

2011

Waste Management and Indemnity Insurance of North America v. Cathie Hartley and Utah Labor Commission: Reply Brief of Appellants

Utah Court of Appeals

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Michael G Belnap; For respondent Cathie Hartley. Alan Hennebold; Utah Labor Commission; For respondent Utah Labor Commission.

Brad J Miller; Thomas Pollart and Miller; For petitioners Waste Management and Indemnity Insurance of North America.

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IN THE UTAH COURT OF APPEALS

WASTE MANAGEMENT and)	REPLY BRIEF OF
INDEMNITY INSURANCE OF)	APPELLANTS
NORTH AMERICA,)	
Appellants/Petitioners,)	
vs.)	
)	Appeal No. 20110450-CA
CATHIE HARTLEY and,)	Agency Decision No. 07-0705
UTAH LABOR COMMISSION,)	
Appelles/Respondents)	
)	

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ARGUMENT

I. 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).

The Administrative Law Judge committed reversible clear error when she prematurely ordered benefits when Respondent had not yet undergone the surgery. Respondent's condition was medically stable as of July 17, 2007. This date of stabilization is supported by the ALJ's order and the medical panel report. 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 as a result of her delay in pursuing the surgery. Such a determination by this Court would allow Respondent to wait and delay treatment solely to gain additional temporary disability benefits. This is not a termination of benefits on the whim of the employer as suggested by Respondent. Petitioners are simply requesting that benefits not be ordered paid until Respondent pursues surgery and is no longer medically stable.

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. 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.

After referring this matter to a medical panel, 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. However, this is not the case. Respondent has delayed in proceeding with the surgery despite it being authorized by petitioners. Based on this incorrect inference, the ALJ found that Respondent was 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 and, therefore, improper. 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.

The ALJ's error in ordering premature benefits 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 an 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 respondent 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. Further, there is no basis in law for the Labor Commission's potential expansion of benefits. If the Labor Commission believed that additional benefits should have been awarded, the matter should have been remanded to the ALJ.

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, the matter either needs to be remanded or ongoing temporary disability benefits should not be awarded until Respondent proceeds with 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 32 day of July, 2012.

THOMAS POLLART & MILLER LLC

BRAD J. MILLER

Attorneys for Petitioners Waste
Mangement and Idemnity Insurance
of North America

CERTIFICATE OF SERVICE

I certify that a copy of the attached **PETITIONERS' REPLY 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):

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

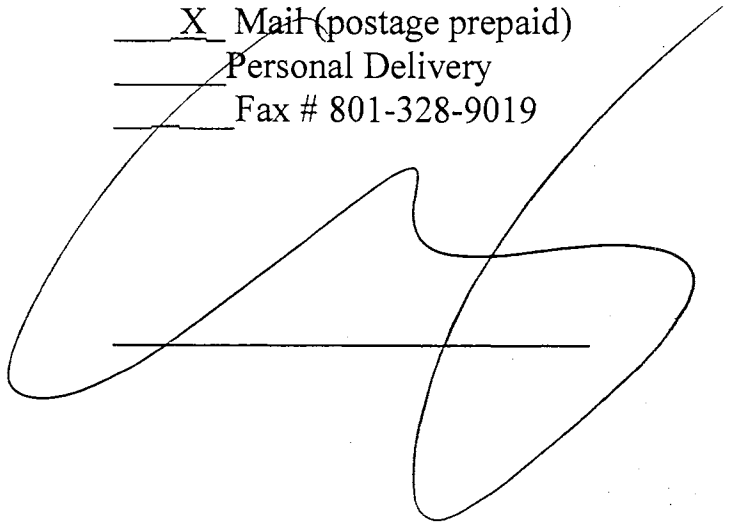
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☐ Personal Delivery
☐ Fax # 801-578-3999

Michael Belnap, Esq.
2610 Washington Blvd.
Ogden, Utah 84401

Sent Via:
☒ Mail (postage prepaid)
☐ Personal Delivery
☐ Fax # 801-399-4033

Utah Labor Commission
Adjudication Division
P.O. Box 146615
Salt Lake City, Utah 84114-6615

Sent Via:
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