1992

Ashcroft v. Airfax Express : Brief of Petitioner

Utah Court of Appeals

UTAH COURT OF APPEALS

DENIS ASHCROFT, Petitioner, vs. AIRFAX EXPRESS, LIBERTY MUTUAL INSURANCE COMPANY, and the INDUSTRIAL COMMISSION OF UTAH, Respondents.	:	Case No. 920586-CA Priority No. 7

B R I E F O F P E T I T I O N E R

PETITION FOR REVIEW OF

DENIAL OF PETITIONER'S MOTION FOR REVIEW OF

ORDER OF THE INDUSTRIAL COMMISSION OF UTAH

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JURISDICTION OF THE COURT

This is a Petition for Review of the Industrial Commission's August 21, 1992 Order Denying Petitioner's Motion for Review alleging entitlement to workers' compensation benefits sustained as a result of an industrial accident. A Petition for Review of that Order was timely filed with this Court on September 11, 1992.

This Court has jurisdiction to hear this Petition for Review pursuant to Utah Code Annotated, Sections 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 ISSUE(S)/STANDARD OF APPELLATE REVIEW

There are two substantial issues presented for review:

(1) whether the Industrial Commission committed error by applying the wrong standard of proof i.e., "substantial evidence" rather than upon a preponderance of the evidence as required by well established law; and,

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

The standard of appellate review which is to be applied to the resolution of the above issues is one involving "correction of error", since they involve questions of law, and no deference to the agency's view of the law is required. Utah Administrative Procedures Act, Utah Code Annotated, Section 63-46b-16(4) (d) (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).

Furthermore, in reviewing the proceedings below and the scope of the Utah Workers Compensation Act, it is important to recognize that the Act is to be liberally construed and any doubt as to compensation is to be resolved in favor of the Petitioner. State Tax Commission v. Industrial Commission, 685 P.2d 1051, 1053 (Utah 1984). McPhie v. Industrial Commission, 567 P.2d 153, 155 (Utah 1977).

DETERMINATIVE STATUTE/RULE

Utah Code Annotated, Section 35-1-77 (1988) is the determinative statute in this case. Rule R568-1-9(A) of the Industrial Commission's administrative rules is also applicable. They are each set forth in full in the Addendum thereto as Exhibit A.

STATEMENT OF THE CASE

Nature of the Case

Mr. Ashcroft seeks review of the Industrial Commission Order denying his Motion for Review wherein he alleged entitlement to workers' compensation occasioned by his industrial accident.

Course of Proceedings

As the result of an industrial injury which occurred on September 25, 1989, (R. at 1), the employer's compensation insurer paid temporary total disability benefits from September 26, 1989 through June 5, 1990 as well as compensation for a 5% permanent

partial impairment. (R. at 18). Petitioner claimed that despite attempts he was unable to return to work and that he needed additional medical care, a longer period of temporary total compensation and a higher permanent partial impairment rating. (R. at 1). Further benefits were denied, and Mr. Ashcroft filed an application for hearing. A Formal Hearing was held before an Administrative Law Judge on May 19, 1992. (R. at 22).

Disposition Below

On September 26, 1991 Petitioner filed for additional temporary disability compensation, increased permanent partial disability rating and medical expenses alleging that as the result of his September 25, 1989 industrial injury he was no longer able to work. (R. at 1). The Administrative Law Judge on June 29, 1992, denied the claim for additional compensation, medical benefits and impairment benefits without referring the matter to a medical panel. (R. at 39-46, copy attached to Addendum as Exhibit B).

Mr. Ashcroft filed a Motion for Review with the Industrial Commission which was subsequently denied on August 21, 1992. (R. at 64-68, copy attached to Addendum as Exhibit C). He challenges that final agency action in his Petition for Review. (R. at 69-80).

Statement of the Facts

There is no dispute as to the basic facts of Mr. Ashcroft's industrial injury. The initial period of compensation and medical treatment was paid. The dispute arises because the employer's insurance carrier discontinued all benefits before the petitioner

and his doctors felt he had reached maximum medical improvement, and because his doctors felt he had a higher impairment than the supervising adjuster was willing to pay.

Following the accident on September 25, 1989, and an initial evaluation in the emergency room, Mr. Ashcroft was seen and treated by his family doctor, Dr. M. K. McGregor, who continued to treat him during the following two months. (R. at 130-136). Dr. McGregor advised complete bed rest and diagnosed him as having a bulging disc/spinal stenosis. (R. at 133). After two months of unsuccessful treatment, Dr. McGregor referred the patient to Dr. Donald G. Bliss, a neurosurgeon.

Dr. Bliss initially saw Mr. Ashcroft on October 20, 1989 and diagnosed, "Central disc herniation with minor spinal stenosis at this level." He recommended conservative treatment with physical therapy primarily for work hardening, but also had him under consideration for surgery. (R. at 146). In December, 1989 Dr. Bliss noted Mr. Ashcroft's continuing bilateral leg pain and after reviewing a myelogram and CT scan, his diagnoses was "Sciatica-like symptoms with central disc herniation and no definite evidence of neural impingement." (R. at 150). Dr. Bliss noted that Mr. Ashcroft's multiple level disc disease indicated that he has had pre-existing problems. (R. at 151). On February 2, 1990, in response to an inquiry from State Vocational Rehabilitation, and to the dismay of the insurance adjuster, Dr. Bliss concluded that Mr. Ashcroft's "... evaluation and treatment are incomplete. (R. at 153).

At the behest of the insurance carrier Mr. Ashcroft's case was transferred to Dr. Neal Capel, an orthopedic physician. (R. at 157-173). Dr. Capel's initial visit notes in reference to the insurance adjusters referral instructions state as follows:

> ... Liberty Mutual account manager determined his permanent partial disability as 5%, March 26, 1990, is the cutoff of benefits... The patient will have his disability rating deferred until the conclusion of his work hardening and conditioning in 6 weeks. He will be revaluated on May 13 before he is released for unlimited activity. He seems to have had a strong improvement in his attitude and seems to be desirous of accepting and working with these provisions. (R. at 158).

Dr. Capel placed him on a work hardening and conditioning program. (R. at 158).

On May 10, 1990, Mr. Ashcroft experienced intrascapular pain, and was treated at an emergency room. Dr. Capel diagnosed this incident as "anxiety reaction with somatization." (R. at 159). Dr. Capel continued to recommend general conditioning. (R. at 159).

On June 5, 1990, Dr. Capel's office notes state, "... The patient has no change in his status and was given a work release. (R. at 160).

Although he had been released to work by Dr. Capel, the patient continued to complain of medical problems and Dr. Capel continued to give medical treatment, the last visit being March 15, 1991. He complained that sitting made him uncomfortable and that he had aching muscles (R. at 161), and low back pain in November 1990 after he lifted two or three pieces of firewood. In March 1991, Mr. Ashcroft reported back pain after he had bent over to

clean up after his dog, and that he had difficulty straightening up. (R. at 167). Dr. Capel concluded that he had a recurrence of iliolumbar strain spain and noted:

> I further advised him that as far as the Industrial Commission is concerned, he is an administrative catch 22 situation where he cannot force them to assume care of his present complaint and while it is possibly associated in quality relation, it is a new episode. (R. at 167).

After that Mr. Ashcroft concluded that he was not going to get satisfactory care from Dr. Capel and changed to Dr. D.R. McNaught on May 8, 1991. Dr. McNaught concluded that he had severe sciatica, due to the bulging of lumbar discs L4,5 and possibly LS. He recommended surgery, but surgery was never performed because it was discovered that the patient had AIDS which complicated the situation by rendering surgery a more difficult option. (R. at 174-175).

During this period of evaluation , on August 19, 1991, Dr. McNaught stated that Mr. Ashcroft was unable to return to work (R. at 178). On September 5, 1991 Dr. McNaught reported "Apparently he was released from light work at sometime in the past, which I feel in retrospect was probable in error, as he does appear to require a more aggressive approach to his low back ...". (R. at 179).

Finally on April 23, 1992, after several other possible interventions including chymopapain treatment had been considered and ruled out, Dr. McNaught concluded that Mr. Ashcroft had a 10% disability rating. (R. at 177). Dr. John Sanders, a consulting surgeon for Dr. McNaught, independently rated the permanent impairment at 15%. (R. at 191).

During this period, Mr. Ashcroft also received at his own expense chiropractic care from Dr. Randall N. Wageman from September 27, 1991, through December, 1991 when he was forced to terminate treatment for financial reasons. Dr. Wageman concluded that Mr. Ashcroft suffered, "Chronic moderate to severe post-traumatic lumbar intervertebral disc syndrome with radiculopathy resulting from over-exertion or strenuous movements." He further found "an exacerbation of his post-traumatic injuries sustained in the original accident" of 1989. (R. at 122).

Respondents did not have Mr. Ashcroft personally examined by a physician of their own choosing, but did have Dr. Boyd Holbrook perform a "file review". On April 10, 1992, Dr. Holbrook concluded on the basis of his examination of the medical records, which did not include the reports of Dr. Wageman, that the majority of Mr. Ashcroft's problems were not industrial in nature and that no further medical treatment was needed in connection with his 1989 industrial injury. (R. at 23-31).

> The Administrative Law Judge found that there was not a well-supported rating in the record, and the Administrative Law Judge can only note that a 5% impairment is reasonable for an unoperated disc problem according to the AMA Guides To The Evaluation of Permanent Impairment, Table 53." (R. at 45).

Despite request by Mr. Ashcroft's attorney the Administrative Law Judge refused to refer Mr. Ashcroft to a Medical Panel. (R. at 47). This refusal was subsequently sustained by the Industrial Commission. (R. at 67).

Petitioner's claim for additional disability benefits was

denied by the Administrative Law Judge on June 29th, 1992. (R. at 45). He filed a Motion for Review with the Industrial Commission on July 15, 1992 (R. at 47-54), but it was denied on August 21, 1992. (R. at 64-68).

SUMMARY OF ARGUMENT(S)

The Industrial Commission's findings were based on the wrong standard of evidence. The Commission refused to disturb the Administrative Law Judge's Findings because they "... were based upon substantial evidence." The Commission applied the higher appellate court review standard rather than the lower level appropriateD at the Industrial Commission level. The appropriate standard of review at the agency level is a "preponderance of the evidence." Lipman v. Industrial Commission, 592 P. 616 (Utah 1979).

The medical evidence in this case demonstrated conflicting disability ratings which ranged from zero % to 15%. Utah Administrative Code R568-1-9 makes the referral to a Medical Panel mandatory when there are conflicting impairment ratings with more than a 5% difference. Despite the fact that the Administrative Law Judge found that the disability ratings were not "well-supported" she failed and refused to submit this matter to a Medical Panel. Referral to a Medical panel was also called for under the Rule when there is a dispute about the cutoff date of temporary total disability and/or more than $2,000.00 in medical bills in controversy. The refusal to convene a Medical Panel is in direct

conflict and violates the Industrial Commission's own rules and regulations.

This Court should summarily reverse the Industrial Commission's determination that Mr. Ashcroft did not establish medical causation and remand with instructions to enter an award establishing that fact. In the alternative, this matter should be remanded with instructions to the Industrial Commission to convene a Medical Panel to examine the medical causation issue.

ARGUMENT

I

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

Few principles of workers' compensation law are as well established in this State as that workers' compensation disability claims are to be liberally construed in favor of awarding benefits, and any doubts raised from the evidence are to be resolved in favor of the claim. Utah Courts have consistently reiterated this principle from 1919 to the present. Heaton v. Second Injury Fund, 796 P.2d 676 (Utah 1990); State Tax Commission v. Industrial Commission, supra.,; J & W Janitorial Co. v. Industrial Commission, 661 P.2d 949 (Utah 1983); Prows v. Industrial Commission, 610 P.2d 1362 (Utah 1980); McPhie v. Industrial Commission, supra.; Baker v. Industrial Commission, 405 P.2d 613 (Utah 1965); Askrew v. Industrial Commission, 391 P.2d 302 (Utah 1964); M & K Corp. v. Industrial Commission, 189 P.2d 132 (Utah 1948); and Chandler v.

Industrial Commission, 184 P. 1020 (Utah 1919).

The Utah Supreme Court in Chandler, supra, at 1021-1022, discussed the proper construction of the Workers' Compensation Act and the underlying purposes of the Act, and stated as follows:

> We are also reminded that our statute requires that the statues of this state are to be 'liberally construed with a view to effect the objects of the statutes and to promote justice.'
>
> * * * * * *
>
> In this connection it must be remembered that the compensation provided for in the act is in no sense to be considered as damages for the injured employee or to his dependents in case death supervenes. The right to compensation arises out of the relation existing between employer and employee, and that the injury arises out of [or] in the course of the employment. Under such an act the costs and expenses of conducting the business or enterprise, including compensation for injuries to 'employees or other casualties, must be taxed to the business. The theory of the Compensation Act is that the whole cost and expense of conducting the business as aforesaid is added to the cost of the articles that are produced and sold, and hence, in the long run, such costs and expenses are borne by the public; that is, by the consumers of the articles produced. The purpose of such an act, therefore, is to protect the employee and those dependent upon him, and in case of his serious injury or death to provide adequate means for the support of those dependent upon him. In view, therefore, that in case of total disability or death of the employee his dependents might become the objects of public charity, such a calamity is avoided by requiring the business or enterprise to provide for such dependents, with the right of the employer to add the amount that is paid out to the cost of producing and selling the product of such business or enterprise. The beneficent purpose of such acts are therefore apparent to all, and for that reason, if for no other, should receive a very liberal construction in favor of the injured employee. We are all united upon the proposition that in view of the purposes of such acts, in case there is any doubt respecting the right to compensation, such doubt should be resolved in favor of the employee or his dependents as the case may be. (Emphasis added).

The Administrative Law Judge in rendering her Findings of Fact and Conclusions of Law failed to apply this vital rule of

construction. Nowhere in her Findings or Conclusions is there any evidence of a "liberal construction" or the "resolution of doubt in favor of the claim". Whenever any doubt or uncertainty appears in the record, the Administrative Law Judge construed it against the injured worker.

The refusal to refer this matter to a Medical Panel is in clear violation of the Industrial Commission's own rules and regulations. The "findings" and "conclusions" do not evidence "humane and beneficent purposes" as required by law. The entire underlying basis of the Order is thus flawed and the entire Order should be disregarded due to this conceptual flaw.

II

THE CONTINUING MEDICAL PROBLEMS CLEARLY AROSE OUT OF THE INDUSTRIAL ACCIDENT AND NOT OUT OF SUBSEQUENT "EPISODES."

The Administrative Law Judge based her denial on the following:

> ... according to medical specialists, the true cause of the applicant's continuing problems stem from pre-existing degenerative problems, intervening non-industrial events, and unrelated health conditions. Therefore, his claim fails for lack of medical and legal causation. (R. at 42).

A balanced review of the record demonstrates that Mr. Ashcroft met his burden to demonstrate legal and medical causation by a preponderance of the evidence.

The alleged "intervening non-industrial events" have been blown entirely out of proportion by deeming them as causes of ongoing injury when the evidence shows no subsequent events that

would constitute an industrial accident and no medical evidence of anything other than an episode of pain triggered by ordinary and nonstrenuous activities which were painful only because of the ongoing back injury that was caused by the original industrial accident. These supposed "intervening nonindustrial events" were picking up three pieces of firewood in November, 1990 (R. at 165) and bending over with a short-handled shovel to clean up after his dog, in March 1991. (R. at 167). It would be difficult to classify those incidents as legally or medically significant events. Although each event resulted in an office visit to Dr. Capel, no new treatment was undertaken and Mr. Ashcroft's condition did not change. No continuing significance for those events can be found in the medical records. The fact that the Administrative Law Judge and the Industrial Commission seized upon them shows that they were engaged in improper fact finding.

If there was any failure to find a medical cause of the injuries Petitioner demonstrates, such failure resulted from the Administrative Law Judge's failure to convene a Medical Panel, as argued below.

The existing record however is replete with evidence of medical causation. In reaching the conclusion that there was not a medical/industrial cause to Mr. Ashcroft's present condition the Administrative Law Judge and the Industrial Commission selectively read the medical reports and ignored large portions of the evidence. Dr. McGregor found a medical/industrial link (R. at 130-136), as did Dr. Bliss (R. at 146-153), Dr. Capel (R. at 158), Dr.

McNaught (R. at 177) and Dr. Wageman (R. at 122). In fact, the only real evidence supporting the lack of medical causation is Dr. Holbrook's "record review" (R. at 23-31) which was done without actually examining Mr. Ashcroft, or having the complete medical record.

There is a uncertainty as to the extent of Petitioner's pre-existing back problems. However, just because a person suffers a pre-existing condition, he or she is not disqualified from obtaining compensation. "Compensation is not dependant on the state of an employee's health or his freedom from constitutional weakness or latent tendency." Denver v. Hansen, 650 P.2d 1319, 1321 (Colo. App., 1982). The clear law of this state is that "the aggravation or lighting up of a preexisting disease by an industrial accident is compensable...." Powers v. Industrial Commission, 427 P.2d 740, 743 (1967) (quoted with approval in Allen, id.).

There was no medical evidence offered at the hearing which would suggest that Petitioner's injuries were not at least partially the result of the industrial accident. The Administrative Law Judge expressly found that at least 5% of Mr. Ashcroft's permanent impairment was due to the industrial accident.

In its review, the Industrial Commission states that "We have concluded that the specialists who determined that the applicant's problems were not industrial in nature outweigh the opinion of Dr. Wageman." (R. at 67). The Commission does not detail however how they reached that conclusion or what balancing process they went

through. In fact, the Industrial Commission did not review the record impartially or as a whole. The Industrial Commission only cites those portions of the record which support the findings of the Administrative Law Judge and ignores any conflicting evidence. The Industrial Commission simply cannot arbitrarily discount competent, uncontradicted evidence indicating that the industrial injury was the cause of Petitioner's present permanent, disability. Kaiser Steel Corp. v. Industrial Commission., 709 P.2d 1168 (Utah 1985). Frito-Lay, Inc. v. Jacobs, 689 P.2d 1335 (Utah 1984).

In addition, The Industrial Commission displayed confusion and committed error when it sustained the Findings, Conclusions and Order of the Administrative Law Judge as being based upon "substantial evidence". (R. at 65). The applicable standard is that of "preponderance of the evidence" and not "substantial evidence". In the case of Lipman v. Industrial Commission, 592 P.2d 616 (Utah 1979) the Utah Supreme Court reversed a similar effort of the Industrial Commission to apply another standard than preponderance of evidence. The Court stated as follows:

> This Court has consistently held that the burden of proof in Workmen's Compensation cases is proof by a preponderance of the evidence. Id. at 618.

Counsel for the Industrial Commission has admitted that he uses the appellate standard of "substantial evidence" in passing on Motions for Review. Virgin v. Industrial Commission, 803 P.2d 1284, 1290 (Utah App. 1990). There is no evidence of balancing of the conflicting evidence by the Industrial Commission and certainly no resolution of doubt in favor of the Petitioner. The Industrial

Commission Order Denying Motion For Review rather is a marshalling of the evidence in support of the Administrative Law Judge's Findings of Fact, Conclusions of Law and Order, to the total exclusion of any contrary evidence.

The application of the "substantial evidence" standard is contrary to law and prejudices the injured worker by making him respond to a higher standard of proof than required by law and statute.

The actual Findings of Fact portion of the Order in this matter are grossly inadequate and do not meet recent legal requirements. Such summary conclusions do not constitute proper fact-finding.

In the recent case of Adams v. Board of Review, 821 P.2d 1 (Utah Ct. App. 1991), the Court stated as follows:

> While the purported "Findings of Fact written by the A.L.J. contain an informative summary of the evidence presented, such a rehearsal of contradictory evidence does not constitute findings of fact. In order for a finding to truly constitute a "finding of fact," it must indicate what the A.L.J. determines in fact occurred.... The evidence did not merely indicate two possible versions of a fact whereby we could conclude that the denial of benefits necessarily indicates that the Commission accepted one version over another. The evidence shows several possible configurations and degrees of injury and/or disease, if any, and the causes, if any, thereby creating a matrix of possible factual findings. A mere summary of the conflicting evidence in this case therefore does not give a clear indication of the A.L.J.'s or the Commission's view as to what in fact occurred. Since we cannot even determine why the Commission found there was no causation shown, we clearly cannot assume that the Commission actually made any of the possible subsidiary findings. The findings are therefore inadequate. Id. at 20.

The Findings made by the Administrative Law Judge and the

Industrial Commission are deficient in that they fail to properly address, in detail, the issue of medical causation. The absence of a Medical Panel report makes this failure even more glaring. Although none of the parties, including the Administrative Law Judge, dispute that Petitioner is permanently impaired, the Administrative Law Judge did not specify the degree to which that disability was caused by the 1989 industrial injury. The Administrative Law Judge selectively reads the medical reports, giving undue weight to a file review by Dr. Holbrook while virtually ignoring the preponderance of the medical evidence. She does not make concise findings as to Petitioner's current medical condition and the causes for it. This failure was undoubtedly compounded by the Administrative Law Judge,s unwarranted refusal to submit the matter to a Medical Panel as complained below, and that failure manifests itself here in inadequate findings.

The Utah Court of Appeals has recently informed this Commission that:

> In order for us to meaningfully review the findings of the Commission, the findings must be 'sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached.' Action v. Deliran, 737 P.2d 996 999 (Utah 1987) (quoting Rucker v. Dalton, 598 P.2d 1336 (Utah 1979))...[T]he failure of an agency to make adequate findings of fact on material issues renders its findings 'arbitrary and capricious' unless the evidence is 'clear, uncontroverted and capable of only one conclusion.' Id. (quoting Kinkella v. Baugh, 660 P.2d 233, 236 (Utah 1983)).

Nyrehn v. Industrial Commission, 800 P.2d 330, 335 (Utah App. 1990), cert. denied, 815 P.2d 241 (Utah 1991).

The Administrative Law Judge's purported Findings of Fact,

Conclusions of Law and Order should at a minimum be vacated and a new Order entered with detailed and subsidiary facts to disclose the steps by which the ultimate conclusion was reached. Failure to do so, denies Petitioner 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).

III

THE ADMINISTRATIVE LAW JUDGE ABUSED HER DISCRETION IN NOT REFERRING THIS MATTER TO A MEDICAL PANEL.

Utah Code Annotated Section 35-1-77(1)(a) (1988) reads as follows:

> 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.

In response to Petitioner's claim that despite requests by counsel, the Administrative Law Judge failed and/or refused to refer this matter to a Medical Panel, Respondent Utah Industrial Commission in its Order Denying Motion for Review states as follows:

> ... the Applicant has failed to show medical and legal causation. Under these circumstances, no medical panel is necessary. (R. at 45).

That rational finds no basis in law, statute or rule. Utah Code Annotated, Section 35-1-77 (1988) expressly contemplates that referrals to Medical Panels will result "... if the employer or its

insurance carrier denies liability..." It is expressly to determine medical causation and degrees of disability that referrals to Medical Panels are made.

Utah Industrial Commission Rule R568-1-9 governing the "necessity of submitting a case to a medical panel" provided in relevant part as follows:

> 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.... (emphasis added). See Addendum, Exhibit A.

The Rule requires that a panel "will" be used when "one or more significant medical issues may be involved". The rule does not, as Respondents seem to suggest, state that a Medical Panel will only be convened when the injured worker has proved both medical and legal causation. Rather the Rule states that a Panel will be used when there are conflicting medical reports of permanent physical impairment which vary more than 5% of the whole person, a disparity of more than 90 days on the temporary total

cutoff date or more than $2,000 in medical expenses in controversy.

It can not be disputed that this case clearly contains conflicting medical reports of permanent physical impairment which vary by more than 5% of the whole person. Dr. Holbrook gave Mr. Ashcroft a zero % physical impairment. (R. at 23-31), Dr. McNaught rated the Petitioner at 10% impairment of the whole person (R. at 177), and Dr. Sanders indicated that he had a 15% whole person rating (R. at 191), a difference of 15%.

It little matters that Respondents do not believe that the doctor's ratings are "not well supported" (R. at 37). It appears that at least Dr. McNaught did not extensively document his 10% rating because the insurance carrier told him that they agreed with it. In such a case, Dr. McNaught reasonably concluded that he would not have to give all of his subsidiary findings which led him to conclude that the Petitioner had a 10% impairment. Respondents should be estopped from attacking the lack of detailed support for the disability ratings when they were responsible for the omission of that support. (R. at 177).

The Rule does not say that referral will occur only when the Administrative Law Judge or the Industrial Commission finds that there are "well supported conflicting medical reports;" rather it states that referral will occur when there are "conflicting medical reports". (emphasis added). It is, in fact, to determine the credibility of the initial medical reports that referrals to Medical Panels are required when there is more than a 5% variance in the impairment ratings.

The Administrative Law Judge adopted a finding of 5% whole person permanent impairment with absolutely no factual support in the record. None of the many doctors who examined Mr. Ashcroft or his records assigned a 5% rating. The only support in the record for a 5% rating is the determination of Respondent Liberty Mutual's account manager in April 1990 that 5% was appropriate. (R. at 158).

There was also "conflicting medical opinions as to the temporary total cutoff date which vary more than 90 days" as provided in section (A)(1)(b) of the administrative rule. Dr. Capel gave the Petitioner a work release on June 5, 1990 (R. at 160) and that is the date Respondents have relied on for the cutoff of temporary total compensation. However, Dr. McNaught on September 5, 1991, well over a year later felt that date was in error. (R. at 179). Clearly there is a dispute as to the appropriate temporary total cutoff date which vary by far more than the mere 90 days provided in the Rule. This is another issue on which the assistance of a Medical Panel would have been extremely helpful.

Finally, there is are medical expenses in controversy amounting to more than $2,000.00. The Administrative Law Judge made no findings on this issue, however the record does specifically document that there is at least $4,000.00 in disputed medical bills. (R. at 116). In addition, Mr. Ashcroft needs additional medical care which Respondents have refused to authorize.

The conflict in the medical reports and concern over legal and medical causation is why referral to a medical panel is required in the circumstances presented here and the failure to do so is more than an abuse of discretion-it is plain error. See Lipman v. Industrial Commission, supra and Schmidt v. Industrial Commission, 617 P.2d 693 (Utah 1980) interpreting the former Utah Code Annotated, Section 35-1-77 (1953) which made referrals to medical panels mandatory in cases of denied liability.

Even more than an abuse of discretion, the failure of an administrative agency to adhere to its own rules and regulations raises grave questions of possible violations of Petitioners constitutional right to equal protection of the law.

Although reference to a medical panel under Utah Code Annotated, Section 35-1-77 (1988) is discretionary, that discretion is not unrestricted and has been made mandatory in some circumstances by the Commission's own Rules and Regulations (Utah Admin. Code R568-1-9). The failure to refer a matter to a Medical Panel when such referral is mandatory is plain error. "In some cases, such as where the evidence of causal connection between the work-related event and the injury is uncertain or highly technical, failure to refer the case to a medical panel may be an abuse of discretion." Champion Home Builders v. Industrial Commission, 703 P.2d 306, 308 (Utah 1985). See also Hone v. J.F. Shea Co., 728 P.2d 1008 (Utah 1986).

In this case, the causal connection between the work-related injury and the Applicant's claims for additional compensation and

medical care if not clear, was at least uncertain and failure to refer the matter to a medical panel was error. The Order Denying Motion for Review should, at the least, be reversed and the matter remanded with directions to refer the matter to a Medical Panel since failure to do was in direct conflict with Industrial Commission practice and rule. The failure to obtain a Medical Panel opinion resulted in the Administrative Law Judge lacking essential and necessary information to adjudicate Petitioner's claim.

CONCLUSION/STATEMENT OF RELIEF SOUGHT

Based on the foregoing it is respectfully submitted that the Industrial Commission erred when it entered it's August 21, 1992 Order affirming the Order of the Administrative Law Judge and denied Mr. Ashcroft additional compensation for lack of medical causation. The uncontroverted evidence submitted to the industrial Commission supports the finding that he sustained a significant permanent partial impairment due to his 1989 industrial accident, and that his impairment exceeds 5%. To the extent there is any doubt or confusion as to medical causation, it was error for the Administrative Law Judge not to convene a Medical Panel.

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 presented, or in the alternative, to convene a medical panel.

DATED this 30 th day of November, 1992.

BRUCE J. WILSON, ESQ.
Attorney for Petitioner

PROOF OF SERVICE

I hereby certify that true and correct copies of the foregoing Brief of Petitioner were mailed, postage prepaid, on this 4th day of December, 1992, to the following:

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Bruce Wilson
Attorney for Petitioner

ADDENDUM

EXHIBIT A: Utah Code Annotated, Section 35-1-77(1)(A) (1988). Utah Administrative Code R568-1-9.

EXHIBIT B: Findings of Fact, Conclusions of Law and Order (June 29, 1992).

EXHIBIT C: Order Denying Motion for Review (August 21, 1992).

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 renumeration or profit, and whether the sole cause of the disability or death, in the opinion of the panel, results from the occupation al 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.

EXHIBIT A

(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 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.

INDUSTRIAL COMMISSION OF UTAH

Case No. 91000984

DENIS ASHCROFT,	*	
	*	**FINDINGS OF FACT,**
Applicant,	*	
	*	**CONCLUSIONS OF LAW**
vs.	*	
	*	
AIRFAX EXPRESS,	*	**AND ORDER**
and/or **LIBERTY**	*	
MUTUAL INSURANCE,	*	
	*	
Defendants.	*	
	*	
* * * * * * * * * * * * * * * * *		

HEARING: Commission Conference Room, Washington County Commission offices, 197 East Tabernacle, St. George, Utah on May 19, 1992, at 9:00 o'clock a.m. Said hearing pursuant to Order and Notice of the Commission.

BEFORE: The Honorable Lisa-Michele Church, Administrative Law Judge.

APPEARANCES: The applicant was present and represented by Bruce Wilson, Attorney at Law.

The defendants were represented by Michael Dyer, Attorney at Law.

This is a claim for additional temporary total disability compensation and medical expenses in connection with a 9/25/89 industrial injury. The defendant insurance carrier denies liability on the basis of medical and legal causation.

An evidentiary hearing was held, during which oral and written evidence was presented. At the conclusion of the evidentiary hearing, the matter was taken under advisement by the Administrative Law Judge. Having been fully advised in the premises, the Administrative Law Judge now enters the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT:

The applicant in this matter, Denis Ashcroft, was employed as a driver for Airfax Express in 1989, earning 18 cents per mile. He was unmarried with no dependent children at the time of his injury.

On September 25, 1989, the applicant was unloading boxes with a dolly to persons on the ground at a Salt Lake K-Mart location, and he bent over and could not straighten up. He felt pain in his back, crawled to the edge of the truck bed and called his employer. His employer told him to finish unloading, but Ashcroft had the store employees do it for him. He then drove to another K-Mart and did the same. Ashcroft drove to Ogden, parked the truck, and took a taxi to the McKay Dee Hospital Emergency Room.

At the emergency room, they took x-rays, gave him muscle relaxants and pain medication. No medical records were available from this visit. Thereafter the applicant rode the bus back to St. George. There, he consulted Dr. McGregor, his family doctor, on September 28, 1989 (Ex. D-01, p. 5). Dr. McGregor advised complete bed rest and continued to see him for two months. Dr. McGregor's records indicate a diagnosis of bulging disc/spinal stenosis and refer the applicant to Dr. Bliss, a neurosurgeon.

Dr. Bliss saw the applicant on October 20, 1989, and diagnosed, ". . . central disc herniation with minor spinal stenosis at this level." He recommended conservative treatment. (Ex. D-1, p. 19.)

In December, 1989, Dr. Bliss noted Ashcroft's continuing bilateral leg pain and reviewed his myelogram and CT scan. He stated his impression was ". . . sciatica-like symptoms with central disc herniation and no definite evidence of neural impingement." The applicant was then referred to Dr. Moress for a neurological consult.

Dr. Moress saw Ashcroft on February 1, 1990 and recommended a complete myelography. Dr. Bliss reviewed this recommendation and noted ". . . [Dr. Moress] suspects possible demyelinating disorder if symptoms are not explained by stenosis. MRI scan of c. spine demonstrates multilevel disc disease. Previous lumbar myelogram and CT scan demonstrated multiple level bulging discs without definite stenosis." Later in the same report, Dr. Bliss stated, ". . . Patient clearly interprets all of his problems as stemming from his recent accident although multiple level disc disease indicates that he has had pre-existing problems and in addition, back pain is not his major complaint at this time." (Ex. D-1, p. 24.)

On February 2, 1990, in response to an inquiry from State Vocational Rehabilitation, Dr. Bliss described Ashcroft's status as ". . . medically stable for return to limited employment in non-laboring activity." (Ex. D-1, p. 26.) The applicant testified

that he applied for and was denied unemployment benefits in late 1989, due to a prior lien.

On April 12, 1990, the applicant consulted another orthopedic physician, Dr. Neal Capel. Dr. Capel saw him on 4/12/90 and recommended a program of conditioning for Ashcroft. In the notes of that visit, Dr. Capel also mentioned, ". . . Liberty Mutual account manager determined his permanent partial disability as 5%, March 26, 1990, is the cutoff of benefits...The patient will have his disability rating deferred until the conclusion of his work hardening and conditioning in 6 weeks." (Ex. D-1, p. 32.)

At the May 10, 1990, visit with the applicant, Dr. Capel described a visit Ashcroft had made to the emergency room for intrascapular pain and noted, ". . . The most likely explanation is an anxiety reaction with somatization." Dr. Capel continued to recommend swimming, bicycle riding and general conditioning.

At the June 5, 1990, visit, Dr. Capel's office notes state, ". . . The patient has no change in his status and was given a work release. He has a job as a cook that is eminent [sic] and was given a release from the welfare department." (Ex. D-1, p. 34.) Ashcroft testified he did apply for the cook position. Following this work release however, the applicant did not return to work, but began attending school at Dixie College.

At the July 12, 1990, office visit, Dr. Capel stated that sitting required by the applicant's school activities was making him uncomfortable. He also had some aching muscles. Later in the summer, Dr. Capel prescribed Xanax for Ashcroft's anxiety symptoms.

Ashcroft began working for his father in his grocery store in Arizona in September, 1990. This job lasted a few weeks. Dr. Capel's notes state, ". . . He has found that the back did fairly well but his legs got tired as he was on his feet all day on concrete." Dr. Capel continued to prescribe Xanax and Naprosyn. (Ex. D-1, p. 37.)

Dr. Capel's notes for November 13, 1990, visit indicate that Ashcroft was having back and leg pain, and had discontinued some of his conditioning activities. His November 29, 1990, office notes describe a "new episode" of back pain occurring when Ashcroft lifted firewood and had, ". . . sudden onset of low back pain..." (Ex. D-1, p. 39.) Dr. Capel diagnosed facet syndrome and low back strain. The applicant testified that this episode involved him lifting two or three pieces of wood branches that would fit in his fireplace.

At his January 29, 1991, office visit, the applicant reported to Dr. Capel that he had worked in his father's grocery store again during Christmas and experienced leg aches. He requested a prescription of Ascendin, but Dr. Capel declined to prescribe it due to side effects.

At Ashcroft's visit with Dr. Capel on March 15, 1991, Dr. Capel reported another episode of back pain: "The patient has been getting along reasonably well until March 14, 1991, when he bent down to clean up manure from his dog. He developed a sudden pain in the low back and had difficulty standing up straight." Dr. Capel concluded that the applicant had had a recurrence of iliolumbar strain sprain and, ". . . I further advised him that as far as the Industrial Commission is concerned, He is an administrative catch 22 situation where he cannot force them to assume care of his present complaint and while it is possibly associated in quality relation, it is a new episode." (Ex. D-1, p. 41.) Ashcroft testified that he was using a 3/4 length shovel and bent over and felt back pain. He then had difficulty straightening up.

Following Dr. Capel's treatment, the applicant was examined by Dr. D.R. McNaught on May 8, 1991. Dr. McNaught concluded that Ashcroft did have severe sciatica, due to the bulging of lumbar discs L4,5 and possibly LS. He recommended that the applicant investigate surgery, although Dr. McNaught expressed some reservations about that approach.

In fact, the applicant was not able to pursue surgical intervention on his back, due at least partially to the fact that he has Acquired Immune Deficiency Syndrome. (Ex. D-1, p. 61-62.) The medical records indicate that Ashcroft tested positive for the HIV virus in the 1980s, and this condition has since developed into AIDS. (Ex. D-1, p. 10-17.) Dr. Hagen has treated the applicant for AIDS since 1989. He stated in a letter dated May 14, 1992, that the applicant's AIDS condition does not prevent him from conducting his normal activities, (Ex. A-1). Hagan's records also indicate that he treated Ashcroft for a variety of conditions, and that Ashcroft was taking Prozac for depression.

Dr. McNaught referred the applicant to Dr. John Sanders for consideration of his back condition. Dr. Sanders produced several reports, including one dated August 9, 1991, which concluded that surgical intervention was not warranted at that time, with no reference to the AIDS factors. Dr. Sanders also wrote a one paragraph report dated October 7, 1991 stating: ". . .It is my opinion that because he is unable to return to his usual work that

he should have been given a disability rating of fifteen percent on that basis alone." (Ex. D-1, p. 66.)

Dr. Boyd Holbrook performed a file review on the applicant's case on April 10, 1992, and found that the majority of his problems were not industrial in nature. Dr. Holbrook stated in part, ". . . This man does have significant multi-level cervical disc disease that is not related to his industrial injury and is not being considered for any possible surgical treatment and appears to be a relatively minor portion of his symptom complex." Dr. Holbrook opined that no further medical treatment was needed in connection with Ashcroft's 1989 injury, that, ". . .it does not appear that more medical examinations or more diagnostic studies will assist in the delineation or management of his problem," and that Chymopapain injections are not advisable, (Ex. D-1, p. 67).

Ashcroft also sought chiropractic care from Dr. Wageman in St. George. Those chiropractic records show the applicant received treatments from September 27, 1991, through December, 1991 for 35 visits. Dr. Wageman believed that Ashcroft suffered, ". . .an exacerbation of his post-traumatic injuries sustained in the original accident," of 1989 (Ex. A-1).

The applicant's medical records indicate that he has undergone the following diagnostic procedures since his industrial injury: x-rays (10/89), CT scan (10/89), myelogram-CT scan (12/89), MRI (2/90), CT scan (5/91), x-rays (10/91), MRI (10/91).

The applicant currently experiences aches in his back and legs. He takes AZT, wellbutrin and dalmane, as well as headache medicines.

CONCLUSIONS OF LAW:

The applicant in this matter, Denis Ashcroft, unfortunately has failed to sustain his burden of proof that further temporary total disability benefits or medical expense benefits are causally related to his industrial accident of 1989. In fact, according to medical specialists, the true cause of the applicant's continuing problems stem from pre-existing degenerative problems, intervening non-industrial events, and unrelated health conditions. Therefore, his claim fails for lack of medical and legal causation.

At the time of the hearing, there was no evidence that Ashcroft was unable to work during the period of his additional temporary total disability claim. The applicant testified that he

applied for unemployment, applied for a job as a cook, and in fact, attended school full-time. He also worked in his father's grocery store for a time. Two doctors had released him to work (Dr. Bliss, 2/2/90) (Dr. Capel, 6/5/90) and considered him medically stable. No other medical provider has taken him off work. Utah workers compensation law is specific on this issue, ". . . Once a claimant reaches medical stabilization, the claimant is moved from temporary to permanent status and he is no longer eligible for temporary benefits." Booms v. Rapp Construction, 720 P.2d 1363, 1366 (Utah 1986.) Lack of stabilization is the plaintiff's burden to prove, Griffith v. Industrial Commission, 754 P.2d 981 (Ct. of App. Utah 1988).

Applicant's counsel argues that Ashcroft is entitled to further benefits while he is still in the "diagnostic" stage of his treatment for his back injury. Unfortunately, the medical records clearly indicate that this case has long ago exhausted the diagnostic stage. In fact, the applicant has been seen by at least six specialists, and has had every possible diagnostic test performed at least twice for his back pain symptoms. The case is also tragically complicated by the presence of the applicant's AIDS condition, which may not have become a ". . .severe medical problem," but ultimately is life-threatening and therefore bound to influence the applicant's choices with regard to surgery, employment, as well as any optional medical treatment.

Further, the medical records in this file indicate that the applicant's case involves psychological components. Moreover, when carefully reviewed, it is illogical for one to attempt to pin all the troublesome circumstances of a situation on a single incident of lumbar strain several years ago, particularly when that condition stabilized within months and was one which the doctors refused to surgically treat.

Applicant's counsel further argues that the applicant may fall into the rare category of one who suffers a sacroiliac condition that is difficult to diagnose. There is no indication, however, of that suspicion on behalf of Ashcroft's numerous physicians. Such arguments are speculative and general, and cannot be the basis of extending workers compensation benefits indefinitely to the applicant.

The Administrative Law Judge agrees with Ashcroft's physicians who have identified this case as a complex one, involving pre-existing and psychological factors. In addition, the applicant experienced two subsequent non-industrial events which occurred when his doctor said he was doing well. The improvement he was

making, together with the strenuous nature of the incidents themselves, render those subsequent events intervening and causally contributing to his continuing back problems.

As to the permanent partial impairment rating, the applicant was paid compensation on a 5% whole person permanent partial disability rating by the defendants. The Administrative Law Judge does not find a specific rating in the records: Dr. Capel merely recites what the insurance adjustor was offering and postpones a rating; Dr. Sanders makes a conclusory statement of 15% without reference to any underlying facts or industrial cause. Without a well-supported rating in the record, and the Administrative Law Judge can only note that a 5% impairment is reasonable for an unoperated disc problem according to the AMA Guides To the Evaluation of Permanent Impairment, Table 53.

ORDER:

IT IS HEREBY ORDERED that the claim of the applicant, Denis Ashcroft, for additional temporary total disability and medical expenses compensation in connection with his industrial injury of September 25, 1989, should be and is hereby denied for lack of legal and medical causation.

IT IS FURTHER ORDERED that any Motion for Review of the foregoing shall be filed in writing within thirty (30) days of the date hereof, specifying in detail the particular errors and objections, and, unless so filed, this Order shall be final and not subject to review or appeal.

INDUSTRIAL COMMISSION OF UTAH

Lisa-Michele Church
Administrative Law Judge

Certified this 29th day of June, 1992.
ATTEST:

Patricia O. Ashby
Commission Secretary

CERTIFICATE OF MAILING

I hereby certify that on the 11th day of June, 1992, the attached FINDINGS OF FACT, CONCLUSIONS OF LAW and ORDER in the case of Denis Ashcroft was mailed, postage pre-paid to the following persons at the following addresses:

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INDUSTRIAL COMMISSION OF UTAH

June A. Stoddard, Paralegal
Adjudication Division

/jas

Ashcroft.ord

THE INDUSTRIAL COMMISSION OF UTAH
SALT LAKE CITY UT 84114-6600

Denis Ashcroft,	*	
	*	
Applicant,	*	DENIAL OF MOTION
vs.	*	FOR REVIEW
	*	
	*	
Airfax Express, and/or	*	
Liberty Mutual Insurance Co.,	*	Case No. 91000984
	*	
Respondents.	*	

****

The Industrial Commission of Utah reviews the Motion for Review of applicant in the above captioned matter, pursuant to Utah Code Annotated, Section 35-1-82.53 and Section 63-46b-12.

The applicant's claim asks for additional compensation and payments in connection with medical expenses, temporary total compensation (TTC), permanent partial compensation (PPC), travel expenses, interest, and medical treatment as a result of his back injury on September 25, 1989. The administrative law judge (ALJ) concluded that the applicant had failed to show legal and medical causation, and therefore denied his claim. It is from this denial that the applicant appeals based on allegations of the following errors:

1. Rejection by the ALJ of two permanent partial disability ratings in favor of a two year old rating done by the "Liberty Mutual account manager."

2. The failure of the ALJ to order that a medical panel be convened to consider among other items the question of maximum medical improvement.

3. The ALJ did not consider that the treating doctors were in the diagnostic stages of the case, and the doctors had not decided upon a course of treatment.

4. The ALJ lost or ignored the chiropractor's results that the applicant was improving with chiropractic treatment.

5. This case contains objective evidence of several radiographically verified disc injuries, and surgery was a "clear possibility but for the complication of the AIDS."

The respondents argue in rebuttal that the medical evidence did not give rise to the need for a medical panel review, and that there is no conflict in the medical evidence regarding the applicant's attainment of maximum medical improvement. We will

briefly discuss the pertinent facts as they relate to the allegations of error.

There seems to be no dispute about the basic facts of the original industrial injury in 1989. At that time, the applicant was a driver for Airfax Express. On September 25, 1989, he was using a dolly to unload boxes at a K-Mart. He bent over, and could not thereafter stand straight. Experiencing pain in his back, he crawled to the edge of his truck, and called his employer. His employer told him to finish unloading. He apparently was able to have the K-Mart employees complete the task, and he subsequently drove to another K-Mart where he was again able to have its employees do the same. The applicant then drove to Ogden, parked his truck, and used a taxi to get to a hospital emergency room.

The emergency room treatment and procedures consisted of x-rays, muscle relaxants, and pain medication. After a trip back to St. George by bus, the applicant was treated by his family doctor, Dr. McGregor, on September 28, 1989. After a period of bed rest, the applicant was seen by the doctor during the following two months. Dr. McGregor diagnosed the applicant as having bulging disc/spinal stenosis. The doctor referred the applicant to Dr. Bliss, a neurosurgeon.

Dr. Bliss saw the applicant on a number of occasions during the period October 20, 1989 through February 20, 1990. The doctor recommended that the applicant receive conservative treatment, and stated that "...Patient clearly interprets all of his problems as stemming from his recent accident although multiple level disc disease indicates that he has had pre-existing problems and in addition, back pain is not his major complaint at this time." Exhibit D-1, at 24. Further, the doctor concluded on February 2, 1990 that the applicant was "...medically stable for return to limited employment in nonlaboring activity." Id., at 26.

During the period April 12, 1990 through March 15, 1991, the applicant was treated by Dr. Capel. Dr. Capel placed the applicant on a work hardening and conditioning program. On May 10, 1990, the applicant experienced intrascapular pain, and went to an emergency room for treatment. The doctor explained this episode as an anxiety reaction with somatization, and recommended general conditioning, bicycle riding, and swimming. On June 5, 1990, the applicant was given a work release, and apparently told the doctor that he had an imminent job as a cook. Apparently, the applicant did not return to work, but instead attended Dixie College as a student.

Between July 12, 1990, and March 15, 1991, the applicant

experienced muscle aches, back and leg pain, and anxiety symptoms on various occasions. Low back pain appeared after the applicant lifted two or three pieces of firewood, and a second episode occurred when the applicant attempted to clean up some of his dog's excrement. Dr. Capel noted on November 13, 1990 that the applicant had discontinued some of his conditioning exercises.

It appears that surgery is either not warranted for the applicant's medical problems, or is not recommended due to AIDS which has developed in the applicant from his initial contact with the HIV in the 1980's. Although one doctor recommended that the applicant investigate surgery (Dr. McNaught), another (Dr. Hunter) indicated that some surgery may be possible, two other doctors have indicated that surgery is not warranted (Dr. Holbrook and Dr. Sanders). Dr. Holbrook reviewed the applicant's file and concluded that the majority of the applicant's problems were not industrial in nature. The doctor concluded that additional medical examinations or diagnostic studies will not assist in the "delineation or management of [the applicant's] problem [in connection with the 1989 injury...." Exhibit D-1 at 67.

Contrary to the view of Dr. Holbrook, and others, is that of a treating chiropractic physician, Dr. Wageman, who believed that the applicant suffered "...an exacerbation of his post-traumatic injuries sustained in the original accident..." of 1989. Exhibit A-1. We have concluded that the specialists who determined that the applicant's problems were not industrial in nature outweigh the opinion of Dr. Wageman.

The ALJ concluded that the applicant had failed to sustain his burden of proof that he was further entitled to TTC or to medical expense benefits. There is substantial evidence in the file in light of the entire record to show that the applicant's continuing problems result from conditions unrelated to the industrial accident. Thus, the applicant has failed to show medical and legal causation. Under these circumstances, no medical panel is necessary.

The file shows that two doctors considered the applicant to be medically stable during the period that the applicant claims additional TTC. As a result, they had released the applicant to work. It is clear that when an injured worker is released from temporary total disability status that TTC should no longer be received. Booms v. Rapp Construction, 720 P.2d 1363, 1366 (Utah 1986).

The applicant's argument that he was still within the diagnostic stages of treatment is contrary to the evidence. Six

specialists have reviewed his case over time, and the applicant has had numerous diagnostic tests completed. None of the specialists with the possible exception of Dr. Hunter have concluded that surgery is warranted or possible. Dr. Holbrook, for example, concluded that no further examinations or diagnostic tests were warranted. This statement shows that the diagnostic period was complete.

This case is complicated by the applicant's pre-existing medical problems, and by his limitation on medical choices forced upon him by AIDS. In addition, the applicant suffered two subsequent nonindustrial accidents which can be considered to be intervening and causally contributing events to the applicant's continuing back problems.

In connection with the permanent partial impairment rating, the applicant argues that he should be given a higher rating since Dr. Sanders indicated that a 15 percent rating was appropriate since the applicant could not work. The applicant also cited Dr. Capel as support for this contention that the rating previously determined at five percent was too low. We note that the applicant was paid for his permanent partial impairment compensation. We agree with the ALJ that a five percent impairment is reasonable for an unoperated disc problem based upon the Guides to the Evaluation of Permanent Impairment, Table 53 (3d ed. rev. 1990) published by the American Medical Association.

The bald statement by Dr. Sanders, in connection with his assertion that a 15 percent rating was appropriate, was supported by absolutely no medical analysis or logic. We need some justification, and in the absence of such, we cannot speculate. In the case of Dr. Capel, there is no statement by him as to any appropriate rating, other than a statement that the adjustor had decided upon a five percent rating. We therefore conclude that the evidence does not support the applicant in this regard.

Under the circumstances, we conclude that the ALJ's findings, conclusions of law, and order were based upon substantial evidence in light of the entire record, and the legal conclusions were correct. The applicant has failed to prove his case.

ORDER:

IT IS ORDERED that the order of the administrative law judge dated June 29, 1992 is affirmed.

IT IS FURTHER ORDERED that any appeal shall be to the Utah

Court of Appeals within 30 days of the date hereof, pursuant to Utah Code Annotated, Sections 35-1-82.53(2), 35-1-86, and 63-46b-16. The requesting party shall bear all costs to prepare a transcript of the hearing for appeals purposes.

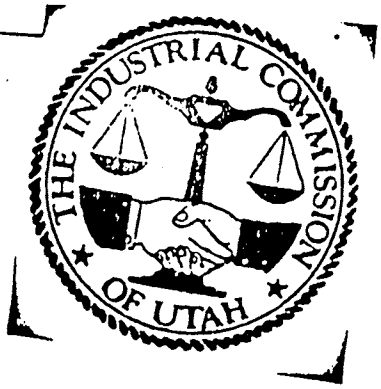
Stephen M. Hadley
Chairman

Thomas R. Carlson
Commissioner

Colleen S. Colton
Commissioner

Certified this 21st day of August 1992.
ATTEST:

Patricia O. Ashby
Commission Secretary



CERTIFICATE OF MAILING

I certify that on August 21, 1992, a copy of the attached Denial of Motion For Review in the case of Denis Ashcroft was mailed to the following persons at the following addresses, postage paid:

Bruce Wilson
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