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Marian L. Sanderson v. Industrial Commission of Utah et al : Brief of Plaintiff

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

IAN L. SANDERSON,

Plaintiff,

vs.

Case No.

INDUSTRIAL COMMISSION
UTAH, BELNAP FREIGHT
ES and THE STATE INSUR-
E FUND,

Defendants.

10235

FILED

NOV 23 1964

Clerk

BRIEF OF PLAINTIFF

APPEAL FROM AN ORDER OF THE INDUSTRIAL
COMMISSION OF UTAH

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UNIVERSITY OF UTAH

APR 23 1965

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IN THE SUPREME COURT OF THE STATE OF UTAH

MARIAN L. SANDERSON,

Plaintiff-Appellant,

vs.

CASE NO.

10235

THE INDUSTRIAL COMMISSION OF
UTAH, BELNAP FREIGHT LINES,
and THE STATE INSURANCE FUND,

Defendants-Respondents.

BRIEF OF PLAINTIFF

NATURE OF THE CASE

This is an Appeal from an Order denying Injury benefits under the Workmen's Compensation Act, and an Order denying a Rehearing.

DISPOSITION IN THE INDUSTRIAL COMMISSION

An Order was entered by The Industrial Commission limiting recovery by the Applicant, denying her claim for payment of expenses and for permanent partial disability benefits, and after application for rehearing, this appeal followed.

RELIEF SOUGHT ON APPEAL

Plaintiff, Marian L. Sanderson, herein called Sanderson, seeks reversal of the Order of the Defendant, The Industrial Commission, as a matter of law and an

Order of this Court directing the Industrial Commission to award the Plaintiff all of her medical and hospital expenses, attorney's fees, permanent partial disability benefits or a rehearing.

STATEMENT OF FACTS

The Applicant, Marian L. Sanderson, suffered an industrial accident January 16, 1962, during her employment with Belnap Freight Lines. She was going out of the building in which she was employed; she slipped and fell down defective, slippery, wet, and snowy stairs, and incurred injury to her back and other parts of her body.

The Applicant was hospitalized and received treatment. She lost time from work and continually suffered from the injury.

She was examined and treated by four physicians, three prior to the hearing and one subsequent to the hearing.

The State Insurance Fund assumed liability for the injuries so sustained by Sanderson.

The matter was referred on April 15, 1963, to a Medical Panel which thereafter filed its report dated July 17, 1963, with the Commission. The Plaintiff filed her objections to said report on August 9, 1963.

The matter was referred again to a Panel on August 19, 1963, and the Panel filed its report on October 18, 1963. Sanderson thereafter filed her objections to the second report on November 21, 1963.

Pursuant to Section 35-1-77, Utah Code Annotated, 1953, as amended, The Industrial Commission set the matter for hearing on February 10, 1964. Dr. Wayne M. Nebertson and Dr. Boyd G. Holbrook appeared on behalf

of the Medical Panel and were examined in regard to the panel reports. Dr. J. Louis Schricker and Dr. John F. Waldo appeared and were examined on behalf of Sanderson, and Sanderson appeared and was examined on her own behalf.

At the hearing, Dr. Hebertson testified that he had reviewed the Sanderson record and had examined her to the extent of examining her mental status and mental functions, her speech mechanisms, head, neck, and lower spine.

His examination of the lower spine revealed the presence of pain and that she by herself was unable to raise her legs to the 80 degree position during the straight-leg test. (R,5,6) He did not examine her in regard to her diabetic condition being aggravated by the pain and suffering from the injury.

When Dr. Hebertson examined the nerves to the head and face, Sanderson complained of a loss of feeling over the left side of the base. (R,75)

When Dr. Hebertson examined her extremities, he found that her grip was slightly reduced on the left side. (R,76)

When Dr. Hebertson examined her sensory functions, she complained that there was some loss of perception of touch over the left upper extremity. (R,77)

When Dr. Hebertson tested the tendon reflex activity, he concluded that her deep tendon reflexes were sluggish. (R, 78)

Dr. Hebertson's evaluation of Sanderson after his examination was (1) he found no objective evidence of loss of function of the central or peripheral nervous system; (2) he found subjective evidence of loss of function, i.e. pain which was present over the patient's head and neck, her decreased grip in the left hand and

the loss of feeling over the left side of the face and left upper extremity. (R, 80,81)

When counsel for Sanderson asked Dr. Hebertson a question regarding disability, he assessed a five (5%) per cent loss of function. When asked about the condition of her hand and arm, the doctor admitted that her arm would get abnormally tired and give a tingling or numbness with her condition. He also admitted a possible disability for typewriting. (R 81-83)

Counsel asked permission of the Referee to have Sanderson explain to Dr. Hebertson what type of work she did. The Referee summarily denied the request.

In reply to the question of whether or not there had been significant loss of function of her arm and hand, Dr. Hebertson replied in the affirmative. (He previously defined subjective evidence, i.e. the presence of pain over Sanderson's head and neck, her decreased grip in the left hand, and the loss of feeling over the left side of the face and left upper extremity.) (R, 80, 81, and 84)

It was at the hearing that Counsel obtained an admission from Dr. Hebertson that Sanderson had a significant loss of function--a disabling factor so that she would not be able to have the reasonable use of her left arm in her work or in her daily living (R, 85) (emphasis added)

In regard to the Medical Panel Report of October 18, 1963, Dr. Hebertson agreed that the report could be amended and the following statement added, to-wit: That subjectively there was a loss of function of arm or hand. (R, 88)

After Dr. Hebertson finished, the Referee permitted Counsel for Applicant to query Dr. Holbrook.

Dr. Holbrook testified that he was present at the examination of Sanderson and acted as recorder.

At the first Panel examination on July 17, 1963, he remembered seeing someone touch various parts of Sanderson's body; but when asked to identify the doctor so examining, he always replied that he didn't know. (R, 97 and 98)

At the second Panel examination, he remembered that Sanderson was examined by Dr. Hebertson. (R,99)

Questions were asked of Dr. Holbrook regarding the first Panel examination on July 17, 1963, in regard to examining Sanderson's head. He said that compression of the head was made in a general manner on the top of the head which resulted "in very marked and severe pain in the neck, with excruciating pain going into the head and the back of both eyes, " and "the applicant wept." (R,100) (emphasis added)

Dr. Holbrook further testified that when the neck was examined, Sanderson complained of pain, (R,100) and of difficulty in turning her head to the left. (R,100 and 101)

After Dr. Holbrook finished, Dr. Schricker was examined; and he testified on behalf of Sanderson.

Dr. Schricker performed a physical examination at his office and conducted an observation of Sanderson in the hospital. From such, he made the following diagnoses: (R, 109)

1. Post-concussion syndrome
2. Lumbo-sacral strain, left
3. Observation for cervical disc

Dr. Schricker concluded in his report of February 25, 1963, which he sent to the State Insurance Fund, that

Sanderson had a temporary partial disability of twenty-five (25%) per cent body function as a whole. (R 108 and 109)

At the hearing, Dr. Schricker testified that Sanderson had a permanent partial disability of ten (10%) to fifteen (15%) per cent body function as a whole including the left arm, the head, the neck, and the back. (R, 110 and 112)

After Dr. Schricker finished, Dr. John F. Waldo was examined and testified on behalf of Sanderson in regard to her diabetic condition. He said that she had to go into the hospital again on June 15, 1962, and stayed until July 4, 1962 because her diabetes was out of control. (R,120) He was of the opinion that the loss of control of the diabetes was related to the injury in her back. (R,120)

Dr. Waldo, in answer to the question--"as she would have severe pain, would this also influence the fact of the diabetes going out of control?"--replied that with Sanderson such had "followed in general." (R,121)

Dr. Waldo also confirmed the fact that the diabetes was difficult to control when the pain and the suffering increased. (R,123 and 129)

After Dr. Waldo testified, Sanderson was examined and testified on her own behalf. (R,139)

The Referee asked for the loss of work record of Sanderson, and the following schedule was given, to-wit: (R,130)

January 18-30, 1962	13 days
February 5-12, 1962	8 days
June 15 - July 4, 1962	21 days
December 8, 1962-February 2, 1963	87 days
April 4 - May 20, 1963	<u>47 days</u>
Total	176 days

Sanderson's counsel, Mr. Farr, attempted to introduce evidence related to difference in earning power since the accident to support a finding of disability and the Referee would not permit such evidence. In fact the Referee represented that in regard to the question of disability it was deferred until later; that the disability rating would have to be decided by a Medical Advisory Board. (R, 131)

The question of disability has never been referred to a Medical Advisory Board; however, The Industrial Commission arbitrarily made a finding that Sanderson should not be rated for permanent partial disability and denied recovery for any claim based on such. (Page 2, Order dated July 1, 1964)

The Referee recognized the fact that Sanderson was still under doctor supervision on February 10, 1964, and so admitted it when he said that she would have to be examined by a Medical Advisory Board when released by the doctor. (R, 132)

At the time of the Application for Rehearing, Sanderson was still under doctor's care and had received subsequent treatment for relief of pain and suffering from the injury involved in the industrial accident. (Page 1, Application for Rehearing and Exhibit A.)

Sanderson offered to introduce additional evidence of the progress of recovery from the injury by way of the Dr. A. F. Martin Report dated June 18, 1964, and The Industrial Commission refused to accept or consider same. (See Exhibit A attached to Application for Rehearing and Commission's Order dated August 27, 1964.)

Sanderson in her Application for Rehearing objected to the Order of the Industrial Commission of July 1, 1964, on the basis, among other things, that the Medical Panel had not made a recommendation in regard to the question of permanent partial disability. (Page 2, Paragraph 1 (f) k, Application for Rehearing.)

The Medical Panel never determined to what extent Sanderson had been injured as a result of the accident. (See Medical Panel Reports - July 17, 1963, and October 18, 1963.)

The Industrial Commission denied Sanderson the right to recover her medical and hospital expenses from June 14, 1962, to date, which she incurred in obtaining treatment for her injuries sustained from the industrial accident.

Neither the Medical Panel nor a Medical Advisory Board has ever made a finding regarding partial disability; however, Dr. Hebertson, a member of the Medical Panel, concluded that the applicant did sustain a five (5%) per cent loss of body function and consented that the Panel Report could be so amended. Dr. Schricker testified that the applicant had a Ten (10%) to fifteen (15%) per cent permanent partial disability. (See Commission Order dated July 1, 1964, and R 84, 85, 88, 91)

The Referee (one of the Commissioners) at the hearing on February 10, 1964, represented that the question of permanent partial disability would later have to be referred to a Medical Advisory Board. (R, 63)

The following is a chronological summary of the Applicant's case as extracted from the record, and beginning with the reports of the Employer and Dr. Greene, to wit:

January 18, 1962

Accident and injury with Dr. Mark Greene and Dr. J. Waldo as attending Physicians. (R,2)

Injury to her back. (R,3)

February 17, 1962

"The patient continues to have considerable trouble with her back..."

"On examination today there is localized tenderness at the lower lumbar area with a change in sensation on the lateral aspect of the lower leg. The patient is also complaining of cramps into the calf region." (R,5)

March 24, 1962

"...She continues to have pain in her back with some radiation into the lower legs. She has continued to work with a considerable amount of difficulty. She states the only thing that has really been keeping her going has been her periodic physical therapy..."

"On examination there is evidence of low back muscle spasm..." (R, 6)

May 5, 1962

"The above patient is complaining of low back pain and also of having some charleyhorses at night. She states she has continued to work and this causes her some difficulty."

"On examination today there is evidence of some lumbar muscle spasm..." (R,7)

July 19, 1962

"...The patient was seen...at the hospital and she was still complaining of back pain...She was again examined in the office on 7/19/62...which revealed localized tenderness in the region between T-6 and T-10..." (R,8)

August 18, 1962

"...the patient still complains of considerable pain in the lower thoracic region...Examination of the back again reveals localized tenderness in the region of T-10... (The Dr. at this time ordered a corset.) (R,9)

October 20, 1962

"The patient states that approximately four days ago when she was getting out of the car, she suddenly fell due to the instability of her left hip. She also has been complaining of constant pain in the low back with numbness of the entire left side.

"...There is evidence of hypesthesia in the entire left side of her body. There is localized tenderness in the level of the lower lumbar back..."

At the recommendation of Dr. John Waldo, Sanderson went to see Dr. J. Louis Schricker on October 24, 1962.

Sanderson last saw Dr. Greene on December 20, 1962, who on March 7, 1963, advised the State Insurance Fund of the transfer of the case to Dr. Schricker.

October 24, 1962

Sanderson was examined by Dr. J. Louis Schricker who sent a report dated February 25, 1963, to the State Insurance Fund. (R,22)

Excerpts from Dr. Schricker's report pertinent to this appeal are as follows: (R,22)

"In June, 1962, she was hospitalized again for another effort at control of her diabetes and because of severe nervous reaction to the effects of the injury."

"On occasion since that time the patient has had loss of ability to control the left side of her body, some difficulty with walking, with the leg going from under her without warning. She also has had pain on the left side of her body. This involves the entire left half of the body and is more prominent with walking at which time pain in the leg becomes quite severe..."

"These problems have been treated with surgical girdle and with appropriate medications for pain and control of her diabetes."

"...Cranial nerves, decrease in sensation over left side of face to pin prick. There is marked decrease in sensation over the entire left half of the body..."

"My initial impression was a herniated nucleus pulposus, L 4-5 on the left. 2. Observation for cervical disc. 3. Diabetes controlled on insulin."

November 5, 1962

"She was seen again...at which time her physical condition had become so severe that she had been fired from her employment."

"She was advised to have hospitalization... and was...admitted to L. D. S. Hospital..."

November 9, 1962

"Admitted to L. D. S. Hospital..."

November 10, 1962

"At this time three diagnoses were made:
1. Post-concussion syndrome.
2. Lumbosacral strain, left.
3. Observation for cervical disc."

November 18, 1962

"She was discharged from the hospital...somewhat improved."

November 30, 1962

"...she complained of difficult concentrating, stated that she had a great deal of pain in her back and both legs, most severely in the left leg, headache had remained essentially unabated. Diabetes at this time was completely out of con-

trol...I released her to return to work as of December 6, 1962."

December 6, 1962

(Date Dr. Schricker released Sanderson to return to work.) (R,24)

January 14, 1963

"She was next seen at the office...at which time the numbness of the entire left side of the body continued.

February 25, 1963

"At the present time, she has a temporary partial disability of twenty-five (25%) per cent body function as a whole. This is based primarily upon the headaches, complaints referable to the cervical spine and manifested primarily by numbness and tingling of the left upper extremity and also from complaints of low back pain with radiation of pain into the left lower extremity, for the most part, but with occasional episodes of radiation into the right."

(From Dr. Schricker Report dated July 25, 1963)
(R,39)

March 22, 1963

"At the time of her visit in March, 1963, she stated she was working part time. Her physical examination was essentially as I had found it on her previous visits and is summarized in the letters already in your hands..."

"...I felt she needed a lumbosacral support in order to more adequately be able to get around..."

June 21, 1963

"She had been advised to obtain a lumbosacral support on the March, 1963, visit and was wearing this support on this visit. She was going

to physical therapy on an out-patient basis and was taking robaical, librium and mellaril."

"Physical examination at this visit revealed tenderness over the spinous processes of C6 and C7 and tenderness over the low lumbar area primarily L4-L5 and S1..."

"...She also noted that there was moderate weakness in grip of the left hand. This, too, I was able to verify objectively, but I am uncertain as to whether it is a functional or organic component..."

(See Medical Report of Dr. A. F. Martin, R, 163)

Quoting from the report of the examination by Dr. A. F. Martin, to-wit:

April 21, 1964

"approximately April 12, she noted recurrence of marked snapping in her low back with extreme pain radiating into both buttocks and the backs of her legs with profound muscle spasm and cramping in the thighs. Cough and sneeze has produced marked pain in the shoulder on the left side, low back, neck, and left arm. She continued to complain of complete anesthesia of the left side of her body... She complained of numerous headaches, extreme weakness, apprehension, and nervousness...She estimated that she has lost six months from work since her accident..."

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"...but complained of hypesthesia, almost total anesthesia to pin prick along the entire left side of her body...She was tender throughout the spine area to touch, especially in the cervical, left shoulder, interscapular, and low-back areas... but bilateral severe sciatic notch tenderness and actual hyperesthesia to light touch throughout her low-back area."

Dr. Martin concluded that Sanderson had:

1. Chronic cervical syndrome
2. Chronic lumbar spine pain

May 6, 1964 (R, 163)

Sanderson admitted to St. Mark's Hospital and "was placed on intermittent heavy cervical traction as well as Williams' exercises to her low back..."

The results of such treatment as stated by Dr. Martin-- "...fortunately experienced very markable improvement in her situation. She has had no further headaches, her emotional status is greatly improved, not being so apprehensive or so concerned, and has returned to gainful employment at this time."

At the time of the Industrial accident, Sanderson was a Diabetic. When the accident happened, her diabetes went out of control; and she had to receive treatment for such in addition to and along with the injuries suffered from the accident. Dr. John F. Waldo was the attending Physician who gave her treatment in regard to the aggravated condition. (R,2)

In regard to the question of to what extent was the diabetes aggravated by the accident, Dr. John F. Waldo at the hearing on February 10, 1964, testified as follows: (R, 118, 119, 120, and 121)

Q. Now on February 5, 1963, you made an observation to the effect that she went into the hospital again on June 15th to July 4th of '62?

A. Yes.

Q. And what was the reason for her hospitalization at that time?

A. Her diabetes was very much out of control at that time.

Q: In your opinion, Doctor, is there any relationship between the diabetes and the injury which she suffered on January 18th of 1962? At that time, On January 18th, you were called in for diabetes. Was there any relationship with the diabetes going out of control and the injury at that time?

A. I can only give an opinion on that.

Q. Well, didn't you make the comment as follows:

"I do feel that the fact of her diabetes getting so thoroughly out of hand under these circumstances does relate, in a manner of speaking, to the injury to her back."

A. I said this appeared to be related to the fact that she had been having such severe pain from her back that we had great trouble controlling her food intake and insulin, and, therefore, felt the hospitalization required.

Q. This was on June 15th to July 4th?

A. Yes. That is correct.

Q. Fine, then in regard to the diabetes out of control at the time of the accident, in your opinion was this related to the accident?

A. To the extent that we could observe that her diabetes became more difficult to control when she was having the severe pain.

Q. And subsequently then, would the observation be the same? That as she would have severe pain, would this also influence the fact of the diabetes going out of control?

A. With this individual patient, this has followed in general.

Q. Then in your opinion would it be that the accident which occurred on January 18th of '62 did aggravate the diabetic condition, through this pain and suffering which she did experience?

A. I can say that her diabetes were difficult to control at that time. I couldn't be more deductive than that.

Q. And then subsequently thereafter, was the diabetes difficult to control when the pain and the suffering increased?

A. Generally speaking, yes.

Neither the Employer nor The Commission offered testimony at the hearing on February 10, 1964, to contradict the testimony of Dr. Waldo, nor Applicant's objections to the Medical Panel Reports.

At the close of the hearing on February 10, 1964, the matter was taken under advisement, and The Commission handed down the decisions dated July 1, 1964, and August 27, 1964, denying compensation benefits, medical expenses, attorney fees or a rehearing.

This appeal challenges the adverse findings and the refusal to grant the Applicant compensation benefits, medical expenses, attorney fees or a rehearing.

ARGUMENT

Point II

THE DECISION OF THE COMMISSION IS NOT SUPPORTED BY THE EVIDENCE.

Applicant challenges the Decision of the Commission because it was based upon the Medical Panel Reports which could not be considered as evidence in the case, (Section 35-1-77, Utah Code Annotated, 1953, as amended.)

The Medical Panel Report of July 17, 1963, was objected to by the Objections filed with the Commission August 8, 1963, (R,41) and the Medical Panel Report of October 18, 1963, was objected to by the Objections filed with the Commission November 21, 1963, (R, 45).

After the Applicant filed written Objections to the Medical Panel Reports, the burden of sustaining the reports by testimony at the hearing was upon the Commission or the Employer, (Hackford vs. Industrial Commission of Utah, 358 P2d 899).

At the hearing on February 10, 1964, neither the Commission nor the employer introduced the testimony required by Section 35-1-77, Utah Code Annotated, 1953, as amended, and, therefore, they did not sustain the Medical Panel Reports, and they as exhibits could not be considered competent evidence, (Hackford vs. Industrial Commission of Utah, 358 P2d 899).

The Objections of the Applicant included: (1) Corrections as to parts of the history of the case; (2) certain aspects of the summary of the physical examination by the Panel; and (3) objections to the Findings and Conclusions of the Panel.

However, on the other hand, at the hearing, the Applicant elicited testimony from Dr. Hebertson and

Dr. Holbrook, members of the Medical Panel, and Dr. Schricker and Dr. Waldo, which sustained her claim for medical expenses and disability benefits, to-wit:

Dr. Hebertson testified that the Applicant had a five (5%) per cent disability loss of function, (R,91)

Dr. Hebertson testified that the Applicant had pain present over her head and neck, a decreased grip in the left hand, loss of feeling over the left side of the face and left upper extremity, (R 80, 81).

Dr. Hebertson testified that the Applicant in her condition had a disability for using a typewriter, (R, 83). (The Applicant is a key-punch operator and uses her hands under some what related circumstances as does a typist.)

Dr. Holbrook testified that when one of the members of the Medical Panel put the Applicant's head between his hands and exerted pressure on the head that it resulted in "very marked and severe pain in the neck, with excruciating pain going into the head and the back of both eyes," and "the Applicant wept."

Dr. Holbrook also testified that the Applicant had difficulty in turning her head to the left, (R,101).

In answer to an inquiry about the condition of the Applicant's back, Dr. Holbrook said he would have to refer to the report of the panel, (R,102). Referring to said report, it states what the Doctors said in regard to the condition of the back, to-wit: (R,37)

"She showed rather marked tenderness over the sacrum and then a moderate tenderness at about L-3 and continuing up the entire spine with it being most marked again

in the mid-cervical area. She was also tender throughout the neck including the posterior occipital nerve and the mastoid processes."

Dr Schricker testified that he obtained a history from the Applicant, performed a physical examination and formulated a conclusion. He said that following his initial evaluation at the office, he made three diagnoses, to-wit: (R, 108)

1. A herniated nucleus pulposus, L4-5 on the left.
2. Observation for cervical disc.
3. Diabetes controlled on insulin.

He further testified that after a period of hospitalization and further examinations and tests his diagnoses were, to-wit: (R, 109)

1. Post-concussion syndrome.
2. Lumbosacral strain, left.
3. Observation for cervical disc.
4. Diabetes controlled on insulin.

In regard to the question of disability, Dr. Schricker testified that the Applicant had a permanent partial disability of ten (10%) to fifteen (15%) per cent body function as a whole, including the left arm. (R, 110)

Dr. Schricker said that he had examined the Applicant on February 7, 1964. (A period of three days prior to the hearing.) He said that his conclusions from said examination were essentially the same as in his report of February 25, 1963. (R, 111)

During said examination the Applicant complained about her left arm to Dr. Schricker, and he testified

that he wrote down her complaints as follows: "the left arm bothered a great deal at work. The left arm and hand weaker, and she drops things easily. The left neck and shoulder cords swell and get tight." (R, 112) (emphasis added)

Dr. Schricker testified that on February 7, 1964, (three days before the hearing) he examined her head, neck, and back, and that the result of the examination was essentially as he had summarized in terms of reaching the three diagnoses, and the degree of disability previously stated. (R, 112)

Neither the Commission nor the Employer cross-examined Dr. Schricker. His testimony stands uncontroverted, sustains his previous reports, and gives additional evidence in the matter.

In regard to the question of the extent to which the Applicant's diabetic condition was aggravated by the pain and suffering from the injury, neither the Commission nor the Employer sustained the report of the Panel at the hearing, February 10, 1964.

The only doctor who knew of the diabetic condition of the Applicant was her own doctor, Dr. John F. Waldo.

Not one of the members of the Medical Panel was sufficiently informed to have made the finding stated in the Panel Reports.

The record shows that the evidence or information which the Medical Panel could review in making its finding regard the question of aggravation was the following:

1. Report of Dr. Mark H. Greene, dated 7/19/62, (R, 8).

2. Letter of Attorney Lionel M. Farr, Dated 4/4/1963, (R, 17).
3. Report of Dr. J. Louis Schricker, Dated 2/25/1963 (R,22).
4. Report of Dr. John F. Waldo, Dated 6/14/1963, (R, 29).
5. Report of Dr. J. Louis Schricker, Dated 7/25/1963, (R, 39).
6. Applicant's Objections, Dated 8/6/1963, (R, 41).
7. Information from the Applicant, herself before the Medical Panel on July 17, 1963, and October 18, 1963.

At the hearing on February 10, 1963, neither the Employer nor The Commission introduced testimony to sustain the Medical Panel Reports or to contradict the Objections of the Applicant or the Report or Testimony of Dr. John F. Waldo.

The best evidence which the Commission had to consider in regard to the aggravation of the diabetic condition was the testimony of Dr. John F. Waldo. Neither the Commission nor the Employer cross-examined Dr. Waldo, and neither did they introduce any evidence to contradict his testimony.

At the hearing, Dr. Waldo testified, in substance, he was of the opinion that there was a relationship between the pain and suffering from the injury in the back to the diabetes getting out of control, (R, 119, 120, 121).

When the Commission and the Employer failed to sustain the medical report by testimony at the hearing February 10, 1963, the Commission was precluded from

basing its decision upon same, (Hackford vs. Industrial Commission of Utah, 385 P2d 899).

Applicant advised the Commission that she objected to the use of the Panel Reports as competent evidence, (R, 160).

After the hearing, Applicant continued to receive medical treatment for her pain and suffering, (R, 162).

In her application for a rehearing, Applicant informed the Commission that she was being attended by Dr. A. F. Martin; and that she had been hospitalized and received treatment from which she experienced improvement. (R, 159).

On July 21, 1964, Dr. J. Louis Schricker sent a copy of a letter informing the Commission that Applicant was released from his office to the care of Dr. A. F. Martin, (R, 157).

Applicant filed with The Commission the report of Dr. A. F. Martin, (R, 148).

Applicant concludes that the following findings and conclusions of the Commission are erroneous and improper, to-wit: (R, 141 and 166)

1. Applicant should not be rated for permanent partial disability because there is no objective evidence of permanent disability as a result of the accident.
2. Any claim at this time for permanent partial disability because of the injury to the back is and the same is hereby denied.
3. The relationship of her diabetes to this accident ceased at the time of her discharge from the hospital and the subsequent

- course and care of her diabetes since that time is not related to this accident.
4. There is no evidence of aggravation of her diabetic process as a result of this accident.
 5. Temporary total disability as a result of this accident ceased prior to June 14, 1962.
 6. No further treatment is indicated as a result of this accident.
 7. Panel reports are competent medical evidence when received by the Commission, after the report has been identified and the Applicant and Defendants have been given an opportunity to examine the chairman of the Panel.
 8. The Panel Report was supported by the facts in evidence.
 9. No new evidence is offered and no legal issues are submitted.

Point II

THE COMMISSION ACTED IN EXCESS OF OR WITHOUT ITS POWERS.

The Industrial Commission acts in excess of or without its powers when it arbitrarily disregards or unreasonably refuses to believe material, substantial, competent and uncontradicted evidence. Dale V. Industrial Commission, 115 Utah 311, 204 P2d 462.

The Decisions of the Commission are unlawful because its findings and conclusions are arbitrary, unreasonable and contrary to the evidence.

A review of the entire record establishes the following facts:

1. Applicant was injured while working at her place of employment.
2. The Applicant received injury to her head, neck, and back.
3. As a result of the injuries from the industrial accident, the Applicant suffered a loss of body function, a partial disability.
4. As a result of the pain and suffering from the injuries incurred, the Applicant's diabetes was aggravated and difficult to control.
5. As a result of the accident, the Applicant had to incur medical and hospital expenses.
6. The injuries have been continuous and require continual treatment.
7. Applicant has not been released by her physician.

The basis of the Decisions of the Commission was entirely upon the Medical Panel Reports. The Commission apparently relied solely upon these exhibits and disregarded entirely the testimony elicited by Applicant at the hearing from the Medical Panel members, Dr. Hebertson and Dr. Holbrook and the testimony of Dr. Schricker and Dr. Waldo.

A review of the record of the hearing on February 10, 1964, establishes the following facts:

1. Applicant suffered a five (5%) to fifteen (15%) per cent permanent partial disability of body function.
2. Dr. Hebertson was of the opinion that the Applicant sustained a disability for type-writing. (Applicant works under related circumstances as a key-punch operator.)
3. Applicant's diabetes was aggravated by the

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pain and suffering from the injuries resulting from the industrial accident. On February 7, 1964, (three days prior to the hearing) Applicant had neurologic examination by Dr. Schricker who testified that as a result of same, his conclusions were essentially that the Applicant had evidences of:

- a. a post-concussion syndrome
- b. lumbosacral strain
- c. some neck complaints

and that the Applicant complained that: "the left arm bothered a great deal at work. The left arm and hand weaker, and she drops things easily. The left neck and shoulder cords swell and get tight."

5. Dr. Schricker testified that as a result of the examination, February 7, 1964, of the Applicant's head, neck and back that he confirmed his previous diagnoses:

- a. Post-concussion syndrome
- b. Lumbosacral strain, left
- c. Observation for cervical disc

and that in his opinion the Applicant sustained a fifteen (15%) per cent loss of body function.

6. From the accident on January 18, 1962, until the hearing on February 10, 1964, Applicant experienced pain and suffering and had to receive treatment from Dr. Greene, Dr. Schricker, and Dr. Waldo.

After said hearing, Applicant was hospitalized by Dr. Martin, and it was not until the treatment received from Dr. Martin that she experienced markable improvement.
(R, 163)

A review of the entire record not only establishes the fact that the Commission disregarded or unreasonably

refused to believe the evidence, but it also establishes the fact that the Medical Panel also acted arbitrarily and unreasonably in its capacity of reviewing the Applicant's record.

At the first meeting of the Medical Panel on July 17, 1963, the record for it to consider would have included the following:

1. Reports of Dr. Greene (R 3, 5-10, and 16)
2. Report of Dr. Schricker (R, 22)
3. Employer's Report of Injury (R, 1 and 2)
4. Letters from Applicant's attorney (R, 11, 17 and 18, 30)
5. Report of Dr. Waldo (R, 29)
6. Miscellaneous letters (R, 4, 12 and 13, 15, 20 and 21, 27, 31)
7. Approximately a one hour group examination of the Applicant.

At the second meeting of the Medical Panel on October 18, 1963, the record for the Panel to consider included the following:

1. The reports, letters, history, and examination which the Panel had to review at its first meeting on July 17, 1963.
2. Applicant's Objections dated August 8, 1963. (R, 41)
3. Report of Dr. Schricker dated July 25, 1963. (R, 39)
4. History and examination obtained at the second hearing.

At the second meeting, Dr. Lindsay and Dr. Hebertson were in attendance in addition to Dr. Holbrook and Dr. Osman, and Dr. Hess was absent.

According to the testimony of Dr. Holbrook and Dr. Hebertson at the hearing, February 10, 1964, Dr.

Hebertson examined that Applicant's head, neck, and back, and Dr. Lindsay apparently only looked at her eyegrounds.

With the exception of the second report of Dr. Schricker, the Applicant's Objections, any physical examination given to the Applicant at the second hearing, and any additional history or comments obtained from Applicant, the second panel was not much better informed about the medical questions in this matter than the first panel.

In addition to the head, neck, and back injuries, another adverse effect which the Applicant suffered from the accident was that of the aggravation of her diabetic condition. Plaintiff, prior to the accident, had a diabetic condition. Before the accident her diabetes was under control. However, at the time of the accident and subsequent thereto she had difficulty getting it back under control.

When the Applicant was hospitalized January 18, 1962, she needed the assistance of two physicians, i.e. Dr. Mark H. Greene and Dr. John F. Waldo. Dr. Greene for observation and treatment of her head, neck, and back injuries, and Dr. Waldo for the observation and control of her diabetes.

Subsequent to her release from the initial hospitalization, the Applicant had continuous trouble with her head, neck, back, arms, and legs causing her great pain and suffering. Concurrently with this trouble she continued to have difficulty in keeping her diabetes under control.

From June 15, 1962, to July 4, 1962, the Applicant was again hospitalized (R, 119) "for another effort at control of her diabetes and because of nervous reaction to the effect of the injury", (R,22).

On November 5, 1962, Applicant was seen by Dr. Schricker who had her admitted to the L. D. S. Hospital on November 9, 1962, because her physical condition had become worse, (R, 23). She was discharged from the hospital on November 18, 1963, somewhat improved.

Applicant continued to have trouble with her head, neck, back, and left side of her body and her diabetes until she was again hospitalized from May 6, 1964, to May 19, 1964, by Dr. A. F. Martin, because of a chronic cervical syndrome, chronic lumbar spine pain and her diabetes which was badly out of control, (R, 163). She received treatment and experienced very markable improvement in her situation and returned to gainful employment by June 18, 1964, (R, 164).

The most competent evidence upon which the Commission could base its decision was that of the testimony of those present at the hearing on February 10, 1964.

All other evidence was hearsay in the form of letters, reports and objections.

Since neither the Commission nor the Employer sustained the Medical Panel Reports by competent testimony at the hearing, their value was mainly as exhibits.

The undisputed evidence compels a finding in favor of the Applicant that she is entitled to compensation benefits, expenses beyond June 13, 1962, and a determination of amount of attorney's fees.

Point III

THE COMMISSION ERRED IN REFUSING TO GRANT PLAINTIFF'S PETITION FOR REHEARING.

Pursuant to Section 35-1-78, Utah Code Annotated, 1953, as amended, The Commission has continuing jurisdiction in industrial cases, and has the authority to

grant a rehearing in the event of some change or new development not previously known. (Footnote No. 3, Page 575, Volume 4, Utah Code Annotated, 1953, referring to Carter v. Industrial Comm., 76 U. 520, 526; 290 P.776.)

Subsequent to the hearing of February 10, 1964, Applicant changed physicians by going to Dr. A. F. Martin with the approval of Dr. Schriker. She was admitted to the St. Mark's Hospital on May 6, 1964, because she had a chronic cervical syndrome and chronic lumbar spine pain, and her diabetes was badly out of control, (R, 163). She was placed in intermittent heavy cervical traction as well as Williams' exercises to her low back. She was discharged from the hospital May 19, 1964. From this treatment she experienced markable improvement in her situation, (R, 163). According to Dr. Martin she at that time had no further headaches; her emotional status greatly improved and she returned to gainful employment.

In addition to advising the Commission of the change in condition and the new developments, Applicant in her petition for a rehearing objected to the Medical Panel Reports as competent evidence, and to the fact that she had not been awarded that to which she was entitled.

Taking the record in its entirety, Plaintiff contends that she has been deprived of a fair determination of the issues involved in her case and has been unjustly denied compensation benefits and medical expenses and a rehearing.

C O N C L U S I O N

Plaintiff-Applicant respectfully submits her case to this Honorable Court for review and contends that the Decisions of the Industrial Commission are contrary to the law; that the Industrial Commission acted in excess of or without its powers; that the Industrial Commission deprived the Applicant of her right to be

further heard; and requests of this Honorable Court that the Industrial Commission should be reversed with instructions to award Applicant the benefits to which she is entitled in accordance with the Statutes of the State of Utah as in such cases made and provided upto and including the expenses and benefits incurred to date, or in the alternative to award to her the benefits accrued to February 10, 1964, the date of the hearing, and remand the matter to the Industrial Commission for further hearing to determine the issues arising subsequent to the said hearing of February 10, 1964.

Respectfully submitted,

Lionel M. Farr
Counsel for Plaintiff-Appellant