

2006

# James Hall v. Utah Labor Commission, Consolidated Freightways and/or Fidelity and Guaranty Insurance : Brief of Appellant

Utah Court of Appeals

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Phillip B. Shell; Day, Shell and Liljenquist; Attorney for Appellant.

Alan Hennebold; Theodore E. Kanell; Joseph C. Alamilla; Plant, Christensen and Kanell; Attorneys for Appellees.

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**IN THE COURT OF APPEALS, STATE OF UTAH**

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JAMES HALL

:

Petitioner,

:

Court of Appeals

v.

Case No 20060493 CA

UTAH LABOR COMMISSION,

:

CONSOLIDATED FREIGHTWAYS and/or

Labor Commission Case No. 200231

FIDELITY & GUARANTY INSURANCE,

:

Priority No. 7

Respondents.

:

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**BRIEF OF PETITIONER**

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**PETITION FOR REVIEW FROM ORDER OF THE UTAH LABOR  
COMMISSION**

---

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**FILED**

**UTAH APPELLATE COURTS**

**NOV 06 2006**

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## **JURISDICTION OF THIS COURT**

The Utah Court of Appeals has jurisdiction in this matter pursuant to Utah Code Ann. §63-46(b)-16 (1988) and Utah Code Ann. §34A-2-801(1997),

## **STATEMENT OF ISSUES AND STANDARD OF REVIEW**

The issues presented in this matter concern:

1. Whether the Labor Commission erred in concluding that a worker with light duty restrictions that do not impact on his ability to perform his work

duties is not entitled to temporary total disability when the employer will not take him back for work until the light duty restrictions have been removed.

Whether the Labor Commission erroneously applied the law is a mixed question of law and fact, which will be reviewed for reasonableness and rationality. The Court will uphold the Labor Commission's determination unless it exceeds the bounds of reasonableness and rationality. Acosta v. Labor Commission, 44 P.3d 819, 2002 UT App 67 (Ut. Ct. App 2002).

2. Whether or not light duty work was available to the Petitioner involves a question of fact, and the Labor Commission will only be upheld in a factual determination if the findings are supported by substantial evidence based upon the record as a whole. Brown & Root Indus. Serv. v. Industrial Commission, 947 P.2d 671, 677 (Utah 1997).

### **CONSTITUTIONAL OR STATUTORY PROVISIONS**

None.

### **STATEMENT OF THE CASE**

#### **PROCEDURE**

1. Mr. Hall filed an Application for Hearing with the Utah Labor Commission on January 3, 2002 claiming coverage for medical expenses and temporary total disability compensation (Record at 2-9).

2. Rather than go to an evidentiary hearing, the case was initially sent directly by the Administrative Law Judge to a medical panel by stipulation of the parties on February 5, 2004 (Record at 35-36).

3. The medical panel's decision was issued on March 26, 2004 and an initial Findings of Fact, Conclusions of Law and Order was issued on November 30, 2004 (Record at 37-46 and 47-50).

4. On December 30, 2004 the Petitioner filed a Motion for Review with the Labor Commission and as a result, the Labor Commission set up a date for an evidentiary hearing for August 16, 2005 (Record at 51).

5. Following the hearing, a Supplemental Findings of Fact, Conclusions of Law and Order was issued on January 4, 2006.

6. A Motion for Review was filed by the Petitioner on February 3, 2006. (Record at 64-68).

7. An Order Denying Motion for Review was issued by the Utah Labor Commission on February 28, 2006 (Record at 91-94).

8. A Motion for Reconsideration was filed by the Petitioner on March 16, 2006 (Record at 95-99) and an Order Extending the Time for Reconsideration was issued by the Labor Commission on 3-27-06 (Record at 100-101).

9. The Petition for Review was filed by the Petitioner with the Utah Court of Appeals on May 30, 2006 following the Memorial Day holiday.

## **FACTS**

1. Petitioner James Hall began working for Consolidated Freightways in October of 1999. He worked full-time as a long-haul driver.

(Record at 31)

2. Beginning in the spring of the year 2000, he began experiencing periodic pain in his right arm the occasional numbness in several fingers of his right hand. He also began having periodic pain and numbness in his wrists.

(Record at 31)

3. On October 28, 2001 Mr. Hall learned of his being laid off from his work at CF, along with a number of other drivers.

4. On October 29, 2001 Mr. Hall first saw a doctor because of his concern about the symptoms he had been experiencing in his left arm. He reported this injury claim to CF and medical bills for treatment for the condition were paid by CF until mid-December 2001 at which time the claim was denied as being industrially related. (Record at 31-32 and Transcript at 18, 1. 5-10).

5. The petitioner was released for full duty on December 18, 2001 by Dr. Jeffrey Scott. (Medical exhibit at 64).

6. Also in December the petitioner was seen by Dr. Mark Greenwood who diagnosed chronic trapezius strain and recommended further

medical care. He was then referred by Dr. Greenwood to see Dr. David Petron, an orthopedic specialist. (Medical exhibit at 8-11).

7. Dr Petron kept the petitioner in a light duty status until a full duty work-release was given on May 9, 2002. (Medical exhibit at 2, 5, 6).

8. After being given a full duty work-release, the petitioner returned to work with Consolidated Freightways in May of 2002. (Transcript at 16, l. 13-19)

9. On January 2, 2002 and January 21, 2002 letters were sent by Mr. Hall's direct supervisor Roy Johnson to Mr. Hall recalling him to work. (Record at 57B-57E).

10. Mr. Hall testified at the evidentiary hearing that he responded to the letters and spoke with Mr. Johnson's assistant Lou Duffin about returning to work. Mr. Hall testified that because he was in a light duty status and because his condition was not recognized as being industrially related at that time that no work was available for him nor would be available for him until he was given a full duty work-release. (Transcript at 10, 11).

11. On January 4, 2002 Mr. Hall filed an Application for Hearing with the Utah Labor Commission seeking temporary total disability benefits as well as medical benefits. (Record at 2-9).

12. At the evidentiary hearing Mr. Roy Johnson testified on behalf of CF. Mr. Johnson was the dispatch operations manager at CF in Salt Lake.

(Transcript at 23, l. 15-17). He was Mr. Hall's direct supervisor. He stated that he did not remember having a discussion with Mr. Hall after either of the two letters were sent about Mr. Hall about returning to work. He testified that it is possible he had a discussion, but he didn't recall whether he did or did not. (Transcript at 25, l. 1-3).

13. Mr. Johnson also testified that he had people on light duty working at CF but they were the people off on industrial leave as documented by their doctors:

**Question:** Okay. Tell me about consolidated freight ways. Do they have a light duty program?

**Answer:** Yes. I had several people on light duty that did different jobs according to their physical ability at that time.

**Question:** Okay and is that offered to any employee who is injured?

**Answer:** It is to—it was, to those there are off on industrial, yes, providing that the doctor released them as such.

(Transcript at 25, l. 4-13).

14. Mr. Johnson testified that recalls from layoff were done by seniority order. If a person doesn't respond to the letter of recall within 14 days, they are discharged from employment at CF. (Transcript at 27, l. 25 and 28, l.10-16).

15. Also testifying at the hearing on behalf of CF was Mr. Stephen R Hillstead. Mr. Hillstead was the group operations manager for CF for the entire area of Montana, Idaho, Nevada and Utah. (Transcript at 30, l. 16-22).

16. Mr Hillstead testified that work was available for Mr. Hall after January 2, 2002 but he did not show up for work. He testified that Mr. Hall would have reported to Roy Johnson and Lou Duffin but he didn't come back to work after the recall letters have been sent. (Transcript at 35, l. 9-20).

17. Mr. Hillstead also testified later in his testimony that it was his understanding that Mr. Hall never reported back for work in January of 2002. He acknowledged that Mr. Hall did return to work after May of 2002. (Transcript at 37, l. 21-25 and 38, l. 1-4).

### **SUMMARY OF THE ARGUMENT**

The Labor Commission concluded that Mr. Hall was fully able to perform his work duties after December 18, 2001 and hence, despite various light duty restrictions given him by his doctors, he was not entitled to any further temporary total disability benefits, notwithstanding the fact that he was not given a full duty release until May 9, 2002. Mr. Hall claims that no light duty work was available for him from the employer and hence temporary total disability benefits should be paid until MMI was reached. A finding that Mr.

Hall had light duty work available to him at his employer is not supported by the greater weight of the evidence.

## **ARGUMENT**

### **POINT I**

**An injured worker with light duty restrictions that do not impact on his ability to perform his work duties is nevertheless entitled to temporary total disability when the employer will not take him back for work until all light duty restrictions have been removed.**

In the Order Denying Motion for Review, and in the Order Denying Request for Reconsideration, the Labor Commission decided that Mr. Hall was able to return to full duty work with Consolidated Freightways after December 18, 2001 and hence was not entitled to consideration for further temporary total disability benefits, despite being on light duty restrictions.

This light duty status continued after that date and until May 9, 2002 when he reached maximum medical improvement and was given a final full duty release, without restrictions, by his treating doctor, Dr. Petron. At that time, he did return to work (Transcript p. 21, l. 20-23).

Normally, we would agree that such a finding, in light of the language of Entwhistle v. Wilkins, 626 P.2d 498 (Utah 1981), would mark the end of the appropriate period of temporary total disability benefits.

In Entwhistle, the Utah Supreme Court stated, as noted by the Labor Commission:

As applied to the issue under consideration here, total disability does not mean a state of abject helplessness or that the injured employee must be unable to do any work at all. The fact that an injured employee may be able to do some kinds of tasks to earn occasional wages does not necessarily preclude a finding of total disability to perform the work or follow the occupation in which he was injured. **His temporary disability may be found to be total if he can no longer perform the duties of the character required of him in his occupation prior to his injury.** Emphasis added

If, despite being given light duty restrictions by the treating physician, a man is able to perform all of the essential portions of his work duties, then usually temporary total disability would end.

The problem in this case is that the Labor Commission apparently did not properly consider the issue of whether the employer, CF, was willing to take back an employee who is on light duty but for what was not being considered to be an industrial injury.

Section 34A-2-410(2), Utah Code Annotated, provides that temporary total disability benefits are to continue to be paid if light duty release is obtained before an injured worker reaches a fixed state of recovery when no light duty work is available from the employer:

In the event a light duty medical release is obtained prior to the employee reaching a fixed state of recovery, and when no light duty employment is available to the employee from the employer, temporary disability benefits shall continue to be paid.

Mr. Hall's was in a light duty status until May 9, 2002 due to continuing further treatment, medications and physical therapy. Dr. David Petron's records from January 31, 2002 show him to be released for work but in a light duty capacity (p.2 of Med Records Exhibit), as do the records from the April 1, 2002 visit (p.5 of Med Records Exhibit). He was not given a full-duty release until May 9, 2002 (p.6 of Med Records Exhibit). He clearly did not reach a fixed state of recovery, or maximum medical improvement, in December of 2001 when the Commission otherwise terminated his period of temporary total disability.

Because he was in a light duty status, unless the employer offered work to the Petitioner, then temporary total disability benefits should continue to be paid until a fixed state of recovery is reached. In this matter, that date of MMI was reached on May 9, 2002.

## **POINT II**

**There is no substantial evidence in the record to support the Labor Commission's finding that the employer would take the Petitioner back to work in January of 2002.**

The record shows that Roy Orson Johnson was the dispatch operations manager at Consolidated Freightways and was the person to whom Mr. Hall reported. (Transcript at p.23, l. 16-17 and p.35, l. 16-17).

Mr. Johnson testified that Consolidated Freightways had a light duty policy or program (Transcript at p.25, l. 6-8). However, he testified that light duty is only given to employees “off on industrial”, providing that their doctors released them from work as such. (Transcript at p.25, l. 11-13).

This is in harmony with Mr. Hall’s testimony when he said he was told that “because it was not an industrial accident, they (CF) didn’t have anything for me. If I’m not cleared for work, I can’t work. I couldn’t do my job because I had light-duty restrictions.” (Transcript at p.11, l. 8-12). Mr. Hall did return to work at CF after receiving his full-duty release in May of 2002.

The only other evidence in the record concerning whether light-duty work was available comes from the testimony of Mr. Steven R. Hillstead, who was the regional manager for CF over all of Montana, Idaho, Nevada and Utah.

Mr. Hillstead claimed that light duty work was available and Mr. Hall’s regular job was available for him at CF in January of 2002. (Transcript at p.34, l. 7-12). For this job, he would have reported to Roy Johnson (or Mr. Johnson’s assistant Lou Duffin) (Transcript at p.35, l. 16-17). This is at odds with Mr. Johnson’s testimony that light-duty work was only tendered to those who have had industrial accidents and have light-duty releases from their doctors.

The evidence in this case shows that on January 2, 2002 and January 21, 2002 Mr. Hall received a recall to work following a general layoff period and was required to report to work within two weeks or lose all seniority rights (Exhibit R3). Mr. Hall testified that he spoke with his assistant supervisor Lew Duffin following receipt of that letter but was not offered light duty work for three reasons:

1. Because he was not released for full-duty work by his doctor;
2. Because his arm problems at that time were not considered work related by the employer; and
3. Because light duty was only offered by CF to employees who were off from work due to a recognized work injury. CF was not recognizing the injury at that time as being work related. (Transcript at p.11., l. 2-12),

This is consistent with Roy Johnson's testimony that light duty work was only offered to those who were off work due to industrial injuries.

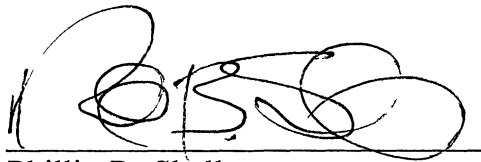
The greater weight of the evidence shows that no light duty work was available to Mr. Hall from CF in January of 2002.

Because of the policy of CF which only made light duty work available to workers with recognized workers' compensation claims, Mr. Hall did not have work offered to him until he received a full-duty release in May of 2002.

### CONCLUSION

Accordingly, the Labor Commission's Order Denying Motion for Review should be reversed to conclude that Mr. Hall did not reach a fixed state of recovery until May 9, 2002, and no light duty work was offered by the employer, and that TTD benefits should be awarded to May 9, 2002 when a full-duty work release was given by Mr. Hall's doctor.

Dated this 31st day of October, 2006.

A handwritten signature in black ink, appearing to read 'P. B. Shell', written over a horizontal line.

Phillip B. Shell  
Attorney for Appellant

CERTIFICATE OF MAILING

I hereby certify that on the 6<sup>th</sup> day of November, 2006, I caused to be mailed by first class mail, postage pre-paid, two (2) copies of the foregoing BRIEF OF APPELLANT to the following:

Theodore E. Kanell  
Plant, Christensen & Kanell  
136 East South Temple, Suite 1700  
Salt Lake City, UT 84111

Alan Hennebold  
Utah Labor Commission  
P.O. Box 146615  
Salt Lake City, UT 84114-6615

A handwritten signature in black ink, appearing to read 'P. B. Shell', written over a horizontal line.

Phillip B. Shell  
Attorney for Appellant

## ADDENDUM

- A. Findings of Fact, Conclusions of Law and Order
- B. Supplemental Findings of Fact, Conclusions of Law and Order
- C. Order Denying Motion for Review
- D. Order Denying Motion for Reconsideration

UTAH LABOR COMMISSION  
160 EAST 300 SOUTH, 3<sup>RD</sup> FLOOR  
SALT LAKE CITY UT 84114

CASE NO. 200231

JAMES HALL,	::	
	::	
Petitioner	::	FINDINGS OF FACT
	::	
v.	::	CONCLUSIONS
	::	
CONSOLIDATED FREIGHTWAYS	::	OF LAW AND ORDER
and /or	::	
FIDELITY & GUARANTY	::	
INSURANCE	::	Judge Donald L. George
	::	
Respondents.	::	

\*\*\*\*\*

**APPEARANCES:** Petitioner James Hall (hereinafter Hall or Petitioner) is represented by attorney Phillip Shell.

Respondent Consolidated Freightways and it's carrier, Fidelity & Guaranty Insurance (hereinafter collectively referred to as Consolidated) are represented by attorney Theodore Kanell.

**FINDINGS OF FACT**

The hearing was waived on this matter in favor of direct referral to a medical panel on stipulated facts to resolve the medical questions of:

(1) whether the Petitioner's claims of thoracic outlet syndrome and other upper extremity complaints are related to his activities and work with Consolidated Freightways, and if so, to what percentage are they work related as opposed to non-industrial.

(2) if any degree of the petitioner's condition is work-related, what period of temporary total disability, if any, has the Petitioner had since 10/29/2001?

(3) if any degree of the Petitioner's condition is work-related, is there any permanent physical impairment due to the work-related condition? If so, rate it according to the AMA 5<sup>th</sup> Edition Guides to the Evaluation of Permanent

Impairment, or the Utah Impairment Guidelines, as applicable.

(4) what future medical care, if any, will be necessary due to work related conditions?

The Stipulation of Facts signed by the parties is incorporated herein by this reference and adopted by the ALJ as his Preliminary Findings of Fact.

The Medical Panel Report has been received by the Labor Commission, distributed to all parties, and no objections were made thereto. The report is based upon a preponderance of the medical facts, is thorough, well reasoned, and accordingly is received into evidence. The Administrative Law Judge adopts the Panel findings as his own and incorporates them herein by this reference.

In essence, the Medical Panel answered the foregoing questions as follows:

- (1) Petitioner's work activity for Consolidated Freightways was 100 percent responsible for the right upper extremity exacerbation and complaints that occurred during and immediately after his employment with Consolidated.
- (2) Petitioner would have been capable of modified duties from the outset and according, there was no time when Petitioner should have been off work.
- (3) treatment resolved Petitioner's right upper extremity symptoms, and he has no current objective deficit or limitation upon which to base an impairment rating.
- (4) no future medical care is necessary as a result of the work exacerbation at Consolidated Freightways. Petitioner may require future treatment for right upper extremity musculoskeletal disorder or thoracic outlet syndrome for both of which he has a proclivity, but any such future treatment would result from a new exacerbation and would be casually unrelated to his prior work for Consolidated Freightways.

### **CONCLUSIONS OF LAW**

All other relief requested under the 4/04/2002 Application for Hearing having apparently been disposed of prior to the referral to the Medical Panel, the issues submitted to the Panel involved causation, temporary total and permanent partial disability compensation, and future medical care.

As to those remaining issues, there is a preponderance of evidence demonstrating that as a result of the Petitioner's work activities while employed by Consolidated Freightways, petitioner James Hall did suffer a temporary exacerbation of thoracic outlet syndrome and right upper extremity symptoms. 100 percent of those symptoms were attributable to his Consolidated work activities, however all of the symptoms have

since been resolved, leaving no objectively ratable permanent partial impairment, and therefore the claim for permanent partial disability compensation should be denied and dismissed with prejudice.

Likewise, since Petitioner was capable of modified duties from the outset, no compensation for any time off work in the form of temporary total disability is appropriate, and that claim should be denied and dismissed with prejudice.

Last, since it is not anticipated that there will be any future medical care that is necessary and reasonable as a result of Petitioner's temporary exacerbation while working for Consolidated, the claim for future medical care should be denied and dismissed with prejudice.

### **ORDER**

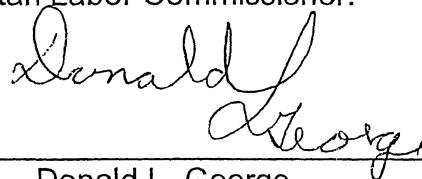
**IT IS THEREFORE ORDERED** that all of petitioner James Hall's claims under the 4/04/2002 Application for Hearing are hereby denied and dismissed with prejudice.

### **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 date 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.

DATED THIS 30<sup>th</sup> day of November, 2004



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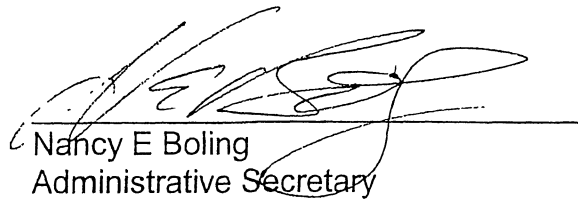
Donald L. George  
Administrative Law Judge

## MAILING CERTIFICATE

I hereby certify that a true and correct copy of Findings of Fact, Conclusions of Law and Order was mailed, first-class, postage prepaid, on this 30th day of November, 2004 to the following:

JAMES HALL 3111 S WATER LEAF WAY WEST VALLEY CITY UT 84128  
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84111  
PHILLIP SHELL ATTY 45 E VINE STREET MURRAY UT 8407

THE LABOR COMMISSION



Nancy E Boling  
Administrative Secretary

UTAH LABOR COMMISSION  
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PO Box 146615  
Salt Lake City, Utah 84114-6615  
801-530-6800

JAMES HALL,  
Petitioner,

vs.

CONSOLIDATED FREIGHTWAYS  
and/or FIDELITY & GUARANTY  
INSURANCE  
Respondents.

SUPPLEMENTAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER

Case No. 200231

Judge Donald L George

Hearing: 12/21/2005 @ 10:00 AM

Appearances: Attorney Phillip Shell for Petitioner  
Attorney Theodore Kanell for Respondents

**STATEMENT OF THE CASE**

On 11/30/2004, Findings of Fact, Conclusions of Law and Order issued concerning this 11/01/2001 industrial accident, which document is incorporated by reference as if fully set forth herein. Petitioner timely objected stating that the parties' stipulation which was the basis for the direct referral to a medical panel and the ensuing Order, did not deal with the newly-germane issue of whether or not light-duty work was available and offered. There being no response to petitioner's objection, the matter was set for this supplemental hearing to receive evidence on that issue.

Petitioner claims he should be awarded 27.429 weeks of temporary total disability from 10/29/2001 through 5/09/2002 as he contends he presented medical documentation with his restrictions to the employer and he was available but was not offered light-duty work.

Respondents contend that petitioner should not receive any temporary total disability, or alternatively, not beyond 12/18/2001 per Dr. Lucas' 12/28/01 Summary of Medical Record.

**ISSUES**

Did petitioner present medical documentation restricting him to light duty work, and was light-duty within petitioner's restrictions available and offered?

### STIPULATED FACTS

1. Mr. Hall is a 33 year-old, left-handed, 200 lb. male who was employed by Consolidated Freightways (CF) as a driver as of October 23, 2001. At that time, he was single with no dependent children and was earning a wage in excess of \$1,000.00 per week. His employment with CF began on about October 2, 1999. Thereafter he worked full-time as a long-haul driver.
2. Mr. Hall did not participate in loading or unloading his truck during the course of his employment with Consolidated Freightways, but rather worked solely as a truck driver. Due to the configuration of his truck, while driving he usually kept his right arm on the gear stick of the truck or otherwise elevated beside him, while steering with his left arm. He noted a fair amount of vibration in the gear shift with the use of the truck.
3. Beginning in about the spring of 2000, he began experiencing periodic pain in his right arm with occasional numbness in 3-5 fingers of his right hand. He also began having periodic pain and numbness in his wrists.
4. On October 29, 2001 he first saw a doctor at the Salt Lake Industrial Clinic because of concerns about these symptoms. He was found at that time to have good ROM, but was noted to have a tender right trapezius muscle and tested positive for impingement of the wrists. Bilaterally he tested positive for tinels, findlesteins and phalens' signs. He was diagnosed as having right arm overuse and bilateral early overuse of the wrists. He was directed to get physical therapy and was not to drive long-haul until his symptoms resolved.
5. He received a period of physical therapy from Todd E. Brown, P.T., C.H.T. at the Work Performance Center of the Pioneer Valley Hospital. By March of 2002, Mr. Hall still had complaints of burning pain in the cervical thoracic region of his right side with occasionally radiating symptoms into the proximal upper right upper extremity.
6. Mr. Hall was treated by Dr. Jeffrey Scott, M.D. who first saw him on December 3, 2001. Dr Scott noted that Mr. Hall had symptoms consistent with mild bilateral median neuritis with right periscapular myofacial-type symptoms.
7. On December 29, 2001, Mr. Hall was seen by Dr. Mark Greenwood, M.D. who diagnosed chronic trapezius strain.
8. Beginning in January of 2002, Mr. Hall began treatment with Dr. Davis Petron, M.D. Dr. Petron felt that Mr. Hall's condition was most consistent with thoracic outlet syndrome and right periscapular myofacial pain.
9. Over the course of treatment and physical therapy. Mr. Hall did note an improvement in his symptoms, although he did not experience a full resolution.
10. Dr. Jeff Chung, M.D. performed an IME on Mr. Hall in April of 2003. Dr. Chung felt that Mr. Hall's condition was not work related but was rather a congenital/developmental

abnormality. He further felt that since Mr. Hall was not using his hands over his shoulders at work in a constant or repetitious manner that his employment was not responsible for any thoracic outlet syndrome. Dr. Chung did feel that the myofascial pain syndrome is most likely work related, but does not result in my disability nor require any work restrictions

### **SUPPLEMENTAL FINDINGS OF FACT**

It is not contested that on 10/29/2001, petitioner was not married and did not have any dependent children. He was earning sufficient to entitle him to a weekly temporary total disability compensation rate of \$554, if such benefit is awarded.

Petitioner had a prior workers compensation claim against another employer for a rotator cuff tear, but testified that he could not remember whether it was on the left or the right side. Page 43 of the Medical Records Exhibit, dated 3/01/02, recites the rotator cuff tear was approximately five years previous. That note continued, referring to a carpal tunnel syndrome which was work related involving a job that petitioner held several years ago at a photo processing company. Petitioner testified he could not recall who treated him for the carpal tunnel.

In addition to prior workers compensation experience, petitioner admitted he was aware for 2 ½ years before 10/29/2001, of the company policy requiring immediate reporting of industrial injuries.

Petitioner admitted that he had right upper extremity problems for a year and a half before he reported it as an industrial injury on 10/29/2001, the day after he was notified of his layoff from work.

Petitioner testified that he lost eight inches of muscle mass, and was aware of that because he is a weightlifter with a 42 inch chest and 19 inch arms.

Respondents Exhibit 1 is their 10/28/2001 letter notifying petitioner he was laid off work effective that date. The letter was sent by certified mail and was received by petitioner on 11/01/2001. Petitioner also testified he was personally given a copy of the letter by Lew Duffin on 10/28/2001.

Respondents Exhibit 2 is a 10/29/2001 written Statement of Injury which indicates petitioner advised supervisor Lew Duffin of the industrial injury on Sunday, 10/28/2001.

Petitioner admits that after he was laid off, he received continuing supplemental income benefits of \$150 per week.

Respondents Exhibit 3 is their 1/02/2002 letter notifying petitioner that he was recalled to work effective 1/21/2002. This letter also stated:

“Please be advised that you must respond to this notice within (14) days of receipt thereof. Failure to do so will result in loss of all seniority rights.”

Petitioner testified that he discussed the layoff with Lew Duffin on 1/02/2002 after receiving Exhibit 3, but denied they told him about light duty being available because of their contention that the injury was non-industrial. Petitioner denies light-duty was ever offered.

Respondents Exhibit 4 is the certified mail receipt with petitioner's signature demonstrating that he received Exhibit 3.

Respondents Exhibit 5 is the Medical Records exhibit.

Dr. Jeffrey Scott concluded in his 12/04/01 Electrodiagnostic Evaluation;

“Modified work release for two weeks namely no heavy lifting and no repetitive motion of the wrists to allow complete resolution of his mild neuritis and deal with his myofascial pain.”

Respondents Exhibit 6 was Dr. Lucas' 12/28/2001 Summary of Medical Record indicating petitioner was required to be off work from 10/29/01 through 11/01/01, was released to light-duty on 11/01/01, and released to usual work on 12/18/01.

By petitioner's direct testimony, he was aware that other individuals were given light-duty. That is consistent with the testimony of Consolidated's then-operations manager Roy Johnson who indicated that light-duty was available and was tailored to an employee's medical restrictions, but petitioner did not contact Johnson at any time concerning light-duty work. That is further reinforced by like testimony of Consolidated's then-regional operations manager, Steve Hillstead, who testified that petitioner simply never returned to work until May 2002. Neither witness Johnson nor witness Hillstead has any present affiliation with respondent, which has gone out of business.

Beginning 1/31/02, petitioner began seeing Dr. Petron who prescribed physical therapy and anti-inflammatories. Petitioner was released to return to work without restrictions on 5/09/2002.

Considering petitioner's prior workers compensation claims experience, his admitted knowledge of the company's policy requiring immediate reporting well before he reported this claim, the coincidence of his reporting this claim immediately after he was notified of layoff and the resulting substantial drop in his income from over \$1,000 per week to \$150 per week and the possibility of garnering an additional \$15,195.67 in aggregated weekly workers compensation benefits, petitioner's self-serving testimony and lack of witnesses or documentation supporting his purported discussions with Roy Johnson or Lew Duffin about light-duty work., is less credible than the contrasting testimony of two witnesses who no longer have any reason to be biased in favor of respondent.

### SUPPLEMENTAL CONCLUSIONS OF LAW

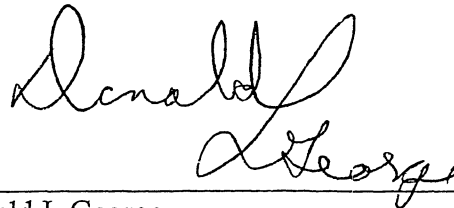
Although it is questionable whether petitioner timely presented documentation to respondent, of his medical restrictions that would justify any temporary total disability compensation, but giving him the benefit of the doubt under Dr. Scott's 12/04/01 Electrodiagnostic Evaluation and Dr. Lucas' 12/28/2001 Summary of Medical Record, petitioner's temporary total disability period would be from 10/29/01 through 12/18/01. There is not a preponderance of the evidence to support petitioner's allegations that he thereafter contemporaneously documented further light-duty work restrictions, requested light-duty, or that it was denied.

### SUPPLEMENTAL ORDER

IT IS THEREFORE ORDERED that respondents Consolidated Freightways and/or Fidelity and Guaranty shall pay petitioner James Hall temporary total disability compensation from 10/29/2001 through 12/18/2001, a period of 7.286 weeks at \$554 per week for a total of \$4,036, plus interest at 8 percent per annum from the date when each payment would have otherwise been due and payable, but less the attorney fee awarded hereinafter.

IT IS FURTHER ORDERED that respondents shall deduct an attorney fee according to the Labor Commission sliding scale from the foregoing award and interest, and pay that fee directly to Philip Shell at his offices.

DATED this 4th day of January, 2006.



Donald L. George  
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 date 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 request review by the Appeals Board, the review will be conducted by the Utah Labor Commission.

### CERTIFICATE OF MAILING

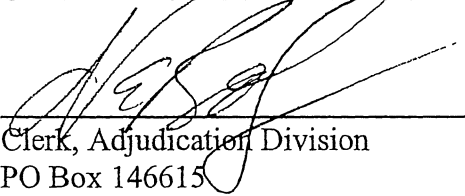
I hereby certify that a true and correct copy of the attached Findings of Fact, Conclusions of Law, and Order, was mailed by prepaid U.S. postage on this 4<sup>th</sup> day of January, 2006 to the persons/parties at the following addresses:

JAMES HALL 3111 WATER LEAF WAY WEST VALLEY CITY UT 84128

PHILLIP SHELL, ATTY 45 E VINE STREET MURRAY UT 84107

THEODORE KANELL ATTY 136 E SOUTH TEMPLE #1700 SALT LAKE CITY UT 84111

UTAH LABOR COMMISSION



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Clerk, Adjudication Division

PO Box 146615

Salt Lake City, UT 84114-6615

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**UTAH LABOR COMMISSION**

**JAMES HALL,**

**Petitioner,**

**vs.**

**CONSOLIDATED FREIGHTWAYS and  
FIDELITY & GUARANTY INSURANCE,**

**Respondents.**

**ORDER DENYING  
MOTION FOR REVIEW**

**Case No. 02-0031**

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James Hall asks the Utah Labor Commission to review Administrative Law Judge George's decision regarding Mr. Hall'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 ISSUE PRESENTED**

On January 3, 2002, Mr. Hall filed an application for workers' compensation benefits against Consolidated Freightways and its insurance carrier, Fidelity & Guarantee Insurance (referred to jointly as "Consolidated" hereafter). In lieu of an evidentiary hearing, Mr. Hall and Consolidated submitted a stipulation of facts and agreed that a medical panel should evaluate Mr. Hall's claim.

The medical panel submitted its report on March 24, 2004, concluding that Mr. Hall's work at Consolidated had caused "thoracic outlet syndrome," but the syndrome had resolved with no permanent impairment and no need for additional medical treatment. The panel also stated that "the evidence does not support any period of total temporary disability. [Mr. Hall] would have been capable of modified duties from the outset."

On November 30, 2004, Judge George adopted the medical panel's report and, on that basis, concluded Mr. Hall was not entitled to any workers' compensation benefits beyond what he had already received. Specifically addressing Mr. Hall's claim for temporary disability compensation, Judge George stated that "since [Mr. Hall] was capable of modified duties from the outset, no compensation for any time off work in the form of temporary total disability is appropriate, and that claim should be denied and dismissed with prejudice."

Mr. Hall requested Commission review of Judge George's decision. Mr. Hall pointed out that, even if he had been able to perform light duty work while recovering from his thoracic outlet syndrome, there was no evidence that Consolidated had actually made light duty work available to him. Judge George did not refer Mr. Hall's motion for review to the Commission, but instead held

## ORDER DENYING MOTION FOR REVIEW

James Hall

PAGE 2

an evidentiary hearing on December 21, 2005, to determine whether Consolidated had made light duty work available to Mr. Hall. On January 4, 2006, Judge George issued a supplemental decision awarding temporary total disability compensation to Mr. Hall for the period between October 29 and December 18, 2001.

Mr. Hall now seeks Commission review of Judge George's supplemental decision. Mr. Hall contends Judge George erred in not extending temporary total disability compensation to May 27, 2002, the date Mr. Hall was released to full duty work by his physician.

### DISCUSSION AND CONCLUSION OF LAW

There is no question that Mr. Hall's thoracic outlet syndrome constitutes a work-related injury and, as such, is covered by the Utah Workers' Compensation Act. The only dispute is the extent to which Mr. Hall qualifies for a particular type of workers' compensation benefit--temporary total disability compensation—that is provided by the Act.

The operative provision of the Act governing temporary disability compensation is found in § 34A-2-410(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 . . . ." (Emphasis added.)

In *Entwistle v. Wilkins*, 626 P. 2d 495, 498 (Utah 1981), the Utah Supreme Court discussed the meaning of the term "total disability" as used in § 34A-2-410(1)(a):

As applied to the issue under consideration here, "total disability" does not mean a state of abject helplessness or that the injured employee must be unable to do any work at all. The fact that an injured employee may be able to do some kinds of tasks to earn occasional wages does not necessarily preclude a finding of total disability to perform the work or follow the occupation in which he was injured. **His temporary disability may be found to be total if he can no longer perform the duties of the character required in his occupation prior to his injury.** (Footnotes omitted; emphasis added.)

In applying this standard to Mr. Hall's claim, it is necessary to determine the duties that were required by Mr. Hall's employment prior to his work injury, and whether the work injury prevented him from performing those duties. According to the stipulated facts, Mr. Hall was a long haul truck driver prior to his injury. He did not participate in loading or unloading trucks. On October 29, 2001, as a result of Mr. Hall's work-related thoracic outlet syndrome, Mr. Hall's physician instructed him to discontinue driving until his symptoms resolved. Then, as of December 18, 2001, Mr. Hall was permitted to return to his usual work duties. Approximately one month later, Dr. Petron concluded Mr. Hall could work full time, with restrictions against lifting more than 20 pounds or repetitive overhead motion.

**ORDER DENYING MOTION FOR REVIEW**

**James Hall**

**PAGE 3**

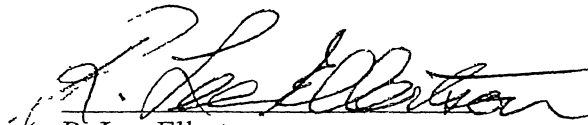
Based on the foregoing facts, the Commission concludes Mr. Hall was able to resume his usual work duties by December 18, 2001. While he may have continued to suffer from some limitations as indicated by Dr. Petron, those continuing limitations did not prevent him from fully performing his regular duties. Consequently, after December 18, 2001, Mr. Hall was not longer temporarily totally disabled.

The Commission notes Judge George's extensive discussion of whether Consolidated had light duty work available to Mr. Hall after December 18, 2001. Because Mr. Hall was able to return to his regular duties by that date, the Commission finds it unnecessary to consider this question of light duty work.

**ORDER**

For the reasons stated herein, the Commission affirms Judge George's conclusion that Mr. Hall is not entitled to temporary total disability compensation after December 18, 2001. The Commission therefore denies Mr. Hall's motion for review. It is so ordered.

Dated this 28<sup>th</sup> day of February, 2006.



R. Lee Ellertson  
Utah Labor Commissioner

**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**

**James Hall**

**PAGE 4**

**CERTIFICATE OF MAILING**

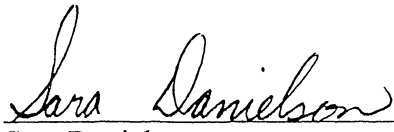
I certify that a copy of the foregoing Order Denying Motion For Review in the matter of James Hall, Case No. 200231, was mailed first class postage prepaid this 28<sup>th</sup> day of February, 2006, to the following:

James Hall  
3111 S Water  
West Valley City UT 84128

Consolidated Freightways  
2240 S 3200 W  
West Valley City UT 84120

Phillip Shell Esq  
45 E Vine St  
Murray UT 84107

Theodore Kanell Esq  
136 E S Temple Ste 1700  
Salt Lake City UT 84111

  
\_\_\_\_\_  
Sara Danielson  
Utah Labor Commission

---

UTAH LABOR COMMISSION

JAMES HALL,

Petitioner,

vs.

CONSOLIDATED FREIGHTWAYS and  
FIDELITY & GUARANTY INSURANCE,

Respondents.

ORDER DENYING REQUEST  
FOR RECONSIDERATION

Case No. 02-0031

---

James Hall asks the Utah Labor Commission to reconsider its prior decision denying a portion of Mr. Hall's claim for temporary total disability compensation under the Utah Workers' Compensation Act ("the Act"; Title 34A, Chapter 2, Utah Code Annotated.).

The Labor Commission exercises jurisdiction over this matter pursuant to Utah Code Annotated §63-46b-13.

**BACKGROUND AND ISSUES PRESENTED**

Mr. Hall seeks temporary total disability compensation from December 18, 2001, until May 27, 2002, for "thoracic outlet syndrome" caused by his work at Consolidated Freightways. In its previous decision, dated February 28, 2006, the Commission concluded that Mr. Hall was not temporarily totally disabled after December 18, 2001, because as of that date he was able to perform his regular work duties.

Mr. Hall now asks the Commission to reconsider its decision on the grounds that Consolidated did not offer light duty work to Mr. Hall.

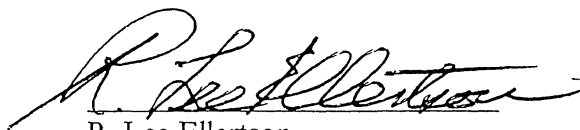
**DISCUSSION**

As the Commission understands Mr. Hall's request for reconsideration, he agrees that, as of December 18, 2001, he was able to perform his regular pre-injury work duties. Utah's appellate courts have held that an individual is temporarily totally disabled "if he can **no longer** perform the duties of the character required in his occupation prior to his injury." *Entwistle v. Wilkins*, 626 P. 2d 495, 498 (Utah 1981)(emphasis added). Because Mr. Hall was able to perform his regular work duties after December 18, 2001, he cannot be considered temporarily totally disabled after that date. This is true even if Mr. Hall was not fully healed from his work injury. Furthermore, since Mr. Hall was not temporarily totally disabled, the question of whether Consolidated actually offered him light duty work is immaterial.

**ORDER**

The Commission denies Mr. Hall's request for reconsideration and reaffirms its previous decision in this matter. It is so ordered.

Dated this 28<sup>th</sup> day of April, 2006.

A handwritten signature in black ink, appearing to read 'R. Lee Ellertson', written over a horizontal line.

R. Lee Ellertson  
Utah Labor Commissioner

**NOTICE OF APPEAL RIGHTS**

Any party may appeal this Order to the Utah Court of Appeals by filing a Petition For Review with that Court within 30 days of the date of this Order.

**ORDER DENYING REQUEST FOR RECONSIDERATION  
JAMES HALL  
PAGE 3**

**CERTIFICATE OF MAILING**

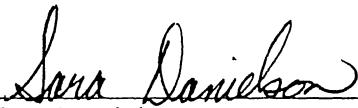
I certify that a copy of the foregoing Order Denying Motion For Reconsideration in the matter of James Hall, Case No. 02-0031, was mailed, first class, postage prepaid this 28<sup>th</sup> day of April, 2006, to the following:

James Hall  
3111 S Water  
West Valley City UT 84128

Consolidated Freightways  
2240 S 3200 W  
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Phillip Shell Esq  
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Murray UT 84107

Theodore Kanell Esq  
136 E S Temple Ste 1700  
Salt Lake City UT 84111

  
\_\_\_\_\_  
Sara Danielson  
Utah Labor Commission