
**APPEALS BOARD
UTAH LABOR COMMISSION**

LARRY V. EVANS,

Petitioner,

vs.

**PROFESSIONAL HEATING &
AIR CONDITIONING and UTAH
PROPERTY & CASUALTY
INSURANCE GUARANTY
ASSOCIATION,**

Respondents.

**ORDER GRANTING
MOTION FOR REVIEW**

ORDER OF REMAND

Case No. 20040097

Professional Heating & Air Conditioning and its insurance carrier, Utah Property & Casualty Insurance Guaranty Association, (referred to jointly as “Professional”) ask the Appeals Board of the Utah Labor Commission to review Administrative Law Judge Sessions’ preliminary award of permanent total disability compensation to Larry V. Evans 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

Mr. Evans claims permanent total disability compensation from Professional for a work injury that occurred on September 15, 1999. Professional admits compensability for the accident but denies that the accident left Mr. Evans permanently totally disabled. Judge Sessions conducted an evidentiary hearing and then issued a preliminary award for permanent total disability compensation. Professional asked the Commission to review this decision. The Commission granted review and remanded the matter to Judge Sessions for a referral to a medical panel on the disputed issue of Mr. Evans’s residual functional capacity. After reviewing the panel’s opinion, Judge Sessions again entered his preliminary award for benefits.

In its motion for review, Professional disputes Judge Sessions’ interpretation of the medical panel’s opinion and findings of fact. Professional also argues that the matter should be remanded so the parties can present evidence of whether other work is available to Mr. Evans based on the panel’s findings as to Mr. Evans’s residual functional capacity.

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FINDINGS OF FACT

The Appeals Board makes the following findings of fact, relevant to the issues in Professional's motion for review:

Mr. Evans worked for Professional for ten years performing commercial HVAC work. Mr. Evans injured his neck while working for Professional on September 15, 1999. He was diagnosed with compression of the spinal cord and a herniated cervical disc at C5-C6. He later had surgery; however, Mr. Evans was left with motor problems and spasticity in all four extremities. By August 30, 2000, Mr. Evans was found to have reached medical stability and was assigned a 30% whole person impairment, 15% attributed to gait disturbance.

Mr. Dell Felix performed a functional capacity exam in July of 2004 and found Mr. Evans met the medium level work classification. Dr. Moress, Professional's medical consultant, agreed with Mr. Felix's assessment and further found Mr. Evans had no restrictions in sitting, standing, or walking (on even surfaces) or working an eight-hour schedule. Both Mr. Felix and Dr. Moress noted that, physically, Mr. Evans walks with an ataxic gait, cannot walk on uneven surfaces, has balancing problems, and has manual dexterity and fine motor skills of less than 1%.

Mr. Evans' physician, Dr. Christian, gave extensive restrictions to Mr. Evans, indicating Mr. Evans can sit, stand, or walk up to 15 minutes before needing to change positions and he could sit, stand or walk for less than two hours in an eight-hour work day.

At the hearing, both parties had a vocational expert testify as to whether there was other work reasonably available for Mr. Evans. Both experts agreed there would be no other work reasonably available to Mr. Evans if they accepted Dr. Christian's restrictions. Mr. Evans' vocational expert, Mr. Kenneth Lister, applied restrictions found in Dr. Christian's report and concluded there was no work available that Mr. Evans could perform. Professional's expert, Dirk Evertsen, concluded there were jobs available to Mr. Evans if Dr. Moress's restrictions were applied.

On remand, Judge Sessions appointed a neutral panel of medical experts to assess Mr. Evans' functional and residual capacity in light of the conflicting medical opinions of Drs. Moress and Christian. The medical panel examined Mr. Evans, reviewed the medical evidence, and sought an additional opinion from a neurologist, Dr. Becker, who also examined Mr. Evans and the medical evidence. The panel also had another functional capacity examination completed by Mr. Randy Forsyth. Mr. Forsyth found that Mr. Evans qualified for work in a light duty classification and the panel agreed with this assessment. Dr. Becker did not agree with the severe restrictions that Dr. Christian placed on Mr. Evans. Dr. Becker found that Mr. Evans: could sit or stand for at least one hour at a time with brief five-minute breaks for stretching. Therefore he should avoid walking unassisted and avoid uneven surfaces, ladders, and heights. The panel agreed with these restrictions

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and found Mr. Evans qualified at the light duty work classification with accommodations.

DISCUSSION AND CONCLUSIONS OF LAW

The question before the Appeals Board is whether Mr. Evans showed he was entitled to a preliminary award for permanent total disability compensation. Particularly, the issue has narrowed on whether Mr. Evans is unable to perform other work reasonably available, taking into consideration his age, education, past work experience, medical capacity and residual functional capacity, as required under § 34A-2-413(1)(c)(iv) of the Workers' Compensation Act.

Both parties obtained vocational experts to support their respective positions on whether Mr. Evans is unable to perform other work reasonably available taking into account his residual functional capacity. However, despite this diligence, new and persuasive evidence of Mr. Evans' residual functional capacity has since been admitted into the record, evidence that neither side has had the opportunity to address. Furthermore, a review of the evidentiary record indicates that Judge Sessions' findings of facts are not consistent with the evidence, including the summary of the medical panel's findings.

Therefore, this matter must be remanded to the Adjudication Division to conduct further proceedings as necessary to adjudicate this matter and to issue a new decision based on the evidence.

ORDER

The Appeals Board hereby grants Professional's motion for review, sets aside Judge Sessions' decision of October 16, 2006 and remands the matter to the Adjudication Division for further proceedings and a new order.

Dated this 18th day of August, 2009.

Colleen S. Colton, Chair

Patricia S. Drawe

Joseph E. Hatch

IMPORTANT! NOTICE OF APPEAL RIGHTS FOLLOWS ON NEXT PAGE.

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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.