original appellate review and determination any matter over which the Court of Appeals has original appellate jurisdiction.

(4) The Court of Appeals shall comply with the requirements of Title 63G, Chapter 4, Administrative Procedures Act, in its review of agency adjudicative proceedings.”

CERTIFICATE OF SERVICE

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

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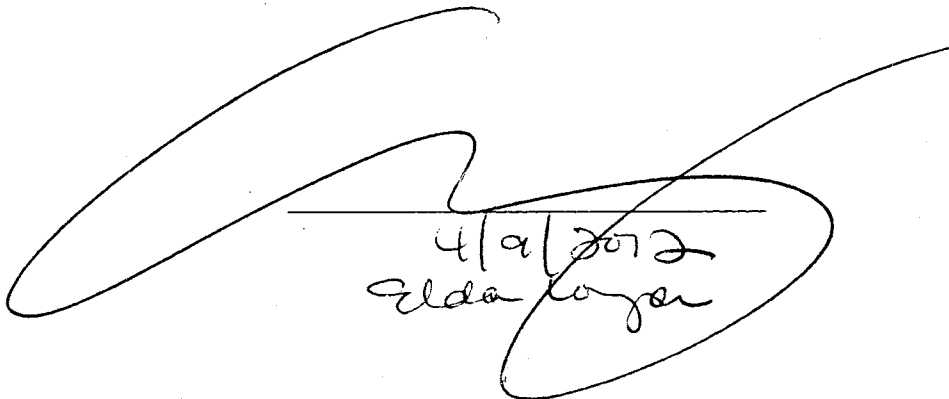
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