

1984

Shirley Moyes, On Behalf of H. Jack Moyes,  
Deceased, State Or Utah And Utah State Insurance  
Fund v. Second Injury Fund And Industrial  
Commission of Utah : Petitioner's Brief

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

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SHIRLEY MOYES, on behalf of )  
H. JACK MOYES, deceased, )  
 )  
Petitioner, )  
 )  
vs. )  
 )  
STATE OF UTAH, STATE INSURANCE )  
FUND, SECOND INJURY FUND and )  
THE INDUSTRIAL COMMISSION OF )  
UTAH, )  
 )  
Respondents. )

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Case No. 19236

PETITIONER'S BRIEF

---

Writ of Review from  
Industrial Commission of the State of Utah

---

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FILED

FEB 14 1984

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	)	
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PETITIONER'S BRIEF ON APPEAL

NATURE OF CASE

This is a review of a final Order of the Industrial Commission of Utah denying petitioner, H. Jack Moyes, workmen's compensation benefits.

DISPOSITION IN LOWER ADMINISTRATIVE BODY

The Industrial Commission of Utah affirmed the Administrative Law Judge's Findings of Fact, Conclusions of Law and Order denying petitioner's request for permanent partial disability benefits on the grounds that the industrial accident did not create additional permanent partial disability.

RELIEF SOUGHT ON APPEAL

Petitioner requests this Honorable Court to review, reverse and/or remand the Order of the Industrial Commission of Utah for the purpose of awarding permanent partial disability

... from the employer and its insurance carrier to the  
... of petitioner's death, and for the further purpose of  
... Second Injury Fund benefits and other benefits as the  
... may have accrued before the date of death.

#### STATEMENT OF FACTS

Petitioner H. Jack Moyes was a sixty-year-old self-taught accountant employed by the Utah State Department of Finance.<sup>1</sup> Mr. Moyes experienced the following series of industrial injuries to his lower back over a period of 12 years preceding the date of his industrial injury.

(a) In 1967, Mr. Moyes injured his lower back during the course of his employment with Ibeck Motor Truck while changing a tire (R.2). Nine days following this reported accident (R.26), Mr. Moyes was hospitalized for six days, during which time he responded well and rapidly to treatment (R.163).

(b) In 1973, while in the employment of the Utah State Department of Finance, Mr. Moyes again injured his lower back when he slipped on some water while walking out of a restroom at his employer's office (R.24, 62). The petitioner was admitted to the hospital approximately one week following the industrial injury and was discharged nine days later with no further back pain (R.162).

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During the appeal of this matter, Mr. Moyes died of causes unrelated to the industrial injury, on or about October 1, 1983. Shirley Moyes, the wife of the decedent, was substituted for the purpose of this appeal.



(c) In 1976, also during the course of his employment with the Utah State Department of Finance, Mr. Moyes once more injured his lower back from lifting a desk (R.132). For this injury, Mr. Moyes was paid temporary total compensation for one week and five days in June 1979, two years after the date of the alleged injury (R.131(a)).

(d) Finally, on November 5, 1979, during the course of his employment with the Utah State Department of Finance, Mr. Moyes suffered an injury to his lower back when he fell down some steps at the State Capitol Building (R.15, 16). This injury is the subject of Mr. Moyes' industrial application and this appeal. Mr. Moyes missed occasional days at work due to back pain (R.16, 17), the pain progressed, and on December 8, 1979, Mr. Moyes' orthopedic surgeon recommended hospitalization and possible surgery (R.17). On January 7, 1979, a myelogram procedure revealed a large herniated disk in the lower back (R.19). Surgery was performed the following day to remove the herniated disk material (R.19) and a second surgery was required in December 1980 (R.20). Persistent pain and debilitation necessitated multiple injections and denervation procedures (R.20-21), and Mr. Moyes continued to experience severe back pain and radiating pain and had been unable to work since he was hospitalized in January 1980 (R.31).

The State Insurance Fund paid temporary total disability compensation to Mr. Moyes for the period January 1980 to September 24, 1981, and also paid medical bills associated with the surgeries performed (R.22).

Following termination of the temporary total disability payments for the November 5, 1979 industrial injury, Mr. Moyes petitioned the Industrial Commission of Utah for a hearing to determine the amount of permanent partial disability associated with the industrial injury. The State Insurance Fund responded to this petition by denying liability for continued compensation on the basis that the Moyes application inadvertently stated that the date of injury was May 5, 1979 instead of the actual date of November 5, 1979 (R.4). As Mr. Moyes did not sustain an injury on May 5, 1979, the Fund had no record of such injury date and accordingly denied liability. This clerical error was corrected on the record at the initial hearing for compensation (R.11). The State Fund further replied that Mr. Moyes had incurred prior back injuries and responded that any permanent disability related directly to the non-industrial injury of 1965 (R.5-6). At the hearing, Mr. Moyes established his prior history of industrially-related back injuries as well as the medical and surgical procedures necessitated as a result of these injuries (R.8-42). It was clarified that although Mr. Moyes was involved in a 1965 non-industrial accident, that accident injured his neck, not his lower back (R.27).

Subsequent to the hearing, the Administrative Law Judge referred Mr. Moyes to a medical panel for evaluation and assessment of his medical condition (R.44). Dr. Frank Dituri, a specialist in internal medicine (R.57), and Dr. Edward C. Spencer, an orthopedic surgeon, were appointed to the panel.

The panel was directed to respond to specific questions propounded by the Administrative Law Judge in terms of "reasonable medical probability" (R.44). The report of the medical panel concluded:

(a) That the percentage of permanent physical impairment attributable to Mr. Moyes' "previously-existing conditions" is 76% of the whole man (R.117);

(b) That the percentage of permanent physical impairment attributable to the industrial accident of November 5, 1979 is 0%; and

(c) That the permanent physical impairment attributable to the lumbar spine is the result of long years of chronic degenerative disease (R.116).

The medical panel neither stated nor explained its findings in terms of "reasonable medical probability". The panel did conclude "there is no medically-demonstrable causal connection" between Mr. Moyes' medical problems and the industrial accident of November 5, 1979 (R.117). This was supported by a statement that the medical panel "[did] not feel that the injury in November 1979 for which he did not see a doctor and for which he did not take off work caused any serious increase in impairment" (R.116).

Following receipt of the medical panel report, objections to the report were timely filed and a hearing was held. Dr. Frank Dituri served as the only witness for the medical panel who presented the medical panel report into evidence subject to cross-examination (R.63). At the hearing

In connection to medical panel report, the medical issues were not delineated between Dr. Dituri's conclusions that Mr. Moyes' lower back problems were the result of "long years of chronic degenerative disease", rather than caused by acute trauma related to the industrial accident of November 5, 1979 (R.77-79). Dr. Dituri based his finding on a hospital admitting history (R.75) and on a March 12, 1980 letter by one of Mr. Moyes' physicians that stated Mr. Moyes experienced a "steady progression of events" probably not precipitated by the November industrial injury (R.75). Dr. Dituri did not base his findings on medical evidence, to-wit, test reports, X-rays or operative and pathological reports (R.76-77). Dr. Dituri further admitted that the letter of March 12, 1980, upon which he relied, was later clarified within nine days by letter of March 21, 1980 from the same physician which noted that the November industrial injury could have precipitated Mr. Moyes' condition (R.138).

Dr. Robert Morrow, an orthopedic surgeon who specializes in spine injuries and who became Mr. Moyes' treating physician, offered significant medical testimony directly contradicting Dr. Dituri's conclusion that the lower back injuries were related to degenerative disease as opposed to trauma. Specifically, Dr. Morrow stated:

- (a) There is a medically demonstrable causal connection between Mr. Moyes' lower back injuries and the industrial accident of November 1979 (R.97);
- (b) Mr. Moyes has residual problems relating to

that industrial injury (R.97);

(c) Mr. Moyes was temporarily totally disabled as result of the industrial injury of November 1979 (R.93);

(d) Mr. Moyes has at least a 5% permanent partial impairment attributable to the industrial injury of November 1979 (R.98); and

(e) Future medical treatment will be required as a result of the November 1979 industrial injury (R.98-99).

Dr. Morrow's conclusions were based upon competent medical evidence, including the results of a myelogram procedure performed on Mr. Moyes on January 7, 1980 which demonstrated "findings consistent with a left antero-lateral herniated nucleus palposus at L-4/L-5 level" (R.99). The operative report of Mr. Moyes' physician was also relied upon by Dr. Morrow which noted a "moderately large bulging disk" (R.99). Dr. Morrow testified that it was reasonably medically probable that the large herniation was caused by the November 1979 industrial injury, notwithstanding pre-existing degenerative disease, because a large herniation of the type Mr. Moyes had would "probably not have been going on for a long period of time" (R.104), and would not have been caused without trauma. At the conclusion of Dr. Morrow's testimony, Dr. Dituri was again called to the stand and asked if, in his opinion, the industrial accident of November 1979 could reasonably have caused the injury as related by Dr. Morrow. The Administrative Law Judge would not allow a response.

Subsequent to the hearing on objections to medical

panel report, the Administrative Law Judge made Findings of Fact, Conclusions of Law and an Order denying applicant's petition for compensation for the reason that the industrial accident did not cause any permanent partial disability. In so finding, the Administrative Law Judge made no findings or explanation of the medical issues raised, but simply concluded, without explanation, that the petition should be denied (R.187). A timely filed motion for review before the Industrial Commission was denied (R.203), resulting in this appeal.

#### ARGUMENT

I. PETITIONER SHIRLEY MOYES MAY PROSECUTE THIS APPEAL FOR BENEFITS WHICH WOULD HAVE ACCRUED PRIOR TO DATE OF DEATH.

A side issue raised since the motion to substitute parties was granted by this Honorable Court questions petitioner's right to appeal benefits after the date of death of H. Jack Moyes. A majority of courts have found claims not to be abated where the applicant dies during the hearing process. This is so even during appeal where the claim was originally denied. Lightle v. Department of Labor, 413 P.2d 814 (Wash. 1966); Powell v. Department of Labor, 485 P.2d 990 (Wash. 1971), rev'g, 463 P.2d 748 (Wash. App. 1970).

This claim is necessarily limited to the amount which would have accrued prior to petitioner's date of death if the Industrial Commission not denied the claim. See Parker v. Industrial Commission, 87 Utah 468, 50 P.2d 278 (Utah 1935), discussed in Pacific States Cast Iron Pipe Co. v. Industrial

Commission, 218 P.2d 970 (Utah 1950). In the instant matter, the sole issue is causation of 5% disability. Was it or was it not associated with the industrial injury? All other factors of an award are known and submitted. Thus, under these limited conditions, the widow or estate should be allowed to continue to prosecute this appeal and receive payment accrued prior to the injured employee's date of death. See, generally, Larson, Workmen's Compensation Law, §58.42, et seq., Vol. 2 (1982).

II. THE INDUSTRIAL COMMISSION ARBITRARILY DISREGARDED SUBSTANTIAL EVIDENCE IN PETITIONER'S FAVOR, AND ENTERED FINDINGS OF FACT UNSUPPORTED BY THE EVIDENCE.

Although the Industrial Commission's findings and conclusions on questions of fact are not ordinarily subject to review, an important exception is made where "the findings of fact do not support the award". Kaiser Steel Corp. v. Monfredi, 631 P.2d 888, 889 (1981) (construing Utah Code Ann. §31-1-84(2)).

The Administrative Law Judge, without explanation, simply disregarded substantial and material evidence presented in petitioner's favor at the hearing on objections to the medical panel report. Despite his acknowledgment that petitioner's treating physician, Dr. Morrow, was a "very fine orthopedic specialist", the Administrative Law Judge ignored the treating surgeon's testimony about petitioner's impairment and its probable cause.

The Administrative Law Judge's refusal to believe Dr. Morrow is manifestly unreasonable because his testimony is

based on uncontradicted, competent medical evidence, including x-rays, myelogram, and an operative report noting "a large hernia of the disk", a hernia of the type usually associated with acute trauma. The refusal to give due weight to this substantial medical evidence is especially unjust to petitioner since Dr. Dituri admitted the medical panel report was not based upon comparable medical evidence. The "Commission cannot act arbitrarily and simply ignore competent and credible evidence when there is nothing discrediting therein and there is no evidence so contrary". Buxton v. Industrial Commission of Utah, 587 P.2d 121, 123 (1978). See Vause v. Industrial Commission of Utah, 17 Utah 2d 217, 407 P.2d 1006 (1965).

Credible and important medical evidence in petitioner's favor was presented without substantial contradiction at the hearing on objections to the medical panel report. The fact such evidence was totally ignored justifies the conclusion that the Commission acted capriciously, arbitrarily and unreasonably in disregarding or refusing to believe the evidence. Therefore, the Industrial Commission's denial of benefits is not supported by the evidence and must be reversed.

III. SUBSTANTIAL EVIDENCE COMPELS A FINDING IN FAVOR OF PETITIONER AS THE ONLY REASONABLE FINDING THAT COULD BE MADE, AND THE COMMISSION'S REFUSAL TO DO SO IS CAPRICIOUS AND ARBITRARY.

The clear standard for when the Industrial Commission's Findings of Fact should be displaced is when:



[T]he Commission's findings are "arbitrary or capricious", or "wholly without cause" or contrary to the "one [inevitable] conclusion from the evidence" or without "any substantial evidence" to support them. . . .

Kaiser Steel Corp. v. Monfredi, *supra*, at 390. See Kincheloe v. Coca-Cola Bottling Company of Ogden, 656 P.2d 440, 443 (1982). The only evidence upon which the Commission relied in denying petitioner permanent partial benefits was the subjective conclusion of the medical panel that because applicant suffered from significant pre-existing injury which was in the nature of degenerative disk disease, there was no causal connection between the industrial accident of November 5, 1978 and the subsequent surgery and disability.

It is the Industrial Commission, rather than the medical panel, which has the responsibility of deciding the issues in each case. Jensen v. U.S. Fuel Co., 424 P.2d 440, 442 (1967). In deciding issues in workmen's compensation proceedings, the Commission's duty is to consider not just the medical panel's report, "but also all of the other evidence and to draw whatever inferences and deductions that fairly and reasonably could be derived therefrom". IGA Food Fair v. Martin, 584 P.2d 828, 830 (1978).

There is no indication in this case that the Industrial Commission considered all or even any of the substantial and largely uncontested evidence in petitioner's favor. Instead, it simply adopted the medical panel's conclusion. As stated, the medical panel relied heavily upon a

admitting history as well as a letter from an  
physician which, on its face, was speculative, not  
subject to cross-examination and later modified. If these were  
the only two significant items relied upon by the medical  
panel, it is then obvious that the medical panel was attempting  
not to evaluate and diagnose, but rather to replace its own  
subjective opinion for the determination of the Administrative  
Law Judge.

When faced with demonstrable medical evidence,  
to-wit, the myelogram report and pathology, the chairman of the  
medical panel admitted that he did not look at, nor did he  
consider, this piece of evidence at all. When confronted with  
this direct evidence, the chairman of the medical panel was not  
allowed to state his opinion as to whether there was a  
reasonable medical probability that the industrial injury in  
fact caused the subsequent disability. (R.94.) Thus, the  
record reveals that there is no substantial evidence to support  
the conclusion or decision of the Commission. On the other  
hand, as discussed above, the evidence clearly and persuasively  
supports petitioner's claim.

In a similar case, Powers v. Industrial Commission,  
19 Utah 2d 140, 427 P.2d 740 (1967), the Industrial Commission  
adopted, without question, the medical panel report and denied  
compensation stating that the firefighting activities of the  
claimant had not aggravated a pre-existing heart disease. This  
Court reversed the decision, first noting that the medical  
panel report was erroneously based in large part on the fact

that the claimant did not consult a doctor until six months after the incident. Secondly, they stated that the Commission may not disregard substantially uncontraverted evidence supporting a claim that an industrial accident aggravated a pre-existing ailment. See also, Perchelli v. Utah State Industrial Commission, 25 Utah 2d 58, 475 P.2d 835 (1970) (conclusion unsupported by record).

As in the Powers case, in the present case the medical panel report and Administrative Law Judge's Findings of Fact and Conclusions of Law rely heavily on the fact that petitioner did not immediately report to his doctor, but waited over a month until the time of his next appointment. Additionally, the Commission adopts the medical panel report which unreasonably and arbitrarily ignores credible competent evidence which clearly and persuasively supports petitioner's claim. Thus, actions of the Commission in adopting without question the conclusory medical report, despite substantial evidence compelling a finding in favor of petitioner, are arbitrary and capricious.

As this Court has asserted, the right to review decisions of the Industrial Commission was not intended to provide an "automatic rubber stamp" for Commission actions, "rather, it was intended as a safeguard against possible arbitrary, unreasonable or unjust actions of the Commission". Nuzum v. Roosendahl Construction & Mining Corp., 565 P.2d 1144, 1146 (1977). Utah statutes provide:

The commission, upon referral of a case to it by an administrative law judge, or upon a motion being filed with it to review its own order, or an administrative law judge's supplemental order, shall review the entire record made in said case. (Emphasis added.)

Mich Code Ann. §35-1-82.54 (Supp. 1983).

In this case, the only conclusion which can be reasonably drawn from the evidence of the "entire record" is that petitioner's industrial accident created additional permanent partial disability. Therefore, the Industrial Commission's refusal to so find is contrary to law and reason and must be reversed.

IV. THE ADMINISTRATIVE LAW JUDGE ACTED ARBITRARILY AND CAPRICIOUSLY BY FAILING TO ADOPT FINDINGS OF FACT.

There is no controversy in this case that an accident occurred or that the applicant was entitled to temporary total disability benefits and medical payments. The sole issue to be determined by the Industrial Commission was: did the petitioner suffer an impairment or aggravation to pre-existing impairments as a result of the industrial accident? This is a factual issue which must be determined based upon proper findings of fact. The Administrative Law Judge stated in his decision only that after reviewing the testimony of Dr. Morrow and the medical panel report, the Administrative Law Judge adopts the findings of the medical panel. No further explanation was given. As this Court has previously held:

Without proper subordinate findings, it is impossible for a reviewing court to exercise its duty of determining whether the Commission applied appropriate legal standards to findings adequately supported by the evidence.

Barney & Sons v. Industrial Commission, 609 P.2d 943, 949 (Utah 1980). The medical report states:

We do not feel that the injury of November of 1979, for which he did not see a doctor and for which he did not take off work, caused a serious increase in this impairment. (R.186.) (Emphasis added.)

Thus, the report erroneously relies in great part on the fact that petitioner did not immediately consult his doctor. As discussed above, whether or not the petitioner immediately seeks medical attention is not determinative of a claim for compensation for aggravation of pre-existing impairments.

Powers v. Industrial Commission, *supra*, at 742. By simply adopting the report of the medical panel which is not competent evidence and which admittedly relied upon assumptions rather than demonstrable medical evidence, the Commission compounded not only its "gratuitous assumptions, but also the unfounded conclusions that sprang therefrom". Redman Warehousing Corp. v. Industrial Commission, 22 Utah 2d 398, 454 P.2d 283, 285 (1969).

Additionally, it must be noted that the head of the medical panel and the only member to testify in support of its "findings of fact" at the hearing on objections is a specialist in internal medicine. Utah workmen's compensation statutes specify that a medical panel with qualifications set forth in

Public Law Ann. §35-2-56 (Supp. 1982) should evaluate the medical aspects of the case. "The Commission shall appoint an ad hoc medical panel to consist of one or more physicians specializing in the treatment of a disease or condition involved in the claim." (Emphasis added.)

Although Dr. Spencer, one member of the medical panel, is an orthopedic surgeon, it is clear that Dr. Dituri played a major role in establishing the panel's finding that the industrial accident did not create additional partial disability. Dr. Dituri's testimony makes it clear that he has no expertise or even understanding of back injuries and problems relating thereto. Thus, it is in direct conflict with petitioner's statutory right that the evaluation by an expert in the field of his injury to have a non-expert play such a major role which results in denial of significant benefits.

Petitioner does not argue that the Commission is duty bound to accept the testimony of petitioner's witness above that of the medical panel witnesses. The Commission cannot, however, arbitrarily accept one conclusion over another without a finding as to the reasons for adopting one version over another, especially where the version accepted is not supported by competent medical evidence. In such case, it is impossible to determine whether the Commission applied appropriate legal standards.

To merely "accept" or "adopt" the panel's finding as its own, the Industrial Commission elevates the panel to factfinder and thus encroaches upon its own authority to make

findings of fact. The proper purpose of a medical panel is limited to medical examination and diagnosis, which is then to be considered by the Commission in arriving at an ultimate decision. Jensen v. United States Fuel, supra, at 441.

#### CONCLUSION

The major factual history presented demonstrates an admitted industrial accident followed by two major surgeries; payment of significant temporary total disability for approximately 20 months; payment of substantial medical benefits; significant objective medical findings in the form of myelograms and X-rays, as well as actual observable evidence demonstrating a traumatic herniation of disk material, not a degenerative process. In addition, a medical specialist testified, based upon demonstrable medical evidence and to a medical certainty, that a permanent partial aggravation occurred.

Against these uncontroverted facts, the Commission arbitrarily adopted the unsupported opinion of the medical panel, which admittedly did not consider all of the evidence and was not allowed to change or clarify its opinion at the conclusion of the panel hearing.

It is accordingly respectfully submitted that the Industrial Commission of Utah erred in adopting the Findings of Fact and Conclusions of Law adopted by the Administrative Law Judge. The Commission's Order denying benefits should be reversed and remanded for the purpose of awarding payment of

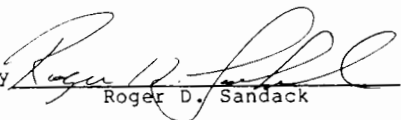
grant partial impairment benefits to the applicant, H. Jack  
and his surviving widow and/or estate.

RESPECTFULLY SUBMITTED this 13<sup>th</sup> day of February,

1984.

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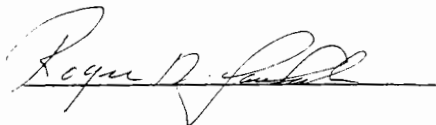
CERTIFICATE OF SERVICE

A true and correct copy of PETITIONER'S BRIEF was placed in the United States mail, postage prepaid, to the following persons on this 14<sup>th</sup> day of February, 1984:

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