

1992

Kerry L. Willardson v. Utah Industrial Commission : Reply Brief

Utah Court of Appeals

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BRIEF

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DOCKET NO. 920165CA

UTAH COURT OF APPEALS

KERRY L. WILLARDSON,

Petitioner,

vs.

UTAH INDUSTRIAL COMMISSION,
BEAVER CREEK COAL CO., CIGNA
INSURANCE CO., and the
EMPLOYERS' REINSURANCE FUND,

Respondents.

Case No. 920165-CA

Priority No. 7

REPLY BRIEF OF PETITIONER

PETITION FOR REVIEW OF

DENIAL OF PETITIONER'S MOTION FOR REVIEW OF

ORDER OF THE INDUSTRIAL COMMISSION OF UTAH

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FILED
Utah Court of Appeals

FEB 16 1993


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Clerk of the Court

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STANDARD OF REVIEW

Respondents have disputed the applicable standard of review to be applied to the issues in this case. It is the parties characterization of the issues which leads to the dispute over the proper standard of review.

Mr. Willardson identified as the first issue whether Mr. Willardson suffered a compensable industrial accident. That issue was identified in Mr. Willardson's Docketing Statement as an issue and was not objected to by Respondents; nor did Respondents indicate that they would modify or raise other issues at that time. In their brief, however, Respondents have for the first time specified that the issue is really whether Mr. Willardson work activities on April 15, 1988 were the medical cause of his disability. After stating that as the issue, they allege that it is a factual issue and should be governed by the "substantial evidence" test. That argument while correct as a matter of law is not responsive to the applicable standard to be applied to the issue Petitioner has raised.

The relevant issue is whether Mr. Willardson suffered a compensable industrial injury and not the more restrictive issue of medical causation. The Order of the Administrative Law Judge, adopted by the Industrial Commission, states as follow:

IT IS THEREFORE ORDERED that the applicant's claim for permanent total disability benefits associated with the work activities of April 15th, 1988 is dismissed with prejudice for failure to establish a compensable industrial injury. (R. at 26).

Neither the Administrative Law Judge or the Industrial Commission made a single Finding of Fact on the issue of medical causation. The Findings of Fact portion of the Order of the Administrative Law Judge is not proper fact finding but merely an "informative summary of the evidence presented" such as was found to be inadequate and improper in Adams v. Board of Review, 821 P.2d 1 (Utah App. 1991). The only discussion of medical causation occurs in the Conclusions of Law section of the Order. Conclusions of Law are reviewed under the "correction of error standard" and no deference need be given to the agency's view of the law. Administrative Procedures Act, Utah Code Annotated, Section 63-46b-16(4)(e) (1988). Mor-flo Industries v. Board of Review, 817 P.2d 328 (Utah 1991). Morton International, Inc. v. Auditing Division of the Utah State Tax Commission, 814 P.2d 581 (Utah 1991).

The parties agree that the second issue as to whether the correct standard of proof was applied should also be governed by the "correction of error standard", thus no reply is required to Respondent's arguments thereon.

In regards to the issue of failure to convene a Medical Panel, Respondents allege that the standard of "abuse of discretion" should apply. "Abuse of discretion" is not a standard of review under the Utah Administrative Procedures Act, and the cases cited by Respondents were not based on the current standards of review necessitated by that Act. The issue is not whether there was an abuse of discretion, but rather whether by reason of the Industrial Commission's own rules and regulations, there was no discretion to

be exercised and whether the Industrial Commission acted unlawfully in not convening a Medical Panel.

DETERMINATIVE STATUTE/RULE

Utah Code Annotated, Section 35-1-77 (1) (a) (1988) is the determinative statute in this case. Rule 568-1-9 of the Industrial Commission's administrative rules is also applicable. They are set forth in full in the Addendum hereto as Exhibits A and B.

STATEMENT OF FACTS

The parties do not truly dispute the relevant and applicable facts in this matter. Despite the fact that Respondents allege Mr. Willardson has failed to marshall the evidence in support in the Findings of the Administrative Law Judge and the Industrial Commission, there is not a single significant relevant fact cited and referred to in Respondent's Brief that does not also appear in Mr. Willardson's Statement of Facts.

Any failure to completely marshall the evidence in support of the Order is due to the inadequate Findings as argued both above and in Mr. Willardson's original Brief. Indeed, Mr. Willardson's Brief contains statements of pre-existing and subsequent injuries to which even the Respondents have not referred. The only true difference between the Statement of Facts contained in the two Briefs is of style and tone; Mr. Willardson has set out the facts fully and without commentary, while Respondent's version is argumentative and biased.

While Mr. Willardson is reluctant to reiterate the facts at this stage, it is important to keep in mind that the following are the relevant, essential and undisputed facts:

1. Mr. Willardson undeniably had a history of prior back injuries including a lumbar laminectomy in 1971 (R. at 20), a diagnosis of osteopathic and degenerative disk disease of the lumbar spine in July of 1993 (R. A-7 at 73), and a fall at home from a ladder in June of 1988 (R. at A-8 at 169).

2. Mr. Willardson suffered an industrial injury on or about April 15, 1988, while in the employ of Respondent Beaver Creek Coal Company. (R. at 8).

3. Mr. Willardson was never able to return to work and it is conceded by all parties that he is permanently and totally disabled. (R. at 10, 74).

4. The United States Social Security Administration also found him to be totally disabled and awarded him total disability benefits beginning April 15, 1988, the date of his industrial accident. (R. A-12).

5. Dr. C. Kotrady in his Physician's Initial Report of Work Injury indicated that Mr. Willardson's condition was the result of his industrial injury, while also noting the existence of pre-existing disk disease. (R. at A-2 at 11.5). Dr. Kotrady saw Mr. Willardson on two occasions, and his medical records comprise a mere six pages, two of which are actually his wife's records. (R. at A-2 at 6-12).

6. Dr. Kotrady never released Mr. Willardson to return to work (despite his initial impression that he would be able to return in ten days), and has never directly stated or even implied that Mr. Willardson's current total disability condition is not at least partially related to his industrial accident. Dr. Kotrady last saw Mr. Willardson on April 19, 1988 (R. A-2 at 8) (only four days after the industrial accident), and some three years prior to the Hearing before the Administrative Law Judge!

7. Mr. Willardson was treated by Drs. Heiner and Gaufin over a two year period between April 1988 and February 1990. He was seen approximately every month or two. The medical records of those two doctors cover the last two years of Mr. Willardson's medical history and comprise some 26 pages. Dr. Gaufin, a Neurologist, specifically found degenerative disk and joint disease, but stressed that the lumbar radiculopathy was secondary to the work related injury of April 15, 1988 (R. A-6 at 58-59).

8. Dr. Kotrady never issued a direct opinion as to the relationship between disability sustained by Mr. Willardson and the industrial accident. Dr. Heiner gave him a 30% whole person rating, with 50% of that being due to the industrial accident (R. A-4 at 42-46). Dr. Gaufin gave a 15% whole person rating, with 50% due to the industrial accident. (R. A-6 at 60).

9. The Respondents did not have Mr. Willardson examined by a physician of their own choosing; nor did they present any contrary medical evidence at the hearing. The Administrative Law Judge did not refer Mr. Willardson to a Medical Panel.

While the Respondents attempt to cast doubt on Mr. Willardson's testimony about his injuries resulting from "screen jerking," that argument is not relevant to the resolution of his claim. Even if the accident occurred as the Administrative Law Judge states as "the result of lifting twenty-twenty five pound wire mesh screens and lifting them to a belt, a procedure involving climbing, stretching, reaching and twisting motions", (R. at 25), it would still be compensable. Allen v. Industrial Commission, 729 P.2d 15 (Utah 1986). Sisco Hilte v. Industrial Commission, 766 P.2d 1089 (Utah App. 1988).

SUMMARY OF REPLY

Utah Code Annotated, Section 35-1-77 (1988) gives the Industrial Commission discretion in determining which cases are to be referred to Medical Panels. The Industrial Commission pursuant to the Utah Administrative Procedures Act, Utah Code Annotated, Section 63-46B-16, et. seq., (1988) adopted rules and regulations governing the exercise of that discretion. R568-1-9 removes the Industrial Commission's general discretion and specifies the terms and conditions in which a Medical Panel "will be utilized".

The Industrial Commission is bound by it's own formally promulgated rules and regulations, and does not have the discretion to ignore them or to modify them without engaging in formal rule - making procedures. This case involves "conflicting medical reports of permanent physical impairment which vary more than 5% of the whole person". Under such facts, a Medical Panel must be used and

this case should be remanded back to the Industrial Commission for the purpose of convening a Medical Panel.

The issue as to whether a compensable industrial injury occurred turns on the question of medical causation. The existing Orders by the Administrative Law Judge and the Industrial Commission are deficient in that they fail to engage in adequate fact finding. Such failure prevents Mr. Willardson from fully marshalling all the evidence in support of the Order, and showing that they are insufficient and inadequate. There is, however, substantial evidence of permanent, partial impairment as the result of an industrial injury. To the extent that there is any doubt as to medical causation and whether a compensable injury has occurred, that issue can only be adequately and fairly resolved after a Medical Panel has been convened and makes its report. This matter should be remanded for review by a Medical Panel.

A R G U M E N T

I

THE INDUSTRIAL COMMISSION COMMITTED ERROR IN NOT REFERRING THIS MATTER TO A MEDICAL PANEL.

Although Utah Code Annotated, Section 35-1-77 (1) (a) (1988) makes the referral of medical aspects of a case to a Medical Panel discretionary with the Industrial Commission, the Industrial Commission has utilized that discretion in enacting rules and regulations specifying the standards for when a Medical Panel will be convened. Industrial Commission Rule R568-1-9 governing the

"Necessity of submitting a case to a Medical Panel" provides in relevant part, as follows:

Pursuant to Section 35-1-77, UCA, the Industrial 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 cut-off date which vary more than 90 days, and/or,

(c). Medical expenses and controversy amounting to more than \$2,000.00... (emphasis added). See Addendum, Exhibit A.

Respondents argue that referral to a Medical Panel is not required because there was no credible evidence of medical causation. While conceding that Dr. Gaufin and Dr. Heiner's reports establish conflicting medical reports which vary by more than 5%, they dismissed those reports as not being "credible." They allege lack of credibility on the basis that the reports were only "fill in the blank forms", that the Doctors did not have access to all of Mr. Willardson's medical records, and that their reports do not specifically state that the ratings are based on the AMA Guidelines. That argument is fallacious.

Indeed, it must be remembered that there is no evidence that Dr. Heiner or Dr. Gaufin did not have - or even needed - all of

Mr. Willardson's records or that their reports were not based upon the AMA Guidelines. Significantly, they were both Mr. Willardson's treating physicians. Although their disability ratings appear on a short form, they are based upon substantial medical reports compiled over a two (2) year period.

The rule does not require that there be conflicting credible reports, that the Doctors have all of the medical records or even that the medical reports be based upon the AMA Guidelines. All the Rule requires is that there be "conflicting medical reports of permanent physical impairment which vary more than 5% of the whole person."

In effect, Respondents are attempting to amend, outside of formal rule making procedures, the Industrial Commission's rules to provide that Medical Panel referral is only required when the Administrative Law Judge finds the reports credible and based on all the evidence in the case, as well as based upon the AMA Guidelines. The Rule, however, does not so require. If such was required, one wonders why a Medical Panel would even be required since the existing reports would be virtually conclusive. The rule flatly provides that a panel "will be used when there are conflicting medical reports of permanent physical impairment which vary by more than 5% of the whole person."

Although the statute makes referral to a Medical Panel discretionary, the Industrial Commission Rule exercises that discretion to make it mandatory should the requirements in

subsections (a), (b) or (c) of the Rule be met. In response to this argument Respondents make three points:

1. Legislative intent. Respondents argue that the Industrial Commission cannot adopt a mandatory rule when the legislature provided that referral would be discretionary. It is clear that given a grant of discretion, an administrative agency can adopt rules and regulations governing the application of the discretion. Indeed, the failure to do so itself may be an abuse of discretion. Were this not so, the Industrial Commission would be constantly subject to claims of "abuse of discretion" since it would have no standards to guide it in its exercise of discretion. There is no conflict between the legislature's grant of discretionary authority to the Industrial Commission, and the Industrial Commission's rule that it will exercise that discretion by making referrals mandatory under specific circumstances. Such rule-making is a proper utilization of the Industrial Commission's discretionary authority.

2. Exceeding the scope of legislative authority. Respondents also argue that the Industrial Commission Rule, providing for mandatory referral in certain circumstances exceeds the scope of the discretionary authority granted by statute. Respondents are essentially remaking the same point they argued above. They cite no authority on point for this position. A regulation which makes referral to a Medical Panel mandatory under certain circumstances is consistent with the discretionary authority to make those referrals granted by the statute. The regulation is not void for

the mere reason that it specifies the terms and conditions under which the grant of discretion will be exercised.

3. The Administrative Law Judge can disregard the finding of the Medical Panel. Mr. Willardson does not dispute the fact that the Medical Panel report is not conclusive on the issue of medical causation. The Administrative Law Judge, and indeed the Industrial Commission itself, may, after viewing the evidence as a whole, including the report of the Medical Panel, make the decision that other evidence in the case outweighs the findings and conclusions of a Medical Panel. Respondent's argument, however, does not at all address whether a Medical Panel report must in the first instance be received and considered.

The Respondent's argument that administrative agencies' rules are mere "guidelines" which can be disregarded at will has already been considered and rejected by the Utah Supreme Court. In State, by and through Department of Community Affairs v. Utah Merit System Council, 614 P.2d 1259, the Supreme Court stated as follows:

The Council cannot violate its own procedure rules.... Defendants contend that procedure rules are mere 'guidelines', but administrative regulations are presumed to be reasonable and valid and cannot be ignored or followed by the agency to suit its own purpose. Such is the essence of arbitrary and capricious action. Without compelling reasons for not following its own rules, an agency must be held to them. (citations omitted) Id. at 1263.

That holding is well grounded and finds authority in virtually all other jurisdictions. An administrative agency may not violate or ignore its own rules, and where it fails to follow the rules which it has promulgated, its orders are unlawful. Clay v. Arizona

Interscholastic Ass'n, Inc., 779 P.2d 349 (Arizona 1989). Tew v. City of Topeka Police and Fire Civil Service Commission, 696 P.2d 1279 (Kansas 1985). State Ex Rel. Nevada Tax Commission v. Safeway Super Service Stations, Inc., 668 P.2d 291 (Nevada 1983). U. S. v. RCA Alaska Communications Inc., 597 P.2d 489 (Alaska 1979).

Should there be any conflict between a statutory grant of authority and an Administrative rule, the rule controls where the matter at issue is merely "procedural" as distinguished from being "substantive." State v. Hawkins, 680 P.2d 522, 523 (Arizona App. 1984). Clearly, referral of a Workers Compensation case to a Medical Panel is not a substantive matter but a procedural one. As Respondents have pointed out, the Medical Panel report is merely additional evidence which must be weighed with the record as a whole and may be disregarded by the fact finder, if a proper basis exists for it. In such cases, the Administrative Rule controls over the statutory enactment.

In this case, the causal connection between the work-related injury and Mr. Willardson's permanent total disability, if not clear, was at least uncertain. Failure to refer the matter to a Medical Panel was, therefore, error. The Order Denying the Motion for Review should at least be reversed and the matter remanded with directions to refer the matter to a Medical Panel, since failure to do so was in direct conflict with the Industrial Commission's Rule. The failure to obtain a Medical Panel opinion resulted in the Administrative Law Judge lacking essential and necessary information to adjudicate Mr. Willardson's claim.

II

PETITIONER SUSTAINED AN INJURY BY REASON OF AN INDUSTRIAL ACCIDENT IN THE COURSE OF HIS EMPLOYMENT.

(a) Petitioner has marshalled the evidence indicating that it is insufficient to support the Order of the Industrial Commission.

As stated above, Mr. Willardson has referenced all of the medical evidence which allegedly supports the findings of the Administrative Law Judge, and that evidence is overwhelmingly insufficient to support the Order entered. Mr. Willardson has admitted that he has a "history of prior back injuries and has been undeniably suffering from moderate to severe arthritic changes in his lumbar spine and pelvis." (R. at 36). He painstakingly recounted and referenced his prior medical history. The findings of the Administrative Law Judge and the Industrial Commission, however, are based solely on the scant medical records of Dr. Kotrady. The four pages of medical records which relate to Mr. Willardson cover only two visits over a four day period. The records and findings of Dr.'s Gaufin and Heiner on the other hand encompass two years of regular physical examination and treatment. Respondents are unable to indicate any specific evidence which Mr. Willardson should have but failed to marshal in support of the Order below.

The Findings of Fact in this case are grossly deficient. The Administrative Law Judge did not engage in proper fact finding; rather, the Findings of Fact portion of the Order is merely a summary of the evidence presented. This Court has previously

stated that a rehearsal of contradictory evidence does not constitute findings of fact. Adams v. Board of Review, supra. The findings made by the Administrative Law Judge are deficient in that they fail to address in detail the issue of medical causation. As argued above the only discussion of medical causation occurs not in the Findings of Fact portion of the Order but in the Conclusions of Law portion.

The Administrative Law Judge spends a great deal of time discussing Mr. Willardson's prior medical problems, but does not make precise Findings as to his current medical condition and the causes for it. This failure was compounded by the Industrial Commission's unwarranted refusal to submit this matter to a Medical Panel as complained above.

The Administrative Law Judge's purported Findings of Fact and Conclusions of Law and Order, as well as the Industrial Commission's Order Denying the Motion for Review, should at a minimum be vacated and a new Order entered with detailed and subsidiary facts to disclose the steps by which the ultimate conclusions were reached. Failure to do so denies Mr. Willardson the ability to marshal the evidence in support of the findings and show that it is not substantial. Grace Drilling Co. v. Board of Review, 776 P.2d 63, 67-68 (Utah App. 1989).

(b) The Industrial Accident aggravated Petitioner's pre-existing condition.

Respondents are correct that the aggravation of a pre-existing condition is compensable only if it is a permanent, ratable

aggravation. Respondent's error, however, is that Mr. Willardson's industrial injury did in fact aggravate his pre-existing condition. The medical records and reports of Dr. Gaufin and Dr. Heiner make clear that at least 50% of Mr. Willardson's present disability status is directly and causally related to his industrial accident. There was no medical evidence offered at the hearing which would suggest that Mr. Willardson's injuries were not at least partially the result of the industrial accident.

The Administrative Law Judge cannot arbitrarily discount competent, uncontradicted evidence indicating that the industrial injury was the cause of Mr. Willardson's present permanent, total disability. Kaiser Steel Corp. v. Industrial Commission, 709 P.2d 1168 (Utah 1985). Frito-Lay, Inc. v. Jacobs, 689 P.2d 1335 (Utah 1984).

CONCLUSION/STATEMENT OF RELIEF SOUGHT

The Industrial Commission violated its own rules and regulations specifying that cases such as Mr. Willardson will be submitted to a Medical Panel. The Rule does not require that a referral will only occur when the conflicting medical reports are found by an Administrative Law Judge to be credible or that they must be based upon AMA Guidelines. Unfortunately, any failure to find medical causation in this case was undoubtedly compounded by the failure to refer this matter to a Medical Panel.

The Orders of the Administrative Law Judge and the Industrial Commission are deficient in that they fail to engage in proper fact finding. The Orders do not "sufficiently detail and include enough

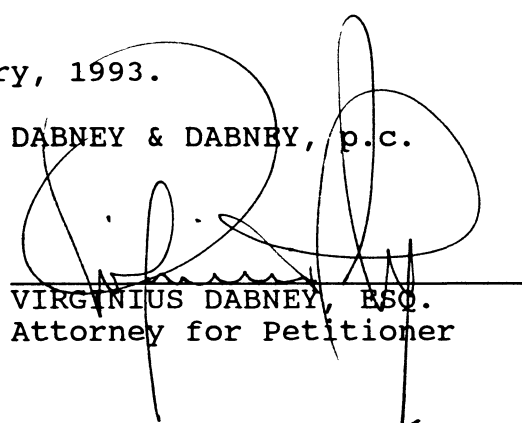
subsidiary facts to disclose the steps by which the ultimate conclusion on each of the factual issues was reached." Adams, supra.

It is undisputed that Mr. Willardson is presently permanently and totally disabled, and that that condition occurred as the result of his industrial accident. Prior to his accident he was gainfully employed, and following that accident he has been unable to return to work. He is entitled to benefits under the Utah Workers Compensation Act.

Therefore, it is respectfully requested that this Court remand this case to the Industrial Commission with instructions to either award him benefits based on the uncontroverted facts and medical evidence presently in the record, or in the alternative, to convene a Medical Panel.

DATED this 16th day of February, 1993.

DABNEY & DABNEY, p.c.



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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 16th day of February, 1993 to the following:

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ADDENDUM

EXHIBIT A: Utah Code Annotated, Section 35-1-77 (1988).

EXHIBIT B: Utah Administrative Code, Rule R568-1-9.

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. (Last amended 1991)

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

(b) When a claim for compensation based upon disability or death due to an occupational disease is filed with the commission, the commission shall, except upon stipulation of all parties, appoint an impartial medical panel.

(c) A medical panel shall consist of one or more physicians specializing in the treatment of the disease or condition involved in the claim.

(d) As an alternative method of obtaining an impartial medical evaluation of the medical aspects of a controverted case, the commission in its sole discretion may employ a medical director or medical consultants on a full-time or part-time basis for the purpose of evaluating the medical evidence and advising the commission with respect to its ultimate fact-finding responsibility. If all parties agree to the use of a medical director or medical consultants, they shall be allowed to function in the same manner and under the same procedures as required of a medical panel.

(2) (a) The medical panel, medical director, or medical consultants shall make such study, take such X-rays, and perform such tests, including post-mortem examinations if authorized by the commission, as it may determine to be necessary or desirable.

(b) The medical panel, medical director, or medical consultants shall make a report in writing to the commission in a form prescribed by the commission, and also make such additional findings as the commission may require. In occupational disease cases, the panel shall certify to the commission the extent, if any, of the disability of the claimant from performing work for remuneration or profit, and whether the sole cause of the disability or death, in the opinion of the panel, results from the occupational disease and whether any other causes have aggravated, prolonged, accelerated, or in any way contributed to the disability or death, and if so, the extent in percentage to which the other causes have so contributed.

(c) The commission shall promptly distribute full copies of the report to the applicant, the employer, and its insurance carrier by registered mail with return receipt requested. Within 15 days after the report is deposited in the United States post office, the applicant, the employer, or its insurance carrier may file with the commission written objections to the report. If no written objections are filed within that period, the report is considered admitted in evidence.

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

(e) If objections to the report are filed, the commission may set the case for hearing to determine the facts and issues involved. At the hearing, any party so desiring may request the commission to have the chairman of the medical panel, the medical director, or the medical consultants present at the hearing for examination and cross-examination. For good cause shown, the commission may order other members of the panel, with or without the chairman or the medical director or medical consultants, to be present at the hearing for examination and cross-examination.

(f) The written report of the panel, medical director, or medical consultants may be received as an exhibit at the hearing, but may not be considered as evidence in the case except as far as it is sustained by the testimony admitted.

(g) The expenses of the study and report of the medical panel, medical director, or medical consultants and the expenses of their appearance before the commission shall be paid out of the Employers' Reinsurance Fund. (as last amended by Chapter 116, Laws of Utah 1988)

R568-1-9 Guidelines for Utilization of Medical Panel.

Pursuant to Section 35-1-77, U.C.A., the Industrial 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 the 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.