

2004

John Brent Braegger v. Utah Dept. of Public Safety,
Workers Compensation Fund of Utah and/or
Employers Reinsurance Fund and Labor
Commission of Utah : Brief of Appellant

Utah Court of Appeals

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UTAH COURT OF APPEALS

JOHN BRENT BRAEGGER,
Applicant/Petitioner/Appellant
v.

**UTAH DEPT. OF PUBLIC SAFETY,
WORKERS COMPENSATION
FUND OF UTAH and/or
EMPLOYERS REINSURANCE
FUND and LABOR COMMISSION
OF UTAH**

Respondents/Appellees

Priority: 7

Case No.: 20040825--*CA*

**APPELLANT JOHN BRENT BRAEGGER BRIEF ON HIS PETITION FOR
REVIEW**

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III.
JURISDICTION OF THE COURT

The Court of Appeals has jurisdiction in this matter pursuant to Utah Code Ann. §34A-2-801(8)(d) and Utah Code Ann. §78-2-2.

IV.
INTRODUCTION

This matter is a Petition for Review of decision by an Administrative Law Judge on March 18, 2004 and Order Denying Motion for Review issued September 8, 2004 by the Labor Commission. The Applicant was injured within the course and scope of his employment with the Department of Public Safety on three occasions, December 17, 1990, June 10, 1994 and May 14, 1998. Applicant requests benefits pursuant to the Utah Workers Compensation Act, Utah Code Ann. §35A-1-1 et. seq. The Labor Commission awarded benefits, the amount of which are not determined, but denied permanent total disability benefits claiming that pain was not related to any of the industrial accidents. The Labor Commission improperly determined that the pain was the significant cause of the Applicant's disability.

V.
STATEMENT OF ISSUES and STANDARD OF REVIEW

1. Whether Mr. Braegger is Permanently and Totally disabled. This issue is a question of law. The Court of Appeals reviews the Labor Commission's decision under a correction of law standard. Utah Code Ann. §63-46b-16(4)(d).
2. Whether the Chronic Pain Syndrome is related to the Industrial Accident. This issue is a mixed question of law and fact. The Court of Appeals will not disturb the findings or order of the Commission if they are supported by the

“preponderance of evidence”. However, the Court of Appeals also recognizes the duty, particularly with reference to a denial of compensation, to determine whether the Commission had arbitrarily disregarded competent evidence in favor of unsubstantial contradictory evidence. See Nicholson v. Industrial Commission, 389 P.2d 730 (Utah 1964), Ashcroft v. Industrial Commission, 855 P.2d 267 (Utah Ct. App. 1993).

3. Whether the impairment determined by Dr. Chung on the Chronic Pain Syndrome is appropriate by law. This is a mixed question of fact and law. The Court of Appeals will not disturb the findings or order of the Commission if they are supported by the “preponderance of evidence”. However, the Court of Appeals also recognizes the duty, particularly with reference to a denial of compensation, to determine whether the Commission had arbitrarily disregarded competent evidence in favor of unsubstantial contradictory evidence. The Court of Appeals will not disturb the findings or order of the Commission if they are supported by the “preponderance of evidence”. However, the Court of Appeals also recognizes the duty, particularly with reference to a denial of compensation, to determine whether the Commission had arbitrarily disregarded competent evidence in favor of unsubstantial contradictory evidence. See Nicholson v. Industrial Commission, 389 P.2d 730 (Utah 1964), Ashcroft v. Industrial Commission, 855 P.2d 267 (Utah Ct. App. 1993).
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5. Whether the Labor Commission is mandated to send this matter to a medical panel. The Court of Appeals reviews the Labor Commission’s decision under a correction of law standard. Utah Code Ann. §63-46b-16(4)(d). . See Nicholson v. Industrial Commission, 389 P.2d 730 (Utah 1964), Ashcroft v. Industrial Commission, 855 P.2d 267 (Utah Ct. App. 1993).
6. Whether “pain” should be considered a significant cause of permanent total disability benefits. This issue is a mixed question of law and fact. The Court of Appeals will not disturb the findings or order of the Commission if they are supported by the “preponderance of evidence”. However, the Court of Appeals also recognizes the duty, particularly with reference to a denial of compensation, to determine whether the Commission had arbitrarily disregarded competent evidence in favor of unsubstantial contradictory evidence. See Nicholson v. Industrial Commission, 389 P.2d 730 (Utah 1964), Ashcroft v. Industrial Commission, 855 P.2d 267 (Utah Ct. App. 1993).
7. Whether the Labor Commission should be mandated to issue an award. This is an issue of law. The Court of Appeals reviews the Labor Commission’s decision under a correction of law standard. Utah Code Ann. §63-46b-16(4)(d).

8. Whether Odd Lot is still appropriate. This is an issue of law. The Court of Appeals reviews the Labor Commission's decision under a correction of law standard. Utah Code Ann. §63-46b-16(4)(d).

VI.

STATEMENT AND NATURE OF THE CASE

This is a Petition for Review of the Utah Labor Commission determination of benefits and whether the Utah Labor Commission followed its own rules, directives and statutes in making its decision. Appellant John Brent Braegger seeks this matter be remanded back for further determination and issuance of an award and to have the matter referred to a medical panel pursuant to Utah Labor Commission rules.

VII.

COURSE OF THE PROCEEDINGS

John Brent Braegger filed three applications for hearing on April 24, 2002 for injuries suffered on December, 17, 1990 (Case no. 2002948), June 10, 1994 (Case No. 2002497) and May 14, 1998 (Case no. 2002948). A hearing was held on August 28, 2003. Judge Deidre Marlowe issued her Findings of Fact, Conclusions of Law on March 18, 2004. A Motion for Review was timely filed with the Labor Commission. On September 8, 2004, the Commissioner for the Utah Labor Commission, R. Lee Ellertson, denied the Motion for Review. A Petition for Review was timely filed on September 27, 2004.

VIII.

STATEMENT OF THE FACTS

1. John Brent Braegger worked for the Utah Department of Public Safety, Criminal Investigations Bureau as a Police Officer.

2. As a Police Officer, he was injured 3 significant times while in the course and scope of his employment. These include:
- a. December 18, 1990, he was moving a file cabinet to retrieve an item, he felt a sharp pain in his lower back. He continued to experience pain, numbness and tingling in his left leg going down the front and side of his leg. While he did improve, the numbness and tingling never went completely away. See Findings of Fact, paragraph 2.
 - b. June 10, 1994, while moving offices from one floor to another, he felt sharp pain again in his low back, with increased numbness and tingling to his left leg. The low back pain increased. See Findings of Fact, paragraph 3.
 - c. May 14, 1998, Mr. Braegger was descending a complete flight of stairs at the Public Safety Building. He overstepped the first step and fell head over heels down 13 metal, carpeted stairs. He struck his left cheek, low back, upper neck, left shoulder and left hip. The pain intensified dramatically in his low back. He felt sharp pain described as a “sharp shock” into his left arm and fingers. See Findings of Fact, paragraph 4.
 - d. Immediately after the 1998 injury, Mr. Braegger experienced pain, loss of strength and stamina to walk. He experienced difficulty getting in and out of chairs and vehicles; going up and down stairs became very difficult; and he would grind his teeth because of the intense pain. He continued to have pain and weakness in the neck, shoulder and low back areas radiating into his arms and legs. See Findings of Fact, paragraph 6.

- e. Mr. Braegger continued to work in pain until March 15, 2001 when it was determined he could no longer perform his essential duties as a Police Officer.
- f. Mr. Braegger has suffered no additional injuries since the 1998 accident.
- g. Workers Compensation Fund of Utah has admitted that all accidents were within the course and scope of employment.
- h. Workers Compensation Fund of Utah further admits to medical causation of the significant injuries relating to the neck, shoulder, cheek, low back and hip. See pages 7, 8, 11, 12 and 52 of hearing transcript (contained in the addendum)
- i. Mr. Braegger has a pre-existing type II diabetes condition (non insulin dependent). However, his diabetes did not prevent him from working, nor does it now.
- j. While Mr. Braegger did have pain from the other industrial injuries, it was not as significant as the pain and weakness immediately following the 5/14/1998 accident.
- k. All the parties agree that Mr. Braegger is functionally unable to work.
- l. All of the parties agree that while Applicant did suffer from pain and weakness prior to May 14, 1998 solely as a result of the prior industrial accidents, it intensified considerably and immediately following the May 14, 1998 event.

3. Workers Compensation Fund of Utah denies, however, the medical relationship between the pain relating to the Applicant's peripheral neuropathy and the industrial accidents.

IX.

SUMMARY OF THE ARGUMENT

Mr. Braegger is permanently and totally disabled from the industrial accidents he suffered while in the course and scope of his employment. He suffered injuries, pain and weakness which is undisputed. The Workers Compensation Fund admits the industrial accidents, but disputes whether the pain is related to any of the industrial accidents and that it is the pain that is the sole disabling condition. Mr. Braegger maintains that the pain is part and process of the Industrial Accidents. Nevertheless, even if the Chronic Pain Syndrome is not related to the Industrial Accident, the Applicant would still be considered Permanently and Totally disabled. The Labor Commission should have referred this matter to a medical panel as there are significant medical issues and pursuant to their own rules, a medical panel referral is mandated. Finally, the Labor Commission failed to issue and determine an award for benefits on Mr. Braegger's industrial accidents leaving the determination up to the Respondents to "figure it out".

X.

ARGUMENT

Mr. Braegger is Permanently and Totally Disabled.

It has been stipulated that Mr. Braegger was injured within the course and scope of his employment with the Department of Public Safety on three occasions. Further, there has been no evidence presented that Mr. Braegger was injured prior or subsequent to the

industrial accidents. Mr. Braegger has been unable to work since March 15, 2001 since it was determined by his employer that he could not return and perform his previous work activities. Mr. Braegger has been determined disabled according to the Social Security Sequential Decision making process. Immediately following the industrial injuries, Mr. Braegger suffered pain and weakness. While some of the pain relating to the neck, shoulder, low back, cheek, and hip is directly related to the industrial accident, there is a dispute about whether his chronic pain syndrome is related. The law is clear that an aggravation or “lighted up” of the chronic pain “give rise to” and leads to the direct cause of the disability. Giesbrecht v. Board of Review, 828 P.2d 544 (1992), Allen v. Industrial Commission, 729 P.2d 14, 25 (Utah 1986). Judge Marlowe determined that the chronic pain were more debilitating than the injury to the neck, shoulder, cheek, low back hip and related pain. Nevertheless, the question is not which is more debilitating, but rather could the Applicant return to previous work as a result of the industrial injuries. See Utah Code Ann. §34A-2-413)(b)(iii). This was never analyzed, and according to the functional capacity report, (see attached) and Department of Public Safety, Mr. Braegger would not be able to return because of his industrial injuries.

The Chronic Pain Syndrome is related to the Industrial Accident

The Applicant did not have any substantial pain or weakness prior to the industrial accidents and more specifically, the accident of 5/14/1998. Immediately following the accident, Applicant suffered pain and weakness. There was no intervening event that would cause the pain. All of the physicians note the proximity of the 5/14/1998 event and the location of the pain relative to the injuries suffered by the Applicant. Nevertheless, the peripheral neuropathy was puzzling.

The Applicant was treated by Dr. Stansfield for pain and weakness in the low back area as well as the neck. On September 7, 1999, Dr. Stansfield conducted Electromyographic testing to ascertain the cause of the pain. Specifically, Dr. Stansfield stated: "The purpose of the EMG at this time is to determine if there is evidence of a peripheral neuropathy secondary to the diabetes or entrapment neuropathy secondary to the fall that he experienced". Dr. Stansfield is an expert in diabetes. While Dr. Stansfield does not reveal his findings are related to the industrial accident, his report clearly indicates the peripheral neuropathy was not related to diabetes. Therefore, it is deduced to be related to the industrial accident as they were the only options determined by Dr. Stansfield.

Workers Compensation Fund of Utah sent the Applicant to Dr. Jeffrey Chung on April 18, 2000. Dr. Chung is a physiatrist. A physiatrist is someone that deals in sports related injuries. Dr. Chung revealed that while Mr. Braegger was compliant with his therapy, the medical treatment for the industrial accident would increase the symptoms of pain and discomfort. See page 038 ME. Dr. Chung also related that Dr. Felix felt the pain in the Applicant's left hand were caused by a rotator cuff tear which would be part of the industrial accident. See page 038 ME. Mr. Braegger indicated he had pain in his neck, hips and upper extremity. Applicant manifested to Dr. Chung that he had the following symptoms (see page 39 ME):

- a. Constant pain since 5/15/1998
- b. Difficulty driving because of severe sharp pain.
- c. Turning neck to the left caused pain to the right side.
- d. Shooting pain in his neck on left side.

- e. Headaches
- f. Low back Pain
- g. Pain in left hip
- h. Swelling of legs
- i. Feet and legs would sweat
- j. Leg cramps in back of calves and arch of feet
- k. Difficulty sleeping

Dr. Chung finds medical causation between the chronic pain syndrome and the 5/14/1998 accident. Dr. Chung determined on April 18, 2000 that Applicant had sustained an injury on 5/14/1998. He opined that Applicant's injuries "helped the patient's non-industrially related rheumatologic condition to become clinically significant." See page 047 ME. He further opined that the 5/14/1998 accident "has caused the patient to have chronic soft tissue injuries in the cervical and lumbosacral region. In addition, subsequent to the industrial injury of 5-14-98, Dr. Chung opined that the patient's previously clinically asymptomatic rheumatologic condition with features consistent with polymyositis became clinically evident." Dr. Chung opined "The patient in my opinion was teetering on the edge of a cliff without actually falling and it was likely that eventually the patient would have fallen anyway. Suffering from his industrial injury of 5-14-98 did not help his condition at all and possibly or even probably caused him to be pushed off the cliff, causing his previously clinically asymptomatic systemic rheumatologic condition to become symptomatic." (See page 049 ME). Dr. Chung continued to treat the Applicant indicating he had "Status post industrial injury of 5-14-98 when the patient fell down stairs causing chronic symptoms in the cervico-thoracic

region and at the left hip region in addition to other findings consistent with a systemic connective tissue disorder with polymyositis-type features”. See 026, 027, 030, 032 ME.

On October 17, 2002, Applicant was sent again to Dr. Chung for determination of impairment. See page 009 ME. During that examination, Dr. Chung reversed his position by saying the Applicant did not have polymyositis or myositis. Dr. Chung further indicated that “If my assumptions of fact are incorrect, my conclusions based on these assumptions are also likely to be incorrect”. He then indicated one of two possibilities on medical causation. His first theory is that Mr. Braegger’s medical problem is “currently unknown to medical science”. His next theory is that Mr. Braegger’s pain is related to psychological problems such as conversion disorder and/or malingering. Dr. Chung dismissed the psychological problem immediately. Dr. Chung further indicated that the industrial injuries “precipitated or accelerated multiple symptoms related to multilevel degenerative changes at the cervical and lumbar spine. Dr. Chung then confuses the issues when he determined that applicant has diabetes related, four-extremity peripheral polyneuropathy and bilateral peroneal mononeuropathies. Note that he did not take into consideration that the industrial accident (legal causation) contributed to or aggravated an underlying asymptomatic pre-existing condition. He was solely looking at the underlying cause.

Dr. Stromquist opined several diagnoses relating to the pain condition:

- A. He has advanced degenerative disc disease in the cervical and lumbar spines (industrially related).
- B. He has a rotator cuff tear in the left shoulder (likewise industrially related).
- C. He has pain and restricted mobility in the left hip (likewise industrially related).

D. Dr. Stromquist finally determined and suggested that “The causation of chronic pain syndromes specifically is unknown, but it is held to relate to physical trauma in a susceptible individual, aggravated by certain adverse conditions, among which may be depression or psychological maladjustment, physical deconditioning and an adverse treatment environment (litigation or insurance claims are a factor). Dr. Stromquist indicated that the Degenerative Disc Disease was aggravated by the injury as was his left hip arthritis. His left lateral femoral cutaneous severe syndrome was caused or aggravated either by the fall, or by wearing the heavy equipment around the hips such as a gun or tool belt.

Dr. Chris Chung, a Fellow with Jim Macintyre opined that Applicant had Neck pain, probable C-Spine and T-spine mechanical dysfunction. (See page 151 ME)

All of the physicians note the proximity of the complaints in relation to the industrial accident of 5/14/1998.

Utah law recognizes the aggravation rule such that where an industrial injury aggravates, accelerates, or combines with a pre-existing condition, the entire resulting injury is compensable so long as the claimant can “show that the employment contributed something substantial to increase the risk he already faced in everyday life because of his condition.” Giesbrecht, v. Board of Review, 828 P.2d 544(1992), Allen v. Industrial Commission, 729 P.2d 15, 25 (Utah 1986).

The pain and weakness that Applicant receives should be considered related to the industrial accident. The symptoms surfaced immediately after the industrial accident of 5/14/1998. It is in the location of his neck, shoulder, low back, cheek, hip and radiating toward his extremities. Since there is time, place, location of injury and absence of any

evidence to the contrary, it therefore should be considered as part of the industrial accident. If there is an underlying asymptomatic condition that becomes symptomatic as a result of the industrial injury, it is likewise compensable under the workers compensation system. Finally, “but for” the industrial accident, he would not be suffering these problems. He was not being treated for chronic pain, nor did he anticipate any treatment for the condition. Finally, even though he has continued pain in his neck, shoulder, low back and hip, which is directly and causally related to the industrial accident, it should not be assumed that all of his pain and weakness is related to other causes. In fact, the chronic pain syndrome that is in dispute is related only to his extremities. Judge Marlowe wholly misinterprets the records when she states there is “nothing in the medical records which relates this syndrome to the injury”. As indicated above, there is ample evidence to show a connection with the pain and the industrial accident.

The impairment determined by Dr. Chung on the Chronic Pain Syndrome was not appropriate.

The Utah Labor Commission requires that an impairment must be determined according to the Utah’s 2002 Impairment Guides as published by the Utah Labor Commission. If the condition is not found in the Utah 2002 Impairment Guides, then one is to utilize the AMA Guides for Evaluation of Permanent Impairment 5th Edition and as modified by the Utah Labor Commission guidelines. See Rule R612-7-3.

The Utah’s 2002 Impairment Guides do not address pain. However, in the AMA Guides for Evaluation of Permanent Impairment 5th Edition on page 566, it states: (See addendum)

Pain is subjective. Its presence cannot be readily validated or objectively measured. Physicians are confronted with ambiguity as they attempt to assess the severity and significance of chronic pain in their patients. In large part, this stems from the fundamental divide between a person who suffers from pain and an observer who attempts to understand that suffering. Observers tend to view pain complaints with suspicion and disbelief, akin to complaints of dizziness, fatigue and malaise. As Scarry remarked, “To have great pain is to have certainty, to hear that another person has pain is to have doubt”. (See page 566)

. . . . In the majority of cases there is no demonstrable tissue pathology. Thus, pain can exist without tissue damage, and tissue damage can exist without pain. In summary, there is no “pain thermometer,” that is, no biological measure that correlates highly with individuals’ complaints of pain. (See page 566.)

. . . Because percentages for pain-related impairment have not been used and tested on a widespread basis, as have other impairment ratings used in the *Guides*, it was decided that impairment ratings for pain disorders would not be expressed as percentages of whole person impairment. (See page 566.)

The AMA Guides for Evaluation of Permanent Impairment 5th Edition

specifically addresses when there are “controversial Pain Syndromes. It specifically states:

As noted above, physicians disagree sharply about whether individuals with chronic pain should be construed as having conditions with definite, albeit obscure, biologic underpinnings. The alternative is to describe these people as having CPS (Chronic Pain Syndrome), psychogenic pain syndromes, or some other term implying that their pain cannot be associated with a well-accepted biologic abnormality. For purposes of this chapter, the pain of individuals with ambiguous or controversial pain syndromes is considered *unratable*. (See page 371)

Dr. Chung went contrary to the AMA Guides for Evaluation of Permanent Impairment 5th Edition when he determined Mr. Braegger suffered an impairment rating for pain of 25%. Dr. Chung then further complicates matters by advocating for the Workers Compensation Fund that the pain impairment exceeds that of all other functional limitations without any basis. Dr. Chung admits in his report that the impairment rating is not accurate. In fact, it is misleading. The Guides to the Evaluation of Permanent

Impairment rarely allow an impairment relating to pain as it is often associated with various injuries or diseases. See page 570. “Physicians recognize the local and instant pain that commonly accompanies many disorders. Impairment ratings in the Guides already have accounted for pain.” Dr. Chung’s report should not be accepted by the Labor Commission as it clearly goes against it’s rules of using the AMA Guides and secondly, Judge Marlowe should have sent the matter to a medical panel for clarification and determination of impairment according to rule.

Judge Marlowe misapplies the direct cause of the permanent disability. She states that it is related to the Chronic Pain Syndrome. She infers that because the impairment rating for pain as indicated by Dr. Chung is higher than the injuries to the neck, low back, shoulder, cheek and left hip that the functional limitations are not the “direct cause”. There is a significant difference between impairment and disability. Impairment is a loss of function, while disability is how the injuries affect one in their vocation. Further, the statute for Permanent Total Disability requires a “substantial” not a “sole direct cause” standard. See Utah Code Ann. §34A-2-413.

Judge Marlowe ruled completely opposite to uncontroverted evidence

Judge Marlowe further cites in her record that Mr. Braegger claims that without the pain, he would still be able to work. This goes contrary and is completely opposite to the evidence presented:

Hearing Transcript, page 55, line 18 to page 56, line 7

Q. Okay, do you believe that your current symptoms are related to the accident that was in May of 1998 and, if so, why?

A. I believe that they are, yes. The reason I believe that is I've had no problems or any type like symptoms prior to the accident. All my problems have started to come on and caused and notice since the accident. Prior to that, I was functioning fine, doing my job, going on just like normal. Other than I'd watch my lower back, I knew I had a problem there, so I was cautious about that. But I didn't have any problems with neck, shouoder, supper back, my legs, the pain, none of that until the accident in 1998.

Hearing Transcript, page 57, lines 4-8.

Q. Okay. If you did not have these neck and shoulder and low back problems, in your opinion, do you believe that you could still function as a – as an officer?

A. Yes.

Hearing Transcript, page 65, line 22 to page 66, line 18. by Attorney Lorri Lima.

Q. My question goes to the amount of pain you felt. You characterized your pain in '98 as being something that was –that the kind of pain that you had never felt before. My question is: Did you feel that kind of pain related to your lower back pain in '90 --.

A. Yes.

Q. and '94?

A. Yes. But in 1998, there was more on my body that was injured. In 1990 and '94, all I had was my lower back. It hurt immensely when I injured it. It got my attention. I went to the doctor.

In 1998, I re-injured my lower back and my neck and my shoulder and my hip from falling down the stairs. And I had immense pain through that area. And it continually go worse.

Q. So is it correct to say that it was a combination of all of the body parts that were in pain, that you felt such pain?

A. Oh, I knew that I had – yes, that’s correct.

The matter should have been sent to a medical panel

Judge Marlowe relies heavily on Dr. Chung’s reports¹. Nevertheless, the report is quite ambiguous and does not assist the trier in fact to determine all of the medical issues, including causation of the pain. Dr. Chung initially indicates direct medical causation with the industrial accident. He then reverses his opinion. He does not, however, recant his position concerning the aggravation of a pre-existing condition. In essence, he has confused the facts about whether the pain syndrome is caused, lighted up or aggravated from the industrial accident. Dr. Chung’s opinion goes contrary to the treating physicians and creates more confusion as to the relationship between the upper extremity pain and the entire industrial injuries. It should be realized that the treating physicians maintain that the Applicant has, in fact, a form of myositis who still maintain the pain is indisputably and directly caused by the industrial accident of 5/14/1998. Dr. Chung’s report clearly goes contrary to the AMA Guides for Evaluation of Permanent Impairment.

The Labor Commission has issued Guidelines when a Medical Panel must be convened. In Willardson v. Industrial Commission, 904 P.2d 671 (1995), the Supreme Court mandated the use of a Medical Panel even though the rule indicates “Guidelines”.

¹ Dr. Jeffrey Chung is well known in the workers compensation arena. He is a physiatrist that is often hired by Workers Compensation Fund to perform insurance medical examinations. In this case, Judge Marlowe cites 7 of the 9 medical causation findings of fact and attributes them to Dr. Chung and only cites to only one Finding of Fact by one treating physician for the Applicant.

R602-2-2. Guidelines for Utilization of Medical Panel.

Pursuant to Section 34A-2-601, the Commission adopts the following guidelines in determining the necessity of submitting a case to a medical panel:

A. A panel will be utilized by the Administrative Law Judge where one or more significant medical issues may be involved. Generally a significant medical issue must be shown by conflicting medical reports. Significant medical issues are involved when there are:

1. Conflicting medical opinions related to causation of the injury or disease;
2. Conflicting medical reports of permanent physical impairment which vary more than 5% of the whole person,
3. Conflicting medical opinions as to the temporary total cutoff date which vary more than 90 days;
4. Conflicting medical opinions related to a claim of permanent total disability, and/or
5. Medical expenses in controversy amounting to more than \$10,000.

A Medical Panel is mandated in this situation as there are conflicting medical opinions relating to medical causation, conflicting medical reports indicating impairment of over 5%, conflicting medical opinions related to a claim of permanent total disability and conflicting opinions concerning medical expenses amounting to more than \$10,000. By rule and mandate of the Supreme Court, the matter must be referred to a medical panel.

Because of the unknown properties of the “cause” of the chronic pain syndrome, it should be considered as part of the industrial accident.

In Stoker v. Workers' Compensation Fund & Industrial Commission, 889 P.2d 409, 411 (Utah 1994) this court stated: "To give effect to that purpose, the Act should be liberally construed and applied to provide coverage. Any doubt respecting the right of compensation will be resolved in favor of the injured employee." State Tax Commission v. Industrial Commission, 685 P.2d 1051, 1053 (Utah 1984). The purpose of the workers compensation statute is to alleviate the financial hardship on individual employees and those dependent upon them by spreading the cost of an injury throughout the industry that employs the workers. Maryland Casualty Company v. Industrial Commission, 364 P.2d 1020 (1961), Ortega v. Salt Lake Wet Wash Laundry, 156 P.2d 885, (1945). To further the purpose of the act, any doubt concerning the right of compensation must be resolved in favor of the injured worker and his dependents. Heaton v. Second Injury Fund, 796 P.2d 676 (1990), J & W Janitorial Co. v. Industrial Commission, 61 P.2d 949 (1983), Kaiser Steel Corp v. Monfredi, 631 P.2d 888 (1981), McPhie v. Industrial Commission, 567 P.2d 153 (1977). The Labor Commission has failed to even consider resolving any doubt of compensation in favor of Mr. Braegger.

Odd Lot is still appropriate

The odd lot doctrine "allows the Commission to find permanent total disability when a relatively small percentage of impairment caused by an industrial accident is combined with other factors to render the claimant unable to obtain employment." Zimmerman v. Industrial Commission, 785 P.2d 1127 (1989). In this case, it is agreed that the Applicant cannot perform the essential duties required in his occupation. It is further agreed that he cannot be rehabilitated. Further, the parties agree that there is no steady work that the Applicant can perform.

Odd Lot doctrine is quite similar to the Permanent Total Statute in that one looks at the combination of all impairments to determine whether the Applicant can return and whether the industrial accidents contribute to the inability to work. This is stipulated to and proven at hearing.

In Smith v. Mity Lite, 939 P.2d 684 (1997), the Court of Appeals stated that the Labor Commission “did not take into consideration the extent to which his physical impairment, compounded by other factors, could render him totally disabled”. In this case, Judge Marlowe improperly looked at the chronic pain syndrome and not all of the factors. Further, in Marshall v. Industrial Commission, 681 P.2d 208 (1984), the Commission denied an employee permanent total disability benefits solely on the percentage of impairment and the fact that the employee was eligible to retire. The Marshall Court determined that reliance on the impairment rating was improper as was done in this case.

Judge Marlowe did not issue an award.

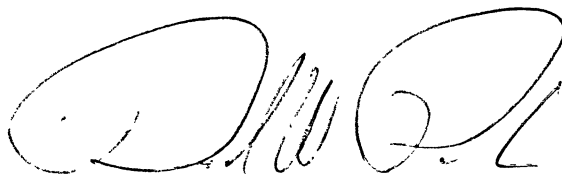
The Labor Commission and Administrative Law Judge have certain duties and responsibilities to make appropriate Findings of Fact, Conclusions of Law and Award. See Utah Code Ann. §63-46b-10. In Adams v. Board of Review, 821 P.2d 1 (Utah App. 1991) the Court of Appeals requires an Agency “must make findings of fact and conclusions of law that are adequately detailed to permit meaningful appellate review”. In Price River Coal Co. v. Industrial Commission, 731, P.2d 1079 (1986), the inadequacy of an administrative law judge’s findings justified remanding the matter back to the hearing level for resolution of conflicting testimony, findings and determination. In review of the pleadings, Judge Marlowe only issued Findings of Fact and Conclusions of

Law. While on page 8, she does indicate an Order, the order does not indicate the amount of the permanent partial impairment, nor when interest would begin to accumulate. Further there is no determination of when Mr. Braegger reached maximum medical improvement. Further, because there is no dollar amount ordered, there is no determination of attorney fees that would be deducted. Finally, Judge Marlowe does not indicate which medical expenses were reasonably related to the industrial accident and what medical visits were appropriate for determination of the travel allowance. In essence, the Labor Commission stated, "Defendants, you figure it all out".

XI. **CONCLUSION**

This matter should be remanded back to the Labor Commission for referral to a medical panel. Further, the chronic pain syndrome should be related to the industrial accident either by cause, aggravation or being "lighted up" as a result of the industrial injury. Therefore, it should be compensable. Finally, the Order is not specific in determining benefits and should be remanded for clarification.

DATED this 21st day of March, 2005.

A handwritten signature in black ink, appearing to read 'D. W. Parker', written over a horizontal line.

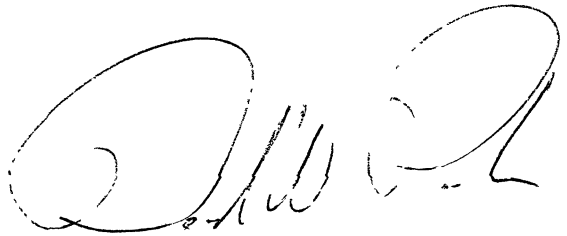
David W. Parker
Attorney for John Brent Braegger
Applicant/Appellant/Petitioner

Certificate of Hand Delivery

I HEREBY CERTIFY that two true and correct copy of foregoing document was hand delivered upon the following parties on this 21 day of March, 2005.

Alan Hennebold, Esq.
Labor Commission of Utah
Attorney For: Employers Reinsurance Fund
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Fax: (801) 288-8164

A handwritten signature in black ink, appearing to read "F. W. Holm", with a large, stylized flourish at the end.

XII.
ADDENDUMS

UTAH LABOR COMMISSION
ADJUDICATION DIVISION

JOHN B. BRAEGGER,

Petitioner,

v.

STATE OF UTAH DEPARTMENT OF
PUBLIC SAFETY, WORKERS'
COMPENSATION FUND, EMPLOYERS'
REINSURANCE FUND,

Respondents.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

Case Nos. 2002496, 2002497, 2002498

Judge: DEIDRE MARLOWE

Hearing: August 28, 2003

Appearances:

John B. Braegger, Petitioner, - David W. Parker, Attorney at Law
Public Safety & WCF, Respondents - Floyd Holm, Attorney at Law
ERF, Respondent - Lorrie Lima, Attorney at Law

On April 24, 2002 Mr. Braegger filed three applications for hearing with three different injury dates: December 17, 1990 (Case No. 2002496); June 10, 1994 (Case No. 2002497); and May 14, 1998 (Case No. 2002948). All applications claim medical expenses, recommended medical care, temporary total compensation, permanent partial compensation, permanent total compensation, travel expenses, interest, and reimbursement to the Petitioner's private health insurance company.

The Respondents agree that the Petitioner is unable to maintain substantial, gainful employment. The Respondents do not dispute the occurrence of the industrial injuries, but do dispute whether they are contributing, significant causes of the Petitioner's current condition, and therefore the other benefits are disputed as well.

FINDINGS OF FACT

1. John B. Braegger worked for the Utah Department of Public Safety, Criminal Investigations Bureau as a police officer during all industrial events relevant to this claim.
2. On December 18, 1990 Petitioner was moving a file cabinet to retrieve an item he had dropped behind it when he felt a sharp pain in his lower back. He experienced pain,

FINDINGS OF FACT AND CONCLUSIONS OF LAW

John B. Braegger, Case Nos. 2002496, 2002497, 2002498

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numbness and tingling in his left leg, going down the front and side of his leg to his knee. He went to see Michael Smithers D.C. six or seven times for treatment. ME p. 160. Petitioner estimates that he got about 80% better, but the numbness and tingling never went away completely.

3. On June 10, 1994 the department was moving offices from one floor to another. The Petitioner was moving a file cabinet and felt sharp pain again in his low back, and increased numbness and tingling in his left leg. His low back pain was increased too.
4. For both of these injuries the doctors did not place Petitioner under any restrictions, but gave him exercises to do to strengthen the low back. This made him more “functional” but he still had pain. The Petitioner did not miss any days at work.
5. Petitioner treated with Dr. Marble until November 15, 1994, at which time Dr. Marble indicated that there was nothing more to be done. ME p. 170. Petitioner didn’t receive any treatment after that for his low back until the 1998 accident.
6. On May 14, 1998 the Petitioner was starting to go down the stairs and overstepped the first stair and fell head over heels down a flight of about 13 metal, carpeted stairs. He hit his left cheek, low back, upper neck, left shoulder and left hip. The pain increased dramatically in his low back - there had always been some from the 1994 injury that had never gone away. He felt sharp pain, described as a “sharp shock” going down into his left arm and fingers.
7. Shortly after the 1998 injury, the Petitioner began experiencing diffuse pain, loss of strength, and stamina to walk. He experienced difficulty getting in and out of chairs and vehicles, and going up and down stairs became very difficult. He started to use the elevator to get to his floor at work because of pain and weakness. He did not have these symptoms prior to the 1998 injury.
8. The Petitioner also began to have sweating at nights and great pain, waking up every two hours or so. He clenched his teeth because of the pain and broke off his front teeth at the gums during one night. Clenching and bruxing continued to be a problem and Petitioner had to wear a night guard to protect the remaining dental work. Petitioner needs to have the bridge replaced and implants done to replace the missing teeth.
9. Petitioner continued working after the May 1998 injury until March 15, 2001, when he failed a fitness for duty test due to his chronic pain condition and weakness. The Petitioner believes that he would have continued working had the only health conditions been his spinal and shoulder conditions rather than the chronic pain syndrome and related symptomology.
10. Since 1998 Petitioner has had no other traumatic injuries.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

John B. Braegger, Case Nos. 2002496, 2002497, 2002498

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11. Dr. Don L. Stromquist evaluated the Petitioner on September 17, 2002 and concludes that the Petitioner suffers from a chronic pain syndrome, which is not polymyositis. Dr. Stromquist also recognizes the spinal injuries and a rotator cuff tear. Dr. Stromquist also indicates that the Petitioner has permanent functional restrictions that effectively make him incapable of employment. ME p. 55.
12. Dr. Stromquist indicates that the structural disease of Petitioner's spine is most likely less than 50% of his overall impairment. The "greater part of [Petitioner's] impairment, something over 50%," is created by his chronic pain syndrome." ME p. 55.
13. Dr. Jeff B. Chung began treating the Petitioner and first opined that the chronic pain and weakness was due to a rheumatologic condition which was accelerated by the 1998 injury. ME p. 47. But on October 17, 2002 Dr. Chung indicates that his five opinions of 4/18/00 through 8/8/02 were based on an assumption that the Petitioner did in fact have polymyositis. Since that diagnosis turned out to be incorrect and was a critical component of his previous reports, Dr. Chung indicates that those reports are flawed and should not be considered to be an accurate representation of the Petitioner's current medical state. ME p. 9.
14. Dr. Chung indicates that there is no question that Petitioner has a rotator cuff tear and severe degenerative processes in both cervical and lumbar regions, which he attributes to the three accident dates at issue. ME p. 15. Dr. Chung recommends surgery to correct the rotator cuff repair. ME p. 20.
15. Dr. Chung indicates that it cannot be determined that there is a medical causal link between the chronic pain symptomology, which includes weakness, night sweats, leg cramps, swelling, and tingling in arms and hands, and the industrial accident of May 14, 1998, even though these symptoms occurred after the accident. ME p. 11. These symptoms are also not related to or caused by the degenerative spinal conditions, which are industrial related. ME, p. 12, 47.
16. Dr. Chung gives a 5% per whole person impairment for the cervical injuries, all attributable to the 1998 injury. He gives a 5% whole person impairment to the lumbar condition (including the hip condition, ME p. 2), and apportions an equal amount of causation to each of the three industrial injuries. ME p. 15. He gives a 1% whole person impairment to the left rotator cuff tear, all attributable to the 1998 injury. ME p. 16. Dr. Chung also gives the Petitioner a 6% whole person impairment rating for his diabetes and diabetes-related four extremity peripheral polyneuropathies. ME p. 16.
17. Dr. Chung opines that 50% of the Petitioner's current condition is related to the structural pathology of the spine, but that the chronic pain syndrome is the clinical entity that is most likely causing Petitioner to be disabled. ME p. 16. Dr. Chung indicates that Petitioner is unable to work because of the chronic pain condition, and not the spinal and

FINDINGS OF FACT AND CONCLUSIONS OF LAW

John B. Braegger, Case Nos. 2002496, 2002497, 2002498

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shoulder injuries related to the industrial injury, and that vocational retraining would likely not be of significant benefit. ME p. 17. Dr. Chung allows Petitioner to be at MMI three to four weeks after April 18, 2000, whether he shows any progression or not. ME p. 48.

18. The Petitioner was found to be disabled for purposes of Social Security disability on March 15, 2001.
19. The Parties stipulated that the proper compensation rate for the Petitioner would be the maximum rate in any year of injury.

DISCUSSION AND CONCLUSIONS OF LAW

1. Medical Causation

Petitioner must show that any conditions for which he claims benefits are medically causally related to the industrial injury. Allen v. Industrial Commission, 729 P.2d 15, 27 (Utah 1986). The burden of proof is on the Petitioner.

The Petitioner argues that the question is not whether there is a label or diagnosis on the chronic pain condition, but whether the condition relates to the 1998 injury. I agree. Petitioner further argues that because onset of the chronic pain syndrome was right after the 1998 injury, it is causally related. However, there is nothing in the medical records which relates this syndrome to the injury, and it is simply not enough to show that the onset was subsequent to the accident in the absence of any medical link. Therefore, I conclude that there is insufficient evidence to show by a preponderance that the chronic pain syndrome, related symptomology, and subsequent dental injuries, were caused by the 1998 injury, and thus the Petitioner is not entitled to workers' compensation benefits regarding these conditions.

Dr. Chung indicates that there is no question that Petitioner has a rotator cuff tear and severe degenerative processes in both cervical and lumbar regions, which he attributes to the three accident dates at issue. ME p. 15. There are no opposing medical opinions and it appears that Dr. Chung's indications as to medical causation on the cervical, lumbar, and shoulder regions is based on a reasoned medical opinion. Therefore I conclude that the Petitioner has shown that he is entitled to benefits with regard to these medical conditions.

2. Medical Expenses and Recommended Medical Care

Under U.C.A. § 34A-2-401 and 2-418 an employee may recover medical expenses for medical care which is necessary and reasonably related to injuries occurring in the course and scope of his or her employment.

The Petitioner may recover expenses and medical care related to his cervical, lumbar, and shoulder regions, including the proposed rotator cuff repair. Though not opposed, it is not clear from the record whether rotator cuff surgery is currently recommended. Dr. Chung did recommend it at one time. ME p. 20. If it is still currently recommended, Petitioner is entitled to expenses for that surgery.

3. Temporary Total Compensation

Utah Code Annotated § 34A-2-410 reads:

(1)(a) In case of temporary disability, so long as the disability is total, the employee shall receive $66 \frac{2}{3}$ of that employee's average weekly wages at the time of the injury

The Petitioner missed no work days with the 1990 and 1994 injuries and thus is not entitled to temporary total compensation benefits for those dates. There was no evidence presented of time off work with regard to the injury in 1998, and the Petitioner continued working until March 15, 2001, from which date permanent total compensation is claimed. Thus no temporary total compensation is awarded.

4. Permanent Partial Compensation

Utah Code Annotated § 34A-2-412 reads:

(1) An employee who sustained a permanent impairment as a result of an industrial accident and who files an application for hearing under Section 34A-2-417 may receive a permanent partial disability award from the commission.

.....

(6)(a) For any permanent impairment caused by an industrial accident that is not otherwise provided for in the schedule of losses in this section, permanent partial disability compensation shall be awarded by the commission based on the medical evidence.

See also Utah Administrative Code Rule 612-7-3 Method for Rating.

Dr. Chung gives a 5% per whole person impairment for the cervical injuries, all attributable to the 1998 injury. He gives a 5% whole person impairment to the lumbar condition (including the hip condition, ME p. 2), and apportions an equal amount of causation to each of the three industrial injuries. ME p. 15. He gives a 1% whole person impairment to the left rotator cuff tear, all attributable to the 1998 injury. ME p. 16. These ratings are undisputed and the Petitioner is entitled to permanent partial compensation for these ratings at the maximum rate in force in the year of the injury.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

John B. Braegger, Case Nos. 2002496, 2002497, 2002498

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5. Permanent Total Compensation

The parties agree that the Petitioner is and has been for some time incapable of sustaining gainful employment due to his current health problems. Because parts of this current condition are apportioned among the various injury dates, and the law in effect when the injury was sustained governs the analysis, it appears necessary to look at the ruling statutes for the different injury years.

For the 1990 and 1994 injuries, Utah Code Ann. § 35-1-67 required an analysis substantively similar to the Social Security Administration, which is set forth in Utah Administrative Code Rule 612-1-10, as follows:

2. For claims arising from accident or disease on or after July 1, 1998 and prior to May 1, 1995, the Commission is required under Section 34A-2-413, to make a finding of total disability as measured by the substance of the sequential decision-making process of the Social Security Administrative under Title 20 of the Code of Federal Regulations, amended April 1, 1993. The use of the term “substance of the sequential decision-making process” is deemed to confer some latitude on the Commission in exercising a degree of discretion in making its findings relative to permanent total disability

.....

- B(3) . . . The sequential decision making process referred to requires a series of questions and evaluations to be made in sequence. In short, these are:
 - a. Is the claimant engaged in a substantial gainful activity?
 - b. Does the claimant have a medically severe impairment?
 - c. Does the severe impairment meet or equal the duration requirement in 20 CFR 404.1509, amended April 1, 1993, and the listed impairments of 20 CFR Subpart P Appendix 1, amended April 1, 1993?
 - d. Does the impairment prevent the claimant from doing past relevant work?
 - e. Does the impairment prevent the claimant from doing any other work?

Because neither the 1990 or 1994 injuries, separately or together, prevented the Petitioner from doing past relevant work or any other work, the Petitioner is not permanently and totally disabled due to either of them, jointly or separately.

The 1998 injury has to be evaluated under § 34A-2-413 (1995), which reads in relevant portion as follows:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

John B. Braegger, Case Nos. 2002496, 2002497, 2002498

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- (1)(a) In cases of permanent total disability resulting from an industrial accident or occupational disease, the employee shall receive compensation as outlined in this section.
- (b) To establish entitlement to permanent total disability compensation, the employee has the burden of proof to show by a preponderance of evidence that:
 - (i) the employee sustained a significant impairment or combination of impairments as a result of the industrial accident or occupational disease that gives rise to the permanent total disability entitlement;
 - (ii) the employee is permanently totally disabled; and
 - (iii) the industrial accident or occupational disease was the direct cause of the employee's permanent total disability.
- (c) To find an employee permanently totally disabled, the commission shall conclude that:
 - (i) the employee is not gainfully employed;
 - (ii) the employee has an impairment or combination of impairments that limit the employee's ability to do basic work activities;
 - (iii) the industrial or occupationally caused impairment or combination of impairments prevent the employee from performing the essential functions of the work activities for which the employee has been qualified until the time of the industrial accident or occupational disease that is the basis for the employee's permanent total disability claim; and
 - (iv) the employee cannot perform other work reasonably available, taking into consideration the employee's age, education, past work experience, medical capacity, and residual functional capacity.

The Petitioner probably meets the requirements of subparagraph (c), (and therefore (b)(ii)), as he is not gainfully employed and Drs. Chung and Stromquist indicate he cannot functionally perform his previous employment or any other employment.

Furthermore, I conclude that Petitioner meets the requirement of (b)(ii) to have significant impairments or combinations of impairments because his cervical, lumbar and shoulder injuries from the 1998 injury all resulted in permanent impairment ratings of 5%, 1/3 of 5%, and 1%, respectively.

However, the issue is whether the combination of these industrially-caused significant impairments "give rise to" and are the "direct cause" of the permanent total disability, as required by (b)(i) and (b)(iii). Dr. Stromquist indicates that the structural disease of Petitioner's spine is most likely less than 50% of his overall impairment. The "greater part of [Petitioner's] impairment, something over 50%," is created by his chronic pain syndrome." ME p. 55. Dr. Chung opines that 50% of the Petitioner's current condition is related to the structural pathology

FINDINGS OF FACT AND CONCLUSIONS OF LAW

John B. Braegger, Case Nos. 2002496, 2002497, 2002498

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of the spine, but that the chronic pain syndrome is the clinical entity that is most likely causing Petitioner to be disabled. ME p. 16. Furthermore, the evidence shows that Petitioner continued working after the May 1998 injury until March 15, 2001, when he failed a fitness for duty test due to his chronic pain condition and weakness. The Petitioner also testified that he would have continued working had the only conditions been his spinal and shoulder conditions rather than the chronic pain symptomology. I therefore conclude that the industrial injuries did not “give rise to” or provide the “direct cause” of Petitioner’s permanent total disability, and the claim for permanent total compensation will be dismissed.

6. Employers’ Reinsurance Fund (ERF)

Utah Code Annotated § 34A-2-703 indicates:

If an employee, who has at least a 10% whole person permanent impairment from any cause or origin, subsequently incurs an additional impairment by an accident arising out of and in the course of the employee’s employment during the period of July 1, 1988 to June 30, 1994, inclusive, and if the additional impairment results in permanent total disability, the employer or its insurance carrier and the Employers’ Reinsurance Fund are liable for the payment of benefits

Because I have concluded that the 1990 and 1994 injuries do not result in a permanent total disability, the ERF has no liability for any award herein.

ORDER

Good cause appearing therefore, IT IS ORDERED that the claims for temporary total compensation and permanent total compensation are dismissed with prejudice.

IT IS FURTHER ORDERED that claims for medical expenses, recommended medical care, permanent partial impairment, travel expenses, and reimbursement to Mr. Braegger’s private health insurance for symptoms related to the chronic pain syndrome are dismissed with prejudice.

IT IS FURTHER ORDERED that the State of Utah Department of Public Safety, and/or the Workers’ Compensation Fund, pay permanent partial impairment ratings as outlined in Dr. Chung’s report for the cervical, lumbar, and shoulder injuries to John B. Braegger, in accordance with Utah Code Ann. §34A-2-412 at the maximum compensation rate for the year of the injury. Any unpaid amounts to date are due and payable in a lump sum, plus interest at eight percent (8%) per annum, under U.C.A. § 34A-2-420(3) and Utah Administrative Code, Rule 612-1-5.

IT IS FURTHER ORDERED that statutory attorney’s fees shall be deducted from the compensation awarded above to John Braegger, and sent directly to David W. Parker, according to U.C.A. 34A-1-309 and U.A.C. Rule 602-2-4.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

John B. Braegger, Case Nos. 2002496, 2002497, 2002498

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IT IS FURTHER ORDERED that the State of Utah Department of Public Safety, and/or the Workers' Compensation Fund shall pay all medical expenses reasonably related to John Braegger's industrial injuries, according to U.C.A. § 34A-2-418, and the medical and surgical fee schedule of the Utah Labor Commission and further travel allowances under Utah Administrative Code, Rule 612-2-20, plus interest at eight percent (8%) per annum.

Issued this 17th day of March, 2004



Deidre Marlowe
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

A party aggrieved by the decision may file a Motion for Review with the Adjudication Division of the Utah Labor Commission. The Motion for Review must set forth the specific basis for review and must be received by the Commission within 30 days from the date this decision is signed. Other parties may then submit their Responses to the Motion for Review within 20 days of the Motion for Review.

Any party may request that the Appeals Board of the Utah Labor Commission conduct the foregoing review. Such request must be included in the party's Motion for Review or its Response. If none of the parties specifically requests review by the Appeals Board, the review will be conducted by the Utah Labor Commissioner.

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing instrument was mailed first class, postage prepaid, on the 18th day of March, 2004 to the following:

John Braegger
867 W. 550 North
West Bountiful, UT 84087

Floyd W. Holm
Workers' Compensation Fund
392 East 6400 South
Salt Lake City, UT 84107

David W. Parker
Attorney at Law
11075 S. State St., Ste. 13
Sandy, UT 84070-5512

UTAH LABOR COMMISSION

JOHN B. BRAEGGER,

Applicant,

v.

**STATE OF UTAH (DEPARTMENT
OF PUBLIC SAFETY), WORKERS
COMPENSATION FUND and
EMPLOYERS' REINSURANCE FUND,**

Defendants.

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**ORDER DENYING
MOTION FOR REVIEW**

**Case Nos. 02-0496 through
02-0498**

John B. Braegger asks the Utah Labor Commission to review Administrative Law Judge Marlowe's decision regarding Mr. Braegger's claim for benefits under the Utah Workers' Compensation Act ("the Act"; Title 34A, Chapter 2, Utah Code Annotated).

The Labor Commission exercises jurisdiction over this motion for review pursuant to Utah Code Ann. §63-46b-12 and Utah Code Ann. §34A-2-801(3).

BACKGROUND AND ISSUES PRESENTED

On April 24, 2002 Mr. Braegger filed three applications for workers' compensation benefits with the Commission's Adjudication Division. These applications claimed workers' compensation benefits from the State of Utah and its insurance carrier, Workers Compensation Fund (referred to jointly as "the State" hereafter), for injuries allegedly caused by three separate accidents Mr. Braegger experienced while working for the State.

Judge Marlowe held an evidentiary hearing on Mr. Braegger's claims on August 28, 2003. On March 18, 2004, Judge Marlowe issued her decision. In summary, Judge Marlowe concluded Mr. Braegger had suffered work-related cervical, lumbar and shoulder injuries and was entitled to benefits for those injuries. However, Judge Marlowe determined that Mr. Braegger's chronic pain syndrome was not work-related. Judge Marlowe therefore denied benefits for that condition. Finally, Judge Marlowe concluded that Mr. Braegger's continuing disability is due to his chronic pain syndrome, rather than his work-related injuries. For that reason, Judge Marlowe denied Mr. Braegger's claim for permanent total disability compensation.

Mr. Braegger now seeks Commission review of Judge Marlowe's decision on the grounds that: 1) his chronic pain is the result of his work accidents; 2) a medical panel should be appointed to consider his claims; 3) even if his chronic pain is not work-related, his other work-related injuries

ORDER DENYING MOTION FOR REVIEW
JOHN B. BRAEGGER
PAGE 2

justify an award of permanent total disability compensation; and 4) Judge Marlowe's order lacks specificity.

FINDINGS OF FACT

The Commission affirms and adopts Judge Marlowe's findings of fact.

In accepting Judge Marlowe's findings, the Commission notes Mr. Braegger's argument that his accidents at work caused his chronic pain. However, despite Mr. Braegger's lengthy argument as to why a conclusion of medical causation should be reached, none of the medical experts have expressed that conclusion. The Commission therefore agrees with Judge Marlowe that Mr. Braegger has failed to meet his burden of proof on the question of medical causation.

DISCUSSION AND CONCLUSION OF LAW

The remainder of Mr. Braegger's motion for review deals with the proper application of the Workers' Compensation Act to the facts of Mr. Braegger's claim.

Mr. Braegger argues that Judge Marlowe should have exercised her discretion under §34A-2-601 of the Act to appoint a medical panel to consider the medical aspects of his claim. The Commission's Rule 602-2-2 sets forth the conditions for appointment of medical panels and envisions their use when the record contains conflicting medical opinions on significant medical issues. In other words, medical panels are used to resolve medical conflicts, not create them. In this case, Mr. Braegger has not established that a conflict of medical opinion exists. It is therefore unnecessary to appoint a medical panel.

Mr. Braegger also argues that, even if his chronic pain is not work-related, his work-related cervical, lumbar and shoulder injuries are sufficient to qualify him for permanent total disability compensation. The Commission disagrees. As Judge Marlowe observed, Mr. Braegger stopped working because of his chronic pain and weakness. Mr. Braegger himself acknowledges that his cervical, lumbar and shoulder injuries did not prevent him from working. It was his chronic pain and weakness that took him out of the labor force. The Commission therefore concludes that Mr. Braegger has failed to meet §34A-2-413(1)(b)(iii)'s requirement that the work accident was the "direct cause" of his permanent total disability.¹

¹ Among its several criteria for permanent total disability claims, §34A-2-413(1)(c)(iii) of the Act requires that "the industrial . . . impairment or combination of impairments prevent the employee from performing the essential functions of the work activities for which the employee has been qualified until the time of the industrial accident" Without discussing the point, Judge Marlowe observed that Mr. Braegger "probably meets" the foregoing requirement. The Commission disagrees. The preponderance of evidence does not establish that Mr. Braegger's work-related impairments prevent him from performing his pre-accident work activities. Therefore, Mr. Braegger's claim for

ORDER DENYING MOTION FOR REVIEW
JOHN B. BRAEGGER
PAGE 3

Mr. Braegger contends that the Commission should award permanent total disability compensation to him under the "Odd Lot Doctrine." While the Odd Lot Doctrine was historically recognized as a part of Utah's workers' compensation system, in 1995 the Utah Legislature amended §34A-2-413 of the Act to establish specific criteria for determining whether an injured worker is permanently and totally disabled. The Commission is now required to evaluate Mr. Braegger's claim for permanent total disability compensation according to the statutory requirements of §34A-2-413.

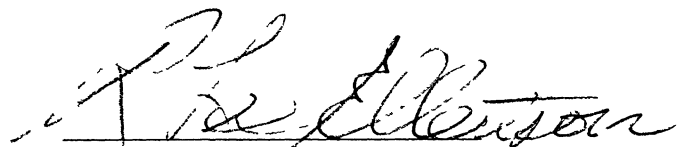
Finally, Mr. Braegger contends Judge Marlowe's decision is inadequate because it does not state the precise dollar amounts Mr. Braegger should receive, or identify the specific medical care that must be paid by the State. The Commission notes that, although Mr. Braegger complains of a lack of specificity in Judge Marlowe's order, he has not submitted a computation of the award he believes is correct.

Judge Marlowe's order correctly states the variables to be used by the parties in computing Mr. Braegger's benefits. While the calculations are complex, they can be easily accomplished by insurance carriers. Of course, if Mr. Braegger disagrees with the insurance carrier's computation of benefits, he can then bring the matter to Judge Marlowe's attention. The same is true for any disagreement over liability for medical treatment. But at this time there is no dispute and the Commission sees no need to intervene.

ORDER

The Commission affirms Judge Marlowe's decision and denies Mr. Braegger's motion for review. It is so ordered. "

Dated this 8th day of September, 2004.



R. Lee Ellertson
Utah Labor Commissioner

IMPORTANT! NOTICE OF APPEAL RIGHTS FOLLOWS ON NEXT PAGE.

permanent total disability compensation must be denied under §34A-2-413(1)(c)(iii) of the Act as well as for the reasons stated in Judge Marlowe's decision.

ORDER DENYING MOTION FOR REVIEW
JOHN B. BRAEGGER
PAGE 4

NOTICE OF APPEAL RIGHTS

Any party may ask the Labor Commission to reconsider this Order. Any such request for reconsideration must be received by the Labor Commission within 20 days of the date of this order. Alternatively, any party may appeal this order to the Utah Court of Appeals by filing a petition for review with the court. Any such petition for review must be received by the court within 30 days of the date of this order.

ORDER DENYING MOTION FOR REVIEW
JOHN B. BRAEGGER
PAGE 5

CERTIFICATE OF MAILING

I certify that a copy of the foregoing Order Denying Motion For Review in the matter of John B. Braegger, Case Nos. 02-0496 through 02-0498, was mailed first class postage prepaid this 5th day of September, 2004, to the following:

JOHN B. BRAEGGER
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A handwritten signature in cursive script, reading "Sara Danielson", written over a horizontal line.

Sara Danielson
Utah Labor Commission

34A-2-413. Permanent total disability -- Amount of payments -- Rehabilitation.

(1) (a) In cases of permanent total disability resulting from an industrial accident or occupational disease, the employee shall receive compensation as outlined in this section.

(b) To establish entitlement to permanent total disability compensation, the employee has the burden of proof to show by a preponderance of evidence that:

(i) the employee sustained a significant impairment or combination of impairments as a result of the industrial accident or occupational disease that gives rise to the permanent total disability entitlement;

(ii) the employee is permanently totally disabled; and

(iii) the industrial accident or occupational disease was the direct cause of the employee's permanent total disability.

(c) To find an employee permanently totally disabled, the commission shall conclude that:

(i) the employee is not gainfully employed;

(ii) the employee has an impairment or combination of impairments that limit the employee's ability to do basic work activities;

(iii) the industrial or occupationally caused impairment or combination of impairments prevent the employee from performing the essential functions of the work activities for which the employee has been qualified until the time of the industrial accident or occupational disease that is the basis for the employee's permanent total disability claim; and

(iv) the employee cannot perform other work reasonably available, taking into consideration the employee's age, education, past work experience, medical capacity, and residual functional capacity.

(d) Evidence of an employee's entitlement to disability benefits other than those provided under this chapter and Chapter 3, Utah Occupational Disease Act, if relevant, may be presented to the commission, but is not binding and creates no presumption of an entitlement under this chapter and Chapter 3, Utah Occupational Disease Act.

(2) For permanent total disability compensation during the initial 312-week entitlement, compensation shall be 66-2/3% of the employee's average weekly wage at the time of the injury, limited as follows:

(a) compensation per week may not be more than 85% of the state average weekly wage at the time of the injury;

(b) compensation per week may not be less than the sum of \$45 per week, plus \$5 for a dependent spouse, plus \$5 for each dependent child under the age of 18 years, up to a maximum of four dependent minor children, but not exceeding the maximum established in Subsection (2)(a) nor exceeding the average weekly wage of the employee at the time of the injury; and

(c) after the initial 312 weeks, the minimum weekly compensation rate under Subsection (2)(b) shall be 36% of the current state average weekly wage, rounded to the nearest dollar.

(3) For claims resulting from an accident or disease arising out of and in the course of the employee's employment on or before June 30, 1994:

(a) The employer or its insurance carrier is liable for the initial 312 weeks of permanent total disability compensation except as outlined in Section 34A-2-703 as in effect on the date of injury.

(b) The employer or its insurance carrier may not be required to pay compensation for any combination of disabilities of any kind, as provided in this section and Sections 34A-2-410

through 34A-2-412 and Sections 34A-2-501 through 34A-2-507 in excess of the amount of compensation payable over the initial 312 weeks at the applicable permanent total disability compensation rate under Subsection (2).

(c) Any overpayment of this compensation shall be reimbursed to the employer or its insurance carrier by the Employers' Reinsurance Fund and shall be paid out of the Employers' Reinsurance Fund's liability to the employee.

(d) After an employee has received compensation from the employee's employer, its insurance carrier, or the Employers' Reinsurance Fund for any combination of disabilities amounting to 312 weeks of compensation at the applicable permanent total disability compensation rate, the Employers'

Reinsurance Fund shall pay all remaining permanent total disability compensation.

(c) Employers' Reinsurance Fund payments shall commence immediately after the employer or its insurance carrier has satisfied its liability under Subsection (3) or Section **34A-2-703**.

(4) For claims resulting from an accident or disease arising out of and in the course of the employee's employment on or after July 1, 1994:

(a) The employer or its insurance carrier is liable for permanent total disability compensation.

(b) The employer or its insurance carrier may not be required to pay compensation for any combination of disabilities of any kind, as provided in this section and Sections **34A-2-410** through **34A-2-412** and Sections **34A-2-501** through **34A-2-507**, in excess of the amount of compensation payable over the initial 312 weeks at the applicable permanent total disability compensation rate under Subsection (2).

(c) Any overpayment of this compensation shall be recouped by the employer or its insurance carrier by reasonably offsetting the overpayment against future liability paid before or after the initial 312 weeks.

(5) Notwithstanding the minimum rate established in Subsection (2), the compensation payable by the employer, its insurance carrier, or the Employers' Reinsurance Fund, after an employee has received compensation from the employer or the employer's insurance carrier for any combination of disabilities amounting to 312 weeks of compensation at the applicable total disability compensation rate, shall be reduced, to the extent allowable by law, by the dollar amount of 50% of the Social Security retirement benefits received by the employee during the same period.

(6) (a) A finding by the commission of permanent total disability is not final, unless otherwise agreed by the parties, until:

(i) an administrative law judge reviews a summary of reemployment activities undertaken pursuant to Chapter 8, Utah Injured Worker Reemployment Act;

(ii) the employer or its insurance carrier submits to the administrative law judge a reemployment plan as prepared by a qualified rehabilitation provider reasonably designed to return the employee to gainful employment or the employer or its insurance carrier provides the administrative law judge notice that the employer or its insurance carrier will not submit a plan; and

(iii) the administrative law judge, after notice to the parties, holds a hearing, unless otherwise stipulated, to consider evidence regarding rehabilitation and to review any reemployment plan submitted by the employer or its insurance carrier under Subsection (6)(a)(ii).

(b) Prior to the finding becoming final, the administrative law judge shall order:

(i) the initiation of permanent total disability compensation payments to provide for the employee's subsistence; and

(ii) the payment of any undisputed disability or medical benefits due the employee.

(c) The employer or its insurance carrier shall be given credit for any disability payments made under Subsection (6)(b) against its ultimate disability compensation liability under this chapter or Chapter 3, Utah Occupational Disease Act.

(d) An employer or its insurance carrier may not be ordered to submit a reemployment plan. If the employer or its insurance carrier voluntarily submits a plan, the plan is subject to Subsections (6)(d)(i) through (iii).

(i) The plan may include retraining, education, medical and disability compensation benefits, job placement services, or incentives calculated to facilitate reemployment funded by the employer or its insurance carrier.

(ii) The plan shall include payment of reasonable disability compensation to provide for the employee's subsistence during the rehabilitation process.

(iii) The employer or its insurance carrier shall diligently pursue the reemployment plan. The employer's or insurance carrier's failure to diligently pursue the reemployment plan shall be cause for the administrative law judge on the administrative law judge's own motion to make a final decision of

permanent total disability.

(e) If a preponderance of the evidence shows that successful rehabilitation is not possible, the administrative law judge shall order that the employee be paid weekly permanent total disability compensation benefits.

(7) (a) The period of benefits commences on the date the employee became permanently totally disabled, as determined by a final order of the commission based on the facts and evidence, and ends:

(i) with the death of the employee; or

(ii) when the employee is capable of returning to regular, steady work.

(b) An employer or its insurance carrier may provide or locate for a permanently totally disabled employee reasonable, medically appropriate, part-time work in a job earning at least minimum wage provided that employment may not be required to the extent that it would disqualify the employee from Social Security disability benefits.

(c) An employee shall fully cooperate in the placement and employment process and accept the reasonable, medically appropriate, part-time work.

(d) In a consecutive four-week period when an employee's gross income from the work provided under Subsection (7)(b) exceeds \$500, the employer or insurance carrier may reduce the employee's permanent total disability compensation by 50% of the employee's income in excess of \$500.

(e) If a work opportunity is not provided by the employer or its insurance carrier, a permanently totally disabled employee may obtain medically appropriate, part-time work subject to the offset provisions contained in Subsection (7)(d).

(f) (i) The commission shall establish rules regarding the part-time work and offset.

(ii) The adjudication of disputes arising under Subsection (7) is governed by Part 8, Adjudication.

(g) The employer or its insurance carrier shall have the burden of proof to show that medically appropriate part-time work is available.

(h) The administrative law judge may:

(i) excuse an employee from participation in any job that would require the employee to undertake work exceeding the employee's medical capacity and residual functional capacity or for good cause; or

(ii) allow the employer or its insurance carrier to reduce permanent total disability benefits as provided in Subsection (7)(d) when reasonable, medically appropriate, part-time employment has been offered but the employee has failed to fully cooperate.

(8) When an employee has been rehabilitated or the employee's rehabilitation is possible but the employee has some loss of bodily function, the award shall be for permanent partial disability.

(9) As determined by an administrative law judge, an employee is not entitled to disability compensation, unless the employee fully cooperates with any evaluation or reemployment plan under this chapter or Chapter 3, Utah Occupational Disease Act. The administrative law judge shall dismiss without prejudice the claim for benefits of an employee if the administrative law judge finds that the employee fails to fully cooperate, unless the administrative law judge states specific findings on the record justifying dismissal with prejudice.

(10) (a) The loss or permanent and complete loss of the use of both hands, both arms, both feet, both legs, both eyes, or any combination of two such body members constitutes total and permanent disability, to be compensated according to this section.

(b) A finding of permanent total disability pursuant to Subsection (10)(a) is final.

(11) (a) An insurer or self-insured employer may periodically reexamine a permanent total disability claim, except those based on Subsection (10), for which the insurer or self-insured employer had or has payment responsibility to determine whether the worker remains permanently totally disabled.

(b) Reexamination may be conducted no more than once every three years after an award is final, unless good cause is shown by the employer or its insurance carrier to allow more frequent reexaminations.

(c) The reexamination may include:

- (i) the review of medical records;
 - (ii) employee submission to reasonable medical evaluations;
 - (iii) employee submission to reasonable rehabilitation evaluations and retraining efforts;
 - (iv) employee disclosure of Federal Income Tax Returns;
 - (v) employee certification of compliance with Section **34A-2-110**; and
 - (vi) employee completion of sworn affidavits or questionnaires approved by the division.
- (d) The insurer or self-insured employer shall pay for the cost of a reexamination with appropriate employee reimbursement pursuant to rule for reasonable travel allowance and per diem as well as reasonable expert witness fees incurred by the employee in supporting the employee's claim for permanent total disability benefits at the time of reexamination.
- (e) If an employee fails to fully cooperate in the reasonable reexamination of a permanent total disability finding, an administrative law judge may order the suspension of the employee's permanent total disability benefits until the employee cooperates with the reexamination.
- (f) (i) Should the reexamination of a permanent total disability finding reveal evidence that reasonably raises the issue of an employee's continued entitlement to permanent total disability compensation benefits, an insurer or self-insured employer may petition the Division of Adjudication for rehearing on that issue. The petition shall be accompanied by documentation supporting the insurer's or self-insured employer's belief that the employee is no longer permanently totally disabled.
- (ii) If the petition under Subsection (11)(f)(i) demonstrates good cause, as determined by the Division of Adjudication, an administrative law judge shall adjudicate the issue at a hearing.
- (iii) Evidence of an employee's participation in medically appropriate, part-time work may not be the sole basis for termination of an employee's permanent total disability entitlement, but the evidence of the employee's participation in medically appropriate, part-time work under Subsection (7) may be considered in the reexamination or hearing with other evidence relating to the employee's status and condition.
- (g) In accordance with Section **34A-1-309**, the administrative law judge may award reasonable attorneys fees to an attorney retained by an employee to represent the employee's interests with respect to reexamination of the permanent total disability finding, except if the employee does not prevail, the attorneys fees shall be set at \$1,000. The attorneys fees shall be paid by the employer or its insurance carrier in addition to the permanent total disability compensation benefits due.
- (h) During the period of reexamination or adjudication if the employee fully cooperates, each insurer, self-insured employer, or the Employers' Reinsurance Fund shall continue to pay the permanent total disability compensation benefits due the employee.
- (12) If any provision of this section, or the application of any provision to any person or circumstance, is held invalid, the remainder of this section shall be given effect without the invalid provision or application.

renumbered and Amended by Chapter 375, 1997 General Session
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Rule R612-7. Impairment Ratings for Industrial Injuries and Diseases.

As in effect on March 1, 2005

Table of Contents

- [R612-7-1. Authority.](#)
- [R612-7-2. Definition.](#)
- [R612-7-3. Method for Rating.](#)
- [KEY](#)
- [Date of Enactment or Last Substantive Amendment](#)
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- [Authorizing, Implemented, or Interpreted Law](#)

R612-7-1. Authority.

This rule is enacted under the authority of Sections 34A-1-104 and 34A-2-412.

[R612-7-2. Definition.](#)

The definition of impairment in Section 34A-2-102 applies to this rule.

R612-7-3. Method for Rating.

A. For rating all impairments, which are not expressly listed in Section 34A-2-412, the Commission adopts "Utah's 2002 Impairment Guides" as published by the Commission for all injuries rated on or after January 1, 2002. For those conditions not found in "Utah's 2002 Impairment Guides," the American Medical Association's "Guides to the Evaluation of Permanent Impairment, Fifth Edition" are to be used.

KEY

workers' compensation, impairment ratings

[Date of Enactment or Last Substantive Amendment](#)

January 15, 2002

63-46b-10. Procedures for formal adjudicative proceedings -- Orders.

In formal adjudicative proceedings:

(1) Within a reasonable time after the hearing, or after the filing of any posthearing documents permitted by the presiding officer, or within the time required by any applicable statute or rule of the agency, the presiding officer shall sign and issue an order that includes:

(a) a statement of the presiding officer's findings of fact based exclusively on the evidence of record in the adjudicative proceedings or on facts officially noted;

(b) a statement of the presiding officer's conclusions of law;

(c) a statement of the reasons for the presiding officer's decision;

(d) a statement of any relief ordered by the agency;

(e) a notice of the right to apply for reconsideration;

(f) a notice of any right to administrative or judicial review of the order available to aggrieved parties; and

(g) the time limits applicable to any reconsideration or review.

(2) The presiding officer may use the presiding officer's experience, technical competence, and specialized knowledge to evaluate the evidence.

(3) A finding of fact that was contested may not be based solely on hearsay evidence unless that evidence is admissible under the Utah Rules of Evidence.

(4) This section does not preclude the presiding officer from issuing interim orders to:

(a) notify the parties of further hearings;

(b) notify the parties of provisional rulings on a portion of the issues presented; or

(c) otherwise provide for the fair and efficient conduct of the adjudicative proceeding.

Amended by Chapter 138, 2001 General Session

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Last revised: Tuesday, December 21, 2004

1 opinion and--and, if it's a lay opinion then it's
2 not really relevant.

3 MR. PARKER: Your Honor, I was going
4 to--my next question was, you know: Why do you
5 believe that? And so that would cover the
6 foundation aspect.

7 MR. HOLM: Well, a foundation for an
8 opinion, but is his opinion as a layperson
9 relevant, Your Honor? That's the more fundamental
10 question.

11 THE COURT: Well, I understand that. I
12 mean, it will just go to the weight of what he
13 says.

14 BY MR. PARKER

15 Q. Brent, you remember the question or do
16 you want me to rephrase it?

17 A. No. Repeat it, please.

18 Q. Okay. Do you believe that your current
19 symptoms are related to the accident that was in
20 May of 1998 and, if so, why?

21 A. I believe that they are, yes. The
22 reason I believe that is I've had no problems or
23 any type like symptoms prior to the accident.
24 All my problems have started to come on and
25 caused and noticed since the accident. Prior to



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1 that, I was functioning fine, doing my job, going
2 on just like normal. Other than I'd watch my
3 lower back, I knew I had a problem there, so I
4 was cautious about that. But I didn't have any
5 problems with neck, shoulder, upper back, my legs,
6 the pain, none of that until the accident in
7 1998.

8 Q. Okay. Let me ask it a little bit
9 different way, okay? If you did not have the
10 neck or the shoulder or the low back, you know,
11 with the accompanying radiation of pain and so
12 forth going down your hip, would you be able to
13 act as an officer?

14 THE WITNESS: Yes.

15 MR. HOLM: Objection. Same objection,
16 basically, but foundation for an opinion, a
17 medical opinion.

18 THE COURT: And I'm going to sustain
19 that one. We do need some more foundation.

20 MR. HOLM: And I guess this is also a
21 vocational opinion that's being asked for now too.

22 MR. PARKER: Okay. Let me--let me try
23 it this way, okay?

24 Q. Brent, you--you understood what is
25 necessary to be an officer and you've gone through



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1 the requirements and you've been a supervisor; is
2 that correct?

3 A. Yes, sir.

4 Q. Okay. If you did not have these neck
5 and shoulder and low back problems, in your
6 opinion, do you believe that you could still
7 function as a--as an officer?

8 A. Yes.

9 MR. HOLM: Objection. Same objection.

10 THE COURT: It's overruled.

11 MR. PARKER: Okay. Thank you, Your
12 Honor.

13 Your Honor, if I may just have one--one
14 quick--

15 THE WITNESS: Do you want to hear my
16 answer? Your Honor?

17 THE COURT: Pardon?

18 THE WITNESS: Did you hear my answer?

19 THE COURT: Yes, I did.

20 MR. PARKER: Oh. Maybe just for the
21 record, since we were all talking over the--

22 Q. You indicated that you could act as an
23 officer if you did not have those--

24 A. I said "Yes, I do."

25 THE COURT: Yes, I understand that.



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1 Did you feel that kind of pain related to your
2 lower back pain in '90--

3 A. Yes.

4 Q. --and '94?

5 A. Yes. But in 1998, there was more on my
6 body that was injured. In 1990 and '94, all I
7 had was my lower back. It hurt immensely when I
8 injured it. It got my attention. I went to the
9 doctor.

10 In 1998, I re-injured my lower back and
11 my neck and my shoulder and my hip from falling
12 down the stairs. And I had immense pain through
13 that area. And it continually got worse.

14 Q. So is it correct to say that it was a
15 combination of all of the body parts that were in
16 pain, that you felt such pain?

17 A. Oh, I knew that I had--yes, that's
18 correct.

19 Q. Thank you.

20 MS. LIMA: No further questions.

21 THE COURT: Okay. Any redirect, Mr.
22 Parker?

23 MR. PARKER: I don't believe so, Your
24 Honor.

25 THE COURT: Any other questions?



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Chapter 18

Pain

- 18.1 Principles of Assessment**
- 18.2 Overview of Pain**
- 18.3 Integrating Pain-Related Impairment Into the Conventional Impairment Rating System**
- 18.4 Behavioral Confounders**
- 18.5 How to Rate Pain-Related Impairment: A Sample Protocol**
- 18.6 Psychogenic Pain**
- 18.7 Malingering**
- 18.8 Conclusion**
- 18.9 Case Examples**

Introduction

This chapter provides information that will enable physicians to understand pain and develop a method to distinguish pain that accompanies illnesses and injuries from pain that has become an autonomous process, and provide physicians with a qualitative method for evaluating permanent impairment due to chronic pain.

This chapter has been completely revised from the fourth edition. Its new features include (1) an overview of pain; (2) a discussion of the complexity of assessing impairment due to pain; (3) a review of situations in which pain is a major cause of suffering, dysfunction, or medical intervention rather than a part of injuries and illnesses of specific organ systems as covered in other chapters of the *Guides*; (4) a qualitative method for evaluating impairment due to chronic pain; and (5) a description of when to use the methods described in this chapter and how they can be integrated with the impairment rating methods used in other chapters of the *Guides*.

Physicians need to use their clinical judgment as to what constitutes normal or expected pain in conditions that produce widely variable amounts of pain; a herniated lumbar disk, for example, may be completely painless or incapacitatingly painful. This chapter focuses on those situations in which the pain itself is a major cause of suffering, dysfunction, or medical intervention. Pain as considered in this chapter is persistent, which is not to say that it is refractory to all treatment, but that it is likely to be permanent and stationary.

18.1 Principles of Assessment

Before using the information in this chapter, the *Guides* user should become familiar with Chapters 1 and 2 and the Glossary. Chapters 1 and 2 discuss the *Guides*' purpose, applications, and methods for performing and reporting impairment evaluations. The Glossary provides definitions of common terms used by many specialties in impairment evaluation.

It is considerably more difficult to provide a method for assessing chronic, persistent pain than acute pain. In chronic pain states, there is often no demonstrable active disease or unhealed injury, and the autonomic changes that accompany acute pain, even in the anesthetized individual, are typically absent. Historically, it was assumed that pain derived from underlying peripheral tissue pathology and that its severity should correlate highly with the identified pathology. Current research, however, shows that pain perception is less a moment-to-moment analysis of afferent input than a dynamic process influenced by the effects of past experiences. Sensory stimuli act on neural systems that have been modified by earlier inputs, and the output of these systems is significantly influenced by the "memory" of these prior events.

18.2 Overview of Pain

18.2a Definitions

Pain is defined by the International Association for the Study of Pain¹ as "an unpleasant sensory and emotional experience associated with actual or potential tissue damage or described in terms of such damage."

Pain is a plural concept with biological, psychological, and social components. Its perception is influenced by cognitive, behavioral, environmental, and cultural factors. At first glance, it seems at odds with scientific medicine because of the difficulty accounting for it with obvious pathophysiologic changes.

Pain is subjective. Its presence cannot be readily validated or objectively measured. Physicians are confronted with ambiguity as they attempt to assess the severity and significance of chronic pain in their patients. In large part, this stems from the fundamental divide between a person who suffers from pain and an observer who attempts to understand that suffering. Observers tend to view pain complaints with suspicion and disbelief, akin to complaints of dizziness, fatigue, and malaise. As Scarry remarked, "To have great pain is to have certainty, to hear that another person has pain is to have doubt."²

The concept of chronic pain as an extension of acute nociceptive pain is not valid. **Chronic pain** is an evolving process in which injury may produce one pathogenic mechanism, which in turn produces others, so that the cause(s) of pain change over time. Support for this concept includes evidence that primary afferent discharge actually has the ability to injure or kill spinal inhibitory neurons (excitotoxicity), leading to hyperexcitability due to disinhibition. Peripheral nerve injury can initiate evolving abnormalities in spinal cord neurons, which in turn generate abnormal responsiveness of thalamic neurons, which in turn generate cortical dysfunction. In time, these higher-level abnormalities may become independent of the abnormalities that produced them.³

Even in situations that might be expected to provide clear correlations between perceived pain and identified peripheral pathology, there are perplexing observations. For example, in up to 85% of individuals who report back pain, no pain-producing pathology can be identified⁴; conversely, some 30% of asymptomatic people have significant pathology on magnetic resonance imaging (MRI)⁵ and computed tomographic (CT) scans⁶ that might be expected to cause pain. Headache is another common disabling condition in which impairment must be assessed primarily on the basis of individuals' reports of pain rather than on tissue pathology or anatomic abnormality. The reason is straightforward: in the majority of cases there is no demonstrable tissue pathology. Thus, pain can exist without tissue damage, and tissue damage can exist without pain. In summary, there is no "pain thermometer," that is, no biological measure that correlates highly with individuals' complaints of pain.

18.2b Impact of Pain on Population Health and Disability

Pain is among the most common reasons for seeking medical attention, accounting for more than 70 million office visits to physicians each year. It is also the most common cause of disability, with chronic low back pain alone accounting for more disability than any other condition, resulting in nearly 150 million lost work days in 1988.⁸ Disability related to back pain has increased dramatically, although there is no reason to suspect that back problems by themselves have increased.^{9,10} Headache disorders are also a major cause of work loss.¹¹ Despite advances in physiologic understanding, surgical interventions, and pharmacologic therapies, the prevalence of chronic pain shows no signs of abating and continues to be of epidemic proportions. Notwithstanding this fact, the importance of pain is often discounted. Morris has averred that pain reported by somebody else falls into the category we reserve for whatever is invisible, subjective, immaterial, and therefore unreal.¹ A 1987 report of the Social Security Administration opined that it is impossible to understand the pain that another person is suffering.¹²

Pain is an essential determinant of the incapacitation of many individuals who undergo impairment evaluation. As observed by the Institute of Medicine Committee on Pain and Disability and Chronic Illness Behavior,¹⁴ "The notion that all impairments should be verifiable by objective evidence is administratively necessary for an entitlement program. Yet this notion is fundamentally at odds with a realistic understanding of how disease and injury operate to incapacitate people. Except for a very few conditions, such as the loss of a limb, blindness, deafness, paralysis, or coma, most diseases and injuries do not prevent people from working by mechanical failure. Rather, people are incapacitated by a variety of unbearable sensations when they try to work."

When pain persists, it has the capacity to dominate a person's existence, contributing to significant impairment, reduction in the quality of life, functional limitations, and disability. The ravages of chronic pain often extend beyond the person who has it, as the lives of family members are often dominated by the pain of a loved one. Indeed, the children of individuals with chronic pain are at risk for suffering a similar fate.¹ In addition to the human costs, chronic pain is extremely costly to society. Medical expenditures for pain-related assessment and treatment, indemnity costs, loss of productivity, and loss of tax revenues are estimated to be \$125 billion each year in the United States.¹⁶

18.2c Medical Advances in Understanding and Managing Pain Behavioral/Psychological

Several major currents of thought and investigation in the last three decades have profoundly altered medical understanding of pain and its associated behaviors. The first was the behavioral hypothesis that much of the behavior associated with chronic pain was not intrinsic to a disease or injury but, rather, reflected environmental contingencies.¹⁷ This development led to the introduction of powerful clinical interventions, but it had the unfortunate effect of increasing skepticism about the validity of the suffering in those with persistent pain.

The considerable role of cognitive factors and coping skills in augmenting and mitigating the suffering and dysfunction of chronic pain has been compellingly demonstrated. These insights have provided the foundation of efficacious treatments.¹⁸

Associated with these developments has been the introduction of the term *chronic pain syndrome (CPS)* into common parlance. Although not official nomenclature, it is frequently used to describe an individual who is markedly impaired by chronic pain with substantial psychological overlay.¹⁹ CPS is largely a behavioral syndrome that affects a minority of those with chronic pain. It may best be understood as a form of **abnormal illness behavior** that consists mainly of excessive adoption of the sick role. The term is useful in that it properly directs therapy toward the reversal of regression and away from an exclusive focus on elimination of nociception. It does not, however, substitute for a careful diagnosis of the physiologic, psychological, and conditioning components that comprise the syndrome. The term *CPS* must be used with caution, as grouping pain problems together under a generic disorder may mask and leave untreated important physiologic differences.

Neurophysiologic

A second major current has derived from explosive growth in our understanding of the pathophysiology of pain, which has rendered many older concepts untenable. Processes of peripheral and central sensitization have been clarified, along with such phenomena as the development of adrenergic sensitivity in injured nociceptive fibers and the accumulation of ion channels at sites of nerve injury, all of which may produce severe pain in response to trivial stimulation. Processes have been identified by which unilateral inflammation, trauma, or illness can lead to pain and sensitivity in uninvolved, often contralateral, structures. Physiologic

processes underlying such symptoms, which were often dismissed as “not real,” have been found at the level of the dorsal horn, thalamus, and sensory cortex. Intense stimulation and peripheral nerve damage have been found to induce persistent changes in the spinal cord that, over time, alter the receptive field mapping and the phenotype of neurons rostral to them, which in turn may induce changes at the cortical level. These findings are of major import. They demonstrate that pain need not be symptomatic of a disease or injury but, in fact, can become a disease unto itself.

A major implication of recent research on sensitization is that the failure of medical and surgical investigation to account for a given pain may result not from looking in the wrong place, but from looking at the wrong time. That is, the investigations may be directed toward the organ or body part that was historically responsible for the individual’s pain, but they may be unrevealing because the pain, having been initiated by an injury or illness in the past, is now relatively independent.

Although sensitization of the peripheral and central nervous system has been demonstrated repeatedly in basic neuroscience research, there are currently no widely accepted methods for determining whether the symptoms of an individual with chronic pain can be ascribed to sensitization. Thus, while the concept of sensitization is extremely important to a conceptual understanding of chronic pain, there is currently no systematic way to incorporate it into impairment ratings.

Implications

The scientific advances described above have important implications for the assessment of pain-related impairment. The *AMA Guides* as a whole embodies the premise that injuries and illnesses cause deficits in the functioning of organs or body parts, and these deficits can be quantitatively assessed during an impairment evaluation. In the simplest situations, an individual experiences a definite biological insult that creates a clear-cut abnormality in his or her biological functioning. This abnormality, in turn, leads directly to deficits in activities of daily living (ADL) that can be quantified during the course of an impairment evaluation. An example is an individual who sustains a below-elbow amputation in a sawmill accident.

The behavioral concept of CPS and the neurophysiologic concept of peripheral or central nervous system sensitization imply that pain and pain-related activity restrictions may be dissociated from the biological insult to which a person was exposed and from any measurable biological dysfunction in that person’s organs or body parts. Both concepts thus challenge the assumed linkages among biological insult, organ or body part dysfunction, and ADL deficits that are fundamental to the AMA rating system.

Physicians differ sharply in the way in which they conceptualize the relations among biological insult, measurable organ or body part dysfunction, and self-reported activity limitations in individuals with chronic pain. Some physicians have a low threshold for using diagnoses like “chronic pain syndrome” or “psychogenic pain” to describe these people. The diagnoses highlight the lack of association between the complaints of the individuals and any well-defined biological abnormality.

Other physicians attempt to link the complaints of pain patients to a biological abnormality. In general, they do this by employing one of two strategies. The first is to view the person as having an atypical presentation of a well-accepted syndrome. For example, thoracic outlet syndrome is a well-recognized condition that can be caused by measurable abnormalities in arterial, venous, or neural structures in the thoracic outlet. Some physicians view people with chronic pain and paresthesias in an upper extremity as having a variant of thoracic outlet syndrome, even though vascular studies and electrodiagnostic studies are either normal or equivocal.²⁰ The other strategy is to construct diagnoses based on the person’s symptoms and on subjective physical examination findings. The assumption of physicians employing this strategy is that a biological underpinning for the symptoms exists, but that medical science has not yet identified it. For example, the diagnosis of fibromyalgia is based on individuals’ reports of widespread pain and their reports of tenderness during physical examination. Despite extensive research, no specific underlying biological abnormality has been discovered to explain the reports of these people.

Acrimonious debates have occurred between physicians who favor biological explanations for controversial pain syndromes and those who construe the syndromes as dissociated from any definable biological abnormality. The interpretation has significant practical implications because many of the administrative agencies that provide benefits for people with impairments emphasize the importance of (1) objective findings of biological dysfunction and (2) a clear causal link between an index injury and an individual's present symptoms and findings. If a painful condition is construed as a CPS or a psychogenic pain syndrome, both of these criteria are violated.

The distinction between well-accepted conditions and those that are ambiguous or controversial is itself ambiguous. Sometimes disagreements arise about individuals with atypical presentations of well-recognized painful syndromes. The example of thoracic outlet syndrome was given above. Another example is a person with chronic low back pain, vague symptoms in one lower extremity, and an MRI with questionable compromise of a lumbar nerve root. The person might be described as having an atypical presentation of a lumbar radiculopathy; an alternative assessment is that the individual has a nonspecific chronic pain syndrome involving the low back. In other instances, disagreements center around the validity of the diagnostic procedures used to diagnose conditions. For example, a practitioner of manual medicine might ascribe an individual's back pain to a lumbar subluxation or torsion of the ilium, whereas physicians not practiced in manual medicine might discount these diagnoses because they do not accept the validity of the physical examination maneuvers underlying them. Finally, as in the case of fibromyalgia, reliable diagnostic criteria exist, but physicians disagree about whether the condition diagnosed by use of these criteria has a specific, definable biologic basis.

The controversies described above cannot be resolved in this chapter of the *Guides* for the simple reason that the medical community has not achieved consensus about how to construe such conditions as myofascial pain syndrome, fibromyalgia, and "disputed neurogenic" thoracic outlet syndrome.²⁰ A practical approach for performing impairment ratings on individuals with ambiguous or controversial syndromes is given below.

18.3 Integrating Pain-Related Impairment Into the Conventional Impairment Rating System

There are several difficulties associated with integrating pain-related impairment into an impairment rating system such as the *Guides*. A basic challenge for a system of rating pain-related impairment is to incorporate the subjectivity associated with pain into an impairment rating system whose fundamental premise is that impairment assessment should be based on objective findings. The inherent subjectivity of pain is incongruent with the *Guides'* attempts to assess impairment on the basis of objective measures of organ dysfunction, as it requires that determinations of pain intensity and the restrictions imposed by it must be largely based on patients' reports.

A second issue is that an individual's pain behaviors are influenced by his or her social environment. Impairment ratings are usually performed not to establish academic facts or to make treatment decisions but, rather, to establish the financial obligations of payers to individuals or, conversely, the entitlements of individuals to monetary rewards. Thus, the social context surrounding impairment ratings might provide an incentive for individuals to exaggerate their reports of pain so as to maximize awards. Conversely, since insurance companies and government agencies often hire the professionals who perform impairment ratings, evaluators may have an incentive to doubt the complaints of individuals. An ideal rating system would validate the genuine suffering of individuals and resist influence by those who exaggerate their incapacitation for secondary gain. In the absence of objective criteria for assessing the severity and functional significance of pain, it has proved exceedingly difficult to achieve this goal.

Third, this chapter assesses pain qualitatively. Because percentages for pain-related impairment have not been used and tested on a widespread basis, as have other impairment ratings used in the *Guides*, it was decided that impairment ratings for pain disorders would not be expressed as percentages of whole person impairment. Future scientific evidence may emerge that will enable a more quantifiable approach to be adopted. Nevertheless, the value of a qualitative assessment is that any identification of a significant pain component warrants additional consideration when interpreting impairment ratings used for allocation of medical resources, work placement, or financial compensation.

Finally, at a practical level, a chapter of the *Guides* devoted to pain-related impairment should not be redundant of or inconsistent with principles of impairment rating described in other chapters. The *Guides'* impairment ratings currently include allowances for the pain that individuals typically experience when they suffer from various injuries or diseases, as articulated in Chapter 1 of the *Guides*: "Physicians recognize the local and distant pain that commonly accompanies many disorders. Impairment ratings in the *Guides* already have accounted for pain. For example, when a cervical spine disorder produces radiating pain down the arm, the arm pain, which is commonly seen, has been accounted for in the cervical spine impairment rating" (p. 10). Thus, if an examining physician determines that an individual has pain-related impairment, he or she will have the additional task of deciding whether or not that impairment has already been adequately incorporated into the rating the person has received on the basis of other chapters of the *Guides*.

18.3a When This Chapter Should Be Used to Evaluate Pain-Related Impairment

Organ and body system ratings of impairment should be used whenever they adequately capture the actual ADL deficits that individuals experience. However, the organ and body system impairment rating does not adequately address impairment in several situations, discussed below.

When There Is Excess Pain in the Context of Verifiable Medical Conditions That Cause Pain

Individuals in this group have pain associated with medical conditions that are verifiable by objective means. An example is an individual with a persistent lumbar radiculopathy following a lumbar discectomy. Such an individual will usually have objective findings, including atrophy of the affected leg, muscle weakness, and MRI evidence of epidural scarring. An individual with these findings would receive an impairment rating of 10% on the basis of the DRE spine impairment rating system described in Chapter 15. Although the DRE rating is usually appropriate, some individuals with persistent lumbar radiculopathies report "excess" pain. That is, they report that their pain causes severe ADL deficits, suggesting a level of impairment greater than 10%.

Procedures in this chapter can be used to assess this additional impairment and to classify it as mild, moderate, moderately severe, or severe.

When There Are Well-Established Pain Syndromes Without Significant, Identifiable Organ Dysfunction to Explain the Pain

Individuals in this group have pain syndromes that are widely accepted by physicians based on the individuals' clinical presentation but that are not associated with definable tissue pathology. These syndromes are not ratable under the conventional rating system and also they do not fit any of the other chapters in the *Guides* since there is no measurable organ dysfunction. Individuals with these well-established pain syndromes can be evaluated on the basis of concepts elaborated in this chapter. These individuals must have symptoms and signs that can plausibly be attributed to a well-defined medical condition. Some of the most common of these syndromes are listed in Table 18-1. The list is not comprehensive and may change as the body of medical information about various pain syndromes grows. If an examiner determines that an individual has a diagnosis that is not on the list, he or she may rate the individual's pain-related impairment if he or she is convinced that the diagnosed condition is well recognized and that the pain-related impairment is a consequence of the condition. An explanation should be provided in writing.

Table 18-1 Illustrative List of Well-Established Pain Syndromes Without Significant, Identifiable Organ Dysfunction to Explain the Pain

Headache (most)
Postherpetic neuralgia
Tic douloureux
Erythromelalgia
Complex regional pain syndrome, type 1 (reflex sympathetic dystrophy)
Any injury to the nervous system

Table 18-2 Illustrative List of Associated Pain Syndromes

Postparaplegic pain
Syringomyelia pain
Thalamic syndrome
Brachial plexus avulsion pain
Nerve entrapment syndromes
Peripheral neuropathy
Complex regional pain syndrome, type 2 (causalgia)

When There Are Other Associated Pain Syndromes

Use this chapter to evaluate pain-related impairment when dealing with syndromes with the following characteristics: (a) They are associated with identifiable organ dysfunction that is ratable according to other chapters in the *Guides*; (b) they may be associated with well-established pain syndromes, but the occurrence or nonoccurrence of the pain syndromes is not predictable; so that (c) the impairment ratings provided in other chapters of the *Guides* do not capture the added burden of illness borne by individuals who have the associated pain syndromes.

Examples of syndromes in this category are given in Table 18-2. Again, the list is not comprehensive, so an examiner must use his or her judgment to decide whether an individual with a . unlisted condition should be placed in this category.

18.3b When This Chapter Should Not Be Used to Rate Pain-Related Impairment When Conditions Are Adequately Rated in Other Chapters of the Guides

Examiners should not use this chapter to rate pain-related impairment for any condition that can be adequately rated on the basis of the body and organ impairment rating systems given in other chapters of the *Guides*.

When Rating Individuals With Low Credibility

Since the assessment of pain-related impairment depends heavily on the verbal reports of individuals, examiners must be careful to provide ratings only for those who provide information that appears to be reasonable and accurate. The reports of individuals may lack credibility for a variety of reasons. Some people appear unable or unwilling to provide information that is sufficiently detailed for an examiner to assess pain-related impairment. The reasons for this are multiple, including psychosis, severe depression, memory deficits secondary to brain injury, and a lack of cooperation. Other individuals provide detailed information, but the validity of the information is questionable.

When There Are Ambiguous or Controversial Pain Syndromes

As noted above, physicians disagree sharply about whether individuals with chronic pain should be construed as having conditions with definite, albeit obscure, biologic underpinnings. The alternative is to describe these people as having CPS, psychogenic pain syndromes, or some other term implying that their pain cannot be associated with a well-accepted biologic abnormality. For purposes of this chapter, the pain of individuals with ambiguous or controversial pain syndromes is considered *unratable*.

As noted earlier, the distinctions between well-recognized conditions and ambiguous or controversial ones is subtle, so that no definitive list of ambiguous or controversial conditions can be given. The examining physician can, however, identify ambiguous or controversial syndromes by asking the following questions:

1. Do the individual's symptoms and/or physical findings match any known medical condition?
2. Is the individual's presentation typical of the diagnosed condition?
3. Is the diagnosed condition one that is widely accepted by physicians as having a well-defined pathophysiologic basis?

If the answer to all three of the above questions is yes, the examiner should consider the individual's pain-related impairment to be ratable and should proceed according to the rating protocol described in Section 18.3d. If the answer to any of the above three questions is no, the examiner should consider the individual's pain-related impairment to be *unratable* on the basis of concepts in this chapter. In that instance, he or she should still use the assessment protocol described in Section 18.3d to determine the severity and impact of the individual's pain and report the results. That is, even if the examiner considers the person to have unratable pain, he or she needs to characterize the apparent pain-related impairment.

The fact that pain-related impairment may be unratable either on the basis of the organ and body rating system or on the basis of this chapter highlights the limits that exist in the science and practice of impairment evaluation. The judgment that pain-related impairment is unratable does not mean that the evaluating physician considers the pain to be "unreal" or fabricated. In fact, individuals with ambiguous or controversial pain syndromes may suffer from severe pain and report significant restrictions in ADL. These reports are often corroborated by information provided by family members and treating physicians. Thus, when a physician judges pain-related impairment to be unratable, he or she is simply asserting an inability to determine how the activity restrictions reported by an individual are linked to a disease or injury. The decision regarding how to construe these reports must therefore be administrative, not medical.

Advances in diagnostic technology and clinical experience may eventually make pain-related impairment rating feasible for individuals with ambiguous or controversial pain syndromes. At the present time, however, the best option available to an examiner is to report that the individual has apparent impairment that is unratable on the basis of current medical knowledge. Insurance companies and administrative agencies that dispense benefits for impairments will need to make the final decision about how to use this information.

18.3c Administrative Issues Associated With Pain-Related Impairment

In essence, this chapter divides apparent impairment into three categories: (1) impairment ratable on the basis of the conventional rating system used throughout *Guides* Chapters 3 through 17; (2) pain-related impairment ratable according to concepts outlined in this chapter; and (3) pain-related impairment that is unratable according to the concepts outlined in this chapter.

There are two major reasons why these distinctions are crucial. First, agencies that provide benefits for individuals with impairments function under different legal mandates with respect to pain-related impairment. For example, workers' compensation laws in some states mandate that pain-related impairment be considered in disability awards for injured workers.²¹ In other states pain-related impairment is not considered.²²

The system described here distinguishes between an impairment rating using the organ system approach and impairment awarded on the basis of pain. This distinction permits administrative agencies to count "conventional" impairment ratings and pain-related impairment ratings on an equal footing, to discount pain-related impairment ratings, or to disregard them entirely. Similarly, the present system identifies individuals with unratable pain-related impairment so that administrative agencies can make informed decisions about whether or not to compensate these individuals.

Second, the distinction between ratable and unratable pain-related impairment embodies a key premise of this chapter: physicians do not currently possess reliable valid techniques for assessing impairment associated with pain in all clinical settings. It is then more appropriate for the examining physician to describe the individual's pain-related impairment as unratable than to give a rating that cannot be supported by either scientific evidence or consensus.

18.3d How to Rate Pain-Related Impairment: Overview

The system described in this chapter relies largely on self-reports by individuals. Thus, it differs significantly from the conventional rating system, which relies primarily on objective indices of organ dysfunction or failure. The present system assesses pain intensity, emotional distress related to pain, and ADL deficits secondary to pain. ADL deficits are given the greatest weight. An individual's pain-related impairment is considered unratable if (a) his or her behavior during the evaluation raises significant issues of credibility, (b) he or she has clinical findings atypical of a well-accepted medical condition, or (c) he or she is diagnosed with a condition that is vague or controversial.

A detailed protocol for assessing pain-related impairment is described below and outlined in Figure 18-1.

- A Evaluate the individual according to the body or organ rating system and determine an impairment percentage. During the evaluation, the examiner should informally assess pain-related impairment.
- B If the body system impairment rating appears to adequately encompass the pain experienced by the individual due to his or her medical condition, his or her impairment rating is as indicated by the body system impairment rating.

- C If the individual appears to have pain-related impairment that has increased the burden of his or her condition *slightly*, the examiner may increase the percentage found in A by up to 3%.
- D The examiner should perform a formal pain-related impairment assessment if any of the following conditions are met:
 - 1) The individual appears to have pain-related impairment that is *substantially* in excess of the impairment determined in step A.
or
 - 2) The individual has a well-recognized medical condition that is characterized by pain in the absence of measurable dysfunction of an organ or body part (see Table 18-1 for examples).
or
 - 3) The individual has a syndrome with the following characteristics: (a) it is associated with identifiable organ dysfunction that is ratable according to other chapters in the *Guides*, (b) it *may be* associated with a well-established pain syndrome, but the occurrence or nonoccurrence of the pain syndrome is not predictable, so that (c) the impairment ratings provided in step A do not capture the added burden of illness borne by the individual because of his or her associated pain syndrome (see Table 18-2 for examples).
- E If the examiner performs a formal pain-related impairment rating, he or she may increase the percentage found in step A by up to 3%, *and* he or she should classify the individual's pain-related impairment into one of four categories: mild, moderate, moderately severe, or severe. In addition, the examiner should determine whether the pain-related impairment is *ratable* or *unratable*.