

1992

James Turcsanski v. Salt Lake City Corporation, and Board of Review of the Utah State Industrial Commission : Brief of Appellee

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Benjamin Simms; Frank Nakamura; Attorney for Respondent.

Robert Breeze; Attorney for Petitioner.

Recommended Citation

Brief of Appellee, *Turcsanski v. Salt Lake City Corporation*, No. 920716 (Utah Court of Appeals, 1992).
https://digitalcommons.law.byu.edu/byu_ca1/4704

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

DOCKET NO. 9207164 BEFORE THE UTAH COURT OF APPEALS

Priority No. 7

Appeal from the Utah Industrial Commission

Mary Noonan
Mary T. Noonan
Clerk of the Court

BEFORE THE UTAH COURT OF APPEALS

JAMES TURCSANSKI,)
)
Petitioner/Applicant,)
)
vs.)
)
SALT LAKE CITY CORPORATION,)
and BOARD OF REVIEW OF THE)
UTAH STATE INDUSTRIAL)
COMMISSION,)
)
Respondent/Defendant.)
)

Case No. 920716-CA

Priority No. 7

BRIEF OF RESPONDENT

Appeal from the Utah Industrial Commission

FRANK M. NAKAMURA
Assistant City Attorney
451 South State, Suite 505
Salt Lake City, Utah 84111
Telephone: (801) 535-7788

Attorney for Respondent
Salt Lake City Corporation

BENJAMIN SIMMS
Industrial Commission of Utah
Box 510250
Salt Lake City, UT 84151-0250

Attorney for Respondent Board
of Review of the Industrial
Commission of Utah

ROBERT BREEZE
Attorney for Defendant
211 East Broadway #215
Salt Lake City, Utah 84111
Telephone: (801) 322-2138

Attorney for Petitioner

TABLE OF CONTENTS

	Page
STATEMENT OF JURISDICTION	1
STATEMENT OF THE ISSUES	1
STANDARDS OF REVIEW	2
A. Standard for Reviewing the Commission's Finding Regarding Medical Causation	2
B. Standard for Reviewing the Commission's Discretionary Decision Not to Refer the Medical Aspects of the Case to a Medical Panel	3
STATUTES, ORDINANCES, RULES AND REGULATIONS WHOSE INTERPRETATION IS DETERMINATIVE	3
STATEMENT OF THE CASE	4
STATEMENT OF FACTS	6
SUMMARY OF ARGUMENT	14
ARGUMENT	15
POINT I.	
THERE IS SUBSTANTIAL EVIDENCE TO SUPPORT THE COMMISSION'S FINDING THAT PETITIONER FAILED TO DEMONSTRATE MEDICAL CAUSATION BETWEEN AN ACCIDENT ON FEBRUARY 13, 1988 AND HIS BACK AND NECK PROBLEMS	15
A. Medical causation is a factual matter	16
B. The Commission's finding regarding the absence of medical causation is supported by substantial evidence	16
C. Petitioner failed to marshal the evidence in support of the findings and show that despite those facts, the findings are not supported by substantial evidence	22

POINT II.

THE COMMISSION'S DISCRETIONARY DECISION NOT
TO REFER THE MEDICAL ASPECTS OF THE CASE TO A
MEDICAL PANEL WAS WITHIN THE BOUNDS OF
REASONABLENESS AND RATIONALITY 26

POINT III.

THE COMMISSION'S DECISION THAT PETITIONER'S
CLAIM WAS BARRED BY SECTION 35-1-99 OF THE
UTAH CODE ANNOTATED (1988) IS DISPOSITIVE OF
THIS CASE 28

CONCLUSION 29

AUTHORITIES CITED

CASES

<u>Anderson v. Dominic Electric</u> , 660 P.2d 241 (Utah 1983)	21
<u>Bigfoot's Inc. v. Industrial Commission</u> , 714 P.2d 1152 (Utah 1986)	23
<u>Champion Home Builders v. Industrial Commission</u> , 703 P.2d 306 (Utah 1985)	3
<u>Gocke v. Wiesley</u> , 420 P.2d 44 (Utah 1966)	23
<u>King v. Industrial Commission</u> , 209 Utah Adv. Rep. 33 (Utah App. 1993)	2, 3, 17, 22, 26
<u>Merriam v. Board of Review</u> , 812 P.2d 447 (Utah App. 1991)	2, 16
<u>Stewart v. Board of Review</u> , 831 P.2d 134 (Utah App. 1992)	2, 16
<u>Stokes v. Board of Review</u> , 832 P.2d 56 (Utah App. 1992)	21, 24, 25
<u>Workers' Compensation Fund v. Industrial Commission</u> , 761 P.2d 572 (Utah App. 1988)	26

STATUTES

35-1-45 <u>Utah Code Annotated</u>	4
35-1-77 <u>Utah Code Annotated</u>	3, 4, 26
35-1-86 <u>Utah Code Annotated</u>	1
35-1-99 <u>Utah Code Annotated</u>	4, 15, 26, 28
63-46b-1 <u>et seq.</u> , <u>Utah Code Annotated</u>	2
63-46b-14(4)(g) <u>Utah Code Annotated</u>	2
63-46b-16 <u>Utah Code Annotated</u>	1, 4
78-2a-3 <u>Utah Code Annotated</u>	1

RULES

Rule 11 <u>Utah Rules of Appellate Procedure</u>	4, 22
Rule 24 <u>Utah Rules of Appellate Procedure</u>	4, 28

TEXTS

3 Larsen, <u>The Law of Workmen's Compensation</u> , §80.21(a) (1992)	24
--	----

BEFORE THE UTAH COURT OF APPEALS

JAMES TURCSANSKI,)	
)	
Petitioner/Applicant,)	
)	
vs.)	
)	Case No. 920716-CA
SALT LAKE CITY CORPORATION,)	
and BOARD OF REVIEW OF THE)	Priority No. 7
UTAH STATE INDUSTRIAL)	
COMMISSION,)	
)	
Respondent/Defendant.)	
)	

STATEMENT OF JURISDICTION

The Court of Appeals has jurisdiction of this appeal from a final order of the Industrial Commission pursuant to Sections 35-1-86, 63-46b-16 and 78-2a-3 of the Utah Code Annotated.

STATEMENT OF THE ISSUES

The issues presented for review are:

1. Is there substantial evidence to support the Industrial Commission's finding that Petitioner Turcsanski failed to meet his burden of demonstrating medical causation between an accident on February 13, 1988 and his back and neck problems?
2. Did the Industrial Commission abuse its discretion by deciding not to refer the medical aspects of the case to a medical panel?
3. Since Petitioner has not raised, as an issue on appeal, either in his docketing statement or initial appellate brief, the Commission's ruling that his claim was barred by the one year

statute of limitations,¹ is this appeal moot?

STANDARDS OF REVIEW

Because these proceedings commenced after January 1, 1988, the review by this Court is governed by the Utah Administrative Procedures Act ("UAPA").²

A. Standard for Reviewing the Commission's Finding Regarding Medical Causation.

Petitioner argues that the Commission erred in ruling that he failed to meet his burden of showing medical causation.³ This Court has consistently held that "medical causation is a factual matter".⁴ Under the UAPA, findings of fact will be affirmed if they are supported by substantial evidence when viewed in light of the whole record before the Court.⁵ Substantial evidence is that which a reasonable person might accept as adequate to support a conclusion.⁶ "Petitioner necessarily has the burden of marshaling all of the evidence supporting the findings and showing that despite the supporting facts, and in light of the conflicting or contradictory evidence,

¹R. at 112 A-Y. Petitioner's Brief at 1.

²§§63-46b-1 et seq. of the Utah Code Ann.

³Petitioner's Brief at 1.

⁴Stewart v. Board of Review, 831 P.2d 134 (Utah App. 1992); Merriam v. Board of Review, 812 P.2d 447, 450 (Utah App. 1991).

⁵King v. Industrial Commission, 209 Utah Adv. Rep. 33, 34 (Utah App. 1993); Stewart v. Board of Review, supra at 137; §63-46b-14(4)(g) of the Utah Code Ann.

⁶King v. Industrial Commission, supra at 34.

the findings are not supported by substantial evidence."⁷

B. Standard for Reviewing the Commission's Discretionary Decision Not to Refer the Medical Aspects of the Case to a Medical Panel.

Petitioner claims that the Commission erred in not referring the medical aspects of the case to a medical panel appointed by the Commission. Section 35-1-77 of the Utah Code Annotated provides that ". . . the Commission may refer the medical aspects of the case to a medical panel" ⁸

The Commission, therefore, is expressly granted the discretion not to refer a case to a medical panel. Where a grant of discretion to an agency exists, this Court ". . . will not disturb the agency's interpretation or application of the law, unless its determination exceeds the bounds of reasonableness and rationality."⁹

STATUTES, ORDINANCES, RULES AND REGULATIONS
WHOSE INTERPRETATION IS DETERMINATIVE

This case does not involve the interpretation of a statute, ordinance, rule or regulation. Rather, the issues presented on appeal pertain to the Commission's factual finding of no medical causation and the exercise of its discretion granted to it under

⁷Id.

⁸§35-1-77 of the Utah Code Ann. (1992), emphasis added.

⁹King v. Industrial Commission, supra at 35. In Champion Home Builders v. Industrial Commission, 703 P.2d 306 (Utah 1985), the Utah Supreme Court applied an "abuse of discretion" standard to the Commission's decision not to refer a case to a medical panel.

Utah law.

The following statutes and rules are, however, controlling in his case:

1. Section 35-1-45 of the Utah Code Annotated.¹⁰
2. Section 35-1-77 of the Utah Code Annotated.¹¹
3. Section 63-46b-16 of the Utah Code Annotated.¹²
4. Section 35-1-99 of the Utah Code Annotated (1988).¹³
5. Rule 24 of the Utah Rules of Appellate Procedure.¹⁴
6. Rule 11 of the Utah Rules of Appellate Procedure.¹⁵

STATEMENT OF THE CASE

On February 13, 1988, Petitioner, while employed by the City, was on a ladder ten to twelve feet from the floor when the ladder slipped.¹⁶ He fell, with the ladder beneath him, and landed on his back, however, the fall was cushioned because he "rode the ladder down" and broke the fall with his hands.¹⁷ When he put his hands down to break his fall, he sustained a contusion to his right forearm. He was treated for injuries to his right forearm at the Holy Cross Hospital Emergency Room and

¹⁰Appendix "A" attached.

¹¹Appendix "B" attached.

¹²Appendix "C" attached.

¹³Appendix "D" attached.

¹⁴Appendix "E" attached.

¹⁵Appendix "F" attached.

¹⁶R. at 57, R. at 99.

¹⁷R. at 57.

returned to work the same day.¹⁸ He did not miss any time from work due to his accident.¹⁹

In a Report of Injury, dated February 13, 1988, Petitioner notified the City of the accident and injuries to his right arm and knee.²⁰ The report did not mention any injuries to his back or neck.²¹ In 1988, the City paid all of Petitioner's medical expenses related to his right arm and knee.²²

Four years after the accident, Petitioner notified the City, for the first time, that he had back and neck problems which he claimed were attributable to the February 13, 1988 accident.²³

On July 20, 1992, an evidentiary hearing was held before an Administrative Law Judge (ALJ) to determine if Petitioner's back and neck problems were compensable under the Workers' Compensation laws. Based upon the evidence presented at the hearing, including all relevant medical records and the testimony of Dr. Cory Anden,²⁴ the ALJ ruled that:

1. Petitioner's claim was barred by the statute of limitations for failing to notify the City of his back injury within one year after the accident;

¹⁸Id.

¹⁹Id.

²⁰R. at 60.

²¹Id.

²²R. at 101.

²³R. at 101, R. at 58.

²⁴R. at 59.

2. Petitioner did not meet his burden of proving medical causation between the accident and his back and neck problems;²⁵ and

3. There was no medical issue to justify the use of a medical panel.²⁶

On Petitioner's Motion for Review, the Commission affirmed the ALJ's decision.²⁷

Petitioner filed an appeal with this Court seeking review of only ". . . that portion of the Order which held that applicant failed to prove causation by a preponderance of the evidence."²⁸

STATEMENT OF FACTS

The following is a statement of the undisputed facts relevant to the Commission's decision:

1. On February 13, 1988, while employed by the City, Petitioner was cleaning the ceiling of a pump house on a ladder approximately 10 to 12 feet off the floor.²⁹

2. The ladder Petitioner was on slipped and, with the ladder underneath him, he "rode the ladder" down which cushioned his fall, and landed on his back.³⁰

3. During the fall, Petitioner put his hands down to

²⁵R. at 60, 61.

²⁶R. at 61.

²⁷R. at 98-103.

²⁸R. at 112.

²⁹R. at 57.

³⁰Id.

further break his fall and sustained a contusion on his right forearm from a protruding valve.³¹

4. After the fall, Petitioner felt pain in his right arm and leg.³²

5. At the time of the accident, Petitioner did not feel any pain in his back or neck.³³

6. Within hours following the accident, Petitioner went to the Emergency Room at Holy Cross Hospital and was examined by Dr. James Antinori.³⁴

7. At no time during the examination on February 13, 1988 did Petitioner complain of back or neck problems to Dr. Antinori.³⁵

8. As a result of the examination on February 13, 1988, Dr. Antinori found injuries only to Petitioner's right forearm.³⁶

9. After the examination by Dr. Antinori, Petitioner returned to work the same day of the accident and completed his shift.³⁷

10. Petitioner did not miss any time from work due to the

³¹Id.

³²Id.

³³Id.

³⁴R. at 57, R. at 129.

³⁵R. at 129.

³⁶R. at 128.

³⁷R. at 57.

accident.³⁸

11. On February 13, 1988, the date of the accident, Petitioner signed and filed a report with the City which stated that he ". . . landed on a pump injuring [his] knee and arm."³⁹

12. The report filed by Petitioner on February 13, 1988 did not mention any injuries to his back or neck.⁴⁰

13. The City paid all of Petitioner's medical expenses submitted by him for care to his right arm and knee.⁴¹

14. On June 22, 1988, the City notified Petitioner, in writing, that his workers' compensation file pertaining to the February 13, 1988 accident was closed and that the City had paid all medical bills related to the claim.⁴²

15. On March 17, 1988, one month after the accident, Petitioner sought medical treatment from Dr. Stephen Barlow.⁴³

16. During his medical visit with Dr. Stephen Barlow, Petitioner made no reference to any back or neck problems.⁴⁴

17. On June 22, 1988, four months after the accident, Petitioner sought medical care from Dr. Stephen Barlow indicating

³⁸Id.

³⁹R. at 6, R. at 60.

⁴⁰R. at 6.

⁴¹R. at 122, R. at 60.

⁴²R. at 123.

⁴³R. at 135. R. at 57. The ALJ indicated that Petitioner saw Dr. King Udall on said date. The Commission, on review, corrected the name to Dr. Stephen Barlow. R. at 102.

⁴⁴R. at 135.

that he had some back discomfort, however, he never mentioned the accident on February 13, 1988. On examination, Dr. Barlow found no back injury and diagnosed prostatitis.⁴⁵

18. More than a year after the accident, Petitioner saw Dr. King Udall for several problems including neck discomfort and depression. Dr. Udall characterized the depression as being of "greater concern" and prescribed Prozac.⁴⁶

19. After a November 20, 1989 visit by Petitioner, Dr. Udall ordered a cervical x-ray on his back. The x-ray report indicates "marked degenerative changes of the intervertebral disc" ⁴⁷

20. Following a December 26, 1989 visit by Petitioner, Dr. Udall noted that "Mr. Turcsanski has had acute pain in the mid-back, mainly on the left side. He had had this kind of problem in the past, usually with acute infection. His neck is somewhat better." Dr. Udall prescribed muscle relaxants.⁴⁸

21. On May 28, 1991, Dr. Udall met with Petitioner and noted "Jim again has severe low back pain. He is still concerned about sexual dysfunction." Dr. Udall prescribed Anaprox.⁴⁹

22. On December 3, 1991, Dr. Udall met with Petitioner and

⁴⁵R. at 136. R. at 57.

⁴⁶R. at 57.

⁴⁷Id.

⁴⁸R. at 58.

⁴⁹Id.

noted "no acute problems."⁵⁰

23. From 1989 through 1992, Petitioner sought medical care from Dr. King Udall for other different problems including bronchitis, sinus conditions, cholesterol and depression.⁵¹

24. At no time, prior to December 1991, did Petitioner mention to Dr. King Udall, during the many visits he had with Dr. Udall, the accident of February 13, 1988.⁵²

25. In December 1991, Petitioner understood that he was unable to get health insurance coverage for his 1991 back problems because they were excluded under a pre-existing condition provision.⁵³

26. In December 1991, Petitioner contacted the City requesting workers' compensation coverage for his back and neck problems which he claimed were sustained in the accident on February 13, 1988.⁵⁴ His request to the City in December 1991 was the first time he notified the City of his back and neck problems and that he attributed these problems to an accident on February 13, 1988.⁵⁵

27. The City denied Petitioner's workers' compensation

⁵⁰Id.

⁵¹Id.

⁵²Id.

⁵³Id.

⁵⁴Id.

⁵⁵R. at 60.

claim in December 1991.⁵⁶

28. Based on a referral of Dr. James Antinori, Petitioner was evaluated by Dr. Cory Anden on December 9, 1991.⁵⁷

29. Dr. Anden stated, in her notes from the visit on December 9, 1991, that Petitioner reported developing neck pain and tenderness in about 1990. She further indicated that he had been evaluated by Dr. Udall and diagnosed with degenerative changes.⁵⁸

30. On December 23, 1991, Dr. Anden met with Petitioner and evaluated x-rays that were taken on his back.⁵⁹

31. On December 23, 1991, Dr. Anden's report stated that there were "post traumatic changes of the L5 vertebral body with disc space narrowing at L4-5 most likely sustained in the industrial fall in 1988; possible left L3-4 radiculopathy secondary to disc herniation; [and] left gluteus medius muscular strain."⁶⁰

32. On July 7, 1992, based on a review of the February 13, 1988 emergency room medical records, Dr. Anden issued an opinion correcting her prior remark of December 23, 1991 stating:

I feel that this was an incorrect statement on my part, in that, if a traumatic vertebral compression fracture had been sustained in the fall, he would have had

⁵⁶R. at 58.

⁵⁷Id.

⁵⁸Id.

⁵⁹Id.

⁶⁰Id.

complaints of back pain at the time, not over one year later. A more correct statement would have been that it is possible that the lumbar injury was sustained in the fall, although it could have been related to any prior or subsequent traumatic injury, as no other lumbar x-rays had been obtained to determine the age of abnormality.⁶¹

33. In her July 7, 1992 opinion, Dr. Anden concluded:

. . . [I]n more complete review of the records and Mr. Turcsanski's complaints of low back pain, I cannot state with any degree of medical certainty that the lumbar injury was sustained at the time of the work-related fall of 2-13-88. In fact, it is unlikely that the lumbar vertebral compression fracture at L5 was sustained in the fall.⁶²

34. Dr. Roger Stuart performed a medical file review relating to Petitioner's back and neck problems.⁶³ On July 9, 1992, Dr. Stuart issued an opinion concluding that:

[Petitioner's] . . . history and x-rays are very typical of the gradual and at times progressive nature of degenerative spinal changes related to age, genetic predisposition and activities. There is no documented cervical or lumbar pain at or near the time of his February 13, 1988 fall. Thus there is no evidence to support the assertion that the fall played a pivotal or major role in developing the diffuse degenerative changes on Mr. Turcsanski's x-rays or in his current back pain problem.⁶⁴

35. At the evidentiary hearing before an Administrative Law Judge (ALJ) on July 20, 1992, Dr. Cory Anden testified that the absence of contemporaneous back pain was critical to her written opinion of July 7, 1992. She testified that she would have

⁶¹R. at 59.

⁶²Id. Emphasis added.

⁶³Id.

⁶⁴Id.

expected Petitioner's back to be "acutely painful" for 4 to 6 weeks after the fall if, in fact, a compression fracture had occurred.⁶⁵

36. On August 24, 1992, the ALJ ruled that:

a. Petitioner's claim fails due to the application of the statute of limitations. The notice of a back injury was not given to employer until four years after the accident.⁶⁶

b. Beyond the statute of limitations, Petitioner has failed to sustain his burden of proving medical causation in relation to the treatment of his back. Medical causation is lacking due to (1) the absence of back pain at the time of the 1988 fall, (2) the absence of missed work at the time of the fall or thereafter, (3) the multi-year long delay in Petitioner's attribution of the back pain to the fall, (4) Petitioner's inconsistent reports of back pain to health care providers while readily seeking treatment for other conditions, (5) the inability of his physicians to state a causal relationship between the 1988 fall and the back pain, (6) the documented presence of degenerative disc disease as an alternative cause of his pain, and (7) the suggestion that one of Petitioner's motives in making this claim was to obtain coverage through workers' compensation insurance several years later because it was being denied him through

⁶⁵Id.

⁶⁶R. at 60.

his private health insurance.⁶⁷

c. Since the records do not identify any medical or factual link between the fall and back pain, and because none of the doctors will go beyond the realm of "possibility", there is no significant medical issue to justify use of a medical panel.⁶⁸

37. The Commission affirmed the ALJ's decision on September 29, 1992.⁶⁹

38. On October 29, 1992, Petitioner filed a Writ of Review requesting this Court to review ". . . that portion of the [Commission's] Order which held that [Petitioner] . . . failed to prove causation by a preponderance of the evidence".⁷⁰

SUMMARY OF ARGUMENT

This Court should affirm the Commission's decision for the following reasons:

1. Petitioner has not marshaled the evidence in support of the Commission's findings and shown that despite the supporting facts, the findings are not supported by substantial evidence. The evidence is more than substantial to support the Commission's decision that Petitioner did not meet his burden of showing medical causation.

⁶⁷R. at 60-61.

⁶⁸R. at 61. A copy of the ALJ's "Findings of Fact, Conclusions of Law and Order" is attached as Appendix "G".

⁶⁹R. at 98. A copy of the Commission's "Denial of Motion for Review" is attached as Appendix "H".

⁷⁰R. at 112.

2. The Commission's discretionary decision not to refer the medical aspects of the case to a medical panel was within the bounds of reasonableness and rationality. According to Utah law, the Commission's decision not to refer the medical aspects of a case to a medical panel is "discretionary". Based on the facts before it, the Commission did not abuse its discretion when it determined that there were no significant issues for a medical panel.

3. Petitioner did not appeal the Commission's decision that the statute of limitations bars his claim pursuant to Section 35-1-99 of the Utah Code Annotated (1988). Accordingly, without more, the Commission's decision denying Petitioner workers' compensation benefits for his back and neck problems must be affirmed.

ARGUMENT

POINT I.

THERE IS SUBSTANTIAL EVIDENCE TO SUPPORT THE COMMISSION'S FINDING THAT PETITIONER FAILED TO DEMONSTRATE MEDICAL CAUSATION BETWEEN AN ACCIDENT ON FEBRUARY 13, 1988 AND HIS BACK AND NECK PROBLEMS.

A. Medical causation is a factual matter.

Petitioner argues that the Commission erred in finding that he failed to meet his burden of demonstrating medical causation between an accident on February 13, 1988 and his back and neck problems.⁷¹

This Court has consistently held that "medical causation is

⁷¹Petitioner's Brief at 1 and 5.

a factual matter."⁷² Petitioner, however, attempts, without citing any authority, to transform medical causation from an issue of fact to one of law, which would necessitate a different standard of review.⁷³

In Stewart v. Board of Review,⁷⁴ a worker claimed, as does the Petitioner in this case, that the Commission erred when it found insufficient credible evidence to support a conclusion that an accident caused her injuries.⁷⁵ This Court analyzed the issue raised by the worker in Stewart as a factual matter.⁷⁶ This Court, in Stewart, accepted the ALJ's findings as conclusive because the worker did not marshal the evidence in support of the findings and then demonstrate that those findings were unsupported by substantial evidence. Accordingly, the proper standard of review regarding medical causation is whether the Commission's finding is supported by substantial evidence.

B. The Commission's finding regarding the absence of medical causation is supported by substantial evidence.

"Substantial evidence" is that which a reasonable person "might

⁷²Stewart v. Board of Review, 831 P.2d 134 (Utah App. 1992); Merriam v. Board of Review, 812 P.2d 447 (Utah App. 1991).

⁷³Petitioner's Brief at 5. There is nothing in the record to indicate that the Commission required a burden of proof other than a preponderance of the evidence.

⁷⁴Stewart v. Board of Review, supra.

⁷⁵Id.

⁷⁶Id.

accept as adequate to support a conclusion."⁷⁷ There is more than adequate evidence to support the Commission's finding that Petitioner failed to meet his burden of demonstrating medical causation between the accident on February 13, 1988 and his back and neck problems.

Immediately after the accident, Petitioner felt no pain in his back or neck.⁷⁸ Within hours after the accident, Petitioner was examined by Dr. James Antinori at the Emergency Room of the Holy Cross Hospital.⁷⁹ During the examination, Petitioner never complained to Dr. Antinori of back or neck pain.⁸⁰ Dr. Antinori noted in his records that the only injuries sustained by Petitioner were contusions to his right forearm.⁸¹ After the examination by Dr. Antinori, Petitioner returned to work the same day and completed his shift.⁸² Petitioner did not miss any time from work due to the accident.⁸³ On the date of the accident, Petitioner signed and filed a report with the City which stated that he ". . . landed on a pump injuring [his] knee and arm."⁸⁴

⁷⁷King v. Industrial Commission, supra, at 34.

⁷⁸Fact ¶5.

⁷⁹Fact ¶6.

⁸⁰Fact ¶7.

⁸¹Fact ¶8.

⁸²Fact ¶9.

⁸³Fact ¶10.

⁸⁴Fact ¶11.

Petitioner never mentioned back or neck problems in the report.⁸⁵ In 1988, the City paid all medical expenses relating to Petitioner's arm and knee.⁸⁶

One month after the accident, Petitioner met with Dr. Stephen Barlow for a regular medical visit and never mentioned the accident of February 13, 1988. Four months after the accident, Petitioner sought further medical care from Dr. Barlow and mentioned some back discomfort.⁸⁷ Dr. Barlow examined the Petitioner and found that there was no back injury.⁸⁸

From 1989 to December 1991, Petitioner visited his family physician, Dr. King Udall, for several problems including depression and some neck and back discomfort.⁸⁹ On examination of Petitioner's back, Dr. Udall noted that x-rays showed marked "degenerative changes of the intervertebral disc,"⁹⁰ or low back pain associated with "acute infection".⁹¹ Significantly, Petitioner never mentioned the February 13, 1988 accident to Dr. King Udall in any of his visits prior to December 1991.⁹²

In December 1991, approximately four years after the

⁸⁵Fact ¶12.

⁸⁶Fact ¶13.

⁸⁷Fact ¶15.

⁸⁸Fact ¶17.

⁸⁹Fact ¶18.

⁹⁰Fact ¶19.

⁹¹Fact ¶20.

⁹²Fact ¶24.

accident, Petitioner contacted the City claiming that his back and neck problems should be covered by workers' compensation because they resulted from the accident on February 13, 1988.⁹³ This was the first time the City was notified of Petitioner's back and neck problems.⁹⁴ Coincidentally, at the time Petitioner notified the City, it was his understanding that, as a result of a change in his health insurance, he would not be covered for his back and neck problems because of a pre-existing condition provision.⁹⁵

In December 1991, as a result of a referral by Dr. James Antinori, Dr. Cory Anden, a physiatrist, issued a letter, based on information given to her by the Petitioner, stating that Petitioner may have a small focal compression and mild narrowing of the L4-5 disc space as well as a mild anterior osteophyte formation at the L4 vertebral body.⁹⁶

Initially, Dr. Anden indicated that, "it is probable that the lumbar injury seen on the x-ray was sustained in this fall."⁹⁷ However, on July 7, 1992, after reviewing the emergency room records prepared on the date of the accident and learning that Petitioner experienced no pain in his back contemporaneously with the accident or months later, Dr. Anden

⁹³Fact ¶26.

⁹⁴Fact ¶26.

⁹⁵Fact ¶25.

⁹⁶Fact ¶31.

⁹⁷Fact ¶31.

corrected her remarks of December 1991 stating that Petitioner's back and neck problems could have been the result of any number of causes including the normal agency process.⁹⁸ She further indicated that she could not state with any medical certainty that the February 13, 1988 accident caused Petitioner's back and neck problems.⁹⁹ Dr. Anden concluded that it was unlikely the small focal compression was caused by the accident.¹⁰⁰

Dr. Anden testified at the hearing before the ALJ and without hesitation, reaffirmed her opinion that it is unlikely the lumbar vertebral compression fracture was sustained in the fall on February 13, 1988.¹⁰¹

Dr. Roger Stuart, on examination of the medical files, reached the same conclusion as Dr. Anden. In Dr. Stuart's opinion, Petitioner's back and neck problems are typical of a gradual and, at times, progressive nature of degenerative spinal changes related to age, genetic predisposition and activities. He concluded that "there is no evidence to support the assertion that the fall played a pivotal or major role in developing the diffuse degenerative changes . . . or in [Petitioner's] current back pain problems."¹⁰²

⁹⁸Fact ¶32.

⁹⁹Id.

¹⁰⁰Fact ¶33.

¹⁰¹Fact ¶35.

¹⁰²Fact ¶34.

This Court, in Stokes v. Board of Review,¹⁰³ held that:

Medical evidence is insufficient to prove industrial causation of any injury if it is equally probable that a non-industrial accident caused the condition.¹⁰⁴

Accordingly, the ALJ, as affirmed by the Commission, properly determined that there was no medical causation according to Stokes v. Board of Review,¹⁰⁵ because: (a) Petitioner experienced no pain to his back or neck contemporaneous with the accident or months thereafter, (b) a medical examination 6 months after the accident showed no back injury, (c) he never mentioned the accident to any medical care provider in four years, even though he made several visits, until he believed that his health insurance would not cover his back and neck problems; (d) the opinions of Dr. Anden and Dr. Stewart agreed that it was unlikely the accident caused his back and neck problems; and (e) it is almost impossible to identify the cause of Petitioner's back and neck problems with the lapse of four years.

Petitioner presented no medical evidence to prove, beyond "mere possibility", that the accident on February 13, 1988 was the medical cause of his back problems. Findings of fact and imposition of liability cannot properly be made on "mere possibility".¹⁰⁶ Substantial evidence clearly supports the Commission's decision.

¹⁰³Stokes v. Board of Review, 832 P.2d 56 (Utah App. 1992).

¹⁰⁴Id. at 58.

¹⁰⁵Stokes v. Board of Review, supra.

¹⁰⁶Anderson v. Dominic Electric, 660 P.2d 241 (Utah 1983).

C. Petitioner failed to marshal the evidence in support of the findings and show that despite those facts, the findings are not supported by substantial evidence. Rule 11(e)(2) of the Utah Rules of Appellate Procedure provides:

If appellant intends to urge on appeal that a finding or conclusion is unsupported by or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion.¹⁰⁷

This Court, in King v. Industrial Commission,¹⁰⁸ stated that:

. . . our procedural rules specifically require a petitioner to provide a transcript of the proceedings if he is going to challenge factual findings under subsection 63-46b-16(4)(g) [of the UAPA]. A petitioner must also provide a transcript if he argues a legal conclusion is unsupported by the evidence in the case. Otherwise, we have no basis on which to evaluate the findings and conclusions.¹⁰⁹

The Petitioner has not only failed to provide a transcript on appeal,¹¹⁰ he resisted the City's efforts to compel Petitioner to order and submit a transcript.¹¹¹

In his efforts to "marshal the evidence" to challenge the Commission's findings, Petitioner argues that Dr. Cory Anden, at one time, stated that it is probable the lumbar injury was

¹⁰⁷Rule 11(e)(2) of the Utah Rules of Appellate Procedure.

¹⁰⁸King v. Industrial Commission, supra.

¹⁰⁹Id. at 34.

¹¹⁰R. at 117-118.

¹¹¹R. at 118-D, R. at 118-E.

sustained in the fall.¹¹² It is an undisputed fact, however, that Dr. Anden corrected her initial statement based upon a review of the Emergency Room records and learning that Petitioner did not feel pain in his back and neck at the time of the accident or months thereafter.¹¹³ Dr. Anden ultimately concluded that it is unlikely that the lumbar vertebral compression fracture at L5 was sustained in the fall.

Dr. Anden later reaffirmed her opinion when she testified at the hearing before the ALJ under oath and subject to cross-examination by Petitioner's counsel. The Commission found Dr. Anden's testimony to be credible, including her explanation as to the correction of her prior statement. The Utah Supreme Court has held that as an appellate court, "it has no power to determine the weight of the evidence or credibility of the witnesses."¹¹⁴ It is inherent within the prerogatives of the Commission, as fact finder, to judge the credibility of witnesses and draw any reasonable inferences.¹¹⁵

The Petitioner next argues that if he did not have a degenerative condition, there is no other trauma, except the fall, to account for his back problems. There is, however, nothing in the record to support Petitioner's statement that he

¹¹²Petitioner's Brief at 6.

¹¹³Fact ¶32.

¹¹⁴Bigfoot's Inc. v. Industrial Commission, 714 P.2d 1152 (Utah 1986).

¹¹⁵See, Gocke v. Wiesley, 420 P.2d 44 (Utah 1966).

did not have a degenerative condition. On the contrary, the record indicates that he has a degenerative condition.¹¹⁶ Further, there is nothing in the record which supports his statement that no other trauma occurred. Unless Petitioner was absolutely dormant during the four year period between the accident and the time he notified the City, any number of exertions could have caused his problems.

Petitioner further argues, without citing the record, that the Commission required him to show that it was "highly likely" his back problem resulted from his accident.¹¹⁷ There is, however, nothing in the record to show that the Commission applied a burden of proof other than a preponderance of the evidence. The Commission did state that the "mere possibility" of medical causation is insufficient which is consistent with this Court's decision in Stokes v. Board of Review.¹¹⁸

Petitioner apparently challenges the weight given to the evidence by the Commission. In an appellate review, however, this Court:

. . . will not ordinarily weigh the evidence nor substitute its judgment for that of the Commission on findings of fact or choices between conflicting testimony or inferences¹¹⁹

Finally, Petitioner states that ". . . the City has already

¹¹⁶Facts ¶¶19, 32 and 34.

¹¹⁷Petitioner's Brief at 7.

¹¹⁸Stokes v. Board of Review, supra.

¹¹⁹3 Larsen, The Law of Workmen's Compensation, §80.21(a) (1992).

conceded that it is equally probable that the claim of [Petitioner] . . . is valid."¹²⁰ As authority for the so-called concession, Petitioner takes, out of context, a statement made by the City in the argument part of a memorandum opposing Petitioner's Motion for Review and then cites the statement as a factual finding. The referenced statement in the City's memorandum paralleled the standard expressed by this Court in Stokes v. Board of Review.¹²¹ The City was arguing that minimally, the medical evidence demonstrated that it was equally probable a non-industrial exertion caused petitioner's back and neck problems. It is an undisputed fact, however, that there is no medical evidence, beyond "mere possibility", to demonstrate medical causation. If Petitioner is citing the City's argument as a fact, then he should also accept, as a fact, the City's argument that there is no medical causation between the February 13, 1988 accident and his back and neck problems.

Accordingly, Petitioner fails to marshal the evidence and draw this Court's attention to any flaw in the evidence relied upon by the Commission in reaching its decision.

¹²⁰Petitioner's Brief at 5 and 6.

¹²¹Stokes v. Board of Review, supra.

POINT II.

THE COMMISSION'S DISCRETIONARY DECISION NOT TO REFER THE MEDICAL ASPECTS OF THE CASE TO A MEDICAL PANEL WAS WITHIN THE BOUNDS OF REASONABLENESS AND RATIONALITY.

Section 35-1-77 of the Utah Code Annotated provides that " . . . the Commission may refer the medical aspects of the case to a medical panel appointed by the Commission."¹²² The controlling statute provides for permissive referral.¹²³ The Commission, therefore, has an express grant of discretion not to refer the medical aspects of a case to a medical panel.

Where a grant of discretion to an agency exists, ". . . [this court] will not disturb the agency's interpretation or application of the law unless its determination exceeds the bounds of reasonableness and rationality."¹²⁴

The Petitioner argues that the Commission erred by not referring the case to a medical panel based on its interpretation of Section 35-1-99 of the Utah Code Annotated - the one year statute of limitations. The Commission, however, did not rely on the statute of limitations in its decision not to refer the case to a medical panel. Rather, the Commission decided, within its discretion, not to refer the case to a medical panel because "there was no significant medical issue for the medical panel to

¹²²§35-1-77 of the Utah Code Ann., emphasis added.

¹²³Workers' Compensation Fund v. Industrial Commission, 761 P.2d 572 (Utah App. 1988).

¹²⁴King v. Industrial Commission, supra at 35.

determine."¹²⁵

The Commission's exercise of its discretion did not exceed the bounds of reasonableness and rationality.

There was no conflict in the medical evidence. Dr. Anden and Dr. Stuart concurred that it was unlikely the lumbar vertebral compression fracture was sustained in the fall on February 13, 1988. There is no evidence, beyond "mere possibility", of medical causation between the accident on February 13, 1988 and Petitioner's back and neck problems. Not only is there a lack of medical evidence demonstrating medical causation, the facts show that Petitioner experienced no pain in his back or neck at the time of the accident or for months thereafter;¹²⁶ the Emergency Room records show no injury to his back or neck;¹²⁷ he missed no work time as a result of the accident;¹²⁸ he never mentioned the accident to any of his medical care providers for four years;¹²⁹ four months after the accident, Dr. Barlow found no back injury; and Petitioner notified the City for the first time of his back and neck problems four years after the accident.

The Commission did not abuse its discretion by deciding not to refer the medical aspects of the case to a medical panel.

¹²⁵Fact ¶36.

¹²⁶Fact ¶5.

¹²⁷Fact ¶7.

¹²⁸Fact ¶9.

¹²⁹Fact ¶¶7, 16, 24.

POINT III.

THE COMMISSION'S DECISION THAT PETITIONER'S CLAIM WAS BARRED BY SECTION 35-1-99 OF THE UTAH CODE ANNOTATED. (1988) IS DISPOSITIVE OF THIS CASE.

The Commission determined that Petitioner's claim was barred by Section 35-1-99 of the Utah Code Annotated (1988) because he failed to notify the City of his alleged back and neck problems within one year from the date of the accident.¹³⁰ The Petitioner notified the City of his alleged back and neck problems approximately four years after the accident.¹³¹

The Petitioner only appealed ". . . that portion of the [Commission's] Order which held that [Petitioner] . . . failed to prove causation by a preponderance of the evidence."¹³² The Commission's decision regarding the statute of limitations was not raised as an issue by Petitioner in his docketing statement or his initial appellate brief.¹³³

Since Rule 24(c) of the Utah Rules of Appellate Procedure limits the material contained in reply briefs to "answering any new matter set forth in opposing briefs", this Court will not address the decision of the Commission regarding the statute of limitations. Accordingly, the Commission's decision that Petitioner's claim was barred by the applicable statute of

¹³⁰Fact ¶36. §35-1-99 of the Utah Code Ann. (1988).

¹³¹Fact ¶26.

¹³²Fact ¶38.


¹³³R. at 112A-Y, Petitioner's Brief at 1.

limitations is final and, without more, disposes of this case.¹³⁴

CONCLUSION

Based on the reasons stated herein, the City respectfully requests this Court to affirm the Commission's decision denying Petitioner worker's compensation for his back and neck problems.

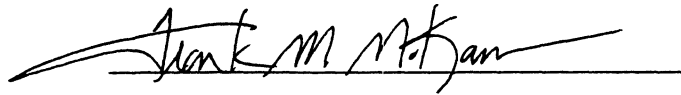
DATED this 13th day of May, 1993.


FRANK M. NAKAMURA
Assistant City Attorney
Attorney for Respondent

¹³⁴It should be noted that the purpose of the one year statute of limitations is particularly applicable in this case. As a result of the four year lapse of time, it is almost impossible to identify the cause of the Petitioner's back and neck problems. Unless Petitioner was absolutely dormant in the last four years, the cause of his back and neck problems could have resulted from any number of causes including the normal aging process. Further, the medical evidence shows that it is unlikely that the accident caused Petitioner's back and neck problems because he did not feel any back or neck pain at the time of the accident or months thereafter. If Petitioner had felt pain in his back and neck at the time of the accident or months thereafter, he likely would have reported the problems to the City in a timely manner. The absence of back and neck pain at the time of the accident or months thereafter was an important factor, in the opinion of Dr. Anden and Dr. Stewart, that there was no medical causation.

CERTIFICATE OF MAILING

I hereby certify that I mailed two copies of Respondent's Brief to Robert Breeze, Attorney for Applicant, 221 East Broadway . #215, Salt Lake City, Utah 84111, and one copy to Benjamin A. Sims, Industrial Commission of Utah, 160 East 300 South, Salt Lake City, Utah 84114-6600, by depositing the same in the U.S. mail, postage prepaid, this 13th day of May, 1993.

A handwritten signature in black ink, appearing to read "Frank M. Nathan", is written over a horizontal line.

FMN:cc

tion, the burden of proof being on any person seeking to establish the contrary; and

(ii) evidence affirmatively establishing that a partner of a partnership or an owner of a sole proprietorship had or shared control or responsibility for any failure to insure or otherwise provide adequate payment of direct compensation may only be overcome by clear and convincing evidence to the contrary.

(g) A director or officer of a corporation may not be considered an employee under Subsection (a) if the director or officer is excluded from coverage under Subsection 35-1-43(3)(b). 1992

35-1-43. "Employee," "worker" or "workmen," and "operative" defined — Mining lessees and sublessees — Partners and sole proprietors — Corporate officers and directors — Real estate agents and brokers.

(1) As used in this chapter, "employee," "worker" or "workmen," and "operative" mean:

(a) each elective and appointive officer and any other person, in the service of the state, or of any county, city, town, or school district within the state, serving the state, or any county, city, town, or school district under any election or appointment, or under any contract of hire, express or implied, written or oral, including each officer and employee of the state institutions of learning; and

(b) each person in the service of any employer, as defined in Section 35-1-42, who employs one or more workers or operatives regularly in the same business, or in or about the same establishment, under any contract of hire, express or implied, oral or written, including aliens and minors, whether legally or illegally working for hire, but not including any person whose employment is casual and not in the usual course of the trade, business, or occupation of his employer.

(2) Unless a lessee provides coverage as an employer under this chapter, any lessee in mines or of mining property and each employee and sublessee of the lessee shall be covered for compensation by the lessor under this chapter, and shall be subject to this chapter and entitled to its benefits to the same extent as if they were employees of the lessor drawing such wages as are paid employees for substantially similar work. The lessor may deduct from the proceeds of ores mined by the lessees an amount equal to the insurance premium for that type of work.

(3) (a) A partnership or sole proprietorship may elect to include as an employee under this chapter any partner of the partnership or the owner of the sole proprietorship. If a partnership or sole proprietorship makes this election, it shall serve written notice upon its insurance carrier and upon the commission naming the persons to be covered. No partner of a partnership or owner of a sole proprietorship is considered an employee under this chapter until this notice has been given. For premium rate making, the insurance carrier shall assume the salary or wage of the employee to be 150% of the state's average weekly wage.

(b) A corporation may elect not to include any director or officer of the corporation as an employee under this chapter. If a corporation makes

naming the persons to be excluded from coverage. A director or officer of a corporation is considered an employee under this chapter until this notice has been given.

(4) As used in this chapter, "employee," "worker" or "workman," and "operative" do not include a real estate agent or real estate broker, as defined in Section 61-2-2, who performs services in that capacity for a real estate broker if:

(a) substantially all of the real estate agent's or associated broker's income for services is from real estate commissions;

(b) the services of the real estate agent or associated broker are performed under a written contract specifying that the real estate agent is an independent contractor; and

(c) the contract states that the real estate agent or associated broker is not to be treated as an employee for federal income tax purposes. 1988

35-1-44. Definition of terms.

The following terms as used in this title shall be construed as follows:

(1) "Average weekly earnings" means the average weekly earnings arrived at by the rules provided in Section 35-1-75.

(2) "Award" means the finding or decision of the commission as to the amount of compensation due any injured, or the dependents of any deceased, employee.

(3) "Compensation" means the payments and benefits provided for in this title.

(4) "Disability" means becoming medically impaired as to function. Disability can be total or partial, temporary or permanent, industrial or nonindustrial.

(5) "General order" means an order applying generally throughout the state to all persons, employments, or places of employment of a class under the jurisdiction of the commission. All other orders of the commission shall be considered special orders.

(6) "Impairment" is a purely medical condition reflecting any anatomical or functional abnormality or loss. Impairment may be either temporary or permanent, industrial or nonindustrial.

(7) "Order" means any decision, rule, regulation, direction, requirement or standard of the commission, or any other determination arrived at, or decision made, by the commission.

(8) (a) "Personal injury by accident arising out of and in the course of employment" includes any injury caused by the willful act of a third person directed against an employee because of his employment.

(b) The term does not include a disease, except as the disease results from the injury.

(9) "Safe" and "safety," as applied to any employment or place of employment, means the freedom from danger to the life, health, or welfare of employees reasonably permitted by the nature of the employment.

(10) "Welfare" means comfort, decency, and moral well-being. 1991

35-1-45. Compensation for industrial accidents to be paid.

Each employee mentioned in Section 35-1-43 who is injured and the dependents of each such employee who is killed by an industrial accident shall be

flicted, shall be paid compensation for loss sustained on account of the injury or death, and such amount for medical, nurse, and hospital services and medicines, and, in case of death, such amount of funeral expenses, as provided in this chapter. The responsibility for compensation and payment of medical, nursing, and hospital services and medicines, and funeral expenses provided under this chapter shall be on the employer and its insurance carrier and not on the employee. 1988

35-1-46. Employers to secure workers' compensation benefits for employees — Methods — Failure — Notice — Injunction — Violation.

(1) Employers, including counties, cities, towns, and school districts, shall secure the payment of workers' compensation benefits for their employees:

(a) by insuring, and keeping insured, the payment of this compensation with the Workers' Compensation Fund of Utah, which payments shall commence within 30 days after any final award by the commission;

(b) by insuring, and keeping insured, the payment of this compensation with any stock corporation or mutual association authorized to transact the business of workers' compensation insurance in this state, which payments shall commence within 30 days after any final award by the commission; or

(c) by furnishing annually to the commission satisfactory proof of financial ability to pay direct compensation in the amount, in the manner, and when due as provided for in this title, which payments shall commence within 30 days after any final award by the commission. In these cases the commission may in its discretion require the deposit of acceptable security, indemnity, or bond to secure the payment of compensation liabilities as they are incurred, and may at any time change or modify its findings of fact herein provided for, if in its judgment this action is necessary or desirable to secure or assure a strict compliance with all the provisions of law relating to the payment of compensation and the furnishing of medical, nurse, and hospital services, medicines, and burial expenses to injured employees and to the dependents of killed employees. The commission may in proper cases revoke any employer's privilege as a self-insurer.

(2) The commission is authorized and empowered to maintain a suit in any court of the state to enjoin any employer, within the provisions of this chapter, from further operation of the employer's business, where the employer has failed to provide for the payment of benefits in one of the three ways provided in this section. Upon a showing of failure to so provide, the court shall enjoin the further operation of the employer's business until the payment of these benefits has been secured by the employer as required by this section. The court may enjoin the employer without requiring bond from the commission.

(3) If the commission has reason to believe that an employer of one or more employees is conducting a business without securing the payment of compensation in one of the three ways provided in this section, the commission may give such employer five days' written notice by registered mail of such noncompliance and if the employer within said period does not remedy such default, the commission may file suit as provided in this section and the court is empowered, ex parte, to issue without bond a temporary injunction

restraining the further operation of the employer's business. 1989

35-1-46.10. Notice of noncompliance to employer — Enforcement power of commission — Penalty.

(1) In addition to the remedies specified in Section 35-1-46, if the commission has reason to believe that an employer of one or more employees is conducting business without securing the payment of benefits in one of the three ways provided in Section 35-1-46, the commission may give that employer written notice of the noncompliance by certified mail to the last known address of the employer.

(2) If the employer does not remedy the default within 15 days after delivery of this notice, the commission may issue an order requiring the employer to appear before the commission and show cause why the employer should not be ordered to comply with the provisions of Section 35-1-46.

(3) If it is found that the employer has failed to provide for the payment of benefits in one of the three ways provided in Section 35-1-46, the commission may order any employer to comply with the provisions of Section 35-1-46.

(4) The commission may also impose, at the time of the hearing, a penalty against the employer of not more than one and one-half times the amount of the premium the employer would have paid for workers' compensation insurance had that employer been insured by the Workers' Compensation Fund of Utah during the period of noncompliance.

(5) This penalty shall be deposited in the Uninsured Employers' Fund created by Section 35-1-107 and used for the purposes of that fund. 1987

35-1-46.20. Requirements of any order of the commission — Court enforcement.

Any order issued by the commission under authority of Section 35-1-46.10 shall be in writing, shall be sent by registered mail to the last known address of the employer, and shall state the findings and order of the commission. The order shall specify its effective date, which may be immediate or may be at a later date. The order of the commission, upon application by the commission made on or after the effective date of the order to a court of general jurisdiction in any county in this state, may be enforced by an order to comply entered ex parte and without notice by the court. 1986

35-1-46.30. Employer's penalty for violation — Notice of noncompliance — Proof required — Admissible evidence — Criminal prosecution.

(1) Any employer who fails to comply, and every officer of a corporation or association which fails to comply, with the provisions of Section 35-1-46 is guilty of a class B misdemeanor. Each day's failure to comply is a separate offense. All funds, fines, or penalties collected or assessed shall be deposited in the Uninsured Employers' Fund created by Section 35-1-107 and used for the purposes of that fund. If the commission has sent written notice of noncompliance by registered mail to the last known address of the employer, corporation, or officers of a corporation or association, and the employer, corporation, or officers do not within ten days provide to the commission proof of compliance, the notice and failure to provide proof constitutes prima facie evidence that the employer, corporation, or officers were in violation of this section.

35-1-75. Average weekly wage — Basis of computation.

NOTES TO DECISIONS

Hourly employees.**—Minimum hours.**

The fact that an employee voluntarily limited his work hours to 13 per week did not make it unfair to award him compensation benefits for 20 hours. If the Legislature had intended to limit an hourly employee to the

actual number of hours he or she worked per week in calculating the compensation rate, the Legislature would not have included a statutory minimum of 20 hours in Subsection (1)(e). *American Roofing Co. v. Industrial Comm'n*, 752 P.2d 912 (Utah Ct. App. 1988).

COLLATERAL REFERENCES

A.L.R. — Workers' compensation: bonus as factor in determining amount of compensation,
84 A.L.R.4th 1055.

35-1-77. Medical panel — Medical director or medical consultants — Discretionary authority of commission to refer case — Findings and reports — Objections to report — Hearing — Expenses.

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

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

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

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

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

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

longed, accelerated, or in any way contributed to the disability or death, and if so, the extent in percentage to which the other causes have so contributed.

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

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

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

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

(g) The expenses of the study and report of the medical panel, medical director, or medical consultants and the expenses of their appearance before the commission shall be paid out of the Employers' Reinsurance Fund.

History: L. 1951, ch. 52, § 1; C. 1943, Supp., 42-1-71.10; L. 1955, ch. 57, § 1; 1969, ch. 86, § 9; 1979, ch. 138, § 6; 1982, ch. 41, § 1; 1988, ch. 116, § 7; 1991, ch. 136, § 13.

Amendment Notes. — The 1991 amendment, effective April 29, 1991, substituted the first "and" for "or" in Subsection (1)(a) and de-

leted the former second sentence, which read "The panel shall have the qualifications generally applicable to the medical panel under Section 35-2-56"; added Subsections (1)(b) and (c) and redesignated former Subsection (1)(b) as (1)(d); and added the second sentence in Subsection (2)(b).

NOTES TO DECISIONS

ANALYSIS

Effect of 1982 amendment.

Referral to panel.

— Discretion.

Cited.

Effect of 1982 amendment.

In accord with bound volume. See *Ortiz v. Industrial Comm'n*, 766 P.2d 1092 (Utah Ct. App. 1989).

This section is procedural and may be applied to an accident that occurred prior to the 1982 amendments. *Ortiz v. Industrial Comm'n*, 101 Utah Adv. Rep. 60 (Ct. App. 1989).

Referral to panel.

— Discretion.

The court of appeals cannot say that the administrative law judge abused his discretion in not referring the case to a medical panel when there was medical evidence to support his finding of medical causation. *Workers' Comp. Fund v. Industrial Comm'n*, 761 P.2d 572 (Utah Ct. App. 1988).

Cited in *Rekward v. Industrial Comm'n*, 755 P.2d 166 (Utah Ct. App. 1988); *USX Corp. v. Industrial Comm'n*, 781 P.2d 883 (Utah Ct. App. 1989).

(b) Venue for judicial review of informal adjudicative proceedings shall be as provided in the statute governing the agency or, in the absence of such a venue provision, in the county where the petitioner resides or maintains his principal place of business.

- (2) (a) The petition for judicial review of informal adjudicative proceedings shall be a complaint governed by the Utah Rules of Civil Procedure and shall include:

- (i) the name and mailing address of the party seeking judicial review;
- (ii) the name and mailing address of the respondent agency;
- (iii) the title and date of the final agency action to be reviewed, together with a duplicate copy, summary, or brief description of the agency action;
- (iv) identification of the persons who were parties in the informal adjudicative proceedings that led to the agency action;
- (v) a copy of the written agency order from the informal proceeding;
- (vi) facts demonstrating that the party seeking judicial review is entitled to obtain judicial review;
- (vii) a request for relief, specifying the type and extent of relief requested;
- (viii) a statement of the reasons why the petitioner is entitled to relief.

(b) All additional pleadings and proceedings in the district court are governed by the Utah Rules of Civil Procedure.

- (3) (a) The district court, without a jury, shall determine all questions of fact and law and any constitutional issue presented in the pleadings.

(b) The Utah Rules of Evidence apply in judicial proceedings under this section. 1990

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

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

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

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

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

- (a) all parties to the review proceedings may stipulate to shorten, summarize, or organize the record;
- (b) the appellate court may tax the cost of preparing transcripts and copies for the record:
 - (i) against a party who unreasonably refuses to stipulate to shorten, summarize, or organize the record; or
 - (ii) according to any other provision of law.

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

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

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

(c) the agency has not decided all of the issues requiring resolution;

(d) the agency has erroneously interpreted or applied the law;

(e) the agency has engaged in an unlawful procedure or decision-making process, or has failed to follow prescribed procedure;

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

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

(h) the agency action is:

- (i) an abuse of the discretion delegated to the agency by statute;
- (ii) contrary to a rule of the agency;
- (iii) contrary to the agency's prior practice, unless the agency justifies the inconsistency by giving facts and reasons that demonstrate a fair and rational basis for the inconsistency; or
- (iv) otherwise arbitrary or capricious. 1988

63-46b-17. Judicial review — Type of relief.

- (1) (a) In either the review of informal adjudicative proceedings by the district court or the review of formal adjudicative proceedings by an appellate court, the court may award damages or compensation only to the extent expressly authorized by statute.

(b) In granting relief, the court may:

- (i) order agency action required by law;
- (ii) order the agency to exercise its discretion as required by law;
- (iii) set aside or modify agency action;
- (iv) enjoin or stay the effective date of agency action; or
- (v) remand the matter to the agency for further proceedings.

(2) Decisions on petitions for judicial review of final agency action are reviewable by a higher court, if authorized by statute. 1987

63-46b-18. Judicial review — Stay and other temporary remedies pending final disposition.

(1) Unless precluded by another statute, the agency may grant a stay of its order or other temporary remedy during the pendency of judicial review, according to the agency's rules.

(2) Parties shall petition the agency for a stay or other temporary remedies unless extraordinary circumstances require immediate judicial intervention.

(3) If the agency denies a stay or denies other temporary remedies requested by a party, the agency's order of denial shall be mailed to all parties and shall specify the reasons why the stay or other temporary remedy was not granted.

(4) If the agency has denied a stay or other temporary remedy to protect the public health, safety, or welfare against a substantial threat, the court may

Form of report.

The attending physician makes his report on a printed blank furnished for that purpose in

which he describes the injury. *Utah Delaware Mining Co. v. Industrial Comm'n*, 76 Utah 187, 289 P. 94 (1930).

COLLATERAL REFERENCES

C.J.S. — 99 C.J.S. Workmen's Compensation § 266.

Key Numbers. — Workers' Compensation — 979.

35-1-99. Notice of injury and claim for compensation — Limitations of action.

(1) If an employee claiming to have suffered an industrial accident in the service of his employer fails to give written notice within 180 calendar days to his employer or the commission of the time and place where the accident and injury occurred, and of the nature of the accident and injury, the employee's claim for benefits under this chapter is wholly barred. If, for any reason, an employee is himself unable to provide this written notice, the employee's next-of-kin or attorney may file it within the required 180-day period. Receipt of written notice is presumed if the employer complies with the terms of Section 35-1-97 by filing with the commission an accident report, or if the employer or its insurance carrier pays disability or medical benefits to or on behalf of the injured employee.

(2) In nonpermanent total disability cases, an employee's medical benefit entitlement, except with respect to prosthetic devices, ceases if the employee does not incur, and submit to his employer or insurance carrier for payment, for a period of three consecutive years, medical expenses reasonably related to the industrial accident.

(3) A claim for compensation for temporary total disability benefits, temporary partial disability benefits, permanent partial disability benefits, or permanent total disability benefits is wholly barred, unless an application for hearing is filed with the industrial commission within six years after the date of the accident.

(4) A claim for death benefits is wholly barred, unless an application for hearing is filed within one year of the date of death of the employee.

History: C.L. 1917, § 3156x, added by L. 1921, ch. 67, § 1; R.S. 1933, 42-1-92; L. 1939, ch. 51, § 1; C. 1943, 42-1-92; L. 1981, ch. 287, § 6; 1986, ch. 211, § 11; 1988, ch. 116, § 9.

Amendment Notes. — The 1986 amendment, effective July 1, 1986, in the first sentence, substituted "accident and injury" for "same", substituted "in the notice subjects" for "therein shall subject" and made minor word changes; made stylistic changes in the second sentence; divided the former third sentence into three sentences and made stylistic changes therein; and, in the fourth sentence, deleted "industrial commission and" before "employee" and made minor word changes.

The 1988 amendment, effective July 1, 1988, designated the previously undesignated language as Subsection (1), added Subsections (2) through (4) and, in Subsection (1), substituted

the present second and third sentences for the former last four sentences, relating to the same subject matter, and, in the first sentence, deleted the proviso clause at the end, relating to knowledge being equivalent to notice and to defect or inaccuracies in the notice, and, in the remaining language, substituted "If an employee claiming to have suffered an industrial accident in the service of his employer fails to give written notice within 180 calendar days to his employer or the commission" for "When an employee claiming to have suffered an injury in the service of his employer fails to give notice to his employer" and "the employee's claim for benefits under this chapter is wholly barred" for "within 48 hours, when possible, or fails to report for medical treatment within that time, the compensation provided for herein shall be reduced 15%."

NOTES TO DECISIONS

ANALYSIS

Dismissal by court.
Summary affirmance.
Time for filing.
Cited.

Dismissal by court.

Appeal appropriate for summary disposition (i.e., dismissal) on court's own motion. See *Thompson v. Jackson*, 743 P.2d 1230 (Utah Ct. App. 1987).

Summary affirmance.

Summary affirmance under this rule is a determination of the appeal on its merits, after the parties have been afforded a full and adequate opportunity to present relevant argu-

ments and authorities. An appellate court's rejection of appellant's contentions as unmeritorious does not deny him his right of appeal. *Hernandez v. Hayward*, 764 P.2d 993 (Utah Ct. App. 1988); *State v. Palmer*, 786 P.2d 248 (Utah Ct. App. 1990) (decided under former Rule 10, Utah R. Ct. App.).

Time for filing.

A motion for summary disposition that is clearly meritorious supports a suspension of the time limitation contained in this rule. *Bailey v. Adams*, 798 P.2d 1142 (Utah Ct. App. 1990).

Cited in *Benchmark, Inc. v. Salt Lake Valley Mental Health Bd., Inc.*, 830 P.2d 218 (Utah 1991).

Rule 11. The record on appeal.

(a) **Composition of the record on appeal.** The original papers and exhibits filed in the trial court, the transcript of proceedings, if any, the index prepared by the clerk of the trial court, and where available the docket sheet, shall constitute the record on appeal in all cases. A copy of the record certified by the clerk of the trial court to conform to the original may be substituted for the original as the record on appeal. Only those papers prescribed under paragraph (d) of this rule shall be transmitted to the appellate court.

(b) **Pagination and indexing of record.** Immediately upon filing of the notice of appeal, the clerk of the trial court shall paginate all of the original papers and any transcript filed in that court in chronological order and shall prepare a chronological index of those papers. The index shall contain a reference to the date on which the paper was filed in the trial court and the starting page of the record on which the paper will be found. Clerks of the trial and appellate courts shall establish rules and procedures for checking out the record after pagination for use by the parties in preparing briefs for an appeal or in preparing or briefing a petition for writ of certiorari.

(c) **Duty of appellant.** After filing the notice of appeal, the appellant, or in the event that more than one appeal is taken, each appellant, shall comply with the provisions of paragraphs (d) and (e) of this rule and shall take any other action necessary to enable the clerk of the trial court to assemble and transmit the record. A single record shall be transmitted.

(d) Papers on appeal.

(1) **Criminal cases.** All of the papers in a criminal case shall be included by the clerk of the trial court as part of the record on appeal.

(2) **Civil cases.** In all civil cases, the papers to be transmitted shall consist of the following.

(A) **Civil cases with short records.** In civil cases where all the papers total fewer than 300 pages, all of the papers will be transmitted to the appellate court upon completion of the filing of briefs. In such cases, the appellant shall serve upon the clerk of the trial court, simultaneously with the filing of appellant's reply brief, notice of the date on which appellant's reply brief was filed. If appellant does not intend to file a reply brief, appellant shall notify the clerk of the trial court of that fact within 30 days of the filing of appellee's brief.

(B) **All other civil cases.** In all other civil cases where the papers are or exceed 300 pages, all parties shall file with the clerk of the trial court, within 10 days after briefing is completed, a joint or separate designation of those papers referred to in their respective briefs. Only those designated papers and the following, to the extent applicable, shall be transmitted to the clerk of the appellate court.

- (i) the pleadings as defined in Rule 7(a), Utah Rules of Civil Procedure;
- (ii) the pretrial order, if any;
- (iii) the final judgment, order, or interlocutory order from which the appeal is taken;
- (iv) other orders sought to be reviewed, if any;
- (v) any supporting opinion, findings of fact or conclusions of law filed or delivered by the trial court;
- (vi) the motion, response, and accompanying memoranda upon which the court rendered judgment, if any;
- (vii) jury instructions given, if any;
- (viii) jury verdicts and interrogatories, if any;
- (ix) the notice of appeal.

(3) **Agency cases.** Where all papers in the agency record total fewer than 300 pages, the agency shall transmit all papers to the appellate court. Where all papers in the agency record total 300 or more pages, the parties shall, within 10 days after briefing is completed, file with the agency a joint or separate designation of those papers necessary to the appeal. The agency shall transmit those designated papers to the appellate court. Instead of filing all papers or designated papers, the agency may, with the approval of the court, file only the chronological index of the record or of such parts of the record as the parties may designate. All parts of the record retained by the agency shall be considered part of the record on review for all purposes.

(e) The transcript of proceedings; duty of appellant to order; notice to appellee if partial transcript is ordered.

(1) **Request for transcript; time for filing.** Within 10 days after filing the notice of appeal, the appellant shall request from the reporter a transcript of such parts of the proceedings not already on file as the appellant deems necessary. The request shall be in writing, and, within the same period, a copy shall be filed with the clerk of the trial court and the clerk of the appellate court. If no such parts of the proceedings are to be requested, within the same period the appellant shall file a certificate to that effect with the clerk of the trial court and a copy with the clerk of the appellate court. If there was no reporter but the proceedings were otherwise recorded, the appellant shall request from a court transcriber certified in accordance with the rules and procedures of the Judicial Council a transcript of such parts of the proceeding not already on file as the appellant deems necessary. By stipulation of the parties approved by the appellate court, a person other than a certified court transcriber may transcribe a recorded hearing. The clerk of the appellate court shall, upon request, provide a list of all certified court transcribers. The transcriber is subject to all of the obligations imposed on reporters by these rules.

(2) **Transcript required of all evidence regarding challenged finding or conclusion.** If the appellant intends to urge on appeal that a finding or conclusion is unsupported by or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion.

(3) **Statement of issues; cross-designation by appellee.** Unless the entire transcript is to be included, the appellant shall, within 10 days after filing the notice of appeal, file a statement of the issues that will be presented on appeal and shall serve on the appellee a copy of the request or certificate and a copy of the statement. If the appellee deems a transcript of other parts of the proceedings to be necessary, the appellee shall, within 10 days after the service of the request or certificate and the statement of the appellant, file and serve on the appellant a designation of additional parts to be included. Unless within 10 days after service of such designation the appellant has requested such parts and has so noti-

fied the appellee, the appellee may within the following 10 days either request the parts or move in the trial court for an order requiring the appellant to do so.

(4) **Payment of reporter.** At the time of the request, a party shall make satisfactory arrangements with the reporter or transcriber for payment of the cost of the transcript.

(f) **Agreed statement as the record on appeal.** In lieu of the record on appeal as defined in paragraph (a) of this rule, the parties may prepare and sign a statement of the case, showing how the issues presented by the appeal arose and were decided in the trial court and setting forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of the issues presented. If the statement conforms to the truth, it, together with such additions as the trial court may consider necessary fully to present the issues raised by the appeal, shall be approved by the trial court. The clerk of the trial court shall transmit the statement to the clerk of the appellate court within the time prescribed by Rule 12(b)(2). The clerk of the trial court shall transmit the index of the record to the clerk of the appellate court upon approval of the statement by the trial court.

(g) **Statement of evidence or proceedings when no report was made or when transcript is unavailable.** If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including recollection. The statement shall be served on the appellee, who may serve objections or propose amendments within 10 days after service. The statement and any objections or proposed amendments shall be submitted to the trial court for settlement and approval and, as settled and approved, shall be included by the clerk of the trial court in the record on appeal.

(h) **Correction or modification of the record.** If any difference arises as to whether the record truly discloses what occurred in the trial court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated, the parties by stipulation, the trial court, or the appellate court, either before or after the record is transmitted, may direct that the omission or misstatement be corrected and if necessary that a supplemental record be certified and transmitted. The moving party, or the court if it is acting on its own initiative, shall serve on the parties a statement of the proposed changes. Within 10 days after service, any party may serve objections to the proposed changes. All other questions as to the form and content of the record shall be presented to the appellate court. (Amended effective October 1, 1992.)

Advisory Committee Note. — The rule is amended to make applicable in the Supreme Court a procedure of the Court of Appeals for preparing a transcript where the record is maintained by an electronic recording device. The rule is modified slightly from the former Court of Appeals rule to make it the appellant's responsibility, not the clerk's responsibility to arrange for the preparation of the transcript.

Amendment Notes. — The 1992 amendment, effective October 1, 1992, added the second sentence in Subdivision (a) and made stylistic

changes in the third sentence; in Subdivision (b) inserted "and any transcript" and substituted "a chronological index" for "an alphabetical index" in the first sentence and added the third sentence; and in Subdivision (d) deleted "and Exhibits" from the heading, deleted "original" before "papers" in four places, rewrote the introductory paragraph in Subdivision (2), deleting a second sentence similar to the new third sentence in Subdivision (b), deleted "by the parties, as set forth in Rule 12(b)(2)" from the end of the first sentence in Subdivision (2)(A), and added Subdivision (3).

remanding the case under this rule on its own motion at any time if the claim has been raised and the motion would have been available to a party.

(b) **Content of motion; response; reply.** The content of the motion shall conform to the requirements of Rule 23. The motion shall include or be accompanied by affidavits alleging facts not fully appearing in the record on appeal that show the claimed deficient performance of the attorney. The affidavits shall also allege facts that show the claimed prejudice suffered by the appellant as a result of the claimed deficient performance. A response shall be filed within 20 days after the motion is filed. Any reply shall be filed within 10 days after the response is filed.

(c) **Order of the court.** Upon consideration of the motion, affidavits, and memoranda, the court may order that the case be temporarily remanded to the trial court for the purpose of entering findings of fact relevant to the claim of ineffective assistance of counsel. If it appears to the appellate court that the attorney of record on the appeal faces a conflict of interest upon remand, the court shall direct that counsel withdraw and that new counsel for the appellant be appointed or retained.

(d) **Effect on appeal.** Oral argument and the deadlines for briefs shall be vacated upon the filing of a motion to remand under this rule. Other procedural steps required by these rules shall not be stayed by a motion for remand, unless a stay is ordered by the court upon stipulation or motion of the parties or upon the court's motion.

(e) **Proceedings before the trial court.** Upon remand the trial court shall conduct hearings and take evidence as necessary to enter the findings of fact necessary to determine the claim of ineffective assistance of counsel. Evidentiary hearings shall be conducted without a jury and as soon as practicable after remand. The burden of proving a fact shall be upon the proponent of the fact. The standard of proof shall be a preponderance of the evidence. The trial court shall enter written findings of fact.

(f) **Preparation and transmittal of the record.** At the conclusion of all proceedings before the trial court, the clerk of the trial court and the court reporter shall prepare the record of the supplemental proceedings as required by these rules. If the record of the original proceedings before the trial court has been transmitted to the appellate court, the clerk of the trial court shall immediately transmit the record of the supplemental proceedings upon preparation of the supplemental record. If the record of the original proceedings before the trial court has not been transmitted to the appellate court, the clerk of the court shall transmit the record of the supplemental proceedings upon the preparation of the entire record.

(g) **Appellate court determination.** Upon receipt of the record from the trial court, the clerk of the court shall notify the parties of the new schedule for briefing or oral argument under these rules. Errors claimed to have been made during the trial court proceedings conducted pursuant to this rule are reviewable under the same standards as the review of errors in other appeals. The findings of fact entered pursuant to this rule are reviewable under the same standards as the review of findings of fact in other appeals.

(Added effective October 1, 1992.)

Rule 24. Briefs.

(a) **Brief of the appellant.** The brief of the appellant shall contain under appropriate headings and in the order indicated:

(1) A complete list of all parties to the proceeding in the court or agency whose judgment or order is sought to be reviewed, except where the caption of the case on appeal contains the names of all such parties. The list should be set out on a separate page which appears immediately inside the cover.

(2) A table of contents, with page references.

(3) A table of authorities with cases alphabetically arranged and with parallel citations, rules, statutes and other authorities cited, with references to the pages of the brief where they are cited.

(4) A brief statement showing the jurisdiction of the appellate court.

(5) A statement of the issues presented for review and the standard of appellate review with supporting authority for each issue.

(6) Constitutional provisions, statutes, ordinances, rules, and regulations whose interpretation is determinative shall be set out verbatim with the appropriate citation. If the pertinent part of the provision is lengthy, the citation alone will suffice, and in that event, the provision shall be set forth as provided in paragraph (f) of this rule.

(7) A statement of the case. The statement shall first indicate briefly the nature of the case, the course of proceedings, and its disposition in the court below. A statement of the facts relevant to the issues presented for review shall follow. All statements of fact and references to the proceedings below shall be supported by citations to the record in accordance with paragraph (e) of this rule.

(8) Summary of arguments. The summary of arguments, suitably paragraphed, shall be a succinct condensation of the arguments actually made in the body of the brief. It shall not be a mere repetition of the heading under which the argument is arranged.

(9) An argument. The argument shall contain the contentions and reasons of the appellant with respect to the issues presented, with citations to the authorities, statutes, and parts of the record relied on.

(10) A short conclusion stating the precise relief sought.

(b) **Brief of the appellee.** The brief of the appellee shall conform to the requirements of paragraph (a) of this rule, except that a statement of the issues or of the case need not be made unless the appellee is dissatisfied with the statement of the appellant.

(c) **Reply brief.** The appellant may file a brief in reply to the brief of the appellee, and if the appellee has cross-appealed, the appellee may file a brief in reply to the response of the appellant to the issues presented by the cross-appeal. Reply briefs shall be limited to answering any new matter set forth in the opposing brief. The content of the reply brief shall conform to the requirements of paragraph (a)(2), (3), (6), (9), and (10) of this rule. No further briefs may be filed except with leave of the appellate court.

(d) **References in briefs to parties.** Counsel will be expected in their briefs and oral arguments to keep to a minimum references to parties by such designations as "appellant" and "appellee." It promotes clarity to use the designations used in the lower court or in the agency proceedings, or the actual names of parties, or descriptive terms such as "the employee," "the injured person," "the taxpayer," etc.

(e) **References in briefs to the record.** References shall be made to the pages of the original record as paginated pursuant to Rule 11(b), to pages of the reporter's transcript, or to pages of any statement of the evidence or proceedings or agreed statement prepared pursuant to Rule 11(f) or 11(g). References to exhibits shall include exhibit numbers. If reference is made to evidence the admissibility of which is in controversy, reference shall be made to the pages of the transcript at which the evidence was identified, offered, and received or rejected.

(f) **Reproduction of statutes, rules, regulations, documents, etc.** If determination of the issues presented requires the study of statutes, rules, regulations, etc., or relevant parts thereof, to the extent not set forth under subparagraph (a)(6) of this rule, they shall be reproduced in the brief or in an addendum at the end, or they may be supplied to the court in pamphlet form. Copies of those parts of the record on appeal that are of central importance to the determination of the appeal (e.g., the challenged instructions, findings of

fact and conclusions of law, memorandum decision, the contract or document subject to construction, etc.) shall also be included in the addendum.

(g) **Length of briefs.** Except by permission of the court, principal briefs shall not exceed 50 pages, and reply briefs shall not exceed 25 pages, exclusive of pages containing the table of contents, tables of citations and any addendum containing statutes, rules, regulations, or portions of the record as required by paragraph (f) of this rule.

(h) **Briefs in cases involving cross-appeals.** If a cross-appeal is filed, the party first filing a notice of appeal shall be deemed the appellant for the purposes of this rule and Rule 26, unless the parties otherwise agree or the court otherwise orders. The brief of the appellee shall contain the issues and arguments involved in the cross-appeal as well as the answer to the brief of the appellant.

(i) **Briefs in cases involving multiple appellants or appellees.** In cases involving more than one appellant or appellee, including cases consolidated for purposes of the appeal, any number of either may join in a single brief, and any appellant or appellee may adopt by reference any part of the brief of another. Parties may similarly join in reply briefs.

(j) **Citation of supplemental authorities.** When pertinent and significant authorities come to the attention of a party after that party's brief has been filed, or after oral argument but before decision, a party may promptly advise the clerk of the appellate court, by letter setting forth the citations. An original letter and nine copies shall be filed in the Supreme Court. An original letter and seven copies shall be filed in the Court of Appeals. There shall be a reference either to the page of the brief or to a point argued orally to which the citations pertain, but the letter shall without argument state the reasons for the supplemental citations. Any response shall be made within 7 days of filing and shall be similarly limited.

(k) **Requirements and sanctions.** All briefs under this rule must be concise, presented with accuracy, logically arranged with proper headings and free from burdensome, irrelevant, immaterial or scandalous matters. Briefs which are not in compliance may be disregarded or stricken, on motion or sua sponte by the court, and the court may assess attorney fees against the offending lawyer.

(l) **Brief covers.** The covers of all briefs shall be of heavy cover stock and shall comply with Rule 27.

(Amended effective October 1, 1992.)

Advisory Committee Note. — The brief must now contain for each issue raised on appeal, a statement of the applicable standard of review and citation of supporting authority.

Amendment Notes. — The 1992 amendment, effective October 1, 1992, added the third sentence in Subdivision (c) and made stylistic changes in Subdivisions (a)(5) and (7).

NOTES TO DECISIONS

ANALYSIS

Constitutional arguments.

Contents.

—Argument.

—Inappropriate language.

—Issues raised.

—Statement of facts with citation to record.

—Failure to contain.

—Standard of review.

Failure to file.

—Defective appeal.

Properly documented argument.

Reply brief.

Cited.

Constitutional arguments.

In order to make an argument for an innovative interpretation of a state constitutional provision textually similar to a federal provi-

sion, the following points should be developed and supported with authority and analysis. First, counsel should offer analysis of the unique context in which Utah's constitution developed with regard to the issue at hand. Second, counsel should demonstrate that state appellate courts regularly interpret even textually similar state constitutional provisions in a manner different from federal interpretations of the United States Constitution and that it is entirely proper to do so in our federal system. Third, citation should be made to authority from other states supporting the particular construction urged by counsel. *State v. Bobo*, 803 P.2d 1268 (Utah Ct. App. 1990).

Contents.

A brief must contain some support for each contention. *State v. Wareham*, 772 P.2d 960

APPENDIX "G"

INDUSTRIAL COMMISSION OF UTAH

Case No. 92000214

RECEIVED
CITY ATTORNEY'S OFFICE

DATE 8-28-92

JAMES TURCSANSKI,

Applicant,

vs.

SALT LAKE CITY CORPORATION,

Defendants.

*
*
*
*
*
*
*
*
*
*
*

FINDINGS OF FACT,

CONCLUSIONS OF LAW

AND ORDER

* * * * *

HEARING: Hearing Room 334, Industrial Commission of Utah,
160 East 300 South, Salt Lake City, Utah on July
20, 1992, at 3:00 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 Robert
Breeze, Attorney at Law.

The defendants were represented by Frank Nakamura,
Attorney at Law.

This is a claim for medical expenses in connection with an
alleged industrial accident of February 13, 1988. No temporary
total disability or permanent partial impairment is claimed.
Defendants deny liability on the grounds that medical causation is
lacking, and further, that the statute of limitations bars this
claim.

Applicant made a preliminary Motion for Summary Judgment based
on the opinion of Dr. Corey Anden. Dr. Anden later changed her
opinion and the motion was withdrawn. Defendants made a Motion for
Summary Judgment based on the statute of limitations. That motion
was taken under advisement by the Administrative Law Judge.

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.

JAMES TURCSANSKI
ORDER
PAGE TWO

FINDINGS OF FACT:

The applicant, James Turcsanski, was employed by Salt Lake City Corporation's water department in 1988. On February 13, 1988, he and another employee, Jeff Jensen, were assigned to clean the ceiling of a pump house.

The applicant was working on a ladder approximately 10 to 12 feet off the floor, cleaning the ceiling overhead with a mop. Jensen was initially holding the ladder, but when Turcsanski began dripping on him, he moved. Shortly thereafter the ladder slipped and fell. Turcsanski fell straight down in a backwards position, and landed on his back with the ladder lying under him. He testified that the fall was somewhat like "riding the ladder" all the way down, with the ladder underneath him. He put his hands down to break his fall and injured his arm on a protruding valve. Photo exhibits A-3, A-4, and A-5 represent photographic attempts by Turcsanski to re-create the fall.

After the fall, the applicant got off the ladder and felt pain in his right arm and leg. On cross-examination he specifically denied feeling any back pain. He went to the Emergency Room at Holy Cross Hospital. Their records indicate that he was treated for a contusion on his right forearm. (Ex. D-1, p. 6.) He returned to work and completed his shift. He has not missed any time from work due to this injury.

During the next few years, Turcsanski was occasionally treated by his family physician, Dr. King Udall, for a variety of general medical problems. The records disclose a visit one month after the fall in 1988 for stomach problems (Ex. D-1, p. 14). On June 20, 1988, Turcsanski saw Dr. Udall complaining of pain in his back. Dr. Udall's notes state "Has pain in his back. No temperature. No back injury. Feels better today." He diagnosed prostatitis and prescribed medication, (Ex. D-1, p. 15.)

More than a year later, on November 20, 1989, Turcsanski saw Dr. Udall complaining of several things, including neck pain and depression. Dr. Udall characterized the depression as being "of greater concern" and prescribed Prozac. (Ex. D-1, p. 18.) He also ordered a cervical x-ray. The x-ray report indicates "marked degenerative changes of the intervertebral disc" between C5 and C6 and between C6 and C7. (Ex. D-1, p. 34).

On December 26, 1989, Dr. Udall saw him again and noted, "Mr. Turcsanski has had acute pain in the mid back, mainly on the left side. He has had this kind of problem in the past, usually with

JAMES TURCSANSKI
ORDER
PAGE THREE

acute infection. His neck is somewhat better." (Ex. D-1, p. 17.) Dr. Udall prescribed muscle relaxants.

Other visits with Dr. Udall involved bronchitis, sinus conditions, cholesterol, and depression. At no time do the records indicate the applicant mentioning a 1988 fall or resultant back pain.

On May 28, 1991, Dr. Udall saw him and noted, "Jim again has had severe low back pain. He is still concerned about sexual dysfunction." (Ex. D-1, p. 22.) Dr. Udall prescribed Anaprox again. The last notes from Dr. Udall are dated December 3, 1991 and state, "no acute problems were noted." (Ex. D-1, p. 23).

In December, 1991, the applicant consulted Dr. Corey Anden, a physiatrist. The circumstances of this medical treatment were in dispute. Turcsanski testified that he had begun to wonder if he had back problems as a result of his 1988 injury, and he called Dr. Jim Antinori, who had originally treated him at the Holy Cross Emergency Room. Dr. Antinori opined that a back problem could have resulted from the fall and referred him to Dr. Anden. (Ex. A-2.)

The employer argues that Turcsanski began tying his back condition in to the 1988 injury because he had been denied insurance coverage for back treatment by his health carrier. Turcsanski admitted that he was unable to get his health insurance to cover his 1991 back problems because they were excluded under a pre-existing conditions clause. He then contacted Reta Halford, who handles workers' compensation claims for Salt Lake City, and inquired about receiving workers' compensation medical expense benefits for neck and back treatment. Halford denied the claim on the basis that no neck or back injuries had been reported in connection with the 1988 accident. (Ex. D-2.)

Dr. Anden saw the applicant on December 9, 1991. Her records state that he reported developing neck pain and tenderness in about 1990. She further noted that he had been evaluated by Dr. Udall and diagnosed with degenerative changes at that time. During her visit, she describes his symptoms as, "persistent left-sided low back pain," and adds, "He generally has increased low back pain every winter since 1989." (Ex. D-1, p. 46.)

Dr. Anden recommended that the applicant have x-rays and possibly, a CT scan. She saw him in follow-up on December 23, 1991, to evaluate the x-rays. Her report states, "post traumatic changes of the L5 vertebral body with disk space narrowing at L4-5 most likely sustained in the industrial fall in 1988; possible left L3-4 radiculopathy secondary to disk herniation; left gluteus medius muscular strain." (Ex. D-1, p. 40.) She recommended a CT

JAMES TURCSANSKI
ORDER
PAGE FOUR

scan but it was not performed due to the denial of coverage by the employer/carrier.

On July 7, 1992, Dr. Anden issued a letter changing her previous opinion given in this case. That letter came about after Dr. Anden was given the emergency room medical records by Salt Lake City Corporation. She notes in that letter that her statement relating the lumbar injury to the 1988 fall should be corrected:

"I feel that this was an incorrect statement on my part, in that, if a traumatic vertebral compression fracture had been sustained in that fall, he would have had complaints of back pain at the time, not over one year later. A more correct statement would have been that it is possible that the lumbar injury was sustained in the fall, although it could have been related to any prior or subsequent traumatic injury, as no other lumbar x-rays had been obtained to determine the age of the abnormality."

Dr. Anden concluded the letter with the statement: "In fact, it is unlikely that the lumbar vertebral compression fracture at L5 was sustained in the fall." (Ex. D-1, p. 38.)

Dr. Anden testified at the hearing and further explained her change of opinion. She stated that when she saw the emergency room medical records from the 1988 fall she learned that Turcsanski did not complain of back pain at the time of the fall. She testified that this absence of contemporaneous back pain was a critical factor in her change of opinion. She further testified that she would have expected Turcsanski's back to be "acutely painful" for 4-6 weeks after the fall -- if, in fact, a compression fracture had occurred.

Dr. Roger Stuart performed a medical file review at the request of the defendants herein on July 9, 1992. His report concluded that the applicant's history and x-rays are, "very typical of the gradual and at times progressive nature of degenerative spinal changes related to age, genetic predisposition and activities. There is no documented cervical or lumbar pain at or near the time of his February 13, 1988 fall. Thus there is no evidence to support the assertion that the fall played a pivotal or major role in developing the diffuse degenerative changes present on Mr. Turcsanski's x-rays or in his current back pain problem." (Ex. D-1, p. 36.)

JAMES TURCSANSKI
ORDER
PAGE FIVE

CONCLUSIONS OF LAW:

The applicant, James Turcsanski, did sustain a compensable industrial accident when he fell from a ladder on February 1, 1988. However, he has not proven any entitlement to further medical benefits as a result of that accident. No evidence of temporary total disability nor permanent partial disability is present in the record.

First, the claim fails due to the application of the statute of limitations, U.C.A. 35-1-99. A claim for a back injury was not made by the applicant to his employer within a reasonable period after the date of the accident. The version of the statute in effect at the time of his February 13, 1988, fall read: "If no notice of accident and injury is given to the employer within one year from the date of the accident, the right to compensation shall be wholly barred." Although notice of the fall and an arm injury was clearly given to the employer, notice of a back injury was not given until December, 1991 -- nearly four years later. This failure to notify the employer of an injury seriously prejudiced their ability to evaluate and treat that injury.

Applicant argues that the language of the pre-1988 statute, which provides for tolling of the statute of limitations until the insurance company (employer) gives a written notice of denial, should apply to preserve his claim. While it is true that the insurance company did not give Turcsanski a written denial of liability, it was because they had no way of knowing he would re-appear four years later with a new claim for a back injury. The employer had paid for the emergency room visit promptly and no follow-up care or missed work had resulted in three years. They had no reason to send a denial of further liability because no further liability was being claimed, and therefore, any application of that portion of the statute to these facts would be strained.

Beyond the statute of limitations questions, Turcsanski has failed to sustain his burden of proving medical causation in relation to the treatment of his back. The Administrative Law Judge finds that medical causation is lacking due to 1) the absence of back pain at the time of his 1988 fall, 2) the absence of missed work at the time of the fall or thereafter, 3) the multi-year long delay in applicant's attribution of the back pain to the fall, 4) applicant's inconsistent reports of back pain to health care providers while readily seeking treatment for other conditions, 5) the inability of his physicians to state a causal relationship between the 1988 fall and the back pain, 6) the documented presence

JAMES TURCSANSKI
ORDER
PAGE SIX

of degenerative disc disease as an alternative cause of his pain, and 7) the suggestion that one of applicant's motives in making this claim was to obtain coverage through workers' compensation insurance several years later because it was being denied him through his private health insurance. In short, there is simply no credible medical or factual evidence that the back pain is related to the 1988 fall.

The applicant urged the Commission to send this matter to a medical panel for yet another evaluation, based on the argument that Drs. Anden, Antinori and Udall thought that medical causation was "possibly" present. Such equivocations are not sufficient to put the medical issue in dispute. It is not clear what information Dr. Udall has concerning the 1988 fall, and Dr. Anden states it is actually unlikely that there is a relationship.

Rather than rely on these doctors' recent speculative opinions as to what might be "possible," the Administrative Law Judge has examined the contemporaneous medical records from the 1988 fall and subsequent visits. Because those records do not identify any medical or factual link between the fall and back pain, and because none of the doctors will go beyond the realm of "possibility," she finds no significant medical issue to justify use of a medical panel as required by Commission Rule. This decision is consistent with the language of the statute, U.C.A. 35-1-77, which clearly places referral to a Medical Panel within the discretion of the Commission.

ORDER:

IT IS HEREBY ORDERED that the claim of James Turcsanski for further medical benefits in connection with his February 13, 1988 industrial accident is denied, and the same is hereby dismissed with prejudice.

IT IS FURTHER ORDERED that any Motion for Review of the foregoing shall be filed in writing within thirty (30) days of the

CERTIFICATE OF MAILING

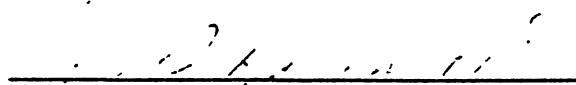
I hereby certify that on the 27th day of August, 1992, the attached FINDINGS OF FACT, CONCLUSIONS OF LAW and ORDER in the case of James Turcsanski was mailed, postage pre-paid to the following persons at the following addresses:

James Turcsanski
4008 Stillwater Way
WVC UT 84120

Robert Breeze, Atty
221 E Broadway #215
Salt Lake City UT 84111

Frank Nakamura, Atty
451 S State Street #505
Salt Lake City UT 84111

INDUSTRIAL COMMISSION OF UTAH



June S. Harrison, Paralegal
Adjudication Division

/jsh

APPENDIX "H"

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

JAMES TURCSANSKI,

Applicant,

vs.

SALT LAKE CITY CORPORATION,

Respondent.

DENIAL OF MOTION
FOR REVIEW

Case No. 92000214

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 asks us to review the findings of fact, conclusions of law, and order of the administrative law judge (ALJ) dated August 27, 1992.

The applicant alleges the following factual errors:

1. The applicant requested permanent total disability benefits once his condition had stabilized sufficiently, and the ALJ incorrectly said that the applicant did not claim these benefits.
2. The ALJ failed to reflect the testimony of Jeff Jansen to the effect that the fall was of such a severity that he thought Mr. Turcsanski was dead.
3. The ALJ said that the applicant went to see Dr. Udall on June 20, 1988 complaining of back pain when the applicant actually had gone to see Dr. Barlow.
4. The ALJ incorrectly stated that there was evidence to the effect that the applicant could not get his group health insurer to cover the back problem.
5. The ALJ made no reference to the city attorney going ex parte to visit Dr. Anden's office to discuss the applicant's case on July 7, 1992 without the applicant's or his counsel's consent.

The applicant further alleges the following legal objections:

1. There is no requirement in the pre July 1, 1988 version of the workers' compensation statute of limitations that all physical maladies resulting from

the accident be reported within one year.

2. The ALJ erred when she determined that the applicant did not meet his burden of proof with respect to the issue of medical causation.

The applicant requests that we reverse the decision of the ALJ, or in the alternative, requests that we order the matter referred to a medical panel.

A brief review of the facts will be set forth. On February 13, 1988, the applicant and another employee were employed by the Salt Lake City Corporation, and were cleaning the ceiling of a pump house. The applicant was on a ladder 10 to 12 feet from the floor. The ladder slipped, and the applicant fell straight down, but backwards. He landed on his back with the ladder beneath him. He put his hands down to break his fall, and he injured his arm on a protrusion.

After the fall, the applicant felt pain in his right leg and arm. He went to the emergency room of Holy Cross Hospital where he was treated for a contusion to his right forearm. He returned to work to complete his shift, and did not miss any work time due to injury.

During the next several years, the applicant was treated for a variety of general medical conditions. With regard to the problems for which he claims workers' compensation, he was treated on June 20, 1988 by Dr. Barlow for pain his back. The doctor determined that there was no back injury, and diagnosed prostatitis.

On November 20, 1989, the applicant saw Dr. Udall for neck pain and depression. An x-ray was taken which indicated "marked degenerative changes of the intervertebral disc" between C5 and C6 and between C6 and C7.

On December 26, 1989, the applicant was treated by Dr. Udall for acute pain on the left side in the mid back. The doctor prescribed muscle relaxants.

On May 28, 1991, among other problems, Dr. Udall treated the applicant for low back pain. On December 3, 1991, Dr. Udall stated that there were "no acute problems ... noted."

With regard to the next treatment on December 9, 1991, there was a dispute between the parties as to the circumstances of treatment. Dr. Anden saw the applicant on this date, and related that the applicant began developing neck tenderness and pain around

TURCSANSKI
ORDER
PAGE THREE

1990. Her records note that the applicant had been evaluated by Dr. Udall who noted degenerative changes. Dr. Anden stated the applicant's symptoms to be "persistent left-sided low back pain ... [which] has increased ... every winter since 1989." She prescribed x-rays and, possibly, a CT scan. She reviewed the x-rays on December 23, 1991, and stated that there were "post traumatic changes of the L5 vertebral body with disk space narrowing at L4-5 most likely sustained in the industrial fall in 1988[;] ... possible left L3-4 radiculopathy secondary to disk herniation[;] ... [and] left gluteus medius muscular strain."

The applicant testified that he went to see Dr. Anden based on a recommendation from the physician who originally treated the applicant at the emergency room. Based on the applicant's suspicion that his current back problems were related to the 1988 fall, he had called the emergency room physician who felt that a back problem could have resulted from the fall.

The employer, however, alleged that the applicant could not get coverage for back treatment by his health insurance carrier due to a pre-existing condition exclusion, and consequently attempted to obtain coverage under workers' compensation. The applicant claims that he did not bother to file with his health insurance provider because of the exclusion. In any event, the employer denied the applicant's claim based on the applicant's failure to report any neck or back injuries in connection with the 1988 accident.

Dr. Anden changed her previous opinion as to the likely cause of the injury on July 7, 1992. Apparently, she was given the emergency room medical records, and after review, she issued a letter in essence retracting her previous opinion, concluding that it was unlikely that the lumbar vertebral compression fracture at L5 was sustained in the fall. Further, she testified at the hearing to explain her change of opinion. She testified that the absence of contemporaneous back pain at the time of the fall was a critical factor in changing her view, and that she would have expected the applicant's back to be acutely painful for 4-6 weeks subsequent to the fall if a compression fracture had occurred.

Finally, a medical file review by Dr. Stuart on behalf of the defendants on July 9, 1992 yielded a report showing that the changes to the applicant's spine were degenerative changes related to age, genetic predisposition, and activities. The doctor concluded that there was no evidence to support the assertion that the fall played a major role in developing the degenerative changes present in the x-rays or in the applicant's current back problems.

TURCSANSKI
ORDER
PAGE FOUR

The ALJ determined that the applicant did sustain a compensable industrial accident on February 1, 1988, but that he did not prove any entitlement to further medical benefits as a result of that accident. Further, she concluded that the applicant had not proved medical causation of his back problems due to:

1. the absence of back pain at the time of his 1988 fall;
2. the absence of missed work at the time of the fall or thereafter;
3. the multi-year long delay in applicant's attribution of the back pain to the fall;
4. the applicant's inconsistent reports of back pain to health care providers while readily seeking treatment for other conditions;
5. the inability of his physicians to state a causal relationship between the 1988 fall and the back pain;
6. the documented presence of degenerative disc disease as an alternative cause of his pain, and,
7. the suggestion that one of the applicant's motives in making this claim was to obtain coverage through workers' compensation insurance several years later because it was being denied him through his private health insurance.

Order, ALJ dated August 27, 1992 at 5-6.

The ALJ also decided that the failure of the employee to provide notice to the employer of accident and injury within one year from the date of the accident barred the applicant from any compensation. The applicant did not give notice of the alleged back injury until December 1991, four years after the accident. This reliance on the statute of limitations to bar the applicant from recovery was an additional reason to the lack of medical causation.

We conclude that there is substantial evidence in the file to support the ALJ's decision when the entire record is considered. There are some minor errors which are harmless, and do not affect the outcome of this case. These errors do not affect the impact of the statute of limitations, or the applicant's failure to show medical causation. We will correct these errors since the

TURCSANSKI
ORDER
PAGE FIVE

respondent concurs.

The doctor who treated the applicant on June 20, 1988 was Dr. Barlow rather than Dr. Udall. The error in naming the physician was harmless. We will also determine that the applicant asked for permanent partial impairment, but this determination does not affect the outcome based on the failure of the applicant to adhere to the statute of limitations or to show medical causation. We do not view the alleged failure of the ALJ to include in her opinion that Jeff Jensen thought the applicant to be dead after the applicant fell to be significant especially since the applicant returned to work, and missed no work as a result of the accident.

The alleged error relating to the "strong arm tactics" in interviewing the respondent's witness is not supported by the evidence, and we deem it to be without merit. Another fact which the applicant felt that the ALJ should reflect in her opinion was that Dr. Anden was affiliated with a clinic which is a contract provider for the city. Even if the ALJ had not considered this fact, the evidence is overwhelming that the applicant did not meet his burden of showing medical causation. Even if such was error, it was harmless under the circumstances.

With regard to the alleged error as to whether the applicant had been denied health insurance coverage or had merely believed that his policy of coverage would deny him health insurance coverage, we find that the net effect of either is the same, acting as if he had no health insurance for this problem. However, this belief of the applicant was only one small factor in the overall equation of this case, and standing alone is not determinative of the outcome. There was enough evidence to support the findings of the ALJ in this determination.

We also determine that the ALJ was correct in her refusal to send this case to a medical panel. Referral to a medical panel is within the discretion of the ALJ in this case. U.C.A. Section 35-1-77. There was no significant medical issue for the medical panel to determine. The strongest term used by the doctors which could support a medical panel was a "possible" medical causation. The records do not identify any medical or factual link between the fall and the back pain.

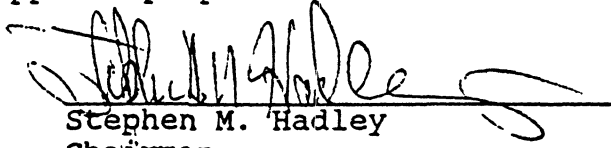
ORDER:


IT IS ORDERED that the order of the administrative law judge dated August 27, is affirmed.

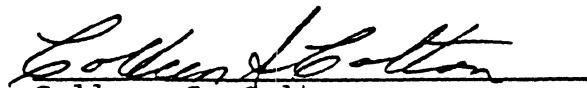
IT IS FURTHER ORDERED that any appeal shall be to the Utah

TURCSANSKI
ORDER
PAGE SIX

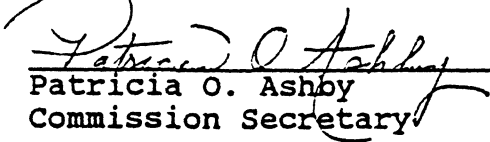
Court of Appeals within 30 days of the date hereof, pursuant to Utah Code Annotated, Sections 35-1-82.53(2), 35-1-86, and 63-46b-16. The requesting party shall bear all costs to prepare a transcript of the hearing for appeals purposes.


Stephen M. Hadley
Chairman


Thomas R. Carlson
Commissioner


Colleen S. Colton
Commissioner

Certified this 29th day of September 1992.
ATTEST:


Patricia O. Ashby
Commission Secretary

