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Lana Hall v. Albertson's Incorporated and Labor Commission of Utah : Brief of Appellant

Utah Court of Appeals

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Ford G. Scalley; Scalley & Reading; Alan Hennebold; Labor Commission of Utah.

Aaron J. Prisbrey; Attorney at law.

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IN THE UTAH COURT OF APPEALS

LANA HALL,

Petitioner/Appellant,

vs.

ALBERTSON'S,
INCORPORATED and LABOR
COMMISSION OF UTAH,

Respondents/Appellee.

Case No. 200010107-CA

Priority No. 7

BRIEF OF APPELLANT

Mr. Ford G. Scalley
Scalley & Reading
261 East 300 South Suite 200
Salt Lake City UT 84111

Mr. Aaron J. Prisbrey
Attorney at Law
1071 East 100 South, Bldg. D, Suite 3
St. George, UT 84770

Mr. Alan Hennebold
Labor Commission of Utah
160 East 300 South, 3rd Floor
P.O. Box 146615
Salt Lake City, UT 84114-6615

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COURT OF APPEALS

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Case No. 200010107-CA

Priority No. 7

BRIEF OF APPELLANT

APPELLATE JURISDICTION

This appellate review proceeding arises from the Utah Labor Commission's denial of workers compensation medical and disability benefits to Lana Hall. The Utah Court of Appeals has jurisdiction over this proceeding pursuant to UTAH CODE ANN. §78-2a-3(2)(a) and UTAH CODE ANN. §34A-2-801(8).

**STATEMENT OF ISSUES PRESENTED, STANDARD OF APPELLATE
REVIEW AND PRESERVATION OF THE ISSUES IN THE ADMINISTRATIVE
AGENCY**

Issue No. 1: Did the Administrative Law Judge rely on the medical panel for a determination of legal issues which were outside of the medical panel's area of expertise?

Standard of Appellate Review: An agency's application of the law to the facts of the case is reviewed for correctness unless the agency is given a measure of discretion. See UTAH CODE ANN. § 63-46b-16(4)(d) (1997); *Drake v. Industrial Comm'n*, 939 P. 2d 177, 181 (Utah 1997).

Preservation of the Issue in the Administrative Agency: This issue was preserved in Petitioner's Motion for Review filed with the Labor Commission. (R. at 528-31, Addendum 4).

Issue No. 2: Was the Labor Commission's reliance on the medical panel report appropriate where the report did not meet any foundational requirements pursuant to Utah law?

Standard of Appellate Review: An agency's application of the law to the facts of the case is reviewed for correctness unless the agency is given a measure of discretion. See UTAH CODE ANN. § 63-46b-16(4)(d) (1997); *Drake v. Industrial Comm'n*, 939 P. 2d 177, 181 (Utah 1997).

Preservation of the Issue in the Administrative Agency: This issue was preserved in Petitioner's Motion for Review. (R. at 531-2, Addendum 4).

STATEMENT OF THE CASE

This is an appeal from the Utah Labor Commission's denial of Hall's claim for medical and disability benefits resulting from a work accident which occurred on

November 12, 1997, while she was working at Albertson's grocery store in St. George, Utah.

Hall filed an Application for Hearing with the Labor Commission on August 17, 1998, seeking payment of disability and medical benefits. This matter was tried before Administrative Law Judge, Kathleen H. Switzer, on April 23, 1999, in St. George, Utah. Judge Switzer referred this matter to a medical panel of the Labor Commission on October 14, 1998, for assistance relative to the medical aspects of the case. A medical panel of the Labor Commission convened on January 17, 2000, and issued a report on February 15, 2000, reaching conclusions unfavorable to Hall relative to all aspects of Hall's claim. Hall objected to the panel report and the ALJ sent those objections back to the medical panel. The medical panel responded indicating that those objections did not change its original conclusions.

On September 14, 2000, the ALJ adopted and incorporated by reference the medical panel report and entered an order denying Hall's claim for medical and disability benefits. On October 13, 2000, Hall filed a Motion for Review with the Utah Labor Commission challenging the determination of the medical panel and of the ALJ in adopting the panel report. On January 8, 2001, the Utah Labor Commission denied Hall's Motion for Review. On February 5, 2001, Hall filed a Petition for Review of Agency Action with this Court seeking review of the January 8, 2001, order of the Utah Labor Commission denying Hall's Motion for Review.

STATEMENT OF FACTS

1. On August 17, 1998, Hall filed an Application for Hearing seeking the payment of medical expenses, recommended medical care, temporary total compensation, and permanent partial disability compensation at stabilization for injuries she sustained to her low back while employed by Albertson's on November 12, 1997, while lifting a tray of meat. (R. at 2).

2. Albertson's answered Hall's Application for Hearing and admitted that Hall sustained injury to her low back arising out of and in the course of her employment with Albertson's on November 12, 1997, while lifting a tray of meat. (R. at 25).

3. Albertson's denied Hall's claims for temporary total disability benefits, medical benefits and permanent partial disability in excess of 3% based upon the insurance evaluation of Dr. Jeff B. Chung. (R. at 25-6).

4. This matter went to hearing before Administrative Law Judge, Kathleen H. Switzer, in St. George, Utah on April 23, 1999. (R. at 167, Addendum 1).

5. At the hearing, Judge Switzer entered the following preliminary findings of fact:

- A. Ms. Hall's wages varied depending upon her actual work assignment. She earned \$7.46 an hour while working at the meat counter and \$6.00 an hour while working at the salad bar. Exhs. R-2, P-4. Post-hearing, Albertsons submitted some additional wage information and both parties filed additional arguments related to Ms. Hall's wages. However, neither party could verify when Ms. Hall began earning \$7.46 an hour at the meat counter and nor the hours Ms. Hall was scheduled to work the week of her accident. (R. at 168, Addendum 1).

- B. The pay period immediately prior to her accident, Ms. Hall worked 12 hours at the salad bar ($12 \times \$6.00 = \72.00) and 28 hours in the meat department ($28 \times \$7.46 = \168.00); Ms. Hall also earned \$10.60 in premium pay, with gross weekly earnings totaling \$250.60. (R. at 168, Addendum 1).
- C. For purposes of calculating workers compensation benefits, Ms. Hall is married with no children under eighteen years old. (R. at 168, Addendum 1).
- D. It's undisputed, on November 12, 1997, Ms. Hall injured her back at work. Ms. Hall testified: She was working at the meat counter. A lady customer wanted a roast located on a tray at the front of the case. The tray measured about 2 ½ feet by 3 feet in size and rested about 30 to 36 inches above floor level. Ms. Hall reached into the case, twisting sideways to reach the tray, putting one hand underneath the tray to lift. A meat sale was in progress and, so, the roasts were a little heavier than usual. Ms. Hall estimated the tray held about 12 or 18 roasts, about 6 to 8 pounds each, for a total weight of 100 pounds or more. Ms. Hall had never lifted anything that heavy before. (R. at 168-9, Addendum 1).
- E. Ms. Hall further testified: She felt a sudden pain in her lower back, a sharp burning, electric shock kind of pain. The customer asked if she was alright. She pulled out the tray and finished waiting on the customer despite her pain. Then she started crying and reported her injury. She thought she was going to pass out. (R. at 169, Addendum 1).
- F. Medical opinion regarding these issues is mixed:
- On May 12, 1998, Dr. Venger released Ms. Hall to light duty, 2 to 4 hours per day with a 10 pound weight limit and no bending or stooping on May 12, 1998. Exh. R-1 at 202. However, Albertsons did not have light duty available. (R. at 169, Addendum 1).
- G. On June 16, 1998, Jeff B. Chung performed an insurance medical evaluation (IME). Dr. Chung did not believe Ms. Hall required any long-term permanent work restrictions. Dr. Chung also opined Ms. Hall was at maximal medical improvement (MMI) and gave her a three percent (3%) permanent partial impairment rating. Exh. R-1 at 284-85. Based on Dr. Chung's opinion, Albertsons offered Ms. Hall part-time work at their salad bar. The "job function . . . entail[ed] lifting watermelons [sic] and full cases

of cantaloupes and . . . long periods of standing.” *See Offer of Employment Letter.* (R. at 169-70, Addendum 1).

- H. Meanwhile, on June 16, 1998, the same day as Dr. Chung’s report, Dr. Green began plans to surgically decompress Ms. Hall’s back because of her severe and incapacitating pain. Exh. R-1 at 413. When Ms. hall did not return to work, Albertsons stopped paying weekly compensation benefits. (R. at 170, Addendum 1).
- I. Post-surgery, on February 9, 1999, Dr. Green released Ms. Hall to work with sixty-day restrictions. She could not lift more than 10 pounds, could not run or jump, and was to avoid long periods of sitting, or any bending, twisting or strenuous activity that produced back pain. Exh. R-1 at 404. Dr. Green declined to given an impairment rating. (R. at 170, Addendum 1).
- J. On April 12, 1999, Dr. Knoebel rated Ms. Hall as having a sixteen percent (16%) permanent partial impairment rating. Exh. R-1 at 001-011. She hasn’t returned to work. (R. at 170, Addendum 1).
- K. Ms. Hall testified: Ms. Hall has had some previous orthopedic problems. In 1976, she sustained mid-back injury. In 1980, she injured her knees, ankle and coccyx in a fall. In December 1990, she developed muscle spasms in her neck and back after driving “bumper cars” and received muscle relaxants. She has had chiropractic treatment for her neck but not her back. (R. at 170, Addendum 1).
- L. However, prior to her November 1997 accident, she had no problems with her back. She was able to work, do housework and other normal daily activities. Ms. Hall could lift cases on honeydew, cantaloupes, and watermelons weighing 40 to 50 pounds at Albertsons. Exh. R-1 at 20. Following her injury at Albertsons, she developed unrelenting back pain. She walked with a cane about one month before Dr. Chung’s IME. (R. at 170, Addendum).
- M. Mr. Hall proffered the following: During 15 years of marriage, he noticed no significant problems with Ms. Hall’s back or spine. He was present at the “bumper car incident” but didn’t notice any significant problems. Before her injury at Albertsons, she could go to work, perform her household chores but, after the injury, she couldn’t do those things. She got immediate relief from Dr. Green’s surgery but, since the car door incident, she has deteriorated somewhat.” (R. at 170, Addendum 1).

6. The ALJ determined there was a conflict in the medical evidence and ordered that a medical panel be convened to consider the medical aspects of the case. (R. at 171, Addendum 1).

7. On November 18, 1999, the ALJ referred this matter to Dr. Hylen and appointed him as medical panel chairperson on behalf of the Labor Commission and requested that he meet with Hall to determine the following four issues:

- A. “Is Ms. Hall’s condition medically stable, and if so, at what time following her injury did Ms. Hall reach medical stability? Medical stability means that Ms. Hall’s condition is ‘unlikely to change substantially, and by no more than 3% in the next year, with or without medical treatment.’ AMA Guides, at 315.’ (R. at 186, Addendum 2).
- B. “During what periods of time prior to reaching medical stability has Ms. Hall been medically restricted from working or medically restricted to light work?” (R. at 186, Addendum 2).
- C. “If Ms. Hall is medically stable, what is the total percentage of permanent partial impairments? What portion is attributable a) to Ms. Hall’s injury of November 12, 1997, and b) to other conditions?” (R. at 187, Addendum 2).
- D. “To what extent, if any, has Ms. Hall’s medical treatment been reasonably related and necessary to treat: a) her injury of November 12, 1997, and b) other conditions? Please specifically address Ms. Hall’s back surgery on August 31, 1998 [sic]. Evaluate what future medical treatment could be reasonably related and necessary to treat Ms. Hall’s injury of November 12, 1997.” (R. at 187, Addendum 2).

8. The referral to Hylen contains the following admonitions from the ALJ:

- A. “You are bound by my findings in regard to the ‘facts’ of this case. The ‘facts’ are the historical and other legal data which I have found as to how the alleged injury occurred, dates and times, places, persons involved, and related information, commonly regarded as the situation or circumstances surrounding Ms. Hall’s injury. **If Ms. Hall relates factual information which is inconsistent with my findings, you must ignore that information. If you discover additional facts which you use in your**

analysis, you must state these facts and describe how these facts changed your analysis.” (Emphasis in original). (R. at 187, Addendum 2).

B. “Except for stipulated medical facts, you are not bound by my discussion of the medical evidence. Unless the parties have stipulated to medical facts, you must rely on the available medical evidence, including but not limited to medical records, films, and medical opinions, diagnoses, and conclusions. **You may order additional tests and examinations you deem necessary or desirable to answer the questions posed, under Utah Code 34A-2-601 (2). Otherwise, however, you must not accept any medical records, documents, medical films or other evidence beyond that which I have provided.”** (Emphasis in original). (R. at 187, Addendum 2).

9. On January 17, 2000, the medical panel convened and met with Hall. (R. at 328).

10. Upon meeting with Hall, the medical panel questioned her at length and recorded the following 40 paragraphs of information in a 119 page report:

A. Ms. Hall articulated that Albertsons had a sale on roast beef during mid November 1997. She said the roasts were approximately double the normal size. She remarked that the tray containing the roast was approximately 1 foot wide and 3 feet long. She related that she was selling a roast to a customer on November 12, 1997 at approximately 8:30 p.m. She stated that she was standing on her left foot and leaning forward attempting to lift the tray containing the roast. She related the customer requested the roast in the very front of the tray. She said, ‘The tray weighed at least 110 pounds. As soon as I picked up the tray I felt my back give way. I had severe back pain. I was hot and sweaty.’ She commented that the pain was across her low back. ‘I thought I was going to pass out.’ She mentioned the pain was a level 10 on a scale of 0 to 10 and the pain was constant in nature. (R. at 332).

B. Ms. Hall elucidated that following her injury she noted pain down her right leg. She said that the pain in her right leg was worse with walking and relieved by rest. She observed the pain occurred in the lateral portion of the buttocks, the lateral thigh and calf, and across the bottom of the foot to the toes. She related at times the pain was a shooting pain into the right leg.

She contended that when she walked her pain quickly became a level 7 and then, when she rested overnight, it was a level 0. (R. at 332-3).

- C. Ms. Hall said during the Thanksgiving and Christmas holidays of 1997 that Albertsons store was short of personnel, particularly in the meat department and the deli. She stated that she continued to work in the meat department and the salad bar despite her pain. She articulated in early December she was called by her boss. She remarked she was instructed by her boss that she was not smiling enough and that customers had complained. She reported she told her boss that her low back was hurting. She recounted her boss told her that she should go see a doctor. (R. at 333).
- D. Ms. Hall conveyed after she saw the doctor on December 5th that he placed her on light duty with no lifting over 10 pounds. She said that the first couple of days she worked in the office but had trouble because she needed to climb the stairs several times up to the office. 'The pain was outrageous with walking the stairs.' (R. at 333).
- E. Ms. Hall described that she worked light duty for approximately a month and she averaged 2 to 3 hours per day. 'One day I did a demo at the salad bar. I stood in one place for two hours. My back pain became severe. I could not do it.' Ms. Hall elucidated that she has not worked since the end of the first week in January of 1998. (R. at 333).
- F. Ms. Hall expressed that she saw her physician, Dr. Thomas Jones who referred her to Dr. Max Root. She articulated she had some facet injections which actually made her pain worse. She stated that her pain changed from a level of 9+ to 10 with each of the facet injections. She reported that she had four facet injections which did not relieve her pain. (R. at 333).
- G. Ms. Hall elucidated that when she worked light duty that her low back pain averaged a level 7, but when she came to the store her pain was a level 10 after 2 to 3 hours work. 'I would shift from side to side due to my low back pain.' (R. at 333).
- H. Ms. Hall stated that she saw Dr. Jeff Chung in June of 1998. 'He spent 6 minutes at the most with me. My back was in severe pain. I had to walk with a cane.' (R. at 333).
- I. Ms. Hall expressed that when she got home from seeing Dr. Chung she found Dr. Michael Green in the phone book. She reported that she called the next day to make an appointment. (R. at 333).

- J. Ms. Hall recounted that she had epidural injections which made her sick. She related she had nausea and her blood sugars were elevated. (R. at 333-4).
- K. Ms. Hall asserted that she received a prescription for a back brace, which was a Knight brace. She remarked, however, that a Knight brace was not available in St. George. She related that a back brace was built specifically for her in March of 1998 in St. George. She articulated she tried to wear the brace during the day for six to eight weeks. 'I had problems with claustrophobia. The brace was too confining. It helped my back a lot but I could not wear it. My bones were coming apart when I took the brace off. It felt like part of my back was coming off when I took the brace off.' (R. at 334).
- L. Ms. Hall expressed that she saw Dr. Knoebel in 1999. 'He just basically agreed with the other insurance doctor.' (R. at 334).
- M. Ms. Hall described her low back pain remained a level 10 until she had nerve root injections ordered by Dr. Green in June of 1998. She elucidated that the nerve root injections were done at Dixie Medical Center. She contended that following the nerve root block that her pain was at a level 0 for about a month and then gradually increased back to a level 10. She expressed that her low back pain stayed at a level 10 until her lumbar laminectomy on August 31, 1998. She expounded that her right leg pain was relieved almost immediately following her lumbar surgery. She maintained that after a week or so that her low back pain was greatly relieved and gradually subsided to a 0. (R. at 334).
- N. Ms. Hall elucidated that following her Administrative Hearing at the Heber Wells Building on October 28, 1998, she had an aggravation of her low back pain. At the curb side next to the Heber Wells Building, she related that as she opened her car door she had an exacerbation of her low back pain. She narrated that her pain in her low back was a level 10 and has remained at that level since October of 1998. She commented when she opened the car door she felt a popping sensation in her low back. This was associated with nausea and pain down the left leg. She maintained that this was the first occasion that she had pain down her left leg. She observed that the pain in her left leg was in the 'exact same location' as it had been in the right leg, namely, in the lateral thigh, calf, and the bottom of the foot. She explained that she also noted pain with more physical activity in the left leg. She stated that with rest the pain was a 0 and with walking and extra

activity that her pain was a level 10. She said her left leg pain has averaged a level 5 since her aggravation. (R. at 334).

- O. Ms. Hall explained that her right leg pain had averaged a level 3 with no pain at rest, but becomes a sharp pain at a level 8 with physical activity. She professed that her current right leg pain lasts 3 seconds at a level 8 then the sharp pain gradually subsided. (R. at 334).
- P. Ms. Hall pronounced that Dr. Green did lumbar injections following her exacerbations. She articulated that the injections did not help her pain. She related that Dr. Green told her he could not do anything more to help her back condition. She declared that he released her to light duty work in February of 1999 with no prolonged walking or standing. (R. at 335).
- Q. Ms. Hall reported that she saw Dr. Dale Stott at the Zions Pain Management Center starting in July of 1999. She noted that Dr. Stott did two lumbar steroid injections. She said that these injections did not make her sick. She vocalized that her low back pain has not been relieved. She mentioned that Dr. Stott had treated her with Lortab 7.5 which gave minimal relief. She observed that she started her on Methadone 5 milligrams tablets. She voiced that she was unable to tolerate the Methadone treatment. (R. at 335).
- R. Ms. Hall said that Dr. Stott wanted to have a spinal cord stimulator implanted. 'I want to try it. They have to replace the batteries every two to five years.' She elucidated that she tried a TENS Units for her neck and a similar unit during physical therapy for low back without any pain relief. (R. at 335).
- S. Ms. Hall described that after her surgery Dr. Green recommended physical therapy. However, she reported she could not pay for the physical therapy and did not receive therapy. She remarked that physical therapy was able to help her before surgery. However, she noted the physical therapy gave pain relief for just very brief periods, such as one or two hours after the therapy. (R. at 335).
- T. Ms. Hall expressed that in mid December 1999 while at Kmart she had severe pain across her low back and into both legs. She described that she was walking with her husband at the time. She articulated that her knees buckled but that her husband was able to support her until the pain subsided somewhat. 'I was just walking to the car. My husband had to hold me up.' (R. at 335).

- U. Ms. Hall related that she started smoking cigarettes at age 15 and started smoking a pack a day at about age 20. She explained that she has attempted to stop smoking several times, usually each new year. She expounded that she stopped smoking from January of 1989 until 1992. She maintained that she stopped smoking for six months in 1995. She said that she stopped smoking for 10 months in 1997 and for four months in 1999. She described that she currently smokes approximately one pack per day. She reported approximately a 15-pack year smoking history. (R. at 336).
- V. Ms. Hall elucidated that she herniated two discs in her neck in 1991 in a nursing home injury. She vocalized that she was working at Canyon Hills Retirement Center which was for assisted living in Anaheim Hills, California. She maintained that the residents were on an outing to Knott's Berry Farm. She related that at the time of her injury she was attempting to load the residents into the bus. She remarked that there was no ramp. She articulated that the wheelchair of the resident was near the edge and started to slip forward. She expressed that she pulled back on the wheelchair with all of her strength and that this caused a whiplash of her neck. "It caused two herniated discs in my neck. I was off work for four years. She mentioned that there was a settlement related to this injury for \$50,000. (R. at 335).
- W. Ms. Hall reported that in 1995 she went back to work taking care of her mother who had a leg amputated, 'I was living with my mother. I was taking care of my mother. I took her to her doctors appointments. I did the housework.' (R. at 336).
- X. Ms. Hall asserted that she first noted anxiety and depression in 1994. 'I was depressed most of the time.' She articulated that she saw a psychiatrist who told her she had anxiety and depression. She announced she first took Zoloft for depression, which did not seem to help, and then was switched to Prozac. She said that she took Ativan for her anxiety. She expressed she took Prozac, 20 milligrams, 2 capsules twice a day until the time of her settlement from her neck injury. (R. at 336).
- Y. Ms. Hall estimated that she was off antidepressant for about 18 months. She related that Dr. Thomas Jones restarted her Prozac before her low back injury in 1997. 'I was having trouble at work. Some of the help had left both in the deli and the meat department. I would work two hours in the meat department and then switch to the salad bar and then switch back to the butcher block.' She vocalized she found that working in both

departments added a lot of stress to her work. She reported she had no stress outside of her employment at that time. (R. at 336).

- Z. Ms. Hall asserted that just before her sinus surgery on September 30, 1999 that she became suicidal. 'The pain in my sinuses and back was so severe. I had suicidal thoughts. If I had a gun, I would have used it. I had Lortab 10 and it did not help the pain. The pain was too severe for the pills.' Ms. Hall denied suicidal thoughts before September of 1999. (R. at 336).
- AA. Ms. Hall noted about her current condition, 'I feel so worthless and useless. I am only 48 years old. I want to work and be active. I want to be somebody. I love my job at Albertsons. I like both the salad bar and the meat department.' (R. at 337).
- BB. Ms. Hall estimated that she first was diagnosed with asthma attacks in about 1996. She said that her last attack was one year ago. She articulated that her attacks last about 10 minutes and are relieved by two pumps of her inhaler. She announced that she had one or two attacks per year. 'It is kind of scary when you are gasping for air.' (R. at 337).
- CC. Ms. Hall pronounced that she developed diabetes mellitus in 1995. She said that she had recurrent vaginal yeast infections. She remarked that she saw a new physician who said that her recurrent yeast infections were probably because she was diabetic. She vocalized that the blood test showed an elevated blood sugar and she was started on oral antidiabetic medication on the same day. (R. at 337).
- DD. Ms. Hall described that she had trouble controlling her diabetes when she had steroid injections in her low back in the past. She expounded she also has trouble controlling her diabetes when she runs out of money and cannot afford her diabetic medication. She reported that since November of 1999, she has been on Medicaid and obtaining her medications was less of a problem. She maintained that her blood sugars currently range from 89 to 92 fasting and 89 to 180 non-fasting. (R. at 337).
- EE. Ms. Hall contended that she developed hypertension in 1997. She mentioned that her blood pressure was out of control before she had her sinus surgery in March of 1999. She explained that the dose of her Diovan was increased from 80 milligrams a day to 160 milligrams for a period of time, in order to control her blood pressure before the surgery was to be performed. She alleged that she has had elevations of her blood pressure intermittently since that time. (R. at 337).

- FF. Ms. Hall narrated that she was in a rear-ended motor vehicle accident in 1967 in which she received whiplash to her neck. She expressed that she underwent physical therapy for approximately two months. (R. at 337).
- GG. Ms. Hall expounded that she had a second rear-ended motor vehicle accident in 1970, and again received a whiplash to her neck. She reported that she received physical therapy after this accident as well. (R. at 338).
- HH. Ms. Hall asserted that she had a third rear-ended accident in 1973 in which there was no injuries. She announced that she was the third car in the line and received only damage to the car. (R. at 338).
- II. Ms. Hall insisted that she had two episodes of severe chest pain in 1990 in which she was seen in the emergency room. She articulated that this was in the right side of the anterior chest and was sharp in nature. She claimed that she has had no recurrence since the early 1990s. (R. at 338).
- JJ. Ms. Hall pronounced that she developed right upper quadrant pain radiating through to the back in 1997. She expressed that this pain was severe and at a level 10. She noted that if she pushed on the right upper side of her abdomen and chest wall, that this maneuver eased the pain. She vocalized that the abdominal pain lasted up to three weeks and was constant in nature. She enunciated that her abdominal pain was brought on and/or made worse with stress. (R. at 338).
- KK. Ms. Hall reported that her physicians thought she had gallbladder disease but that multiple tests for gallbladder disease were negative. She declared that since 1997, she continued to have bouts of right upper quadrant pain every two to three months. She described that these were brought on with increased stress. 'When I get really stressed it starts to both me. When I know that I do not have the money to pay the bills such as the rent or phone bill my abdomen hurts and my back hurts but nothing helps.' (R. at 338).
- LL. Ms. Hall expounded that her longest bout of abdominal pain last year lasted three weeks. She articulated that she had six bouts of abdominal pain last year and most of them lasted two to three days. She remarked her abdominal pain was constant in nature. She related that the pain averaged a level 8 to 10, when she has the abdominal pain. She conveyed when she pushed on the abdomen and right side of her chest with her hand that the pain decreased to a level 5. (R. at 338).

MM. Ms. Hall explained that she continued to have severe low back pain across the lumbar region and into both legs although the left leg pain was noted to be more severe. She observed that her low back pain in the lumbar area was at a level 10, her left leg pain was at a level 8, and her right leg pain was at a level 0 at the time of her evaluation. She mentioned her neck pain was at a level 5 to 6 and her headache was a level 8 at the time of her evaluation. She described she continued to be bothered with anxiety and depression. R. at 338-9).

NN. Ms. Hall described that she started on an exercise program three months ago. She remarked she started walking around the block. She articulated at first she had trouble walking around the block but she gradually gained strength so that she could walk around two blocks. 'I cannot do stairs. I have trouble doing one step at a time.' In relationship to her current condition, Ms. Hall stated, 'I am like an obstinate child. I have always been a doer. I do not like the inactivity. Do not tell me I cannot go do anything. I always need to keep busy.' (R. at 339).

11. The medical panel indicated that it reviewed medical research on issues related to depression, anxiety, pain disorder, nicotine dependency, degenerative joint disease, and degenerative disc disease, even though not asked to do so by the ALJ. The total amount of articles identified were 147 (R. at 350-62).

12. Having not been asked the question, the medical panel determined that Hall had the following pre-existing medical conditions:

- A. Nicotine dependency. (R. at 362).
- B. Obesity. (R. at 362).
- C. Anxiety and depression. (R. at 363).
- D. History of asthma. (R. at 363).
- E. Motor vehicle accident with whiplash in 1967. (R. at 363).
- F. History of prior industrial injuries. (R. at 364).
- G. Migraine headaches. (R. at 364).
- H. Glaucoma in 1990. (R. at 365).
- I. Injury from bumper car accident. (R. at 365).
- J. Industrial neck injury in 1991. (R. at 366).
- K. Trapezius muscle spasm in April 1991. (R. at 369).
- L. Herniated cervical discs noted in 1991 and 1997. (R. at 370).

- M. Adult onset diabetes mellitus starting in 1994. (R. at 371).
- N. Bilateral temporal mandibular joint myofacial pain in March of 1993. (R. at 372).
- O. Recurrent bouts of chest pain. (R. at 373).
- P. Abdominal pain starting in October 1997. (R. at 374).
- Q. Peripheral neuropathy in February of 1997. (R. at 376).
- R. Tooth abscesses in 1997. (R. at 377).

13. The medical panel determined that Hall's medical condition stabilized on June 16, 1998. (R. at 430).

14. The medical panel acknowledged that Michael R. Green, M.D. performed a lumbar laminectomy with partial facetectomies and foraminotomies at three levels, L-3, L-4, and L-5 on August 31, 1998, two and one half months after the panel found Hall's condition to be stable. (R. at 402).

15. The medical panel determined that Hall had a pre-existing degenerative joint disease and that the industrial injury did not cause that degenerative disease. (R. at 434).

16. The medical panel determined that Hall's work injury was a permanent aggravation of her pre-existing degenerative lumbar spine. (R. at 436).

17. The medical panel determined that Hall's medical care, which included the surgery with Dr. Green was not related to the industrial accident. (R. at 438).

18. The panel determined that Hall had a 16% whole person impairment to her lumbar spine. It found that all but 13% of that impairment rating was attributable to subsequent medical conditions. (R. 444).

19. On September 14, 2000, the ALJ adopted and incorporated the medical panel report relative to the panel's determination of maximum medical improvement, temporary total disability compensation, permanent partial disability compensation, and medical treatment and issued an order denying Hall benefits on these issues. (R. 520-21).

20. Hall filed a Motion for Review with the Labor Commission on October 13, 2000, alleging the panel had usurped the power of the ALJ by making it's own findings and in ignoring those of the ALJ; that the ALJ had improperly delegated her duties to the panel and that the conclusions of the panel were not supported by the evidence. (R. at 529, Addendum 4).

21. On January 8, 2001, the Labor Commission denied Hall's Motion for Review finding the panel report to be persuasive and affirming the ALJ's use of the panel report. (R. at 565, Addendum 5).

SUMMARY OF THE ARGUMENT

In rendering it's decision in this case, the ALJ and the Utah Labor Commission have improperly delegated their respective legal responsibilities to the medical panel for determination on both causation and apportionment.

Once the panel determined that Hall's work permanently aggravated her pre-existing condition, it was then the obligation of the ALJ and the Labor Commission to award medical benefits pursuant to *Allen v. Industrial Comm'n* 729 P.2d 15 (Utah 1986).

Likewise, the ALJ and the Commission improperly relied upon the panel relative to apportionment of impairment. Once the panel determined that Hall sustained a 3% permanent aggravation of her pre-existing condition, it was then the obligation of the ALJ and the Commission to award benefits for the entire 16% impairment pursuant to *Crosland v. Board of Review*, 828 P.2d 528 (Utah Ct. App. 1992).

The ALJ, in allowing the panel to determine it's own facts, and ignore those of the ALJ, ended up with panel conclusions that are not supported by the evidence.

The panel made a determination that Hall's condition was stable on June 16, 1998. This ignores the fact that Hall had undergone a lumbar fusion surgery two and one half months later on August 31, 1998. Obviously, Petitioner's condition could not be stable if she had undergone such an operation. If the ALJ would have used her own findings, instead of deferring to the panel, this would not have been possible.

The panel apparently found that Hall's impairment may have been attributable to some type of incident subsequent to spine surgery. There was no such finding made by the ALJ and there is no explanation in the medical panel report as to what it refers when it states there was a 13% subsequent aggravation of Hall's low back injury. Again, by allowing the medical panel to make it's own findings and provide conclusory results, without foundation, this is a result which is not supported by the evidence.

Wherefore, Hall respectfully requests this Court overrule the Labor Commission's denial of Hall's medical and disability benefits.

ARGUMENT

I. THE ALJ AND LABOR COMMISSION'S ADOPTION OF THE MEDICAL PANEL REPORT WAS INAPPROPRIATE AS THE MEDICAL PANEL REPORT ADDRESSED LEGAL, NOT MEDICAL ISSUES.

The ALJ and the Commission rely on the panel for a determination of both causation and apportionment. These are legal issues within the province of the finder of fact, not the medical panel.

It has been held that “a medical panel is only to take the facts as found by the Administrative Law Judge and consider them in light of it’s medical expertise to assist the Administrative Law Judge in deciding whether medical cause has been proven. The medical panel strays beyond it’s province when it attempts to resolve factual disputes, and the Administrative Law Judge improperly abdicates his function if he permits the panel to so act.” *IGA Food Fair v. Martin*, 584 P.2d 828, 830 (Utah 1978).

As stated in *Jensen v. United State Fuel Co.*, 424 P.2d 440, 443 (Utah 1967), “we recognize the value and the usefulness of an impartial medical panel to make an independent examination and diagnosis in such cases. We are also in accord with the physician of the Plaintiff that it is not in the panel’s prerogative to encroach upon the authority invested in the Commission to make the findings of fact and render a decision upon the application. . . It’s proper purpose is limited to medical examination and diagnosis, the evidence of which is to be considered by the Commission in arriving at it’s decision.”

Here, the Commission has delegated it's duty to the panel on two very important issues; causation and apportionment of permanent partial disability.

A. THE COMMISSION RELIES ON THE PANEL FOR A DETERMINATION OF CAUSATION, WHICH IS A LEGAL ISSUE

The panel determined that Hall had a pre-existing degenerative joint disease and that the industrial injury did not cause that disease. (R. at 434). However, the panel also determined that Hall's work injury permanently aggravated her pre-existing degenerative lumbar spine condition. (R. at 436). The panel then determined that Albertson's was responsible for the permanent aggravation of the pre-existing condition, but not for the pre-existing condition itself. (R. at 434-6). The ALJ causally adopted the medical panel's conclusion that Hall's need for medical treatment was not causally related to her industrial accident (R. at 520-1, Addendum 3), as did the Labor Commission. (R. at 565, Addendum 5).

At first glance, it would appear that the ALJ and Commission's adoption of the panel report relative to medical causation is appropriate. That issue has the appearance of being a solely medical issue. However, Utah case law on that issue is quite clear and quite contrary.

Whether Hall is entitled to medical benefits in this case is based upon the two prong analysis of medical and legal causation set forth in *Allen v. Industrial Comm'n* 729 P.2d 15 (Utah 1986). In *Allen*, the Utah Supreme Court established the test for determining whether a pre-existing condition which is exacerbated by employment

activities constitutes a compensable industrial injury. *Allen*, 729 P.2d 25-27. As part of the test, a claimant must prove both legal and medical causation, and failure to prove either precludes recovery. *Id.*

To meet the legal causation requirement “a claimant with a pre-existing condition must show that the employment contributed something substantial to increase the risk he faced in everyday life because of his condition.” *Id.* at 25. “The element of risk is usually supplied by a showing of unusual exertion.” *Id.* The “Court applies an objective standard to compare usual and unusual exertion.” *Id.*, “the focus is on what typical non-employment activities are generally expected of people in today’s society, not what this particular claimant is accustomed to doing.” *Id.* To meet the medical causation requirement, a claimant must “show that the employment contributed something substantial to increase the risk he already faced in everyday life because of his condition.” *Id.* at 25.

There is no question that the injuries sustained by Hall in this case meet the legal prong of the *Allen* test. It is unrefuted that she was injured while bending over to lift a tray full of meat which weighed in excess of 100 pounds. (R. at 168-9, Addendum 1).

The more difficult issue is whether the medical panel, and hence the Commission, erred in adopting the medical panel’s determination that Hall’s surgery was not medically required as a result of the industrial accident. This, while it appears to be a medical determination actually involves medical and legal issues. Utah law is relatively clear that

if an injured worker **sustains a permanent aggravation** to a pre-existing condition, the medical prong of *Allen* has been met.

Medical causation is shown and compensation must be awarded “if the industrial injury results in a permanent impairment that is aggravated by or aggravates a pre-existing permanent impairment to any degree.” *Zimmerman v. Industrial Comm’n*, 785 P.2d 1127, 1131 (Utah Ct. App. 1989); *Second Injury Fund v. Streater Chevrolet*, 709 P.2d 1176, 1181 (Utah 1985).

As stated in *Giesbrecht v. Board of Review*, 828 P.2d 544 (Utah Ct. App. 1992), “Utah law recognizes the aggravation rule such that where an industrial injury aggravates, accelerates, or combines with a pre-existing condition, **the entire resulting injury is compensable** so long as the claimant can ‘show that the employment contributed something substantial to increase the risk he already faced in everyday life because of his condition.’” (emphasis added) *Id.* at 547 (citing *Allen v. Industrial Comm’n*, 729 P.2d 15, 25 (Utah 1986)).

A similar case to Hall’s was previously before this Court in *Chase v. Industrial Comm’n*, 872 P.2d 475 (Utah Ct. App. 1994). There, the injured worker had substantial pre-existing conditions that were aggravated by his work. Irrespective of those pre-existing conditions, this Court overruled the Commission and reversed the medical panel’s finding that Chase had not proved medical causation because Chase had shown that his work contributed to his pre-existing disability. *Id.* at 479-80.

In this case, the panel made the clear and unambiguous determination that the lifting of the 100 pound tray of meat caused a **permanent aggravation** to Hall's pre-existing condition. That is obviously a medical determination which is within the purview of the medical panel. However, at that point, the remaining issue of whether medical causation has been proved is a legal determination for the ALJ. Based upon *Allen* and the above referenced precedent, Albertson's became responsible for the entire circumstances associated with Hall's pre-existing condition when the panel made the unequivocal determination that her work caused a permanent aggravation to her pre-existing condition and she met her burden of both legal and medical causation.

Wherefore, Hall respectfully requests this Court reverse the determination of the Administrative Law Judge and order the payment of medical benefits to Hall, pursuant to *Allen v. Industrial Comm'n*, 729 P.2d 15 (Utah 1986).

B. THE COMMISSION RELIES ON THE PANEL FOR A DETERMINATION OF APPORTIONMENT WHICH IS A LEGAL ISSUE

The medical panel found that Hall had a 16% whole person impairment of her lumbar spine. It found that only 3% of that impairment was related to her industrial injury. (R. at 444). The ALJ adopted the conclusion of the medical panel. (R. at 520-1, Addendum 3), as did the Commission. (R. at 564, Addendum 5). However, both the ALJ and the Labor Commission overlook the fact that determination of apportionment is a legal determination which should not be delegated to the medical panel.

In *Crosland v. Board of Review*, 828 P.2d 528 (Utah Ct. App. 1992), this Court addressed the issue relative to apportionment of permanent partial disability. There, the medical panel appointed by the ALJ found that following the industrial accident, “Crosland had a 20% permanent partial impairment of the whole body. The panel attributed half, or 10%, permanent partial impairment, to the industrial accident and half to the asymptomatic pre-existing condition medically aggravated by the accident. *Crosland*, 828 P.2d at 529 (Utah Ct. App. 1992). The panel commented that ‘[i]t is entirely possible he could have gone on for an indefinite period had it not been for the event described, but it is unlikely he would have had the degree of difficulty had he not had the developmental abnormality.’” 828 P.2d at 529. Based on this evaluation, the ALJ denied Crosland compensation for the 10% permanent partial impairment the panel had determined to be pre-existing.

This Court, in *Crosland*, however, reversed the Labor Commission finding the entire 20% whole person impairment to be the responsibility of the employer. The Court held that, “Utah Courts have followed the well-established common law rule that when an industrial accident lights up or aggravates a pre-existing deficiency or disease, the resulting disability is compensable as long as the industrial accident was the medical and legal cause of the injury.” *Id.* at 530. *See also*, *Nuzum v. Roosendahl Const. and Mining Corp.*, 565 P.2d 1144, 1146 (Utah 1997); *Allen v. Industrial Comm’n*, 729 P.2d 15, 25 (Utah 1986); *Virgin v. Board of Review of the Indus. Comm’n*, 803 P.2d 1284, 1288 (Utah Ct. App. 1990); *Giles v. Industrial Comm’n*, 692 P.2d 743 (Utah 1984).

By adopting the medical panel report, the ALJ and the Commission delegated their responsibility as the finder of fact to the panel. If the Commission would have applied the law as set forth in *Crosland*, it would have concluded that the entire impairment of 16% was attributable to Hall's industrial accident, as the pre-existing condition was obviously "lit up" by lifting the 100 pound tray of meat.

Wherefore, Hall requests this Court reverse the Commission's apportionment of permanent partial disability and find the entire 16% permanent partial impairment rating attributable to the work accident.

II. THE REPORT OF THE MEDICAL PANEL SHOULD NOT HAVE BEEN RELIED UPON BY THE COMMISSION AS IT LACKS FOUNDATION

While much respect must be paid to a panel of medical experts, the panel cannot simply reach conclusions from facts which are not supported by the record, but are simply assumptions which are unfounded conclusions. (See, *Redman Warehouse Corp. v. Industrial Comm'n*, 454 P.2d 283 (Utah 1969). In this situation, the medical panel made determinations relative to the date of Hall's stability and subsequent events which are not in any manner supported by the record or the facts of the case.

A. THE MEDICAL PANEL'S DETERMINATION THAT IMPAIRMENT TO HALL'S LUMBAR SPINE IS RELATED TO "SUBSEQUENT EVENTS" IS NOT SUPPORTED BY THE RECORD

With no discussion at all, the medical panel determined that 13% of the 16% impairment to Hall's lumbar spine was attributable to subsequent medical conditions.

There is no discussion as to how the panel made this determination. The findings of fact of the ALJ do not support any such determination. There is absolutely no explanation given in the panel report for this conclusion. One can only speculate as to what the panel may refer. However, speculation and probabilities are simply insufficient to support a panel report. *See, IGA Food Fair v. Martin*, 584 P.2d 828, 830 (Utah 1978). As there is no basis for the determination that Hall's impairment was caused by subsequent events, the determination of the panel in this regard should be disregarded.

B. THE MEDICAL PANEL'S DETERMINATION THAT HALL'S CONDITION STABILIZED ON JUNE 16, 1998, IS NOT SUPPORTED BY THE RECORD

The ALJ found that Hall underwent a lumbar spine fusion on August 31, 1998. (R. at 170, Addendum 1). Irrespective of that finding, the medical panel determined that Hall's condition had stabilized on June 16, 1998. (R. at 430), even though the panel was aware of the three level spine surgery. (R. at 430). It is simply physically impossible for Hall's condition to be stable after a multiple level back fusion.

"Temporary total compensation benefits are to continue 'until [the claimant's] condition has stabilized.'" *Booms v. Rapp Constr. Co.*, 720 P.2d 1363, 1366 (Utah 1986). (quoting *Entwistle v. Wilkins*, 626 P.2d 485,497 (Utah 1981)). Further, medical stabilization is a time when "the period of healing has ended and the condition of the claimant will not materially improve." *Reddish v. Sentinel Consumer Prod.*, 771 P.2d 1103,1104 (Utah Ct. App. 1989). (quoting *Booms v. Rapp Constr. Co.*, 720 P.2d 1366).

In this situation, there is absolutely no question that Hall's period of healing had not ended by June 16, 1998. She underwent a multi-level fusion of the lumbar spine two and one half months later. The panel ignored this fact and found her condition to have been stable prior to surgery. There is clearly no factual basis for such a determination and the adoption of the panel report by the Commission relative to stability is not supported by the evidence.

CONCLUSION

The medical panel in this case made legal determinations relative to causation and apportionment. The ALJ and the Commission could have remedied this situation by applying the appropriate legal standard to both apportionment and causation. However, the Commission is apparently content to let the medical panel make these determinations. Further, the medical panel issued opinions relative to stability and subsequent events which are not based upon the facts found by the ALJ, and are conclusory in nature. Again, the Commission is apparently content to let the medical panel substitute its own findings for those which should be determined by the ALJ and the Commission.

Hall respectfully submits that this is improper and contrary to law and requests this Court reverse the decision of the Labor Commission; ordering Albertson's to pay for Hall's spine surgery and other medical treatment, the 16% permanent partial impairment and remand this matter back to the Labor Commission for a determination as to when Hall's condition reached stability after the August 31, 1998, surgery.

DATED this ____ day of June, 2001.

COPY

Aaron J. Prisbrey
Attorney for Petitioner/Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the ____ day of June, 2001, a copy of the foregoing
BRIEF OF APPELLANT was mailed, postage prepaid, as follows:

Utah Court of Appeals	(1) original
450 South State Street	(9) copies
P.O. Box 140230	
Salt Lake City, Utah 84111-0230	

Mr. Ford G. Scalley	(2) copies
Scalley & Reading	
261 East 300 South Suite 200	
Salt Lake City UT 84111	

Mr. Alan Hennebold	(2) copies
Labor Commission of Utah	
160 East 300 South, 3 rd Floor	
P.O. Box 146615	
Salt Lake City, UT 84114-6615	

Ms. Lana Hall	(1) copy
544 South 100 West #9	
St. George, UT 84770	

COPY

AARON J. PRISBREY
Attorney for Plaintiff/Appellant

ADDENDUM

1 Preliminary Findings of Fact, Conclusions of Law and Interim Order
2	... Letter of November 18, 1999, to John C. Hylen, M.D. from Hon. Kathleen H. Switzer
3 Findings of Fact, Conclusions of Law and Order
4 Motion for Review
5 Order Denying Motion for Review

Tab 1

LANA HALL,

Petitioner,

v.

ALBERTSONS, INCORPORATED,

Respondent(s).

::
:: PRELIMINARY FINDINGS OF FACT,
:: CONCLUSIONS OF LAW,
:: AND INTERIM ORDER
::
:: Case No. 98707
::
:: Judge Kathleen H. Switzer
::

Ford G. Scalley, Esq., Scalley & Reading, representing Albertsons,
Incorporated

.....

Ms. Hall filed her objections to the IME within the time permitted. Albertsons requested additional time to obtain wage information and both parties submitted arguments related to that issue. On October 4, 1999, the matter was deemed ready for decision although medical films

still had not been submitted. Accordingly, except for medical films and any additional medical records, this tribunal now closes the record to all further evidence and enters its Preliminary Findings of Fact, Conclusions of Law, and Interim Order.

II. ISSUES TO BE RESOLVED

As a bottom-line issue, the parties contested Ms. Hall's average weekly wage. However, the major issues are: 1) when Ms. Hall reached medical stability; 2) whether Ms. Hall is entitled to temporary total disability (TTD) compensation after June 16, 1998; 3) whether Ms. Hall is entitled to a permanent partial disability (PPD) rating above three percent (3%); and 4) whether certain medical benefits were reasonably medically necessary from her work injury.

III. PRELIMINARY FINDINGS OF FACT

A. Ms. Hall's Average Weekly Wages.

Ms. Hall's wages varied depending upon her actual work assignment. She earned \$7.46 an hour while working at the meat counter and \$6.00 an hour while working at the salad bar. Exhs. R-2, P-4. Post-hearing, Albertsons submitted some additional wage information and both parties filed additional arguments related to Ms. Hall's wages. However, neither party could verify when Ms. Hall began earning \$7.46 an hour at the meat counter and nor the hours Ms. Hall was scheduled to work the week of her accident.

The pay period immediately prior to her accident, Ms. Hall worked 12 hours at the salad bar ($12 \times \$6.00 = \72.00) and 28 hours in the meat department ($28 \times \$7.46 = \168.00); Ms. Hall also earned \$10.60 in premium pay, with gross weekly earnings totaling \$250.60.

For purposes of calculating workers compensation benefits, Ms. Hall is married with no children under eighteen years old.

B. Ms. Hall's Injury.

Its undisputed, on November 12, 1997, Ms. Hall injured her back at work. Ms. Hall testified: She was working at the meat counter. A lady customer wanted a roast located on a tray at the front of the case. The tray measured about 2 1/2 feet by 3 feet in size and rested about 30 to 36 inches above floor level. Ms. Hall reached into the case, twisting sideways to reach the tray, putting one hand underneath the tray to lift. A meat sale was in progress and, so, the roasts were a little heavier than usual. Ms. Hall estimated the tray held about 17 or 18 roasts, about 6 to 8

pounds each, for a total weight of 100 pounds or more. Ms. Hall had never lifted anything that heavy before.

Ms. Hall further testified: She felt a sudden pain in her lower back, a sharp burning, electric shock kind of pain. The customer asked if she was alright. She pulled out the tray and finished waiting on the customer despite her pain. Then she started crying and reported her injury. She thought she was going to pass out.

C. Ms. Hall's Medical Treatment.

Ms. Hall did not seek medical treatment immediately. However, on December 5, 1997, she reported new complaints of acute low back pain to her family physician, Thomas K. Jones, M.D. On December 22, 1997, Max Root, M.D., a physiatrist, evaluated Ms. Hall and initiated physical therapy. On February 17, 1998, Benjamin H. Venger, M.D., a neurosurgeon, thought a "case could be made for surgery" but primarily recommended conservative treatment. Exh. R-1 at 208. Similarly, Dr. Jones recorded Ms. Hall should not have surgery for her herniated discs. Exh. R-1 at 138, 143.

Albertsons discontinued her medical benefits in May 1998. Nevertheless, on August 31, 1998, Michael R. Green, M.D., performed a lumbar laminectomy. Exh. R-1 at 338. Two weeks later, on September 15, 1998, Ms. Hall had absolutely no leg pain, was improving, and doing "quite a bit of walking." Exh. R-1 at 405.

In October 1998, Ms. Hall felt her back "pop" as she opened her car door and experienced a further aggravation of her back problem. Dr. Green gave her an injection but it didn't help. He recommended physical therapy but she lacks funds for any medical treatment.

D. Medical Stability, Return to Work and Permanent Partial Impairment.

Medical opinion regarding these issues is mixed:

On May 12, 1998, Dr. Venger released Ms. Hall to light duty, 2 to 4 hours per day with a 10 pound weight limit and no bending or stooping on May 12, 1998. Exh. R-1 at 202. However, Albertsons did not have light duty available.

On June 16, 1998, Jeff. B. Chung performed an insurance medical evaluation (IME). Dr. Chung did not believe Ms. Hall required any long-term permanent work restrictions. Dr. Chung also opined Ms. Hall was at maximal medical improvement (MMI) and gave her a three percent (3 %) permanent partial impairment rating. Exh. R-1 at 284-85. Based on Dr. Chung's opinion,

Albertsons offered Ms. Hall part-time work at their salad bar. The "job function . . . entail[ed] lifting watermelons [sic] and full cases of cantaloupes and . . . long periods of standing." *See* Offer of Employment Letter.

Meanwhile, on June 16, 1998, the same day as Dr. Chung's report, Dr. Green began plans to surgically decompress Ms. Hall's back because of her severe and incapacitating pain. Exh. R-1 at 413. When Ms. Hall did not return to work, Albertsons stopped paying weekly compensation benefits.

Post-surgery, on February 9, 1999, Dr. Green released Ms. Hall to work with sixty-day restrictions. She could not lift more than 10 pounds, could not run or jump, and was to avoid long periods of sitting, or any bending, twisting or strenuous activity that produced back pain. Exh. R-1 at 404. Dr. Green declined to give an impairment rating.

On April 12, 1999, Dr. Knoebel rated Ms. Hall as having a sixteen percent (16%) permanent partial impairment rating. Exh. R-1 at 001, 011. She hasn't returned to work.

E. Other Injuries and Current Functioning.

Ms. Hall testified: Ms. Hall has had some previous orthopedic problems. In 1976, she sustained mid-back injury. In 1980, she injured her knees, ankle and coccyx in a fall. In December 1990, she developed muscle spasms in her neck and back after driving "bumper cars" and received muscle relaxants. She has had chiropractic treatment for her neck but not her back.

However, prior to her November 1997 accident, she had no problems with her back. She was able to work, do housework and other normal daily activities. Ms. Hall could lift cases on honeydew, cantaloupes, and watermelons weighting 40 to 50 pounds at Albertsons. Exh. R-1 at 20. Following her injury at Albertsons, she developed unrelenting back pain. She walked with a cane about one month before Dr. Chung's IME.

Mr. Hall proffered the following: During 15 years of marriage, he noticed no significant problems with Ms. Hall's back or spine. He was present at the "bumper car incident" but didn't notice any significant problems. Before her injury at Albertsons, she could go to work, perform her household chores but, after the injury, she couldn't do those things. She got immediate relief from Dr. Green's surgery but, since the car door incident, she has deteriorated somewhat.

IV. CONCLUSIONS OF LAW

First, Ms. Hall's average weekly wage may be computed under alternate methods set forth in Utah Code § 34A-2-409 (1). Subsection 409 (2) further provides:

If none of the methods in Subsection (1) will fairly determine the average weekly wage in a particular case, the commission shall use such other method as will, based on the facts presented, fairly determine the employee's average weekly wage.

In post-hearing arguments, Ms. Hall contends her weekly wage during the week of her injury would have been \$283.49. Albertsons argues they calculated her average weekly wage at \$232.27. Given the evidence presented, this tribunal perceives Ms. Hall's weekly wage the last full week before her injury as most fairly representing her earnings. Accordingly, Ms. Hall's average weekly wage for workers compensation purposes is set at \$250.60. Ms. Hall is also entitled to \$5.00 a week for a dependent spouse under Utah Code § 34A-2-410.

Second, under Utah Code § 34A-2-601, this tribunal may appoint a medical panel to consider medical aspects of a case. The Labor Commission adopted guidelines whereby a medical panel will consider significant medical issues, such as PPI varying more than 5%; TTD dates varying more than 90 days; and medical expenses in controversy exceeding more than \$2,000.00. Utah Administrative Code, Rule 602-2-2. Stabilization dates are also medical questions for medical panel consideration. Boom v. Rapp Constr. Co., 720 P.2d 1363, 1367 (Utah 1986). Thus, the evidence presented here provides appropriate reasons to convene a medical panel.

INTERIM ORDER

IT IS THEREFORE ORDERED that Ms. Hall's average weekly wage for workers compensation purpose is set at \$250.60, with dependency benefits for her spouse.

IT IS FURTHER ORDERED that a medical panel will be convened to consider medical aspects of this case.

IT IS FURTHER ORDERED that, to prepare for medical panel evaluation, Albertsons will submit any additional medical records and Ms. Hall will submit all medical films relating to this case.

LANA HALL

Findings of Fact, Conclusions of Law, and Order

Page 6

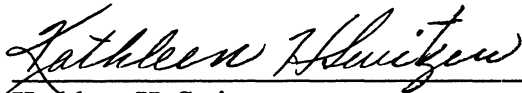
IT IS FURTHER ORDERED that Ms. Hall will appear for the medical panel evaluation, as scheduled by the medical panel chairperson. Failure to appear may result in dismissal or other sanctions.

IT IS FURTHER ORDERED this Interim Order is not appealable until the final Findings of Fact, Conclusions of Law, and Order is entered. Utah Code § 63-46b-10 (4).

IT IS SO ORDERED.

DATED this 14th day of October, 1999.

UTAH LABOR COMMISSION


Kathleen H. Switzer
Administrative Law Judge

CERTIFICATE OF MAILING

I hereby certify that on the 14 day of Oct, 1999, I mailed a true and correct copy of the foregoing Preliminary Findings of Fact, Conclusions of Law, and Interim Order, in the case of Lana Hall v. Albertsons, Incorporated (Case No. 98707), to the following parties:

POSTAGE PREPAID:

LANA HALL
544 S. 100 W., No. 9
St. George, UT 84770

AARON J. PRISBREY, ESQ.
1071 East 100 South, Bldg. D, Suite 3-S
St. George, UT 84770

FORD G. SCALLEY, ESQ.
SCALLEY & READING
261 East 300 South, Suite 200
Salt Lake City, UT 84111


Kathy Houskeeper

Tab 2



Michael O. Leavitt
Governor

State of Utah

LABOR COMMISSION DIVISION OF ADJUDICATION

R. Lee Ellertson
Commissioner



Benjamin A. Sims
Presiding Administrative Law Judge
and Division Director
E-mail: icmain.bsims@state.ut.us
160 East 300 South, 3rd Floor
PO Box 146615
Salt Lake City, Utah 84114-6615
(801) 530-6800
(800) 530-5090
(801) 530-6333 (FAX)
(801) 530-7685 (TDD)

November 18, 1999

John C. Hylen, M.D.
288 North 1460 West
Salt Lake City, UT 84116

Regarding: Lana Hall v. Albertsons, Incorporated (Case No. 98707)

Dear Dr. Hylen:

The Utah Labor Commission hereby appoints you to convene a medical panel and to conduct an impartial evaluation of medical aspects of this case, under Utah Code § 34A-2-601 and Utah Administrative Code R602-2-2. You are authorized to associate any others you deem appropriate as panel members.

Lana Hall was injured while employed at Albertsons on November 12, 1997. The Preliminary Findings of Fact, Conclusions of Law, and Interim Order, medical records, medical films, and any other relevant documents or exhibits are enclosed.

Please answer and discuss the following points in light of reasonable medical probability. Reasonable medical probability means a greater than fifty percent (50%) chance your answers are medically correct. Your answers should be based on the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (Fourth Edition), and the most recent Utah modifications to the *Guides*, as approved by the Labor Commission of Utah (collectively referred to as the AMA Guides).

1. Is Ms. Hall's condition medically stable, and if so, at what time following her injury did Ms. Hall reach medical stability? Medical stability means that Ms. Hall's condition is "unlikely to change substantially, and by no more than 3% in the next year, with or without medical treatment." AMA Guides, at 315.
2. During what periods of time prior to reaching medical stability has Ms. Hall been medically restricted from working or medically restricted to light work?

Lana Hall

Letter to John C. Hylen, M.D.

Page 2

3. If Ms. Hall is medically stable, what is the total percentage of permanent partial impairments? What portion is attributable a) to Ms. Hall's injury of November 12, 1997, and b) to other conditions?
4. To what extent, if any, has Ms. Hall's medical treatment been reasonably related and necessary to treat: a) her injury of November 12, 1997, and b) other conditions? Please specifically address Ms. Hall's back surgery on August 31, 1998. Evaluate what future medical treatment could be reasonably related and necessary to treat Ms. Hall's injury of November 12, 1997.

• **You are bound by my findings in regard to the "facts" of this case.** The "facts" are the historical and other legal data which I have found as to how the alleged injury occurred, dates and times, places, persons involved, and related information, commonly regarded as the situation or circumstances surrounding Ms. Hall's injury. **If Ms. Hall relates factual information which is inconsistent with my findings, you must ignore that information. If you discover additional facts which you use in your analysis, you must state these facts and describe how these facts changed your analysis.**

• **Except for stipulated medical facts, you are not bound by my discussion of the medical evidence.** Unless the parties have stipulated to medical facts, you must rely on the available medical evidence, including but not limited to medical records, films, and medical opinions, diagnoses, and conclusions. **You may order additional tests and examinations you deem necessary or desirable to answer the questions posed, under Utah Code § 34A-2-601 (2). Otherwise, however, you must not accept any medical records, documents, medical films or other evidence beyond that which I have provided.**

You are authorized to examine Ms. Hall. You may reach Ms. Hall to schedule an examination at 544 S. 100 W., St. George, UT 83770 (Ph: 435-688-2482). Except for Ms. Hall, no party or person representing the parties or the Commission will be present.

Lana Hall
Letter to John C. Hylen, M.D.
Page 3

Please contact me directly if you have any questions. Thank you for your assistance in this matter.



Kathleen H. Switzer
Administrative Law Judge

Encl

cc: Lana Hall (w/o encl)
Aaron J. Prisbrey, Esq. (w/o encl)
Ford G. Scalley, Esq., (w/o encl)

Tab 3

UTAH LABOR COMMISSION
ADJUDICATION DIVISION

J. Cal.

LANA HALL,	::	
	::	FINDINGS OF FACT,
Petitioner,	::	CONCLUSIONS OF LAW,
	::	AND ORDER
v.	::	
	::	Case No. 98707
ALBERTSONS, INCORPORATED,	::	
	::	Judge Kathleen H. Switzer
Respondent(s).	::	

HEARING: April 23, 1999, at 9:00 a.m.
Washington County Commission
197 E. Tabernacle, St. George, UT 84770

BEFORE: Kathleen H. Switzer, Administrative Law Judge

APPEARANCES: Aaron Prisbrey, Esq., representing Lana Hall

Ford G. Scalley, Esq., Scalley & Reading, representing Albertsons,
Incorporated

.....

I. COURSE OF THE PROCEEDINGS

Lana Hall filed an application for hearing, claiming benefits for a work injury occurring on November 12, 1997. Albertsons, her self-insured employer, admitted the accident, but denied Ms. Hall is entitled to all the benefits she now seeks.

At hearing, Ms. Hall was the only witness. Mr. Hall's testimony was proffered without significant objection. Both parties submitted documents as exhibits. This tribunal left the record open so Ms. Hall could evaluate an insurance medical evaluation (IME) Albertsons submitted two days before the scheduled hearing, and so both parties could submit additional documents.

Ms. Hall filed her objections to the IME within the time permitted. Albertsons requested additional time to obtain wage information and both parties submitted arguments related to that issue. On October 4, 1999, the matter was deemed ready for decision although medical films still had not been submitted. Accordingly, except for medical films and any additional medical records,

this tribunal closed the record to all further evidence and entered its Preliminary Findings of Fact, Conclusions of Law, and Interim Order.

The medical panel evaluated Ms. Hall and issued a comprehensive medical panel report, totaling 119 pages long. Ms. Hall objected to certain statements in the medical panel report, to which Albertson's responded. Subsequently, the matter was returned to the medical panel. The medical panel issued a 16-page supplemental medical panel report (collectively "Medical Reports"). Again Ms. Hall objected and Albertson's responded.

On September 8, 2000, the matter was ready for final order and decision.

II. ISSUES TO BE RESOLVED

As a bottom-line issue, the parties contested Ms. Hall's average weekly wage. However, the major issues are: 1) when Ms. Hall reached medical stability; 2) whether Ms. Hall is entitled to temporary total disability (TTD) compensation after June 16, 1998; 3) whether Ms. Hall is entitled to a permanent partial disability (PPD) rating above three percent (3%); and 4) whether certain medical benefits were reasonably medically necessary from her work injury. Albertson's declared its intent to secure reimbursement from Albertson's Health Insurance Trust for any medical expenses erroneously paid as workers compensation benefits.

III. PRELIMINARY FINDINGS OF FACT

A. Ms. Hall's Average Weekly Wages.

Ms. Hall's wages varied depending upon her actual work assignment. She earned \$7.46 an hour while working at the meat counter and \$6.00 an hour while working at the salad bar. Exhs. R-2, P-4. Post-hearing, Albertsons submitted some additional wage information and both parties filed additional arguments related to Ms. Hall's wages. However, neither party could verify when Ms. Hall began earning \$7.46 an hour at the meat counter and nor the hours Ms. Hall was scheduled to work the week of her accident.

The pay period immediately prior to her accident, Ms. Hall worked 12 hours at the salad bar ($12 \times \$6.00 = \72.00) and 28 hours in the meat department ($28 \times \$7.46 = \168.00); Ms. Hall also earned \$10.60 in premium pay, with gross weekly earnings totaling \$250.60.

For purposes of calculating workers compensation benefits, Ms. Hall is married with no children under eighteen years old.

B. Ms. Hall's Injury.

Its undisputed, on November 12, 1997, Ms. Hall injured her back at work. Ms. Hall testified: She was working at the meat counter. A lady customer wanted a roast located on a tray at the front of the case. The tray measured about 2 1/2 feet by 3 feet in size and rested about 30 to 36 inches above floor level. Ms. Hall reached into the case, twisting sideways to reach the tray, putting one hand underneath the tray to lift. A meat sale was in progress and, so, the roasts were a little heavier than usual. Ms. Hall estimated the tray held about 17 or 18 roasts, about 6 to 8 pounds each, for a total weight of 100 pounds or more. Ms. Hall had never lifted anything that heavy before.

Ms. Hall further testified: She felt a sudden pain in her lower back, a sharp burning, electric shock kind of pain. The customer asked if she was alright. She pulled out the tray and finished waiting on the customer despite her pain. Then she started crying and reported her injury. She thought she was going to pass out.

C. Ms. Hall's Medical Treatment.

Ms. Hall did not seek medical treatment immediately. However, on December 5, 1997, she reported new complaints of acute low back pain to her family physician, Thomas K. Jones, M.D. On December 22, 1997, Max Root, M.D., a physiatrist, evaluated Ms. Hall and initiated physical therapy. On February 17, 1998, Benjamin H. Venger, M.D., a neurosurgeon, thought a "case could be made for surgery" but primarily recommended conservative treatment. Exh. R-1 at 208. Similarly, Dr. Jones recorded Ms. Hall should not have surgery for her herniated discs. Exh. R-1 at 138, 143.

Albertsons discontinued her medical benefits in May 1998. Nevertheless, on August 31, 1998, Michael R. Green, M.D., performed a lumbar laminectomy. Exh. R-1 at 338. Two weeks later, on September 15, 1998, Ms. Hall had absolutely no leg pain, was improving, and doing "quite a bit of walking." Exh. R-1 at 405.

In October 1998, Ms. Hall felt her back "pop" as she opened her car door and experienced a further aggravation of her back problem. Dr. Green gave her an injection but it didn't help. He recommended physical therapy but she lacks funds for any medical treatment.

D. Medical Stability, Return to Work and Permanent Partial Impairment.

Medical opinion regarding these issues is mixed:

On May 12, 1998, Dr. Venger released Ms. Hall to light duty, 2 to 4 hours per day with a 10 pound weight limit and no bending or stooping on May 12, 1998. Exh. R-1 at 202. However, Albertsons did not have light duty available.

On June 16, 1998, Jeff. B. Chung performed an insurance medical evaluation (IME). Dr. Chung did not believe Ms. Hall required any long-term permanent work restrictions. Dr. Chung also opined Ms. Hall was at maximal medical improvement (MMI) and gave her a three percent (3 %) permanent partial impairment rating. Exh. R-1 at 284-85. Based on Dr. Chung's opinion, Albertsons offered Ms. Hall part-time work at their salad bar. The "job function . . . entail[ed] lifting watermelons [sic] and full cases of cantaloupes and . . . long periods of standing." *See Offer of Employment Letter.*

Meanwhile, on June 16, 1998, the same day as Dr. Chung's report, Dr. Green began plans to surgically decompress Ms. Hall's back because of her severe and incapacitating pain. Exh. R-1 at 413. When Ms. Hall did not return to work, Albertsons stopped paying weekly compensation benefits.

Post-surgery, on February 9, 1999, Dr. Green released Ms. Hall to work with sixty-day restrictions. She could not lift more than 10 pounds, could not run or jump, and was to avoid long periods of sitting, or any bending, twisting or strenuous activity that produced back pain. Exh. R-1 at 404. Dr. Green declined to give an impairment rating.

On April 12, 1999, Dr. Knoebel rated Ms. Hall as having a sixteen percent (16%) permanent partial impairment rating. Exh. R-1 at 001, 011. She hasn't returned to work.

E. Other Injuries and Current Functioning.

Ms. Hall testified: Ms. Hall has had some previous orthopedic problems. In 1976, she sustained mid-back injury. In 1980, she injured her knees, ankle and coccyx in a fall. In December 1990, she developed muscle spasms in her neck and back after driving "bumper cars" and received muscle relaxants. She has had chiropractic treatment for her neck but not her back.

However, prior to her November 1997 accident, she had no problems with her back. She was able to work, do housework and other normal daily activities. Ms. Hall could lift cases on honeydew, cantaloupes, and watermelons weighting 40 to 50 pounds at Albertsons. Exh. R-1 at 20. Following her injury at Albertsons, she developed unrelenting back pain. She walked with a cane about one month before Dr. Chung's IME.

Mr. Hall proffered the following: During 15 years of marriage, he noticed no significant problems with Ms. Hall's back or spine. He was present at the "bumper car incident" but didn't

notice any significant problems. Before her injury at Albertsons, she could go to work, perform her household chores but, after the injury, she couldn't do those things. She got immediate relief from Dr. Green's surgery but, since the car door incident, she has deteriorated somewhat.

IV. CONCLUSIONS OF LAW

●**Ms. Hall's Average Weekly Wage.** Ms. Hall's average weekly wage may be computed under alternate methods set forth in Utah Code § 34A-2-409 (1). Subsection 409 (2) further provides:

If none of the methods in Subsection (1) will fairly determine the average weekly wage in a particular case, the commission shall use such other method as will, based on the facts presented, fairly determine the employee's average weekly wage.

In post-hearing arguments, Ms. Hall contends her weekly wage during the week of her injury would have been \$283.49. Albertsons argues they calculated her average weekly wage at \$232.27. Given the evidence presented, this tribunal perceives Ms. Hall's weekly wage the last full week before her injury as most fairly representing her earnings. Accordingly, Ms. Hall's average weekly wage for workers compensation purposes is set at \$250.60. Ms. Hall is also entitled to \$5.00 a week for a dependent spouse under Utah Code § 34A-2-410.

●**Ms. Hall's Claim for Medical Benefits.** Under Utah Code § 34A-2-601, this tribunal may appoint a medical panel to consider medical aspects of a case. The medical panel appointed in this case consisted of an internal medicine specialist and an orthopedic surgeon. This tribunal studied the Medical Reports, plus all evidence on file. Although Ms. Hall disagreed with the medical panel's opinions, this tribunal finds the Medical Report complete, well-reasoned and supported by the evidence. See Ashcroft v. Industrial Comm'n, 855 P.2d 267, 269 (Utah Ct. App. 1993) (trier of fact applies preponderance of evidence standard). Further, the medical panel closely followed this tribunal's instructions in reaching their opinions. The medical panel was not specifically not bound by this tribunal's discussion of medical facts but was charged with examining all medical evidence including their examination and medical history. Accordingly, this tribunal incorporates the Medical Reports by reference and adopts the following conclusions:

●**Maximum medical improvement (MMI).** Ms. Hall reached medical stability on June 16, 1998. See Entwistle Co. v. Wilkins, 626 P.2d 495, 498 (Utah 1981) (duration of employee's disability constitutes question of fact for Commission's determination).

●**Temporary total disability (TTD) compensation.** Ms. Hall was restricted to light duty work from December 12, 1997 to January 9, 1998, and medically restricted from all work, beginning January 10, 1998 and ending June 16, 1998, when she became medically

stable. Ms. Hall was not restricted from working and, therefore, not entitled to temporary total disability (TTD) benefits after June 16, 1998. *See Booms v. Rapp Constr. Co.*, 720 P.2d 1363, 1366 (Utah 1986) (temporary total disability intended for periods of medical instability; *Entwistle Co. v. Wilkins*, 626 P.2d at 498 (both extent and duration of employee's disability constitute questions of fact)).

● **Permanent partial disability (PPD) compensation.** Applying the AMA Guides and Utah's most recent modifications to the AMA Guides, the medical panel found Ms. Hall had a permanent partial disability rating of sixteen percent (16%) to the lumbosacral spine; however, only three percent (3%) is related to her industrial injury of November 12, 1997. Therefore, she is not entitled to PPD compensation above that already paid. *See Hardman v. Salt Lake City Fleet Management*, 725 P.2d 1323, 1326 (Utah 1986) (medical panel qualified to determine percentage of impairment).

● **Medical treatment.** All of the treatment Ms. Hall received between her accident date, November 12, 1997, and her date of medical stability, June 16, 1998, was reasonably medical necessary. Consistent with apportionment of Ms. Hall's permanent total disability rating, the medical panel opined the lumbar laminectomies at L3-L5 performed on August 31, 1998, were unrelated and not reasonably medically necessary to treat her industrial injury. Medical care was not required to treat her industrial injury after June 16, 1998, and no future medical treatment is reasonably medically necessary. *See Blaine v. Industrial Comm'n*, 700 P.2d 1084, 1087 (Utah 1985) (medical treatment must be "reasonably necessary"); *Clark v. Interstate Homes, Inc.*, 604 P.2d 937, 938 (Utah 1979) (evidence must show "medical necessity").

ORDER

IT IS THEREFORE ORDERED, consistent with this opinion, Albertson's pay Lana Hall for her industrial accident of November 12, 1997, as follows:

● Unpaid medical expenses, reasonably related to Ms. Hall's industrial accident, between November 12, 1997 and June 16, 1998, according to Utah Code § 34A-2-418, and the medical and surgical fee schedule of the Utah Labor Commission, and travel allowances under Utah Administrative Code, Rule 612-2-20, plus interest at eight percent (8%) per annum, under Utah Code § 34A-2-420 (3) and Utah Administrative Code, Rule 612-2-13.

IT IS FURTHER ORDERED that a party aggrieved by this 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. Utah Code §§ 63-46b-12 (1) (a); 34A-1-

LANA HALL

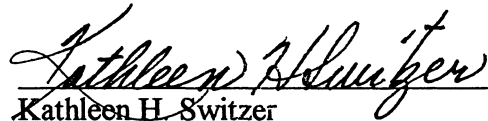
Findings of Fact, Conclusions of Law, and Order

Page 7

303. Other parties may then submit their Responses to the Motion For Review within **20 days** of the date of the Motion for Review. Utah Code § 63-46b-12 (2); Utah Administrative Code R602-2-1 (M). 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 requests review by the Appeals Board, the review will be conducted by the Utah Labor Commission. Utah Code § 34A-1-303 (2) (b).

DATED this 14th day of September, 2000.

UTAH LABOR COMMISSION


Kathleen H. Switzer
Administrative Law Judge

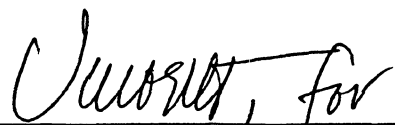
CERTIFICATE OF MAILING

I hereby certify that on the 14th day of Sept, 2000, I mailed a true and correct copy of the foregoing Findings of Fact, Conclusions of Law, and Order, in the case of Lana Hall v. Albertsons, Incorporated (Case No. 98707), to the following parties:

LANA HALL
544 S. 100 W., No. 9
St. George, UT 84770

AARON J. PRISBREY, ESQ.
1071 East 100 South, Bldg. D, Suite 3-S
St. George, UT 84770

FORD G. SCALLEY, ESQ.
SCALLEY & READING
261 East 300 South, Suite 200
Salt Lake City, UT 84111


Kathy Houskeeper

Tab 4

Aaron J. Prisbrey #6968
Attorney for Petitioner
1071 East 100 South, Bldg. D, Suite 3
St. George, Utah 84770
Telephone 435/673-1661

LABOR COMMISSION OF UTAH

<div data-bbox="234 576 427 612" data-label="Text"><p>LANA HALL</p></div> <div data-bbox="690 614 837 653" data-label="Text"><p>Petitioner,</p></div> <div data-bbox="307 695 341 727" data-label="Text"><p>v.</p></div> <div data-bbox="234 766 540 804" data-label="Text"><p>ALBERTSON'S INC.,</p></div> <div data-bbox="662 804 832 842" data-label="Text"><p>Respondent.</p></div>	<div data-bbox="971 653 1346 687" data-label="Section-Header"><p>MOTION FOR REVIEW</p></div> <div data-bbox="1045 727 1268 763" data-label="Text"><p>Case No. 98707</p></div>
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COMES NOW the Petitioner, Lana Hall, by and through counsel, Aaron J. Prisbrey and pursuant to *Utah Code Ann.* §34A-2-801 and the Rules and Regulations of the Labor Commission of Utah, respectfully files her Motion for Review of the Order of the Administrative Law Judge dated September 14, 2000, in the above-entitled case.

I. GROUNDS FOR REVIEW

The denial of medical and disability benefits by the Administrative Law Judge was inappropriate as she allowed her duty as the finder of fact to be delegated to the panel. Likewise, she delegated to the panel legal determinations regarding apportionment of impairment and whether Ms. Hall's surgery was resultant from the industrial accident. Further, the ALJ relied upon an inadmissible panel report as the panel's determination lacked the requisite foundation for admissibility.

II. STATEMENT OF FACTS

1. On November 12, 1997, Petitioner injured her back at work. She was working at the meat counter at Albertson's Grocery Store. While lifting a tray, measuring about 2 ½ to 3 feet in size, she reached into a meat counter, twisting sideways to reach the tray, putting one hand underneath the tray to lift it, she felt a sudden pain in her lower back with a sharp burning electrical kind of pain. The tray possibly weighed as much as 100 lbs. (See Preliminary Findings of Fact, Conclusions of Law and Interim Order at paragraph III B.)

2. Hall underwent conservative treatment for pain and numbness in her leg. Then on June 26, 1998, a right L5 nerve root block was performed which gave her marked improvement of the right lower quadrant pain without much numbness. (See medical record Exhibit "T", radiology report dated June 26, 1998.)

3. At the request of the insurance carrier, Dr. Jeff Chung examined Hall on June 16, 1998. Chung found Hall's condition to be stable and issued a 3% permanent partial disability rating. Chung determined that surgical intervention would most likely not provide significant long-term improvement. (See medical record Exhibit "H" at pages 16-17.)¹

4. On August 11, 1998, Dr. Michael R. Green found Hall to be having severe back pain with radicular symptoms. An MRI, EMG and nerve root blocks pointed to a right-sided L5 nerve root which needed surgical decompression. (See medical record Exhibit "J", note dated August 11, 1998.)

5. Based upon Chung's report, Respondent denied Petitioner additional benefits. She

¹Respondents did not paginate the medical records exhibit so it is identified as best Petitioner can in referring to the exhibit.

filed an Application for Hearing with the Commission on or about August 17, 1998, claiming medical expenses, recommended medical care, temporary total compensation and interest.

6. On August 31, 1998, Dr. Green performed a lumbar laminectomy with partial facetectomies and foraminotomies at levels L3, L4 and L5.

7. After the surgery, Green found that Hall no longer had leg pain and had improvement with numbness that had previously existed over her right foot. He also found her range of motion to have improved. (See medical records Exhibit “J”, note of Dr. Green dated September 15, 1998.)

8. On April 12, 1999, Respondents had a second insurance examination performed by Dr. Richard T. Knoebel. Knoebel determined that, in spite of the surgery, Petitioner reached maximum medical improvement 1 ½ months prior, on June 16, 1998. He also opined that Petitioner had a 16% whole person impairment, 13% of which would be written off as non-industrial. Knoebel determined that the surgery performed by Green was “entirely elective” and the surgery was not the responsibility of the insurance carrier. (See medical records Exhibit “A” at page 11.)

9. This matter proceeded to hearing before the Labor Commission, the Honorable Kathleen H. Switzer, presiding on April 23, 1999, at the Washington County Commission chambers in St. George, Utah. At the time of hearing, Green had not yet found Hall’s condition to be stable. (See Preliminary Findings of Fact, Conclusions of Law and Interim Order at page 1.)

10. On November 14, 1999, the ALJ referred this matter to a medical panel for a determination of the medical aspects of the case based upon the conflicting reports of Chung, Knoebel, and Green. (See Preliminary Findings of Fact, Conclusions of Law, and Interim Order

at page 5.)

11. The medical panel, consisting of Dr. John C. Hylen and Dr. Richard G. Bromley, issued a 119 page medical panel report on February 15, 2000. However, the report offered no new insight into the case. The report simply parroted back the “findings” of Chung and Knoebel.

In relevant part, the panel found:

- a. Ms. Hall’s condition stabilized on June 16, 1998. (See medical panel report at page 116.)
- b. Ms. Hall had a 16% whole person impairment only 3% of which was caused by the industrial accident. (See medical panel report at page 117.)
- c. The surgery to Ms. Hall’s back was not related and was not medically necessary to treat Ms. Hall’s industrial injury of November 12, 1997. (See medical panel report at page 118.)

12. The panel’s report listed 40 paragraphs of findings in spite of the ALJ’s direction that the panel was bound by the ALJ’s Findings of Fact and ignored the 13 findings as made by the ALJ. (See Medical Panel Report at pages 5-12).

13. A timely objection to the panel report and request for hearing was made. The ALJ denied the request for hearing and referred the matter back to the medical panel for clarification. Hylen issued a supplemental report which essentially parroted back the first report.

14. The ALJ adopted the report of the panel with little explanation as to why she was relying on the report or why she would allow the panel to make a determination of legal issues and make it’s own findings.

15. The ALJ’s Findings of Fact, Conclusions of Law and Order mirrored that of the the panel, finding that: (1) Hall’s condition was stable on June 16, 1998; (2) Hall had a 16%

impairment rating, all but 3% was apportioned off; and (3) no additional medical expenses were reasonably related to the industrial accident. (See Findings of Fact, Conclusions of Law and Order at pages 2, 5 and 6.)

16. It was from that order of the ALJ that Hall appeals to the Labor Commissioner.

III. SUMMARY OF ARGUMENT

The ALJ has delegated her responsibility to the medical panel on legal issues. Further, the panel report is flawed, improperly admitted and the ALJ's reliance on the medical panel report was inappropriate.

IV. THE ALJ DELEGATED JUDICIAL RESPONSIBILITY TO THE MEDICAL PANEL

A. THE MEDICAL PANEL USURPED THE AUTHORITY OF THE ALJ IN RENDERING ITS DECISION.

The medical panel usurped the authority of the ALJ in rendering its decision. It is the responsibility of the ALJ to make a determination as to the facts involved in a particular case. (See, *Utah Code Ann.* § 63-46b-10(1).) In this situation, the ALJ informed the medical panel that it was bound by her determination as to what the facts of the case were. The sole function of the medical panel is to give the Commission the benefit of its diagnosis relating to matters within its expertise. It is inappropriate to infringe upon the Commission's responsibility to decide the issues in a workers compensation case. (See, *IGA Food Fair v. Martin*, 548 P.2d 828 (Utah 1978).

In violation of the ALJ's directive and Utah law, the medical panel questioned Ms. Hall

from two to two and a half hours before even performing a medical examination. (See page 9 of the supplemental medical panel report.) The panel basically ignored the 13 Preliminary Findings of Fact of the ALJ and made it's own 40 paragraphs of "facts" which resulted from the questioning of Hall. (See medical panel report at pages 5 through 12.) The entire panel report was based upon it's own fact finding mission and with disregard to the directive of the ALJ.

The panel cannot simply ignore the ALJ's findings and supplant them with it's own. That is clearly in violation of procedural requirements set forth under the statutorily mandated authority of the Commission.

A. THE DENIAL OF MEDICAL BENEFITS AND APPORTIONMENT OF IMPAIRMENT WAS A LEGAL DETERMINATION THAT SHOULD NOT HAVE BEEN DELEGATED TO THE PANEL.

The basis for the denial of Hall's surgery and subsequent care and the basis for the impairment was the idea that Hall had an "elective surgery". Knoebel made that determination which was then adopted by Hylen and subsequently by the ALJ. However, that is a legal determination that is not to be deferred to the panel.

"It is now uniformly held that aggravation of the primary injury by medical or surgical treatment is compensable. . . Fault on the part of the physician, such as faulty diagnosis, improper administration of anesthesia, or a slip of the surgeon's knife, even if it might amount to actual tortiousness does not break the chain of causation." (See, Larson, *Workers Compensation Law* § 13.21, a copy of which is attached hereto as Exhibit "A".)

Here, Knoebel, Hylen and the ALJ found Green did perform a surgery which was not necessary. If Green performed a surgery which was not needed, that would presumably be negligence. It is well settled that solely because a physician performed an operation in a

negligent manner, that does not break the causal connection whereby an insurance carrier would be immune from liability. In fact, if the operation performed by Green were inappropriate, the insurance carrier would be the trustee of any cause of action against him pursuant to *Utah Code Ann.* § 34A-2-106(2)(a)(i).

The fact that the panel believes Green performed an unneeded surgery does not relieve Respondent from liability. If not for her accident, Hall would not have had the surgery. Based upon the above referenced authority the surgery and resulting impairment are compensable.

C. THE APPORTIONMENT OF PETITIONER'S IMPAIRMENT BY THE PANEL WAS INAPPROPRIATE AS THAT IS A LEGAL ISSUE.

The apportioning of 13% of Petitioner's impairment is inappropriate. This is a legal determination. It is improper for the ALJ to make her determination on these issues based upon the medical panel report without going through the required legal analysis.

The Commission has adopted the *American Medical Association Guides to the Evaluation of Permanent Impairment*² ("The Guides"). The guides address apportionment of impairment only in the glossary of that text. (See, *The Guides* at page 314.)

In relevant part, *The Guides* provide that prior to apportioning impairment, there are two criteria which must be met:

- a. The alleged factor *could have caused* or contributed to the impairment, which is a medical determination (see 'causation' at page 316.)

² The 1997 *Utah Modifications to the AMA Guides* also provide guidance relative to apportionment. However, that apportionment relates only to pre-existing conditions and does not address subsequent conditions as "found" by the medical panel and the ALJ in this case.

- b. In a case in question, the factor *did cause* or contribute to the impairment **which usually is a non-medical determination . . .** (Emphasis added.)

Here, Knoebel and the panel apportioned the impairment. That was improper. This was a determination for the ALJ to make after review of the medical evidence. She did not do so. As described above, the entire 16% impairment rating is compensable as Hall would not have had the surgery but for the industrial accident.

V. THE PANEL REPORT WAS FATALLY FLAWED

A. ONCE AN OBJECTION TO A MEDICAL PANEL REPORT IS FILED, THERE MUST BE TESTIMONY TO SUSTAIN THE REPORT.

Where written objections are filed to a medical panel report, the burden rests upon the Commission or the employer to sustain the report by **oral testimony**. When that is not done, the report cannot be considered as evidence. See, *Hackford v. Industrial Comm'n*, 358 P.2d 899 (Utah 1961). (Emphasis added).

In this situation, objections to the medical panel report were received by the ALJ and she simply referred the matter back to the panel to have the panel readdress those issues. There was no testimony received to the objections. Pursuant to the above-referenced authority, the burden at that time shifted to Respondents and the Commission to sustain the report via oral testimony. That was not done. Therefore, the reliance upon the medical panel report by the ALJ was inappropriate and the medical panel report should be stricken unless and until there is sufficient oral testimony to support it.

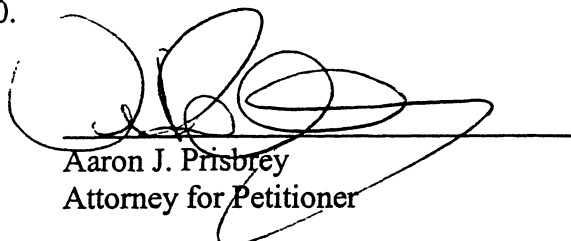
B. THERE WAS NO COMPETENT EVIDENCE TO SUPPORT THE MEDICAL PANEL'S DETERMINATION THAT PETITIONER HAD REACHED MAXIMUM MEDICAL STABILITY.

Where the Labor Commission adopts a medical panel's conclusion, it must be supported by credible and competent evidence. Otherwise, an award of benefits must be reversed. (See, *Redman Warehousing Corp. v. Industrial Comm'n*, 454 P.2d 283 (Utah 1969). Likewise, as the medical panel report is essentially an expert opinion, it must meet foundational requirements in order for the physician to render the opinion. (See, *Utah Packers, Inc. v. Industrial Comm'n*, 469 P.2d 500 (Utah 1970).

In this situation, the medical panel made a determination that Petitioner's condition was stable on June 16, 1998. The panel had information before it that Petitioner underwent a three level fusion 1 ½ months after that. Yet the panel still found Petitioner's condition was stable. Under that analysis, Hall was stable during surgery, during physical therapy and during follow up. That is clearly not based upon any medical principles. Foundation for the report has not been laid and the determination should be rejected.

WHEREFORE, Petitioner requests the determination of the ALJ be reversed and that the Commission enter an order awarding Ms. Hall a 16% permanent partial disability award, ordering Respondents to pay medical benefits including, but not limited to, the surgery performed by Green and that this matter be remanded to the ALJ for a determination of stability based upon sound medical and legal reasoning.

DATED this 13 day of October, 2000.


Aaron J. Pristrey
Attorney for Petitioner

CERTIFICATE OF MAILING

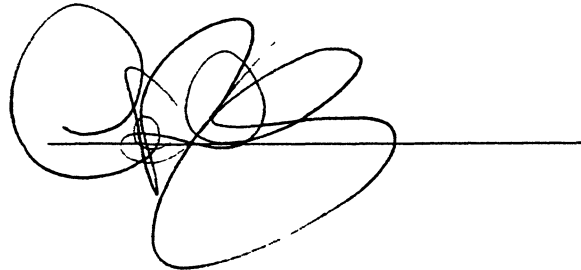
I hereby certify that I caused to be deposited in the United States Mail, postage prepaid, a true and correct copy of the foregoing instrument, on this 1² day of October, 2000, addressed to the following:

Ford Scalley
261 East 300 South Suite 200
Salt Lake City UT 84111
via facsimile (801) 531-7968

Lana Hall
544 South 100 West #9
St. George, UT 84770

I further certify that I deposited in the U.S. Mail the original of the foregoing instrument, this 1³ day of October, 2000, to the following:

Labor Commission of Utah
160 East 300 South, 3rd floor
PO Box 146615
Salt Lake City UT 84114-6615
via facsimile (801) 530-6333

A handwritten signature in black ink, consisting of a large, stylized 'L' or 'J' shape with a horizontal line extending to the right.

Tab 5

RECEIVED
JAN 10 2001
JS/ae

UTAH LABOR COMMISSION

LANA HALL,

Applicant,

v.

ALBERTSON'S, INCORPORATED,

Defendant.

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ORDER DENYING
MOTION FOR REVIEW

Case No. 98-0707

Lana Hall asks the Utah Labor Commission to review the Administrative Law Judge's decision regarding Mrs. Hall's claim for benefits under the Utah Workers' Compensation Act ("the Act"; Title 34A, Chapter 2, Utah Code Ann.).

The Labor Commission exercises jurisdiction over this motion for review pursuant to Utah Code Ann. §63-46b-12, Utah Code Ann. §34A-2-801(3) and Utah Admin. Code R602-2-1.M.

ISSUE PRESENTED

Mrs. Hall challenges the admission of the medical panel report into evidence. Mrs. Hall also contends the ALJ improperly delegated adjudicative responsibilities to the medical panel.

BACKGROUND

On November 12, 1997, Mrs. Hall injured her back while working for Albertson's. On August 21, 1998, she filed an Application for Hearing with the Labor Commission's Adjudication Division seeking workers' compensation benefits for her work-related injury. Following an evidentiary hearing on Mrs. Hall's claim, the ALJ concluded that conflicting medical evidence warranted referral of the disputed medical issues to an impartial medical panel. The ALJ appointed Dr. Hylen, a physician specializing in internal medicine and cardiovascular diseases, and Dr. Bromley, a physician specializing in orthopedic surgery, to comprise the medical panel.

In appointing the medical panel, the ALJ instructed the panel members that they were bound by the ALJ's determination of non-medical fact but were free to evaluate the available medical information according to their medical expertise. The medical panel was also permitted to personally examine Mrs. Hall and obtain additional medical diagnostic tests as necessary.

In a thorough, well-reasoned and persuasive report dated February 15, 2000, the medical panel concluded that Mrs. Hall achieved medical stability from her work-related injury on June 16,

ORDER DENYING MOTION FOR REVIEW
LANA HALL
PAGE 2

1998, and that she suffered a 3% whole person impairment related to lumbosacral spine conditions as a result of her work-related injury. The medical panel further concluded that the medical treatment Mrs. Hall had received for her low back condition from November 12, 1997, through June 16, 1998, was necessary to treat her work-related injury, but that subsequent medical treatment had not been necessary to treat her work-related injury.

On March 13, 2000, Mrs. Hall raised a number of objections to the medical panel's conclusions and requested a hearing on her objections. Rather than holding a hearing as requested, the ALJ referred Mrs. Hall's objections to the medical panel for its consideration. The medical panel responded with additional explanation of its previous conclusions. Mrs. Hall then renewed her objections to the medical panel's report. The ALJ over-ruled such objections, adopted the medical panel's medical opinions and awarded workers' compensation benefits to Mrs. Hall consistent with the medical panel's opinions. Mrs. Hall then sought review of the ALJ's decision by the Labor Commission.

DISCUSSION AND CONCLUSION OF LAW

In her motion for review, Mrs. Hall contends that the medical panel's report is inadmissible as evidence in this matter because it lacked sufficient foundation to support its conclusion that Mrs. Hall achieved medical stability on June 16, 1998. Having carefully reviewed the medical panel's report, the Commission agrees with the ALJ's determination that the report is fully grounded in the medical record and supported by the panelists' professional expertise. The Commission therefore concludes that sufficient foundation has been established to warrant admission of the panel report into evidence.

Mrs. Hall also contends that, once she raised objections to the medical panel's report, the ALJ was required to conduct a hearing on the report. In support of this position, Mrs. Hall cites Hackford v. Industrial Commission, 358 P.2d 899 (Utah 1961). However, at the time Hackford was decided, the relevant provisions of the Utah Workers' Compensation Act provided: "If objections to such (medical) report are filed it **shall be the duty of the commission to set the case for hearing . . .**" (Emphasis added.) But the Act was subsequently amended to remove the foregoing mandatory requirement for a hearing and replace it with the following permissive language: "If objections to the report are filed, the administrative law judge **may** set the case for hearing to determine the facts and issues involved." Thus, the determination of whether a hearing on medical panel objections is required is left to the discretion of the ALJ.

In this case, the ALJ concluded that no additional hearing was necessary. The Commission agrees. As discussed in the ALJ's decision and in other parts of this decision, Mrs. Hall's objections to the medical panel's report did not raise significant medical or other issues, nor were the objections themselves supported by medical opinion. The ALJ therefore properly exercised her discretion by not conducting additional hearings on the objections.

ORDER DENYING MOTION FOR REVIEW
LANA HALL
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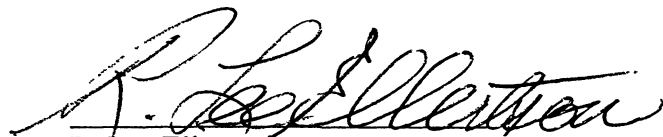
Mrs. Hall also argues that the medical panel overstepped its authority by substituting its findings for those of the ALJ. However, the Commission does not view the medical panel's report as ignoring or superseding the ALJ's findings. Rather, the medical panel performed exactly the function that is envisioned for it by the Act—it used its medical expertise and independent professional judgment in evaluating the admittedly complex medical aspects of Mrs. Hall's claim. The question whether Mrs. Hall's back surgery was necessary to treat her work-related injury is preeminently a medical question. Likewise, the application of medical norms such as the American Medical Association's Impairment Guides to determine the extent of impairment that resulted from Mrs. Hall's work injury is also a medical question. Such questions may properly be referred to a medical panel.

In summary, the Commission finds Mrs. Hall's challenges to the medical panel's report and the ALJ's decision to be without merit. The Commission concludes, as did the ALJ, that the medical panel's report is admissible and persuasive. The Commission therefore affirms and adopts the ALJ's decision, which is based on the panel's report.

ORDER

The Labor Commission affirms the decision of the ALJ and denies Mrs. Hall's motion for review. It is so ordered.

Dated this 8th day of January, 2001.


R. Lee Ellertson
Utah Labor Commissioner

IMPORTANT! 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.

ORDER DENYING MOTION FOR REVIEW
LANA HALL
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CERTIFICATE OF MAILING

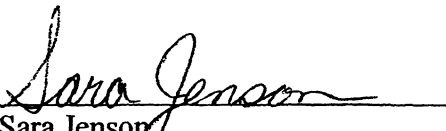
I certify that a copy of the foregoing Order Denying Motion For Review in the matter of Lana Hall, Case No. 98-0707, was mailed first class postage prepaid this 8th day of January, 2001, to the following:

LANA HALL
544 S 100 W #9
ST GEORGE UT 84770

ALBERTSON'S INC.
BOX 20
BOISE ID 83726-0020

AARON J PRISBREY, ATTORNEY
1071 E 100 S, BLDG D, #3S
ST GEORGE UT 84770

FORD G SCALLEY, ATTORNEY
SCALLEY & READING
261 E 300 S #200
SALT LAKE CITY UT 84111


Sara Jenson
Support Specialist
Utah Labor Commission

Orders\98-0707