IN THE UTAH COURT OF APPEALS

----ooOoo----

John Brent Braegger, Petitioner, v. Labor Commission, Workers' Compensation Fund and/or Employers' Reinsurance Fund, and Department of Public Safety, Respondents.	MEMORANDUM DECISION (Not For Official Publication) Case No. 20040825-CA F I L E D (November 10, 2005) 2005 UT App 492

Original Proceeding in this Court

Attorneys: David W. Parker, Salt Lake City, for Petitioner
James R. Black, Floyd W. Holm, and Alan L. Hennebold, Salt Lake City, for Respondents

---

Before Judges McHugh, Orme, and Thorne.

McHUGH, Judge:

John Brent Braegger seeks judicial review of the Utah Labor Commission's (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 Utah Code Ann. § 34A-2-413 (Supp. 2005).[1] We affirm.

When reviewing the Commission's decision, we will disturb its factual findings only if they are "not supported by

---

[1]We recognize that "in workers' compensation claims, the law existing at the time of the injury applies in relation to that injury." Brown & Root Indus. Serv. v. Industrial Comm'n, 947 P.2d 671, 675 (Utah 1997). Because the relevant portions of the current version of this statute, see Utah Code Ann. § 34A-2-413 (Supp. 2005), are substantively identical to the relevant portions of the version in effect at the time of Braegger's industrial accident, see Utah Code Ann. § 34A-2-413 (1997), we cite to the most current version throughout this decision as a convenience to the reader.

substantial evidence when viewed in light of the whole record before the court." Utah Code Ann. § 63-46b-16(4)(g) (2004). Further, "[w]hen an agency has discretion to apply its factual findings to the law, we will not disturb the agency's application unless its determination exceeds the bounds of reasonableness and rationality." Smith v. Mity Lite, 939 P.2d 684, 686 (Utah Ct. App. 1997) (quotations and citation omitted).

First, Braegger argues that the Commission erred by determining that he did not "show by a preponderance of evidence that . . . the industrial accident . . . was the direct cause of [his] permanent total disability." Utah Code Ann. § 34A-2-413(1)(b)(iii) (emphasis added). In its decision, the ALJ found[2] that (1) Dr. Stromquist evaluated Braegger and indicated that the greater part of Braegger's disability was created by his chronic pain syndrome; and (2) Dr. Chung evaluated Braegger and, according to the most recent evaluation, indicated that Braegger's chronic pain syndrome was most likely causing Braegger to be disabled. Braegger does not directly challenge these findings. Instead, Braegger reargues the weight of the evidence supporting his position and attacks the credibility of Dr. Chung's evaluation. Both of these are ineffective tactics on appeal. See Drake v. Industrial Comm'n, 939 P.2d 177, 181 (Utah 1997) ("We give deference to the [agency] on questions of fact because it stands in a superior position from which to evaluate and weigh the evidence and assess the credibility and accuracy of witnesses' recollections."); Questar Pipeline Co. v. Utah State Tax Comm'n, 850 P.2d 1175, 1178 (Utah 1993) ("[W]hen reviewing an agency's decision, [we do] not conduct a de novo credibility determination or reweigh the evidence."); Whitear v. Labor Comm'n, 973 P.2d 982, 984 (Utah Ct. App. 1998) (stating that "findings will 'not be overturned if based on substantial evidence, even if another conclusion from the evidence is permissible'" (citation omitted)). Because Braegger does not directly challenge these factual findings, we assume that they are supported by the record and do not disturb them. See Heber City Corp. v. Simpson, 942 P.2d 307, 312 (Utah 1997) ("When a party fails to challenge a factual finding and marshal the evidence in support of that finding, we 'assume[] that the record supports the finding[] . . . .'" (first alteration in original) (citations omitted)).

Based upon these undisturbed findings, the Commission concluded that Braegger had not established by a preponderance of the evidence that the industrial accident "was the direct cause of [his] permanent total disability." Utah Code Ann. § 34A-2-

---

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

413(1)(b)(iii). Because we cannot say that it "exceeds the bounds of reasonableness and rationality," Mity Lite, 939 P.2d at 686 (quotations and citation omitted), we affirm the Commission's conclusion.

Second, Braegger argues that the Commission erred by failing to submit his case to a medical panel. Rule 602-2-2 of the Utah Administrative Code was adopted by the Commission to provide the "guidelines in determining the necessity of submitting a case to a medical panel." Utah Admin. Code R602-2-2. This rule provides that the Commission will utilize a medical panel "where one or more significant medical issues may be involved" and that, "[g]enerally[,] a significant medical issue must be shown by conflicting medical reports." Id. R602-2-2(A). Braegger asserts that conflicting medical reports exist, but does not cite to any conflicting reports in the record. Indeed, Braegger's treating physician, Dr. Chung, like Respondents' expert, was unable to conclude that Braegger's disability was directly caused by any of his industrial accidents. Accordingly, Braegger has not demonstrated that a significant medical issue exists necessitating submission of his case to a medical panel.

Third, Braegger argues that the Commission erred by not considering his case under the odd lot doctrine. See, e.g., Peck v. Eimco Process Equip. Co., 748 P.2d 572, 574-75 (Utah 1987); Zupon v. Industrial Comm'n, 860 P.2d 960, 963-64 (Utah Ct. App. 1993). Because we have affirmed the Commission's conclusion that Braegger did not establish by a preponderance of the evidence that the industrial accident "was the direct cause of [his] permanent total disability," Utah Code Ann. § 34A-2-413(1)(b)(iii), we need not consider this argument, even assuming that the doctrine continues to have viability after the legislative amendments to the Workers' Compensation Act. See Utah Code Ann. § 34A-2-413 (1997) (Amendment Notes) (discussing 1995 amendment); see also Mity Lite, 939 P.2d at 689 (stating that when a "claimant[] fail[s] to establish medical causation between the industrial accident and the claimed impairment, . . . the Commission [is] precluded from . . . considering the odd lot doctrine").

Finally, Braegger argues that because the ALJ's order is "not specific in determining benefits," the ALJ violated Utah Code section 63-46b-10 by failing to "issue an award." See Utah Code Ann. § 63-46b-10(1)(a)-(g) (2004) (providing requirements for orders issued after formal adjudicative proceedings). We have reviewed the ALJ's order and conclude that it is adequately specific to satisfy the requirements of section 63-46b-10. Moreover, because Braegger has failed to demonstrate that he was substantially prejudiced by the alleged inadequacies of the ALJ's order, we will not disturb the order. See id. § 63-46b-16(4)(e)

(providing that "[t]he appellate court shall grant relief only if, on the basis of the agency's record, it determines that a person seeking judicial review has been substantially prejudiced by . . . the agency['s] . . . fail[ure] to follow prescribed procedure").

Affirmed.

_____
Carolyn B. McHugh, Judge

WE CONCUR:

_____
Gregory K. Orme, Judge

_____
William A. Thorne Jr., Judge