Senator Jacob L. Anderegg

Representative Brian M. Greene

June 27th, 2018

Dear Administrative Rules Committee:

This letter concerns a rule of the Labor Commission on Medical Panels. Both the Workers Compensation Statute and the Labor Commission Rule regarding the discretionary use of Medical Panels limits referral of medical issues only to Medical Panels. Any other workers compensation issues that are not medical in nature cannot by statute or rule be referred to medical panels.

The Utah Workers Compensation Act statutory provision regarding the use of Medical Panels limits referrals to medical issues:

> **34A-2-601. Medical panel, director, or consultant.**
>
> (1)(a) The Division of Adjudication may refer the medical aspects of a case described in this Subsection (1)(a) to a medical panel appointed by an administrative law judge:
>
> (i) upon the filing of a claim for compensation arising out of and in the course of employment for:
>
> (A) disability by accident; or
>
> (B) death by accident; and
>
> (ii) if the employer or the employer's insurance carrier denies liability.
>
> (b) An administrative law judge may appoint a medical panel upon the filing of a claim for compensation based upon disability or death due to an occupational disease. (Emphasis Added)

Similar in scope, the Labor Commission Rule regarding the use of Medical Panels reaffirms this limited referral by providing that Medical Panels will be utilized where "one or more significant medical issues may be involved." (Emphasis Added):

> **R602-2-2. Guidelines for Utilization of Medical Panel**.
>
> Pursuant to Section 34A-2-601, the Commission adopts the following guidelines in determining the necessity of submitting a case to a medical panel:
>
> A. A panel **will be utilized** by the Administrative Law Judge where one or more significant medical issues may be involved. Generally a significant medical issue must be shown by conflicting medical reports. Significant medical issues are involved when there are:
>
> 1. Conflicting medical opinions related to causation of the injury or disease;
>
> 2. Conflicting medical opinion of permanent physical impairment which vary more than 5% of the whole person,

3. Conflicting medical opinions as to the temporary total cutoff date which vary more than 90 days;

4. Conflicting medical opinions related to a claim of permanent total disability, and/or

5. Medical expenses in controversy amounting to more than $10,000.

(Emphasis Added)

Underscoring both the statute and rule is a long-standing decision of the Utah Supreme Court: A Medical Panel's ". . . proper purpose is limited to medical examination and diagnosis" i.e., matters particularly within the scope of its medical expertise, a pronouncement that has been the law in Utah for over half a century. Jensen v. United States Fuel Co., 424 P.2d 440, 442 (Utah 1967).

In stark contrast and contrary to this statutory, regulatory and case law pronouncement is the **mandatory** referral to a Medical Panel of "conflicting medical opinions related to a claim of **permanent total disability**". Labor Commission Rule R602-2-2 (A) (4) (emphasis added). PTD claims involve questions involving an injured worker's vocational profile, including analysis of the individual's age, education, past work history, limitations in basic work activities, employment criteria, jobs analysis and research, and possibilities for vocational training and vocational rehabilitation - vocational and not medical inquiries. These vocational questions are beyond the Medical Panel's expertise.

The Labor Commission continues this practice in spite of the above Statute and Rule and even a decision of the Utah Court of Appeals, which recently stated, ". . . **the courts have been consistent that medical panels cannot opine on vocational questions**. " Guzman v. Labor Commission, 2015 UT App 310, 365 P.2d 725 (emphasis added). In Guzman the Utah Court of Appeals addressed medical panels issuing conclusions on injured worker's vocational abilities, and stated that it was plain error for an Administrative Law Judge to rely on a medical panel's description of whether an injured worker can work at a "light duty" or "sedentary" level. Vocational opinions are beyond the expertise of medical doctors who serve on medical panels and beyond the statute, Rule, and case law for the Labor Commission to so use them.

In conclusion, we believe that Rule R602-2-2 (A) (4) which specifies that "a [medical] panel will be utilized by [ALJ's]" in permanent total disability cases conflicts with UCA Section 34A-2-601(1)(a) of the Workers Compensation Act which provides that the use of medical panels by [ALJs] can only involve medical issues. As such, the referral for vocational questions goes well beyond the intention of the Legislature to limit the use of Medical Panes for assistance regarding medical issues only. Because the Rule (of the Executive Branch) is contrary to the statute (of the Legislative Branch), the Rule is in violation of the Separation of Powers provision in the Utah Constitution, Article V, Section 1, and unconstitutional. It is also contrary to even one of the Labor Commission's own Rules, namely R602-2-2(A), and therefore this Committee should render it void.

Sincerely,

Virginius Dabney

Stony V. Olsen