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**APPEALS BOARD  
UTAH LABOR COMMISSION**

**DONNA E. JONES,**

**Petitioner,**

**vs.**

**RESORT RETAILERS and ZENITH  
INSURANCE COMPANY,**

**Respondents.**

**ORDER AFFIRMING  
ALJ'S DECISION**

**Case No. 2002480**

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Resort Retailers and its insurance carrier, Zenith Insurance Company (“Resort”) asks the Appeals Board of the Utah Labor Commission to review Administrative Law Judge Lima’s award of benefits to Donna E. Jones under the Utah Workers’ Compensation Act, Title 34A, Chapter 2, Utah Code Annotated.

The Appeals Board exercises jurisdiction over this motion for review pursuant to § 63G-4-301 of the Utah Administrative Procedures Act and § 34A-2-801(3) of the Utah Workers’ Compensation Act.

**BACKGROUND AND ISSUE PRESENTED**

Ms. Jones claims workers’ compensation benefits from Resort Retailers for a work accident that occurred on December 28, 2001. On January 13, 2004, Judge Hann held an evidentiary hearing and then referred the medical aspects of the case to a medical panel. On October 13, 2004, the panel submitted its opinion, concluding that Ms. Jones’s back injuries were caused by her work accident, she had not yet reached medical stability, and spinal surgery was necessary. However, prior to being admitted into the record, Resort Retailers objected to the admission of the panel’s report and presented a new medical opinion from Dr. Hood, whose opinion initially created the conflict in the medical opinions that sent the matter to a panel.

Judge Lima, who had been reassigned the case, concluded that in light of Dr. Hood’s new opinion, there were no conflicting medical opinions, thus obviating the need to submit the medical aspects to a panel. Judge Lima excluded the panel’s opinion from the record and, relying on the remaining medical evidence, including Dr. Hood’s new report, denied Ms. Jones’s claim for recommended medical care and temporary total disability.

Judge Lima’s decision was appealed to the Commissioner on a motion for review. The Commissioner set aside Judge Lima’s decision and remanded the case with instructions that included admitting the medical panel’s opinion into evidence. Resort Retailers did not appeal that decision. On remand, Judge Lima reopened the evidentiary record to include the medical panel report, Dr.

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Hood's opinion, and any rebuttal evidence. No rebuttal evidence was submitted and Judge Lima then resubmitted the medical aspects of the case to the medical panel, taking into consideration Dr. Hood's new opinion. The panel reaffirmed its previous opinion that Ms. Jones was still medically unstable and surgery was necessary. After reviewing the evidence, Judge Lima found Ms. Jones was entitled to benefits, including recommended medical care and temporary total disability compensation.

In its motion for review, Resort Retailers argues that there was no "present" conflict in the medical opinions necessitating referral to a medical panel by either Judge Hann or Lima and therefore the panel's reports should be excluded from the evidence. It further contends that, based on the remaining medical opinions in the record, Ms. Jones is not entitled to further benefits.

**FINDINGS OF FACT**

The Appeals Board adopts Judge Lima's findings of facts. The facts material to the issues in the motion for review can be summarized as follows:

On December 28, 2001, while working for Resort Retailers, Ms. Jones was standing on a step ladder that collapsed and she fell on her buttocks and back. She was first diagnosed with a lumbar spasm/strain and fractured coccyx. Eventually Ms. Jones was referred to Dr. Braun for a surgical consultation. Dr. Braun ordered additional tests and found an acute fracture in the L4-S1 facet region. He initially discussed surgical options with Ms. Jones until he was presented with a surveillance tape of Ms. Jones. He then reserved his recommendation for surgery pending a psychological evaluation.

At Resort Retailers' request, Dr. Moress evaluated Ms. Jones and concluded that she suffered an L5 pedicle fracture as a result of the work injury. He recommended a psychological evaluation if Ms. Jones did undergo surgery. If she did not have surgery, Dr. Moress found she had reached medical stability by October 31, 2002. Dr. Mooney, a spine psychologist, found Ms. Jones's profile correlated to poor recovery after elective back surgery and that "[t]he totality of the information suggests caution with surgical decision making." On July 21, 2003, Dr. Braun decided that Ms. Jones was not a good surgical candidate. He further noted, "[C]ertainly this should not condemn Donna Jones to non-operative treatment or to any specific form of treatment, as she has the right to pursue additional surgical opinions."

On November 19, 2003, Dr. Hood evaluated Ms. Jones and found a remote fracture of the left L5 pedicle and L5-S1 facet that he assessed was caused by the accident and was the primary source for her pain. He recommended surgery. Because Dr. Hood's opinion created a conflict in the medical opinions, a medical panel was appointed. The medical panel, consisting of Dr. Madison Thomas, Dr. Glenn Momberger, and Dr. Robert Burgoyne (who conducted a psychiatric evaluation), examined Ms. Jones and reviewed the medical evidence, including the various medical opinions, the preliminary findings of fact, and video surveillance tapes dated October 31, 2002 and January 7,

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2003. The panel found a medical causal connection between Ms. Jones's back condition and the accident and that her condition from the accident had not yet stabilized. The panel recommended surgery as necessary treatment for the work injury.

In the meantime, after the hearing on this matter on January 13, 2004, and the closing of the evidentiary record, Resort Retailers provided Dr. Hood copies of the other medical opinions in Ms. Jones's case as well as the video surveillance tapes. Dr. Hood provided a new medical opinion dated January 30, 2004, wherein he decided he would not perform surgery on Ms. Jones and that he had cancelled the surgery that had been scheduled for Ms. Jones's the following month.

On March 24, 2006, the medical panel reexamined Ms. Jones and reviewed the medical evidence, including Dr. Hood's new opinion. The panel reaffirmed its previous findings that Ms. Jones's back condition, caused by the work accident, had still not reached medical stability and that surgery was necessary to treat her injury.

**DISCUSSION AND CONCLUSIONS OF LAW**

According to the Commission's rules of evidence and procedures, § 34A-2-802 of the Utah Workers' Compensation Act, the Commission is given the authority to make its investigations into workers' compensation claims "in such manner as in its judgment is best calculated to ascertain the substantial rights of the parties." The Act further authorizes the Commission to "receive as evidence and use as proof of any fact in dispute all evidence deemed material and relevant including, but not limited to . . . reports of attending or examining physicians, or of pathologists."

Resort Retailers argues that there was no proper legal or medical foundation for Judge Hann to submit this case to a medical panel because there was no "present" conflicting medical opinions. However, the Commission has already decided that the medical panel report was admissible as evidence and Resort Retailers did not appeal that decision. Therefore the panel's report is admissible.

Resort Retailers also challenges Judge Lima's resubmission of the issues to the medical panel in light of Dr. Hood's new conflicting report. Commission Rule R602-2-2.B provides:

A hearing on objections to the panel report **may** be scheduled if there is a proffer of conflicting medical testimony showing a need to clarify the medical panel report. Where there is a proffer of new written conflicting medical evidence, the Administrative Law Judge **may**, in lieu of a hearing, re-submit the new evidence to the panel for consideration and clarification. (Emphasis added.)

The Appeals Board finds that Dr. Hood's new opinion, which was in direct contradiction of his previous report submitted to the panel, constitutes a conflicting report and that it was reasonable and within her discretionary authority for Judge Lima to ask the panel to clarify its opinion in light

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of this new opinion.

Finally, Resort Retailers argues that Judge Lima's decision, which relied on the medical panel's opinion, was not supported by the medical evidence. The panel, consisting of three doctors who are experts in medical specialties relevant to Ms. Jones's claim, reviewed the preliminary findings of fact, the medical record, and both surveillance videos, and personally examined Ms. Jones. The panel then concluded that Ms. Jones's back condition was caused by the work injury, Ms. Jones had not reached medical stability, and surgery was necessary to treat the injury. The Appeals Board has reviewed the record and finds that the independent medical panel's opinion, which was formed after a review of the factual information and the medical evidence, is well reasoned, supported by the evidence, and persuasive.

In summary, the Appeals Board finds, based on the evidence, that Ms. Jones's back condition was caused by the work injury, she is not medically stable and is entitled to temporary total disability compensation, and she is entitled to the recommended medical care as outlined in the panel's report.

**ORDER**

The Appeals Board hereby affirms Judge Lima's decision for benefits. It is so ordered.

Dated this 28<sup>th</sup> day of April, 2009.

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Colleen S. Colton, Chair

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Patricia S. Drawe

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Joseph E. Hatch

**NOTICE OF APPEAL RIGHTS**

Any party may ask the Appeals Board of the Utah Labor Commission to reconsider this Order. Any such request for reconsideration must be received by the Appeals Board 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.

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**CERTIFICATE OF MAILING**

I certify that a copy of the foregoing Order Affirming ALJ's Decision in the matter of Donna E. Jones 2002480, was mailed first class postage prepaid this \_\_\_\_ day of April, 2009, to the following:

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Utah Labor Commission