
UTAH LABOR COMMISSION

RANDY RAEL,

Petitioner,

vs.

**J&S MECHANICAL, RELIANCE
INSURANCE, and AMERICAN
PROTECTION INSURANCE,**

Respondents.

**ORDER AFFIRMING
ALJ'S DECISION**

ORDER OF REMAND

Case No. 00-0700

J&S Mechanical and its insurance carriers, Reliance Insurance and American Protection Insurance,¹ ask the Utah Labor Commission to review Administrative Law Judge Sessions' determination that Randy Rael is entitled to a preliminary² finding of permanent total disability under the Utah Workers' Compensation Act, Title 34A, Chapter 2, Utah Code Annotated.

The Labor Commission 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. Rael claims workers' compensation benefits for injuries from two work accidents at J&S Mechanical. The first accident, on March 27, 1998, injured Mr. Rael's cervical spine. The second accident, on January 8, 1999, injured his lumbar spine. Reliance Insurance provided J&S Mechanical's workers' compensation coverage at the time of the first accident; American Protection Insurance provided coverage at the time of the second accident.

¹ Although the record is inconsistent in identifying the respondents and their legal counsel, Mr. Kanell has responded to a Commission inquiry by stating that he now represents both Reliance Insurance and American Protection Insurance with respect to Mr. Rael's claim for permanent total disability compensation.

² This finding is referred to as "preliminary" in light of the provisions of § 34A-2-413(6), which preclude a final determination of permanent total disability until the employer and insurance carriers have an opportunity to develop and present a reemployment plan

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Previous proceedings. Judge Eblen awarded permanent partial disability compensation to Mr. Rael for his two injuries. Judge Eblen also ordered American Protection Insurance to pay Mr. Rael's on-going medical expenses. However, Judge Eblen concluded that Mr. Rael had failed to satisfy one prerequisite to an award of permanent total disability compensation—the requirement of § 34A-2-413 (1) (c) (iv) that Mr. Rael establish he is unable to perform “other work reasonably available.” For that reason, Judge Eblen denied Mr. Rael's claim for permanent total disability compensation.

Mr. Rael requested Commission review of Judge Eblen's decision, and the Commission concluded that Judge Eblen had incorrectly applied subsection 413 (1) (c) (iv)'s “other work” requirement to the facts of Mr. Rael's claim. The Commission remanded the claim for correct application of the “other work” standard. Because Judge Eblen had resigned from her position as an ALJ, Judge Sessions assumed responsibility over Mr. Rael's claim.

Current proceedings. Judge Sessions referred certain aspects of Mr. Rael's claim to a medical panel. After receiving the panel's report, Judge Sessions issued his final decision on August 18, 2006. In summary, Judge Sessions held that Mr. Rael had satisfied all requirements for a preliminary finding of permanent total disability, including the “other work” requirement of § 413 (1) (c) (iv). Judge Sessions ordered the respondents to begin paying subsistence benefits and to elect whether they would submit a reemployment plan for Mr. Rael. However, Judge Sessions' order did not indicate which of the respondents—Reliance Insurance or American Protection Insurance—was liable for Mr. Rael's benefits.

The respondents have now asked the Commission to review Judge Sessions' decision. The motion argues that Mr. Rael's claim should be returned to the medical panel for consideration of Mr. Rael's functional capacity. The motion further argues that Mr. Rael is, in fact, capable of performing other work reasonably available and, therefore, does not satisfy the requirement of § 413 (1) (c) (iv) for a preliminary finding of permanent total disability.

FINDINGS OF FACT

While Mr. Rael was working for J&S Mechanical on March 27, 1998, a dumpster being moved by a forklift hit the back of Mr. Rael's hardhat. A few days later, he sought medical attention for headache, neck pain and upper back pain. He was diagnosed with cervical and thoracic strain and treated with medication, physical therapy and trigger point injections. He continued to work at J & S, but with light-duty restrictions. He was subsequently rated with a permanent 7% whole person impairment from this injury. Reliance Insurance provided J & S Mechanical with workers' compensation insurance coverage at the time of this first accident.

Mr. Rael's second injury at J&S Mechanical occurred on January 8, 1999, as he carried a heavy roll of plastic. He experienced pain in his low back, radiating down his left buttock and leg. He was diagnosed with degenerative conditions of the lumbar spine, but also a significant disc

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herniation at the L5/S1 spine level that affected adjacent nerve roots and accounted for Mr. Rael's symptoms. Following a period of conservative medical care for his lumbar injuries, he underwent two back surgeries during 1999. After reaching medical stability, Mr. Rael was left with a permanent 20% whole person impairment from this second injury. American Protection Insurance provided J&S Mechanical with workers' compensation insurance coverage at the time of this second accident.

Mr. Rael is 53 years old. He attended some special education classes in school and ultimately completed the twelfth grade, but he has very limited reading and comprehension ability. His work experience is limited to plumbing, heavy equipment operation, and construction labor. He has no other training or vocational skills.

As a result of his January 1999 work accident, Mr. Rael is unable to sit or stand for longer than 15 to 20 minutes at a time. He is limited to light lifting of up to 15 pounds, no frequent bending or twisting and limited walking. He continues to experience pain in his low back and legs and requires substantial pain medications. He suffers from mild depression.

Mr. Rael has not worked since he underwent surgery to treat the lumbar injuries suffered in the January 1999 accident at J&S Mechanical. He has not sought employment because he does not believe he is capable of working. The Social Security Administration has concluded Mr. Rael is totally disabled and therefore entitled to receive federal social security disability benefits.

A vocational assessment prepared on behalf of J&S Mechanical concludes that Mr. Rael cannot return to his former fields of employment, but asserts that he can perform other types of work. The Commission finds this assessment unpersuasive because it does not reflect Mr. Rael's educational limitations, his physical limitations from the January 1999 accident, or his use of medications for pain from those injuries. Furthermore, the assessment does not establish that any of the jobs allegedly within Mr. Rael's abilities are actually available to Mr. Rael in his geographical location. Thus, after considering the foregoing evidence as it relates to Mr. Rael's age, education, experience, and medical/functional capacity, the Commission concludes that no other work is reasonably available to Mr. Rael.

The parties have stipulated that Mr. Rael's earnings at J&S Mechanical at the time of his January 1999 accident qualify him for permanent total disability compensation of \$433 per week.

DISCUSSION AND CONCLUSION OF LAW

As previously noted, the respondents have raised two arguments in challenging Judge Sessions' decision. The first of those arguments relates to the sufficiency of the evidentiary record—specifically, whether it is necessary to return Mr. Rael's claim to the medical panel for evaluation of his functional capacity. Respondents' second argument is that Mr. Rael cannot be considered permanently and totally disabled because he is capable of performing other work that is reasonably available to him. The Commission addresses each of these issues below.

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I. SUFFICIENCY OF EVIDENCE REGARDING FUNCTIONAL CAPACITY

The respondents argue that the evidentiary record in this matter contains inadequate information to assess Mr. Rael's functional capacity. The Commission disagrees. Mr. Rael's medical records, which are part of the evidence now before the Commission, include assessments from several physicians and the impartial medical panel regarding Mr. Rael's functional capacity. These assessments, which are relatively similar in their conclusions, support findings that Mr. Rael has substantial limitations to his ability to sit or stand for more than a short period of time as well as further substantial limitations on his ability to lift, bend, twist, or walk. The record also establishes that Mr. Rael requires substantial pain medications and that he suffers from depression. These factors detract from his already-limited intellectual abilities.

The respondents also contend that Judge Sessions "failed to follow the rules," but do not identify the specific rules they believe were violated. Respondents assert that Judge Sessions failed to provide the medical panel with Mr. Rael's current medical records. However, pursuant to Judge Sessions' interim order of March 15, 2005, it was respondents who were directed to assemble and submit Mr. Rael's most recent medical records. Consequently, respondents bear responsibility for any missing records. Respondents further argue that Mr. Rael willfully refused to cooperate with the medical panel's efforts to arrange for a functional capacity evaluation. The Commission accepts Mr. Rael's explanation that he was under the initial impression that he would have to pay for the evaluation. Thereafter, he expressed a willingness to undergo the evaluation, but no such evaluation was arranged. These circumstances do not establish that Mr. Rael willfully failed to cooperate in this proceeding.

Finally, respondents argue that without a full-scale functional capacity evaluation they cannot prepare a reemployment plan for Mr. Rael. Pursuant to § 413 (5) of the Act, the respondents are entitled to prepare and present a reemployment plan for Mr. Rael prior to any final determination that Mr. Rael is permanently and totally disabled. The presentation of such a reemployment plan is separate from the adjudication of Mr. Rael's right to a preliminary determination of permanent total disability, which is the only matter at issue here. If they choose to do so, respondents are entitled to obtain a functional capacity assessment for use in the reemployment proceedings that will follow this proceeding.

In summary, the respondents could have augmented the evidentiary record with Mr. Rael's current medical records and submitted their own assessments of Mr. Rael's functional capacity. At this point in these proceedings, the Commission must make its decision based on the evidence that the parties have actually submitted. Such evidence establishes that Mr. Rael has the functional limitations identified elsewhere in this decision.

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II. TENTATIVE FINDING OF PERMANENT TOTAL DISABILITY

Having addressed respondents' challenges to the evidentiary record, the Commission now turns to the primary issue presented by Mr. Rael's claim—whether he is entitled to a preliminary finding of permanent total disability. Because previous adjudicative decisions on Mr. Rael's claim have been made in a piecemeal fashion by different judges over a long period of time, the Commission will provide a comprehensive analysis of this question.

Claims for permanent total disability compensation are evaluated under the standards established by § 34A-2-413(1) of the Utah Workers' Compensation Act. In summary, § 413(1)(b) requires that Mr. Rael prove that: 1) he has suffered significant impairment as a result of his work accident; 2) he is permanent and totally disabled, as defined by subsection 413(1)(c); and 3) his work accident is the direct cause of his permanent total disability. These requirements are discussed below.

Significant impairment from work accident. Subsection 413(1)(b)(i) requires that Mr. Rael prove he sustained a significant impairment as a result of his work accident. Mr. Rael's first work accident caused a permanent 7% whole person impairment, which would qualify as a significant impairment in its own right. But Mr. Rael's second accident resulted in a more extensive permanent 20% whole person impairment. Clearly, Mr. Rael's impairment from his second accident constitutes a significant impairment within the meaning of § 413(1)(b)(i).

Permanent total disability. Subsection 413 (1) (b) (ii) requires that Mr. Rael prove he is permanently totally disabled according to the four-part definition set out in subsection 413 (1) (c) (i) through (iv). Each of the four components of subsection 413(1)(c) are summarized and discussed below.

The employee is not gainfully employed. Mr. Rael has not been gainfully employed since he underwent surgery for the lumbar spine injury suffered in his second accident at J&S Mechanical.

The employee has impairments limiting basic work activities. This factor takes into account all Mr. Rael's impairments, whether or not they are caused by his work. Mr. Rael's impairments include the 7% whole person impairment attributable to his cervical injury and the 20% whole person impairment from his lumbar injury. These impairments have left Mr. Rael with limitations on his ability to stand and sit, lift, bend, and walk, all of which limit his ability to perform basic work activities.

The employee's work-related impairments prevent him from performing the essential functions of past work. Although Mr. Rael suffered a permanent 7% whole person impairment from his first accident, he was able to return to work at J&S Mechanical. However, Mr. Rael's second accident and the two surgeries to his lumbar spine left him unable to perform the physical exertions required by his past work.

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Ability to perform other work. This final element of subsection 413(1)(c) requires the Commission to consider whether Mr. Rael can do other work that is reasonably available to him, taking into account his age, education, past work experience, medical capacity and residual functional capacity.

Mr. Rael is 53 years old. He has only a basic education and limited reading and comprehension ability. His past work experience is limited to strenuous occupations that are beyond his post-injury abilities, and he has no other training or vocational skills. All of these conditions are compounded by his need for pain medication and his depression. Mr. Rael's belief that he cannot work is supported by the Social Security Administration's finding that he is totally disabled. These factors persuade the Commission that Mr. Rael cannot perform other work reasonably available to him.

Work accident as direct cause of permanent total disability. The final element Mr. Rael must prove is that his work injuries are the direct cause of his permanent total disability. Mr. Rael had no apparent difficulty performing his work duties at J&S prior to the two work accidents that are the subject of this proceeding. Even after his first work accident involving a blow to his head, he was able to return to work and engage in strenuous activity. However, the second accident caused back injuries that resulted in significant impairments and pain that combined with his other limitations to prevent him from returning to his previous work or turning to any other type of work that is reasonably available to him. Thus, there is a direct causal connection between Mr. Rael's second accident and injury and his permanent total disability.

III. CONCLUSION

The Commission has carefully reviewed the record in this proceeding and finds that Mr. Rael has met all requirements of § 34A-2-413 (1) (b) and (c) for a preliminary determination of permanent total disability compensation. The record also establishes that Mr. Rael's permanent total disability is attributable to his second accident at J&S, at which time J&S was insured by American Protection Insurance. The Commission therefore concludes that J&S and American Protection Insurance are liable for payment of subsistence benefits to Mr. Rael pursuant to § 34A-2-413 (6) (b) (i) as directed by Judge Sessions' order of August 18, 2006. However, Judge Sessions erroneously ordered that such subsistence benefits be paid at the rate of \$325 per week, rather than the correct amount of \$509 per week as stipulated by the parties. (See Judge Eblen's order of May 6, 2003, page 2, paragraph 1 of "Findings of Fact.") The Commission will correct that error in this order.

For their part, J&S and American Protection Insurance are entitled pursuant to § 34A-2-413 (6) (a) to develop and submit to the Commission a reemployment plan reasonably designed to return Mr. Rael to gainful employment. The Commission will remand this matter to the Commission's Adjudication Division to oversee that process, and for any additional proceedings or decisions necessary to complete the adjudication of Mr. Rael's claim.

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ORDER

For the reasons stated herein, the Commission affirms Judge Sessions' determination and order, with the clarification that J&S Mechanical and American Protection Insurance are the entities liable for payment of the medical and subsistence benefits awarded therein, and with further clarification that such subsistence benefits are to be paid at the rate of \$509 per week. The Commission remands this matter to the Adjudication Division for further proceedings, decisions and other actions as are consistent with this decision and necessary to conclude the adjudication of Mr. Rael's claim. It is so ordered.

Dated this 28th day of October, 2009.

Sherrie Hayashi
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.