

1992

Kerry L. Willardson v. Utah Industrial Commission, Beaver Creek Coal Co., Cigna Insurance Co., and the Employers' Reinsurance Fund : Brief of Petitioner

Utah Court of Appeals

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Benjamin A. Sims; Attorney for Industrial Commission of Utah; Erie V. Boorman; Attorney for Employers\' Reinsurance Fund; Robert J. Shaughnessy; Attorney for Beaver Creek Coal Co..
Virginius Dabney; Dabney and Dabney; Attorney for Petitioner.

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UTAH COURT OF APPEALS

DOCKET NO. 920165CA

KERRY L. WILLARDSON,

Petitioner,

VS.

UTAH INDUSTRIAL COMMISSION,
BEAVER CREEK COAL CO., CIGNA
INSURANCE CO., and the
EMPLOYERS' REINSURANCE FUND,

Respondents.

• • • • •

Case No. 920165-CA

Priority No. 7

BRIEF OF PETITIONER

PETITION FOR REVIEW OF
DENIAL OF PETITIONER'S MOTION FOR REVIEW OF
ORDER OF THE INDUSTRIAL COMMISSION OF UTAH

Benjamin A. Sims, Esq.
UTAH INDUSTRIAL COMMISSION
P.O. Box 510250
Salt Lake City, Utah 84151-0250
Attorney for Industrial
Commission of Utah

Virginius Dabney, Esq.
DABNEY & DABNEY, p.c.
350 South 400 East, Suite 202
Salt Lake City, Utah 84111
Attorney for Petitioner

Erie V. Boorman, Esq.
EMPLOYERS' REINSURANCE FUND
Post Office Box 510250
Salt Lake City, Utah 84145
Attorney for Employers'
Reinsurance Fund

Robert J. Shaughnessy, Esq.
Post Office Box 963
Salt Lake City, Utah 84110
Attorney for Beaver Creek
Coal Company and CIGNA Insurance Company

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Mary T. Noonan
Clerk of the Court
North Court of Appeals

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JURISDICTION OF THE COURT

This is a Petition for Review of the Industrial Commission's February 18, 1992 Order Denying Petitioner's Motion for Review alleging entitlement to permanent, total disability benefits sustained as a result of an industrial accident. A Petition for Review of that Order was timely filed with this Court on March 17, 1992.

This Court has jurisdiction to hear this Petition for Review pursuant to Utah Code Annotated, Sections 35-1-82.53(2) (1988), 35-1-86 (1988), 63-46b-16 (1988), and 78-2a-3(2)(a) (1988); and Rule 14 of the Utah Rules of Appellate Procedure.

STATEMENT OF THE ISSUE(S)/STANDARD OF APPELLATE REVIEW

There are three substantial issues presented for review:

- (1) whether Mr. Willardson suffered a compensable industrial accident;
- (2) whether the Administrative Law Judge applied the wrong standard of proof to Petitioner's injuries; and,
- (3) whether the Industrial Commission abused its discretion by failing to convene a Medical Panel.

The standard of appellate review which is to be applied to the resolution of the above issues is one involving "correction of error", since they involve questions of law, and no deference to the agency's view of the law is required. Utah Administrative Procedures Act, Utah Code Annotated, Section 63-46b-16(4) (d) (1988). Mor-Flo Industries v. Board of Review, 817 P.2d 328 (Utah

1991). Morton International, Inc. v. Auditing Division of the Utah State Tax Commission, 814 P.2d 581 (Utah 1991).

Furthermore, in reviewing the proceedings below and the scope of the Utah Workers Compensation Act, it is important to recognize that the Act is to be liberally construed and any doubt as to compensation is to be resolved in favor of the Petitioner. State Tax Commission v. Industrial Commission, 685 P.2d 1051, 1053 (Utah 1984). McPhie v. Industrial Commission, 567 P.2d 153, 155 (Utah 1977).

DETERMINATIVE STATUTE/RULE

Utah Code Annotated, Section 35-1-77(1)(a) (1988) is the determinative statute in this case. Rule 490-1-9 of the Industrial Commission's administrative rules is also applicable. They are set forth in full in the Addendum thereto as Exhibit A.

STATEMENT OF THE CASE

Nature of the Case

Mr. Willardson seeks review of the Industrial Commission Order denying his Motion for Review wherein he alleged entitlement to permanent, total disability compensation occasioned by his industrial accident.

Course of Proceedings

Mr. Willardson filed an application for permanent, total disability compensation benefits sustained as the result of an industrial injury on or about April 15, 1988. (R. at 8). None of

the parties disputed that Mr. Willardson is disabled (R. at 10, 74); however, the Respondents alleged that Mr. Willardson did not sustain a compensable industrial injury and is thus not entitled to permanent, total disability benefits. (R. at 10). A hearing was held on February 26, 1991. (R. at 17).

Disposition Below

On March 18, 1991 the Administrative Law Judge held that Petitioner had failed to demonstrate medical causation and that his symptoms and disability after April 15, 1988 were the result of pre-existing conditions with no contribution from the work activities of April 15, 1988. A Medical Panel was not appointed to examine Mr. Willardson or review his medical records. His claim for permanent, total disability benefits was dismissed with prejudice for failure to establish medical causation. (R. at 19-28, copy attached to Addendum as Exhibit B).

He filed a Motion for Review with the Industrial Commission which was subsequently denied on February 18, 1992. (R. at 74-79, copy attached to Addendum as Exhibit C). He challenges that final agency action in this Petition for Review.

Statement of the Facts

At the time of his industrial accident on April 15, 1988, Mr. Willardson was 57 years old and employed by Beaver Creek Coal Company as a Belt Supervisor. (R. at 20). That job involved maintaining a conveyor belt that was approximately 1 and 1/2 miles long. The belt was mostly waist-high, but was shoulder high for a portion of its total length, and was three (3) feet overhead in

places. Mr. Willardson's duties required him to keep the belt clean, primarily by shoveling under the rollers to keep debris from building up. (R. at 20).

On April 15, 1988, Mr. Willardson was engaged in "regarding" the belt, which involved replacing wire mesh guards that were fastened to the belt lengthwise and are designed to prevent rock from falling off the belt. He had never previously performed this activity. The guards are made of heavy wire mesh and were approximately 4 feet by 8 feet in dimension, and weighed approximately 20-25 pounds each. They were stacked in packages of 50 to 100 and bound together with straps. To reguard the belt, the guards needed to be carried from the stack over to the belt and then fastened to the belt, using wire and pliers. (R. at 21). While attempting to pick up one of the screens from a stack, Mr. Willardson found that it was stuck and that he would have to jerk it loose. He bent over at the waist and grabbed onto the guard on top of the stack and jerked on it while straightening up and stepping back at the same time. As he jerked it, pulling it up and away from the stack, he felt a sharp pain about at the level of his belt line in his low back. (R. at A-1).

Due to the severity of the pain, he immediately laid down flat on his back and was found laying on the ground by another employee, Mr. Owen Hunt. Mr. Hunt helped him up and into a shack approximately 6 to 8 feet away. When the pain did not subside and in fact had increased, Mr. Willardson concluded that he would be unable to remain at work. He showered, and with some difficulty,

got out of his work clothes and got dressed. Mr. Hunt helped him into his (Hunt's) van and drove him to a Chiropractor, Dr. Sanders. Dr. Sanders declined to treat him and referred him to the Emery medical Center. (R. at 21,22, A-1).

Mr. Willardson was seen by Dr. C. Kotrady at the Emery Medical Center that same day. (R. at 22, A-2). Dr. Kotrady's Physician's Initial Report of Work Injury noted that Mr. Willardson had right hip pain in a number of different places, and contained a diagnosis of right hip pain, severe degenerative arthritis - hips, pelvis and lumbar spine, with degenerative disc disease at all levels of the lumbar spine with scoliosis present. (R. A-2 at 11.5). Dr. Kotrady indicated that Mr. Willardson's condition was the result of an industrial injury, but noted that there was also evidence of degenerative arthritis and disc disease pre-existing this injury. (R. A-2 at 11.5). Dr. Kotrady initially felt that Mr. Willardson could return to work as of April 25, 1988. (R. A-2 at 11.5).

When leaving Dr. Kotrady's office on April 19, 1988 for a follow up visit, Mr. Willardson "felt something twist and pull in his hip and the hip pain reoccurred". He was unable to stand in a line at a scout meeting that evening because of worsening pain. That pain became markedly worse when he stooped over to take some clothes out of the dryer on April 23, 1988. (R. A-4 at 25).

On April 23, 1988, Mr. Willardson was admitted to Castlevlew Hospital for low back pain. The Admit History and Physical Exam report indicates that he had chronic low back pain, but that after recovery from a 1970 injury and surgery that he was OK with just

occasional low back discomfort and had not experienced any loss of work time. (R. A-4 at 25). He was treated conservatively and discharged on April 30, 1988. The Discharge Summary indicates that he seemed to improve, but had reached a plateau and still had significant pain and discomfort in the hip with minimal ambulatory functioning. (R. A-4 at 25).

Mr. Willardson followed up with Dr. David R. Heiner after release from the hospital, and was referred by him to Dr. L. Gaufin, a neurologist in Provo, Utah. On May 5, 1988, after an initial examination, Dr. Gaufin reported his findings as: (1) acute lumbar radiculopathy L4-5, L3-4, right, secondary to degenerative disc and joint disease with disc protrusion at L3-4, L4-5, right, secondary to degenerative disc and joint disease with disc protrusion at L3-4, L4-5, right greater than left and (2) chronic osteoarthritis and degenerative disc and joint disease L1-2, L2-3, L3-4, L4-5 L5-S1 bilaterally. Dr. Gaufin noted that the lumbar radiculopathy was secondary to the work-related injury on April 15, 1988. (R. A-6 at 58-59).

Mr. Willardson continued to be followed up by Dr. Heiner approximately every month or two through February 1990. There was never any real change in his overall condition or symptoms during this period, although routine events would sometimes exacerbate the pain causing it to increase in intensity for a period of time. (R. A-2 at 48-51). Mr. Willardson was never able to return to work after the industrial injury and was awarded Social Security Disability beginning as of April 15, 1988, the date of his

industrial accident. (R. A-12).

Both Dr. Gaufin and Dr. Heiner completed Summary of Medical Record reports in September, 1988 and accessed impairment ratings for Mr. Willardson. Dr. Heiner gave him a 30% whole person rating, with 50% of that being due to pre-existing conditions and 50% due to the April 15, 1988 industrial injury. (R. A-5 at 42, 46). Dr. Gaufin gave him a 15% whole person rating, with 50% being due to pre-existing conditions and 50% due to the April 15, 1988 industrial injury. (R. A-6 at 60). The Respondents did not have Mr. Willardson examined by a physician of their own choosing and did not present any contrary medical evidence. The Administrative Law Judge did not refer Mr. Willardson to a Medical Panel.

Petitioner's claim for permanent total disability benefits was dismissed with prejudice by the Administrative Law Judge on March 18, 1991 for failure to establish medical causation (R. at 19-28). He filed a Motion for Review with the Industrial Commission on April 17, 1991 (R. at 29-31), but it was denied on February 18, 1992. (R. at 74-79).

SUMMARY OF ARGUMENT(S)

The Petitioner sustained a compensable industrial injury on April 15, 1988 while in the employ of Respondent Beaver Creek Coal Co. That injury was severe enough to require immediate medical treatment and prevent him from being able to return to work after that injury. Both of the Doctors who examined and treated Mr. Willardson found that he had sustained an industrial injury and

that it was responsible for at least half of his resulting permanent total disability status.

The Respondents did not provide any conflicting medical testimony or documentation and despite the fact that the disability ratings assessed by Petitioner's two doctors varied by more than 5%, (they actually varied by 15%), the Administrative Law Judge did not refer this matter to a Medical Panel.

This Court should summarily reverse the Industrial Commission's determination that Petitioner did not establish medical causation and remand with instructions to enter an award establishing that fact. In the alternative, this matter should be remanded with instructions to the Industrial Commission to convene a Medical Panel to examine the medical causation issue.

ARGUMENT

I

THE WORKERS' COMPENSATION ACT IS TO BE APPLIED LIBERALLY IN FAVOR OF AWARDING BENEFITS AND ALL DOUBTS AS TO COVERAGE ARE TO BE RESOLVED IN FAVOR OF THE INJURED WORKER.

Few principles of workers' compensation law are as well established in this State as that workers' compensation disability claims are to be liberally construed in favor of awarding benefits, and any doubts raised from the evidence are to be resolved in favor of the claim. Utah Courts have consistently reiterated this principle from 1919 to the present. Heaton v. Second Injury Fund, 796 P.2d 676 (Utah 1990); State v. Industrial Commission, supra., J & W Janitorial Co. v. Industrial Commission, 661 P.2d 949 (Utah

1983); Prows v. Industrial Commission, 610 P.2d 1362 (Utah 1980); McPhie v. Industrial Commission, supra.; Baker v. Industrial Commission, 405 P.2d 613 (Utah 1965); Askrew v. Industrial Commission, 391 P.2d 302 (Utah 1964); M & K Corp. v. Industrial Commission, 189 P.2d 132 (Utah 1948); and Chandler v. Industrial Commission, 184 P. 1020 (Utah 1919).

The Utah Supreme Court in Chandler, supra, discussed the proper construction of the Workers' Compensation Act and the underlying purposes of the Act, and stated as follows:

We are also reminded that our statute requires that the statutes of this state are to be 'liberally construed with a view to effect the objects of the statutes and to promote justice.'

* * * * *

In this connection it must be remembered that the compensation provided for in the act is in no sense to be considered as damages for the injured employee or to his dependents in case death supervenes. The right to compensation arises out of the relation existing between employer and employee, and that the injury arises out of [or] in the course of the employment. Under such an act the costs and expenses of conducting the business or enterprise, including compensation for injuries to 'employees or other casualties, must be taxed to the business. The theory of the Compensation Act is that the whole cost and expense of conducting the business as aforesaid is added to the cost of the articles that are produced and sold, and hence, in the long run, such costs and expenses are borne by the public; that is, by the consumers of the articles produced. The purpose of such an act, therefore, is to protect the employee and those dependent upon him, and in case of his serious injury or death to provide adequate means for the support of those dependent upon him. In view, therefore, that in case of total disability or death of the employee his dependents might become the objects of public charity, such a calamity is avoided by requiring the business or enterprise to provide for such dependents, with the right of the employer to add the amount that is paid out to the cost of producing and selling the product of such business or enterprise. The beneficent purpose of such acts are therefore apparent to all, and for that reason, if for no other, should receive a very liberal

construction in favor of the injured employee. We are all united upon the proposition that in view of the purposes of such acts, in case there is any doubt respecting the right to compensation, such doubt should be resolved in favor of the employee or his dependents as the case may be. Id. at 1021-1022. (Emphasis added)

The Administrative Law Judge in rendering her Findings of Fact and Conclusions of Law failed to apply this vital rule of construction. Nowhere in her Findings or Conclusions is there any evidence of a "liberal construction" or the "resolution of doubt in favor of the claim". Whenever any doubt or uncertainty appears in the record, the Administrative Law Judge construed it against the injured employee which is contrary to the correct statutory construction required in a workers compensation case.

In light of the Administrative Law Judge's casual disregard of the findings of the only two Doctors who presented medical evidence, the absence of any medical evidence supporting her Findings or refuting Petitioner's physicians, the finding of a lack of medical causation, for the reasons set forth below, is simply not supported by the record. The entire underlying basis of the Order is thus flawed. The "findings" and "conclusions" do not evidence "humane and beneficent purposes" as required by law. The entire Order should be disregarded due to this conceptional flaw.

II

THE PETITIONER SUSTAINED AN INJURY BY REASON OF AN INDUSTRIAL ACCIDENT IN THE COURSE OF HIS EMPLOYMENT.

The law is clear and overwhelming that the Workman's Compensation Act is to be applied liberally and in favor of

awarding benefits, with all doubts as to coverage being resolved in favor of the injured worker. Heaton v. Second Injury Fund, *supra*. This principle of construction is not only to be applied to the application of law, but also to the reasonable inferences which can be drawn from the facts. The Petitioner is entitled to have all doubts as to whether he sustained a compensable industrial injury as a result of the events of April 15, 1988 resolved in his favor.

The evidence that Petitioner suffered an industrial injury on that date was overwhelming and largely unrefuted other than by innuendo. The Respondents base their argument that a compensable injury did not occur on that date on the Administrative Law Judges conclusion that "[Petitioner's] symptoms and disability after April 15, 1988 were the result of his long-standing and significant degenerative condition of his lumbar spine and were not the result of any significant contribution by activities of April 15, 1988." (R. at 26). This argument begs the question and fails to apply clearly delineated standards as to what constitutes a "compensable injury".

In order to establish that he has suffered a compensable injury under the Workers' Compensation Act, the Petitioner need only show that the injury must have occurred by accident; and there must be a causal connection between the injury and the claimant's employment activities. Sisco Hilte v. Industrial Commission, 766 P.2d 1089, 190 (Utah Ct. App. 1988).

In the landmark case of Allen v. Industrial Commission, 729 P.2d 15 (Utah 1986), the Supreme Court defined what constitutes an

accident under Workers' Compensation Act. The Court held as follows:

For purpose of worker's compensation, the key requirement of an 'accident' is that the occurrence be unanticipated, unplanned and unintended; where either cause of injury or result of exertion is different from what would normally be expected to occur, occurrence is unplanned, unforeseen, and unintended and, thus, by 'accident'. Id. at 21.

The Petitioner testified that he suffered an industrial accident when he injured himself attempting to pick up a 25-pound metal screen. The sudden jerking to free the screen was the precipitating event which created the back pain. His version of the events was supported by co-workers and was never rebutted by Respondents. The evidence is overwhelming that on April 15, 1988, Petitioner suffered an industrial accident.

There is no requirement that the accident result in immediate and debilitating injury, only that in cases involving the presence of pre-existing conditions that it involve some unusual and extraordinary exertion. (Allen, supra.) In this case, as a result of an accident, Petitioner indisputably engaged in unusual and extraordinary exertion. He did sustain an accident as that term is defined in the act.

Petitioner has admitted that he has "a history of prior back injuries and has been undeniably suffering from moderate to severe arthritic changes in his lumbar spine and pelvis." (R. at 36). However, just because a person suffers a pre-existing condition, he or she is not disqualified from obtaining compensation. "Compensation is not dependant on the state of an employee's health

or his freedom from constitutional weakness or latent tendency." Denver v. Hansen, 650 P.2d 1319, 1321 (Colo. App., 1982). The clear law of this state is that "the aggravation or lighting up of a preexisting disease by an industrial accident is compensable...." Powers v. Industrial Commission, 19 Utah 2d 140, 143-44, 427 P.2d 740, 743 (1967) (quoted with approval in Allen, id.).

There was no medical evidence offered at the hearing which would suggest that Petitioner's injuries were not at least partially the result of the industrial accident. In fact, both of the examining doctors assigned one-half of the Petitioner's injuries to the industrial accident. The Respondents failed to offer any conflicting medical evidence. The Administrative Law Judge simply cannot arbitrarily discount competent, uncontradicted evidence indicating that the industrial injury was the cause of Petitioner's present permanent, total disability. Kaiser Steel Corp. v. Industrial Commission., 709 P.2d 1168 (Utah 1985). Frito-Lay, Inc. v. Jacobs, 689 P.2d 1335 (Utah 1984).

If there was any failure to find a medical/industrial cause of the injuries Petitioner demonstrates, such failure resulted from the Administrative Law Judge's failure to empanel a medical panel, as argued below.

The actual Findings of Fact portion of the Order in this matter are grossly inadequate and do not meet recent legal requirements. Such summary conclusions do not constitute proper fact-finding.

In the recent case of Adams v. Board of Review, 821 P.2d 1 (Utah Ct. App. 1991), the Court stated as follows:

While the purported "Findings of Fact written by the A.L.J. contain an informative summary of the evidence presented, such a rehearsal of contradictory evidence does not constitute findings of fact. In order for a finding to truly constitute a "finding of fact," it must indicate what the A.L.J. determines in fact occurred.... The evidence did not merely indicate two possible versions of a fact whereby we could conclude that the denial of benefits necessarily indicates that the Commission accepted one version over another. The evidence shows several possible configurations and degrees of injury and/or disease, if any, and the causes, if any, thereby creating a matrix of possible factual findings. A mere summary of the conflicting evidence in this case therefore does not give a clear indication of the A.L.J.'s or the Commission's view as to what in fact occurred. Since we cannot even determine why the Commission found there was no causation shown, we clearly cannot assume that the Commission actually made any of the possible subsidiary findings. The findings are therefore inadequate. Id. at 20.

The Findings made by the Administrative Law Judge are deficient in that they fail to address in detail the issue of medical causation. The absence of a Medical Panel report makes this failure even more glaring. Although none of the parties, including the Administrative Law Judge, dispute that Petitioner is permanently and totally disabled, the Administrative Law Judge did not specify the degree to which that disability was caused by the 1988 industrial injury. The Administrative Law Judge spends a great deal of time discussing Petitioner's prior medical problems, but does not make concise findings as to Petitioner's current medical condition and the causes for it. This failure was undoubtedly compounded by the Administrative Law Judges unwarranted refusal to submit the matter to a Medical Panel as complained

below, and that failure manifests itself here in inadequate findings.

The Utah Court of Appeals has recently informed this Commission that:

In order for us to meaningfully review the findings of the Commission, the findings must be 'sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached.' Action v. Deliran, 737 P.2d 996 999 (Utah 1987) (quoting Rucker v. Dalton, 598 P.2d 1336 (Utah 1979))...[T]he failure of an agency to make adequate findings of fact on material issues renders its findings 'arbitrary and capricious' unless the evidence is 'clear, uncontroverted and capable of only one conclusion.' Id. (quoting Kinkella v. Baugh, 660 P.2d 233, 236 (Utah 1983)).

Nyrehn v. Industrial Commission, 800 P.2d 330, 335 (Utah App. 1990), cert. denied, 815 P.2d 241 (Utah 1991).

The Administrative Law Judge's purported Findings of Fact, Conclusions of Law and Order should at a minimum be vacated and a new Order entered with detailed and subsidiary facts to disclose the steps by which the ultimate conclusion was reached. Failure to do so, denies Petitioner the ability to marshal the evidence in support of the findings and show that it is not substantial. Grace Drilling Co. v. Board of Review, 776 P.2d 63, 67-68 (Utah App. 1989).

III

THE ADMINISTRATIVE LAW JUDGE APPLIED THE WRONG STANDARD OF PROOF TO THE PETITIONER'S INJURIES.

The Administrative Law Judge based her finding of "no medical causation" on the finding that the Petitioner's "symptoms and

disability after April 15, 1988 were the result of his long-standing and significant degenerative condition in his lumbar spine and were not the result of any significant contribution by the activities of April 15, 1988." (emphasis added) (R. at 26).

There is no requirement in the Workers' Compensation Act that the work-related activities "significantly" contribute to an injury in order for a compensable industrial accident to occur. Case law is overwhelming that the only requirement is that there be a medical and legal relationship between the Petitioner's symptoms and work-related activities, significant or otherwise. Ostler v. Industrial Commission, 84 Utah 428, 46 P.2d 95 (1934).

In like regard is Larson, Workman's Compensation Law, Section 12.26 at 3-480-481: "The relative contribution of the accident and the prior disease is not weighed,...." The only requirement is that the work-related event be a contributing cause of the injury; it not be a significant contribution. Higgins v. Industrial Commission, 700 P.2d 704 (Utah 1985).

Respondents, Beaver Creek and CIGNA, have conceded that the Administrative Law Judge erred in the use of "no significant contribution" as an evidentiary standard, and allege that she could have stopped with a mere negative finding of any contribution. (R. at 56). While that may be the case, it is clear that she did not find that there was "no contribution" but rather that the contribution was not "significant".

The Administrative Law Judge displayed confusion in the invocation of the "clear and convincing evidence" standard. At

times the Judge refers to a "preponderance" but at other times she seems to require proof by "clear and convincing" evidence. The applicable standard is that of "preponderance of the evidence" and not "clear and convincing," evidence. Lipman v. Industrial Commission, 592 P.2d 616 (Utah 1979). In addition, the Administrative Law Judge applied the wrong standard of proof under Allen, supra, because the higher burden of proof is inapplicable to this case since the risk brought to the work place was incurred by working for the same employer as distinguished from any personal risk brought to the work place by the Petitioner. Fred Meyer v. Industrial Commission, 800 P.2d 825 (Utah Ct. App. 1990).

And finally, the Administrative Law Judge selectively chose only a single day's activities of April 15, 1988 in order to determine whether a compensable injury had occurred as opposed to reviewing the repetitive cause and cumulative effects of the Petitioner's employment history with the same employer over several years. Petitioner was entitled to have the entire scope of his employment history weighed rather than just one isolated day. Stouffer Foods Corp. v. Industrial Commission, 801 P.2d 179 (Utah Ct. App. 1990). Nyrehn v. Industrial Commission, supra. Miera v. Industrial Commission, 728 P.2d 1023 (Utah 1986).

IV

THE ADMINISTRATIVE LAW JUDGE ABUSED HER DISCRETION IN NOT REFERRING THIS MATTER TO A MEDICAL PANEL TO ASSIST IN THE RESOLUTION OF THE MEDICAL CAUSATION ISSUES.

Utah Code Annotated, Section 35-1-77(1)(a) (1988) reads as follows:

Upon the filing of a claim for compensation for injury by accident, or for death, arising out of or in the course of employment, and if the employer or its insurance carrier denies liability, the commission may refer the medical aspects of the case to a medical panel appointed by the commission.

In response to Petitioner's claim that despite requests by counsel, the Administrative Law Judge failed and/or refused to refer this matter to a medical panel, Respondent Utah Industrial Commission in its Order Denying Motion for Review states as follows:

Appointment of a medical panel is within the sound discretion of the ALJ as limited by U.C.A. Section 35-1-77 (1953 as amended), and R490-1-9 (Utah Admin. Code 1992). Since there was no credible conflicting medical evidence, the ALJ did not err in making her decision not to appoint a medical panel. (R. at 107).

While that argument might have some merit in the initial formulation of policy, it has none in the execution of the policy presently contained in statute, rules and regulations. Utah Industrial Commission Rule R568-1-9 governing the "necessity of submitting a case to a medical panel" provided in relevant part as follows:

Pursuant to Section 35-1-77, U.C.A., the commission adopts the following guidelines in determining the necessity of submitting a case to a medical panel:

A. A panel will be utilized by the Administrative Law Judge where:

1. One or more significant medical issues may be involved. Generally a significant medical issue must be shown by conflicting medical reports. Significant medical issues are involved when there are:

(a) Conflicting medical reports of permanent physical impairment which vary more than 5% of the whole person,

(b) Conflicting medical opinions as to the temporary total cutoff date which vary more than 90 days, and/or

(c) Medical expenses in controversy amounting to more than \$2,000.... See Addendum, Exhibit A.

The Rule mandatorily requires that a panel "will" be used when "one or more significant medical issues may be involved". The rule does not, as Respondents seem to suggest, give the Administrative Law Judge unbridled discretion to determine the existence of such issues, but rather definitively states that "Significant medical issues are involved where there are: (a) conflicting medical reports of permanent physical impairment which vary more than 5% of the whole person...."

It can not be disputed that this case clearly contains conflicting medical reports of permanent physical impairment which vary by more than 5% of the whole person. Dr. Gaufin rated the Petitioner at 15% impairment of the whole person (R. A-5 at 42, 46), while Dr. Heiner indicated that he had a 30% whole person rating (R. A-6 at 60), a difference of 15%. Both physicians divided the Petitioner's permanent impairment as 50% industrial and 50% pre-existing.

It little matters that Respondents do not believe that the doctor's ratings are not credible. Indeed, they should be estopped from such an argument due to their failure to request their own consultative medical examination. The Rule does not say that referral will occur only when the Administrative Law Judge finds

that there are "credible conflicting medical reports;" rather it states that referral will occur when there are "conflicting medical reports". (emphasis added). It is, in fact, to determine the credibility of the initial medical reports that referrals are required to medical panels when there is more than a 5% variance in the impairment ratings.

Respondent CIGNA's attorney in his Answer is correct when he states; "Now, I am no doctor..." (R. at 54). Neither is the Administrative Law Judge. That is why referral to a medical panel in such cases is required and the failure to do so is more than an abuse of discretion-it is plain error. See Lipman v. Industrial Commission, supra and Schmidt v. Industrial Commission, 617 P.2d 693 (Utah 1980) interpreting the former Utah Code Annotated, Section 35-1-77 (1953) which made referrals to medical panels mandatory in cases of denied liability.

Although reference to a medical panel under Utah Code Annotated, Section 35-1-77 (1988) is discretionary, that discretion is not unrestricted and has been made mandatory by the Commission's own Rules and Regulations (Utah Admin. Code R568-1-9). The failure to refer a matter to a Medical Panel when such referral is mandatory is plain error. "In some cases, such as where the evidence of causal connection between the work-related event and the injury is uncertain or highly technical, failure to refer the case to a medical panel may be an abuse of discretion." Champion Home Builders v. Industrial Commission, 703 P.2d 306, 308 (Utah 1985). See also Hone v. J.F. Shea Co., 728 P.2d 1008 (Utah 1986).

In this case, the causal connection between the work-related injury and the Applicant's permanent, total disability, if not clear, was at least uncertain and failure to refer the matter to a medical panel was error. The Order Denying Motion for Review should at the least be reversed and the matter remanded with directions to refer the matter to a medical panel since failure to do was in direct conflict with Industrial Commission practice and rule. The failure to obtain a Medical Panel opinion resulted in the Administrative Law Judge lacking essential and necessary information to adjudicate Petitioner's claim.

CONCLUSION/STATEMENT OF RELIEF SOUGHT

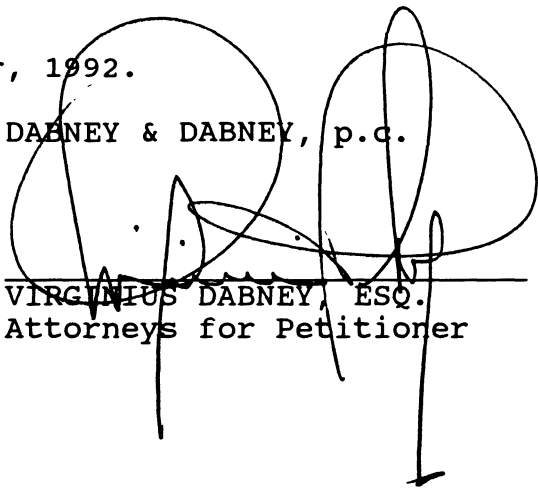
Based upon the foregoing it is respectfully submitted that the Industrial Commission erred when it entered its February 18, 1992 Order dismissing Mr. Willardson's claim for permanent, total disability benefits for lack of medical causation. The uncontroverted evidence submitted to the Industrial Commission supports the finding that he sustained a significant permanent, partial impairment due to his 1988 industrial accident, and is permanently and totally disabled due to his industrial injury. To the extent there is any doubt or confusion as to medical causation, it was error for the Administrative Law Judge not to convene a medical panel.

Therefore, it is respectfully requested that this Court remand this case to the Industrial Commission with instructions to either award him benefits based on the uncontroverted facts and medical

evidence presented, or in the alternative, to convene a medical panel.

DATED this 26th day of October, 1992.

DABNEY & DABNEY, p.c.



VIRGILIUS DABNEY, ESQ.
Attorneys for Petitioner

PROOF OF SERVICE

I hereby certify that true and correct copies of the foregoing Brief of Petitioner were mailed, postage prepaid, on this 26th day of October, 1992 to the following:

Utah Court of Appeals (1 original & 7 copies)
400 Midtown Plaza
230 South 500 East, Suite 400
Salt Lake City, Utah 84102

Benjamin A. Sims, Esq. (4 copies)
Industrial Commission of Utah
160 South 300 East
Post Office Box 510250
Salt Lake City, Utah 84151-0250

Erie V. Boorman, Esq. (4 copies)
EMPLOYER'S REINSURANCE FUND
P.O. Box 510250
Salt Lake City, Utah 84151-0250

Robert J. Shaugnessy, Esq. (4 copies)
1800 South West Temple Suite 407
Salt Lake City, Utah 84115

Kerry L. Willardson (1 copy)
P.O. Box 209
Castle Dale, Utah 84513

File (2 copies)

DABNEY & DABNEY, P.C.

VIRGINIUS DABNEY, ESQ.
Attorneys for Petitioners

ADDENDUM

EXHIBIT A: Utah Code Annotated, Section 35-1-77(1)(a) (1988).
Utah Administrative Code R568-1-9.

EXHIBIT B: Findings of Fact, Conclusions of Law and Order
(March 18, 1991).

EXHIBIT C: Order Denying Motion for Review (February 18, 1992).

35-1-77. Medical panel -- Medical director or medical consultants -- Discretionary authority of commission to refer case -- Findings and reports -- Objections to report -- Hearing -- Expenses. (Last amended 1991)

(1) (a) Upon the filing of a claim for compensation for injury by accident, or for death, arising out of and in the course of employment, and if the employer or its insurance carrier denies liability, the commission may refer the medical aspects of the case to a medical panel appointed by the commission.

(b) When a claim for compensation based upon disability or death due to an occupational disease is filed with the commission, the commission shall, except upon stipulation of all parties, appoint an impartial medical panel.

(c) A medical panel shall consist of one or more physicians specializing in the treatment of the disease or condition involved in the claim.

(d) As an alternative method of obtaining an impartial medical evaluation of the medical aspects of a controverted case, the commission in its sole discretion may employ a medical director or medical consultants on a full-time or part-time basis for the purpose of evaluating the medical evidence and advising the commission with respect to its ultimate fact-finding responsibility. If all parties agree to the use of a medical director or medical consultants, they shall be allowed to function in the same manner and under the same procedures as required of a medical panel.

(2) (a) The medical panel, medical director, or medical consultants shall make such study, take such X-rays, and perform such tests, including post-mortem examinations if authorized by the commission, as it may determine to be necessary or desirable.

(b) The medical panel, medical director, or medical consultants shall make a report in writing to the commission in a form prescribed by the commission, and also make such additional findings as the commission may require. In occupational disease cases, the panel shall certify to the commission the extent, if any, of the disability of the claimant from performing work for remuneration or profit, and whether the sole cause of the disability or death, in the opinion of the panel, results from the occupational disease and whether any other causes have aggravated, prolonged, accelerated, or in any way contributed to the disability or death, and if so, the extent in percentage to which the other causes have so contributed.

(c) The commission shall promptly distribute full copies of the report to the applicant, the employer, and its insurance carrier by registered mail with return receipt requested. Within 15 days after the report is deposited in the United States post office, the applicant, the employer, or its insurance carrier may file with the commission written objections to the report. If no written objections are filed within that period, the report is considered admitted in evidence.

(d) The commission may base its finding and decision on the report of the panel, medical director, or medical consultants, but is not bound by the report if other substantial conflicting evidence in the case supports a contrary finding.

(e) If objections to the report are filed, the commission may set the case for hearing to determine the facts and issues involved. At the hearing, any party so desiring may request the commission to have the chairman of the medical panel, the medical director, or the medical consultants present at the hearing for examination and cross-examination. For good cause shown, the commission may order other members of the panel, with or without the chairman or the medical director or medical consultants, to be present at the hearing for examination and cross-examination.

(f) The written report of the panel, medical director, or medical consultants may be received as an exhibit at the hearing, but may not be considered as evidence in the case except as far as it is sustained by the testimony admitted.

(g) The expenses of the study and report of the medical panel, medical director, or medical consultants and the expenses of their appearance before the commission shall be paid out of the Employers' Reinsurance Fund. (as last amended by Chapter 116, Laws of Utah 1988)

R568-1-9 Guidelines for Utilization of Medical Panel.

Pursuant to Section 35-1-77, U.C.A., the commission adopts the following guidelines in determining the necessity of submitting a case to a medical panel:

A. A panel will be utilized by the Administrative Law Judge where:

1. One or more significant medical issues may be involved. Generally a significant medical issue must be shown by conflicting medical reports. Significant medical issues are involved when there are:

- (a) Conflicting medical reports of permanent physical impairment which vary more than 5% of the whole person,

- (b) Conflicting medical opinions as to the temporary total cutoff date which vary more than 90 days, and/or

- (c) Medical expenses in controversy amounting to more than \$2,000.

B. A hearing on objections to the panel report may be scheduled if there is a proffer of conflicting medical testimony showing a need to clarify the medical panel report. Where there is a proffer of new written conflicting medical evidence, the Administrative Law Judge may, in lieu of a hearing, re-submit the new evidence to the panel for consideration and clarification.

C. The Administrative Law Judge may authorize an injured worker to be examined by another physician for the purpose of obtaining a further medical examination or evaluation pertaining to the medical issues involved, and to obtain a report addressing these medical issues in all cases where:

1. The treating physician has failed or refused to give an impairment rating,

2. The employer or doctor considers the claim to be non-industrial, and/or

3. A substantial injustice may occur without such further evaluation.

D. Any expenses of the study and report of a medical panel or medical consultant and of their appearance at the hearing, as well as any expenses for further medical examination or evaluation, as directed by the Administrative Law Judge, shall be paid out of the Employers' Reinsurance Fund.

THE INDUSTRIAL COMMISSION OF UTAH

Case No. 90000895

KERRY WILLARDSON,	*	
	*	
	*	
Applicant,	*	FINDINGS OF FACT
	*	
vs.	*	CONCLUSIONS OF LAW
	*	
BEAVER CREEK COAL COMPANY/ CIGNA and EMPLOYERS REINSURANCE FUND,	*	AND ORDER
	*	
Defendants.	*	
	*	
* * * * *		

HEARING: Hearing Room 334, Industrial Commission of Utah, 160 East 300 South, Salt Lake City, Utah, on February 26, 1991 at 1:00 o'clock p.m. Said hearing was pursuant to Order and Notice of the Commission.

BEFORE: Barbara Elicerio, Administrative Law Judge.

APPEARANCES: The applicant was present and was represented by Virginus Dabney, Attorney..

The defendants were represented by Robert J. Shaughnessy, Attorney.

The Employers Reinsurance Fund was represented by Erie Boorman, Administrator.

This case involves a claim for permanent total disability benefits related to an April 15, 1988 industrial incident after which the applicant experienced back and hip symptoms. The carrier has denied the claim and has paid no medical expenses or compensation related to the April 15, 1988 incident. The carrier and the Employers Reinsurance Fund both stipulate to the fact that the applicant is currently in a disabled status. However, the carrier and the Fund argue that the applicant did not sustain a compensable industrial injury on April 15, 1988 and thus he is not entitled to permanent total disability benefits. In addition, the Employers Reinsurance Fund argues that even if he did sustain a compensable industrial injury on April 15, 1988, his injury is not the cause of his permanent total disability status. As the injury did not cause the disability, the Fund argues the applicant is not entitled to permanent total disability benefits related to the injury. As precedent for this argument, the Fund cites Large v. Industrial Commission, 758 P.2d 954 (Utah App. 1988).

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RE: KERRY WILLARDSON
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FINDINGS OF FACT:

The applicant is a male who was 57 years old on the date of injury and who had a spouse, but no minor children on that date. The applicant was employed by Beaver Creek Coal Company on the date of injury, April 15, 1988, and held the position of Belt Supervisor at the time. He was earning a wage that would entitle him to the maximum rate for workers compensation benefits. The April 15, 1988 industrial event was not the first time the applicant experienced symptoms related to his back, and in the interest of giving a chronological overview, the prior back related problems will be summarized first.

The first back injury noted in the medical records submitted at hearing is a December 9, 1970 industrial injury that the applicant sustained while he was working for the Mid-Continent Coal Company in Carbondale, Colorado. The only description of that injury in the medical records indicates that the applicant stooped over to pick up a shuttle car cable and felt a catch in his back. The applicant apparently was unable to straighten up after this incident. On August 31, 1971, the applicant underwent back surgery at St. Luke's Hospital in Denver, Colorado. Actual hospital records are not included in the medical record exhibit, but a later letter of the treating surgeon, Dr. W. Gerber, indicates that the procedure performed was a lumbar laminectomy at L5-S1. Per Dr. Gerber, the surgery was successful in eliminating the right leg pain that the applicant experienced following the December 9, 1970 injury. The applicant was later rated in 1972 at both 5% and 7% by different doctors, but it is unclear whether these ratings are the equivalent of whole person ratings specified in the AMA Guides to the Evaluation of Permanent Impairment.

The next reference to back problems in the medical record exhibit is on July 8, 1983, when the applicant was seen at the Emery Medical Center for back pain, bilateral shoulder pain and left hip pain. X-rays were taken of the cervical and lumbar spine and were read to show as follows: Cervical spine - mostly normal with some question of osteoarthritic changes and compromise of the neuro foramina at C3-4; Lumbar spine - severe degenerative osteoarthritis of the lumbar spine with multi-level degenerative disc disease and scoliosis. The diagnosis of the examining physician was: severe osteoarthritis and degenerative disc disease of the lumbar spine. It is unclear what treatment the applicant had at that time and what follow-up occurred.

On January 16, 1988, per records of Dr. D. Faust, D. C., the applicant was at home hanging a ceiling fan when the ladder he was standing on collapsed and he fell as a result. The applicant testified at hearing that he was not really sure how he landed in this fall, but he believes he fell onto his shoulder. Dr. Faust's diagnosis was thoraco-cervical strain/sprain, grade II disc syndrome C5-6 with brachial extension neuralgia of the right shoulder and arm as a direct complication. The applicant was treated 8 times in January 1988, 7 times in February 1988 and 4 times in March 1988 by Dr. Faust. The applicant testified at hearing that Dr. Faust only treated his neck and shoulder and did not treat his low back.

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The next incident noted in the medical records is the April 15, 1988 industrial event at issue. As noted above, the applicant was employed with Beaver Creek Coal Company on that date as a Belt Supervisor. This position involved maintaining a conveyor belt that was approximately 1 and 1/2 miles long. The belt was about waist-high for most of its length, but was shoulder height for a portion of its total length, and was 3 feet overhead in places. The applicant needed to keep the belt clean and this required shoveling under the rollers to keep debris from building up. He normally worked 4 10-hour days a week and overtime was normally involved. On April 15, 1988, the applicant was engaged in replacing wire mesh guards that were fastened to the belt lengthwise, apparently to prevent rock running along the belt from falling off the belt. The guards were made of heavy wire mesh and were approximately 4 feet by 8 feet in dimension. The applicant estimated that the guards weighed about 20-25 pounds each. They were stacked in packages of 50 to 100 and bound together with straps. To reguard the belt, the guards needed to be carried from the stack over to the belt and then had to be fastened to the belt, apparently using wire and pliers. The applicant had been doing this job for 2 or 3 days as of April 15, 1988. He testified that he had no problems with the job until April 15, 1988. He indicated that he had never done the task before during his 2 to 3 years working on the belt, but that he did hang chain link guarding on the belt at one time. The applicant stated that he felt hanging the chain link was easier than the wire mesh.

The applicant had hung about 14 or 15 guards around mid-day on April 15, 1988. He estimated that it took from 5 to 15 minutes to hang a guard. The applicant testified that he initially felt sharp back pain around mid-day on April 15, 1988 when he was trying to free one of the guards from the stack on the ground. The applicant explained that the guards were pressed together in the stacks as a result of being bound by the straps. This caused the guards to catch on each other, and to loosen the guard on the top of the stack, the applicant needed to jerk at it to uncatch it. The applicant bent over at the waist and grabbed onto the guard on top of the stack (apparently with both hands) and jerked on it while straightening up and stepping back at the same time. As he jerked it, pulling it up and away from the stack, he felt a sharp pain about at the level of his belt in his low back.

The applicant did manage to free the guard and he dragged it over to fasten it to the belt. After doing so, the applicant testified that he felt he needed to lay down and he did so flat on his back. This helped somewhat. Per the applicant, another employee was there at the time. This was Owen Hunt. The applicant stated that he did not immediately tell Hunt that he had hurt his back, because he was in such pain at the time. At some point, Hunt noticed the applicant laying down on the ground and, per the applicant, Hunt helped him to his feet and into the tippie shack that was 6 or 8 feet away. The applicant testified that he sat down on a metal tool box for about 10 minutes with the pain in his right hip and back increasing at this point. The applicant then decided to lay down again and he laid down on a bench for about

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one hour. He finally decided he could not remain at work and he showered, with some difficulty getting out of his clothes. The applicant testified that Hunt helped him into Hunt's van and Hunt drove him to the home of a chiropractor, Dr. Sanders. When he arrived there, Dr. Sanders did not provide any treatment and just referred him to the Emery Medical Center.

The applicant saw Dr. K. Kotrady at the Emery Medical Center the same day. Dr. Kotrady's Physician's Initial Report of Work Injury indicates that the injury occurred when the applicant was working and climbing up and down on the drive, stretching and twisting, re-guarding the drive. The pain he noticed is listed as hip pain. Low back pain and hip pain is listed in the complaints section, however, the section regarding the findings of the examination indicates that the applicant had right hip pain in a number of different positions, but that there was no back pain. An X-ray was taken and was read by Dr. Kotrady to show: moderate to severe arthritic changes involving lumbar spine and pelvis, multiple levels of osteophyte formation with bridging across the discs, significant scoliosis beginning at L3, disc space narrowing between L1-2, L2-3, L3-4 and L4-5, facet sclerosis at these levels as well, large osteophyte seen almost bridging between L5 and sacrum and evidence of arthritic wear involving both hip joints. There is a final note stating "I can determine no acute changes" (emphasis added).

Dr. Kotrady's diagnosis was: right hip pain, severe degenerative arthritis hips, pelvis and lumbar spine, degenerative disc disease all levels of the lumbar spine and scoliosis. Answering the question "Is condition requiring treatment the result of the industrial injury or exposure described?", Dr. Kotrady has marked both the yes and the no box and refers to the comments section for explanation. The explanation states: degenerative arthritis and disc disease pre-existed this injury - X-ray evidence in 1983. In Dr. Kotrady's office note of the same date, he notes that he felt the applicant had compensated for his bad back by shifting the weight to his hips and that the hip pain the applicant was experiencing was secondary to arthritis in the hips. That note also states that Dr. Kotrady found no evidence of back pain in his examination. He prescribed bed rest, heat/ice, robaxin and apparently provided an injection of demerol/phenergan. Dr. Kotrady's follow-up note on April 19, 1988, indicates that the applicant's right hip pain was a little better and that there was no back pain and full range of motion in the back. His assessment on that date was: ligamentous strain right hip, no back involvement. He indicates that the applicant could return to work as of April 25, 1988.

The applicant was admitted to Castleview Hospital on April 23, 1988 for low back pain. The Admit History and Physical Exam report indicates that the applicant had a chronic low back pain history. After recovery from the 1970 injury and surgery, the report indicates that the applicant was OK with just occasional low back discomfort and no loss of work time resulting. The applicant confirmed this at hearing and stated that he would have back pain during those years only after doing a lot of bending. The Admit History Report

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indicates that the applicant was injured on April 15, 1988 climbing up and down a drive using long steps. It notes that the applicant made a step and twisted and felt pain in the right hip. The report states that the applicant was feeling better, but when leaving Dr. Kotrady's office on April 19, 1988, he simply turned and felt something twist and pull in his hip and the hip pain reoccurred. Also indicated is the applicant's inability to stand in line at a scout meeting that night because of worsened pain. Then it is noted that the applicant's pain became markedly worse when he stooped to take something out of the dryer on April 23, 1988. The applicant's complaints were noted as mostly hip pain radiating into the groin, but also back pain. Right leg pain that was noticed just after the industrial event had resolved per the Admit Report.

A CT scan of the lumbar spine was taken on April 27, 1988 during the applicant's stay in the hospital. It was read to show multi-level degenerative and osteoarthritic changes in the lumbar spine, with some indication of a possible herniation at L3-4. The applicant was treated conservatively at the hospital and the April 30, 1988 discharge summary indicates that the applicant seemed to improve, but reached a plateau and still had significant pain and discomfort in the hip with minimal ambulatory functioning. The applicant followed up with Dr. D. Heiner in Castledale, Utah after release from the hospital and Dr. Heiner apparently referred the applicant to neurologist, Dr. L. Gaufin in Salt Lake City for a specialist opinion. On May 5, 1988, Dr. Gaufin wrote Dr. Heiner explaining his findings after the initial examination. Dr. Gaufin's letter describes the injury to have occurred when the applicant was re-guarding a belt drive for about 5 hours, climbing 8 to 10 feet and reaching and stretching. Right hip pain and severe right leg pain resulted per Dr. Gaufin. Dr. Gaufin's impression was: 1) acute lumbar radiculopathy L4-5, L3-4, right, secondary to degenerative disc and joint disease with disc protrusion at L3-4, L4-5, right greater than left and 2) chronic osteoarthritis and degenerative disc and joint disease L1-2, L2-3, L3-4, L4-5, L5-S1 bilaterally. Dr. Gaufin comments that the lumbar radiculopathy was secondary to the work-related injury on April 15, 1988.

After May 1988, Dr. Heiner followed up with the applicant every month to two months through at least February of 1990. Dr. Heiner's follow-up notes appear to show no real change in the applicant's overall condition and symptoms during this time period. There are various incidents mentioned where the applicant would exacerbate the pain causing it to increase in intensity for a period of time. For the most part, it appears from the notes that the pain would return to its normal level eventually. The incidents include washing 2 cars in July of 1988, putting up Christmas lights and falling in December of 1988, reaching to hand something to his son and a turning/twisting episode which required an emergency room visit in March 1989. Dr. Gaufin did one other report dated December 21, 1988 which indicates radiation into the right and left hip and left leg. That report states that the applicant was unable to work in the future because of his severe

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degenerative process in the lumbar spine. Dr. Gaufin notes in that report that the applicant was the same as when he had previously seen him in May of 1988 and that he would not improve. Dr. Gaufin states that the only goal was to reduce the rate at which the applicant's joints wore out and to minimize the severe crippling that might take place.

Both Dr. Gaufin and Dr. Heiner completed Summary of Medical Record forms provided to them by counsel for the applicant. They are dated September of 1988 and give impairment ratings for the applicant. Dr. Gaufin indicates in his form that the applicant had a 15% whole person rating, with 1/2 being due to pre-existing conditions and 1/2 due to the April 15, 1988 industrial incident. Dr. Heiner indicates in his form that the applicant had a 30% whole person rating, with 1/2 being due to pre-existing conditions and 1/2 due to the April 15, 1988 industrial injury. The forms are very brief and do not contain any explanatory breakdown regarding the ratings. At hearing, the defendants argued that the ratings appear to be rather off-hand in simply dividing up the pre-existing and industrial impairment 1/2 and 1/2. Counsel for the applicant indicated that neither doctor had access to the applicant's prior medical records when the ratings were assessed.

The applicant was questioned by the defendants at hearing regarding his report of the industrial injury and his filing of a claim. The defendants were concerned in particular that the medical records contain no reference to an incident involving jerking on a screen. In addition, the defendants point to a form the applicant completed for his attorney in August of 1988 (Exhibit A-15). That form describes the injury as "regarding belt drive with heavy wire sheets, stepping up and down high places, stretching and bending." The applicant for the most part indicated he could not remember exactly what he told the various doctors regarding how the injury occurred and he could not recall whether he had told anyone regarding the incident with the screen.

Currently, the applicant stated he has low back discomfort, but not the sharp pain he had experienced just after the April 15, 1988 work incident. He stated the pain will become sharp 3 or 4 times per day and that this never occurred prior to the April 15, 1988 incident. He stated that he has a dull ache in his right thigh from the hip to the knee that he never had to the current intensity before April 15, 1988. He also has a dull hurt in his left buttocks that he stated comes and goes constantly and began sometime after he came home from the hospital in 1988. He has been taking darvocet, soma and prozac since April 15, 1988 and he wears a pelvic brace that Dr. Heiner prescribed for him.

The applicant was awarded Social Security Disability beginning as of April 15, 1988 for osteoarthritic lumbar spine and degenerative disc disease. He also has received long term disability benefits by way of employer benefit package which was effective as of October 16, 1988. The combined benefit from the two comes to around \$1,400.00 per month.

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CONCLUSIONS OF LAW:

The Industrial Incident:

The preponderance of the evidence supports the following description of the April 15, 1988 industrial incident: The applicant experienced hip pain while re-guarding a belt on April 15, 1988 which involved lifting 20-25 pound wire mesh screens or guards, measuring 4 feet by 8 feet, and fastening them to the belt. The process involved some climbing, stretching and reaching and possibly twisting motions.

All the medical records include some version of the above-stated facts. The April 23, 1988 Castleview Hospital Admit History refers to an incident where the applicant made a step and twisted with resulting hip pain. This is the only place that description is found. Only the applicant's hearing testimony includes mention of jerking on a guard/screen. It is difficult to believe that such a definitive incident was never mentioned to the physicians just after the incident, or that it was mentioned but never noted by any of the physicians in their injury descriptions. In addition, it is difficult to believe that the applicant did not even mention the screen jerking to his attorney when he completed the form for his attorney in August of 1988 (Exhibit A-15). The description listed in that form is much the same as the description stated above and much the same as is indicated in the medical records. Therefore, the ALJ must dismiss the applicant's testimony regarding the screen jerking and adopt the above-stated description of how the symptoms began.

Compensable Industrial Injury:

Medical Cause:

It is clear that after April 15, 1988, the applicant began to seek medical treatment for symptoms in the hip and back, and to a certain extent, in the legs, that he either did not experience before April 15, 1988 or for which he did not seek treatment prior to April 15, 1988. It is not clear that the events of April 15, 1988 are the cause of those symptoms. Dr. Kotrady, the doctor who saw the applicant on April 15, 1988 is clearly of the opinion that the applicant's problems were pre-existing. His records put heavy emphasis on the hip pain and in several places he definitively states there was no back pain. His explanation for the hip pain was arthritis of the hip joints, confirmed by X-ray, that he believed was caused by a shifting of weight from the back to the hips as a result of the applicant's bad back. He was unable to answer a definitive "yes" to whether the industrial injury caused the symptoms he was treating and noted that degenerative disc disease and the degenerative arthritis were pre-existing as confirmed in X-rays pre-dating April 15, 1988. He read the April 15, 1988 X-rays to show no acute changes. All of these things clearly point to the applicant's significant pre-existing condition as being the cause of his need for treatment at that point with no confirmation of contribution from the work activities of April

ORDER

RE: KERRY WILLARDSON

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In addition to Dr. Kotrady's records, there is the Castleview Hospital records which do mention a unique version of an incident on April 15, 1988, but also mention several other incidents occurring after April 15, 1988 causing either hip or back pain. The hospital diagnoses match those of Dr. Kotrady and Dr. Gaufin, in that they refer to extensive degenerative and arthritic changes in the entire lumbar spine. No acute herniations or fractures are noted and the film readings match almost exactly the film readings from 1983. Although Dr. Gaufin and Dr. Heiner both have indicated that 1/2 of the applicant's lumbar spine impairment is due to the industrial incident on April 15, 1988, the basis of these brief notations on the fill-in-the-blank forms they completed for applicant's counsel has to be questioned. Dr. Gaufin saw the applicant only twice per the medical records and he had no prior records for the applicant to review (per counsel for the applicant). His diagnosis of extensive degenerative and arthritic changes with no acute changes seems to contradict a finding that 1/2 the applicant's impairment is due to the April 15, 1988 activities. Dr. Gaufin also later notes that the applicant was unable to work due to the severe degenerative process in his lumbar spine. Dr. Heiner also had no prior records to review and also gives no explanation regarding how he arrived at the percentages he has indicated.

In conclusion, the preponderance of the medical evidence strongly suggests that the applicant's symptoms and disability after April 15, 1988 were the result of his long-standing and significant degenerative condition in his lumbar spine and were not the result of any significant contribution by the activities of April 15, 1988.

Legal Cause:

This issue need not be addressed as the failure to establish medical cause prevents any finding of a compensable industrial injury. Allen v. Industrial Commission, 729 P.2d 15 (Utah 1986). Merely as commentary, the activities of April 15, 1988, as described at the beginning of the Conclusions of Law, certainly do not clearly fall into the "unusual exertion" category.

ORDER:

IT IT THEREFORE ORDERED that the applicant's claim for permanent total disability benefits associated with the work activities of April 15, 1988 is dismissed with prejudice for failure to establish a compensable industrial injury.

INDUSTRIAL COMMISSION OF UTAH

Case No. 90000895

Kerry L. Willardson,	*	
Applicant,	*	
	*	ORDER DENYING MOTION
vs.	*	FOR REVIEW
	*	
Beaver Creek Coal Co.,	*	
Cigna Insurance Co., Emplo-	*	
yers Reinsurance Fund,	*	
	*	
Defendants.	*	

The Industrial Commission of Utah (IC) reviews the Motion for Review of applicant who requests that a review be made of the administrative law judge's (ALJ) Order of March 18, 1991 in the above captioned matter, pursuant to Utah Code Annotated, Section 35-1-82.53 and Section 63-46b-12.

There is no question among the parties to this case that applicant is disabled. However, the defendants argue that the applicant did not sustain a compensable industrial injury. In brief, the relevant facts follow.

On the date of the alleged injury, April 15, 1988, applicant was 57 years old, and was employed by the Beaver Creek Coal Company. Applicant held the position of belt supervisor. Applicant had back problems prior to the April 15, 1988 injury. In 1970, applicant injured his back while working for the Mid-Continent Coal Company in Colorado. He had a lumbar laminectomy at L5-S1 for his problems in 1971, and he was rated in 1972 at five percent and seven percent by different doctors.

In 1983 X-rays were taken in response to his complaints of back pain, bilateral shoulder pain, and left hip pain. The X-rays showed the following: Cervical spine was mostly normal with some question of osteoarthritic changes and compromise of the neuroforamina at C3-4; and severe degenerative osteoarthritis of the lumbar spine with multi-level degenerative disc disease and scoliosis.

In 1988 applicant was treated 19 times during a three month period after he fell at home while hanging a ceiling fan. The diagnosis was thoraco-cervical strain/sprain, grade II disc syndrome C5-6 with brachial extension neuralgia of the right shoulder and arm as a direct complication.

On the date of the accident at issue in this case, the applicant had been working on a job with the Beaver Creek Coal Company for two to three years. He was replacing heavy wire mesh

guards on the belt. The guards were used to prevent rock from falling off the belt. The guards were four feet by eight feet long, weighed approximately 20-25 pounds each, and were stacked in bound bundles of 50-100. Applicant had been doing the guard replacement for two to three days at the time of the accident.

On April 15, 1988, applicant had hung about 15 guards that day, and while trying to free one of the guards from its stack by jerking at it, applicant stated at the hearing that he felt a sharp pain in his low back at about belt level. The applicant lay down on the ground because of the pain, and another employee assisted applicant into a nearby shack. Applicant reclined for about an hour after which he showered, and was assisted into the other employee's van. Applicant was driven to a chiropractor's home who did not provide treatment, but instead referred applicant to the Emery Medical Center where applicant was treated.

The ALJ found by a preponderance of the evidence that the April 15, 1988 occurred as follows: "The applicant experienced hip pain while re-guarding a belt on April 15, 1988 which involved lifting 20-25 pound wire mesh screens or guards, measuring 4 feet by 8 feet, and fastening them to the belt. The process involved some climbing, stretching and reaching and possibly twisting motions." Findings of Fact, Conclusions of Law, and Order, dated March 18, 1991, at 7. The ALJ dismissed the applicant's testimony that he had jerked the screen since "such a definitive incident was never mentioned to the physicians just after the incident...." Id.

Further, the ALJ concluded that the symptoms and disability after April 15, 1988 were the result of applicant's long standing and significant degenerative condition in his lumbar spine, and were not the result of any significant contribution by the activities of April 15, 1988. Since she found no medical cause, there was no compensable accident and Allen was not invoked. Allen v. Industrial Comm'n, 729 P.2d 15 (Utah 1986).

We find that there is substantial evidence to support the findings and conclusions of the ALJ in light of the whole record. The treating physician on April 15, 1988 was clearly of the opinion that the applicant's medical problems were preexisting. That physician explained the hip pain as being due to arthritis of the hip joints.

The Castleview Hospital records of April 15, 1988 refer to extensive degenerative and arthritic lumbar changes. No fractures or acute herniations were found. The film readings from 1988 were remarkably similar to those of 1983. No surgery was completed to correct any problem allegedly aggravated by the April 15, 1988 injury.

Applicant submitted two fill-in-the-blank documents from Doctors' Heiner and Gaufin. Both doctors had indicated that one-half of applicant's lumbar spine impairment was caused by the industrial accident of April 15, 1988. However, neither doctor had applicant's prior records to review. Thus, their conclusions were based on incomplete information, and can be discounted.

The ALJ determined that no medical cause existed based upon the lack of probative evidence of a connection with the accident of April 15, 1988. Applicant contends that the ALJ erred by not appointing a medical panel. Appointment of a medical panel is within the sound discretion of the ALJ as limited by U.C.A. Section 35-1-77 (1953 as amended), and R490-1-9 (Utah Admin. Code 1992). Since there was no credible conflicting medical evidence, the ALJ did not err in making her decision not to appoint a medical panel.

Applicant also asserts that the ALJ erred when she stated that "Applicant's symptoms and disability after April 15, 1988 were the result of his long-standing and significant degenerative condition in his lumbar spine and were not the result of any significant contribution by the activities of April 15, 1988." Order of the ALJ, at 8. He disputes her use of a standard of "significant contribution." However, on the preceding page of her order, the ALJ stated that there was "no confirmation of contribution from the work activities of April 15, 1988." Id. at 7. Further, the ALJ stated that the cause of applicant's need for treatment on April 15, 1988 was his "significant pre-existing condition...." Id. Thus, it appears that the ALJ determined that the applicant's treatment on April 15, 1988 had nothing to do with his work, and resulted entirely from his preexisting condition with no contribution from his workplace labor. The use by the ALJ of "significant" was therefore surplusage, and she did not use the standard alleged by applicant.

Applicant also alleges that the ALJ looked at only one day's activity, and failed to consider the cumulative effects of his exertions over many years. The ALJ determined that the applicant's rendition of how his alleged injury of April 15, 1988 occurred was not credible. There was no support for applicant's rendition in the records of his physicians. Thus, applicant did not meet his burden. The ALJ considered the previous injuries, and determined that applicant's injury was entirely preexisting, and did not occur on April 15, 1988.

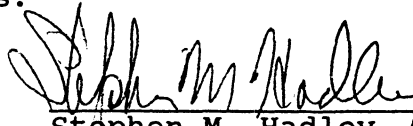
It is the opinion of the Commission that the Findings of Fact, Conclusions of Law, and Order of the ALJ are substantially correct in law and fact in light of the entire file.

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KERRY L. WILLARDSON
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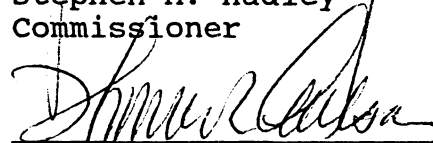
ORDER:

IT IS ORDERED that the order of the administrative law judge dated March 18, 1991 is affirmed.

IT IS FURTHER ORDERED that any appeal shall be to the Utah Court of Appeals within 30 days of the date hereof, pursuant to Utah Code Annotated, Sections 35-1-82.53(2), 35-1-86, and 63-46b-16. The requester shall bear all costs to prepare a transcript of the hearing for appeals purposes.



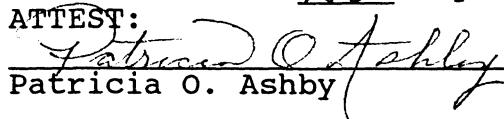
Stephen M. Hadley
Commissioner



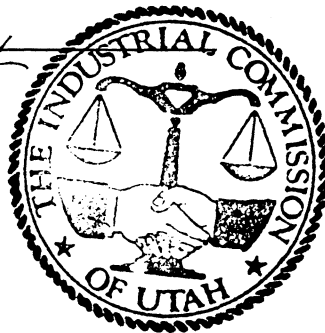
Thomas R. Carlson
Commissioner

Certified this 18th day of February 1992.

ATTEST:



Patricia O. Ashby



CERTIFICATE OF MAILING

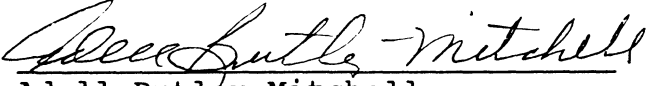
I certify that on FEBRUARY 18, 1992, a copy of the attached ORDER DENYING MOTION FOR REVIEW in the case of KERRY L. WILLARDSON, was mailed to the following persons at the following addresses, postage paid:

Erie V. Boorman, Esq.
Employer's Reinsurance Fund
P.O. Box 510250
Salt Lake City, Utah 84151-0250

Robert J. Shaughnessy, Esq.
1800 South West Temple Suite 407
Salt Lake City, Utah 84115

Kerry L. Willardson
P.O. Box 209
Castle Dale Utah 84513

Virginus Dabney, Esq.
350 South 400 East Suite 202
Salt Lake City, Utah 84111


Adell Butler-Mitchell
Legal Assistant