IN THE UTAH COURT OF APPEALS

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Lex L. Brady, Petitioner, v. Labor Commission and Young Electric Sign Co., Respondents.	MEMORANDUM DECISION (Not For Official Publication) Case No. 20080976-CA F I L E D (March 11, 2010) 2010 UT App 58

Original Proceeding in this Court

Attorneys: Mark T. Ethington, South Jordan, for Petitioner
James R. Black and Alan L. Hennebold, Salt Lake City, for Respondents

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Before Judges Voros, Bench, and Greenwood.[1]

VOROS, Judge:

Lex L. Brady seeks judicial review of the Utah Labor Commission's (the Commission) denial of his motion for review of a decision of a Commission Administrative Law Judge (ALJ) denying his claim for permanent total disability compensation benefits. See generally Utah Code Ann. § 34A-2-413 (Supp. 2009). We affirm.

The industrial accident in question took place January 24, 2001 (the industrial accident), while Brady was working for YESCO sign company. Although he had suffered medical problems prior to the industrial accident, he asserts that it aggravated these problems. He claimed that "his whole body felt numb" and that he "experienced pain in his neck, shoulders, and back." Brady continued to work after the industrial accident, stating that work was therapeutic and helped him deal with a recent family tragedy. On December 26, 2001, Brady was involved in a serious car accident, after which he was forced to quit work.

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[1]The Honorable Russell W. Bench and the Honorable Pamela T. Greenwood, Senior Judges, sat by special assignment pursuant to Utah Code section 78A-3-103(2) (2008) and rule 11-201(6) of the Utah Rules of Judicial Administration.

Brady applied for workers' compensation benefits stemming from the industrial accident under Utah Code section 34A-2-413. That provision states,

> To establish entitlement to permanent total disability compensation, the employee must prove by a preponderance of evidence that:
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> (i) the employee sustained a significant impairment or combination of impairments as a result of the industrial accident or occupational disease that gives rise to the permanent total disability entitlement;
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> (ii) the employee is permanently totally disabled; and
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> (iii) the industrial accident or occupational disease is the direct cause of the employee's permanent total disability.

Id. § 34A-2-413(1)(b). The parties stipulated that Brady was permanently and totally disabled. However, his application was denied because the ALJ, and subsequently the Commission, determined that the industrial accident was not "the direct cause" of his permanent total disability. Id. Brady appeals.

When reviewing the Commission's decision, we will disturb its factual findings only if they are "not supported by substantial evidence when viewed in light of the whole record before the court." Utah Code Ann. § 63G-4-403(4)(g) (2008). "Substantial evidence exists when the factual findings support more than a mere scintilla of evidence . . . though something less than the weight of the evidence. An administrative law decision meets the substantial evidence test when a reasonable mind might accept as adequate the evidence supporting the decision." Martinez v. Media-Paymaster Plus, 2007 UT 42, ¶ 35, 164 P.3d 384 (omission in original) (citations and internal quotation marks omitted).

The ALJ issued a twenty-page opinion that included fourteen pages of findings of fact.[2] Those findings of fact included a summary of Brady's medical problems prior to the industrial accident and an analysis of medical problems caused by the industrial accident in comparison with the medical problems caused by the December 2001 car accident. Among these detailed

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[2]In its order denying Brady's motion for review, the Commission affirmed and adopted the ALJ's findings of fact.

findings were accounts of spine, back, shoulder, and arm pain, and respiratory problems. The ALJ recognized that Brady suffered chronic neck and back pain before the industrial accident and that the pain was likely aggravated by the industrial accident. The ALJ also found that some of Brady's problems were unrelated to the industrial accident--either the pain was preexisting, or the problems stemmed from the car accident. For example, the ALJ entertained several conflicting theories regarding Brady's respiratory problems but ultimately accepted the medical panel's findings that the hypoxia was not "a consequence of the accident on 1/24/01." The medical panel opined,

> While it is true that the incident on 1/24/01 did likely increase pain problems for Mr. Brady, the clinical records in this case indicate that difficulties in management of the overall pain problems and onset of the hypoxia occurred after the auto accident of 12/01. Therefore, the medical panel finds it likely that Mr. Brady would not have encountered hypoxia absent the auto accident in December 2001.

Ultimately, the ALJ concluded that "Brady's industrial accident on January 24, 2001, and the medical problems resultant therefrom, did not serve as the direct cause of his permanent total disability."

Brady does not directly challenge the ALJ's findings. Instead, he reargues the weight of the evidence, listing facts that do and do not support the ALJ's decision while emphasizing medical evidence that supports his theory that the industrial accident was the direct cause of his permanent total disability.

We agree with Brady that some record evidence supports his theory. But that is not the standard on appeal. We will affirm so long as the Commission's findings are "'based on substantial evidence, even if another conclusion from the evidence is permissible.'" Whitear v. Labor Comm'n, 973 P.2d 982, 984 (Utah Ct. App. 1998) (quoting Hurley v. Board of Review of Indus. Comm'n, 767 P.2d 524, 526-27 (Utah 1988)). Here, although Brady may have competing medical theories, the ALJ's and the Commission's conclusions were certainly supported by substantial evidence that the industrial accident was not the "direct cause" of Brady's permanent total disability. Accordingly, we affirm the Commission's conclusion.

Brady also argues that the Commission erred in affirming the ALJ's refusal to send a letter submitted by Brady's physician to the medical panel after finding the letter contained no new

information. We "will not disturb the agency's interpretation or application of one of the agency's rules unless its determination exceeds the bounds of reasonableness and rationality. Thus, we will overturn the agency's interpretation only if that interpretation is an abuse of discretion." Brown & Root Indus. Serv. v. Industrial Comm'n, 947 P.2d 671, 677 (Utah 1997) (citation omitted).

The Commission's applicable rules require an ALJ to seek the advice of a medical panel "where one or more significant medical issues may be involved," Utah Admin. Code R602-2-2(A), such as "conflicting medical opinions relating to a claim of permanent total disability," id. R602-2-2(A)(4). A party may challenge a medical panel's findings, but the rules grant the ALJ discretion to decide whether to resubmit evidence to a medical panel: "Where there is a proffer of new written conflicting medical evidence, the Administrative Law Judge may, in lieu of a hearing, re-submit the new evidence to the panel for consideration and clarification." Id. R602-2-2B.

Here, the medical panel issued a letter on August 1, 2005 stating that there was

> no evidence that Mr. Brady's hypoxia should be considered a consequence of the incident on 1/24/01. The right hemi-diaphragm is clearly elevated well before 2001. There is evidence that phrenic nerve function is intact . . . . While it is true that the incident on 1/24/01 did likely increase pain problems for Mr. Brady, the clinical records in this case indicate that difficulties in management of the overall pain problems and onset of the hypoxia occurred after the auto accident of 12/01. Therefore, the medical panel finds it likely that Mr. Brady would not have encountered hypoxia absent the auto accident in December 2001.

On August 15, 2005, Brady submitted a letter written by Dr. James Pearl disagreeing with the medical panel's findings regarding Brady's hypoxia:

> [The medical panel] has written an opinion dated 08/01/05 where [it] says that phrenic nerve function is intact. This is not entirely clear as [Brady] had an EMG of that nerve which is somewhat equivocal making it somewhat difficult to tell whether-or-not

> [sic] function is intact. Physiologically however, the diaphragm does not move.
>
> It is most likely that Mr. Brady's injury of January 2001 caused his neck injury which affected the nerves which innervate the diaphragm #'s 3, 4, and C3-C4 and C4-C5. This is the cause of his hypoxemia as his other workup has been completely negative.

This letter does offer a different interpretation of the medical evidence. But we cannot say that the ALJ acted unreasonably in concluding that these paragraphs did not rise to the level of "new written conflicting medical evidence." Accordingly, the Commission did not err in affirming the ALJ's decision to not resubmit the evidence to the medical panel.

Affirmed.

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J. Frederic Voros Jr., Judge

WE CONCUR:

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Russell W. Bench,
Senior Judge

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Pamela T. Greenwood,
Senior Judge