

2002

# Kahler Corp., and/or General Casualty/ C.W. Reese, v. Martine Husereau and the Labor Commission of Utah : Brief of Respondent

Utah Court of Appeals

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**IN THE COURT OF APPEALS, STATE OF UTAH**

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KAHLER COPR., and/or GENERAL	:	
CASUALTY/C.W. REESE,	:	
	:	Court of Appeals
Petitioners,	:	Case No 20020766-CA
v.	:	
MARTIN HUSEREAU and the LABOR	:	Labor Commission Case No. <del>20001155</del>
COMMISSION OF UTAH,	:	Priority No. 7
	:	
Respondents.	:	

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**BRIEF OF RESPONDENT MARTIN HUSEREAU**

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**PETITION FOR REVIEW FROM ORDERS OF THE UTAH  
LABOR COMMISSION**

---

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	:	Court of Appeals
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**PETITION FOR REVIEW FROM ORDERS OF THE UTAH  
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**JURISDICTION OF THIS COURT**

The Utah Court of Appeals, pursuant to Utah Code Ann. §63-46(b)-16 (1988) and Utah Code Ann. §34A-2-801(1997), has jurisdiction in this matter.

**CONTROLLING STATUTES AND RULES**

None.

**STATEMENT OF THE CASE**

**Procedure**

In December of 2000, Mr. Husereau filed an Application for Hearing with the Utah Labor Commission in connection with seeking benefits for a left hip surgery related to his industrial accident of December 15, 1994. (R. Vol. 1 at 16).

The matter subsequently went to hearing before Administrative Law Judge Richard LaJeunesse, who issued his Findings of Fact, Conclusions of Law and Order on March 21, 2002. The order was favorable to Mr. Husereau and awarded coverage for the needed surgery. (R Vol. 1 at 94- 102).

The Petitioners filed a timely Motion for Review which was ruled on by the Labor Commission in its Order Denying Motion for Review on August 28, 2002. (R. Vol. 1 at 103-108).

The Petitioners filed a Petition for Review with the Utah Court of Appeals on September 26, 2002.

### **Facts**

The facts are not in dispute. We, along with the Petitioners, adopt the Findings of Fact as set forth by the ALJ in his March 21, 2002 Order, and adopted by the Labor Commission in its August 28, 2002 Order Denying Motion for Review. Further, we generally agree with the emphasized facts set forth in the Petitioners' brief and will not repeat them here.

The facts central to this case are found in the July 19, 2000 written report of Dr. Jeff B. Chung. (R. Vol. 1 at 219 to 237).

### **SUMMARY OF THE ARGUMENT**

Dr. Chung's report of July 19, 2000 did not raise a significant medical issue regarding causation that required a referral of the case to a medical panel as he did not state a medical opinion at all. Hence, the Labor Commission was

justified in its refusal to send the case to a medical panel and in basing its decision on the supportive medical reports of the treating physicians.

Whether or not Dr. Chung stated a medical opinion is a question of fact. The Labor Commission is given broad deference in determining questions of fact and its determination here that Dr. Chung did not state a medical opinion is well within the deference accorded to the Labor Commission. The Petitioners further failed to marshal the evidence.

The Petitioners failed to seek leave of the Labor Commission following the issuance of the Findings of Fact, Conclusions of Law and Order of the Administrative Law Judge to obtain a new report from Dr. Chung in light of the ruling that the doctor had failed to state a medical opinion. Nor did the Petitioners file a motion for reconsideration following the issuance of the Labor Commission's Order Denying Motion for Review. Without a request by the Petitioner for leave to obtain a new report, the Commission's actions were not arbitrary or capricious.

## POINT I

### Dr. Chung Did Not State a Medical Opinion and Hence No Referral to a Medical Panel was Warranted as There is No Conflicting Medical Opinion in the Record

The central question in this matter is whether the July 19, 2000 report of Dr. Jeff B. Chung creates a significant issue regarding medical causation. Coverage for the right knee has never been an issue and the carrier has paid for the four surgeries to the knee. Rather, the question concerns whether the subsequent deterioration of the left knee and hip is causally related as well.

Dr. Chung agreed that Mr. Husereau is a candidate for hip surgery (R. Vol. 1 at 233).

Dr. Chung's report is 19 pages long and consists mostly of a recitation of Mr. Husereau's medical history. His discussion about his feelings about the relationship between the original right knee injury and the current left hip problems is found on parts of three pages. (R. Vol. 1 at 232, 233, and 236).

The Petitioner insurance carrier claimed in its brief that Dr. Chung's opinion was taken out of context by the Labor Commission regarding the left knee and hip problems. We disagree. Rather, the Petitioner has taken three short paragraphs that support its position and, presented alone, they would

appear to say there is no causal relationship between the injury to the right knee and the later progression of symptoms to the left. However, when read in connection with the rest of the discussion a different conclusion is seen.

The complete discussion by Dr. Chung on the causational question is set forth in the following paragraphs. It begins on page 232 of Volume 1 of the record.

There is no question in my mind that the patient had an industrial injury to his right knee on 12-15-94 which was appropriately treated by Dr. Kipley Siggard with the patient's first surgery at the right knee on 3-3-95.

I can see how theoretically it makes sense that the patient with an abnormality of the right knee could be at increased risk for problems at the left knee and hip, but I would like to note that there is absolutely **no indication according to the medical literature that either supports or contradicts** the contention that a right knee injury could predispose a patient to a left knee and left hip problem.

I believe the assessment as to whether the patient fills the criteria for having an industrial injury to the left knee and hip related to an abnormal gait pattern based upon his right knee injury of 12-15-94 **is a legal question rather than a medical**. I would like to note however that personally as a physician who has worked with numerous amputees there is absolutely no indication in the medical literature that indicates that below or above-knee amputees at the right limb have any increased incidence of problems at the left lower extremity than the normal population.

Also, from a social/economic standpoint, I do not know how financially viable the concept of allowing a patient with pain and discomfort at one joint to claim an injury at another joint related to abnormal movement patterns would be. If the theory that the patient's right knee injury caused increased problems at the left knee and left hip is accepted as being industrial, it would also be

reasonable within that same thought process to indicate that the abnormal gait problem would caused increased problems in the low back which in turn would caused increased problems in the thoracic and cervical region and therefore also the shoulders and the upper extremities bilaterally. At what point would it be reasonable to deny the patient's spread of symptoms as being industrial and origin? Although **I do not have absolute medical literature or scientific research that supports my opinion**, I believe the patient's industrial injury of 12-15-94 should be kept isolated to the right knee without spread to other joints or areas of the patient's body. (R. Vol 1 at 232-233)

...

Again, I would like to put forth my opinion that the patient's complaints of pain and discomfort at the left hip and knee should not be considered directly related to the patient's industrial injury of 12-15-94. In the absence of medical literature that definitely supports or contradicts this opinion **I believe the answer to this question should be considered a legal rather than a medical decision.**

As noted previously in this report, although I believe the patient is an appropriate elective surgical candidate for his left trochanteric bursitis, I personally do not believe that there is a direct relationship between the patient's need for this surgery and the patient's initial industrial injury of 12-15- 94. Given the lack of significant medical literature that either confirms or contradicts his opinion, it is quite possible that other reasonable physicians would disagree with this opinion. (R. Vol. 1 at 236) [Emphasis added]

Dr.Chung, when read as a whole, has given a provisional opinion. He is basically saying, "I don't know of any medical evidence either way that proves or disproves the relationship between altered gait due to an injury in one leg and subsequent difficulties in the other. It's a legal issue rather than a medical one as medically it could go either way, but I don't approve of it for a variety of reasons."

If he had just said, “No, there is no causal relationship between the industrial injury and the current left hip complaint,” with no further explanation or qualification, then we would have conflicting medical reports between Dr. Chung and the opinions of Dr. Beck, Dr. Palmer and Dr. Rasmussen, as noted on pages 4 and 5 of the ALJ’s Findings of Fact, Conclusions of Law and Order.

However, by explaining his opinion as he did, his reasoning is clearly seen to be centered on other than medical analysis. He doesn’t feel there should be a connection because of what he calls “social/economic” factors and other things that relate to legal and public policy matters rather than medical issues.

For this reason, Willardson v. Industrial Commission of Utah, 904 P.2d 671 (Utah S. Ct. 1995), as cited by the Petitioners, does not apply here. There is no medical controversy because Dr. Chung, although having provided an extensive outline of the facts and medical findings of other doctors, has not given a **medical** opinion that controverts the supportive opinions of the various treating physicians.

Accordingly, the Labor Commission was fully justified in concluding the same - that no significant medical controversy existed because the **medical** evidence is undisputed and which supports a finding of medical causation.

For the same reasons, in the absence of such evidence, there was no abuse of discretion on the part of the Labor Commission for not sending the case to a medical panel under Rule 602-2-2 of the Utah Administrative Code.

## POINT II

### **Whether Dr. Chung Stated a Medical Opinion in His Written Report is a Question of Fact. The Labor Commission's Determination of Facts Were Not Clearly Erroneous**

The Labor Commission has been given broad discretion by the Legislature to determine the facts and apply the law. The factual findings of the Labor Commission and trial courts in general will not be upset unless they are clearly erroneous. Esquivel v Labor Commission, 973 P.2d 440 (Utah App. 1999) and State v Pena, 869 P.2d 932 (Utah 1994). Although the Petitioners did not discuss Dr. Chung's report as a whole in their brief, we see in the report a discussion about the medical history of the Respondent (R. Vol 1, 219-232) and social reasons about why the effects of an injury to one part of the body should not be considered compensable if they subsequently impact on another area of the body (R. Vol 1 at 233). We also see comments about how he knows of no literature either supporting or contradicting the idea of a relationship between altered gait/overuse and injury to other parts of the body (R. Vol 1 at 235). He also discusses concerns about secondary gain (R. Vol 1 at 236), reasons for why there were multiple knee surgeries and how that might lead to a total disability claim later (R. Vol 1 at 234) and how whether there is a relationship between the original right knee injury and the current need for a left hip surgery is really a legal question rather than a medical one (R. Vol 1 at 233).

Whether all of this constitutes a medical opinion is a question of fact. The Labor Commission, both the ALJ and the Commissioner of the Labor Commission, found that this all did not rise, in the context of the report, to a medical opinion. This was well within the Commission's discretion to do so and should be affirmed.

### **POINT III**

#### **The Petitioners Failed to Marshal the Evidence**

It is well settled law that on appeal, an Petitioner has the obligation to marshal all of the evidence supporting the Labor Commission's findings and show that they are clearly erroneous. See, for example, SLW/Utah, Whiteal v. Labor Commission, 973 P.2d 982 (Utah App. 1998). That has not been done here. There is no discussion in the Petitioners' brief about Dr. Chung's report as a whole. Rather, they have only listed and discussed those parts that support their theory of the appeal and have not shown how the report when read as a whole and in context, must lead to the conclusion that a medical opinion is actually contained therein.

### **POINT IV**

#### **The Petitioners Never Requested Leave of the Labor Commission to Clarify the Report of Dr. Chung**

The Petitioners complain that the Labor Commission's decisions were arbitrary and capricious because they were unaware of the problems with

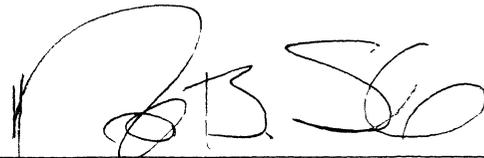
Dr. Chung's report and hence did not have an opportunity to obtain a clarification of the report prior to the hearing.

The Petitioners may have been surprised by the ruling of the ALJ in light of their reliance on Dr. Chung's report. However, following that, they did not obtain a new report or request leave to obtain a new report in connection with their filing a Motion for Review with the Labor Commission. They did not file a request for reconsideration following the issuance of the Commission's Motion for Review. It is now too late to raise the issue in light of the opportunities they had to do so at the Labor Commission level. Issues not raised before the Commission are waived on appeal. SLW/Utah, Whitear v. Labor Commission, 973 P.2d 982 (Utah App. 1998).

#### CONCLUSION

The Order Denying Motion for Review issued by the Labor Commission against the Petitioners in this matter should be affirmed.

Dated this 5th day of February, 2003.



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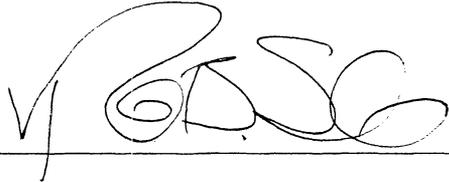
Phillip B. Shell  
Attorney for Respondent Martin Husereau

CERTIFICATE OF MAILING

I hereby certify that on the 5<sup>TH</sup> day of February, 2003, I caused to be mailed by first class mail, postage pre-paid, two (2) copies of the foregoing BRIEF OF RESPONDENT to the following:

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