

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 Petitioner

Utah Court of Appeals

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Recommended Citation

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IN THE UTAH COURT OF APPEALS

DOCKET NO. 92-0279-CA

MICHAEL BLACKETT,

Petitioner,

vs.

BOARD OF REVIEW OF THE
INDUSTRIAL COMMISSION OF UTAH,
RALPH H. LARSEN & SONS, INC.
and WORKERS COMPENSATION
FUND OF UTAH,

Respondents.

Case No. 920279 CA

Argument Priority
Classification Number 7BRIEF OF PETITIONERPETITION FOR REVIEW OF INDUSTRIAL COMMISSION
ORDER SUSTAINING ADMINISTRATIVE LAW JUDGE'S
REFUSAL TO REFER MEDICAL ASPECT OF CASE TO
MEDICAL PANEL FOR MORE DETAILED ANALYSISDEBORAH M. LARSEN
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AUG 10 1992

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vs.)	
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BRIEF OF PETITIONER

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ORDER SUSTAINING ADMINISTRATIVE LAW JUDGE'S
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MEDICAL PANEL FOR MORE DETAILED ANALYSIS

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JURISDICTION AND NATURE OF PROCEEDINGS

This Court has jurisdiction pursuant to Section 78-2a-3(2)(a).
This is a Petition for Review of a Final Order of a State Agency.

STATEMENT OF ISSUES

Point I

The Applicant met his original burden of proof when the matter was referred to a Medical Panel by stipulation.

Point II

The Administrative Law Judge erred when he 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.

STANDARD OF REVIEW

The Standard of Review for review of administrative agencies is found in Utah Code Annotated, Section 63-46b-16(4). The Statute provides in relevant part that "The Appellate Court should grant relief only if, upon the basis of the agency's record, it

determines that a person seeking judicial review has been substantially prejudiced by any of the following: . . .

(c) The agency has not decided all of the issues requiring resolution;

(d) The agency has erroneously interpreted or applied the law;

(e) The agency has engaged in an unlawful procedure or decision-making process, or has failed to follow prescribed procedure; . . .

Additionally, "[A]bsent a grant of discretion, a correction-of-error standard is used in reviewing an agency interpretation of a statutory term." Cross v. Board of Review, 179 U.A.R. 18, 19 (Ut. App. 1992).

When an Administrative Law Judge fails to make adequate Findings of Fact, said conduct renders the findings arbitrary unless the record is so clear that only one conclusion is possible. Nyreh v. Industrial Commission, 800 P.2d 330, (Ut. App. 1990).

STATEMENT OF THE CASE

Petitioner sustained an industrial injury on or about May 1, 1990. The Petitioner file an application for Workers Compensation Benefits which application was resisted by the employer and its insurer. The Administrative Law Judge referred the medical aspects of the case to a Medical Panel. The Medical Panel, comprised of two members, rendered inconsistent opinions regarding the extent of Defendant's injuries. The Applicant requested that the matter be

referred back to the Medical Panel for a more detailed statement. The Administrative Law Judge failed to hold a Hearing regarding the objections to the Medical Panel Report or to refer the matter back to the Medical Panel for a detailed determination. The decision of the Administrative Law Judge was affirmed by the Board of Review of the Industrial Commission. This Appeal ensued.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Petitioner submits that the following Statutory Provisions are determinative of the issues raised on appeal;

1. Section 35-1-77 Utah Code Annotated, 1953 as amended, (See Appendix 1 for full text).

2. Rule 568-1-9, Utah Administrative Code, copy attached hereto as Exhibit No. 2.

STATEMENT OF MATERIAL FACTS

a. Petitioner sustained an industrial injury on 5-1-90. (R. 40).

b. Petitioner began suffering "brain" problems. (R. 45).

c. The Defendants denied responsibility for the "brain" problems. (See Answer).

d. In view of the conflicting medical evidence the Defendants suggested the matter be referred to a Medical Panel. (R. 44-45).

e. The parties then stipulated to the appointment of a Medical Panel. (R. 77).

f. The Medical Panel concluded that the "brain" problem was not caused by the industrial injury. (R. 60-68).

g. The psychiatric member of the Panel submitted a Supplemental Report indicating that "The patient could be suffering from a somatoform pain disorder". The Supplemental Report also stated "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". (R. 69 and Exhibit 3 attached hereto).

h. The Applicant filed an Objection to the Medical Panel Report requesting that the matter be referred back to the Medical Panel for a determination as regards the duration and extent of psychological problems evidenced by Dr. Burgoyne's letter dated September 16, 1991. (R. 71).

i. The Administrative Law Judge refused to refer the matter back to the Medical Panel and failed to hold an Evidentiary Hearing regarding the findings of the Medical Panel.

SUMMARY OF ARGUMENT

The applicant asserts that he met his burden of proof as a matter of law when the parties stipulated to the appointment of a medical panel based upon conflicting medical reports.

The applicant further asserts that the ALJ erred when he refused to refer to brain issue back to the medical panel for a more detailed analysis.

ARGUMENT

ARGUMENT POINT I

PETITIONER MET HIS ORIGINAL BURDEN OF PROOF WHEN THE PARTIES STIPULATED TO THE MEDICAL PANEL REVIEW

The purpose of a Medical Panel under Rule 568-1-9(A)(1) is to

resolve conflicting medical reports.

The purpose of a Medical Panel is not to enable an Applicant for Workers Compensation Benefits to obtain the minimal medical proof required to put the case at issue. A Medical Panel is only appointed once a conflict of medical reports exists.

Both the Administrative Law Judge and the Industrial Commission stated that the Applicant's claim for Temporary Total and Permanent Total Disability Benefits should be denied because Applicant had not met his burden of proof with the Supplemental Report submitted by the Medical Panel. The Industrial Commission and the Administrative Law Judge confused the role of a Medical Panel when making said rulings.

The purpose of a Medical Panel is to assist the Industrial Commission in determining the medical aspects of a case. Specifically, Section 35-1-77 Utah Code Annotated provides at Subsection (b) that "The commission may base its findings and decision on the Report of the Medical Panel, Medical Director or Medical Consultants, but is not bound by the report if other substantial conflicting evidence supports a contrary finding."

POINT II

THE ALJ SHOULD HAVE REFERRED THE MATTER BACK TO THE MEDICAL PANEL OR, IN THE ALTERNATIVE, HELD A HEARING

Section 35-1-77(e) Utah Code Annotated (1953 as amended) provides that if objections to the Medical Panel 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. . . .".

When the Administrative Law Judge and the Commission are provided with conflicting opinions in the context of a Medical Panel Report, the purposes of the Workers Compensation Act and the specific provision providing for the appointment of a Medical Panel are not well served.

The basis for the appointment of a Medical Panel, basically at tax payers expense through the Employers Reinsurance Fund, is to provide the Administrative Law Judge and/or Industrial Commission with the medical expertise necessary to carry into effect the purpose of the Workers Compensation Act.

In this case the Medical Panel provided inconsistent reports. Specifically, Dr. Moress' report was quite emphatic that the Applicant was not suffering from any brain trauma/syndrome attributable to the industrial injury. However, Dr. Burgoyne stated facts indicating a possibility of a mental component to the development of pain. These two reports are not entirely reconcilable. It is a waste of Employers Reinsurance Fund money to pay for a Medical Panel Report which leaves significant questions unanswered. The purpose of the Medical Panel Report is to resolve conflicting medical evidence. The only way to effectively resolve conflicting medical issues is for a definitive report to be issued.

It is interesting to note that the Administrative Law Judge and the Industrial Commission responded to Applicant's request for a referral back to the Medical Panel with an abrupt refusal.

Furthermore, the Administrative Law Judge/Industrial Commission did not set a Hearing for the purpose of allowing Applicant to cross examine the members of the Medical Panel regarding the conflicting and irreconcilable reports.

Referral back to the Medical Panel for an authoritative determination regarding the conflicting issues is a less cumbersome and less expensive method for resolution than scheduling an Evidentiary Hearing with the Medical Professionals. However, the Administrative Law Judge/Industrial Commission chose to totally ignore the objection merits of the application of the Applicant's objection. Applicant asserts the failure of the Administrative Law Judge/Industrial Commission to resubmit the issue to the Medical Panel or to set an Evidentiary Hearing was arbitrary because the Findings of Fact relied upon by the Administrative Law Judge/Industrial Commission are inadequate. Adequate Findings of Fact should have included a resolution of the issue raised by the conflict between Dr. Moress and Dr. Burgoyne. In Nyreh v. Industrial Commission, 800 P.2d 330 (Ut. App. 1990, Cert denied 815 P.2d 241) this Court accepted the proposition that failure to make adequate Findings of Fact renders the Findings arbitrary unless the record is so clear that only one conclusion is possible. Obviously, based on Dr. Burgoyne's supplemental report, more than one conclusion is possible.

CONCLUSION

The Applicant clearly met his original burden of proof by submitting evidence sufficient for the appointment of a Medical Panel. For the Administrative Law Judge/Industrial Commission to suggest that the Applicant has some burden of proof with regard to the activities of a Medical Panel is patently absurd.

The Applicant objected to the adoption of an irreconcilably inconsistent two part Medical Panel Report. The Applicant attempted to allow an expeditious resubmission of the key issue to the Medical Panel. The Administrative Law Judge/Industrial Commission not only failed to resubmit the issues to the Medical Panel Report, the Administrative Law Judge/Industrial Commission failed to set an Evidentiary Hearing as permitted by Section 35-1-77.

WHEREFORE, Applicant prays for the following relief.

1. For an Order remanding this matter to the Industrial Commission with instructions for a full analysis of the somatoform pain disorder issue and whether said somatoform pain disorder is attributable to the industrial injury of 5-1-90.

DATED this 8 day of August, 1992.



ROBERT BREEZE
Attorney for Petitioner

CERTIFICATE OF SERVICE

I certify I mailed ⁴ ~~x~~ copy of the foregoing to:

Industrial Commission of Utah
Box 510250
Salt Lake City, Utah 84151-0250

DEBORAH M. LARSEN
Attorney at Law
Workers Compensation Fund of Utah
560 South 300 East
Salt Lake City, Utah 84111

on this 10th day of August, 1992.

Michael Halman

has not been fixed or cannot be ascertained, the wage for the purpose of calculating compensation shall be the usual wage for similar services where those services are rendered by paid employees.

(g) (i) If at the time of the injury the wages are fixed by the output of the employee, the average weekly wage shall be the wage most favorable to the employee computed by dividing by thirteen the wages, not including overtime or premium pay, of the employee earned through that employer in the first, second, third, or fourth period of thirteen consecutive calendar weeks in the 52 weeks immediately preceding the injury.

(ii) If the employee has been employed by that employer less than thirteen calendar weeks immediately preceding the injury, his average weekly wage shall be computed as under Subsection (1)(g)(i), presuming the wages, not including overtime or premium pay, to be the amount he would have earned had he been so employed for the full thirteen calendar weeks immediately preceding the injury and had worked, when work was available to other employees, in a similar occupation.

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

(2) When the average weekly wage of the injured employee at the time of the injury is determined as in this section provided, it shall be taken as the basis upon which to compute the weekly compensation rate. After the weekly compensation has been computed, it shall be rounded to the nearest dollar. 1987

35-1-76. Likelihood of increase to be considered.

If it is established that the injured employee was of such age and experience when injured that under natural conditions his wages would be expected to increase, that fact may be considered in arriving at his average weekly wage. 1953

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

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. 1991

35-1-78. Continuing jurisdiction of commission to modify award — Authority to de-

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.



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**LDS HOSPITAL
ALTA VIEW HOSPITAL
COTTONWOOD HOSPITAL**

GARY WM FARNES, CHIEF EXECUTIVE OFFICER

OF

LDS Hospital
Richard M. Cagen
Administrator/Chief Operating Officer
Eighth Avenue and C Street
Salt Lake City Utah 84143
(801) 321-1100

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: 5/1/90 570-54-7197
Emp: Ralph H. Larsen & Sons, Inc.

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