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**UTAH LABOR COMMISSION**

**MICHAEL J. BULLOCK,**

**Petitioner,**

**vs.**

**DAX DEBERRY, dba ROCKY  
MOUNTAIN CARPET AND  
INSTALLATION and UNINSURED  
EMPLOYERS FUND,**

**Respondents.**

**ORDER MODIFYING  
ALJ'S DECISION**

**Case No. 05-0927**

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Dax Deberry and the Uninsured Employers Fund (“UEF”) each ask the Utah Labor Commission to review Administrative Law Judge La Jeunesse's determination that Michael J. Bullock is entitled to benefits and that Mr. Deberry and the UEF are liable for those benefits under the Utah Workers' Compensation Act, Title 34A, Chapter 2, Utah Code Annotated.

The Labor Commission exercises jurisdiction over these motions 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. Bullock claimed workers' compensation benefits for a back injury he suffered on August 4, 2004, while working for Mr. Deberry. Mr. Bullock sought payment of those benefits from Mr. Deberry or, in the event that Mr. Deberry was unable to pay the benefits, from the UEF. Judge La Jeunesse held an evidentiary hearing on Mr. Bullock's claim and then issued his decision on July 19, 2006. Judge La Jeunesse concluded that Mr. Bullock was entitled to benefits for his work-related injury. Judge La Jeunesse also concluded that Mr. Deberry was unable to pay the benefits. Judge La Jeunesse therefore ordered the UEF to pay Mr. Bullock's benefits and granted the UEF the right to recover the amounts so paid from Mr. Deberry.

On August 17, 2006, the UEF filed a motion for review of Judge La Jeunesse's decision which: 1) requested leave to submit additional medical records into evidence; 2) challenged Judge La Jeunesse's denial of UEF's prehearing motion to compel Mr. Bullock to respond to discovery; 3) argued that the evidence did not support an award of temporary partial disability compensation to Mr. Bullock; and 4) challenged Mr. Bullock's credibility. The UEF's motion for review also asserted that it is not liable for Mr. Bullock's benefits because the record does not establish that Mr. Deberry cannot pay them.

**ORDER MODIFYING ALJ'S DECISION  
MICHAEL J. BULLOCK  
PAGE 2 OF 5**

On August 31, 2006, Mr. Deberry also filed a motion for review of the decision. Mr. Deberry argues that Judge La Jeunesse's award of benefits to Mr. Bullock is not supported by the evidence.

**FINDINGS OF FACT**

The Commission affirms and adopts Judge La Jeunesse's findings regarding: 1) Mr. Bullock's employment relationship with Mr. Deberry; 2) the circumstances of Mr. Bullock's work-related accident; and 3) the medical consequences of that accident. The facts on these issues can be summarized as follows.

On August 4, 2004, Mr. Bullock was employed by Mr. Deberry in Mr. Deberry's carpet installation business. Mr. Bullock injured his back unloading a heavy roll of carpet from Mr. Deberry's trailer. He sought medical attention and was ultimately diagnosed as suffering from a work-related herniated disc. Mr. Bullock has not been able to perform his regular work duties since his accident. However, on December 15, 2005, he began part-time light-duty work for another employer.

Regarding Mr. Deberry's financial ability to pay Mr. Bullock's workers' compensation benefits, the Commission finds that Mr. Deberry did not have workers' compensation insurance at the time of Mr. Bullock's injury. However, Mr. Deberry's testimony at hearing establishes that his carpet installation business is a going concern with established customers and employees (described by Mr. Deberry as "independent contractors"). At the hearing, Mr. Deberry testified that he was suffering from an ACL injury that prevented him from installing carpet, but no evidence was submitted as to the effect this injury had on Mr. Deberry's income. The Commission therefore finds no basis to conclude that Mr. Deberry is insolvent or otherwise unable to pay the benefits due Mr. Bullock.

**DISCUSSION AND CONCLUSION OF LAW**

As a preliminary matter, the Commission notes that Mr. Deberry did not file his motion for review until 43 days after Judge La Jeunesse issued his decision. Section 63G-4-301 of the Utah Administrative Procedures Act and § 34A-2-801 of the Utah Workers' Compensation Act require that such motions for review must be filed within 30 days. Because Mr. Deberry failed to file his motion for review within the time period established by the foregoing statutes, the Commission has no jurisdiction to consider the merits of that motion for review. The Commission now turns to the issues raised in UEF's motion for review, which was timely filed.

The Commission denies the UEF's request to submit additional medical records into evidence. The records in question were available at the time of the evidentiary hearing, and the UEF has failed to explain why those records could not have been submitted then. Likewise, the

**ORDER MODIFYING ALJ'S DECISION  
MICHAEL J. BULLOCK  
PAGE 3 OF 5**

Commission finds no merit in UEF's contention that Judge La Jeunesse should have granted the UEF's prehearing motion to compel Mr. Bullock to respond to discovery. Judge La Jeunesse denied the motion because it was not raised in a timely manner. At the hearing, the UEF conceded that point, and the UEF has not explained its delay in submitting the motion.

The UEF also argues that the evidence does not support an award of temporary partial disability compensation to Mr. Bullock. On this point, the UEF attempts to explain away the various opinions of Mr. Bullock's treating physicians or to minimize the persuasive effect of the physicians' opinions. However, the UEF submitted no medical evidence contradicting Mr. Bullock's physicians, and the Commission accepts their opinions.

Finally, the UEF argues that Mr. Bullock was not credible because of discrepancies in details regarding his work accident and medical treatment. Some of these discrepancies are not particularly material to his claim for benefits. Furthermore, other parts of his testimony are supported by objective evidence. The Commission concludes that the essential elements of Mr. Bullock's claim are established by credible evidence. The Commission therefore concurs with Judge La Jeunesse's award of benefits to Mr. Bullock.

The final argument raised by the UEF is that, even if Mr. Bullock is entitled to benefits, the UEF is not liable for those benefits. Specifically, the UEF contends that its liability for Mr. Bullock's benefits is contingent upon a finding that Mr. Deberry cannot pay them, and the evidentiary record in this matter does not support such a finding.

The UEF's liability for Mr. Bullock's benefits is governed by § 34A-1-704(1) of the Utah Workers' Compensation Act:

- . . . . The Uninsured Employers' Fund has the purpose of assisting in the payment of workers' compensation benefits to any person entitled to the benefits, if:
- (i) that person's employer:
    - (A) is individually, jointly, or severally liable to pay the benefits; and
    - (B) (I) becomes or is insolvent;
      - (II) appoints or has appointed a receiver; or
      - (III) otherwise does not have sufficient funds, insurance sureties, or other security to cover workers' compensation liabilities; and
  - (ii) the employment relationship . . . is localized within the state . . . .

In light of subsection (704) (1) (i) (B) of the foregoing statute, the UEF is correct that its liability for payment of benefits is contingent upon a showing that the injured worker's employer is insolvent, in receivership, or is otherwise unable to pay the benefits due to the injured worker. In other words, UEF's liability is secondary to that of the employer. In this case, very little evidence

**ORDER MODIFYING ALJ'S DECISION  
MICHAEL J. BULLOCK  
PAGE 4 OF 5**

was presented regarding Mr. Deberry's financial condition,<sup>1</sup> and the evidence that was submitted indicates that Mr. Deberry continues to do business and has other assets as well. These facts are inconsistent with Judge La Jeunesse's conclusion that Mr. Deberry is unable to pay Mr. Bullock's benefits. The Commission therefore concludes that the requirements for UEF liability found in subsection (704) (1) (i) (B) have not been met and the UEF cannot be ordered to pay Mr. Deberry's benefits.

**ORDER**

The Commission dismisses Mr. Deberry's motion for review as untimely. The Commission affirms Judge La Jeunesse's award of medical and disability benefits to Mr. Bullock, but sets aside those parts of Judge La Jeunesse's order that require the UEF to pay such benefits. The Commission orders Mr. Deberry to pay all Mr. Bullock's medical and disability benefits as detailed in Judge La Jeunesse's order.

It is so ordered.

Dated this 30<sup>th</sup> day of April, 2009.

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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.

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<sup>1</sup> While it is the parties' duty to present evidence in support of the various elements of their claims and defenses, the Commission observes that it might have been helpful in this case if the ALJ had pointed out the parties' failure to address the issue of Mr. Deberry's financial circumstances.

**ORDER MODIFYING ALJ'S DECISION  
MICHAEL J. BULLOCK  
PAGE 5 OF 5**

**CERTIFICATE OF MAILING**

I certify that a copy of the foregoing Order Modify ALJ's Decision in the matter of Michael J. Bullock, Case No. 05-0927, was mailed first class postage prepaid this \_\_\_\_ day of April, 2009, to the following:

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Sara Danielson  
Utah Labor Commission