

IN THE UTAH COURT OF APPEALS

-----ooOoo-----

Phoebe E. Pashuta Delaney,	)	MEMORANDUM DECISION
	)	(Not For Official Publication)
Petitioner,	)	
	)	Case No. 20060692-CA
v.	)	
	)	
Labor Commission, Workers'	)	F I L E D
Compensation Fund, and Park	)	(April 17, 2008)
City Family Healthcare,	)	
	)	2008 UT App 141
Respondents.	)	

-----

Original Proceeding in this Court

Attorneys: James A. McIntyre and J. David Milliner, Salt Lake City, for Petitioner  
Floyd W. Holm and Alan L. Hennebold, Salt Lake City, for Respondents

-----

Before Judges Greenwood, Thorne, and Billings.

THORNE, Associate Presiding Judge:

Petitioner Phoebe E. Pashuta Delaney appeals from the Labor Commission's order denying her request for reconsideration. Petitioner raises six issues, but we decline to review the first three claims<sup>1</sup> for lack of preservation and the next two<sup>2</sup> for inadequate briefing. Additionally, we decline to consider the merits of her final claim that the Labor Commission's finding of lack of medical causation was not supported by substantial evidence because Petitioner failed to properly marshal the evidence. Accordingly, we affirm.

---

1. Petitioner claims that the Labor Commission erred by failing to submit an independent medical examination (IME) report, referring the case to a medical panel, and delegating appointment authority to Dr. Alvin J. Wirthlin.

2. Petitioner also claims that the Labor Commission failed to give proper notice of the appointment of medical panel members and failed to remove Dr. Lair Swensen from the medical panel.

## I. Preservation

### A. Labor Commission's Failure to Submit Evidence to Medical Panel

Petitioner appeals from the Labor Commission's denial of her motion for reconsideration, claiming for the first time on appeal that the Labor Commission erred by failing to submit the IME report and other medical records to the medical panel. "[I]ssues not raised in proceedings before administrative agencies are not subject to judicial review except in exceptional circumstances." Brown & Root Indus. Serv. v. Industrial Comm'n, 947 P.2d 671, 677 (Utah 1997).

In Petitioner's pro se motion for reconsideration before the Commission, she argued that there was substantial medical evidence contrary to the medical panel's opinion, which the administrative law judge (the ALJ) relied on in determining a lack of causation. Petitioner requested that the Labor Commission review the ALJ's order taking into account the contrary medical evidence. Accordingly, after reviewing the order and medical evidence, the Labor Commission determined that it was permissible for the ALJ to rely on the medical panel's report.

Petitioner did not bring her claim that the ALJ failed to submit the late-filed IME report and other evidence to the medical panel to the Labor Commission's attention.<sup>3</sup> Instead, she discussed the IME results and argued that the medical panel's opinion was completely contrary to the IME report. At no time did Petitioner request that the Labor Commission or the ALJ submit the IME report or other evidence to the medical panel. Because Petitioner did not raise this particular issue such that there was a possibility that the Labor Commission could consider the argument and remedy any asserted defect, we conclude that Petitioner failed to preserve her claim.

"Although we occasionally will depart from strict application of [the preservation rule] for pro se litigants," Jensen v. State Tax Comm'n, 835 P.2d 965, 974 (Utah 1992), we do not do so here because although Petitioner appeared pro se before the ALJ and Labor Commission, she is represented by counsel on appeal. To the extent that Petitioner, acting pro se, failed to raise the issue below, whether it be because of legal

---

3. Although Petitioner only appeals from her motion for reconsideration, we note that she failed to raise this issue either before the ALJ or in her prior motion for review filed with the Labor Commission.

inexperience or because Petitioner was unaware at the time she filed her motion for reconsideration with the Labor Commission that the ALJ had failed to submit the IME and other evidence to the medical panel, Petitioner's appellate counsel could have, but did not, argue plain error or exceptional circumstances. Because Petitioner failed to preserve this issue and did not argue that plain error or exceptional circumstances exist to justify a review of this issue, we decline to consider it on appeal. See State v. Pledger, 896 P.2d 1226, 1229 n.5 (Utah 1995).

B. The ALJ's Case Referral to a Medical Panel and Delegation of Appointment Authority to Dr. Wirthlin

Petitioner has likewise failed to preserve or demonstrate grounds for reviewing her claims that the Labor Commission erred when it approved the ALJ's referral of the case to a medical panel and when it allowed the ALJ to delegate to Dr. Wirthlin, the medical panel chairman, the discretion to appoint other specialists to the medical panel. Petitioner concedes that she did not raise these issues below and neither does she adequately argue plain error and exceptional circumstances. In arguing that plain error and exceptional circumstances exist to justify review of her unpreserved issues, she makes only conclusory statements without relevant supporting legal authority. Petitioner asserts, without supporting authority, that the Labor Commission committed plain error when it affirmed the ALJ's finding of conflicting medical reports based on an unsigned medical records review letter and subsequent referral of the case to a medical panel.<sup>4</sup> Likewise, Petitioner argues, without supporting authority, that exceptional circumstances existed to warrant review because the Labor Commission's own rules regulating workers' compensation attorney fees created a procedural anomaly wherein workers' compensation claimants who, because of said regulations are unable to secure counsel and as a result proceed pro se, oftentimes fail to properly object and preserve an issue for appeal. Because Petitioner does not provide relevant supporting authority for her arguments that plain error and exceptional circumstances exist, we find that Petitioner has failed to demonstrate a basis for review, and we decline to consider Petitioner's unpreserved issues on appeal.

---

4. "[R]eferral to a medical panel is mandatory only where there is a medical controversy as evidenced through conflicting medical reports." Brown & Root Indus. Serv. v. Industrial Comm'n, 947 P.2d 671, 677 (Utah 1997); see also Utah Admin. Code R602-2-2.

II. Inadequate Briefing of Petitioner's Arguments that the Labor Commission Failed to Give Proper Notice of the Appointment of Medical Panel Members and Its Failure to Remove Dr. Swensen from the Medical Panel

We also decline to review Petitioner's issues regarding the appointment of Dr. Wirthlin and Dr. Swensen to the medical panel without prior notice to Petitioner and the Labor Commission's failure to remove Dr. Swensen, an allegedly biased doctor, from the panel because Petitioner failed to adequately brief those issues. "It is well established that an appellate court will decline to consider an argument that a party has failed to adequately brief." Valcarce v. Fitzgerald, 961 P.2d 305, 313 (Utah 1998). "An adequately briefed argument must provide 'meaningful legal analysis.' A brief must go beyond providing conclusory statements and 'fully identify, analyze, and cite its legal arguments.' This analysis 'requires not just bald citation to authority but development of that authority and reasoned analysis based on that authority.'" West Jordan City v. Goodman, 2006 UT 27, ¶ 29, 135 P.3d 874 (footnotes omitted). Petitioner's briefing fails to meet these requirements. Petitioner makes only conclusory statements without citation to relevant legal authority to support her claims that the Labor Commission erred by affirming the ALJ's decision when the ALJ failed to give her prior notice and an opportunity to object to the appointment of Dr. Wirthlin and Dr. Swensen to the medical panel, and then by subsequently failing to remove Dr. Swensen from the medical panel.

For instance, Petitioner asserts that the appointment of a medical panel is analogous to the appointment of a special master requiring proper notice to Petitioner of the prospective members prior to their appointment and an opportunity to object to said appointment. However, she cites only to rule 53 of the Utah Rules of Civil Procedure, which governs masters and provides legal authority pertaining to special masters. Petitioner provides no legal authority or reasoned analysis to support her claim that the appointment of a medical panel is analogous to the appointment of a special master. Petitioner's other arguments on the failure to remove Dr. Swensen from the medical panel are similarly afflicted. Because Petitioner provides no meaningful analysis or legal authority to support said claims, we decline to address them.

III. Failure to Marshal Argument that No Substantial Evidence Existed to Support the Lack of Causation Finding

Lastly, we decline to consider the merits of Petitioner's claim that there was no substantial evidence to support the Labor

Commission's finding of lack of medical causation. "To successfully challenge an agency's factual findings, the party 'must marshall [sic] all of the evidence supporting the findings and show that despite the supporting facts, and in light of the conflicting or contradictory evidence, the findings are not supported by substantial evidence.'" Martinez v. Media-Paymaster Plus, 2007 UT 42, ¶ 17, 164 P.3d 384 (alteration in original) (citation omitted); see also Utah R. App. P. 24(a)(9). "While parties have a duty to marshal the evidence when challenging the factual basis for a lower body's decision," Martinez, 2007 UT 42, ¶ 20, appellate courts retain discretion to review the trial court's factual findings or determine the proper remedy when parties fail to meet the marshaling requirement, see id. ¶¶ 19-21.

Here, to advance her argument that there is insufficient evidence to support the Labor Commission's determination that no medical causation exists, Petitioner attacks the evidence the medical panel relied upon to conclude that it is not reasonably probable that Petitioner's left ulnar nerve problems were the result of the industrial accident. Petitioner did not, however, marshal the evidence in support of the Labor Commission's ultimate finding of lack of medical causation, such as the supporting evidence in the medical records and medical panel report. Because Petitioner failed to marshal the evidence in support of the Labor Commission's finding on causation, we decline to review the issue and assume the Labor Commission was justified in relying on the medical panel's special expertise. See Heber City Corp. v. Simpson, 942 P.2d 307, 312 (Utah 1997) ("When a party fails to . . . marshal the evidence in support of [a] finding, we 'assume[] that the record supports the finding[] . . . .'" (second alteration in original) (citations omitted)).

Accordingly, we affirm the order of the Labor Commission.

---

William A. Thorne Jr.,  
Associate Presiding Judge

-----

WE CONCUR:

---

Pamela T. Greenwood,  
Presiding Judge

---

Judith M. Billings, Judge