

2011

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

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

WASTE MANAGEMENT and
INDEMNITY INSURANCE OF
NORTH AMERICA,

Petitioners/Appellants,

VS.

CATHIE HARTLEY:

The Utah Labor Commission

Respondents/Appellee

BRIEF OF APPELLEE CATHIE
HARTLEY

Appeal No. 20110450-CA

Agency Decision No. 07-0705

Appeal from the Utah Labor Commission, Commissioner Sherrie Hayashi.

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UTAH APPELLATE COURTS

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STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to UTAH CODE ANN. §§34A-1-303(6); 63G-4-403(1); and 78A-4-103(2)(a).

ISSUES PRESENTED ON APPEAL

Issue One

Whether the Labor Commission and the Administrative Law Judge had any substantive evidence to support their finding that Appellee Ms. Hartley was not and is not medically stabilized until necessary surgery for a coccyx condition is performed.

Standard of Review: Factual findings of the Labor Commission should be granted a great deal of deference, and will be upheld if there is any substantive evidence in the record as a whole to support such findings, even if another interpretation of the facts may also be valid. Whitewright v. Labor Comm'n, 973 P.2d 982, 984 (Utah App. 1998). Substantive evidence is that which a reasonable person might accept as adequate to support the conclusion. Stewart v. Board of Review, 831 P.2d 134, 137 (Utah App. 1992).

Issue Two

Whether this Court should uphold the Labor Commission's award of ongoing Temporary Total Disability Benefits to Appellee Ms. Hartley and remand back to the Labor Commission to determine the amount awarded as a consequence of the Appellee Ms. Hartley still not having reached medical stabilization due to Appellant Waste Management's denial of needed coccyx surgery?

Standard of Review: This Court applies an abuse of discretion standard to decisions of law and fact, and this Court “will uphold the Labor Commission's determination unless it ‘exceeds the bounds of reasonableness and rationality.’” Hymas v. Labor Commission, 2008 UT App 471, 200 P.3d 218 ¶5 (citing AE Clevite, Inc. v. Labor Comm'n, 2000 UT App 35, ¶ 7, 996 P.2d 1072).

DETERMINATIVE PROVISIONS OF STATUTES, RULES, OR

CONSTITUTIONS

The determinative statutes in this case are UTAH CODE ANN. §§34A-1-303(6); 63G-4-403(1); and 78A-4-103(2)(a). They are reproduced in the Addendum.

STATEMENT OF THE CASE

The parties to this case are Cathie Hartley, who was the petitioner below and is the main Appellee in this Court, and Waste Management and their insurance carrier, Indemnity Insurance of North America (hereinafter collectively referred to as “Waste Management”). Waste Management was the respondent below and has filed this appeal in this Court, referring to themselves as Petitioners. Waste Management has also included the Utah Labor Commission as appellees.

On July 17th, 2006, Cathie Hartley was injured in an industrial accident. On August 16th, 2007, Cathie Hartley 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). Waste Management answered on September 21, 2007 (R. 13-19).

On June 5th, 2008, a hearing on Ms. Hartley’s Application for Hearing was held in front of Administrative Law Judge Lorrie Lima. Judge Lima requested a Medical Panel to provide opinions on several issues on the medical disputes in the case.

The medical panel filed a report on December 18th, 2008, which was subsequently admitted into evidence. (R. 69-76). The panel found medical causation for, among other things, Ms. Hartley's coccyx condition.

On February 26th, 2009 Judge Lima issued her Findings of Fact and Conclusions of Law and Order. Judge Lima adopted the Medical Panel's report and awarded benefits to Ms. Hartley. (R. 77-87).

Waste Management filed a Motion for Review of Judge Lima's decision on March 30, 2009 in the Labor Commission. (R. 88-91). The Labor Commission affirmed Judge Lima's decision on April 26th, 2011. (R. 93-96).

Waste Management filed its Petition for Review on May 25th, 2011 in the Utah Court of Appeals.

STATEMENT OF THE FACTS

- 1) On July 17th, 2006 Kathie Hartley suffered an industrial accident while on the job with her employer, Waste Management. (R. 78).
- 2) This accident arose while Ms. Hartley, who was employed as a truck driver, tried to move a garbage can into place. Id.

3) The garbage can, loaded down with cement, fell on top of Ms. Hartley, pinning her and causing several injuries, including to her coccyx or tailbone. Id.

4) After increasing pain and increasingly restricted amounts of light duty, she received more substantial medical care. (R. 79).

5) Ms. Hartley stopped working for Appellant Waste Management on August 26th, 2006, and was unemployed until October 24th, 2006, when she started work as an animal control officer with Davis County. Id.

6) On February 24th, 2007 Ms. Hartley was terminated from her employment with Davis County as she was unable to perform work duties such as lifting a dog by herself. (R. 79).

7) Ms. Hartley looked for work from February 24th 2007 until October 30th, 2007. On that date she began to work as an animal control officer for Brigham City, where she was assigned to work with another officer and therefore able to perform the duties required of her with the additional help. Id.

8) Throughout 2007, several physicians examined Ms. Hartley in connection with the aftermath of the accident. (R.80).

9) These doctors disagreed as to the necessity of further surgery on Ms. Hartley's coccyx region, with Dr. Bean recommending a coccygectomy, while Dr. Moress disagreed and said it was not necessary. Id.

10) The disagreement between these opinions meant that Judge Lorrie Lima of the Labor Commission referred the matter to a medical panel, chaired by Dr. Alan Goldman. (R. 81).

11) Dr. Goldman examined Ms. Hartley on November 21, 2008 and examined her medical history and notes. Id.

12) With respect to Ms. Hartley's coccyx condition, Dr. Goldman found that the condition was caused by the accident and that further therapies were needed to treat it. (R. 82, 74-75, 93).

13) Dr. Goldman specifically answered that the proposed coccygectomy was, in fact, a reasonable procedure to treat Ms. Hartley. (R. 74).

14) Dr. Goldman further recommended that prior to the coccygectomy a bone scan be performed as preparatory work. Id.

15) Recognizing that a coccygectomy is a somewhat unusual procedure, that may or may not actually relieve pain, Dr. Goldman recommended that further discussion take place between Ms. Hartley and her physician on the feasibility of proceeding with the surgery. (R. 75).

16) Dr. Goldman found that if Ms. Hartley underwent the coccygectomy she would be medically stable approximately six months after the surgery. If she elected to not undergo the surgery, Dr. Goldman stated that Ms. Hartley would have been medically stable on July 17th, 2007. (R. 74).

17) Judge Lima incorporated the bone scan recommendation of Dr. Goldman as part of the findings of fact, as well as the two separate dates of stabilization. (R. 82).

18) Judge Lima then found that since May 2007 Ms. Hartley had actually been seeking to have the coccygectomy surgery. (R. 84).

19) As part of her finding that Ms. Hartley was pursuing the coccygectomy surgery, Judge Lima also found that Waste Management had consistently resisted approving the surgery. Indeed, Judge Lima found that one of the principal reasons this entire case exists is because Waste Management is disputing the need for the coccygectomy. Id.

20) Judge Lima specifically found that “further therapies, including surgery, were reasonable to treat Petitioner’s [Ms. Hartley] industrial injury.” (R. 84).

21) Further, Judge Lima found that Ms. Hartley “was entitled to recommended medical care of her industrial coccyx condition including a coccygectomy.” (R. 85).

22) Judge Lima awarded temporary disability payments from February 24th, 2007 to October 29, 2007 (the date that Ms. Hartley became employed with Brigham City), as of the date of Judge Lima's order in February 2009. Id.

23) Judge Lima further ordered Waste Management to pay for reasonable medical expenses of Ms. Hartley, including a coccygectomy. Id.

24) The Labor Commission upon review concluded that the coccygectomy was necessary to treat Ms. Hartley, and concluded that when reading the medical panel's report as a whole, the medical panel endorsed the recommended coccygectomy as necessary treatment. (R. 94-95).

SUMMARY OF ARGUMENT

The proper standard of review in this case is twofold, an abuse of discretion standard as well as deference to the Labor Commissions findings of facts if based on any substantive evidence. The Labor Commission found that Ms. Hartley needed surgery to become medically stabilized. Waste Management has not marshaled the facts in favor of the Labor Commission's finding, therefore Waste Management's attack on the facts should be disregarded and the Labor Commission upheld.

In addition, Waste Management has not demonstrated that Ms. Hartley was medically stabilized on July 17th, 2007—the date that Waste Management contends stabilization was reached. Waste Management bases this off of one statement from the Medical Panel. However, the medical panel, the Administrative Law Judge, and the Labor Commission all found that stabilization was not reached if surgery was in the offing. Despite Waste Management's claim that the surgery has not happened yet, it is clear that the reason for this surgery not yet occurring is that Waste Management has refused to authorize such surgery and the preparatory steps to proceed. Thus Waste Management has not met their burden to show that there was no evidence of substance to find medical stabilization.

Since stabilization has not occurred yet, and Waste Management has denied and refused surgery, this Court should remand to the Labor Commission to determine whether additional awards of temporary total disability should be made after the date of October 2007.

ARGUMENT

I. The Appropriate Standard of Review Is That Of Deference to the Labor Commission's Findings of Facts

Waste Management states that there are two standards of review in this case: one a question of law and the other an abuse of discretion standard. Appellee Ms. Hartley does not dispute that this Court should set aside the Labor Commission's order if the Labor Commission's decision exceeds the bounds of rationality. This is a very deferential standard.

However, Waste Management is incorrect when they state that this Court should apply the non-deferential standard of correctness of law. At heart, this case turns on the question of whether Ms. Hartley was medically stabilized or not, which fundamentally is a question of fact. As Waste Management admits in their brief, the Administrative Law Judge "implicitly inferred that Respondent had, by generally pursuing [sic] the claim and medical treatment, sought to have the coccygectomy and, therefore, was not at MMI." MMI is Maximum Medical Improvement, generally referred to as medical stabilization.

Waste Management's brief is, essentially, an attack on that finding. Thus, this Court should apply the standard of review appropriate to appeals of factual decisions and not questions of law.

That standard of review is well established. In reviewing the factual findings of a governmental agency, this Court extends the agency the greatest degree of deference and reviews the record to determine whether there is evidence of any substance to support its findings. Griffith v. Industrial Commission, 754 P.2d 981 (Utah App.1988), at 983; UTAH CODE ANN. § 63G-4-403(4)(g); AE Clevite, Inc. v. Labor Comm'n, 2000 UT App 35, ¶ 7, 996 P.2d 1072 'Such findings will "not be overturned if based on substantial evidence, even if another conclusion from the evidence is permissible."' Whitewar v. Labor Comm'n, 973 P.2d 982, 984 (Utah App. 1998)(quoting Hurley v. Board of Review of Indus. Comm'n, 767 P.2d 524, 526-27 (Utah 1988)).

'Substantial evidence is that which a reasonable person "might accept as adequate to support a conclusion."' Stewart v. Board of Review, 831 P.2d 134, 137 (Utah App.1992) (internal citations omitted).

Thus, Waste Management must show that the Labor Commission and the Administrative Law Judge did not have adequate evidence to support

their finding that Ms. Hartley was not at medical stabilization, and that there is no way the Commission and ALJ could have concluded the way they did.

II. Waste Management Has Not Marshalled The Evidence as Required by This Court and Therefore Their Attack on the Commission's Facts should be Disregarded

In order to attack the findings of the Commission, the ‘Petitioner necessarily has the burden of marshaling “all of the evidence supporting the findings and show[ing] that despite the supporting facts, and in light of the conflicting or contradictory evidence, the findings are not supported by substantial evidence.”’ King v. Industrial Commission, 850 P.2d 1281, 1285 (Utah Ct.App.1993) (quoting Grace Drilling Co. v. Board of Review, 776 P.2d 63 at 68 (Utah App.1989). Whitewar discusses the burden resting on the appellant to marshal the facts, and states that when the appellant fails to do so, the Court assumes the record supports the Commission’s findings. Whitewar, 973 P.2d at 985. In Whitewar, the petitioner “merely state[d] those facts most favorable to his position and ignores the contrary evidence. This is not adequate.” Id.

Similarly, Waste Management has only recited the bare minimum of facts in this case, including parts of the medical panel’s opinion. Yet, other

facts that support Ms. Hartley in this case and relied upon by the Commission and Administrative Law Judge are ignored. These facts include the recommendation of the medical panel to have a bone scan before the recommended coccygectomy surgery (R. 76), adopted by the Administrative Law Judge as part of her Findings (R. 82, 84); that Waste Management had denied Ms. Hartley's request to approve the Coccygectomy surgery (R.84); and that Ms. Hartley from February 2007 to at least February 2009 (the date of the ALJ's order) and possibly beyond continued to seek approval for the surgery. In addition, the Labor Commission explicitly concluded "after reviewing the evidence in the record, the Commission concludes that the surgery is necessary to treat Ms. Hartley's work-related coccyx condition." R. 94. Additionally, the Labor Commission interpreted the medical panel as endorsing the surgery as "necessary treatment." R. 95.

None of the above facts were mentioned or addressed by Waste Management in their brief. They have only stated facts supporting their position and ignored the above contrary evidence. As the Whitewar Court stated, this is not adequate. Whitewar, 973 P.2d at 985. Thus, Waste Management has not marshaled all the relevant facts supporting the Commission and ALJ in this case. Therefore, their contention that Ms. Hartley was, in fact, stabilized as of July 17th 2007 should not be

considered. “We have shown no reluctance to affirm when the petitioner has failed to meet its marshaling burden.” *Id.*

III. The Evidence Clearly Shows That Ms. Hartley Has Never Been Medically Stabilized

A. Stabilization Requires Healing to Be Ended and No Material Improvement Possible

Even if Waste Management correctly marshaled the facts, they have not demonstrated that Ms. Hartley was, in fact, at maximum medical improvement on July 17th, 2007. Maximum medical improvement is also referred to as medical stabilization.

Stabilization is defined in Booms v. Rapp Constr. Co., 720 P.2d 1363 (Utah 1986). “Stabilization means that the period of healing has ended and the condition of the claimant will not materially improve.” *Id.* at 1366. “Stabilization is strictly a medical question that is appropriately decided on the basis of medical evidence.” *Id.* at 1367.

There appears to be two prongs, then, to decide stabilization. First, has the period of healing ended? Second, will the condition of the claimant materially improve? If the answer is yes to the first and no to the second, then, and only then, is stabilization achieved. In Rapp, the claimant was still

undergoing treatment, but the medical panel had concluded that such treatment would not improve the claimant's condition. Id. Therefore, stabilization was justified.

Conversely, in King v. Industrial Commission, 850 P.2d 1281 (Utah Ct.App.1993), the claimant was found to not have stabilized, even though there was a substantial (8 month) delay before a needed surgery was performed, due to an intervening incarceration. The King court found that the incarceration did not change the stabilization equation any, even though the natural processes of healing were still at work over the 8 months in question.

Clearly, in King, the claimant could materially improve after the needed surgery was performed, even though it appears that the claimant was relatively stable for the 8 months of delay before the surgery took place. Therefore, stabilization had not taken place.

Waste Management rests their entire case on one statement from the medical panel. As the Labor Commission found (and the Labor Commission's Order is the one being appealed from, not the medical panel's opinion), the medical panel "endorsed Dr. Bean's recommendation that Ms. Hartley undergo a coccygectomy to treat her coccyx injury. The panel added that if Ms. Hartley did not want to undergo surgery, her condition was

medically stable as of November 2007.” R. 94. Presumably the Labor Commission meant July 2007 instead of November.

Waste Management cites, almost as a mantra, the following language from the medical panel: “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 the date of her injury, that being on and/or about 07/17/07.” R. 75. Waste Management, however, fails to note that the medical panel then goes on and recommends the coccygectomy surgery as reasonable, and specifically recommends bone scans in preparation for that surgery. R.76.

It is hard to see how a recommendation of reasonable surgery to help the claimant heal (as the medical panel recommended) can at the same time support a finding that there was medical stabilization, as Waste Management claims.

The Labor Commission, as noted above, specifically “concludes that the surgery is necessary to treat Ms. Hartley’s work-related coccyx condition.” R. 94. Additionally, the Commission interpreted the medical panel as also stating the coccygectomy as necessary treatment. R. 95. This is quite clearly not a finding of stabilization with respect to Ms. Hartley injury.

Since the Labor Commission's order is what is being appealed from, it is clear that the finding in question is that Ms. Hartley was not stabilized. Waste Management is thus challenging a finding of fact by the Labor Commission. As noted above, the standard of review this Court should apply is one of great deference and whether there is anything of substance to the Commission's finding.

Is there adequate evidence to support the Commission's finding of non-stability, even if another conclusion could have been drawn? It is obvious that the answer is yes. The medical panel gave two options on stabilization: one path where if surgery was not going to happen, then stabilization had occurred; and the other where if surgery were being considered, then stabilization had not occurred. Either option was available, and the ALJ and the Labor Commission took the second. This is evidence of substance, certainly sufficient to conclude that stabilization had not occurred.

***B. Waste Management has Refused Approval for Necessary Surgery
And Therefore Is At Fault***

The ALJ also found that Waste Management has been denying the request to proceed with surgery. R. 84. Waste Management has ignored this finding. Thus, while Waste Management states in their brief that it is

unknown and unfair to allow Ms. Hartley to continue to accrue temporary total disability until such uncertain time as the surgery may take place, it is Waste Management themselves who are to blame for this uncertainty. Perhaps, if Waste Management had approved the surgery and related bone scan back in May of 2007, they would not now be in their current 'woe is me' position.

Instead, Waste Management seems to argue that they can deny and postpone approval for surgery, and escape the consequent payment of disability by claiming that Ms. Hartley has been stabilized. It is true that without the surgery, Ms. Hartley has not seen an improvement in her condition, much as any other injury that requires surgery will eventually stop healing until the surgery is performed. This does not mean, however, that the claimant's medical condition cannot improve, which is the second prong of the stabilization test. Clearly, the surgery is required before improvement can be seen.

Waste Management relies on Griffith v. Industrial Commission, 754 P.2d 981 (Utah App.1988), to support their claim of stabilization. While Waste Management actually only cites to Griffith without discussion, it is important to address it nevertheless. In that case, the claimant injured an ankle, and improved temporarily, but eventually required surgery. The ALJ

and Commission in that case found a period of temporary stabilization before surgery and denied temporary disability payments for that period of time.

The Utah Court of Appeals faced a similar reliance on Griffith in the King case. The King court distinguished Griffith based on the underlying fact that the ALJ and the Commission had found stabilization, and Griffith had not shown that such conclusion was arbitrary and capricious. King v. Industrial Commission, 850 P.2d 1281, 1296 (Utah Ct.App.1993).

In the case on appeal here, the conclusion of the ALJ and the Commission is exactly the opposite: Ms. Hartley was not at stabilization; the surgery was necessary and that the medical panel had recommended said surgery. It is therefore Waste Management's duty to show that such a conclusion is arbitrary and capricious. They have failed utterly to do so. Indeed, the gist of their argument appears to be that they do not want to pay, so they shouldn't have to. The following language from King seems appropriate here:

Counsel for the Workers' Compensation Fund also suggests we should adopt a rule that as long as circumstances which delay the claimant's surgery are beyond the control of the insurer, the insurer should not be required to pay temporary total disability

compensation. Such a rule, however, makes no sense. It would permit the insurer to terminate benefits whenever they deem the claimant's surgery to be sufficiently "delayed," resulting in subjective and arbitrary determinations.

King, 850 P.2d at 1296. The King court was unwilling to consider delays in the surgery that were not the fault of the insurer as reasons to cut off payments. In the present case, the delays are identified as being the fault of Waste Management! Yet Waste Management contends that delay that they themselves cause is reason alone to not pay benefits. Clearly, this is absurd.

Because the Labor Commission and the ALJ found that Ms. Hartley was not stabilized on July 17th, 2007 and will not be stabilized until six months after the coccygectomy surgery occurs, the burden is on Waste Management to show that such finding is arbitrary, without any evidence of substance that would allow the Commission to find in that manner. Waste Management has utterly failed to do this, and therefore this Court should uphold the finding of the Labor Commission that Ms. Hartley is entitled to temporary total disability payments after the date of July 17th, 2007.

IV. This Court Should Remand Back to the Labor Commission to Determine Ongoing Temporary Disability Payments.

A. Temporary Disability Payments Only Expire With Stabilization, Not on Employer's Whim.

Waste Management argues that the Labor Commission may have ordered temporary total disability payments to be made for time after October 29th, 2007. Waste Management argues that such an order, if made, should not be allowed to stand. Waste Management cites no authority as to why such an order should not be allowed.

The Administrative Law Judge ordered temporary total disability payments for several periods of time, with the relevant one terminating on October 29th of 2007. The reason such temporary disability was terminated was due to Ms. Hartley managing to find work that she could do, even with her disability. Ms. Hartley had managed to find such work while under her disability before, from October of 2006 to February of 2007, and the ALJ had not granted temporary total disability for that period of time. Temporary benefits had resumed in February 2007 and the ALJ granted them until October 2007, for the period of time in which Ms. Hartley did not have work.

Significantly, Waste Management does not contest these benefits on any other ground other than that after July 17th, 2007, Waste Management claims stabilization occurred. Now, Waste Management claims that the October 29th date is the maximum cut-off date for any and all temporary total disability payments for any reason. Waste Management cites no legal authority as to why this may be, other than that Waste Management does not want to pay said benefits.

Temporary total disability benefits, however, do not come with any other expiration date except that of stabilization. This Court, in King v. Industrial Commission, stated, “such benefits must be paid until the claimant’s medical condition has stabilized.” King, 850 P.2d at 1296. The Rapp court states that: “temporary total disability benefits are to continue until the Commission determines that the disability fits into another disability classification or until benefits have been paid for the statutory maximum of 312 weeks.” Booms v. Rapp Constr. Co., 720 P.2d 1363, 1366 (Utah 1986).

These cases, along with others, state that temporary total disability payments are to continue until medical stabilization. Even in Griffith, temporary disability was paused for a time and then resumed until healing was complete.

B. This Court Should Favor Coverage of Employee's Benefits

Liberally

It has long been held that it is the court's "duty 'to construe the Workers' Compensation Act liberally and in favor of employee coverage when statutory terms reasonably admit of such a construction.'" Stampin' Up, Inc. v. Labor Commission, 2011 UT App 147, 256 P.3d 250 ¶11 (citing Heaton v. Second Injury Fund, 796 P.2d 676, 679 (Utah 1990)); see also Chandler v. Industrial Commission, 184 P. 1020 (Utah 1919).

"Moreover, we resolve '[a]ny doubt respecting the right of compensation in favor of the injured employee.'" AE Clevite, Inc. v. Labor Comm'n, 2000 UT App 35, ¶ 7, 996 P.2d 1072 (citations omitted).

This duty would therefore lean towards remanding to the Labor Commission to determine how much, if any, additional temporary total disability benefits should be awarded to Ms. Hartley. After all, as even Waste Management admits, the Commission and the ALJ found that Ms. Hartley was not medically stabilized and therefore is entitled to those benefits until such stabilization takes place.

Further, Waste Management has only themselves to blame for any large amount of disability awarded, if any. It is quite clear that after the

surgery, it would take six months of healing and then Ms. Hartley would be stabilized, according to the medical panel's report. R.75. Everyone, including Waste Management, acknowledges this time. Yet it has been much longer than six months that Waste Management has denied Ms. Hartley the surgery or bone scans necessary for the surgery to even be a viable option. R. 84. If Waste Management is forced to pay temporary total disability benefits for a lengthy period of time, they can look in the mirror to see who is at fault.

In the present case, the only reason temporary disability payments were ended as of October 2007 was because Ms. Hartley found employment as of that date, and at the time of the ALJ's order in February 2009 was still employed. But it is now 2012, medical stabilization has not yet occurred as the Labor Commission pointed out and as was discussed supra, and Ms. Hartley may, in fact, be eligible for more temporary disability payments depending on her employment situation in the last three years.

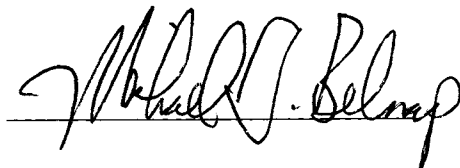
Since there is no evidence in the record about the current situation, Ms. Hartley asks this Court to remand back to the Labor Commission to clarify and take additional evidence to see if any more temporary total disability payments should be authorized, for specific time frames and ongoing, until surgery takes place.

CONCLUSION AND PRAYER FOR RELIEF

WHEREFORE, since Waste Management is attacking a factual finding of the Labor Commission, this Court should uphold the findings of the Commission unless Waste Management shows that those findings are not based on substantive evidence. Waste Management has failed to marshal the facts in support of the Commission, and therefore Waste Management's attack on the findings should be disregarded and this Court should uphold the finding that Ms. Hartley is not at medical stability.

Further, this Court should remand back to the Labor Commission for a determination of any additional temporary total disability payments due in the last few years and ongoing, as Ms. Hartley still is not medically stabilized, due to Waste Management's refusal to authorize the necessary surgery.

DATED This 11th day of June, 2012.



Michael G. Belnap (#03635)
Attorney for
Respondent Cathie Hartley

FILED
UTAH APPELLATE COURTS
JUN 12 2012

CERTIFICATE OF SERVICE

I certify that a copy of the BRIEF OF APPELLEE CATHIE HARTLEY, Appeal No. 20110450-CA, was served upon the parties listed below by personal hand delivery or by mailing it by first class mail, postage prepaid, to the following address(es):

Utah Court of Appeals
Appellate Clerks' Office
450 South State, Fifth Floor
PO BOX 140230
Salt Lake City, UT 84114-023

Sent Via:

_____ Mail (Postage Prepaid)
 X Personal Hand Delivery

Utah Labor Commission
Adjudication Division
PO Box 146615
Salt Lake City, UT 84114-6615

_____ Mail (Postage Prepaid)
 X Personal Hand Delivery

Brad J. Miller
Thomas Pollart & Miller, LLC
5600 S. Quebec St. Ste 220A
Greenwood Village, CO 80111

 X Mail (Postage Prepaid)
_____ Personal Hand Delivery

DATED This 12th day of June, 2012.

Stacy Olsen

ADDENDUM

I. Reproductions of Court Decisions Below

A. Excerpts from Administrative Law Judge's Finding's of Fact, Conclusions of Law, and Order

2007. Likewise, the medical panel opined that Petitioner's cervical and thoracic spine complaints were medically stable on February 17, 2007.

The medical panel determined that the medical care Petitioner received was necessary due to the industrial accident except for treatment specifically addressing Petitioner's bilateral knees.

C. Coccyx Condition.

The medical panel opined that there was a medical nexus between Petitioner's coccyx and the industrial accident. The medical panel further opined that Petitioner sustained a coccygeal fracture and other soft-tissue injuries to the supporting ligaments and tendons of the lower lumbosacral spine.

The medical panel determined that further therapies were reasonable to treat Petitioner's industrial injury. The medical panel concurred with Drs. Moress and Bean that coccygectomy was a rare procedure but it did have a place in individuals with irretractable and isolated tailbone pain. The medical panel recommended that, before the procedure, Petitioner have a bone scan limited to the pelvic and coccygeal areas to better understand the area of the prior fracture and to ensure that no other unusual anatomic dysfunctions were ongoing. The medical panel commented that Petitioner has had more than two years of high discomfort level in her coccygeal region which did not respond to prior medication. The medical panel recommended that Petitioner consult with Dr. Bean or, another specialist, to discuss the coccygectomy procedure, risks, possible outcomes and the fact that the procedure may not reduce her discomfort.

The medical panel opined that, if Petitioner underwent a coccygectomy, she would not be medically stable until approximately six months after surgery. In the alternative, if Petitioner elected to not have a coccygectomy, she was medically stable of her industrial coccygeal and lower lumbosacral structures on July 17, 2007.

PRINCIPLES OF LAW

1. Utah Code Ann. §34A-2-401 requires compensation be paid only for those injuries arising out of and in the course of employment.
2. Utah Code Ann. §34A-2-418(1) states in relevant part "...the employer or the insurance carrier shall pay reasonable sums for medical...services...necessary to treat the injured employee."
3. Temporary total and partial disability are payable until the healing period has ended and the petitioner's condition has stabilized. "Stabilization means that the period of healing has ended and the condition of the claimant will not materially improve. Once healing has ended, the permanent nature of the claimant's disability can be assessed and benefits awarded accordingly." *Booms v. Rapp Construction Co.*, 720 P.2d 1363, 1366 (Utah 1986).

of temporary partial disability compensation in the amount of \$2,113.19 covering this period.
 $(\$659.49 \text{ (AWW)} \times 5.85 \text{ weeks} = \$3,858.01 - \$688.09 \text{ (wages)} = \$3,169.42 \div 5.85 \text{ weeks} =$
 $\$541.86 \times .662/3 = \$361.23 \text{ per week TPD} \times 5.85 \text{ weeks} = \$2,113.19).$

Petitioner did not work after her termination by Waste Management on August 26, 2006, until she was hired by Davis County. She was entitled to temporary total disability compensation from August 27, 2006, through October 23, 2006, the day before she began employment at Davis County, in the amount of \$4,769.28 (8.28 weeks x \$576.00).

Petitioner did not work after her termination by Davis County on February 24, 2007, until she was hired by Brigham City on October 30, 2007. The medical panel opined that Petitioner's industrial coccyx injury was medically stable on June 17, 2007, if Petitioner did not wish to undergo a coccygectomy. However, since May 2007, Petitioner has desired the recommended surgery in spite of Respondents' denial of her request to approve the surgery. Moreover, one of the motivating factors for Petitioner's Application for Hearing in August 2008, was to resolve the dispute regarding the recommended surgery. Finally, following Waste Management's termination of Petitioner for not being able to perform her work duties due to her industrial injury, Petitioner pursued her quest for work on her own initiative. She found work at Davis County but was subsequently terminated once again for not being able to perform her work duties due to her industrial injury. To Petitioner's credit, she found similar work with Brigham City but fortunately was afforded assistance from a co-worker assigned to work with her. During this time period, from February 2007, to the present, Petitioner's continued efforts to receive approval for the recommended medical care demonstrates her wish to undergo the recommended surgery. Accordingly, based on the medical panel's opinion that Petitioner's industrial injury was not medically stable if she wanted to have surgery, Petitioner was entitled to temporary total disability compensation from February 24, 2007, to October 29, 2007, the day before she began employment at Brigham City, in the amount of \$20,390.40 (35.4 weeks X \$576.00).

3. Medical Care.

The preponderance of evidence, based on the medical panel, demonstrates that Petitioner's work-related problems, bilateral ankle/feet, great right toe and cervical and thoracic spine complaints, were medically stable on February 17, 2007. The medical panel opined that the medical care of Petitioner's work-related problems was necessary due to the industrial accident.

The preponderance of evidence, based on the medical panel and Dr. Bean, demonstrates that further therapies, including surgery, were reasonable to treat Petitioner's industrial injury. The medical panel recommended that, before surgery, Petitioner have a bone scan limited to the pelvic and coccygeal areas to better understand the area of the prior fracture and to ensure that no other unusual anatomic dysfunctions were ongoing. The medical panel commented that Petitioner has had more than two years of high discomfort level in her coccygeal region which did not respond to prior medication. The medical panel recommended that Petitioner consult

NOTICE OF APPEAL RIGHTS

A party aggrieved by the decision may file a Motion for Review with the Adjudication Division of the Utah Labor Commission. The Motion for Review must set forth the specific basis for review and must be received by the Commission within 30 days from the date this decision is signed. Other parties may then submit their responses to the Motion for Review within 20 days of the date of the Motion for Review.

Any party may request that the Appeals Board of the Utah Labor Commission conduct the foregoing review. Such request must be included in the party's Motion for Review or its response. If none of the parties specifically request review by the Appeals Board, the review will be conducted by the Utah Labor Commission.

B. Labor Commission Order Affirming ALJ's Decision

UTAH LABOR COMMISSION	
CATHIE HARTLEY, Petitioner, vs. WASTE MANAGEMENT and INDEMNITY INSURANCE CO. OF NORTH AMERICA, Respondents.	ORDER AFFIRMING ALJ'S DECISION Case No. 07-0705

Waste Management and its insurance carrier, Indemnity Insurance Co. of North America, (collectively referred to as "Waste Management") ask the Utah Labor Commission to review Administrative Law Judge Lima's award of benefits to Cathie Hartley under the Utah Workers' Compensation Act, Title 34A, Chapter 2, Utah Code Annotated.

The Labor Commission exercises jurisdiction over this motion for review pursuant to §63G-4-301 of the Utah Administrative Procedures Act and §34A-2-801(3) of the Utah Workers' Compensation Act.

BACKGROUND AND ISSUES PRESENTED

Ms. Hartley claims workers' compensation benefits for injuries to her spine, coccyx, feet and right knee that she sustained from an accident on July 17, 2006, while working for Waste Management. Waste Management admitted that Ms. Hartley suffered a cervical-spine injury and paid her temporary disability compensation through November 8, 2006, but denied liability for the remainder of her claim. Judge Lima referred the medical aspects of Ms. Hartley's claim to an impartial medical panel.

The medical panel determined that Ms. Hartley's right-knee problems were not due to the accident, but her spine, coccyx and foot injuries were medically caused by the accident. The panel concluded that Ms. Hartley reached medical stability for her spine and foot problems as of February 2007. Judge Lima asked the panel if surgery was reasonable to treat Ms. Hartley's coccyx condition, and the panel concluded that it was reasonable. The panel added that if Ms. Hartley did not desire surgery, her injury was medically stable as of July 2007. Ms. Hartley chose to have surgery to treat her coccyx injury.

Judge Lima adopted the medical panel's report and awarded benefits to Ms. Hartley. Judge Lima ordered Waste Management to pay for the surgery and medical care necessary to treat Ms. Hartley's coccyx condition in addition to temporary disability compensation. Waste Management challenges Judge Lima's award of medical benefits beyond July 2007, by arguing that the award was

**ORDER AFFIRMING ALJ'S DECISION
CATHIE HARTLEY
PAGE 2 OF 4**

premature and not based on the evidence.

FINDINGS OF FACT

The Commission adopts Judge Lima's findings of fact, which are summarized as follows. On July 17, 2006, Ms. Hartley was working for Waste Management maneuvering a garbage can when it fell and knocked her over, pinning her to the ground. Ms. Hartley sought treatment from Nowcare complaining of pain in her feet, tailbone and ribs. Ms. Hartley was referred to Dr. Bean, who diagnosed her with a fractured coccyx along with a lumbar disc injury and cervical and thoracic spine injuries resulting from the accident. Dr. Bean also assessed Ms. Hartley with a possible medial meniscus injury in her right-knee caused by the work accident. Dr. Bean eventually recommended a coccygectomy to treat the ongoing pain in Ms. Hartley's tailbone.

Waste Management's medical expert, Dr. Moress, examined Ms. Hartley and determined that the accident caused her to suffer diffuse cervical, thoracic and lumbar spine pain as well as coccygeal pain without evidence of fracture. Dr. Moress opined that Ms. Hartley's right-knee condition was not related to the work accident and that her coccyx injury did not require surgery. Dr. Moress concluded that Ms. Hartley was medically stable from her work-related injuries as of November 8, 2006.

Based on the conflicting opinions between the parties' medical experts, Judge Lima referred the medical aspects of Ms. Hartley's claim to an impartial medical panel. The panel examined Ms. Hartley and reviewed her relevant medical history before determining that her spine, foot and coccyx injuries were medically caused by the work accident, but her right-knee problems were unrelated to the accident. The panel found that the medical treatment Ms. Hartley had received was necessary to treat her spine and foot injuries, and that she reached medical stability from such injuries in February 2007. The panel also endorsed Dr. Bean's recommendation that Ms. Hartley undergo a coccygectomy to treat her coccyx injury. The panel added that if Ms. Hartley did not want to undergo surgery, her condition was medically stable as of November 2007.

DISCUSSION AND CONCLUSION OF LAW

Waste Management contends that the award of a coccygectomy and related medical care to Ms. Hartley is improper and premature because she has not undergone the surgery. Waste Management also argues that such an award is not based on the evidence. However, after reviewing the evidence in the record, the Commission concludes that the surgery is necessary to treat Ms. Hartley's work-related coccyx condition.

Although the medical panel opined that surgery was a reasonable "option" to treat Ms. Hartley's work-related coccyx injury, the panel also approved of Dr. Bean's recommendation that Ms. Hartley undergo a coccygectomy to treat her work-related coccyx injury. Taken in conjunction with Dr. Bean's recommendation of surgery, the Commission interprets the medical panel's opinion

**ORDER AFFIRMING ALJ'S DECISION
CATHIE HARTLEY
PAGE 3 OF 4**

as endorsing the recommended coccygectomy as necessary treatment for Ms. Hartley's work-related coccyx injury. The panel's opinion is persuasive because it is thorough and well-reasoned and because the panel is impartial in this matter and has the benefit of reviewing Ms. Hartley's relevant medical history. The Commission therefore agrees with Judge Lima's finding that Ms. Hartley is entitled to the cost of the coccygectomy, as well as recommended medical treatment and temporary disability compensation until she reaches medical stability after the surgery.

ORDER

The Commission affirms Judge Lima's decision of February 26, 2009, in this matter. It is so ordered.

Dated this 26th day of April, 2011.



Sherrie Hayashi
Utah Labor Commissioner

NOTICE OF APPEAL RIGHTS

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

II. Reproductions of parts of the Record of Importance-Medical panel

Report Excerpts

Re: Cathie Hartley
November 21, 2008
Page Six

2. Has Ms. Hartley's industrial medical condition stabilized? If so, when?

Response: As the Medical Panel in its answer to question #1, cannot demonstrate a causal connection between Ms. Hartley's right knee condition and the industrial accident of 07-17-06, concern will be focused on Ms. Hartley's coccyx, right great toe, and bilateral ankle/feet complaints. As the lower extremity concerns [ankles and right great toe] are thought to be musculoskeletal in nature, it is the Panel's opinion that after an approximate 6 month window of time, on and/or about 02-17-07, Ms. Hartley's bilateral ankles, right great toe, cervical and thoracic spine complaints would have stabilized.

Although I believe [after personally reviewing her coccyx x-rays] that Ms. Hartley did sustain a coccygeal fracture and other soft-tissue injuries to the supporting ligaments and tendons of the lower lumbosacral spine, as noted in my answer to question #4 below, further therapies are considered reasonable. As the consideration of a surgical procedure has been raised, however, if 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 in reference to her coccygeal and lower lumbosacral structures one year after her date of injury, that being on and/or about 07-17-07.

3. Has the medical care that Ms. Hartley received have been necessary due to the industrial accident on 07-17-06?

Response: Yes, absent therapies specifically addressing Ms. Hartley's bilateral knees.

4. Is the recommended coccygectomy to treat Ms. Hartley's industrial injury to her coccyx reasonable?

Response: Yes.

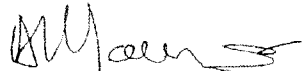
The Medical Panel, of interest, agrees with the thoughts of both Dr. Gerald Moress [02-18-08] and Dr. Charles Bean [05-05-08] that coccygectomy is a rare procedure but it does have a place in individuals with intractable and isolated

Re: Cathie Hartley
November 21, 2008
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coccygodynia [tailbone pain]. Although Dr. Moress has pointed out that Ms. Hartley's examination suggests pain beyond the actual anatomic site of the coccyx, many patients with coccygodynia note discomfort to the various connecting fascial planes [ligaments and tendons] which can extend outward from the area of initial discomfort. Frequently, prior to the procedure, patients have responded positively to various sacrococcygeal ligament injections, however Ms. Hartley does not want such injections, and apparently did have some type of reaction to her prior steroid usage. I would suggest, however, that a bone scan limited to the pelvic and coccygeal areas be undertaken for a better understanding of the area of the prior fracture and to ensure that no other unusual anatomic dysfunctions, such as infections or even malignancies, are not ongoing. Given Ms. Hartley's almost 2 ½ years of high levels of discomfort emanating from her coccygeal region, and with no response to her prior medication usage, and with her understanding all of the possible side effects/complications of a possible surgery and that the procedure may not, in fact, reduce her discomfort, I believe she would be a candidate and defer to the expertise of Dr. Bean or Ms. Hartley's other designated physician to discuss the coccygectomy procedure, risks, and possible outcomes.

I thank you very much for allowing me the opportunity to have examined Cathie Hartley. Please be advised that the entire history, physical examination, review of the *Medical Exhibit*, legal documents, the history, physical examination, dictation, and editing of this report was done solely by me. Please also be advised that I have never attempted to achieve a doctor/patient relationship with Cathie Hartley.

Sincerely,



ALAN J. GOLDMAN, M.D.
Diplomate, American Board of Neurology & Psychiatry
Medical Panel Chairperson

AJG/dh

III. Reproduction of Determinative Rules, Statutes or Constitutional

Provisions.

34A-1-303(6). Review of administrative decision.

(6) If an order is appealed to the court of appeals after the party appealing the order has exhausted all administrative appeals, the court of appeals has jurisdiction to:

(a) review, reverse, remand, or annul any order of the commissioner or Appeals Board; or

(b) suspend or delay the operation or execution of the order of the

commissioner or Appeals Board being appealed.

63G-4-403. 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, 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.

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) (i) a final order or decree resulting from:
 - (A) a formal adjudicative proceeding of a state agency; or
 - (B) a permit review adjudicative proceeding, as defined in Section **19-1-301.5**;

or

(ii) an appeal from the district court review of an informal adjudicative proceeding of an agency other than the following:

- (A) the Public Service Commission;
- (B) the State Tax Commission;
- (C) the School and Institutional Trust Lands Board of Trustees;
- (D) the Division of Forestry, Fire, and State Lands, for an action reviewed by the executive director of the Department of Natural Resources;
- (E) the Board of Oil, Gas, and Mining; or
- (F) the state engineer;