

1992

Michael Blackett v. Board of Review of the Industrial Commission of Utah, Ralph H. Larsen & Sons, INC., and Workers Compensation Fund of Utah : Brief of Respondent

Utah Court of Appeals

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UTAH COURT OF APPEALS

BRIEF

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DOCKET NO. 92-0279-CA IN THE UTAH COURT OF APPEALS

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MICHAEL BLACKETT,)	BRIEF OF RESPONDENTS
)	WORKERS COMPENSATION
Applicant/Petitioner,)	FUND OF UTAH AND RALPH
)	H. LARSEN & SONS
vs.)	
)	Court of Appeals No.:
BOARD OF REVIEW OF THE)	920279-CA
INDUSTRIAL COMMISSION OF)	
UTAH, RALPH H. LARSEN & SONS)	Priority No. 7
and/or WORKERS COMPENSATION)	
FUND OF UTAH,)	
)	
Defendants/Respondents.)	

* * * * *

BRIEF OF WORKERS COMPENSATION FUND OF UTAH AND ITS INSURED
RALPH H. LARSEN AND SONS RESPONDING TO PETITIONER'S APPEAL OF A
FINAL ORDER BY THE INDUSTRIAL COMMISSION OF UTAH DENYING
WORKERS' COMPENSATION BENEFITS.

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Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

* * * * *

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5. Findings of Fact, Conclusion of Law and Order dated January 24, 1992. (R. 77-83)
6. Medical Panel Report by Dr. Gerald R. Moress dated August 21, 1991 with concurrence of Dr. Robert H. Burgoyne dated September 16, 1991. (R. 55-69)
7. Industrial Commission Rule R568-1-9
Guidelines for Utilization of Medical Panel
8. Motion For Review, February 26, 1992. (R. 84-85)

I. STATEMENT OF JURISDICTION OF THE COURT OF APPEALS

The Court of Appeals has jurisdiction to review, reverse, or annul any order of the commission, or to suspend or delay the operation or execution of any order.

§35-1-86 U.C.A.

II. STATEMENT OF ISSUES

1. Michael Blackett makes the claim that the Industrial Commission committed reversible error when it "...failed to refer the medical aspects of the case back to the medical panel for a more detailed analysis or to set the matter for an evidentiary hearing where the medical panel members would be subject to cross examination." (Appellant's brief at p. 1) The real issue, however, is, did Mr. Blackett ...marshal the evidence in support of the [Commission's] findings and then demonstrate that those findings are unsupported by substantial evidence...? *Stewart v. Board of Review*, 831 P.2d 134 (Utah App. 1992) See also, *Merriam v. Board of Review*, 812 P.2d 447, 450-451 (Utah App. 1991).

2. Does Michael Blackett have an unqualified right to have a hearing on or a resubmission of his objections to the Medical Panel Report? §35-1-77, U.C.A. (Appendix 2)

3. If error at all, was it harmless error for the Industrial Commission of Utah not to further question evidence by the psychiatric member of the medical panel who concurred that there was no causal relationship between the May 1, 1990, industrial event and the current reported symptoms (R. 65-66, 69) but said that "...The patient *could* be suffering from a somatoform disorder....[and] that there was a *possibility* that

this diagnosis would be related to the May 1, 1990 injury"? (R. 69) (Emphasis Added). *Workers Compensation Fund v. Industrial Comm'n*, 761 P.2d 572 (Ut. App. 1988).

III. STANDARDS OF REVIEW

1. The standard of review in analyzing findings of fact by an administrative body has been concisely stated in *Stewart*, supra.:

Because these proceedings were commenced after January 1, 1988, our review is governed by the Utah Administrative Procedures Act (UAPA), Utah Code Ann. Section 63-46b-16 (1989). The standard for reviewing findings of fact under UAPA is well settled. "[F]indings of fact will be affirmed if they are 'supported by substantial evidence when viewed in light of the whole record before the court'" *Merriam v. Board of Review*, 812 P.2d 447, 450 (Utah App. 1991) (quoting *Nelson v. Department of Employment Sec.*, 801 P.2d 158, 161 (Utah App. 1990). "Substantial evidence is that which a reasonable person 'might accept as adequate to support a conclusion.'" *Id.* (quoting *Grace Drilling Co. v. Board of Review*, 776 P.2d 63, 68 (Utah App. 1989))...

(Appendix 3) This applies to Issues 1 and 3.

2. Interpretation of state statutes is a question of law. As such, the appellate court's standard of review is a correction of error standard, giving no deference to the agency's decision. *Morton International v. Utah State Tax Commission*, 814 P.2d 581 (Utah 1991); *Questar Pipeline v. Utah State Tax Commission*, 817 P.2d 316 (Utah 1991). This standard applies to Issue 2.

IV. DETERMINATIVE STATUTES AND RULES

A. Statutes.

1. §35-1-77 U.C.A., Medical Panel - Medical Director or Medical Consultants - Discretionary Authority of Commission to Refer Case - Findings and Report - Hearing - Expenses. (Appendix No. 2)

2. §35-1-88 U.C.A., Rules of Evidence and Procedure before Commission and Hearing Examiner - Admissible Evidence. (Appendix No. 4)

B. Rule.

R568-1-9, Industrial Commission Guidelines for Utilization of Medical Panel (Appendix No. 7)

V. STATEMENT OF THE CASE

This matter is before the Court of Appeals pursuant to a Writ of Review (R. 101) from an Industrial Commission of Utah Order Denying Motion For Review dated April 2, 1992, (R. 96-100, Appendix 1). The Commission's Order affirmed an administrative law judge's Findings of Fact, Conclusion of Law, and Order dated January 24, 1992, (R. 77-83, Appendix 5) denying additional benefits to Michael Blackett. The Commission's denial was based in part on evidence derived from a Medical Panel Report received by the Commission September 13, 1991, (R. 55-69, Appendix 6) as well as all other evidence that had been presented by the parties.

Mr. Blackett began the administrative process by filing an Application For Hearing dated November 1, 1990, in which he claimed an entitlement to additional workers' compensation

benefits for an alleged work related accidental fall injury he suffered during the course of his employment for Ralph Larsen & Sons, Inc. when he "fell off truck while filling radiator w/water" on May 1, 1990. (R. 37) The Workers Compensation Fund of Utah responded to the Application as the insurance carrier for Ralph Larsen & Sons, Inc. on December 13, 1990, by admitting that there had been an accident and that it had paid certain benefits. The Fund denied any further liability and asserted that any continuing complaints of injury were not causally related to the alleged event of May 1, 1990. (R.40-42)

VI. STATEMENT OF FACTS

A. Preliminary

It is Michael Blackett's (hereinafter "Blackett") burden to "...marshal the evidence in support of the [Industrial Commission's] findings and then demonstrate that those findings are unsupported by substantial evidence..." *Stewart, supra.* at 185 Utah Adv. Rep. 32. He has made minimal, if any, attempt in his brief to marshal the evidence. The Statement of Material Facts in his brief while accurate to the extent the facts are given does not pretend to be a marshaling of the evidence in support of the Commission's decision. Rather, later in his brief, Blackett cites *Nyren v. Industrial Commission*, 800 P.2d 330 (Ut. App. 1990), Cert. den. 815 P.2d 241 and without clarification states that the "...the Findings of Fact relied upon by the Administrative Law Judge/Industrial Commission are inadequate." (Appellant's Brief pp. 6-7) Failure to marshal

the evidence as required makes the Industrial Commission's findings conclusive.

B. Facts.

Defendants will marshal the substantial evidence which supports the Commission's denial of benefits.

Blackett had serious back and hip injuries which predated his industrial accident of May 1, 1990. (R. 1-35) On November 2, 1985, while he was employed by Mesa Moving and Storage, he was "...unloading a refrigerator down a walk board, fell off with refrig. [sic] on top of him. Injured lower back, [sic] left hip pain down left leg. Had surgery for a shattered disk."

(Application for Hearing, December 3, 1986, R. 10) The surgery was performed at the St. Mark's Hospital by Dr. John C. Zahniser on November 13, 1985. (R. 283-290) Dr. Zahniser had treated Blackett beginning about 1978 for back problems associated with lifting heavy objects. (R. 300-307) Dr. Zahniser gave Mr. Blackett a permanent partial impairment rating of 20% with 10% caused by his industrial accident which resulted in the November, 1985, surgery and 10% to conditions predating the surgery. (R. 18).

On December 30, 1987, Dr. Gerald R. Moress who would later be the chairman of the Medical Panel examined Mr. Blackett on a referral from chiropractor, Dr. Richard Wright. The examination was for severe post-traumatic cervical muscle spasm and headaches as a result of a fall while he was carrying a microwave oven on December 24, 1987. Mr. Blackett had not remembered the headaches

and fall until reminded of them by Dr. Moress during the Medical Panel examination as reported on August 21, 1991. (R. 60, 64)

On November 21, 1988, Western Rehabilitation Institute through Patricia Tobin, LPT, assessed Mr. Blackett's condition as follows:

This pt represents a male who has been suffering with back pain off-and-on for approx 10 years, most severely has been the last year. In the past two years, the pain has encompassed this man's life, resulting in a chronic pain situation with decreased function and mobility.

(R. 215)

Before the accident in question, Mr. Blackett struggled psychologically with obesity, depression, his wife's personality and her ongoing pain problem. (R. 219-220, 222)

He was off work under doctor's orders from E. Warren Stadler, M.D. to at least June 30, 1989. (R. 203) As late as April 25, 1990, the insurance carrier for Mesa Moving and Storage was awarded reimbursement for temporary total disability compensation from the Employer's Reinsurance Fund. (R. 34)

The accident which is at issue occurred on May 1, 1990. At the time, Michael Blackett was employed by Ralph Larsen & Sons. He was filling the radiator of a truck with water when he fell. He received temporary total disability compensation from the Workers Compensation Fund of Utah (hereinafter the "Fund") for in excess of five months. His medical expenses were likewise paid by the Fund. (R. 37)

On the day of the injury Mr. Blackett reported to the Holy Cross Hospital for treatment. At that time he complained of and

was treated for an injury to his right forearm and wrist. He neither made complaint of nor did he give a history of striking his head or of experiencing any other injury. (R. 56, 275) He had no loss of consciousness with the fall that he could recall. As reported to the Medical Panel by Mr. Blackett, he had no head complaints until about one month after the accident when he was in physical therapy for his arm. (R. 56)

On October 17, 1990, and again on May 22, 1991, neurologist Nathaniel M. Nord expressed the opinion to the Fund that:

...I do not believe that Mr. Blackett has sustained intracranial/central nervous system injury or dysfunction as a consequence of the work-related incident of May 1, 1990. This opinion is shared, I believe, by Dr. Fred Matsuo, based upon my review of letters which he submitted to your office.

(R. 112-122)

Dr. Thomas D. Houts, M.D., who examined Mr. Blackett on a referral from his treating physician, Dr. Taylor A. Jeppson, likewise could find no objective signs of any disorder connected to his May 1, 1990, accident:

The patient sounds like he is having a lot of physiologic headaches, mostly tension in type but with occasional migraines. He has had three episodes of syncope. These may be, in part, related to migraine or stress. I do not find evidence of an acquired neurological illness or organic brain syndrome. There does not appear to be any obvious evidence of brain injury from his head trauma...

(R. 47-49)

On August 21, 1991, the Medical Panel carefully considered all of the medical evidence and their own examinations of Mr. Blackett. Their conclusions were:

I find it incredulous that one would believe that Mr. Blackett has a post concussion syndrome/organic brain syndrome secondary to his May 1990 industrial incident. There is no evidence that he had any loss of consciousness whatsoever. There was no mention in the original emergency room notes of any problem with the head, and even Mr. Blackett admitted to several physicians that there was no loss of consciousness. In fact, he had no headaches develop, according to him, until a month after the incident and according to the medical records not until July. The headache mechanism appears to be related to cervical muscle strain and tension in agreement to many observers who have seen him....The bottom line is [his blackouts] do not represent any primary cerebral electrical even such as a seizure. This would be in agreement with the IME of Dr. Nord and opinion of Dr. Matsuo.

Since there appears to be documentation on the record of an organic brain syndrome from his psychological evaluation, I would accept that. What I would not accept would be an attempt to find a causal relationship between non-existent head injury and the onset of an organic brain syndrome....

Rather than looking at the 5-1-90 accident as an isolated event, I feel it has to be looked at in terms of his premorbid problems including the 1985 back injury and the very prolonged recovery with much psychological overlay in his recovery.

The Medical Panel went on to assert strongly its medical judgment that none of the symptoms then being experienced by Mr. Blackett were medically caused by the May 1, 1990, accident. (R. 64-66) Dr. Robert H. Burgoyne, the psychiatrist on the Medical Panel, concurred: *...I agree entirely with Dr. Moress's conclusions. My opinion is that there was no permanent partial impairment due to the industrial accident of May 1, 1990.* (R. 69)

Counsel for Mr. Blackett responded to the Medical Panel Report on October 15, 1991. He claimed an entitlement for Mr.

Blackett for Compensation Neurosis. He requested that the matter be referred back to the Medical Panel for a determination as regards the duration and extent of the psychological problems evidenced by Dr. Burgoyne's letter.... (R. 71) Counsel did not ask for a hearing nor did he term his letter an objection to the Medical Panel Report.

Judge Timothy C. Allen entered his Findings of Fact, Conclusions of Law and Order on January 24, 1992. (R. 77-82, Appendix 5). Judge Allen responded to the above request as follows:

...[C]areful scrutiny of Dr. Burgoyne's findings indicates that the applicant "could be suffering from a somatoform disorder." (Emphasis added). Dr. Burgoyne goes on to indicate that "There was a possibility that this diagnosis would be related to the May 1, 1990 injury." (Emphasis added). [T]he foregoing language of Dr. Burgoyne does not satisfy the evidentiary requirements in these matters. In these cases, medical evidence must be stated in terms of reasonable medical probability.

(R. 77) Judge Allen admitted the report into evidence and adopted the findings as his own. (R. 78) He then entered his findings of fact citing many of the same facts stated hereinbefore as well as others in support of his denial of additional benefits. After reviewing the facts, the Industrial Commission sustained the decision of the Administrative Law Judge. (R. 96-100, Appendix 1)

Blackett's counsel then filed a timely Motion for Review. He asked that the matter be referred back to the Medical Panel for a full review of the alleged Compensation Neurosis. He did

not request a hearing on objections to the Medical Panel Report.
(R. 84-85, Appendix 8)

The refusal to refer the matter back to the Panel for clarification, if error at all, constitutes harmless errors in light of the record before this court. *Workers Compensation Fund v. Industrial Comm'n*, *infra*.

VII. SUMMARY OF THE ARGUMENTS

Argument A. When one is appealing from adverse findings of fact, the law requires the appellant to "...marshal the evidence in support of the ... findings and then demonstrate that those findings are unsupported by substantial evidence." *Merriam v. Board of Review*, *supra*. Blackett made little or no attempt at such marshaling. Instead, he ever so briefly argues the facts as one might do before a trier of facts. That is, he tried to paint the facts in a light most favorable to his position while excluding all facts that would be detrimental to his claim. That he does not like the result is a given. That there were indeed factual disputes regarding the causes of his very many physical, mental and emotional complaints is also a given. However, the disputed facts were resolved by the Commission contrary to Blackett's interpretation. There was substantive evidence from the records of treating physicians, examining physicians who the Workers Compensation Fund retained and the evidence provided by the Medical Panel, all of which supports the denial of additional benefits. Contrary to Blackett's unsupported implied assertion that the Commission misinterpreted Dr. Burgoyne's concurrence in

the report of Dr. Moress, the evidence overwhelmingly supports the Commission's findings.

Argument B. Utah Code Ann. §35-1-77 makes it discretionary with the Commission to appoint a medical panel to review the medical evidence. It is also in the sound discretion of the Commission by the same statute to determine whether a hearing on objections to a medical panel report is to be held for the purpose of cross-examining the panel members, to resubmit the issues to the panel for clarification, or to decide that it has enough facts upon which to base its decision. In this case the panel unequivocally opined that none of Mr. Blackett's current problems were caused medically by his accident of May 1, 1990. If the trier of facts were to find the evidence of certain of Mr. Blackett's examining and treating physicians to be more credible, then he should receive the additional benefits he seeks. However, the trier of facts, the Industrial Commission, found the more credible evidence was against awarding more benefits. Furthermore, Blackett presented no new evidence that conflicted with the opinions expressed by the Medical Panel. He therefore did not comply with Industrial Commission Rule R568-1-9 B. (Appendix 7) which requires a proffer of conflicting medical evidence before the Commission will exercise its discretion to resubmit a matter to a medical panel. Without at least such a proffer, cross-examining the Panel is of no use. It was left for Blackett to convince the Commission that the evidence preponderated in his favor. He simply did not carry his burden of persuasion.

VIII. ARGUMENT

- A. **BLACKETT FAILED TO MARSHAL ALL THE EVIDENCE WHICH SUPPORTS THE COMMISSION'S DECISION. HAD HE DONE SO, THE ONLY CONCLUSION ONE CAN REACH IS THAT A REASONABLE PERSON WOULD HAVE TO ACCEPT THE FACTS AS BEING SUBSTANTIAL AND ADEQUATE TO SUPPORT THE COMMISSION'S DENIAL OF ADDITIONAL BENEFITS.**

It is Blackett's responsibility to ...*"marshal the evidence in support of the [Commission's] findings and then demonstrate that those findings are unsupported by substantial evidence."* *Stewart v. Board of Review, supra.; Merriam v. Board of Review, supra.*

In any event, to successfully challenge findings of fact made in an administrative proceeding, the party seeking to upset those findings must show that the findings are "not supported by substantial evidence when viewed in light of the whole record before the court." Utah Code Ann. §63-46b-16(4)(g) (1990). [Citation omitted] Under this "whole record test," a party challenging the findings must "marshal all of the evidence supporting the findings and show that despite the supporting facts, and in light of the conflicting or contradictory evidence, the findings are not supported by substantial evidence." [Citations omitted]

In challenging the ALJ's decision, IHC catalogues only that evidence in the record most helpful to its position, and wholly neglects to amass the evidence supporting the ALJ's findings. Thus, IHC has 'failed to completely satisfy [its] obligation to marshal the evidence by persistently arguing [its] own position without regard for the evidence supporting the [ALJ's] findings". [Citations omitted]

IHC v. Board of Review, __ P.2d __, (Utah App. 1992), 193 Utah Adv. Rep. 33, at 30 (Ct. App. 8/14/92).

...[E]vidence contrary to that supporting the findings should "be referred to in briefing only after the supporting evidence has been separately marshalled." [Citation omitted]

Since IHC has failed to comply with the marshaling requirement in this case, we have no occasion to consider the evidence supporting its position.

id at footnote 3, page 33.

By even a cursory reading of Blackett's brief, it is apparent he is implying this Court should reweigh the evidence in the most favorable light to support his claims. He is not satisfied with the fact finder's decisions. Ralph H. Larsen & Sons and the Workers Compensation Fund of Utah have documented the substantial facts supporting the Commission's denial of benefits. The Court is again referred to that summary in the Statement of Facts.

B. THE EXERCISE OF THE DISCRETIONARY AUTHORITY GIVEN THE INDUSTRIAL COMMISSION TO APPOINT A MEDICAL PANEL TO REVIEW THE MEDICAL ISSUES OF A CASE DOES NOT GIVE BLACKETT AN UNFETTERED RIGHT TO A HEARING ON OR A RESUBMISSION OF HIS OBJECTIONS TO THE MEDICAL PANEL REPORT.

With little legal analysis and no citation to any legal authority in point in his brief at pages 5-7, Blackett asserts that "The ALJ should have referred the matter back to the medical panel or, in the alternative, held a hearing." (R. 5).

Utah Code Ann. §35-1-77 of the Workers' Compensation Act makes the appointment of a Medical Panel in any given case a discretionary act of the Commission. The Commission may base its findings on the Panel Report and in the event of timely objections may set a hearing on those objections:

(1)(a) Upon the filing of a claim...the commission may refer the medical aspects of the case to a medical panel.

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

(2)(e) If objections to the report are filed, the commission may set the case for hearing to determine the facts and issues involved. . .

(2)(f) The written report of the panel . . . 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. . .

(emphasis added) (See §35-1-77 U.C.A., 1991 Cumulative Supplement, in its entirety attached as Appendix 4.)

The language of the statute makes it clear Blackett does not have a statutory right to a hearing on his objections to the Medical Panel Report. The convening of such a hearing is discretionary with the Commission. Utah Appellate Courts have interpreted Utah Code Ann. §35-1-77(2)(e) in just that manner. *Moore v. American Coal Co.*, 737 P.2d 989 (Utah 1987) and *Rekward v. Industrial Com'n of Utah*, 755 P.2d 166 (Utah App. 1988).

Blackett has not complied with Industrial Commission Rule R568-1-9 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.

Blackett proffered no new conflicting medical evidence in any form.

It was Blackett's burden to show his condition was medically caused by the accident of May 1, 1990, by a preponderance of the evidence:

"Medical evidence is insufficient to prove industrial causation of any injury if it is equally probable that a nonindustrial accident caused the condition" [Citation omitted]; see also Allen v. Industrial Comm'n, 729 P.2d 15, 27 (Utah 1986).

The standard of proof for causation is by a preponderance of the evidence. Large v. Industrial Comm'n, 758 P.2d 954, 956.

Stokes v. Board of Review, 185 Utah Adv. Rep. 21 at 23 and 24 (Ct. App. 4/22/92), Pet. for Cert. pending. He simply failed in that burden.

It would have been a useless act in this case to have a hearing on the objections to the Medical Panel Report. As shown in the Statement of Facts, there is evidence from treating and examining physicians that fully supports the unequivocal opinions of the members of the medical panel. The most that a hearing on the Objections to the Medical Panel Report could have supplied was for the panel members to reassert their clear opinions of no causation.

The Industrial Commission is solely responsible for finding facts. The determination of credibility is the sole province of the fact finder, not expert witnesses. The Commission was free to accept all or part of the Report and/or all or part of the other evidence presented by the parties as its findings. It is

for the Commission to weigh the evidence. See for example, *Greyhound Lines v. Wallace*, 728 P.2d 1021 (Utah 1986); *Booms v. Rapp Construction Company*, 720 P.2d 1363 (Utah 1986); *Price River Coal Co. v. Industrial Commission*, 731 P.2d (Utah 1986). The Commission is not required to give preferential weight to a treating physician's findings. *Rushton v. Gelco Express*, 732 P.2d 109 (Utah 1986).

The very worst that can be said about the Commission's decision not to have a hearing or refer the matter back to the panel for further findings based on Blackett's objection to the Medical Panel Report is that it would make the report "hearsay". However, the "hearsay rule" has no application in a Commission proceeding. The administrative law judge and the Commission may consider any hearsay evidence presented to them which bears on the issues being considered. *Schmidt v. Industrial Comm'n*, 617 P.2d 693 (Utah 1980); *Bunnell v. Industrial Comm'n*, 740 P.2d 1331 (Utah 1987). The only restrictions to the admission of hearsay evidence are: 1) that the evidence have some probative weight and reliability, *Bunnell v. Industrial Comm'n*, supra.; and that findings of fact not be based exclusively on hearsay. There must be a residuum of legal and competent substantive evidence. That residuum requirement can be met by evidence which is either admitted without objection or is otherwise allowed as evidence by rule or statute. See, for example, *Industrial Power v. Industrial Commission*, 187 Utah Adv. Rep. 29 (Ct. App. 5/13/92).

Utah Code Ann. Section 35-1-88 (Appendix No.4) provides:

The commission may receive as evidence and use as proof of any fact in dispute all

evidence deemed material and relevant
including, but not limited to the following:

(b) Reports of attending or examining
physicians, or of pathologists.

(c) Reports of investigators appointed
by the commission.

(d) Reports of employers, including
copies of time sheets, book accounts or other
records.

(e) Hospital records in the case of an
injured or diseased employee.

(Emphasis added). Obviously this statute and the overall concept of the Workers' Compensation Act of Utah (Utah Code Ann. Sections 35-1-1 et seq.) contemplates admission of material that would otherwise be considered "hearsay" to which one would not have the opportunity of cross-examination. The concept is that if the "...the usual common-law or statutory rules of evidence, or...technical or formal rules of procedure..." were to be applied,¹ the purposes of the Workers' Compensation Act to provide speedy, inexpensive resolution of disputed issues dealing with employees' rights to compensation would be thwarted. Certainly, if a party had the absolute right to cross-examine every person or entity supplying hearsay evidence, the system would be so burdened that it could never meet its purposes. That is why the Commission is given the discretionary authority to appoint a Medical Panel and discretionary authority to determine whether objections to Medical Panel Reports establish sufficient factual controversy to set a hearing to examine the issues further. Here, the Commission correctly found that the objection

¹. Utah Code Ann. Section 35-1-88.

added nothing materially different to the facts and merely constituted additional adversarial argument because the evidence relied upon by Blackett from the report of Dr. Burgoyne "....does not meet the evidentiary requirements in these matters. In workers compensation cases, medical evidence must be stated in terms of reasonable medical probability." (R. 96-100 at 97, Appendix 6 hereto.)

The right of cross-examination is not an absolute right. *Cellular Mobile Systems of Pennsylvania, Inc. v. Federal Communications Commission*, 782 F.2d 182, 198 (Ct. App. D.C. Dist. 1985) involved a claim that the FCC was required to give a full hearing to applicants for a nonwire line cellular telephone license and that the hearing should involve cross-examination of witnesses. The Court Said:

Cross-examination is therefore not an automatic right conferred by the APA, instead, its necessity must be established under specific circumstances by the party seeking it. The APA . . . provides only for "such cross-examination as may be required for a full and true disclosure of the facts . . . In this case-by-case analysis, cross-examination is appropriately denied if the party fails to "point to any specific weakness in the proof which might have been explored or developed more fully by that technique than by the procedures adopted by the Commission, or fails specifically to suggest what questions were necessary to explore the general issues to be examined, or fails to explain why written submissions, including rebuttal material, were ineffectual. Absent such a showing, no prejudice has been established . . . Cross-examination is not essential in all cases; instead, this traditional device of truth-finding is deemed to lie within the discretion of the ALJ, whose decision will not be reversed by the Commission if it reflects sound discretion. Even if a party

successfully argues under this standard that cross-examination should have been permitted, the second inquiry is whether the matters sought to be cross-examined bore significantly upon the Commission's fact finding and drawing of conclusions. If not, then the party has not been prejudiced.

Due to the vagueness of Blackett's argument, it is difficult to argue with more particularity against his assertions of a right to have the matter referred back to the panel or to cross-examination of the Medical Panel. The proponent of a proposition, after all, bears the burden of proof and persuasion as to the proposition. *Loesling v. Basamkis*, 539 P.2d 1043, 1046 (Utah 1975); *Hiltsley v. Ryder*, 738 P.2d 1024, 1027 (Utah 1987). That burden has not been met.

IX. CONCLUSION

Blackett's appeal to this Court to have the case remanded with instructions to the Industrial Commission to have his objections to the Medical Panel Report resubmitted to the Panel for further consideration or in the alternative to have the Commission convene a hearing on the objections to the Medical Panel Report should fail for several reasons. First, the referral to the Medical Panel and the convening of a hearing on objections to the Panel's report are discretionary with the Commission pursuant to §35-1-77 U.C.A. The Commission used its discretion to determine that nothing could be added to the case that had not already been considered by the Panel.

Second, Blackett did not comply with Industrial Commission Rule R568-1-9 B. which requires an objecting party to proffer new

conflicting medical testimony showing a need to clarify the medical panel report All Blackett did was argue that the Panel members Drs. Burgoyne and Moress disagreed with one another. He chose not to believe Dr. Burgoyne when he said, I agree entirely with Dr. Moress's conclusions. My opinion is that there was no permanent partial impairment due to the industrial accident of May 1, 1990... (R. 69) The Commission chose to take Dr. Burgoyne at his word.

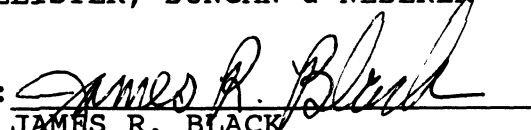
Third, Blackett has totally failed to marshal the evidence in support of the Commission's findings and then show they are unsupported by substantial evidence. Instead he has provided the Court with slightly more than one page of "Material Facts", none of which support his burden to show medical causation by a preponderance of the evidence. (See Blackett's Brief at pages 3-4)

Defendants ask this Court to sustain the decision of the Industrial Commission denying Michael Blackett's application for additional workers' compensation benefits stemming from his accident of May 1, 1990, and that the case and record be remitted to the Industrial Commission for action consistent therewith.

DATED this 7 day of October, 1992.

CALLISTER, DUNCAN & NEBEKER

By:


JAMES R. BLACK

Cocounsel for Ralph H. Larsen
and Sons and Workers
Compensation Fund of Utah

WORKERS COMPENSATION FUND OF UTAH

By: Deborah M. Larsen
DEBORAH M. LARSEN
Cocounsel for Ralph H. Larsen &
Sons and Workers Compensation
Fund of Utah

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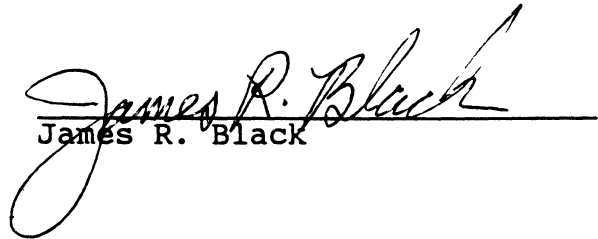
CERTIFICATE OF MAILING

I hereby certify that ^{Fair D.R.B.} a true and correct copy of the foregoing BRIEF OF RESPONDENTS WORKERS COMPENSATION FUND OF UTAH AND RALPH H. LARSEN & SONS, INC. was mailed, postage prepaid, on this 7 day of October, 1992 to the following:

ROBERT BREEZE
Attorney for Petitioner
211 East Broadway #215
Salt Lake City, Utah 84111

Deborah M. Larsen #4866
Cocounsel for Respondents
560 South 300 East
Salt Lake City, Utah 84111

For Respondent
Industrial Commission of Utah
Benjamin J. Sims
160 East 300 South
P.O. Box 5800
Salt Lake City, Utah 84101


James R. Black

Tab 1

Appendix Number 1

**Order Denying Motion For Review
dated April 2, 1992. (R. 96-100)**

INDUSTRIAL COMMISSION OF UTAH

Case No. 86001152

MICHAEL BLACKETT,

Applicant,

vs.

RALPH H. LARSON & SONS, INC.
& WORKERS COMPENSATION FUND
OF UTAH,

Defendants.

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ORDER

DENYING MOTION FOR REVIEW

The Industrial Commission of Utah, on Motion of the Applicant, Michael Blackett, reviews an Order of the Administrative Law Judge dated January 24, 1992, pursuant to Utah Code Ann. Section 35-1-82.53 and Section 63-46b-12.

On January 24, 1992, an Order was entered by an Administrative Law Judge of the Commission wherein it was concluded that the Applicant was not entitled to permanent total disability, permanent partial impairment and additional temporary total disability benefits as the result of his industrial accident of May 1, 1991.

On January 26, 1992, the Commission received a Motion for Review from the Applicant alleging that Administrative Law Judge Allen erred in failing to refer the question of whether the Applicant suffered from "Compensation Neurosis" back to the medical panel for a full analysis of whether the somatoform pain disorder was cause the industrial accident.

Thereafter, the matter was referred to the entire Commission for review. It is the opinion of the Commission that the issues to be decided are: 1) whether the Administrative Law Judge erred in failing to refer the question of whether the Applicant suffered from "Compensation Neurosis" back to the medical panel; and 2) whether Administrative Law Judge's Findings of Fact and Conclusions of Law are supported by substantial evidence when viewed in light of the whole record?

A report from the psychiatric member of the panel, Dr. Burgoyne, was forwarded to the parties as a supplemental panel report. In response thereto, applicant made a Motion to Amend Application for Hearing to allege that the applicant was suffering

BLACKETT
ORDER
PAGE TWO

from compensation neurosis, based on applicant's reading of the findings of Dr. Burgoyne. However, in reviewing the report of Dr. Burgoyne, and the rest of the medical evidence contained on this file, the Administrative Law Judge found that the applicant mischaracterized Dr. Burgoyne's report.

The applicant asserts that Dr. Burgoyne clearly indicated that the applicant suffers from a somatoform pain disorder and that this is a result of the industrial accident. However, scrutiny of Dr. Burgoyne's findings indicates that the applicant "could be suffering from a somatoform disorder." (Emphasis added). Dr. Burgoyne goes on to indicate that "There was a possibility that this diagnosis would be related to the May 1, 1990 injury." (Emphasis added). The foregoing language of Dr. Burgoyne does not satisfy the evidentiary requirements in these matters. In workers compensation cases, medical evidence must be stated in terms of reasonable medical probability.

It is for this very reason that the medical panel in its charge is always instructed by the Industrial Commission to couch its findings in terms of "reasonable medical probability". The Commission finds that the better view of Dr. Burgoyne's conclusions is that any somatoform pain disorder that the applicant might have is related to his previous psychological makeup, since Dr. Burgoyne found that there was no organic pathology, and that the applicant's of pain or impairment was in excess of what would be expected from his physical findings. However, this observation by Dr. Burgoyne is not clear proof of "compensation neurosis" as alleged by the applicant. Rather, other than the applicant's mischaracterization of Dr. Burgoyne's findings, there is no medical evidence whatsoever to support the applicant's contention that he suffers "compensation neurosis" as the result of the industrial accident.

The medical panel found that there was no post concussion syndrome/organic brain syndrome due to the industrial accident of May 1, 1990. The panel noted that there was no evidence whatsoever that the applicant had any loss of consciousness. In addition, there was no mention in the original emergency room notes of any problem with the applicant's head, and further, the applicant himself admitted to several physicians that there was no loss of consciousness. Of particular importance, is the fact that the applicant had no headaches develop until, according to the applicant, a month after the incident, and according to the medical records, not until July of 1990. The medical panel concluded that the headache mechanism was related to the cervical muscle strain, and that the applicant's blackouts are a syncopal-like episode, or that they are some type of dissociative psychological reaction.

MICHAEL BLACKETT
ORDER
PAGE THREE

Finally, the panel concluded that the applicant has "An organic brain syndrome from his psychological evaluation. . . ." The panel concluded that there was no causal relationship between the "Non-existent head injury and the onset of an organic brain syndrome. An organic brain syndrome would be related to factors other than his 5-1-90 industrial incident." The panel noted further careful scrutiny should be made of the applicant's pre-accident problems, "Including the 1985 back injury and the very prolonged recovery with much psychological overlay in his recovery."

The panel also found that the applicant was status post L5-S1 laminectomy, discectomy, and finally, that the applicant had an organic brain syndrome, the etiology of which was unclear, but the panel concluded that it possibly was neurodegenerative. The panel concluded that the foregoing diagnosis were not a result of the industrial accident of May 1, 1990. The panel found, in addition, that the applicant's condition stabilized from the industrial accident approximately one month following the accident or June 1, 1990. The findings of the medical panel were adopted by the Administrative Law Judge as his own and admitted into evidence.

Based upon these medical findings the Administrative Law Judge did not err in failing to refer the issue of "compensation neurosis" back to the medical panel. The panel had dealt with the issue of the applicant's somatoform pain disorder and psychological overlay at some length. In addition, the Administrative Law Judge's Findings of Fact and Conclusions of Law were supported by substantial evidence when viewed in light of the whole record before the court.

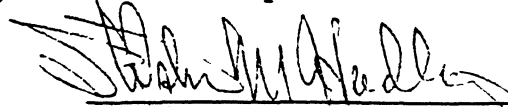
For the foregoing reasons, it is the opinion of the Commission that the Administrative Law Judges' Order denying the applicant worker's compensation benefits related to the May 1, 1991, industrial accident should be affirmed.

ORDER:

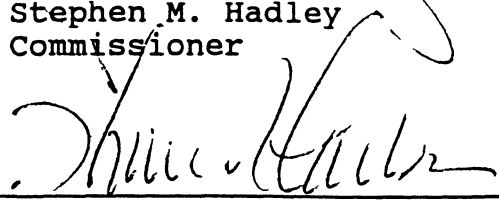
IT IS THEREFORE ORDERED that the Motion for Review, dated January 22, 1992, is hereby denied.

BLACKETT
ORDER
PAGE FOUR

IT IS FURTHER ORDERED that any appeal shall be to the Utah Court of Appeals within thirty (30) days of the date hereof pursuant to Utah Code Ann., Sections 35-1-82.53(2), 35-1-86, and 63-46b-16. Costs to prepare transcripts for appeals purposes shall be borne by the party requesting the transcripts.

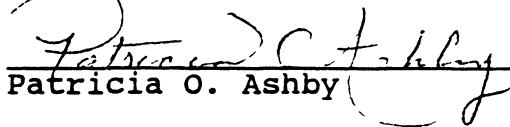
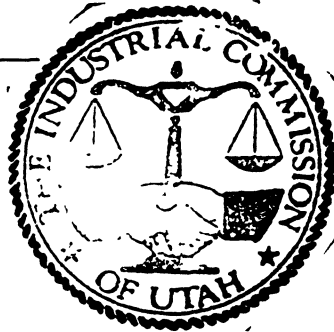


Stephen M. Hadley
Commissioner



Thomas R. Carlson
Commissioner

Certified this 2nd day of April 1992.
ATTEST:


Patricia O. Ashby

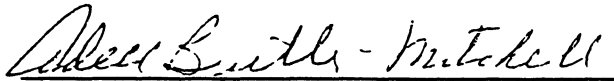
CERTIFICATE OF MAILING

I certify that on April 2, 1992, a copy of the attached ORDER DENYING MOTION FOR REVIEW in the case of MICHAEL BLACKETT was mailed to the following persons at the following addresses, postage paid:

Michael Blackett
2837 Breeze Drive
Magna, Utah 84044

Robert Breeze, Attorney
211 East 300 South #215
Salt Lake City, Utah 84111

Timothy C. Allen
Administrative Law Judge


Adell Butler-Mitchell
Legal Assistant

Tab 2

Appendix Number 2

**Utah Code Ann. Section 35-1-77
1991 Cumulative Supplement
Medical Panel - Medical Director or
Medical Consultants
Discretionary Authority of Commission
to Refer Case
Findings and Report - Hearing -
Expenses**

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.

(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.

History: L. 1951, ch. 52, § 1; C. 1943, Supp., 42-1-71.10; L. 1955, ch. 57, § 1; 1969, ch. 86, § 9; 1979, ch. 138, § 6; 1982, ch. 41, § 1; 1988, ch. 116, § 7; 1991, ch. 136, § 13.

Amendment Notes. — The 1991 amendment, effective April 29, 1991, substituted the first "and" for "or" in Subsection (1)(a) and de-

leted the former second sentence, which read "The panel shall have the qualifications generally applicable to the medical panel under Section 35-2-56"; added Subsections (1)(b) and (c) and redesignated former Subsection (1)(b) as (1)(d); and added the second sentence in Subsection (2)(b).

NOTES TO DECISIONS

ANALYSIS

Effect of 1982 amendment.

Referral to panel.

— Discretion.

Cited.

Effect of 1982 amendment.

In accord with bound volume. See *Ortiz v. Industrial Comm'n*, 766 P.2d 1092 (Utah Ct. App. 1989).

This section is procedural and may be applied to an accident that occurred prior to the 1982 amendments. *Ortiz v. Industrial Comm'n*, 101 Utah Adv. Rep. 60 (Ct. App. 1989).

Referral to panel.

— Discretion.

The court of appeals cannot say that the administrative law judge abused his discretion in not referring the case to a medical panel when there was medical evidence to support his finding of medical causation. *Workers' Comp. Fund v. Industrial Comm'n*, 761 P.2d 572 (Utah Ct. App. 1988).

Cited in *Rekward v. Industrial Comm'n*, 755 P.2d 166 (Utah Ct. App. 1988); *USX Corp. v. Industrial Comm'n*, 781 P.2d 883 (Utah Ct. App. 1989).

Tab 3

Appendix Number 3

Stewart v. Board of Review

831 P.2d 134

185 Utah Adv. Rep. 30

(Apr. 29, 1992)

Cite as
185 Utah Adv. Rep. 30

IN THE
UTAH COURT OF APPEALS

Jennie STEWART,
Petitioner,

v.

BOARD OF REVIEW of the Industrial
Commission of Utah; Warner Lambert/
AmericanChickle; and Underwriters Adjusting
Company,
Respondents.

No. 910425-CA
FILED: April 29, 1992

Original Proceeding in this Court

ATTORNEYS:

Lowell V. Summerhays, Murray, for
Petitioner

Henry K. Chai, II, Salt Lake City, for
Respondents Warner Lambert/American
Chickle and Underwriters Adjusting
Company

Before Judges Billings, Greenwood, and
Jackson.

**This opinion is subject to revision before
publication in the Pacific Reporter.**

JACKSON, Judge:

Petitioner Jennie Stewart appeals the Industrial Commission's denial of certain benefits sought by Stewart. We affirm.

FACTS¹

On July 31, 1984, Stewart experienced a pain in her right shoulder while lifting boxes in the course of her employment duties. Stewart did not report the injury to her employer, respondent American Chickle (Chickle), nor did she seek immediate medical treatment. Stewart continued to work and first sought medical treatment on August 27, 1984. At that time she saw Dr. Jerry Poulson, her family physician, who referred her to Dr. Devon Toone, a chiropractor. Stewart did not mention any specific industrial injury to Dr. Poulson. Dr. Toone first saw Stewart on October 10 and continued treating her until May of 1985. Dr. Toone's records indicate that Stewart reported the injury had occurred at work while she was lifting boxes. In a subsequent report completed by Dr. Poulson, the date of injury was stated as July 1984.

In a report dated November 7, 1984, Stewart reported the injury to her employer. In that report, Stewart indicated she did not

know how the injury occurred.

Dr. Thomas Soderburg, an orthopedic surgeon, examined Stewart on May 1, 1985. Both Dr. Soderburg and Dr. Kim Bertin, another orthopedic surgeon, opined that Stewart had a muscle strain of her right shoulder. Stewart continued working until September 12, 1985. On that date, Dr. Bertin hospitalized Stewart and performed an acromioplasty of her right shoulder. Stewart received temporary total compensation from workers' compensation from September 12, 1985 through March 26, 1986. On March 19, 1986, Dr. Bertin gave Stewart a permanent partial impairment rating of four percent of the upper extremity which he converted to a two percent whole person permanent rating. Chickie, through its insurance carrier, tendered a compensation agreement and check to Stewart to compensate her for a 2.4 percent whole person impairment. Stewart disputed this rating.

When Stewart's temporary total disability benefits were terminated in March of 1986, she began receiving long-term disability benefits. After an unrelated hospitalization in September of 1986, Stewart returned to Dr. Bertin with complaints of shoulder pain. Dr. Bertin referred Stewart to Dr. Bruce Sorenson to determine if Stewart's shoulder pain was being caused by some cervical abnormality. Several tests were performed and all results were normal. Neither Dr. Bertin nor Dr. Sorenson could determine the source of Stewart's pain and Dr. Bertin concluded Stewart should seek further consultation to make sure nothing was being overlooked.

On August 25, 1987, Stewart was involved in an automobile accident. The collision caused the dashboard of the vehicle to be pushed into her right arm which in turn pushed Stewart's right shoulder back. The armrest of the passenger door struck Stewart on the right side below her ribs. A few days later, Stewart sought medical treatment from Dr. Poulson. Dr. Poulson's records indicate Stewart had a bruise to the right shoulder and arm as well as pain in her neck. The records also indicate that Dr. Poulson concluded that Stewart's problems resulting from the industrial accident had resolved and that they were not contributing to the problems from the automobile accident. He provided fifteen treatments which ended in March of 1988, all of which were for treatment of the neck and dorsal back. In a letter to Stewart's counsel dated March 3, 1988, Dr. Poulson reported two separate injuries. He attributed Stewart's pain in her right shoulder to the 1984 industrial accident and gave a two percent whole person impairment rating for that injury. Dr. Poulson attributed the cervical spine, dorsal spine, and right shoulder injuries to the automobile accident and gave a ten percent whole person rating for that injury. Dr. Poulson

concluded that most if not all of the pain Stewart was experiencing in her shoulder was due to pain from her cervical spine area.

At the request of the long-term disability insurance carrier, two additional physicians examined Stewart. Those physicians' reports indicate that they believed the industrial accident was responsible for Stewart's pain. The administrative law judge (ALJ)² found that neither of these physicians were informed about the automobile accident or about Dr. Poulson's conclusions. A medical panel consisting of one physician reviewed the case and submitted a report to the ALJ on June 6, 1989. The findings of the medical panel are summarized by the ALJ as follows:

The medical panel felt that the applicant's complaints were cervical in nature, rather than shoulder, and that the applicant had a lot of subjective complaints without objective findings. The medical panel found a causal connection between the right shoulder problems and the industrial accident, and gave the applicant a 5% upper extremity rating which converts to a 3% whole person. The panel also found that the impairment led to a 30% disability, which was beyond its charge. In a supplemental panel report issued April 3, 1990, the medical panel concluded that the automobile accident did not cause any significant damage to the applicant's right shoulder. The panel concluded that all of the applicant's current complaints are related to a cervical disc injury ... [which] was caused by the industrial accident of 1984, and was accentuated by the automobile accident.

The ALJ rejected the medical panel's finding that there was a causal connection between Stewart's cervical complaints and the 1984 industrial accident. The ALJ found there was no medical evidence to support that finding, and that therefore, Stewart's cervical injury resulted from her automobile accident and not the industrial accident.

The ALJ concluded that Stewart was entitled to a three percent whole person impairment as found by the medical panel, that Chickie had no responsibility for treatment resulting from the automobile accident, that Chickie was not responsible for the medical expenses of the two physicians to whom the long-term disability carrier had referred Stewart, and that all future medical expenses were Stewart's responsibility. Stewart moved for review whereupon the Industrial Commission affirmed the ALJ's findings and conclusions.

ISSUES

Stewart challenges the ALJ's rejection of the medical panel's conclusion that her current injury was caused by the industrial accident. Stewart further claims that the Industrial Commission failed to determine all findings of fact, and that there is credible evidence in the record to support a conclusion that the industrial accident caused all of Stewart's injuries. Stewart asks this court to conclude that Chickie is liable for all present and future medical expenses incurred as a result of that accident.³

STANDARD OF REVIEW

Because these proceedings were commenced after January 1, 1988, our review is governed by the Utah Administrative Procedures Act (UAPA), Utah Code Ann. §63-46b-16 (1989). The standard for reviewing findings of fact under UAPA is well settled. "[F]indings of fact will be affirmed if they are 'supported by substantial evidence when viewed in light of the whole record before the court.'" *Merriam v. Board of Review*, 812 P.2d 447, 450 (Utah App. 1991) (quoting *Nelson v. Department of Employment Sec.*, 801 P.2d 158, 161 (Utah App. 1990)). "Substantial evidence is that which a reasonable person 'might accept as adequate to support a conclusion.'" *Id.* (quoting *Grace Drilling Co. v. Board of Review*, 776 P.2d 63, 68 (Utah App. 1989)). In conducting this review, we examine both sides of the record, and not simply that part of the record which supports the ALJ's findings. *Tasters Ltd. v. Department of Employment Sec.*, 819 P.2d 361, 365 (Utah App. 1991).

ANALYSIS

On review, Stewart makes a general claim that her current pain is a result of the 1984 industrial accident, and not, as the ALJ determined, a result of the 1987 automobile accident. She thus challenges the ALJ's factual findings and the ALJ's rejection of the medical panel's opinion which agreed with Stewart's position.

While Stewart apparently disagrees with the ALJ's factual findings, she fails to challenge those findings. As noted above, we will not disturb findings unless Stewart can demonstrate they are not supported by substantial evidence. See *Merriam v. Board of Review*, 812 P.2d 447, 450-51 (Utah App. 1991); *Grace Drilling v. Board of Review*, 776 P.2d 63, 68 (Utah App. 1989). Stewart's challenge to the ALJ's findings falls short of this requirement.

After stating that, "[i]n marshaling all the evidence in support of the decision, the petitioner sees that there is no credible evidence to do so," Stewart identifies the marshaling burden and cites to evidence in the record upon which the ALJ relied in making his findings.⁴ On this point, Stewart comes close to

meeting her burden of presenting evidence which supports the very findings she contests. However, Stewart fails to draw this court's attention to any flaw in the evidence upon which the ALJ relied. See *West Valley City v. Majestic Inv. Co.*, 818 P.2d 1311, 1315 (Utah App. 1991) (appellant acknowledged marshaling requirement but "misperceived it"). Accordingly, because she does not marshal the evidence in support of the ALJ's findings and then demonstrate that those findings are unsupported by substantial evidence, we accept the ALJ's findings as conclusive.⁵ See *Merriam*, 812 P.2d at 450.

CONCLUSION

We accept the ALJ's determination that the 1984 industrial injury is not responsible for Stewart's current pain. Accordingly, we affirm.

Norman H. Jackson, Judge

WE CONCUR:

Judith M. Billings, Judge

Pamela T. Greenwood, Judge

1. We accept the Industrial Commission's findings of fact as conclusive because, as discussed later in this opinion, Stewart has failed to challenge these findings.

2. This case was originally heard by Judge Gilbert Martinez, who took it under advisement and referred the matter to a medical panel. Before the medical panel submitted its report, Judge Martinez left the Industrial Commission. Judge Timothy Allen was then assigned to the case. His findings of fact and conclusions of law state that he reviewed the transcript of the evidentiary hearing before Judge Martinez as well as the complete record, before rendering his decision. Unless otherwise specified, this opinion's reference to the ALJ refers to Judge Allen.

3. Stewart filed a reply brief which Chickie has moved this court to strike. In her reply brief, Stewart raises issues which were not raised before the Industrial Commission, in her docketing statement to this court, or in her initial appellate brief. Utah Rule of Appellate Procedure 23(c) limits the material contained in reply briefs to "answering any new matter set forth in the opposing brief." Because Stewart's brief fails to comply with this rule, we decline to address the issues raised therein.

4. Stewart cites to a medical report submitted by her physician, Dr. Poulson, which states that the pain Stewart was experiencing from the cervical area resulted from the automobile accident. She also states that because the two physicians who evaluated her at the request of the long-term disability insurance carrier did not have relevant medical records, their opinions that the industrial accident caused her present pain should be rejected.

5. We note that even were we to overlook Stewart's failure to comply with our marshaling requirement and reach the merits of this issue, the outcome would be no different.

The record is replete with documentation supporting the finding that Stewart's current pain resulted from the 1987 automobile accident. Stewart was treated for shoulder pain prior to the automobile accident. No cervical damage was ever diagnosed as

resulting from the 1984 industrial accident. After the automobile accident, Stewart was treated for cervical problems which even her own family physician determined to have resulted solely from the automobile accident. The medical records reveal that Stewart's neck was free from anatomical or functional abnormality as late as June of 1987, when she received an MRI scan. In short, sufficient evidence supports the ALJ's factual findings.

Further, while the ALJ rejected the medical panel's conclusion that the automobile accident accentuated Stewart's pain, the ALJ did adopt the impairment rating determined by the panel. Stewart fails to show how an alleged error in the ALJ's factual findings made any difference in this outcome on this point. As to whether the ALJ erred in rejecting the causation finding made by the medical panel, it was clearly within his discretion to do so. See *Olsen v. Industrial Comm'n*, 797 P.2d 1098, 1100 (Utah 1990) (appropriate for ALJ to reject medical opinions which are not supported by credible evidence); *Lancaster v. Gilbert Dev.*, 736 P.2d 237, 241 (Utah 1987) (when medical evidence is conflicting, ALJ has duty to resolve factual conflict).

Tab 4

Appendix Number 4

**Utah Code Ann. Section 35-1-88
Rules of Evidence and Procedure
before Commission and Hearing
Examiner
Admissible Evidence**

35-1-88. Rules of evidence and procedure before commission and hearing examiner — Admissible evidence.

Neither the commission nor its hearing examiner shall be bound by the usual common-law or statutory rules of evidence, or by any technical or formal rules of procedure, other than as herein provided or as adopted by the commission pursuant to this act. The commission may make its investigation in such manner as in its judgment is best calculated to ascertain the substantial rights of the parties and to carry out justly the spirit of the Workmen's Compensation Act.

The commission may receive as evidence and use as proof of any fact in dispute all evidence deemed material and relevant including, but not limited to the following:

- (a) Depositions and sworn testimony presented in open hearings.
- (b) Reports of attending or examining physicians, or of pathologists.
- (c) Reports of investigators appointed by the commission.
- (d) Reports of employers, including copies of time sheets, book accounts or other records.
- (e) Hospital records in the case of an injured or diseased employee.

History: L. 1917, ch. 100, § 88; C.L. 1917, § 3148; R.S. 1933 & C. 1943, 42-1-82; L. 1965, ch. 67, § 1.

Meaning of "this act". — See same catchline in notes following § 35-1-46

Cross-References. — Rules for procedure of commission, § 35-1-10

NOTES TO DECISIONS

ANALYSIS

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Taking testimony — admissibility and competency of evidence.
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Admissibility and competency of evidence.

While Industrial Commission in its investigations may have recourse to hearsay evidence to assist it at arriving at real facts, when it makes its findings every finding of fact must be based on some substantial legal and competent evidence, and every material finding that is entirely based on hearsay or other incompetent evidence not supported by substantial evidence cannot be permitted to stand if properly assailed. *Garfield Smelting Co. v. Industrial Comm'n*, 53 Utah 133, 178 P. 57 (1918).

Industrial Commission erred in permitting some witnesses to testify as to the statements made by deceased employee before he died, and other witnesses to state their conclusions or inferences in violation of rule limiting admission of incompetent evidence before commission. *Rockefeller v. Industrial Comm'n*, 58 Utah 124, 197 P. 1038 (1921).

In view of provisions of this section, §§ 35-1-78, 35-1-85 (now repealed) and 35-1-86, commission may deny award to non-resident alien father of deceased employee, though evidence of partial dependency was uncontradicted where evidence was somewhat fragmentary and not in all respects satisfactory or convincing, being mostly depositions and letters, but commission may not arbitrarily or capriciously deny award. *Kavalinakis v. Industrial Comm'n*, 67 Utah 174, 246 P. 698 (1926).

In proceeding for compensation for death of miner, declaration of deceased made to his companion when rocks were falling that he had been hit in back with rock was part or res gestae and evidence as to that was not open to objection that it was hearsay. *Chief Consol.*

Mining Co. v. Industrial Comm'n, 70 Utah 333, 260 P. 271 (1927).

Whether the present disabilities are or are not attributable to the injuries received at time of accident, when constituting the ultimate fact or question to be determined by the commission, may be decided without accepting a mere opinion of an expert. *Utah Delaware Mining Co. v. Industrial Comm'n*, 76 Utah 187, 289 P. 94 (1930).

In proceeding for compensation for death of city employee who died from acute dilatation or collapse of heart resulting from overexertion or strain while working on reservoir, declarations of deceased to doctor as to nature and extent of pain and as to nature of work, and declarations to wife as to pain were admissible, as against contention that such evidence was hearsay. *Hammond v. Industrial Comm'n*, 84 Utah 67, 34 P.2d 687 (1934).

Whether an employee is totally disabled or permanently disabled are ultimate matters to be decided by the commission, as is also amount and time compensation may be awarded upon all the evidence; and upon these ultimate questions expert witnesses may not properly express opinions, nor may such opinions relating to loss of bodily function become measure of compensable function possessed by an employee prior to his injury. *Spencer v. Industrial Comm'n*, 87 Utah 336, 40 P.2d 188, *aff'd*, 87 Utah 358, 48 P.2d 1120 (1935).

All transmitted evidence, such as declarations and statements by employee to another, have been held to be incompetent. Nor is commission compelled to accept circumstantial evidence and where evidence of accident is all hearsay, mere narratives of a past event, with

no element of spontaneity, it is inadmissible. *Boyd v. Industrial Comm'n.* 88 Utah 173, 48 P.2d 498 (1936), rehearing denied, 88 Utah 184, 53 P.2d 80 (1935).

When the matter is one within the knowledge of laymen, the Industrial Commission need not decide according to testimony given by experts. *Caillet v. Industrial Comm'n.* 90 Utah 8, 58 P.2d 760 (1936).

Industrial Commission is not bound to accept opinion of physician testifying as an expert unless such is the only reasonable conclusion to reach in the premises. *Ellis v. Industrial Comm'n.* 91 Utah 432, 64 P.2d 363 (1937).

Commission is not bound to follow opinion of expert as to whether claimant has suffered total permanent disability, but may make its own finding from consideration of all the evidence. *Johnson v. Industrial Comm'n.* 93 Utah 493, 73 P.2d 1308 (1937).

This section plainly changes the rules of evidence in cases within the act (§ 35-1-1 et seq.). It authorizes the commission to receive and consider any kind of evidence that may throw light on a pending claim. The statute, however, does not declare the probative force of any evidence, but declares the aim and end of the investigation shall be "ascertain the substantial rights of the parties and to carry out justly the spirit of the title." *Ogden Iron Works v. Industrial Comm'n.* 102 Utah 492, 132 P.2d 376 (1942).

In a proceeding to determine disability, the commission properly received into evidence the reports of a physician although they were hearsay. *Hackford v. Industrial Comm'n.* 11 Utah 2d 312, 358 P.2d 899 (1961).

Hearsay admissions are not prejudicial where the facts abstracted by the Industrial Commission did not compel a reversal on the ground that the commission was arbitrary and capricious in entering its order. *Williams v. Industrial Comm'n.* 17 Utah 2d 169, 406 P.2d 707 (1965).

Appearance.

By responding to notice sent out by commission and stipulating certain facts relating to employer, employer's counsel and process agent in effect entered general appearance although they stated they were appearing specially to object to commission's assumption of jurisdiction. *Buckingham Transp. Co. v. Industrial Comm'n.* 93 Utah 342, 72 P.2d 1077 (1937).

Burden of proof.

The burden of proof is on applicant to establish before the Industrial Commission that the injury resulted from the employee's employment, and this must be done by a preponderance of the evidence. *Grasteit v. Industrial Comm'n.* 76 Utah 487, 290 P. 764 (1930); *Wherritt v. Industrial Comm'n.* 100 Utah 68,

110 P.2d 374 (1941); *General Mills, Inc. v. Industrial Comm'n.* 101 Utah 214, 120 P.2d 279 (1941).

Where plaintiff filed written objections to the report of the medical panel and objected to the report at the hearing, the burden was on the commission or the employer to sustain it and, where this was not done, the report could not be considered as evidence. *Hackford v. Industrial Comm'n.* 11 Utah 312, 358 P.2d 899 (1961).

The burden of proof is on plaintiff to prove the extent of his disability; where plaintiff introduces evidence that he is unemployable and a medical panel rates his medical disability at 50%, it is within the discretion of the commission to find a 50% disability. *Shipley v. C & W Contracting Co.* 528 P.2d 153 (Utah 1974).

The burden of proof in workmen's compensation cases is proof by a preponderance of the evidence. *Lipman v. Industrial Comm'n.* 592 P.2d 616 (Utah 1979).

Conduct of proceedings before commission.

Proceedings before Industrial Commission are very informal and in some respects "sui generis." *Utah Fuel Co. v. Industrial Comm'n.* 59 Utah 46, 201 P. 1034 (1921).

Except for the application or petition of the applicant, pleadings are not necessary and generally are not filed. The hearings are informal in manner, time, and place. There is no attempt to observe the forms of rules which govern judicial trials, and the strict and formal rules of judicial procedure are as inapplicable to the form and manner of making objections and defenses as they are to the presentation and proof of claims for compensation. The main reason back of all of this was to enable lay members of society, if necessary, to prosecute proceedings under the Workmen's Compensation Act, with the assistance, if necessary, of the Industrial Commission. *Taslich v. Industrial Comm'n.* 71 Utah 33, 262 P. 281 (1927).

The same procedure is specified in all cases, irrespective of who or what the employer may be and whether compensation is assured by an insurance company, the state insurance fund, or the employer as a self-insurer. No difference can be made between the different kinds of employers and insurance carriers, but all must be treated alike. *Woldberg v. Industrial Comm'n.* 74 Utah 309, 279 P. 609 (1929).

A broad discretion is vested in Industrial Commission by this section with respect to manner in which its investigations shall be conducted, and unless it is shown that some substantial right of a party has been denied him, or that he has been deprived of an opportunity to fairly and fully develop his case, Supreme Court will not interfere to direct method

of conducting such hearings. *Spencer v. Industrial Comm'n*, 81 Utah 511, 20 P.2d 618 (1933).

Where there is a conflict in the testimony, and the weight and credibility to be given testimony of the various witnesses is the determining factor, in order to accord a "full hearing" to which all litigants are entitled, the person who conducts the hearing, hears the testimony, and sees the witnesses while testifying, whether a member of the board of an examiner or referee, must either participate in the decision or where, at the time the decision is rendered, he has severed his connections with the board, commission or fact-finding body, the record must show affirmatively that the one who finds the facts had access to the benefit of his findings, conclusions and impressions of such testimony by either written or oral reports thereof. This does not necessarily require all of the commissioners to be present at the hearing, or even that the one hearing the evidence must concur in the result, but his opinion on the testimony must be available to the commission in making its decision. *Crow v. Industrial Comm'n*, 104 Utah 333, 140 P.2d 321, 148 A.L.R. 316 (1943); *E.C. Olsen Co. v. State Tax Comm'n*, 109 Utah 563, 168 P.2d 324 (1946).

Constitutional rights of parties.

While the Industrial Commission is given power to adopt its own rules of procedure § 35-1-10), and is not bound by the usual common-law or statutory rules of evidence or by any technical or formal rules of procedure, rules promulgated by the commission must not deprive parties of constitutional rights to day in court and of having cause determined after impartial hearing. *Ocean Accident & Guarantee Corp. v. Industrial Comm'n*, 66 Utah 600, 45 P. 343 (1926).

Industrial Commission, in exercising its rights to proceed without certain formalities under this section, must not deprive any party of every fair means of eliciting facts to be rationally determined nor unnecessarily limit cross-examination of witnesses. *Ocean Accident & Guarantee Corp. v. Industrial Comm'n*, 66 Utah 600, 45 P. 343 (1926).

An award of compensation, supported by substantial competent evidence, will not be reversed on the ground that appellant was denied a fair and impartial hearing where it does not appear witnesses were in any way hindered or influenced by the hearing examiner, and it does not appear that said witnesses were not given opportunity to, or did not freely give their opinions respecting the matter about which they were interrogated. *Ocean Accident & Guarantee Corp. v. Industrial Comm'n*, 66 Utah 600, 45 P. 343 (1926).

Delegation of power to take testimony.
Industrial Commission has authority to dele-

gate to deputy, designated as referee, the power to take testimony in support of or against the application of anyone asking relief before commission; and the power to take testimony necessarily carries with it the authority to administer oaths. *Utah Copper Co. v. Industrial Comm'n*, 57 Utah 118, 193 P. 24, 13 A.L.R. 1367 (1920).

General construction.

Provisions of this section conferring upon Industrial Commission wide discretion in ascertaining substantial rights of parties should be construed in conjunction with § 35-1-78 in determining powers of commission under provision conferring upon it continuing jurisdiction in compensation cases. *Aetna Life Ins. Co. v. Industrial Comm'n*, 69 Utah 102, 252 P. 567 (1926).

The commission is not bound by the rules of evidence recognized by the common law. *Ogden Iron Works v. Industrial Comm'n*, 102 Utah 492, 132 P.2d 376 (1942).

Hearsay.

Hearsay rule has no application in a commission proceeding and the commission and its hearing officers may receive and consider any hearsay evidence presented to it. *Schmidt v. Industrial Comm'n*, 617 P.2d 693 (Utah 1980).

The hearsay rule does not apply in administrative hearings. *Bunnell v. Industrial Comm'n*, 740 P.2d 1331 (Utah 1987).

Judicial notice.

Rule that court may take judicial notice of proceedings and records in the cause before it, but cannot in one case take judicial notice of its own records in another and different case, applies to Industrial Commission. *Spencer v. Industrial Comm'n*, 81 Utah 511, 20 P.2d 618 (1933).

Neither Utah Industrial Commission nor Supreme Court of this state can take judicial notice of workmen's compensation laws of another state. If not offered in evidence, presumption is that they are the same as those of the forum. *United Air Lines Transp. Corp. v. Industrial Comm'n*, 107 Utah 52, 151 P.2d 591 (1944).

Jury trial.

Industrial Commission is not a court, court procedure is not applicable to proceedings before it, and it has no power to grant demand for jury trial to try issue of fact. *Palle v. Industrial Comm'n*, 81 Utah 372, 18 P.2d 299 (1933).

Raising and waiving objections.

Employer and insurer could not complain of introduction into evidence of report made a year earlier by their own doctor as to claimant's condition the day following the closing of the hearing, as they had knowledge of its contents and could not have been taken by sur-

prise. *Tintic Std. Mining Co. v. Industrial Comm'n*, 100 Utah 96, 110 P.2d 367 (1941).

Rehearing.

Notice of hearing on petition for rehearing is not required where, after rehearing is granted, applicant is given notice of second hearing and, hence, all his rights are fully protected. *Pinyon Queen Mining Co. v. Industrial Comm'n*, 59 Utah 402, 204 P. 323 (1922).

Stipulations.

In compensation cases stipulations as to jurisdictional facts are to be encouraged because they shorten the proceedings and take from applicants burden of proving matters about which ordinarily there should be no dispute. *General Mills, Inc. v. Industrial Comm'n*, 99 Utah 293, 105 P.2d 340 (1940).

Stipulation that employee received accident arising out of or in course of employment would be considered withdrawn or negated, where investigation showed that date of accident had been erroneously stated. *General Mills, Inc. v. Industrial Comm'n*, 99 Utah 293, 105 P.2d 340 (1940).

Question whether defendant employer has stipulated certain facts as true depends upon terms of stipulation. *Smith v. Industrial Comm'n*, 104 Utah 318, 140 P.2d 314 (1943).

Stipulation to take testimony.

Attorney for applicant was not required to make statement to Industrial Commission of what he proposed to prove by witness where he relied upon stipulation to take further testimony. *McVicar v. Industrial Comm'n*, 56 Utah 342, 191 P. 1089 (1920).

Taking testimony.

When an award of compensation has been annulled and the commission again considers the question of whether or not compensation should be allowed, the commission may, by reason of the provisions of this section, consider evidence received at the hearing or hearings had before the award was annulled. *Denver & R.G.W.R.R. v. Industrial Comm'n*, 74 Utah 316, 279 P. 612 (1929).

This section was not intended to authorize the commission in receiving and considering evidence to disregard the common-law or statutory rules of evidence and adopt those of Latin countries. *Diaz v. Industrial Comm'n*, 80 Utah 77, 13 P.2d 307 (1932).

Commission may not, without cause or reason, disregard or refuse to give effect to contradicted evidence, nor may commission, whether it makes findings of fact or not, arbitrarily or capriciously refuse to believe and to act upon credible evidence which is unquestioned and undisputed. *Spencer v. Industrial Comm'n*, 87 Utah 336, 40 P.2d 188, *aff'd* 87 Utah 358, 48 P.2d 1120 (1935).

The purpose of this section in relaxing the

rules of evidence ordinarily obtaining in the trial of cases was to throw as much light as possible upon the general situation in an industrial case. *Columbia Steel Co. v. Industrial Comm'n*, 92 Utah 72, 66 P.2d 124 (1937).

Commission should not receive evidence on disputed matters where a hearing is held after the hearing is closed. *Tintic Std. Mining Co. v. Industrial Comm'n*, 100 Utah 96, 110 P.2d 367 (1941).

Taking testimony—admissibility and competency of evidence.

Physician's testimony regarding statement made to him by claimant's wife concerning claimant's health prior to alleged injury was admissible before board despite its hearsay nature. *Pruce v. Fruehauf Corp.*, 27 Utah 2d 370, 496 P.2d 712 (1972).

Weight and sufficiency of evidence.

Industrial Commission is not authorized to make rules prescribing what evidence is necessary to warrant recovery in hernia cases since such involves substantive law which Legislature delegated no power to commission. *Livingston v. Industrial Comm'n*, 68 Utah 567, 251 P. 368 (1926).

The preponderance of evidence rule applies in proceedings to establish claims before the Industrial Commission. *Grasteit v. Industrial Comm'n*, 76 Utah 487, 290 P. 764 (1930).

Industrial Commission is not required to believe uncontradicted evidence unless there is nothing in the record which is intrinsically discrediting to such testimony. *Gerber v. Industrial Comm'n*, 91 Utah 479, 64 P.2d 1281 (1937).

Industrial Commission cannot compel certain sorts of evidence, but must take cases as they are presented with such evidence as nature of case permits, and from such evidence come to its conclusion, rather than from fact that certain type of evidence, presentation of which it makes a condition precedent, has not been forthcoming. *Milkovich v. Industrial Comm'n*, 91 Utah 498, 64 P.2d 1290 (1937).

There must be a residuum of evidence, legal and competent in a court of law, to support a claim before an award can be made; and a finding cannot be based wholly upon hearsay evidence. *Ogden Iron Works v. Industrial Comm'n*, 102 Utah 492, 132 P.2d 376 (1942).

This section means that the commission may act upon hearsay evidence where the circumstances are such that the evidence offered is deemed by the commission to be trustworthy. *Ogden Iron Works v. Industrial Comm'n*, 102 Utah 492, 132 P.2d 376 (1942).

Industrial Commission is entitled to disbelieve the testimony of an interested witness. *Godfrey v. Industrial Comm'n*, 105 Utah 324, 142 P.2d 174 (1943).

The commission is not bound to accept the

testimony of plaintiff as to the cause of his eye injury to the exclusion of all other testimony and record evidence. *Lorange v. Industrial Comm'n*, 107 Utah 261, 153 P.2d 272 (1944).

Although the commission may receive and consider any kind of evidence that may throw light on a pending claim, there must be a residuum of evidence, legal and competent in a court of law, to support an award, and a finding cannot be based wholly upon hearsay evidence. *Hackford v. Industrial Comm'n*, 11 Utah 2d 312, 358 P.2d 899 (1961).

The commission must look at all relevant evidence in reaching its findings without being

restricted to giving evidence from specific witnesses more weight than that from other witnesses. *Rushton v. Gelco Express & Employers Mut. Liab.*, 732 P.2d 109 (Utah 1986).

The administrative law judge was not required as a matter of law to accept the findings of plaintiff's treating physician and reject those of the medical panel. *Rushton v. Gelco Express & Employers Mut. Liab.*, 732 P.2d 109 (Utah 1986).

Cited in *Ring v. Industrial Comm'n*, 744 P.2d 602 (Utah Ct. App. 1987).

COLLATERAL REFERENCES

C.J.S. — 100 C.J.S. Workmen's Compensation § 525.

A.L.R. — Workmen's compensation: use of medical books or treatises as independent evidence, 17 A.L.R.3d 993.

Hearsay evidence in proceedings before state administrative agencies, 36 A.L.R.3d 12.

Key Numbers. — Workers' Compensation ⇨ 1165.

Tab 5

Appendix Number 5

**Findings of Fact, Conclusion of Law
and Order
dated January 24, 1992. (R. 77-83)**

THE INDUSTRIAL COMMISSION OF UTAH

Case No. 86001152

MICHAEL BLACKETT,

Applicant,

vs.

RALPH H. LARSEN & SONS, INC. and/or*
WORKERS COMPENSATION FUND
OF UTAH,

Defendants.

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FINDINGS OF FACT
CONCLUSIONS OF LAW
AND ORDER

* * * * *

The parties hereto stipulated that the case could be referred directly to the medical panel, since there were only medical issues involved. The medical panel report was received by the Commission and copies were forwarded to the parties. Thereafter, a report from the psychiatric member of the panel, Dr. Burgoyne, was also forwarded to the parties as a supplemental panel report. In response thereto, applicant, by and through counsel, made a Motion to Amend Application for Hearing to allege that the applicant was suffering from compensation neurosis, based on applicant's reading of the findings of Dr. Burgoyne. However, in reviewing the report of Dr. Burgoyne, and the rest of the medical evidence contained on this file, I find that the applicant has mischaracterized Dr. Burgoyne's report. The applicant feels that Dr. Burgoyne indicates that the applicant clearly suffers from a somatoform pain disorder and that this is a result of the industrial accident. However, careful scrutiny of Dr. Burgoyne's findings indicates that the applicant "could be suffering from a somatoform disorder." (Emphasis added). Dr. Burgoyne goes on to indicate that "There was a possibility that this diagnosis would be related to the May 1, 1990 injury." (Emphasis added). As so aptly noted by the Workers Compensation Fund of Utah, the foregoing language of Dr. Burgoyne does not satisfy the evidentiary requirements in these matters. In these cases, medical evidence must be stated in terms of reasonable medical probability. It is for this reason that the medical panel in its charge is always instructed by the Industrial Commission to couch its findings in terms of "reasonable medical probability". I find that the better view of Dr. Burgoyne's conclusions is that any somatoform pain disorder that the applicant might have would be related to his previous psychological makeup, since Dr. Burgoyne found that there was no organic pathology, and that the applicant's

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complaint of pain or impairment was in excess of what would be expected from his physical findings. However, that observation by Dr. Burgoyne is not clear proof of compensation neurosis as alleged by the applicant. Rather, other than the applicant's mischaracterization of Dr. Burgoyne's findings, there is no medical evidence whatsoever to support the applicant's contention that he suffers compensation neurosis as the result of the industrial accident. Accordingly, I find that the applicant's attempt to amend his Application to allege a compensation neurosis should be, and the same is hereby dismissed.

I find that the medical panel report is a very thorough and thoughtful analysis of the medical issues and opinions contained on this file. Having reviewed the medical evidence on the file, I find that the medical panel's analysis of that evidence is balanced and well reasoned, and accordingly, the medical panel report is admitted into evidence and the findings therein are adopted by the Administrative Law Judge as his own.

FINDINGS OF FACT:

The applicant herein, Michael Blackett, sustained a compensable industrial accident on May 1, 1990, while employed by Ralph H. Larsen & Sons. The applicant was working as a truck driver, and was in the Kanab, Utah, area when he had some problems with the radiator of his truck. He stayed overnight and the following morning was standing on the frame of the truck, when he touched the radiator, which was quite hot, with his hand. Of course, his hand instinctively retracted and his wrist struck a part of the truck. The applicant had this happen a second time, and, on that occasion, he stepped backward and fell onto the fine gravel surface striking his back, shoulder and head. The medical records contained on the file clearly indicate that the applicant was not knocked unconscious. The applicant did not make a big deal out of his fall, and on his way back to Salt Lake City, noted a swelling in his right arm. The applicant reported to the Holy Cross Emergency Room.

At the emergency room, the applicant was seen for a contusion of the right forearm resulting from his industrial accident. There was no mention whatsoever of any injury to any other part of the applicant's body including his head. Over the next two weeks, the applicant continued to have complaints in his right arm and was sent to physical therapy. The applicant was complaining of pain from the wrist up to the upper arm and shoulder and pain into the neck. The applicant denied any neurological loss and none was noted. The applicant received follow-up treatment, and was referred to a physiatrist, Dr. Griffin, for physical medicine

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treatment. An EMG performed on June 1, 1990, of the applicant's right upper extremity was normal.

Dr. Griffin saw the applicant on June 6, 1990, and at that time made a diagnosis of a possible C6 radiculopathy and possible reflex sympathetic dystrophy. A bone scan failed to confirm the diagnosis of reflex sympathetic dystrophy and a CT scan of the applicant's neck was normal. By the end of June, 1990, the applicant was found to have decreased sensitivity of the entire right upper extremity, and was thought to have myofascial type pain in the trapezius. The first mention of any complaints of headaches by the applicant was noted on July 11, 1990, when the applicant complained that the headaches were also associated with dizziness. The applicant had an episode at home whereby he fell down and had a loss of urine. Because of these headaches, the applicant was referred to a neurologist, Dr. David Smith.

Dr. Smith saw the applicant on July 16, 1990, and his history indicated that the applicant did not have a loss of consciousness as the result of the industrial injury of May 1, 1990. Dr. Smith also stated that the applicant did not have headaches until the end of July. Dr. Smith diagnosed a possible complex partial seizure disorder and recommended that the applicant receive an EEG and an MRI. The EEG was negative, while the MRI showed some focal white matter disease, which was felt to be of no clinical significance. Dr. Smith felt that the applicant had complex partial seizures and started the applicant on Dilantin. Dr. Smith recommended that the applicant receive a psychological assessment. Dr. Smith provided no treatment to the applicant beyond September 1990.

On October 3, 1990, the applicant returned to the Holy Cross Emergency Room complaining of falling asleep, dizziness, and inability to function. At that time, the applicant was on Prozac, and it was opined that he was lethargic, and dizzy and possibly had a psychological component. The applicant received various evaluations from numerous health care providers.

The applicant denied headaches before May 1, 1990. However, the applicant was seen on December 30, 1987, by Dr. Moress upon the referral of a chiropractor, Dr. Richard Wright. The applicant had fallen on December 24, 1987, while carrying a microwave oven. As a result, the applicant struck his left hip and shoulder and also began having severe neck pain, as well occipital temporal headaches. The applicant described those headaches as a 5-6/10 intensity. Dr. Moress concluded that the headaches were related to his cervical ligamentous strain problem compounded by some cervical arthritis. These headaches of 1987, lasted approximately 3-4 months.

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On November 2, 1985, the applicant sustained an industrial accident to his low back. He received back surgery from Dr. Zahniser at the St. Marks Hospital. The applicant had a difficult recovery, and was out of work for four years. The applicant was followed extensively by Dr. Stadler of the Western Rehabilitation Institute. Dr. Stadler on July 15, 1988, diagnosed the applicant's condition as a failed back syndrome associated with social problems. On August 4, 1988, Dr. Stadler found that the applicant had an inconsistent examination with symptom magnification. Dr. Lighty performed a psychological evaluation on the applicant and concluded that the applicant had a lack of confidence in ability to manage pain, significant affective distress with depression and anxiety, psychosocial stressors, minimizing somatizing coping style and deconditioning. The applicant was eventually given a 20% permanent partial impairment rating, with 10% being due to the industrial accident and 10% being due to pre-existing problems.

The medical panel found that there was no post concussion syndrome/organic brain syndrome due to the industrial accident of May 1, 1990. The panel noted that there was no evidence whatsoever that the applicant had any loss of consciousness. In addition, there was no mention in the original emergency room notes of any problem with the applicant's head, and further, the applicant himself admitted to several physicians that there was no loss of consciousness. Of particular importance, is the fact that the applicant had no headaches develop until, according to the applicant, a month after the incident, and according to the medical records, not until July of 1990. The medical panel concluded that the headache mechanism was related to the cervical muscle strain in tension, and that the applicant's blackouts are a syncopal-like episode, or that they are some type of dissociative psychological reaction. The medical panel concluded that the applicant did not have "Any primary cerebral electrical event such as a seizure." Rather, the panel concluded that the applicant has "An organic brain syndrome from his psychological evaluation. . . ." The panel concluded that there was no causal relationship between the "Non-existent head injury and the onset of an organic brain syndrome. An organic brain syndrome would be related to factors other than his 5-1-90 industrial incident." The panel also noted that careful scrutiny should be made of the applicant's pre-morbid problems, "Including the 1985 back injury and the very prolonged recovery with much psychological overlay in his recovery."

The medical panel found, in terms of reasonable medical probability, that the applicant's headaches were related to his cervical musculoligamentous strain and tension. The panel also found that there were episodic alterations of consciousness that were not related to seizures or any other identifiable organic source. The panel also found that the applicant was status post

MICHAEL BLACKETT
ORDER
PAGE FIVE

L5-S1 laminectomy, discectomy, and finally, that the applicant had an organic brain syndrome, the etiology of which was unclear, but the panel concluded that it possibly was neurodegenerative. The panel concluded that the foregoing diagnosis were not a result of the industrial accident of May 1, 1990. The panel found, in addition, that the applicant's condition stabilized from the industrial accident one month following the accident or June 1, 1990.

As indicated previously, the Administrative Law Judge adopts the findings of the medical panel as his own.

The defendants in this matter have paid the applicant temporary total disability at the rate of \$222.00 per week for the period May 2, 1990 through October 19, 1990, for a total of \$7,216.90. Pursuant to the medical panel findings, the applicant is entitled to one month of temporary total disability or 4.33 weeks at the rate of \$222.00 per week for a total award of \$961.26. Since the applicant has been paid \$7,216.90, the Workers Compensation Fund of Utah has overpaid the applicant \$6,255.64.

The medical panel also found that there was no permanent impairment due to the industrial accident of May 1, 1990. Accordingly, since there is no permanent impairment due to the industrial accident, by necessity, the applicant's claim for permanent total disability must also fall. Finally, there was a dispute concerning the amount of medical care received by the applicant. The medical panel found that medical treatment related to the industrial accident should end on September 11, 1990, when the applicant was last seen by Dr. Smith. Accordingly, the applicant is entitled to all medical expenses incurred for the period May 1, 1990 through September 11, 1990. Any expenses incurred after September 11, 1990, are the responsibility of the applicant.

ORDER:

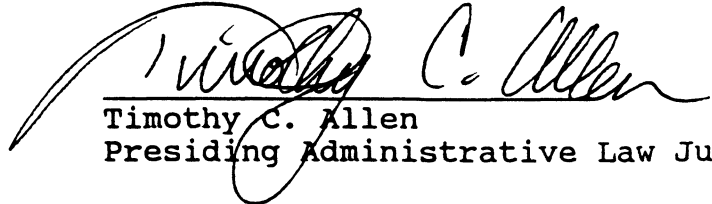
IT IS THEREFORE ORDERED that the claim of Michael Blackett alleging permanent total disability, permanent partial impairment, and additional temporary total disability as the result of his industrial accident of May 1, 1990, while employed by Ralph H. Larsen & Sons, Inc., should be, and the same is hereby dismissed with prejudice.

IT IS FURTHER ORDERED that Ralph H. Larsen & Sons, Inc., and/or Workers Compensation Fund of Utah, shall pay all medical expenses incurred by the applicant on or before September 11, 1990, as the result of the industrial accident of May 1, 1990. Said

MICHAEL BLACKETT
ORDER
PAGE SIX

expenses to be paid in accordance with the Medical and Surgical Fee Schedule of the Industrial Commission of Utah.


IT IS FURTHER ORDERED that any Motion for Review of the foregoing shall be filed in writing within thirty (30) days of the date hereof, specifying in detail the particular errors and objections, and, unless so filed, this Order shall be final and not subject to review or appeal.

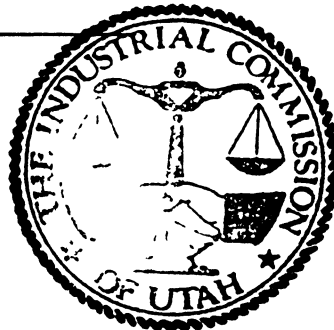

Timothy C. Allen
Presiding Administrative Law Judge

Certified by the Industrial Commission
of Utah, Salt Lake City, Utah, this

24th day of January, 1992.

ATTEST:


Patricia O. Ashby
Commission Secretary



CERTIFICATE OF MAILING

I certify that on January 24, 1992, a copy of the attached Findings of Fact, Conclusions of Law and Order, in the case of Michael Blackett, was mailed to the following persons at the following addresses, postage paid:

Michael Blackett, 2837 Breeze Drive, Magna, UT 84044

Robert Breeze, Atty., 211 East 300 South, #215, SLC, UT 84111

Deborah Larsen, Atty., Workers Compensation Fund of Utah

INDUSTRIAL COMMISSION OF UTAH

By Wilma Burrows
Wilma Burrows
for Adjudication Division

Tab 6

Appendix Number 6

**Medical Panel Report of August 21,
1991 with Concurrence of Dr.
Burgoyne dated September 16, 1991.
(R. 55-69)**

Gerald R. Moress M.D., P.C.

NEUROLOGY

370 E. South Temple, Suite 300
Salt Lake City, Utah 84111
Telephone (801) 363-7386

August 21, 1991

Judge Timothy Allen
State of Utah
Adjudication Division
P. O. Box 510250
Salt Lake City, Utah 84141-0250

Re: Michael Blackett
Inj: 5-1-90
Emp: Ralph H. Larsen & Sons, Inc.

Dear Judge Allen:

A panel composed of Gerald R. Moress, M.D. neurologist, chairman and Robert Burgoyne, M.D. psychiatrist, panel chairman, considered the medical matters of Mr. Blackett. His medical records were available for review.

HISTORY OF INDUSTRIAL INJURY:

5-1-90 Mr. Blackett was working for Ralph H. Larsen & Sons as a truck driver. He was in Kanab and had had some problems with the radiator of his truck. He had stayed overnight and the next morning he was standing on the frame of the truck and touched the radiator with his hand which was quite hot. His hand reflexively retracted and his wrist struck something. This happened a second time and on the second occasion he stepped backward and fell onto the fine gravel surface, striking his back, shoulder, and his head. He does not feel that he was knocked unconscious, and if that did occur it would be no longer than a brief second. He said that he did not make a big deal out of his fall. On his way back to Salt Lake he noted a swelling of his right arm and went to the Holy

Cross Emergency Room.

The date of service at Holy Cross Emergency Room was 5-1-90 where he was seen for contusion of the right forearm that had occurred with the truck incident. There was no mention of any injury to any other part of his body including the head. The doctor did not ask him any question about the loss of consciousness or head injury. The diagnosis was contusion of the right forearm. Over the ensuing two weeks he continued to have complaints in the right arm and was sent to physical therapy. The complaints were from the wrist up to the upper arm and shoulder and now pain into the neck. He denied any neurological loss. On 5-15-90 the follow up Emergency Room visit still found right arm pain with a possible radicular component. He was referred to physiatrist Ben Griffin. I asked Mr. Blackett if he specifically had any headaches initially and he said he did not have any. He said the headaches began about a month after the injury when he was in therapy and they thought at first it was due to tight muscles or something in his jaw.

An EMG performed 6-1-90 of the right upper extremity was normal.

Dr. Griffin saw him on 6-6-90 with a diagnosis of possible C6 radiculopathy and possible reflex sympathetic dystrophy (RSD). A bone scan did not confirm the diagnosis of RSD and the CT scan of the neck was normal. By the end of June he was found to have decreased sensitivity of the entire right upper extremity, and he was thought to have myofascial type pain in the trapezius and temporalis muscle with trigger points. It was not until the 7-11-90 visit that specific headaches were mentioned associated with dizziness. He had an episode at home when he fell down with loss of urine. Because of the

headaches and the passing out spell he was referred to neurologist David Smith.

Dr. Smith's evaluation was 7-16-90. His history included the statement that Mr. Blackett did not have a loss of consciousness with his 5-1-90 industrial incident. He also mentioned that it was not until the end of July that he developed the headaches. In addition, the episode of passing out that had recently occurred was mentioned. Dr. Smith diagnosed a possible complex partial seizure disorder and recommend an EEG and MRI. The EEG showed no epileptiform activity and the MRI showed some focal white matter disease that was felt not to be of any clinical significance. Dr. Smith felt because of a left temporal rare sharp wave that the patient had complex partial seizures and was started on an anticonvulsant. He continued to fall despite being on Dilantin and in August Dr. Smith now diagnosed a post concussive syndrome with possible seizures and mentioned that psychological evaluation might help. Dr. Smith gave a series of trigger point injections which Mr. Blackett said made him worse. Some family problems were mentioned by Dr. Smith and again re-emphasized the need for psychological assessment. He was not seen by Dr. Smith beyond September 1990.

Mr. Blackett returned to the Holy Cross Emergency Room on 10-3-90 because of falling asleep, dizzy, cannot function. He was on Prozac and it was felt that he was lethargic and dizzy and possibly had a psychological component.

On four separate visits in September through November of 1990 Mr. Blackett was evaluated by psychologist Dr. Gregory Mayer at the request of the Fund. It was Dr. Mayer's assessment that Mr. Blackett had cognitive deficits not consistent with his past educational and occupational histories. He had

problems in attention/concentration. Psychomotor slowing was noted. A factitious disorder was considered but felt to be unlikely. Anxiety and depression were mentioned as a possible source for some of his complaints. He was felt to have neural behavioral problems consistent with an organic brain dysfunction. He was found to have a full scale IQ of 92, verbal of 89 and a performance of 99.

Neurologist Nat Nord saw Mr. Blackett on 10-17-90 for the Fund. He was complaining of occipital and cervical pains, right trapezius pain, headaches, ear pressure, light-headedness and vertigo, as well as black outs which had occurred on several occasions with one lasting 30-40 minutes. Dr. Nord repeated an electroencephalogram that showed no epileptiform activity. Dr. Nord did not feel that the patient had a seizure disorder. He felt that there was a tenuous causal relationship between his headaches and his industrial incident. He felt that many of the complaints were functional in nature and that he was stable. He gave him a 30 day TTD as a result of his industrial accident. Dr. Nord did not feel that there was a closed head injury, post traumatic encephalopathy, nor was there any evidence of vestibular abnormality on testing done at Holy Cross to detect such a problem.

Psychiatrist Dave McCann performed an evaluation for the Fund on 4-30-91 and based on the interview and information available to him, he diagnosed an organic mental disorder based on the findings of Dr. Mayer and whether the dysfunction was caused by a closed head injury was in question. He felt the psychological diagnosis was related to the industrial injury of May 1990. He did not feel he had a post-traumatic stress disorder. He felt he was temporally and totally disabled. He did not want to give him an impairment rating

at that time.

Mr. Blackett was seen for rehabilitation group Heal and Company by Dr. Matsuo, a neurologist at the University Medical Center 12-26-90. Dr. Matsuo mentioned a possible post-traumatic stress disorder. He did not feel he had a seizure disorder. He mentioned pre-existing symptoms of motion sickness and labyrinthitis in 1982, erratic sleep habits were mentioned since 1959. In another note dictated 2 weeks later to Heal and Company Dr. Matsuo mentioned that he could not identify evidence of permanent central nervous system damage resulting from his 5-1-90 accident. He felt the episodes of loss of consciousness were some type of syncopal episode and not epileptic.

At the request of his family physician, Taylor Jeppsen, he was seen for another neurological consultation on his own 6-11-91 by neurologist, Tom Houts. Dr. Houts felt that the patient had physiologic headaches, most probably tension but possibly occasional migraine. The syncopal episodes he felt were related to his headaches or stress. He found no evidence of any neurological illness or organic brain syndrome. He did not feel he had evidence of brain injury from his head trauma and placed him on Calan. He also had the history that there had been no loss of consciousness at the time of the accident 5-1-90. An EEG was normal.

Physiatric consultation was obtained from Dr. Mark McGlothlin for Heal and Company 10-11-90. The doctor's impressions were closed head injury secondary to a 5-1-90 fall plus probable seizure disorder, problems of cognition, emotional, behavioral problems, as well as cervical musculoligamentous strain, right upper extremity injury, details unknown.

PRIOR HEADACHE COMPLAINTS

The patient said he had never had headaches before this accident. I then mentioned to Mr. Blackett that I had seen him 12-30-87 for chiropractor Richard Wright for severe post-traumatic cervical muscle spasm and headaches. He had fallen on 12-24-87 while carrying a microwave oven. He struck his left hip and shoulder and then began having severe neck pain as well as occipital temporal headaches. His headaches were described as a 5-6/10 intensity. It is my feeling that the headaches were related to his cervical ligamentous strain problem compounded by some cervical arthritis. CT scan of the cervical spine was normal. Mr. Blackett told me that he had forgotten all about those severe headaches. He said they lasted about 3-4 months.

CURRENT COMPLAINTS:

He has headaches that begin at the base of the head which began one month after the accident. They radiate into the occipital region and behind his eyes. They are anywhere between a 7-9/10 and have been continuous since May of 1990. They are associated with dry heaves. His scalp feels prickly.

BLACK-OUTS

He last had a black-out July 1, 1991 when he was found by his son sitting in front of the television with his eyes open and staring. He is not sure how long the episode lasted. When it was over he felt as though he had been asleep. He has no warning before he goes into these episodes. They may occur sitting or standing, they have never occurred in the recumbent position. He describes these black-outs having occurred in July of 1990 and then January of 1991 and the last episode described. He also has feelings of intermittent vertigo and dizziness. These are not always clearly related to changes

in posture.

DEPRESSION

He admits to some degree of depression manifested by lack of caring and decreased motivation. His libido is good and his appetite is also good.

PAST INDUSTRIAL INJURIES

In 1985 he hurt his low back at work which resulted in extruded disc at L5-S1. Surgery was performed 11-13-85 by neurosurgeon Jack Zahniser at St. Marks Hospital. He did not do well following that surgery and in fact was out of work for four years. He was followed extensively by Dr. Stadler at the Western Rehabilitation Institute. On 7-15-88 Dr. Stadler mentioned a failed back syndrome associated with social problems which were affecting his back pain. On 8-4-88 Dr. Stadler mentioned an inconsistent examination with symptom magnification. Evaluation by psychologist, Larry Lighty was performed for Dr. Stadler and mentioned lack of confidence in ability to manage pain, significant affective distress with depression and anxiety, psychosocial stressors, minimizing somatizing coping style, and deconditioning. Problems with depression were previously mentioned between 1978 and 1990. The last note from Dr. Stadler to the insurance carrier was dated 8-4-89 at which time he gave him a 10% impairment rating for his low back problem. Mr. Blackett was eventually given that rating from the industrial commission.

EDUCATION:

Mr. Blackett has worked in electronics previously. He did recently attempt to take an entry examination to get back into electronics and failed the examination. Things which he said had been easy for him previously in terms of working in that

field have now become difficult for him.

He has had two years of junior college in general education.

MEDICATIONS:

Calan which he says has helped his headaches.

HABITS:

Alcohol minimal, tobacco none.

MILITARY HISTORY:

Four years with an honorable discharge

EXAMINATION:

An affable middle aged man who sat comfortably during the interview. When I brought out my old consultation on him he then remembered that he had seen me previously. 200 pounds, 5'10", right handed.

VITAL SIGNS:

Blood pressure 140/90 sitting, recumbent, and standing.

LUNGS:

Clear

HEART:

No murmurs

ABDOMEN:

There was a well healed midline epigastric scar

CRANIAL NERVES:

II through XII revealed no abnormalities.

SHOULDERS:

Full range of motion

MOTOR:

Reflexes 2+ and equal, no pathological reflexes, no evidence of weakness.

SENSATION:

Intact to pin prick throughout.

CEREBELLAR:

Finger to nose, rapid movements, heel to shin, tandem gait performed well.

SPINE:

Axial loading caused pain referred to the cervical region.

CERVICAL:

Full range of motion, diffusely tender over the cervical spines, right paracervical musculature. The muscles were supple.

DORSAL:

Full rotation, nontender

LUMBOSACRAL:

1+ tender over 3 cm. lumbosacral scar. The muscles were supple and he had full range of motion.

STRAIGHT LEG RAISING:

Negative to 70 degrees bilaterally

ASSESSMENT:

Mr. Blackett had a history of an industrial accident in 1985

and had a very poor response to surgery to remove an L5-S1 disc. He was out of work for four years. Review of the records from the Western Rehabilitation Institute revealed that he had poor coping skills associated with depression, anxiety, and somatic preoccupation. There were no mention of headaches until my note in 1987 when he presented with severe headaches in relationship to a recent industrial fall. Mr. Blackett had originally told me that he had had no prior headaches before his fall in Kanab until I brought out the old records. He said he had totally forgotten about that episode.

I find it incredulous that one would believe that Mr. Blackett has a post concussion syndrome/organic brain syndrome secondary to his May 1990 industrial incident. There is no evidence that he had any loss of consciousness whatsoever. There was no mention in the original emergency room notes of any problem with the head, and even Mr. Blackett admitted to several physicians that there was no loss of consciousness. In fact, he had no headaches develop, according to him, until a month after the incident and according to the medical records not until July. The headache mechanism appears to be related to cervical muscle strain and tension in agreement to many observers who have seen him. His black-outs appear to be a syncopal-like episode or they are some type of dissociative psychological reaction. The bottom line is that they do not represent any primary cerebral electrical event such as a seizure. This would be in agreement with the IME of Dr. Nord and opinion of Dr. Matsuo.

Since there appears to be documentation on the record of an organic brain syndrome from his psychological evaluation, I would accept that. What I would not accept would be an attempt to find a causal relationship between non-existent

head injury and the onset of an organic brain syndrome. An organic brain syndrome would be related to factors other than his 5-1-90 industrial incident. These factors have not been identified.

Rather than looking at the 5-1-90 accident as an isolated event, I feel it has to be looked at in terms of his premorbid problems including the 1985 back injury and the very prolonged recovery with much psychological overlay in his recovery.

In terms of reasonable medical probability, I find that his medical diagnoses are:

1. Headaches chronic and recurring relating to cervical musculoligamentous strain and tension.
2. Episodic alterations of consciousness not related to seizures or any other identifiable organic source.
3. Status post L5-S1 laminectomy discectomy.
4. Organic brain syndrome, etiology unclear, possibly neurodegenerative.

The above diagnoses are not a result of the industrial accident of 5-1-90.

5. His condition has stabilized. I would allow him one month to have recovered from the industrial accident of 5-1-90. The only injury that I could identify from that accident was that of his right upper extremity direct trauma.
6. There was no permanent partial impairment due to the industrial accident of 5-1-90.

7. Since his problem became so complex following what appeared to be a relatively minor injury, I would allow the medical treatment that was subsequently provided to be related to the 5-1-90 injury. I don't feel that the insurance carrier should have been liable for any additional treatment beyond 9-11-90 when last seen by Dr. Smith, however.

Sincerely,

A handwritten signature in black ink, appearing to read 'G. Moress', with a long horizontal flourish extending to the right.

Gerald R. Moress, M.D. P.C.

GRM:dsm

Tx: 8/22/91

CERTIFICATE OF MAILING

I certify that on July 15, 1991, a copy of the attached Medical Panel letter in the case of Michael Blackett was mailed to the following persons at the following addresses, postage paid:

Robert Burgoyne, M.D.

Michael Blackett
2837 Breeze Dr.
Magna, Utah 84044

Robert Breeze, Esq.
211 East 300 So., # 215
SLC, Utah 84111

Deborah Larsen, Esq.
WCFU

INDUSTRIAL COMMISSION OF UTAH

BY 
Wilma Burrows



Norman H. Bangerter
Governor

Timothy C. Allen
Presiding Administrative Law Judge

State of Utah
INDUSTRIAL COMMISSION OF UTAH
ADJUDICATION DIVISION

160 East 300 South
P O Box 510250
Salt Lake City, Utah 84151-0250
(801) 530-6800
(801) 530-6804 (Fax)

September 16, 1991

Stephen M. Hadley
Chairman
Thomas R. Carlson
Commissioner
Dixie L. Minson
Commissioner

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Michael Blackett
2837 Breeze Dr.
Magna, Utah 84044

Re: Michael Blackett
Inj: 5-1-90
Emp: Ralph H. Larsen &
Sons

Dear Mr. Blackett:

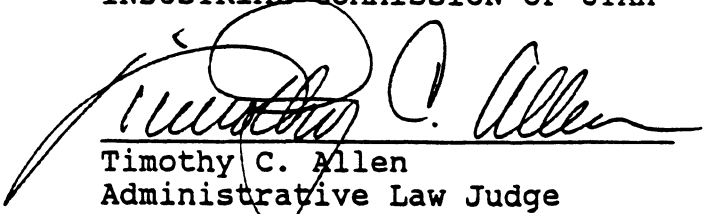
We are enclosing a copy of the signed report of the Medical Panel in connection with your claim.

You are allowed fifteen (15) days from the date of this letter within which to file objections, if you are not satisfied with the findings of the panel. Please specify in detail the basis of your objections to each finding and conclusion. Further, state in detail the medical evidence or facts you rely on as a basis of your objection. Copies of objections must be mailed to all parties concerned.

Parties who desire to submit the matter on written objections without a hearing may so indicate in a letter accompanying the objections. A hearing will not be set on the objections unless there is a proffer of conflicting medical testimony. If a hearing is scheduled, the Medical Panel Chairman will be requested by the Commission to appear and testify and all parties will be notified of the time and place of the hearing.

When no objections to a Medical Panel Report are received, the Administrative Law Judge will decide the case on the record as currently constituted.

BY DIRECTION;
INDUSTRIAL COMMISSION OF UTAH


Timothy C. Allen
Administrative Law Judge

TCA:wb

cc:Robert Breeze, Atty., 211 East 300 So., SLC, UT 84111
Deborah Larsen, Atty., WCFU

066



LDS HOSPITAL
ALTA VIEW HOSPITAL
COTTONWOOD HOSPITAL

GARY WM FARNES, CHIEF EXECUTIVE OFFICER

168

LDS Hospital
Richard M. Caghen
Administrator/Chief Operating Officer
Eighth Avenue and C Street
Salt Lake City, Utah 84143
(801) 324-1100

September 16, 1991

Honorable Timothy Allen
State of Utah
Adjudication Division
P.O. Box 510250
Salt Lake City, Utah 84141-0250

Re: Michael Blackett
Inj: 5/1/90
Emp: Ralph H. Larsen & Sons, Inc.

570-54-7197

Dear Judge Allen:

I have conferred with Gerald R. Moress, M.D., neurologist, and read his report concerning the above patient. I agree entirely with Dr. Moress's conclusions. My opinion is that there was no permanent partial impairment due to the industrial accident of May 1, 1990, as I indicated in the psychiatric evaluation, which Dr. Moress is enclosing with his report. The patient could be suffering from a somatoform pain disorder. This would indicate that an appropriate evaluation has uncovered no organic pathology or pathophysiologic mechanism and the complaint of pain or impairment is in excess of what would be expected from the physical findings. I indicated that there was a possibility that this diagnosis would be related to the May 1, 1990 injury. If so, the injury would not be a direct cause, but provide an avenue to develop the pain. The insurance courier should not be liable for this, because in my opinion this would be a result of the person's psychological make-up.

If you need more information from me, please let me know.

Yours respectfully,

Robert H. Burgoyne, M.D.
Psychiatrist

/mb

069

Tab 7

Appendix Number 7

Industrial Commission Rule R568-1-9 Guidelines for Utilization of Medical Panel

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 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 a 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.

Tab 8

Appendix Number 8

**Motion for Review
February 26, 1992
(R. 84-85)**

ROBERT BREEZE #4278
Attorney for Claimant
211 East Broadway #215
Salt Lake City, Utah 84111
Telephone: 322-2138

BEFORE THE INDUSTRIAL COMMISSION OF UTAH

MICHAEL BLACKETT,)	MOTION FOR REVIEW
)	
Applicant,)	
)	
vs.)	
)	
RALPH H. LARSEN & SONS, INC.)	Case No. 86001152
and/or WORKERS COMPENSATION)	
FUND OF UTAH,)	
)	
Defendants.)	Honorable Timothy C. Allen
)	

COMES NOW the Applicant herein who moves the Commission for an Order reversing the decision of the Administrative Law Judge on the foillowing grounds:

1. The Administrative Law Judge failed to refer the matter of Compensation Neurosis back to the Medical Panel for a full analysis of whether the somatoform pain disorder was in fact caused by the industrial injury.

WHEREFORE, Claimant prays for the following relief:

1. For an Order remanding the matter back to the Administrative Law Judge with instructions to refer this case back to the Medical Panel for a full evaluation of the somatoform pain disorder and the issue of causation related to Temporary Total and

Permanent Partial Disability.

DATED this 26 day of February, 1992.



ROBERT BREEZE
Attorney for Claimant

CERTIFICATE OF MAILING

I certify I mailed a copy of the foregoing to:

Deborah Larsen
Workers Compensation Fund of Utah
560 South 300 East
Salt Lake City, Utah 84111

on this 26 day of February, 1992.