
UTAH LABOR COMMISSION

LEONARD M. BRIGGS,

Petitioner,

vs.

HOME DEPOT,

Respondent.

**ORDER AFFIRMING
ALJ'S DECISION**

ORDER OF REMAND

Case No. 02-1114

Home Depot asks the Utah Labor Commission to review Administrative Law Judge Sessions' preliminary determination that Leonard M. Briggs is entitled to permanent total disability compensation 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

During September and October 2002, Mr. Briggs filed several applications for hearing with the Labor Commission's Adjudication Division. Through these applications, Mr. Briggs sought workers' compensation or occupational disease benefits as follows:

- Case No. 02-1002, claiming workers' compensation benefits from Control and its insurance carrier, Workers Compensation Fund, and the Employers' Reinsurance Fund for low-back injuries allegedly caused by a work accident at Control on March 18, 1985.
- Case No. 02-1003, claiming occupational disease benefits from Home Depot for degenerative disc disease allegedly caused by repetitive lifting and bending from 1998 until June 1, 2002;
- Case No 02- 1114, claiming workers' compensation benefits from Home Depot for low back injury allegedly caused by moving a floor ladder on March 29, 2000;
- Case No. 02-1115, claiming workers' compensation benefits from Home Depot for low back injury allegedly caused by lifting paint buckets and lifting the gate of a trash compactor on October 14, 2001;
- Case No. 02-1116, claiming workers' compensation benefits from Home Depot for low back injury allegedly caused by lifting a spool of rope at Home Depot on June 1, 2002.

Judge Hann held an evidentiary hearing on Mr. Briggs' claims but resigned from the Commission before issuing a decision. Judge Sessions then assumed responsibility for completing

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the adjudication of Mr. Briggs' claims. On May 13, 2005, Judge Sessions issued an initial order that: 1) dismissed Case No. 02-1002-- Mr. Briggs' claim against Comtrol, Workers' Compensation Fund, and Employers' Reinsurance Fund; 2) dismissed Case No. 02-1003-- Mr. Briggs' occupational disease claim against Home Depot; and 3) appointed an impartial medical panel to evaluate the medical aspects of Mr. Briggs' remaining claims against Home Depot, which Judge Sessions consolidated as Case No. 02-1114.

After receipt of the medical panel's report, Judge Sessions issued his second order on September 15, 2005, awarding temporary disability compensation and permanent partial disability compensation to Mr. Briggs. In December 2005, Judge Sessions submitted additional questions to the medical panel regarding Mr. Briggs' medical capacity and work restrictions. Judge Sessions received the panel's supplemental report in January 2006. On April 13, 2006, he issued his third order. This order found Mr. Briggs to be permanently and total disabled, subject to Home Depot's right to propose a reemployment plan for him, and directed Home Depot to begin paying subsistence benefits to Mr. Briggs.

Home Depot challenges Judge Sessions' third decision, issued in April 2006, on the following grounds:¹

1. Judge Sessions' 2nd decision, issued on September 15, 2005, constituted the final adjudication of Mr. Briggs' claims. Consequently, Judge Sessions lacked authority to issue his subsequent decision of April 2006;
2. Mr. Briggs is not totally disabled because other work is reasonable available to him;
3. Even if Mr. Briggs is permanent and totally disabled, that disability is caused by medical problems that existed before he began work at Home Depot; and
4. Home Depot has been denied its right under §413(6) of the Act to submit a reemployment plan for Mr. Briggs.

FINDINGS OF FACT

The Commission finds the following facts material to the issues raised in Home Depot's motion for review.

Mr. Briggs is 65 years old. He has a high school education but no other formal education, training, or computer skills. His work experience has been in construction and sales.

Mr. Briggs suffered a herniated disc in 1977 and a lumbar strain in 1983. Then, while working for Comtrol on March 18, 1985, he suffered another herniated disc at the L4/L5 level of his spine. He underwent surgery and reached medical stability by December 22, 1986. He was left with

¹ The Commission has changed the order of Home Depot's arguments to place them in logical sequence.

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a permanent 10% whole person impairment and restrictions against heavy labor or prolonged sitting.

Mr. Briggs did not return to work at Control but, instead, found other work as a grocery sales representative. This position required travel to surrounding states and carrying and lifting boxes of grocery products weighing up to 30 pounds. Although Mr. Briggs experienced occasional back pain, it did not interfere with his ability to perform his work duties. Medical examinations during this period of time showed an "old" disc herniation at L5/S1 and bulging discs at L4/L-5 and L5/S1, but Mr. Briggs was assessed as "neurologically intact" and "doing quite well."

Sometime later, Mr. Briggs accepted employment with Home Depot as a sales associate at \$12.80 per hour. Mr. Briggs was able to perform the physical exertions required by this job, which included lifting items weighing as much as 100 pounds. However, on March 29, 2000, Mr. Briggs attempted to "jerk" one end of a large industrial ladder around the corner of an aisle at Home Depot. He experienced immediate "needle-like" pain in his low back. He sought medical attention for this injury and was taken off work. The pain spread to his left leg. He received medical attention and was taken off work temporarily.

On October 15, 2001, after Mr. Briggs had been released to full-duty work, he attempted to deposit trash in a trash compactor at Home Depot. As he lifted the compactor's gate over his head, he experienced a "shocking" pain in his back and fell to the ground. He was again released from work.

Ultimately, Mr. Briggs was diagnosed with permanent aggravation of pre-existing back problems and rated with an additional 3% permanent whole person impairment from the accidents at Home Depot. He returned to part-time work at Home Depot during January 2002. Over the next several months, Mr. Briggs continued to receive medical care for his back problems and was placed under more limiting work restrictions of: 1) sitting no more than 30 minutes at a time and no more than 2 hours total in an 8-hour period; 2) walking for no more than 1 hour at a time; 3) the ability to lie down for 2 hours in an 8 hour period; 4) lifting only 5 pounds frequently, 10 pounds occasionally, and 20 pounds rarely; and 5) no bending, stooping, climbing stairs, or rapid repetitive movements.

Home Depot offered light-duty work to Mr. Briggs in its telephone call-center. He declined the offer because he could not tolerate the extended periods of sitting that he believed were required by the job. He attempted to return to his previous assignment at Home Depot, but resigned after he found he could not tolerate the resulting back pain. Thereafter, Mr. Briggs was employed to caulk shower tiles, but was unable to work fast enough due to his back problems. He has also attempted to find work in cable installation and sales but was rejected for lack of qualifications.

The Commission accepts the medical panel's assessment that Mr. Briggs' current work capacity is as follows: 1) lifting restrictions of 20 pounds occasionally and never more than 30 pounds; 2) no lifting from the ground; 3) repetitive bending, twisting, and stooping to be avoided; and 4) the ability to frequently change position.

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The Social Security Administration has determined that Mr. Briggs has been totally disabled and since October 15, 2001, the date of his second accident at Home Depot.

DISCUSSION AND CONCLUSION OF LAW

Judge Sessions' authority to issue his April 2006 order. As noted in the introductory portion of this decision, Judge Sessions has issued three orders in this proceeding. The first order is not now in dispute. The second order, issued in September 2005, resolved Mr. Briggs' claims for temporary disability compensation and permanent partial disability. The third order, issued in April 2006, addressed Mr. Briggs' claim for permanent total disability compensation. Home Depot argues that, because no party requested review of Judge Sessions' second order, that order constituted the final resolution of Mr. Briggs' claims. Under this theory, Judge Sessions lacked authority to "reopen" Mr. Briggs' claim and issue the April 2006 order.

The Utah Supreme Court has observed that "[b]ecause of the nature of agency proceedings, final actions often take place seriatim, disposing completely of discrete issues in one order while leaving other issues for later orders." *Barker v. Public Service Commission*, 770 P.2d 702, 706 (Utah 1998). In this case, Mr. Briggs claimed a variety of workers' compensation benefits. And while Judge Sessions' order of September 2005 resolved some of those claims, it did not resolve Mr. Briggs' claim for permanent total disability compensation. Judge Sessions retained jurisdiction over that issue, which he resolved with the April 2006 order, after receiving a supplemental opinion from the medical panel. Thus, the April 2006 order was not a "reopening" of Mr. Briggs' claims but, rather, the last of three orders resolving different aspects of those claims. Under these circumstances, the Commission concludes that Judge Sessions had authority to issue the April 2006 order.

Mr. Briggs' eligibility for permanent total disability compensation. To qualify for permanent total disability compensation, an injured worker must satisfy each of the tests set forth in subsections 413(1) (b) and (c) of the Utah Workers' Compensation Act. Home Depot contends that Mr. Briggs has failed to satisfy two of those tests:

- The requirement of 413 (1) (c) (iv) that, in order to be considered permanently and totally disabled, the injured worker must not be able to "perform other work reasonably available, taking into consideration the employee's age, education, past work experience, medical capacity, and residual functional capacity."
- The requirement of 413 (1) (b) (iii) that "the industrial accident . . . was the direct cause of the employee's permanent total disability."

In light of Home Depot's arguments, the Commission evaluates the facts of Mr. Briggs' claim under each of the foregoing tests.

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Inability to perform other work reasonably available. Mr. Briggs has reached medical stability and suffers from a permanent 13% whole person impairment. He has persistent low back and leg pain with demonstrable impairments that substantially limit his functional capacity. Furthermore, Mr. Briggs's age, lack of education, limited work experience, and lack of technological skills count against him in the labor market. He has been unsuccessful in his attempts to return to his former work or to find new work, and the Social Security Administration has found him to be totally disabled.

The Commission notes, but is not persuaded by, the vocational assessment offered by Home Depot. While the assessment identified a large number of job openings in sales, it remains uncertain whether Mr. Briggs has the ability to perform the specific duties of those jobs and whether the positions could accommodate Mr. Briggs' physical limitations. It is also uncertain whether the identified positions would meet the wage standards of the Commission's rule 612-1-10.D.1.

Having considered the foregoing factors, the Commission concludes that the evidence, taken as a whole, establishes that Mr. Briggs cannot perform other work reasonably available to him.

Direct cause of disability. Home Depot points out that Mr. Briggs had pre-existing back problems even before he began work at Home Depot. Home Depot argues that Mr. Briggs' accidents at Home Depot caused only *temporary* aggravations of his preexisting back problems, and any permanent disability is the result of those pre-existing conditions. This argument is unsupported by the evidence—Home Depot's own medical consultants concluded that the Home Depot accidents resulted in permanent, not temporary, aggravation of Mr. Briggs' back problems. The impartial medical panel appointed by the Commission reached the same conclusion. The evidence also shows that Mr. Briggs was able to perform the full range of his work duties prior to the Home Depot accident of March 2000. But after that accident and subsequent accidents at Home Depot, Mr. Briggs became progressively more impaired. The Commission therefore concludes that Mr. Briggs' injuries at Home Depot are the direct cause of his permanent total disability so as to satisfy the requirement of § 413 (1) (b) (iii).

Home Depot's right to submit a reemployment plan. Home Depot points out, correctly, that § 34A-2-413 (5) of the Utah Workers' Compensation Act precludes a final determination that Mr. Briggs is permanently and totally disabled until Home Depot has an opportunity to submit a reemployment plan for Mr. Briggs. It is apparent from Judge Sessions' April 2006 order that he intended to allow Home Depot to submit such a reemployment plan. However, no action was taken to accomplish that intention. The Commission will, therefore, remand this matter to the Adjudication Division to allow Home Depot to submit a reemployment plan. The Division will then conduct any additional proceedings necessary to evaluate the plan's sufficiency.

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ORDER

The Commission affirms Judge Session's preliminary determination that Mr. Brigg is permanently and totally disabled for purposes of the Utah Workers' Compensation Act. The Commission remands this matter to the Adjudication Division to receive and evaluate Home Depot's reemployment plan for Mr. Briggs. It is so ordered.

Dated this 28th day of August, 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.