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OCKET NO. 920586

UTAH COURT OF APPEALS

DENNIS ASHCROFT, Appellant, vs. AIRFAX EXPRESS, INC. LIBERTY EXPRESS INSURANCE CO. and the INDUSTRIAL COMMISSION OF UTAH, Appellees.	Case No. 920586-CA Priority No. 7 Industrial Commission File No. 91000984 Date: 9 March 1993

R E P L Y B R I E F O F

A P P E L L A N T

APPEAL FROM DENIAL OF A WORKER'S COMPENSATION CLAIM FILED WITH THE INDUSTRIAL COMMISSION OF UTAH

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FILED
MAR 10 1993
COURT OF APPEALS

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Utah Industrial Commission Procedural rule R490-1-9.

SUMMARY OF REPLY

Of the points that Appellee claims were not preserved on appeal, the first is a point of law and has no need of preservation for appeal and the second was practically the only issue dealt with by the Industrial Commission.

The rules command the use of a medical panel in cases of conflicting medical reports of physical impairment. There is no dispute that such is the case here. Therefore, the case should have been sent to a medical panel.

The review conducted by the Industrial Commission was not a review based on a "preponderance of the evidence standard". The Commission itself uses the language of "substantial evidence". Such a review is invalid and improper. The Industrial Commission is in

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need of guidance from this Court on the proper method of review.

REPLY ARGUMENT

The Appellee [hereinafter] Liberty Mutual has replied to the Appellant's [hereinafter Mr. Ashcroft] brief with five points:

1. Points 1 and 2 of Mr. Ashcroft's brief were not preserved for appeal.

2. A medical panel was unnecessary because Mr.Ashcroft had no competent medical evidence to support his claim.

3. The Industrial Commission did use the correct standard in its review of the case.

4. There is substantial evidence to support the findings of the Industrial Commission.

5. Mr. Ashcroft failed to "marshall the evidence" in that he did not list the medical evidence adverse to his case.

POINT I

THE PROPER STANDARD OF REVIEW IS A POINT OF LAW NOT AN ISSUE TO BE PRESERVED FOR REVIEW

Liberty Mutual seems to be confused over the meaning of point

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I of the Mr. Ashcroft's brief. The point reads:

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

This point is not an issue to be decided but is a point of law which is supported by several cases. While it may be true that this argument was not used at the Commission level, there is no rule or law that would prevent the utilization of these cases and principles at a later date in an appellate proceeding.

Point 2 of Mr. Ashcroft's brief reads:

> **THE CONTINUING MEDICAL PROBLEMS CLEARLY AROSE OUT OF THE INDUSTRIAL ACCIDENTS AND NOT OUT OF SUBSEQUENT "EPISODES".**

This is simply a statement that the Commission was incorrect in its medical factual conclusions. To argue that this issue was not present in the appeal to the Commission is amazing. The Commission delineated the issues that it was dealing with in its denial of motion for review:

> **1. Rejection of the ALJ of two permanent partial disability ratings in favor of a two year old rating done by the "Liberty Mutual account manager."**
>
> **2. The failure of the ALJ to order that a medical panel be convened to consider among other things the question of maximum medical improvement.**
>
> **3. The ALJ did not consider that the treating doctors were in the diagnostic stages of the case, and the doctors had not decided on a course of treatment.**
>
> **4. The ALJ lost or ignored the chiropractor's results that the applicant was improving with chiropractic treatment.**
>
> **5. This case contains objective evidence of several radiographically verified disc injuries, and surgery was a**

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clear possibility but for the complication of the AIDS.

See DENIAL OF MOTION FOR REVIEW page 1.

Four of these five arguments were designed to convince the Commission that their findings of fact were incorrect. Specifically if the Commission had agreed with Mr. Ashcroft that there was evidence of disc injury

POINT II

THE RULE REQUIRES CONTROVERSIES OF THIS TYPE TO BE SUBMITTED TO A MEDICAL REVIEW BOARD

Liberty Mutual claims that the rating of Doctors Sanders and McNaught "do not remotely qualify as medically and empirically substantiated impairment ratings". Since these ratings don't qualify, Liberty Mutual claims that the judge was justified in not submitting these ratings to a medical panel. This is simply not the rule. This decision is not in the hands of the administrative judge.

The rule is quite specific:

> **A panel will be utilized by the administrative law judge where:**
>
> **1. One or more significant medical issues may be involved. Generally a significant medical issue must be shown by conflicting medical reports. Significant medical issues are involved when there are:**
>
> > **(a) Conflicting medical reports of physical impairment which vary more than 5% of the whole person,**
> > **(b) Conflicting medical opinions as to the temporary total cutoff date which vary more than 90 days, and/or**
> > **(c) Medical expenses in controversy amounting to more than $2,000.**

See Utah Industrial Commission Procedural rule R490-1-9.

There is no leeway given to the judge as to whether or not he

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believes the medical report or whether he believes the level of impairment is justified by the facts. The judge is not a doctor. The rules clearly states that such a controversy over levels of impairment are to be settled by doctors on a medical panel.

Liberty Mutual contends that the statute granting the use of a medical panel is permissive and indeed it is:

> **"... the Commission may refer the medical aspects of the case to a medical panel appointed by the commission"**

See U.C.A. Sec 35-1-77 (1)(a)

While the grant to the commission itself is permissive the rules promulgated by the commission to its administrative law judges is not permissive:

> "A panel **will** be utilized by the administrative law judge where:"

See Utah Industrial Commission Procedural rule R490-1-9. The administrative law judge has no leeway even if the Commission itself did have leeway in the promulgation of the rule. Even if there were no statutory grant at all in the use of medical the Commission could make it mandatory for their judges to use such panels.

If the rule is considered permissive for the judges then the rule simply has no meaning at all. Judges may decide to use the medical panel or not under whatever circumstances they please. Obviously, there would be no uniformity and predictability to such a system.

In actual practice this rule serves a very important purpose.

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Insurance companies are aware of which doctors will give them the ratings that they want. Those doctors find considerable business with the insurance companies and have a personal interest in assuring continued employment. One way to counteract such personal interest is to create a panel that will review conflicting ratings. The Industrial Commission wisely decided to make such panels mandatory under certain conditions.

Liberty Mutual also contends that a medical panel is not necessary because the rules which control the medical panel are "guidelines" and therefore they can be followed by the judges and the commission when they are so inclined and that they may decline to follow these "guidelines" when contrarily inclined. This conclusion appears to be based on the fact that the heading of Rule R490-1-9 reads "Guidelines for Utilization of Medical Panel".

There are three reasons why such a conclusion is inaccurate. The first is that the heading of a rule is not determinative of its content. The body of the rule itself is the explanation of the meaning of the heading. A Subchapter S Corporation gains its meaning not from its heading but from the body of the information which defines such a corporation. Hence the "guidelines" explained in the rule are made permissive or mandatory based on the rule which follows. The guideline for submission of the case to a medical panel based on certain criteria is made mandatory if the conditions of the rule are met. It is undisputed that these conditions are met in this case. Therefore the submission of the case to a medical panel is mandatory.

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Secondly, the established rule of statutory interpretation is that the specific controls over the general. In this case even if there were a general grant of permissiveness in the heading, there is a specific mandatory command in the body of the rule. Since the specific controls over the general, the mandatory command is the controlling interpretation.

Finally, the word guideline does not necessarily imply permissiveness. My thesaurus states that synonyms for guideline are: direction, instruction, regulation, rule or stricture. None of these words, used in a regulatory sense, imply permissiveness.

The mere fact that word "guideline" is used in the heading of the Rules does not change the clear meaning of the rule. A medical panel "will" be used when a specific set of circumstances is met. It is uncontested that these circumstances were met. A panel was not used. Herein, we have clear error.

POINT III

THE REVIEW DONE BY THE INDUSTRIAL COMMISSION MUST BE CORRECT IN FACT AND IN FORM

Petitioner acknowledges the fact that the Commissioners do not necessarily have legal training and so may be inexpert in their use of legal language. But, the commission executes a judicial function which is of critical importance to many injured workers. The standard of review which the commission uses is critical with respect to the adjudication of cases at the administrative judge level. We are certain that this Court recognizes that the

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Commission is reviewing the actions of its own administrative judges. It is imperative that this review not give way to bureaucratic efficiency, but that this review is calculated to insure that substantial justice is done in these cases. Therefore, we would ask this Court to instruct the Commission that the appropriate standard of review must applied at the Commission level in form and in fact. In applying the "preponderance of the evidence rule" the Commission must explore the evidence which is available on both sides of the issue and explain why one body of evidence is superior to the other.

If such instruction is not given to the Commission we can anticipate, at the least, continued loose language from the Commission in their decisions. What is more likely is that the Commission will simply use the rule which they have declared that they are using, which is a "substantial evidence" standard. Such a rule would allow the Commission to seek out any evidence that would support its judges and therefore reinforce the power of the Commission's judges and ease its own administrative burdens.

If the Commission uses the language of substantial evidence, it must be assumed that the Commission is using the substantial evidence review. If the Commission is allowed to use the language of substantial evidence then we are more likely to see appeals of such rulings with the burden falling on this court to review each ruling to decide whether the Commission actually meant what they said.

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POINT IV

SUBSTANTIAL EVIDENCE DOES NOT MEET THE STANDARD OF A PREPONDERANCE OF THE EVIDENCE

Again Liberty Mutual has missed the point and shares the confusion of the Industrial Commission. The Industrial Commission's review was based on a substantial evidence standard. As we have shown, the proper review standard is a "preponderance of the evidence". To recite the case against Mr. Ashcroft without specifically weighing all of the evidence for Mr. Ashcroft is an invalid analysis.

A "preponderance of the evidence" review requires that the both sides of the argument be weighed and considered. This was not done by the Industrial Commission in their review. To simply state that there is evidence to support the decision is exactly the error created by the Industrial Commission initially.

POINT V

MR. ASHCROFT HAS MARSHALLED THE EVIDENCE EQUALLY AS WELL AS EITHER LIBERTY MUTUAL OR THE INDUSTRIAL COMMISSION

It is somewhat poetic that Liberty Mutual should now accuse Mr. Ashcroft of the same sin of which the Industrial Commission is guilty. While Liberty Mutual finds no problem with a marshalling of the evidence satisfying a simple "substantial evidence" standard by either the Industrial Commission or itself, they take issue with Mr. Ashcroft's emphasis on his own best evidence. While it could be argued, the question raised is basically one of fact to be decided by a perusal of the evidence available in the record and on the briefs.

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The appellant is content to leave the question to this court to decide if the record and briefs provide sufficient information for a determination of the issue.

CONCLUSION/STATEMENT OF RELIEF SOUGHT

The decision of the Industrial Commission should be overturned and sent back with intructions that a medical panel be used and that reviews by the Industrial Commmissions of lower judges must be done based on a "preponderance of the evidence" standard with appropriate language and weighing of the evidence from both sides.

Sam Primavera, ESQ.

Attorney for Appellant

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PROOF OF SERVICE

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

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DATE: 9 March '93

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