

1992

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

Utah Court of Appeals

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Recommended Citation

Brief of Appellee, *Willardson v. Utah Industrial Commission*, No. 920165 (Utah Court of Appeals, 1992).
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BRIEF

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DOCKET NO. 920165CA UTAH-COURT OF APPEALS

KERRY L. WILLARDSON,	:	Case No. 920165-CA
Applicant/Petitioner,	:	
v.	:	Priority No. 7
UTAH INDUSTRIAL COMMISSION,	:	
BEAVER CREEK COAL CO., CIGNA	:	
INSURANCE CO., and the	:	
EMPLOYERS' REINSURANCE FUND,	:	
Defendants/Respondents.	:	

**BRIEF OF RESPONDENTS BEAVER CREEK COAL CO.
and CIGNA INSURANCE CO.**

**RESPONDENTS' RESPONSE TO PETITION FOR REVIEW
FROM THE ORDER OF THE INDUSTRIAL COMMISSION**

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UTAH INDUSTRIAL COMMISSION, :
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Respondents Beaver Creek Coal Co. and CIGNA Insurance Co. (hereinafter collectively referred to as "Beaver Creek") hereby file their Response to Petitioner's Petition for Review on appeal to this Court from the Industrial Commission. The Industrial Commission denied Petitioner's Motion for Review of the administrative law judge's Order denying Petitioner's claim for workers' compensation benefits.

JURISDICTION

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

STATEMENT OF THE ISSUES ON APPEAL AND STANDARDS OF APPELLATE REVIEW

Beaver Creek submits that the issues on appeal and the standards of appellate review are as follows:

(1) Whether Petitioner's work activities on April 15, 1988 were the medical cause of his disability.¹

¹Petitioner argues that the issue is whether a compensable accident occurred. This misses the point, the Industrial Commission's decision turns upon the finding of no medical causation between the April 15, 1988 events and his disability. The Administrative Law Judge's order specifically does not reach the issue of legal causation, and that non-determination cannot be reviewed on appeal. Accordingly, a finding of a compensable accident cannot be made because the ALJ and the Commission did not make all the factual determinations necessary for an award of benefits. The ALJ and the Commission only made factual findings

The proper standard of review of this question is the "substantial evidence" test because medical causation is a factual issue. Grace Drilling Co. v. Board of Review, 776 P.2d 63, 68 (Utah App. 1989). The administrative law judge ("ALJ") and the Industrial Commission (the "Commission") found that Petitioner's disability was not medically caused by his April 15, 1988 work activities. (R. at 26). Petitioner claims, without support, that a "correction of error" standard should be used, but this Court has held that whether a disability is medically the result of a work-related activity is a question of fact. Merriam v. Board of Review, 812 P.2d 447, 450 (Utah App. 1991). The proper standard of review for questions of fact is the "substantial evidence" test. Johnson v. Board of Review, 198 Utah Adv. Rep. 67, 68 (Utah App. 1992). Findings of fact are affirmed if they are "supported by substantial evidence when viewed in light of the whole record before the court." Id., citing Stewart v. Board of Review, 831 P.2d 134, 137 (Utah App. 1992) (quoting Utah Code Ann. § 63-46(b)-16(4)(g) (1989)). "Substantial evidence is more than a scintilla of evidence but

necessary to support the finding of no medical causation and, as this was fatal to Petitioner's claim, no other findings were necessary. At most, the claim could be sent back for further proceedings, but that is not necessary in this case.

less than the weight of the evidence." Grace Drilling, P.2d 776 at 68.

(2) Whether the Industrial Commission applied the correct standard of proof to Petitioner's claim.²

As this issue is a question of law, the standard of appellate review is "correction of error." Mor-Flo Industries v. Board of Review, 817 P.2d 328 (Utah App. 1991).

(3) Whether the Industrial Commission abused its discretion by failing to convene a Medical Panel.

The standard of review of this issue is "abuse of discretion." The Supreme Court of Utah has stated that, in some cases, failure to convene a medical panel is an "abuse of discretion." Champion Home Builders v. Industrial Commission, 703 P.2d 306, 308 (Utah 1985). This Court also applied an abuse of discretion standard when reviewing whether the ALJ should have referred the medical causation issue to a medical panel. Workers Comp Fund v. Industrial Commission, 761 P.2d 572, 577 (Utah App. 1988).

²Petitioner argues that the issue is what standard the ALJ applied, but it is the Commission's order which is being reviewed, and that is the only relevant inquiry.

DETERMINATIVE STATUTES, RULES AND REGULATIONS

The following statutes and Rule are determinative in this appeal:

Utah Code Annotated Section 35-1-77 (1988), Utah Code Annotated Section 63-46(b)-16(4)(g) (1988) and Utah Administrative Code R490-1-9. The determinative statutes and rules are fully set forth in Exhibit A of the Addendum.

STATEMENT OF THE CASE

Nature of the Case

Petitioner seeks review of the Commission's Order denying his Motion for Review of the ALJ's denial of workers' compensation benefits. The ALJ denied workers' compensation benefits on the grounds that Plaintiff's work activities were not the medical cause of his disability.

Course of Proceedings and Disposition Below

Petitioner applied for permanent total disability compensation benefits claiming that he suffered an industrial accident on April 15, 1988 which caused or contributed to his disability from degenerative osteoarthritis (R. 8). Beaver Creek submits that Petitioner's disability was not caused by an industrial accident, but was solely due to a preexisting condition and, therefore, that Petitioner is not entitled to permanent total disability benefits.

A hearing before an ALJ was held on February 26, 1991. (R. at 19). The ALJ found that Petitioner's back condition was not caused by his work activity but was the result of degenerative osteoarthritis and disc disease. (R. 26). The ALJ dismissed Petitioner's claim with prejudice and Petitioner filed a Motion for Review with the Commission. On February 18, 1992, the Commission denied Petitioner's Motion for Review, finding that Petitioner's medical problems were preexisting, that no credible medical evidence conflicted with that determination, and that the ALJ did not err. (R. 107).

Statement of Facts

Petitioner's medical records show a history of back problems beginning in 1970. In 1970 Petitioner was injured while working for a coal company in Colorado when he stooped to pick up a cable and was unable to straighten up. (R. 20). Petitioner experienced right leg pain following this incident and, in August of 1971, he underwent back surgery, a lumbar laminectomy, which, according to Petitioner, eliminated the right leg pain. (R. 20).

According to his medical records, Petitioner next sought medical attention for back problems on July 8, 1983. On that day, Petitioner went to Emery Medical Center complaining of back pain, bilateral shoulder pain and left hip pain. (R. A-7 at 73). The attending physician took X-rays and diagnosed

Petitioner with severe osteoarthritis and degenerative disc disease of the lumbar spine. (R. A-7 at 73).

Petitioner was next treated for back problems on January 16, 1988. On that day, Petitioner was at home hanging a ceiling fan when the ladder on which he was standing collapsed and he fell. (R. 20). Petitioner went to see Dr. Faust and was diagnosed with thoraco-cervical strain/sprain; grade II 9 intervertebral disc syndrome C-5, C-6 with brachial extension neuralgia of the right shoulder and arm as a direct complication. (R. A-8 at 169). Petitioner was treated by Dr. Faust eight times in January 1988, seven times in February 1988, and four times in March 1988. (R. 20). Petitioner testified that Dr. Faust treated only his shoulders and neck. (R. 20).

Petitioner claims his next bout with back pain occurred at work for Beaver Creek Coal Co. on April 15, 1988. Petitioner testified at the hearing before the ALJ that he experienced back pain as a result of jerking a 20-25 pound wire mesh screen off a stack, but there is no mention in the record of any such screen jerking incident until the 1991 hearing before the ALJ. The ALJ found that the screen jerking testimony was not credible. Dr. Konrad P. Kotrady, M.D. treated Petitioner on the day of the industrial incident but Dr. Kotrady's records say nothing of the alleged screen jerking. (R. A-2 at 9). Dr. Kotrady's records

instead state that Petitioner was walking and climbing up and down the belt drive when he experienced pain. (R. A-2 at 9).

Dr. Gaufin and Dr. Heiner also treated Petitioner after the April 15, 1988 incident, but their records say nothing about screen jerking. Dr. Heiner's records say that Petitioner experienced right hip pain on April 15, 1988 while re-guarding a belt drive which required Petitioner to climb, reach and stretch. (R. A-6 at 63). Petitioner experienced back pain on April 23, 1988 and was admitted to Castlevue Hospital. The Castlevue records state that Petitioner was climbing up and down a drive taking long steps when there "was a twisting type motion which grabbed at his back, leg and right hip," but say nothing about screen jerking. (R. A-4 at 22). Finally, there is not even any mention of the alleged screen jerking incident in the form which Petitioner completed for his attorney in August of 1988 or in his application for hearing. (R. 8, 25).

The ALJ dismissed Petitioner's testimony regarding the screen jerking and found by a preponderance of the evidence that on April 15, 1988, Petitioner experienced hip pain while re-guarding the belt drive with 20-25 pound wire mesh guards which involved climbing, stretching, reaching and possibly twisting. (R. 25, 107).

After leaving work on April 15, 1988, Petitioner went to Emery Medical Center and was treated by Dr. Kotrady. Dr. Kotrady diagnosed Petitioner with right hip pain, severe degenerative arthritis in the hips, pelvic and lumbar spine, degenerative disc disease in all levels of the lumbar spine and scoliosis. (R. A-2 at 9-10). Dr. Kotrady completed a Physician's Initial Report in which he marked both the "yes" and the "no" box in answer to the question, "Is condition requiring treatment the result of the industrial injury or exposure described?" (R. A-2 at 12). In the Remarks section of the Physician's Initial Report, Dr. Kotrady wrote, "Degenerative arthritis and disc disease pre-existing the injury. X-ray evidence in 1983." (R. A-2 at 12). Dr. Kotrady's follow-up notes state that Petitioner had full range of motion in his back and that his assessment was ligamentitus strain of the right hip, but no back involvement. (R. A-2 at 8).

Petitioner was later seen by Dr. Gaufin and Dr. Heiner. Dr. Gaufin and Dr. Heiner each completed a one-page, fill-in-the-blank "Summary of Medical Record Form" which had been provided by Petitioner's attorney. (R. A-5 at 46, A-6 at 60). The doctors completed the fill-in-the-blank form in September of 1988 and there is no evidence in the record that Petitioner has been rated since that time. Dr. Gaufin and Dr. Heiner each gave a

disability rating for Petitioner, without explanation or reference to the AMA Guidelines for the Evaluation of Permanent Impairment, and each attributed half of the rating to the April 15, 1988 incident. However, neither of them had access to Petitioner's prior medical records when they rated him. (R. 24). Dr. Gaufin's and Dr. Heiner's Summary of Medical Record Forms are attached hereto as Exhibits B and C.

Despite his rating that one-half of Petitioner's disability was due to the April 15th incident, Dr. Heiner diagnosed Petitioner with severe degenerative arthritis of the lumbosacral spine. (R. A-5 at 50). Dr. Heiner's September 26, 1989 notes indicate that Petitioner's condition is unpredictable because severe pain bouts can occur just from walking, sitting or standing, but pain most often occurs when Petitioner twists or turns. (R. A-5 at 51). Dr. Heiner's medical notes also reveal that Petitioner experienced severe back pain on July 7, 1988 while washing two cars (R. A-5 at 61) and on April 21, 1989 when he fell while attempting to hang Christmas lights. (R. A-5 at 52).

Dr. Gaufin saw Petitioner on May 5, 1988, and his impression of Petitioner was acute lumbar radiculopathy L4-5, L3-4, right, secondary to degenerative disc and joint disease with disc protrusion at L3-4, L4-5, right greater than left, and

chronic osteoarthritis and degenerative disc disease and joint disease, L1-2, L2-3, L3-4, L4-5, L5-S1 bilaterally. (R. A-6 at 66). Dr. Gaufin's December 21, 1988 impression of Petitioner is acute and chronic lumbar radiculopathy secondary to degenerative disc and joint disease. (R. A-6 at 58.) Finally, Dr. Gaufin comments in a December 21, 1988 letter that Petitioner has a permanent disability, and will be unable to work in the future because of a severe degenerative process of the lumbar spine. (R. A-6 at 58.) Dr. Gaufin also comments in that letter that his goal is to reduce the rate at which the joints in Petitioner's lower back wear out and, hopefully, minimize severe crippling effects which might occur. (R. A-6 at 59).

After reviewing the medical records and conducting a hearing, the ALJ determined that Petitioner's disability was due to a preexisting condition and that Petitioner did not prove that any incident on April 15, 1988 caused his disability. (R. 26). The ALJ noted that Dr. Kotrady was of the opinion that Petitioner's back problems were preexisting. (R. 25). Dr. Kotrady's explanation of the hip pain was arthritis of the hip joints, confirmed by X-ray, which he believed was caused by Petitioner shifting weight from his bad back to his hip. (R. 25). The ALJ also noted that Dr. Kotrady was unable to give a definitive yes to whether the industrial injury caused

Petitioner's pain. (R. 25). The ALJ emphasized that Dr. Kotrady diagnosed Petitioner with degenerative disc disease and degenerative arthritis found in both the 1988 X-ray and the 1983 X-ray. (R. 25). The ALJ noted that Dr. Kotrady found no acute changes in Petitioner's condition from 1983 to 1988. (R. 25). In addition to Dr. Kotrady's diagnosis, the ALJ noted that the Castlevew Hospital records refer to extensive degenerative arthritis in the lumbar spine and show no acute herniations or fractures in the X-ray and no changes from the 1983 X-ray. (R. 26).

The ALJ found Dr. Gaufin's medical records contradictory because he diagnosed extensive degenerative arthritic changes yet he indicated that one-half of Petitioner's impairment was due to the April 15, 1988 incident. (R. 26). The ALJ noted that Dr. Gaufin did not have access to Petitioner's prior medical records and that Dr. Gaufin found that Petitioner was unable to work because of a severe degenerative process of the lumbar spine. (R. 26). The ALJ also pointed out that Dr. Heiner also did not have access to Petitioner's prior medical records and that neither Dr. Heiner nor Dr. Gaufin explained how they arrived at their impairment ratings. Finally, the ALJ questioned the basis of Dr. Gaufin's and Dr. Heiner's impairment ratings. The only evidence of these ratings were brief notations

on fill-in-the-blank forms which were prepared by Petitioner's counsel. (R. 26). The Commission held that, since the doctors' conclusions were based on incomplete information, they could be discounted and did not constitute credible medical evidence. (R. 73).

The ALJ concluded that there was "no confirmation of contribution from the work activities of April 15, 1988," and that Petitioner's need for treatment and any disability after April 15, 1988, were the result of his long-standing, preexisting degenerative back condition. (R. 25, 26).

SUMMARY OF ARGUMENT

Petitioner seeks permanent total disability benefits for osteoarthritis in his back, based upon a claimed event which he has been unable to consistently describe. He has long-standing back problems and was diagnosed with severe degenerative osteoarthritis of the lumbar spine and degenerative disc disease five years before this alleged accident. Petitioner's condition is not compensable because it was not caused by his activities at work. The ALJ and the Commission found that Petitioner's disability was due to his pre-existing condition, severe degenerative osteoarthritis, and that his work activities on April 15, 1988 were not the medical cause of his disability. When reviewing a factual finding of medical

causation the proper standard of review is whether substantial evidence supports the finding. The ALJ and the Commission's finding of no medical causation is supported by substantial evidence, based on the testimony given at the hearing and a review of the medical records.

In order to have a factual finding overturned on appeal, the Petitioner must marshal the evidence and show that the Commission's findings are not supported by substantial evidence. In this case, Petitioner has not marshaled the evidence supporting the findings of the Commission and the ALJ, nor has he shown that there is not substantial evidence supporting the determinations. Therefore, this Court must defer to the unchallenged factual findings of the ALJ and the Commission.

The Commission applied the correct standard of proof to the findings of fact. Petitioner argues that the ALJ held that Petitioner's work activities must "significantly" contribute to his pre-existing conditions in order for the condition to be compensable. Petitioner's argument is irrelevant because it is the Commission's order and not the ALJ's order which is on review to this Court and Petitioner does not claim that the Commission applied the wrong standard of proof. In addition, Petitioner's argument is wrong because, as the Commission found, the ALJ used

the proper standard. She found that Petitioner's disability was due to a pre-existing condition and that there was no confirmation of contributions from his April 15, 1988 work activities.

Petitioner argues that the ALJ abused her discretion by not referring this matter to a medical panel. Referral to a medical panel, however, is not mandatory but is in the discretion of the ALJ and the Commission. In this case, the ALJ and the Commission examined the evidence and determined that there was no credible evidence of medical causation and, therefore, no reason to refer the matter to a medical panel.

ARGUMENT

I. PETITIONER IS NOT ENTITLED TO WORKERS' COMPENSATION BENEFITS BECAUSE HIS DISABILITY IS THE RESULT OF SEVERE DEGENERATIVE OSTEOARTHRITIS AND WAS NOT CAUSED BY HIS WORK ACTIVITIES.

A. The Petition Should be Dismissed Because Petitioner has Failed to Marshal the Evidence and Refute the Factual Finding of no Medical Causation.

Petitioner has the burden of proving by a preponderance of the evidence that his disability was caused by an industrial accident. Large v. Industrial Commission, 758 P.2d 954, 956. (Utah App. 1988).³ In order to receive workers' compensation

³Petitioner tries to circumvent his burden of proof by arguing that the Workers Compensation Act should be liberally construed. Liberal construction does not, however, relieve Petitioner from the requirement of proving all elements of his

benefits, Petitioner must prove that an industrial accident was the medical cause of his disability. "The medical causation requirement will prevent an employer from becoming a general insurer of his employees and discourage fraudulent claims." Allen v. Industrial Commission, 729 P.2d 15, 26-27 (Utah App. 1986). In this case, Petitioner failed to prove medical causation. (R. 26). The ALJ and the Commission found that Petitioner's back condition was due to degenerative osteoarthritis and degenerative disc disease with no proof of contribution from the April 15, 1988 industrial incident. (R. 26, 77).

In order to overturn the findings of the Commission, Petitioner must first marshal the evidence supporting the Commission's finding and then show that the finding is not supported by substantial evidence. Grace Drilling, 776 P.2d at 68. In Grace Drilling, this Court explained the application of the substantial evidence test for reviewing findings of fact:

claim by a preponderance of the evidence, including medical causation. If he fails to meet his burden of proof his claim must be denied. In Kaiser Steel Corp. v. Industrial Commission, 709 P.2d 1168, 1169 (Utah 1985), the Supreme Court of Utah stated "[w]hile disability claims are liberally construed in favor of awarding benefits . . . we do not overturn the Commission's findings unless they are arbitrary or capricious, wholly without cause, contrary to the one inevitable conclusion from the evidence or without substantial evidence to support them." Petitioner's argument at p.11 of his brief that he is entitled to have all factual doubts resolved in his favor is flatly wrong.

[i]t is also important to note that the 'whole record test' necessarily requires that a party challenging the Board's findings of fact 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. Id.

This Court also stated in Grace Drilling that: "[i]n undertaking such a review, this court will not substitute its judgment as between two reasonable conflicting views, even though we may have come to a different conclusion had the case come before us for de novo review." Id., and: "[i]t is the province of the Board, not appellate courts, to resolve conflicting evidence, and where inconsistent inferences can be drawn from the same evidence, it is for the Board to draw the inferences." Id., citing Board of Educ. of Montgomery County v. Paynter, 303 Md. 22, 491 A.2d 1186, 1193 (1985).

Petitioner has failed to even attempt to marshal the evidence in this case and, therefore, has not and cannot challenge the Commission's finding of no medical causation. Instead of marshaling the evidence, Petitioner merely makes general statements in his Brief such as: "The evidence that petitioner suffered an industrial injury...is overwhelming," and "both of the examining doctors assign one-half of the petitioner's injuries to the industrial accident." These general

statements do nothing to show the facts supporting the Commission's decision, and do not amount to marshaling the evidence. In Johnson v. Board of Review, 198 Utah Adv. Rep. at 68, this Court found that a party who challenges the Commission's findings of fact must marshal all the evidence in support of those findings and show that those findings are not supported by substantial evidence.

Petitioner does not show that the Commission's findings are not supported by substantial evidence. Petitioner does not address Dr. Kotrady's findings nor does he address the ALJ's findings regarding Drs. Gaufin and Heiner. Dr. Gaufin and Dr. Heiner both diagnosed degenerative osteoarthritis, yet neither doctor explained how the April 15, 1988 incidents contributed to or caused Petitioner's degenerative condition. Additionally, Petitioner provides no credible medical evidence explaining how the hip pain he suffered in April 15, 1988 aggravated his degenerative back disease. Finally, Petitioner does not explain the conflicting reports of what actually occurred on April 15, 1988 and does not explain why there is no mention of the screen jerking incident in the record until the hearing.

Petitioner claims that he was unable to marshal the evidence because the ALJ's findings of fact were "grossly inadequate." The ALJ's findings of fact, however, are clearly in

line with the recent case of Adams v. Board of Review, 821 P.2d 1 (Utah App. 1991). Adams requires findings by the ALJ which "indicate respectively (1) the issues decided,...(2) the legal interpretation and applications made...and (3) the subsidiary factual findings in support of the decision.... Id. at 6.

In this case, (1) the ALJ found that Petitioner did not injure his back on April 15, 1988 at work and that Petitioner's April 15, 1988 work activities did not cause Petitioner's disability. (2) The ALJ applied the law that compensation will be awarded only when the industrial incident is the medical cause of the disability for which compensation is sought. (3) She supported her decision by reviewing the descriptions of the April 15, 1988 events in the record, by referring to the substance of all the doctors' medical records, and by resolving the factual discrepancies in the testimony and the medical records. She found, based in part on 1983 x-rays, that Petitioner had a severe degenerative condition which preexisted April 15, 1988. (R. 26.) She pointed to specifics in Dr. Kotrady's medical records and in Dr. Gaufin's and Dr. Heiner's medical records.⁴ (R. 25, 26). She found that Dr. Kotrady was

⁴Petitioner argues that the ALJ casually disregarded Dr. Gaufin's and Dr. Heiner's ratings. On the contrary, the ALJ found that the fill-in-the-blanks forms were not reliable because the doctors did not explain the basis for the ratings and did not have access to Petitioner's prior medical records. Moreover, she

clearly of the opinion that the Petitioner's problems were preexisting and that he was unable to answer a definitive "yes" to whether the industrial injury caused the symptoms. (R. 25). In addition, she found that there were no acute changes in Petitioner's x-rays from 1983-1988 and that Dr. Gaufin, Dr. Heiner and Dr. Kotrady all found that Petitioner had a severe degenerative back condition. (R. 25, 26.)

In addition to the ALJ's findings, the Commission's findings were also quite specific. The Commission emphasized that the treating physician on April 15, 1988 (Dr. Kotrady) "was clearly of the opinion that the applicant's medical problems were preexisting." (R. 106.) The Commission noted that the Castlevue records refer to severe degenerative osteoarthritis and that the x-ray readings in 1983 and 1988 were "remarkably similar." (R. 106.) The Commission also noted that Dr. Gaufin and Dr. Heiner's fill-in-the-blank forms could be discounted because the doctors did not have access to Petitioner's prior medical records when they completed them. (R. 107.) The ALJ's Order and the Commission's Order each set out and explain specific facts and how those facts lead to the conclusion that

stated that Dr. Gaufin's rating seemed to contradict his diagnosis. (R. 26).

Petitioner failed to meet his burden of proving medical causation.

B. The Aggravation of a Preexisting Condition is Compensable Only if it is a Permanent, Ratable Aggravation.

Despite his failure to marshal the evidence, and despite that the Commission found no evidence of aggravation, Petitioner argues that his work activities on April 15, 1988 aggravated his preexisting condition and, therefore, that his injury is compensable. Petitioner cites Powers v. Industrial Commission, 427 P.2d 740, 743 (Utah 1967), for the proposition that "the aggravation or lighting up of a preexisting disease by an industrial accident is compensable. . . ." Petitioner's argument that "any aggravation" is compensable is unfounded.

In Virgin v. Board of Review, 803 P.2d 1284, 1289 (Utah App. 1990), this Court held that an aggravation of a preexisting condition is not compensable if it is a temporary aggravation or a non-ratable acceleration of symptoms. Id. Only a permanent, ratable aggravation of a preexisting condition is compensable. Id.

In Virgin, the petitioner was injured at work when a support chain broke and an automobile engine hit him in the left hip and knocked him down. Id. at 1285. The petitioner sought review of the Commission's Order denying workers' compensation

benefits. The Commission concluded that there was no causal connection between petitioner's injury and the hip replacement surgery for which he sought compensation. Id. About fourteen months after the accident, petitioner went to see an orthopedic surgeon who concluded that petitioner had aseptic necrosis of the left hip and, to a lesser degree, of the right hip. The orthopedic surgeon concluded that this was probably caused by alcoholism and recommended a hip replacement. Id.

Petitioner sought workers' compensation benefits for the hip replacement claiming that his hip condition was aggravated by the industrial accident. The ALJ appointed a medical panel of one orthopedic surgeon who concluded "I think perhaps it happened sooner than it would have had he not had an injury, but I feel he would have ultimately needed surgery on this in spite of any industrial injury. . . ." Id. at 1286. The ALJ found that the industrial accident permanently aggravated petitioner's preexisting condition and thus was causally connected to his hip replacement. The Commission reviewed the case and overturned the ALJ's order and findings. Id.

On review to this Court, the petitioner argued that because the Medical Panel found that the industrial accident aggravated his preexisting condition, his hip replacement was compensable. Id. at 1287. This Court held that petitioner's

injury was not a ratable permanent aggravation of his preexisting condition and, therefore, was not compensable. Id. at 1289.

As with Virgin, this case involves the alleged aggravation of a preexisting condition. There is no credible medical evidence that Petitioner's condition was permanently aggravated by his April 15 work activities. Indeed, substantial evidence shows, instead, that Petitioner's disability is due to severe degenerative arthritis and degenerative disc disease.⁵

This case is also analogous to Giesbrecht v. Board of Review, 828 P.2d 544 (Utah App. 1992). In Giesbrecht, this Court addressed the "direction of medical causality" and held that in order to be compensable, the injury at work must aggravate the preexisting condition. Id. at 547. In Giesbrecht, the applicant fractured his femur at work. He discovered cancer in the bone and sought worker's compensation. Id. at 545-546. This Court found that while the cancer may have aggravated the femur

⁵Petitioner briefly states that the Commission should have looked at Petitioner's entire employment history with Beaver Creek Coal Co. in determining whether he suffered a compensable injury. It is unclear what Petitioner is trying to argue. Petitioner cites cases which deal with legal causation, which is not at issue in this appeal. Any inference that the effects of a life-time of living and working is automatically compensable as an industrial accident is wholly unsupported and goes against the purpose and intent of workers' compensation laws. Finally, Petitioner made a claim only for an alleged industrial accident on April 15, 1988. To now claim in alternative that perhaps his problems were caused by repetitive motion is not supported in the record and was not properly raised below.

fracture, in order to recover, the applicant had to prove the reverse: "that the femur fracture contributed to, accelerated, or aggravated the cancer." Id. Since there was no evidence it did, denial of compensation was affirmed. (R. A-2 at 9.)

In this case, Dr. Kotrady stated that Petitioner's hip pain was possibly caused by compensating for his back problem by shifting his weight to his hips. However, there is certainly nothing to support that Petitioner's hip problem contributed to or aggravated his back problem, and therefore, his disability is not compensable.

II. THE COMMISSION AND THE ALJ APPLIED THE CORRECT STANDARD OF PROOF TO PETITIONER'S CLAIM.

A. It is the Commission's Order which is on Review and The Commission Applied the Correct Standard of Proof to Petitioner's Claim.

Petitioner argues that the ALJ applied the incorrect standard of proof because, in her Order, she stated that Petitioner's symptoms "were not the result of any significant contribution by the activities of April 15, 1988." Petitioner construes this to mean that the ALJ found that work activities must significantly contribute to a preexisting condition in order to be compensable. However, Petitioner ignores other language in the ALJ's Order and the analysis made by the Commission in its Order.

The Commission applied the correct standard and it is the Commission's Order which is being reviewed by this Court. In Ring v. Industrial Commission, 744 P.2d 602, 603 (Utah App. 1987), this Court stated that a decision by the Commission "which finally disposes of a proper motion for review is a final order subject to review only by timely appeal to the Court of Appeals." As it is the Commission's order which is being reviewed, whether the ALJ applied the wrong standard is irrelevant as long as the Commission did not apply the wrong standard. In its Order the Commission stated that the ALJ "did not use the standard alleged" by Petitioner. (R. 107). The Commission found that the ALJ did not apply a significant contribution standard and, therefore, it follows that the Commission did not apply a significant contribution standard in affirming the ALJ's order.

B. The ALJ Applied the Correct Standard of Proof to Petitioner's Claim.

The ALJ did use the language "significant contribution" but, it is apparent from the Orders of both the ALJ and the Commission that the ALJ did not apply that standard. As noted above, the Commission found that the ALJ did not apply a "significant contribution" standard regarding aggravation of a preexisting injury:

. . . it appears that the ALJ determined that the applicant's treatment on April 15, 1988 had nothing to do with his work, and resulted

entirely from his pre-existing condition with no contribution from his work place labor.

(R. 107). The ALJ specifically stated that Petitioner's preexisting condition was the cause of his need for treatment with "no confirmation of contribution from the work activities of April 15, 1988." (R. 25). The ALJ found that there was no contribution from the April 15 work events and did not need to address the question of what degree of aggravation was compensable since there was no aggravation.⁵

III. THE COMMISSION DID NOT ABUSE ITS DISCRETION IN NOT REFERRING THIS MATTER TO A MEDICAL PANEL BECAUSE IT WAS ABLE TO MAKE THE DETERMINATION REGARDING MEDICAL CAUSATION ON THE EVIDENCE BEFORE IT.

A. The Commission did not need to Refer this Matter to a Medical Panel Because there was no Credible Evidence of Medical Causation.

Failure to refer to a medical panel cannot be an abuse of discretion when there is no credible evidence of medical causation. Plaintiff would have the Commission convene a medical panel so he can try to prove his case at state expense, but medical panels should not be used to fill in the gaps in

⁵Petitioner also argues that the ALJ applied a "clear and convincing" standard rather than a preponderance of the evidence standard to the issue of causation, but the ALJ specifically used the term "preponderance of medical evidence." (R. 26). She used the term "clearly" in dicta only when referring to legal causation not medical causation. She was not applying a clear and convincing standard but merely saying that if she had reached the issue of legal causation it is not "clear" that Petitioner's work activities could be classified as "unusual exertion." The ALJ did not reach the issue of legal causation because the finding of no medical causation is dispositive.

Petitioner's case. In Workers' Comp. Fund v. Industrial Commission, 761 P.2d 572, 577 (Utah App. 1988), this Court stated in response to an argument that failure to refer to a medical panel was an abuse of discretion, "we cannot say that the administrative law judge abused his discretion in not referring this case to a medical panel when there was medical evidence to support his finding of medical causation." It follows that there is no requirement to refer to a medical panel when there is evidence of no causation and certainly when there is no credible evidence of medical causation.

There is ample medical evidence to support the ALJ's finding of no medical causation. Petitioner presented only two fill-in-the-blank forms from doctors who did not have access to his prior medical records. (R. 26, 107.) The doctors did not review Petitioner's 1983 X-rays and therefore did not see that there were no acute changes from the 1983 X-rays to the 1988 X-rays. The doctors rated Petitioner in September, 1988, and stated, without explanation, that 50% of the impairment was due to the accident only a few months before. There is no indication that the ratings were based on the AMA guidelines. (R. 46, 60). The ALJ relied on Dr. Kotrady's medical records which state that Petitioner's condition was caused by his preexisting, severe degenerative osteoarthritis of the back and degenerative arthritis of both hips. (R. A-2 at 9). Dr. Kotrady first saw

Petitioner on April 15, 1988, and diagnosed Petitioner with the benefit of Petitioner's prior medical records.

B. Referral to a Medical Panel is Discretionary.

Petitioner puts much emphasis on the fact that Dr. Gaufin's and Dr. Heiner's impairment ratings differed by more than 5% and argues that R490-1-9 of the Utah Administrative Code mandates reference to a medical panel in this situation. This argument puts the cart before the horse because the ALJ and the Commission found no credible evidence of medical causation and, therefore, any conflict over impairment ratings is irrelevant. Permanent partial disability ratings are not at issue in this case because the Commission found no credible evidence of medical causation and, therefore, no medical dispute.

Reference to a medical panel is, in any event, discretionary. Utah Code Ann. 35-1-77(1)(a) (1988) states:

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. (Emphasis added.)

The above statute makes referral to a medical panel discretionary; the Commission may appoint a medical panel but is not required to do so. In Hone v. J.F. Shea Co., 728 P.2d 1008, 1012 (Utah 1986), the Utah Supreme Court stated "reference to the medical panel is controlled by statute. In 1982, the legislature

amended U.C.A., 1953, § 35-1-77 and changed the requirement of mandatory referral to the medical panel to permissive referral." Id.

Despite the above statute and case law, Petitioner argues that R490-1-9 mandates referral to a medical panel. Regulation 490-1-9, however, simply sets out guidelines and cannot be construed as mandatory for a number of reasons. The first reason that R490-1-9 cannot be construed as mandatory is that the legislature intended referral to a medical panel to be discretionary. The legislature specifically changed reference to a medical panel from mandatory to discretionary. Before it was amended, U.C.A. 35-1-77 (1953) said:

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

In 1982, the legislature amended U.C.A., 1953, § 35-1-77 and changed the shall refer to a medical panel to may refer to a medical panel. Hone, 778 P.2d at 1012. R490-1-9 cannot be read to circumvent legislative intent.

The second reason that the Regulation cannot be construed as mandatory is that, if it were mandatory, it would be void as beyond the scope of U.C.A. § 35-1-77 (1988). The word "may" in § 35-1-77 indicates that it is discretionary and,

therefore, it cannot be made mandatory by a regulation. In Crowther v. Nationwide Mut. Ins. Co., 762 P.2d 1119, 1122 (Utah App. 1988) this Court stated:

An administrative agency's authority to promulgate regulations is limited to those regulations which are consonant with the statutory framework, and neither contrary to the statute or beyond its scope.

Any regulation which makes referral to a medical panel mandatory is not consistent with and goes beyond the scope of U.C.A. § 35-1-77 and is therefore void.

The final reason that R490-1-9 cannot be construed as mandatory is that the ALJ can disregard the finding of the medical panel in light of other evidence. U.C.A. § 35-1-77(2)(d) (1988) states:

The commission may base its findings and decisions 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.

In Greyhound Lines Inc. v. Wallace, 728 P.2d 1021, 1022 (1988) the Supreme Court of Utah found that the Commission can reject the finding of the medical panel and rely on other evidence in the record. Also, in Pittsburgh Testing Laboratory v. Keller, 657 P.2d 1367, 1371-1372 (1983), the Supreme Court of Utah upheld the Commission's finding regarding medical causation despite the fact that the medical panel made contrary findings. The

Pittsburg Testing Court relied on other medical evidence and rejected the medical panel report. Id.

If an ALJ determines that there is no evidence of medical causation and that it is unnecessary to refer a case to a medical panel, then it would be illogical to require her to do so in light of the fact that she could rely on other medical evidence and disregard the findings of the medical panel. It would also be a costly waste of State resources to require reference of every single matter to a medical panel when the ALJ is able to make a determination without the assistance of a panel. Petitioner essentially argues for mandating referral to a panel every time a petitioner loses on medical causation. This is contrary to the 1982 amendment to U.C.A. § 35-1-77, and to the spirit of the case law, Champion Home Builders, 703 P.2d at 308, and should not be permitted. The Commission did not abuse its discretion.

CONCLUSION

Based upon the foregoing, Beaver Creek respectfully requests that this Court deny Petitioner's Petition for Review. The February 18, 1992 order of the Industrial Commission should be affirmed because substantial evidence shows that Petitioner's disability is due to a preexisting condition and is not related to his April 15, 1988 work activities. The ALJ reviewed the medical records, heard Petitioner's testimony and made a factual determination as to the events that occurred and the lack of

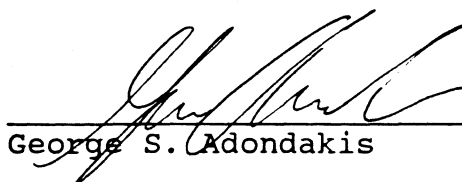
proof of medical causation. The Industrial Commission's order should be affirmed.

DATED this 5th day of January, 1993.

RAY, QUINNEY, & NEBEKER



Steven J. Aeschbacher



George S. Adondakis

Attorneys for Beaver Creek
Coal Co. and Cigna Insurance
Co.

6163.01/gsa

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing Brief of Petitioner were hand delivered on the 5th day of January, 1993, to the following:

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RAY, QUINNEY & NEBEKER



Attorneys for Respondent
Beaver Creek Coal Co. and
Cigna Insurance Co.

ADDENDUM

- Exhibit A: Utah Code Annotated, Sections 35-1-77 and 63-46(b)-16
Utah Administrative Code R490-1-9
- Exhibit B: Summary Medical Record Form - Dr. Lynn M. Gaufin
- Exhibit C: Summary Medical Record Form - Dr. David R. Heiner

R490-1-9. Guidelines for Utilization of Medical Panel.

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

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

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

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

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

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

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

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

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

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

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

D. Any expenses of the study and report of a medical panel or medical consultant and of their appearance at 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.

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 or in the course of employment, and if the employer or its insurance carrier denies liability, the commission may refer the medical aspects of the case to a medical panel appointed by the commission. The panel shall have the qualifications generally applicable to the medical panel under Section 35-2-56.

(b) 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.

(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.

1968

63-46b-16. Judicial review — Formal adjudicative proceedings.

(1) As provided by statute, the Supreme Court or the Court of Appeals has jurisdiction to review all final agency action resulting from formal adjudicative proceedings.

(2) (a) To seek judicial review of final agency action resulting from formal adjudicative proceedings, the petitioner shall file a petition for review of agency action with the appropriate appellate court in the form required by the appellate rules of the appropriate appellate court.

(b) The appellate rules of the appropriate appellate court shall govern all additional filings and proceedings in the appellate court.

(3) The contents, transmittal, and filing of the agency's record for judicial review of formal adjudicative proceedings are governed by the Utah Rules of Appellate Procedure, except that:

(a) all parties to the review proceedings may stipulate to shorten, summarize, or organize the record;

(b) the appellate court may tax the cost of preparing transcripts and copies for the record:

(i) against a party who unreasonably refuses to stipulate to shorten, summarize, or organize the record; or

(ii) according to any other provision of law.

(4) The appellate court shall grant relief only if, on the basis of the agency's record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following:

(a) the agency action, or the statute or rule on which the agency action is based, is unconstitutional on its face or as applied;

(b) the agency has acted beyond the jurisdiction conferred by any statute;

(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;

(f) the persons taking the agency action were illegally constituted as a decision-making body or were subject to disqualification;

(g) the agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court;

(h) the agency action is:

(i) an abuse of the discretion delegated to the agency by statute;

(ii) contrary to a rule of the agency;

(iii) contrary to the agency's prior practice, unless the agency justifies the inconsistency by giving facts and reasons that demonstrate a fair and rational basis for the inconsistency; or

(iv) otherwise arbitrary or capricious. 1988

SUMMARY OF MEDICAL RECORD
REGARDING AN INDUSTRIAL INJURY

TO: Dr. Lynn Gaufin
1055 North 300 West, Suite 400
Provo, Utah 84604

Applicant Kerry LeRoy Willardson
Date of Injury 04/15/88
Area Affected Right Hip & Leg

1. Is there a medically demonstrated causal relationship between the industrial injury and the problems you have been treating? Yes
2. Has Applicant reached maximum medical improvement? Yes When? 5/5/88
3. Has Applicant been released by you to return to work? When? *Recommended medical retirement*
4. Was it a regular full duty or light duty work release? No
5. Has Applicant a permanent impairment due to the industrial injury? Yes; if so, what is the percent of impairment (whole body)? ~~100%~~ 7 1/2 %
6. Has Applicant a permanent impairment which existed before his industrial injury? Yes; if so, what is the percent of impairment (whole body)? 7 1/2 %
7. Was the industrial injury aggravated by any pre-existing condition and/or was any pre-existing condition aggravated by the industrial injury? Previously condition was aggravated by industrial injury
Dated this 15 day of Sept, 1988

[Signature]
Physician's Signature

AUTHORIZATION FOR RELEASE OF MEDICAL INFORMATION

I hereby authorize and request you to release to my attorneys, DABNEY & DABNEY, P.C., the above requested medical information concerning my medical history, physical condition, prognoses and treatment rendered by you to me. IF THERE IS ANY CHARGE INVOLVED IN PROVIDING THE REQUESTED INFORMATION, PLEASE FORWARD A BILL FOR SUCH SERVICE DIRECTLY TO ME (THE PATIENT).

Kerry Willardson
Patient's Signature

ined Release in char
medical records
Summary
Physical
Commission Expires:

NOTE: Address all questions to above law firm, not Utah Industrial Commission!

[Signature]
Notary Public Residing in:
Salt Lake, UT

12th day of September, 1988.

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SUMMARY OF MEDICAL RECORD

REGARDING AN INDUSTRIAL INJURY

TO: Dr. David R. Heiner
945 West Hospital Dr., Suite 8
Price, Utah 84501

Applicant Kerry LeRoy Willardso
Date of Injury 04/15/88
Area Affected Right Hip & leg

1. Is there a medically demonstrated causal relationship between the industrial injury and the problems you have been treating? yes
2. Has Applicant reached maximum medical improvement? yes When? unknown
3. Has Applicant been released by you to return to work? no When? physical return
4. Was it a regular full duty or light duty work release? —
5. Has Applicant a permanent impairment due to the industrial injury? not met
if so, what is the percent of impairment (whole body)? 15% yes
6. Has Applicant a permanent impairment which existed before his industrial injury? yes; if so, what is the percent of impairment (whole body)? 45%
7. Was the industrial injury aggravated by any pre-existing condition and/or was any pre-existing condition aggravated by the industrial injury? yes

Dated this 19 day of September, 1988.

Heiner
Physician's Signature

AUTHORIZATION FOR RELEASE OF MEDICAL INFORMATION

I hereby authorize and request you to release to my attorneys, DABNEY & DABNEY, P.C., the above requested medical information concerning my medical history, physical condition, prognoses and treatment rendered by you to me. IF THERE IS ANY CHARGE INVOLVED IN PROVIDING THE REQUESTED INFORMATION, PLEASE FORWARD A BILL FOR SUCH SERVICE DIRECTLY TO ME (THE PATIENT).

Kerry Willardson
Patient's Signature

SUBSCRIBED and SWORN to before me this 12th day of September, 1988.

My Commission Expires:

June 1991
Notary Public Residing in:

NOTE: Address all questions to above law firm, not Utah Industrial Commission!